SUPER SIZE ME AND THE CONUNDRUM OF RACE/ETHNICITY, GENDER, AND CLASS FOR THE CONTEMPORARY LAW-GENRE DOCUMENTARY FILMMAKER

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I. THE INGREDIENTS OF A SUPERSIZED SUCCESS

More than other genres of popular culture, documentaries are favorably disposed to what passes as a liberal perspective on social issues, including civil litigation. Newspaper headlines proclaim it, conservatives lament it, and documentarians do not dispute it. Indeed, the premise for *Super Size Me*,[1] one of the most popular documentaries of the first half decade of the 21st century, actually originated with the fast-food obesity case *Pelman v. McDonald's Corp.*[2] According to *Daily Variety*, the idea for the documentary

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1. SUPER SIZE ME (The Con 2004) (exploring the health effects of fast food, including the consequences of the filmmaker's one-month diet of exclusively McDonald's fare).

2. *See* Pelman v. McDonald's Corp., 237 F. Supp. 2d 512, 543 (S.D.N.Y. 2003) (dismissing complaint with leave to amend); No. 02 Civ. 7821 (RWS), 2003 WL 22052778, at *14 (S.D.N.Y. Sept. 3, 2003) (dismissing amended complaint), *vacated*, 396 F.3d 508 (2nd Cir. 2005); 396 F. Supp. 2d 439, 446 (S.D.N.Y. 2005) (granting motion for a more definite statement); 452 F. Supp. 2d 320, 328 (S.D.N.Y. 2006) (denying motion to dismiss). *See generally* Samuel J. Romero, *Obesity Liability: A Super-Sized Problem or a Small Fry in the Inevitable Development of Product Liability?*, 7 CHAP. L. REV. 239 (2004) (concluding that the obesity cases are likely to fail although concerns beyond eaters' individual choice suggest that a definitive resolution of the issues will not occur soon). The *Pelman* plaintiffs essentially maintained that eating McDonald's food caused them to become obese and to suffer from obesity-related ailments. The broad claims regarding the quality of the food and its impact on the plaintiffs' health were dismissed, however. The case is proceeding on the claim that representations about the healthfulness of McDonald's food violated state law. *See also* Reyes v. McDonald's Corp., Nos. 06C1604, 06C2813 2006, WL 3253579, at *8 (N.D. Ill. Nov. 8, 2006) (upholding a class action asserting that the chain's modification of its representations of the fat and caloric content of its french fries violated the Illinois Consumer Fraud and Deceptive Practices Act to the extent that it is not preempted by the federal Nutrition Labeling in Education Act).

came to Morgan Spurlock, the film's director, after he had eaten Thanksgiving dinner in 2002 and was in "a tryptophan haze."[3] He saw a television news report about the *Pelman* case and "remember[s] a spokesman being quoted at the time as saying: 'You can't link our food to these girls being sick or fat.' Then the lights went on: I turned to my vegan girlfriend and said, 'There's a basis for argument there.'"[4]

In the first of two opinions responding to defendants' motions to dismiss, the judge in the *Pelman* case discussed plaintiffs' assertion that foreseeable over-consumption of McDonald's food might be actionable misuse. In doing so, he issued the following challenge to the plaintiffs:

> A better argument based on over-consumption would involve a claim that McDonald's products are unreasonably dangerous for their intended use. The intended use of McDonald's food is to be eaten, at some frequency that presents a question of fact. If plaintiffs can allege that McDonald's products' intended use is to be eaten for every meal of every day, and that McDonald's is or should be aware that eating McDonald's products for every meal of every day is unreasonably dangerous, they may be able to state a claim.[5]

Spurlock took up the gauntlet of proving this proposition and ran with it. The result was *Super Size Me*, a hugely popular film that was made on a budget of $65,000 and grossed $28,575,078 worldwide.[6] Spurlock assumed the role of guinea pig and lived on nothing but McDonald's food for thirty days. He ate it for breakfast, lunch, and dinner. To be sure, there was some exaggeration in his experiment, much like there seems to be in scientific experiments where little laboratory animals are fed extraordinary amounts of a potential carcinogen or mutagen. According to his rules, Spurlock could only eat items sold at McDonald's, he had to eat three meals a day whether or not he was hungry, and he had to eat everything on

3. Daniel Frankel, *Super Size Me*, DAILY VARIETY, Dec. 10, 2004, at A4, available at http://www.variety.com.

4. *Id.*

5. *Pelman*, 237 F. Supp. 2d at 537.

6. Box Office Mojo, http://www.boxofficemojo.com/movies/?id=supersizeme.htm (last visited Sept. 23, 2006).

the McDonald's menu at least once. Whenever he was asked if he wanted to "super size" his order,[7] he was required to do so. Moreover, he limited his physical exertion to between 3,000 and 5,000 steps per day, a bit more than the average American takes; allowance was made for the fact that Manhattanites like Spurlock tend to walk more and live in multi-story walk-up apartments. Prior to undertaking his diet, he went to three doctors (an internist, a cardiologist, and a gastroenterologist/hepatologist) to have his health status checked, and he saw them periodically throughout the month-long binge. He also worked with a dietitian who tracked his caloric intake and his weight. Much like a lab rat confined to a cage, Spurlock was oblivious to the social setting in which he ate. He focused on eating under the watchful eye of the camera, the cameraman, and other unidentified minions whose voices are heard, but whose faces are not seen.

By the end of the month, Spurlock had gained roughly twenty-five pounds, his cholesterol had gone up sixty-five points, and his body fat had increased from 11 percent to 18 percent.[8] Most significantly, the diet took a measurable toll on his physical health, as indicated by the results of medical lab tests. The swiftness and extent of the impact on his liver were especially surprising to his physicians.

The suspense of seeing whether Spurlock can make it through the month is the narrative thread that holds the film together. However, interspersed between segments of Spurlock eating, enjoying (at first), and (then) suffering through his McDonald's diet are a host of informative interviews with experts; trips to schools, a hospital, and fast-food locations outside of New York City; and a number of on-the-spot exchanges with consumers on the street. Creative animation, graphics, paintings by pop artist and billboard propagandist Ron English, and sound effects, along with a hip, contemporary soundtrack, blend with the video segments to generate a captivating compilation that illuminates the impact of fast food on the collective physique.

Though the film's subject is deadly serious, the tone and approach are humorous and entertaining. Though much of the

7. A "super-sized" meal included extra-large servings of french fries and soda.

8. SUPER SIZE ME, *supra* note 1.

information is what consumers are assumed to know or what they would be embarrassed to admit they did not know, the film does a good job of exposing the lack of dietary information available to the ordinary fast-food consumer, the impact of fast-food marketing in making our children dumber about the world and less physically fit than they would otherwise be, and the importance of increasing the availability of healthy alternatives in school lunch programs. Indeed, the most disturbing scenes may be those involving first graders who vaguely knew George Washington, totally missed Jesus Christ, but nailed Ronald McDonald, and a school cafeteria cook who said that the "best tool" she has is a box cutter with which to open packages of government-issued food that can be reconstituted, reheated, and served for lunch.

It is difficult to measure the success of a muckraking documentary film, but there are indications that *Super Size Me* made a difference, if for no other reason than that it suggested that the *Pelman* litigation should be taken seriously. To begin with, "super size" has entered the common parlance as a verb and found its way into the dictionary.[9] Just weeks after the film's debut at the Sundance Film Festival in January 2004, the inventor of supersized portions, McDonald's, took them off the menu.[10] Furthermore, initiatives to improve the healthiness of school lunch programs have popped up around the country, some of them prompted by schoolchildren who had seen *Super Size Me*.[11] The absence of

9. THE NEW OXFORD AMERICAN DICTIONARY 1698 (Eric McKean, 2nd ed. 2005) (defining "supersize" as to "produce or serve something in a larger size").

10. *See* Delroy Alexander, *Will They Buy It?; McDonald's Plan to Eliminate Supersize Portions Could Anger Its Most Loyal and Biggest-Spending Customers*, CHI. TRIB., Mar. 4, 2004, at C1 (considering the impact on heavy users and the company's bottom line of the decision to phase out supersized drinks and fries). McDonald's denied that there was a connection between its decision to eliminate supersized portions and either the lawsuits or *Super Size Me*. *See also* David Hinckley, *Just Say, 'Stupor-Size Me': Despite a McDonald's Retreat, Fast-Food Fans Have More Than a Full Plate*, N.Y. DAILY NEWS, Mar. 14, 2004, at 23 (contending that the fast-food chain's elimination of supersized portions from its menu was likely a routine decision to drop items that do not sell well); Kim Severson, *Love Those Trips to McDonald's? What If That Was All You Could Eat for a Month? Filmmaker Enters a Supersize Nightmare*, S.F. CHRON., Apr. 21, 2004, at E1 (linking the decision to McDonald's introduction of salads and its "healthy lifestyle initiative," which included adult Happy Meals with fruit, bottled water, and a pedometer). *But see* Editorial, *Super Downsized McDonald's Makes a Good Move—If Consumers Will Buy It*, OMAHA WORLD-HERALD, Mar. 5, 2004, at 6B (suggesting that, despite denials, the timing of the decision meant that it was linked to "recent lawsuits" and the "obesity claims").

11. It remains to be seen whether the changes in school lunch menus will have a measurable impact on the scales. *See* Lisa Belkin, *The School-Lunch Test*, N.Y. TIMES MAG., Aug. 20, 2006,

dietary information in the restaurants themselves became the subject of regulatory investigation. Finally, the *Pelman* case is proceeding after an appellate court sustained one of the plaintiffs' claims.[12] On the other hand, the House of Representatives twice passed the Personal Responsibility in Food Consumption Act or what has been referred to as the "Cheeseburger Bill."[13] Comparable legislation (the Common Sense Consumption Act) was introduced in the Senate, but went nowhere.[14] At least twenty states have enacted similar provisions into law, and another dozen have bills pending. The food and restaurant industries heavily lobbied for the passage of these state bans on obesity lawsuits.[15]

In addition to being very entertaining, there are several other factors that likely contributed to the financial success and political impact of *Super Size Me*. For one thing, it belongs to the genre of recent commercially successful muckraking documentaries that attack corporate irresponsibility. The series began with Michael Moore's *Roger & Me*[16] and *Bowling for Columbine*[17] and continued after the release of *Super Size Me* with films like *The Corporation*,[18] *Enron: The Smartest Guys in the Room*,[19] *Wal-Mart: The High Cost of Low Price*,[20] *An Inconvenient Truth*,[21] *Who Killed the Electric*

§ 6, at 30 (reporting on a trial initiative to improve lunches in schools in Kissimmee, Florida where end-of-year results showed a decline in obesity despite finicky eaters, unsympathetic adults, and a system of requisitioning that make change difficult).

12. Pelman v. McDonald's Corp., 396 F.3d 508, 512 (2nd Cir. 2005).

13. Personal Responsibility in Food Consumption Act, H.R. 339, 108th Cong. (2004); Personal Responsibility in Food Consumption Act of 2005, H.R. 554, 109th Cong. (2005).

14. Commonsense Consumption Act of 2005, S. 908, 109th Cong. (2005).

15. *See* Melanie Warner, *The Food Industry Empire Strikes Back: Lobbying Effort to Shield Companies from Court Action Is Gaining Ground*, N.Y. TIMES, Jul. 7, 2005, at C1 (reporting that the restaurant industry did not treat the *Pelman* litigation like a joke; rather, it marshaled its lobbying muscle and millions of dollars to promote the passage of laws banning such suits).

16. ROGER & ME (Dog Eat Dog Films & Warner Bros. Pictures 1989) (exploring the impact of General Motors' mismanagement and downsizing on the working people of Flint, Michigan).

17. BOWLING FOR COLUMBINE (Alliance Atlantis Communications et al. 2002) (attacking America's penchant for guns and gun violence, as represented by, *inter alia*, a bank that offers guns as a gift for opening a new account and Wal-Mart, which sold the bullets used in the Columbine school shootings).

18. THE CORPORATION (Big Media Picture Corp. 2003) (exploring the corporation as an institution).

19. ENRON: THE SMARTEST GUYS IN THE ROOM (HDNet Films & Jigsaw Productions 2005) (recounting the story of the rise and fall of the energy trading giant and the principal corporate officers who created the avaricious, arrogant corporate culture that led to the firm's bankruptcy).

20. WAL-MART: THE HIGH COST OF LOW PRICE (Brave New Films 2005) (recounting the many ways in which Wal-Mart, though charging low prices, makes large profits, including paying

Car?,[22] and *This Film Is Not Yet Rated*.[23] Like *Super Size Me*, each of these films is characterized by a subject that is a hot social issue, contemporary music, animation, humor, irony, a confident critical narrative, and typically a winning male onscreen performer-filmmaker. Most premiered at Sundance, the independent cinema festival started by actor Robert Redford. Lovers of films of this ilk are not put off by the fact that they do not necessarily learn much that they do not already know. Instead, they derive pleasure from the familiarity of the arguments and the targeted attack on big business. Like the newly converted, the audience enjoys the self-congratulatory satisfaction of hearing a sermon pitched, with passion, directly to them.

Most of the heavy lifting with regard to making fast-food giant McDonald's a suitable target for mass condemnation had been done by the time that Spurlock produced *Super Size Me*.[24] For example, in 1990, McDonald's made the mistake of bringing a defamation action against two penniless London activists who were members of a

poverty-level wages, resisting unionization of its workers, urging employees to apply for public health benefits, soliciting subsidies from local governments while driving smaller, family-owned businesses out of the market, contributing little to charity, and failing to protect consumers from violence in its parking lots).

21. AN INCONVENIENT TRUTH (Lawrence Bender Productions & Participant Productions 2006) (presenting Al Gore's star turn as an environmental advocate and crusader against global warming).

22. WHO KILLED THE ELECTRIC CAR? (Plinyminor & Electric Entertainment 2006) (recounting the birth and demise of the electric car at the hands of the auto manufacturers and "big oil").

23. THIS FILM IS NOT YET RATED (Independent Film Channel & NetFlix 2006) (exposing the secretive and "fascistic" nature of the MPAA (Motion Picture Association of America) rating system as well as revealing the identities of the raters and the members of the appeals body, which were uncovered with the help of two female private investigators).

24. Popular culture has been very important in the battle between consumer advocates and the producers and purveyors of fast food. The failings of the fast food industry have been the subject of other nonfiction films. *See, e.g.*, FAST FOOD FAST WOMEN (Fast Productions LLC et al. 2000) (focusing on the struggles of adult women with children working in fast-food restaurants in eastern Kentucky); MCLIBEL: TWO WORLDS COLLIDE (Spanner Films 2005) (exploring through interviews and reenactments of key trial testimony the libel proceeding brought by McDonald's against the British activists Helen Steel and Dave Morris).

Criticism of the fast-food industry is one of several fronts of the so-called "War on Obesity." The war terminology seems to have originated with opponents of the federal government's effort to influence the collective weight of Americans. *See* Katherine Mayer, Note, *An Unjust War: The Case Against the Government's War on Obesity*, 92 GEO. L.J. 999, 1011, 1028–30 (2004) (arguing that the government should focus on increasing the activity level among Americans rather than on wiping out obesity because "obesity is not a high-priority health risk" and "the benefits of anti-obesity regulation are minimal").

group that published a leaflet titled "What's Wrong with McDonald's."[25] The trial of the case, which was tagged "McLibel," lasted two and a half years and resulted in a mixed verdict rendered by the judge in the summer of 1997. The defendants, who were forced to represent themselves, succeeded in substantiating a number of the charges made against the behemoth corporation, including that it exploited children and produced misleading advertising. McLibel led to the creation of the website McSpotlight, which continues to criticize the firm,[26] and a book and a documentary recounting the course of the trial.[27]

In many ways, Eric Schlosser's book *Fast Food Nation* is the precursor to *Super Size Me*, although the debt is not acknowledged in the film itself[28] (the recognition comes during a dialogue between Spurlock and Schlosser that is included among the extras on the DVD version of *Super Size Me*). *Fast Food Nation* is a well-written, well-researched work of nonfiction of the sort that appears in *Atlantic Monthly* and *The New Yorker*. Schlosser's book makes it clear that the fast-food industry deserves condemnation on a number of grounds. Concerns about the quality of fast food go beyond the amount of fat, sugar, and salt it contains to its very wholesomeness for human consumption given its potential for spreading food-borne pathogens.[29] In addition, there are complaints about the way the industry treats its workers.[30] It is also claimed that the industry is working in tandem with giant agribusiness suppliers that are not only driving independent farmers and ranchers off the land,[31] but also exploiting a workforce of undocumented, unskilled laborers who are injured at an alarming rate in slaughterhouses and processing

25. The defendants' valiant defense was the subject of a book and a documentary. *See generally* JOHN VIDAL, MCLIBEL: BURGER CULTURE ON TRIAL (1997) (examining the case against McDonald's and its tribulations); MCLIBEL, supra note 24.

26. *See* McSpotlight, http://www.mcspotlight.org/ (last visited Feb. 13, 2007).

27. *See supra* note 25.

28. ERIC SCHLOSSER, FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL (2001).

29. *Id.* at 193–222 (describing the impact of *E. coli* O157:H7 contaminated beef).

30. *Id.* at 59–88 (describing the fast food industry's anti-worker stance with regard to the monotony of the work, training, the minimum wage, unionization, overtime pay, and worker safety).

31. *Id.* at 133–47 (recounting the impact of consolidation of the meatpacking industry on independent cattle ranchers and chicken growers).

plants.[32] Though absorbing and informative, *Fast Food Nation* is not a light read. *Super Size Me*, on the other hand, takes on the narrow issue of fast food's relationship to obesity, ratchets down its complexity a notch or two, achieves a wider dissemination of the message, and has a greater impact.[33]

It was probably beneficial as well to the film's success that Spurlock did not dwell on the *Pelman* litigation. The film addresses the case with a deft, light touch. It has a short, unflattering excerpt of an interview with the *Pelman* plaintiffs' lawyer, which leaves the impression that he and they are only in the case for the money. More generous treatment is accorded to George Washington University law professor John F. Banzhaf, III, one of the theorists behind the tobacco litigation and the fast-food litigation such as it is. He comes across as affable and sincere. Early on, there are a few candid comments from persons on the street disparaging the lawsuit, an attempt at being fair and balanced perhaps. In any event, *Super Size Me* avoids mounting a response to those who denigrate civil litigation or accuse the *Pelman* plaintiffs of being suit-happy or money-grubbing.

Spurlock does, however, follow the lead of *Pelman* by focusing on the harms done to children by McDonald's. The film amply illustrates that the primary victims of fast food and its marketing are young, impressionable kids, not adults. The claims of adults against the fast food industry are weakened by notions of personal responsibility. Nearly everyone eats or has eaten fast food. There are strong sentiments in this country that what one eats and how much one eats are matters of personal choice, and they should remain that way. If some consumers like food that is high in fat, salt, and sugar, that is their right. Furthermore, dictating food choices cannot be justified on the ground that others will be hurt by those choices; the

32. *Id.* at 160–66 (describing the turnover, working conditions, and injury rate of migrant workers at the ConAgra Beef Company plant in Greeley, Colorado).

33. Schlosser, for his part, has coauthored a book, meant for teachers and pre-adolescent students, that draws heavily on his bestseller. ERIC SCHLOSSER & CHARLES WILSON, CHEW ON THIS: EVERYTHING YOU DON'T WANT TO KNOW ABOUT FAST FOOD (2006). This second book follows on the heels of one by Spurlock. MORGAN SPURLOCK, DON'T EAT THIS BOOK: FAST FOOD AND THE SUPER SIZING OF AMERICA (2005). Moreover, *Fast Food Nation* has been made into a feature film that premiered in Cannes in 2006 and received mixed reviews when released right before Thanksgiving 2006. *See* FAST FOOD NATION (Recorded Picture Company 2006); Todd McCarthy, *Fast Food Nation*, DAILY VARIETY, May 29, 2006, at 35 (concluding that the film's laissez-faire pacing is inconsistent with the attack mode of the book).

secondhand smoke effect seems to be missing from fast food.[34]

The case of child victims, however, is quite different. It is generally accepted that children should not be exploited and may need protection with regard to their dietary choices. Even their parents may be exonerated for not supervising their children's diets if the parents lacked information about fast food's deleterious qualities, or if they had no control over what their children ate, such as when their children were in school. Although the principal narrative line of *Super Size Me* is Spurlock's experiment and the toll it takes on his body, the secondary story is full of pictures of cute kids as to whom the case for the fast-food industry's social responsibility is clearer.

That said, college-educated, relatively young (early thirties), moderately attractive, physically fit, heterosexual (his girlfriend, whom we meet, is a vegan chef), white, and male, Spurlock puts an acceptable face on the problem of fast food's ill-effect on the adult body politic.[35] Working in a participatory narrative style,[36] he takes on the persona or identity of the fast-food-eating everyman in order to become an authentic anti-corporate consumer crusader on behalf of his fellow sufferers. To shore up his credentials as a poster boy

34. Of course, the costs of medical care for obesity-related conditions might be passed along to non-obese insureds and participants in life, health, and disability plans and to non-obese taxpayers whose withholdings contribute to Social Security benefits, and Medicare and Medicaid reimbursements. *See generally* Helen Johnson Alford & James W. Lampkin II, *The Supersizing of America: Obesity's Potential Implications for the Insurance Industry*, 56 FDCC Q. 465, 476–78 (2006) (summarizing the impact of obesity on the various lines of insurance). To limit such subsidization, many employee benefit plans and health insurance policies entirely exclude coverage for weight control measures and obesity-related treatments, including gastric bypass surgery or stomach stapling procedures, while some administrators and insurers have disclaimed coverage for obesity-related expenses on a case-by-case basis. *See generally id.* at 480–97 (reviewing federal and state cases and laws impacting the ability of the insurance industry to deal with the rise in obesity). *But see* Deenna Patel, *Are We Too Darned Fat? Trying to Prevent and Treat Obesity with Health Care Reform*, 8 QUINNIPIAC HEALTH L.J. 141, 151, 155–56 (2004) (arguing that insurers should cover obesity prevention and treatment measures like bariatric surgery because they will ultimately lower costs, while at the same time creating incentives that will reward weight loss).

35. *See* Alissa Quart, *Dude, Where's My Aesthetic?*, FILM COMMENT, May–June 2001, at 21 (reading *Super Size Me* as an expression of identity politics).

36. In the participatory mode or narrative style, the documentary filmmaker not only interacts with subjects off camera through interviews, but he or she also assumes an on-screen role as a performer engaged in advancing the narrative. *See* Regina Austin, *The Next "New Wave": Law-Genre Documentaries, Lawyering in Support of the Creative Process, and Visual Legal Advocacy*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 809, 824–25, 833 (2006). Filmmakers who employ the participatory style have been criticized for elevating style over substance, for not being sufficiently self-critical or reflexive, and for being meddlesome and paternalistic in their treatment of subjects. *Id.* at 825, 835.

for the cause, he admits to eating fast food occasionally and bares his nearly naked white body throughout the film, including several scenes in which he wears only a patriotic red, white, and blue Speedo bathing suit and shows off the small paunch he has developed. Because his physique does not undergo monumental changes in a month, the deleterious impact of his McDonald's diet is confirmed with lab results.

In fact, like Spurlock, the other fast food "victims" highlighted in the film are white. The man who drank gallons of soda a day, developed sudden blindness from undiagnosed diabetes, and underwent physique-transforming gastric bypass surgery is white. So too are the middle-school students who ate french fries and drank canned sodas for lunch every day. All but one of the first-graders who recognized Ronald McDonald but thought that he worked behind the cash register, helped people, and took his friends to McDonald's for Happy Meals appear to be white (one boy appears to be of East Indian or Middle Eastern extraction). All but one of the experts (former U.S. Surgeon General David Satcher)[37] and a substantial majority of the interviewed passers-by appear to be white. Latinos are scarcer than blacks. There are no black women in the film, as least as far as the eye can discern. Furthermore, socioeconomic class is not explicitly addressed, though a very overweight white female eighth grade honor student expressed regret that she could not afford to eat at Subway twice a day like Jared Fogle, the corporate spokesperson who once weighed an astounding 425 pounds.

Of course, the *Pelman* plaintiffs are black. The film notes only their sizes, accompanied by a cute graphic of their ballooning dimensions, and provides no other information that might be relevant to understanding *their* obesity or the role McDonald's played in *their* lives. At the time the suit was brought, plaintiff Ashley Pelman was fourteen years old, four feet ten inches tall, and 170 pounds. The other plaintiff, Jazlyn Bradley, was nineteen years old, five feet six inches tall, and 270 pounds.[38] The plaintiffs ate their McDonald's in

37. Dr. Satcher was the surgeon general who issued an influential report on obesity. *See* OFFICE OF THE SURGEON GEN., U.S. DEP'T OF HEALTH & HUMAN SERVICES, THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY (2001) [hereinafter THE S.G.'S CALL TO ACTION].

38. *See* Marc Santora, *Teenagers' Suit Says McDonald's Made Them Obese*, N.Y. TIMES, Nov. 21, 2002, at B1 (describing the *Pelman* litigation and arguments advanced at a hearing on

the Bronx.[39] The population of the Bronx is 15% white, 31% African American, 48% Hispanic, 3% Asian and 3% other. The Bronx has the highest rate of obesity in the City of New York.[40] Plaintiff Jazlyn Bradley, one of ten children, resided in a dilapidated apartment that had no kitchen sink (dishes were washed in the bathtub)[41] before she moved to a homeless shelter where she lived between the ages of fifteen and eighteen.[42] 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.[43] Jazlyn attributed her weight to the quantity of food that she ate, not its quality.[44]

Instead of showing the audience the stout black and brown denizens of the streets of the Bronx, Spurlock gives us portly white patrons of an upstate New York county fair and mostly white sunbathers at the public beach on Coney Island. Perhaps tackling the impact of fast food on obesity in a context of racial/ethnic and gender discrimination and poverty would not have been as captivating, entertaining, or politically effective as exploring the impact of fast food on obesity in a context of relative overabundance. Highlighting the white victims with whom a white audience might identify advances the cause of the anti-fast-food, anti-big-food consumer crusade, but it may not have done much to educate young minority consumers like the *Pelman* plaintiffs about the peculiar dangers of fast food for them. For that matter, *Super Size Me*'s homogenized message, by skirting over significant details of the social and economic context in which the plaintiffs became obese, is less truly

defendants' motion to dismiss).

39. *Id.*

40. The rate of obesity among residents of the Bronx is 25%, compared with 23% in Brooklyn, 21% in Staten Island, 19% in Queens, and 15% in Manhattan; of course, there is wide variation among neighborhoods within each borough. *See* New York City Dep't of Health and Mental Hygiene, Community Health Profiles, http://www.nyc.gov/html/doh/html/data/data.shtml#bx (last visited Feb. 15, 2007).

41. Ellen Ruppel Shell, *Obesity Crisis: Are We Turning Our Children into 'Fat' Junkies?*, THE OBSERVER (London), Oct. 12, 2003 (Observer Food Monthly), at 40 (describing aspects of Jazlyn Bradley's life in an analysis of the case).

42. Neil Buckley, *Have Fat, Will Sue*, FIN. TIMES, Dec. 12, 2003, *available at* http://www.foodpolitics.com/pdf/havefat.pdf (profiling Jazlyn Bradley and her father who is also a plaintiff in an analysis of the *Pelman* case).

43. *Id.*

44. *Id.*

informative about fast food's contribution to obesity in general than it appears.

II. Obesity as Viewed from Uncommon Ground: Putting Race/Ethnicity, Gender, and Class in the Picture

Suppose that Spurlock had chosen to concentrate on the context and environment in which the plaintiffs lived and ate. What points might the film have made? What nuances and caveats might its message have included if it had paid more attention to the circumstances of the plaintiffs' obesity and the role that fast food played in their lives? Set forth here are a few topics that come most readily to mind.

A. Race, Gender, Obesity, and Obesity-Related Illnesses

If Spurlock had taken his camera to the Bronx, he would likely have seen a higher percentage of overweight and obese people, particularly women, than he captured on the streets of Manhattan where his office and apartment are located, given the incidence of obesity and overweight among the racial and ethnic minorities who comprise the majority of the population of the Bronx.

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.[45] Adults with a BMI of thirty or higher are considered obese.[46] 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.[47] 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.[48] So, when digesting the figures

45. According to *The Surgeon General's Call to Action*, "BMI is calculated as weight in pounds divided by the square of the height in inches, multiplied by 703. Alternatively, BMI can be calculated as weight in kilograms divided by the square of the height in meters." THE S.G.'S CALL TO ACTION, *supra* note 37, at 4. For a full explanation of the Body Mass Index, *see* Division of Nutrition and Physical Activity, BMI—Body Mass Index: About BMI for Adults, http://www.cdc.gov/nccdphp/dnpa/bmi/adult_BMI/ about_adult_BMI.htm (last visited Dec. 29, 2006).

46. THE S.G.'S CALL TO ACTION, *supra* note 37, at 4–5.

47. *Id.* at 6–7.

48. *See* Abby Ellin, *Quick, Do You Know Your B.M.I.?*, N.Y. TIMES, Dec. 28, 2006, at G1 (explaining the Body Mass Index and competing ways of measuring health).

set forth here it is wise to keep in mind that as a general matter, the BMI likely overstates the incidence of weight problems borne by Americans.

Whereas 30.6% of non-Hispanic white adults are deemed obese, 45% of non-Hispanic blacks and 36.8% of Mexican Americans are deemed obese.[49] Among white adults, the rate of obesity is slightly higher for men (31.1%) than for women (30.2%). For blacks and Mexican Americans, the opposite is true; the rates for women are 53.9% and 42.3% respectively, while those for men are 34% and 31.6%.[50] With regard to children and adolescents, the percentage of overweight black females ages two through nineteen exceeds that for black males in the same age cadres, 23.8% compared to 16.4%.[51] The reverse is true for the other groups; 14.8% of white female children and adolescents are overweight compared to 17.8% of white male children and adolescents, while 16.2% of Mexican American female children and adolescents are overweight compared with 22% of Mexican American male children and adolescents.[52] Note that the percentage of Mexican American boys who are overweight is significantly higher than the percentages of black or white boys who are overweight.[53]

Obesity is associated with a number of chronic conditions like diabetes and hypertension, chronic conditions disproportionately suffered by racial and ethnic minorities. In 2005, among persons twenty years old or older, 8.7% of whites, 13.3% of blacks, 9.5% of Hispanics (based on an extrapolation of the data for Mexican Americans), and 12.8% of Native Americans who received care from the Indian Health Service were diabetic. (Data is not available for Asian Americans and Pacific Islanders.) Likewise, between 1999 and 2002, the rates of hypertension by race/ethnicity and gender were as follows: white males, 27.5%; white females, 28.4%; black males, 40.4%; black females, 43.4%; Mexican American males, 26.7%; and Mexican American females, 27.8%. (Data is not

49. Cynthia L. Ogden et al., *Prevalence of Overweight and Obesity in the United States, 1999–2004*, 295 JAMA 1549, 1553 tbl.4 (2006).

50. *Id.* at 1554 tbl.5.

51. *Id.* at 1552 tbl.3.

52. *Id.*

53. National Center for Health Statistics, *Obesity Still a Major Problem*, NCHS NEWS RELEASES, Apr. 14, 2006, http://www.cdc.gov/nchs/pressroom/06facts/obesity03_04.htm (last visited Feb. 13, 2007).

provided for Asian Americans and Native Americans.)[54]

Because the racial/ethnic minority population is at greater risk for diabetes, hypertension, or arteriosclerosis, it is likewise in greater jeopardy from the sugar, salt, and fat the ordinary consumer may not be aware of or would hardly expect to be contained in fast food products. Surely the purveyors of fast food must be aware that their fare has certain qualities that make it more problematic for poor minority group consumers. A producer's obligation to warn, however, is generally not affected by the demographic characteristics of the consumers likely to be harmed by its products.[55]

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54. *See* Centers for Disease Control and Prevention, *QuickStats: Percentage of Persons Aged > 20 Years with Hypertension, by Race/Ethnicity—United States, 1999–2002*, 54 MORBIDITY AND MORTALITY WKLY. REP., 826 *available at* http://www.cdc.gov/mmwr/pdf/wk/mm5433.pdf.

55. The litigation provoked by the Milk Processor Education Program's (MilkPEP) "Got Milk?" advertising campaign provides one illustration of the irrelevance of consumer demographics to products liability. As many as 80% of blacks, Latinos, and Ashkenazi Jews, and 90% of Native Americans and Asian Americans are thought to be lactase deficient (as compared with only 15% of whites) and many of those minority people are lactose intolerant, which means that they suffer abdominal discomfort when they ingest foods containing lactose. Daniel L. Swagerty, Jr., *Lactose Intolerance*, AM. FAM. PHYSICIAN, May 1, 2002, at 1845, 1846, 1847. The Physicians Committee for Responsible Medicine brought a class action against major supermarket chains and dairies doing business in Washington, D.C., on behalf of persons who purchased milk ignorant of the fact that they were lactose intolerant. *See* Mills v. Giant of Md. LLC, 441 F. Supp. 2d 104, 105 (D.D.C. 2006). The group maintains that the successful "Got Milk?" campaign ignores the detrimental effect of milk consumption for millions of minority people, children included. *See* Physicians Committee for Responsible Medicine, *Got Lactose Intolerance? Take Legal Action*, http://www.milkmakesmesick.org (last visited Mar. 5, 2007) (indicating an intention to initiate a lawsuit). *See also* Physicians Committee for Responsible Medicine, *Get Real About Milk*, http://www.getrealaboutmilk.org (last visited Jan. 26, 2007) (outlining a multi-pronged attack on the "Got Milk?" promotional campaign based on a critical assessment of milk's nutritional benefits). The group's aim was to force the producers and sellers of milk to include a label on containers warning consumers that diarrhea, bloating, stomach cramps, and other symptoms of gastrointestinal discomfort might be signs of lactose intolerance and that they should consult their doctors. *Mills*, 441 F. Supp. 2d at 105–06 n.2.

The district court dismissed the suit on the ground that it was pre-empted by the Federal Food, Drug, and Cosmetic Act which "carefully delineated [a] list of information that must appear on [the] label" of milk. *Id.* at 108. The harm associated with lactose intolerance was not sufficiently grievous as to trigger the safety exception to the FDA label. *Id.* at 108–09. Likening the side effects of milk to those of the food additive Olestra, the court accepted the FDA's conclusion that "the risk of gastrointestinal irritations comparable to those experienced by the lactose intolerant does not implicate 'safety' concerns." *Id.* at 109. The court also found that the action failed under state products liability law. *Id.* at 110 n.9. Lactose intolerance, it concluded, is like an allergy to a common food such as eggs or strawberries as to which no warning is required. *Id.* at 110–11 (citing RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965)). Moreover, the harms associated with lactose intolerance appear to be relatively mild, as opposed to life threatening. *Id.* at 111. The source of the intolerance is an inherent quality of milk, not a hidden ingredient. *Id.*

The adequacy of one-size-fits-all food regulation will be tested by the changing demographics of the country and the expanding investigation of the genetic complexity of its

B. Obesity, Poverty, and Food Insecurity

Whereas obesity is generally thought to be the consequence of an overabundance of food, in poorer communities, such as in parts of the Bronx where the *Pelman* plaintiffs ate their McDonald's, obesity is associated with hunger or food insecurity.[56] The conditions are not mutually exclusive. This correlation may not be generally known or understood, however.

People in poor and working-class minority communities may suffer from the ill-effects of having too little of any kind of food to eat, too much of the wrong kinds of food to eat, or both on a cyclical or periodic basis. Nutritionists and public health experts have not yet identified the precise mechanisms by which obesity, poverty, and food insecurity are linked.[57] A person who is poor and obese may be a person who goes hungry or cuts back on her or his caloric intake for a given period and then compensates by overeating during other periods. Alternatively, the person might resort to consistently eating dense, fattening, but cheap food to stretch her or his food budget. A third hypothesis is that obesity is the result of deprivation that occurred early in life when eating patterns are determined. In any event, where there is nutritional insufficiency, cheap fast food is a very important commodity. Whatever value fast food might have in more affluent communities, its particular significance in poorer enclaves really needs to be separately assessed.

Unfortunately, the attention being paid to obesity seems to be pushing hunger and food insecurity off the political radar screen. There is some reason for concern that the campaign against obesity

consumers. We should expect to see more political activism demanding funds for medical research and treatment of food-related health problems affecting identifiable subgroups of our diverse population.

56. *See generally* Parke E. Wilde & Jerusha N. Peterman, *Individual Weight Change Is Associated with Household Food Security Status*, 136 J. NUTRITION 1395 (2006) (reporting that NHANES (National Health and Nutrition Examination Surveys) data reveals that intermediate levels of household food insecurity contribute to both obesity and weight gain); Marilyn S. Townsend et al., *Food Insecurity Is Positively Related to Overweight in Women*, 131 J. NUTRITION 1738 (2001) (reporting findings based on analysis of CSFII (Continuing Survey of Food Intakes by Individuals) data that, if the severely food insecure are excluded, the prevalence of obesity among women increases with food insecurity).

57. *See* Sonya J. Jones & Edward A. Frongillo, *The Modifying Effects of Food Stamp Program Participation on the Relation Between Food Insecurity and Weight Change in Women*, 136 J. NUTRITION 1091, 1094 (2006) (reviewing hypotheses on the relationship between obesity and food insecurity in the context of a study of the impact of participation in the food stamp program).

may be used to limit the assault on nutritional insufficiency by prompting reductions in food stamps and free lunch programs.[58]

C. The Significance of Fast Food to Urban Minorities

Because of societal changes, more of our meals are eaten out; this is true even for poorer Americans whose choices beyond fast food restaurants are limited. In poorer communities, patronage of fast-food outlets is impacted not only by the scarcity of supermarkets and grocery stores,[59] but also by the absence of alternative local restaurants. Urban communities are still rather bereft of dining establishments that offer and promote healthy food choices and that cater to parents and children.[60] Fast casual and full service chains, like Applebee's, Houlihans, Chuck E. Cheese's, and IHOP, whose standard fare is somewhat better than fast food, are only now finding their way into inner city neighborhoods, largely through arrangements involving minority franchisees.[61] Some resurgent

58. Anthony Robbins, et al., *Race, Poverty, and New Strategies to Control the Obesity Epidemic*, POVERTY & RACE, (Poverty & Race Research Action Council, Washington, D.C.), May–June 2003, *available at* http://www.prrac.org/newsletters/mayjun2003.pdf.

59. A study funded by the LaSalle Bank of Chicago attempted to measure the impact of food imbalance on the residents of Chicago, grouped by race and ethnicity, as measured by the location of both grocery stores and fast food restaurants. *See* MARI GALLAGHER RESEARCH & CONSULTING GROUP, EXAMINING THE IMPACT OF FOOD DESERTS ON PUBLIC HEALTH IN CHICAGO 6 (2006), *available at* http://www.lasallebank.com/about/pdfs/report.pdf. A food imbalanced community was one in which grocery stores were nonexistent or distant while fast-food outlets were close and abundant. *Id.* at 6, 12–13. The study found that, for the residents of predominately African American tracts, "[t]he distance to fast food is slightly farther . . . than [in] other tracts, but a grocery store is nearly twice as far. This means that, for African-American [sic], it is much easier to access fast food than other types of food." *Id.* at 17. Moreover, "fast food is often inversely correlated with income in certain African-American blocks, tracts, and communities: as income goes down, grocery store concentration goes down, but fast food concentration goes up. . . . African-American communities are much more likely to cluster into food deserts where fast food outlets are more prevalent than grocers." *Id.* at 18. Latinos, by contrast, had more than above average access to grocery stores. *Id.* at 22. The study concluded that "as communities become more out of balance with food purchasing venues, negative diet-related health outcomes consistently increase." *Id.* at 28. Data linking food imbalance and premature death related to diabetes were statistically significant with regard to blacks. *Id.* at 29.

60. *See, e.g.*, LaVonna Blair Lewis et al., *African Americans' Access to Healthy Food Options in South Los Angeles Restaurants*, 95 AM. J. PUB. HEALTH 668, 670–72 (2005) (concluding that, compared to West Los Angeles, which is whiter, South Los Angeles, whose residents are poorer and blacker, had fewer restaurants, fewer limited service or full service restaurants, and more fast-food restaurants; moreover, the restaurants in South Los Angeles heavily promoted unhealthy food and offered fewer healthy food options on their menus).

61. *See* Milford Prewitt, *Joining the Inner-City Circle: Chains Eye Urban Expansion*, NATION'S RESTAURANT NEWS, Mar. 14, 2005, at 6 (reporting that urban minority communities are attracting the attention of chains that have realized that money can be made there); Milford Prewitt, *Chains Tap Inner-City Locations as Golden Opportunities*, NATION'S RESTAURANT

working class and gentrifying minority neighborhoods like Harlem are even attracting more upscale fine dining restaurants.[62] In a great many minority urban enclaves, though, small restaurants and takeouts serving Chinese food, BBQ, and Caribbean jerk chicken have been and will remain the likely alternatives to fast-food outlets. As a general matter, food on the menus of the former establishments is not much lower in salt, sugar, and fat than fast food.

For some people, McDonald's and other fast-food restaurants are more than a place to get a meal; they are destinations, desirable social milieus. That is especially true of people of limited means. Fast-food restaurants tend to have not only standardized food of a fairly high quality, but also clean and pleasant physical environments where the prevailing informality puts diners at ease. Eating at McDonald's or Wendy's is a source of pleasure for poorer kids. They get to enjoy a meal out. Burger King or Taco Bell is a hang out for kids without homes where they can entertain or a place where children can go and be relatively safe when there is no one at home. Elderly people on fixed incomes, the marginally employed, and the homeless find fast-food restaurants a social venue in which the food is a real bargain. Because the food is cheap, fast-food restaurants address one of the pressing problems of folks who fall into these categories, namely food insufficiency.

It is not hard to imagine that a homeless person might eat fast food two or three times a day, seven days a week. The homeless find fast food restaurants inviting venues.[63] The $1 specials are good values. The bathrooms are clean and, because they lock, are suitable for sponge bathing. Fast-food restaurants are warm in winter, cool in summer, safe in the dead of night, and stirring at the crack of dawn. Some fast-food establishments even accept the equivalent of food stamps or electronic forms of social welfare benefit payments from

NEWS, Aug. 30, 2004, at 1 (reporting that high levels of disposable income and a substantial, geographically close workforce are enticing restaurant chains to urban enclaves).

62. Josh Greenwald, *Sense of Neighborhood Fuels Harlem Restaurant Revival*, NATION'S RESTAURANT NEWS, Nov. 13, 2000, at 38 (concluding that the upsurge of dining opportunities in Harlem is fueled by an influx of middle-class residents and young professionals).

63. *See* Les Gapuy, *How a Regular Guy Gets Homeless*, USA TODAY, Sept. 22, 2003, at 3B (describing the author's use of fast food restaurants when he was homeless). *See generally* Grassroots.org Community Discussion Forum on Fast Food, http://gr.grassroots.org/jive3/thread.jspa?messageID=5729 (Nov. 5, 2005, 14:14 – Jan 24, 2007, 10:09) (last visited Jan. 26, 2007) (postings discussing the advantages and disadvantages of fast food for the homeless).

homeless customers.[64] Indeed, urban residents have been urged to hand out fast-food coupons in lieu of giving cash to people begging on the street.[65] Though the homeless who do not have access to television may be sheltered from some of the advertising that induces over-consumption of fast food, they may also be beyond the reach of nutritional information that will guide them in making healthy choices. Guaranteeing that the majority of fast-food options are healthy *and* cheap may be better for the least well-off among us than simply increasing the variety of offerings.

Inner city communities seem saturated with fast-food restaurants; at least one study undertaken in pre-Katrina New Orleans found that the number of fast-food restaurants in black neighborhoods exceeded the number in white neighborhoods.[66] This is ironic because fast-food chains once assiduously avoided inner city neighborhoods, and minorities had a difficult time obtaining franchises. That began to change in the 1980s when civil rights organizations put pressure on the chains to create jobs and entrepreneurial opportunities for blacks.[67] The process of taking on minority franchisees and opening restaurants in cities did not run smoothly at first.[68] At some point, however, the franchisors realized that there was money to be made in urban communities, and the number of outlets began to grow.[69] Now there is a concern that there

64. Dina Berta, *Food Stamp Recipients, Including Homeless, Using Debit Cards for Restaurant Meals*, NATION'S RESTAURANT NEWS, July 19, 2004, at 4 (describing the merits of a program whereby restaurants agree to accept food stamps and debit cards from homeless customers in the face of criticism that the vendors' food was not healthful).

65. *See* Letitia Leonard, *Support the Homeless, by Giving Food Gift Certificates*, CHARITY GUIDE http://charityguide.org/volunteer/fifteen/homeless.htm (last visited Jan. 26, 2007).

66. Jason P. Block et al., *Fast Food, Race/Ethnicity, and Income: A Geographic Analysis*, 27 AM. J. PREVENTIVE MED. 211, 214 (2004) (finding that predominately black neighborhoods had 2.4 fast-food restaurants per square mile as compared with 1.5 in white neighborhoods, which meant that "for an average neighborhood shopping area," blacks were "exposed to" six more fast food restaurants than whites).

67. *See* Cassandra Hayes & Rhonda Reynolds, *25 Years of Blacks in Franchising*, BLACK ENTERPRISE, Sept. 1994, at 125 (recounting important milestones in the history of blacks' involvement in franchising).

68. *See* Erik F. Dyhrkopp & Andrew H. Kim, *Prospecting the Last Frontier: Legal Considerations for Franchisors Expanding into Inner Cities*, 19 FRANCHISE L.J. 89, 136–37 (2000) (describing difficulties encountered by Church's Chicken and Burger King during the late 1990s because of the inability of minority franchisees to pay back loans, and by Wendy's and KFC, which were accused of refusing to award franchises in non-minority areas to blacks).

69. *Id.* at 89, 134. Of course, subsidization of the purchase of fast-food franchises through Small Business Administration loans no doubt makes franchisees seeking to open urban outlets more attractive to the chains. *See* SCHLOSSER, *supra* note 28 , at 101-02..

are too many fast-food franchises in urban communities. A New York City councilman from the Bronx, worried about obesity, has indicated that he will introduce a zoning bill to regulate the number of fast-food establishments in order to increase the availability of healthy food alternatives.[70] Other jurisdictions have enacted zoning restrictions on fast-food, quick-service, or formula (euphemisms for fast food) restaurants, though none has done so for the purpose of combating obesity.[71]

D. Cultural Preferences for Black Southern Cuisine (a/k/a Soul Food)

Eating is generally subject to cultural imperatives. The dietary preferences of many native-born blacks bear evidence of a history of adaptation to the material deprivation associated with decades of slavery and Jim Crow segregation. That history has impacted their preference for the high-fat, high-salt, high-carbohydrate staples of agrarian Southern blacks known as "soul food."[72] Coming into prominence during the Black Power Movement, the term "soul food" added cache to such down-home favorites as chitterlings and pigs' feet. Triggering powerful linkages between food and history, soul food is associated with rituals that bind black people together, like Sunday dinner at home or at church.[73] A nexus to soul food no doubt

70. Manny Fernandez, *A Proposal to Fight Obesity by Limiting the City's Fast-Food Restaurants*, N.Y. TIMES, Sept. 24, 2006, at 37 (recounting the pros and cons of a zoning measure limiting fast food).

71. *See generally* JULIE SAMIA MAIR ET AL., THE CENTER FOR LAW AND THE PUBLIC'S HEALTH AT JOHNS HOPKINS & GEORGETOWN UNIVERSITIES, THE USE OF ZONING TO RESTRICT FAST FOOD OUTLETS: A POTENTIAL STRATEGY TO COMBAT OBESITY 2 (2005), *available at* http://www.publichealthlaw.net/zoning%20Fast%20Food%20outlets.pdf. The monograph argues that zoning restrictions on fast-food restaurants for the purpose of combating the obesity epidemic could be justified as promoting public health. *Id.* Moreover, existing precedent upholding zoning restrictions or limitations on fast food restaurants, even though they were based on traffic and aesthetic concerns, suggests that legal challenges to obesity-related zoning provisions and decisions should fail. *Id.* at 4, 39.

72. *See generally* Marvalene H. Hughes, *Soul, Black Women, and Food*, *in* FOOD AND CULTURE: *A READER* 272 (Carole Counihan & Penny Van Esterik eds., 1997) (describing the role soul food plays in forging the identities of black American women). *See also* Tracey N. Poe, *The Origins of Soul Food in Black Urban Identity: Chicago, 1915–1947*, 37 AM. STUD. INT'L 4 (1999) (describing the impact of the great northern migration of blacks from the South on the dietary preference of black bourgeois Chicagoans).

73. The feature film *Soul Food* amply illustrates the way in which a meal of soul food is linked to ethnic and familial solidarity. SOUL FOOD (Edmonds Entertainment & Fox 2000 Pictures 1997) (the fictional story of a squabbling black family brought together, after the death of the matriarch, by a Sunday soul food dinner). *See* Robin Balthrope, *Food as Representative of*

increases the pleasure and gratification that come from consuming certain kinds of fast food, notably fried chicken and fried seafood. Moreover, where and with whom one eats is also an important aspect of eating soul food, which is associated with "fellowship and a sense of community."[74] As a matter of comfort, blacks have tended to prefer eating at home as opposed to eating out.[75] The relaxed nature and egalitarian service of fast food restaurants and the ability to take the food home in suitable containers are compatible with these cultural norms.[76] So, in addition to the food, the fast food restaurant setting is a selling point that increases the patronage of minority customers.

Unfortunately, soul food, like fast food, is linked to diet-related illnesses such as diabetes, hypertension, and cardiovascular disease. A pattern of consuming soul food might constitute a competing cause-in-fact of the obesity and illness suffered by some black fast-food eaters.[77]

Ethnicity and Culture in George Tillman, Jr.'s Soul Food, *María Ripoll's* Tortilla Soup, *and Tim Reid's* Once Upon a Time When We Were Colored, *in* REEL FOOD: ESSAYS ON FOOD AND FILM 101 (Anne L. Bower ed., 2004). For a review by the author, *see* SOUL FOOD (the Movie), on file with the author. The film was made into a successful television program of the same name that ran between 2000 and 2004. Blacks are not alone in associating food with positive cultural and communal ties. *See generally The Meaning of Food* (PBS television broadcast 2004) (a documentary about the impact on community, family, and individual identity of Americans' culturally diverse foods and food rituals).

74. Collins O. Airhihenbuwa et al., *Cultural Aspects of African American Eating Patterns*, 1 ETHNICITY & HEALTH 245, 258 (1996).

75. *See* Diane Cardwell, *The Tablecloths Are White, and So Are Most Faces*, N.Y. TIMES, Sept. 7, 2005, at F4 (a black diner lamenting the sparsity of black customers at the fanciest restaurants in New York City).

76. *See* Regina Austin, *"Bad for Business": Contextual Analysis, Race Discrimination, and Fast Food*, 34 J. MARSHALL L. REV. 207, 226–30 (2000) (elaborating on the ways in which fast-food restaurants satisfy black customers' needs and expectations regarding dining out).

77. It is not clear what impact a plaintiff's consumption of a soul food diet would have on the liability of McDonald's. McDonald's might claim the customer's choice of its food was driven not by its advertising or its failure to disclose nutritional information, but by the customer's cultural predilections; therefore, McDonald's was not the cause of the customer's consumption of its food to the point of obesity or ill-health. Alternatively, it might argue that the customer would have become obese and ill at some point because of her or his penchant for soul food and that McDonald's liability should be limited to the consequences of early onset of obesity and ill-health only.

The plaintiff, on the other hand, might argue that McDonald's exploited her or his known cultural preferences for soul food in selling its products and is under a heightened obligation to protect its customers against the risks of foods that bear a resemblance to soul food prepared in their private homes but that are in fact much saltier, fatter, and sweeter, as well as composed of chemicals that are not found in anyone's kitchen. It should be noted, by the way, that soul food is associated with cooking from scratch.

Conversely, because of its association with extreme poverty and deprivation, gender stereotypes, and regional history, soul food has been[78] and will continue to be a contested cultural artifact, and not only with regard to its nutritiousness. Black people are not monolithic, and their culinary ways are varied and dynamic. Class, region, ethnicity, religion, and health concerns have an impact on blacks' food preferences; the dishes that would be considered classic soul food are not staples of the diets of some black subgroups who object to the entire race being identified with particular foods.[79] Moreover, to the extent that food is connected to memory, young black people who have only a distant connection to the history of slavery and segregation are also less likely to associate their food choices with their race.[80]

In any event, it is unclear whether blacks' preferences for soul food and its near equivalents (preferences that arose when blacks had relatively little choice about what they ate) will be sustained as healthier options become more readily available. Given that food culture responds to material circumstances, blacks' adoption of healthier diets will depend on their access to healthier food staples and ingredients. But such access is subject to the distribution and marketing practices of the food industry, including the purveyors of fast food. As the rest of society demands healthier alternatives, the incentive for the food industry to look to poorer minority communities for customers will grow. Lawsuits that force the fast-food chains to disseminate or post nutritional information and to offer healthier selections, despite limited existing demand, should be viewed as being significant in improving the material context or environment in which blacks will ultimately have both greater freedom to make dietary choices,[81] and the ability to eat food that conforms to their changing cultural norms, in settings that are

78. For example, the literature of the Black Power Movement of the 1960s is replete with discussions about the nature of "soul food" and whether the food derives its "soul" from its inherent qualities (scraps, remains, and cast-offs like chitterlings and pigs' feet), or from those who cook it (the problematic black matriarch) or from those who eat it ("for blacks only"). *See* DORIS WITT, BLACK HUNGER: FOOD AND THE POLITICS OF U.S. IDENTITY 79–101 (1999).

79. *See* PSYCHE A. WILLIAMS-FORSON, BUILDING HOUSES OUT OF CHICKEN LEGS: BLACK WOMEN, FOOD, & POWER 197–98 (2006) (objecting to the portrayal of classic soul food as representative of blacks' culinary culture in the fiction film SOUL FOOD (Edmonds Entertainment 1997)).

80. *See* Airhihenbuwa et al., *supra* note 74, at 250-51.

81. *Id.*

conducive to socializing at mealtime.[82]

E. Phat! or Race-Related Cultural Preferences Regarding Women's Weight

Nothing better captures black cultural attitudes regarding women's weight than the slang term "phat." An exploration of the etymology of "phat" could be as funny as anything in *Super Size Me*.[83] Back in the 1970s, if not earlier, it was a black slang term for a well-endowed female.[84] Today, the word, which is apparently used by both black and white young people, is synonymous with "cool" or is thought to be an acronym for "pretty hot and tempting."[85] Thus, "phat's" nexus to a desirable body weight may be waning.

As "phat" suggests, large women are not as stigmatized in black culture as they are in white culture.[86] Some full-bodied females are considered attractive and accordingly do not suffer lowered self-esteem on account of their size. In addition, there are some large women who are not sexually alluring, but are considered maternal or matriarchal figures deserving of the highest respect. The origin of this cultural appreciation of larger female bodies is not clear, although standards of beauty tend to have a nexus to wealth, power, or the material reality.[87] Given black people's history of deprivation in America, size might be taken as an indication of good health, fertility, economic prosperity, and proficiency in the culinary arts and other forms of nurturing, as well as evidence of a recognition that the African body has different contours than the European

82. *See* Carol R. Horowitz et al., *How Do Urban African Americans and Latinos View the Influence of Diet on Hypertension?*, 15 J. HEALTH CARE FOR POOR & UNDERSERVED 631, 639–42 (2004) (recommending "culturally sensitive approaches to dietary change" for blacks and Latinos being treated for hypertension who, according to focus group results, incur difficulties when recommendations are inconsistent with their finances, family obligations, and cultures).

83. *See, e.g.*, TOM DALZELL, FLAPPERS 2 RAPPERS: AMERICAN YOUTH SLANG 215–16 (1996).

84. *See* JONATHON GREEN, CASSELL'S DICTIONARY OF SLANG 908 (1998).

85. Urban Dictionary, http://www.urbandictionary.com/define.php?term=phat (last visited Sept. 15, 2006). A more vulgar definition associates each letter of the term with a part of the female anatomy. *Id.*

86. Cheryl Townsend Gilkes, *The "Loves" and "Troubles" of African-American Women's Bodies*, *in* A TROUBLING IN MY SOUL: WOMANIST PERSPECTIVES ON EVIL AND SUFFERING 232, 242 (Emilie M. Townes ed., 1993) (affirming the respect accorded large black women while exploring the overall ambivalence with which images of black female bodies are read).

87. *See* Imani Perry, *Buying White Beauty*, 12 CARDOZO J.L. & GENDER 579, 586 (2006) (arguing, in a discussion of evolving assessments of white skin and skin-whitening creams, that ideals of beauty "are often reflective of economic power, or the operations of markets").

body.[88]

Cultural factors regarding desirable weight influence how much criticism or negative comment black females encounter when they gain weight and how much social support they receive when they attempt to lose weight.[89] In the *Pelman* litigation, the defendants might claim that the plaintiffs were merely following in-group aesthetic considerations when they gained weight while eating fast food and that their obesity was not harmful to their emotional well-being because it did not violate the norms of their racial reference group.

"Phat" notwithstanding, blacks are ambivalent and contradictory about heavy women.[90] The same obese black female who is considered "phat" by some may be likened to the caricature of the fat and sassy black woman that pervades American media and popular culture.[91] The stereotype is associated with loud, brazen, self-assuredness. The stereotypical "Big Mama" possesses characteristics that are the antithesis of vulnerability; there is little doubt that she should be responsible for her dietary choices. The stereotype's baggage also attaches to younger versions of the sassy black female—the "Little Mamas" who are the younger overweight versions of their mothers and grandmothers. These stereotypes harm the psyches of black girls and women who are unable to resist their impact by internalizing the black cultural norms praising the "phat" female.

Unfortunately, obesity is bad for black women's physical health.

88. *See* Hughes, *supra* note 72, at 273; Shiriki Kumanyika & Sonya Grier, *Targeting Interventions for Ethnic Minority and Low-Income Populations*, 16 FUTURE OF CHILD. 187, 198–99 (2006) (suggesting sensitivity to the likelihood that low-income minority parents and the communities from which they come will have positive attitudes about a child's being overweight that are the product of culture or economic insecurity).

89. *See* Kumanyika & Grier, *supra* note 88; *see also* Jennifer McLeod Dannelly et al., *Recommendations for Nutrition Interventions with Overweight African-American Adolescents and Young Adults at the Atlanta Job Corps Center*, 16 J. HEALTH CARE FOR POOR & UNDERSERVED 111, 112 (2005) (recounting research findings as to the cultural attitudes of blacks regarding obesity).

90. Gilkes, *supra* note 86, at 238; *see also* Margaret K. Bass, *On Being a Fat Black Girl in a Fat-Hating Culture*, *in* RECOVERING THE BLACK FEMALE BODY: SELF-REPRESENTATIONS BY AFRICAN AMERICAN WOMEN 219, 224–30 (Michael Bennett & Vanessa D. Dickerson eds., 2001) (recounting the harassment the author encountered as a fat girl and the compliments she got as a fat woman living in black communities in the South).

91. Jeremy W. Peters, *What's So Funny? An Image Popular in Films Raises Some Eyebrows in Ads*, N.Y. TIMES, Aug. 1, 2006, at C1 (exploring the ambivalent reception of commercials and films presenting black female characters who are large, boisterous, and controlling).

Just as feminists are beginning to re-examine the weight issue in terms of public health and socioeconomic class, as opposed to aesthetics and morality,[92] the serious physical consequences associated with obesity, especially for the least well off, suggest that weight ought to be an issue for black women. It remains to be seen, though, whether it is possible to encourage black women to control their weight and adopt healthy dietary practices without on the one hand challenging the notion that fat is phat, or on the other hand confirming the negative assessment of the large black woman that finds expression in mainstream and black popular culture.

F. Race/Ethnicity and Restraints on Exercise

In addition to limiting caloric intake, physical exertion and exercise are significant factors in controlling weight. Inequalities related to race/ethnicity, gender, and class in the built environment impact the opportunity to engage in physical activity and in turn impact the incidence of overweight and obese residents in a community.

There is some evidence showing that children and adolescents who reside in lower socioeconomic and/or predominantly minority communities have more limited access to recreational facilities and higher rates of overweight and obesity than others.[93] Some urban schools, for instance, lack adequate recreational facilities; playgrounds may be taken up with trailers to relieve overcrowding

92. *See generally* Antronette K. Yancey et al., *Obesity at the Crossroads: Feminist and Public Health Perspectives*, 31 SIGNS: J. WOMEN CULTURE & SOC'Y 425, 425–27 (2006) (arguing that "strategies . . . to support healthy eating and active living should move from the margins to the center of feminist concern").

93. Penny Gordon-Larsen et al., *Inequality in the Built Environment Underlies Key Health Disparities in Physical Activity and Obesity*, 117 PEDIATRICS 417, 421 (2006) (concluding that physical activity and recreational facilities are distributed inequitably, and that the presence of such a facility in a community is associated with an increased likelihood of a resident engaging in moderate or vigorous physical activity and a decreased likelihood of her or his being overweight). The study correlated the socioeconomic and racial/ethnic variables for the census-block-groups of over 20,000 adolescents, most of them participants enrolled in Add Health, who were asked about their level of physical activity and their weight and height, with the presence of physical activity and recreational facilities. *Id.* at 418. The facilities included were schools; public beaches, pools, tennis courts, and recreation centers; youth organizations, parks, YMCAs and YWCAs; public fee facilities such as public golf courses and physical fitness gyms; instruction-oriented facilities like martial arts and dance studios; and membership facilities like tennis clubs, gyms, and swimming pools. *Id.* at 420 tbl.1. The authors thought it particularly significant that "categories of facilities that were expected to be distributed equitably (e.g., public facilities, youth organizations, parks, YMCAs, and schools) were actually distributed inequitably." *Id.* at 421.

inside the school building itself, or they may be poorly maintained and dangerous. Security concerns may keep children indoors and out of harm's way; girls are more likely to be handicapped in this regard than boys.[94] Black and Hispanic females have been found to be less physically active than white females.[95] Unfortunately, governmental restraints on leisure, particularly barriers to the use by urban blacks and Latinos of public spaces, have rarely been the subject of legal challenges.[96]

The absence of facilities for physical activity and recreation in poor and working-class urban communities does not, of course, stop children and adolescents who are adept at making do with what is available to them when it comes to play. Dancing and jumping rope do not require large capital investments, but do demand the expenditure of large amounts of energy and creativity.[97]

Ironically, some of the hardships urban parents experience in finding safe environments in which their children can play might be eliminated by McDonald's on-site playlands. Of course, purchasing Happy Meals or such is the price of the ticket to get in. Moreover, the availability of a McDonald's playland depends on the considerations that enter into the siting of playlands in communities composed of low-earning minority residents.

94. *See* Kumanyika & Grier, *supra* note 88, at 195 (reasoning that the built environment adversely impacts the physical activities of low-income and minority children and calling for more studies); James F. Sallis & Karen Glanz, *The Role of Built Environments in Physical Activity, Eating, and Obesity in Childhood*, 16 FUTURE OF CHILD. 89, 93-94 (2006) (suggesting that boys and girls have different needs with regard to the safety of the built environment).

95. *See generally* Amy E, Eyler et al., *Correlates of Physical Activity Among Women from Diverse Racial/Ethnic Groups*, 11 J. WOMEN'S HEALTH & GENDER-BASED MED. 239, 240, (concluding from statistical data and a survey of the literature that black and Hispanic women engage in less physical activity than white women though the studies do not consider the vast diversity of cultures within racial/ethnic groups, the role played by social support which cuts across racial/ethnic lines, and the physical activity that is involved in a household labor and caregiving).

96. *See generally* Regina Austin, "Not *Just for the Fun of It!": Governmental Restraints on Black Leisure, Social Inequality, and the Privatization of Public Space*, 71 S. CAL. L. REV. 667 (1998) (analyzing the impact of governmental restraints on black leisure).

97. *See* KYRA G. GAUNT, THE GAMES BLACK GIRLS PLAY: LEARNING THE ROPES FROM DOUBLE-DUTCH TO HIP-HOP 133-39 (2006) (breaking down the elements of double-dutch as jumped on the street, from its acrobatic footwork to the clever rhymed chants that accompany the performances); RIZE (David LaChapelle Studios et al. 2005) (showcasing crumping, a L.A. street dance that combines elements of breakdancing and hip-hop).

G. Recap

Super Size Me ignores the reality of the context and environment in which the *Pelman* plaintiffs lived their lives, with possible ill effects for the general enlightenment of the majority population and many of its minority viewers, regarding the following:

(1) The incidence of obesity and obesity-related illnesses is greater in minority communities, especially among women.

(2) Obesity is associated with poverty and food insecurity, though that connection is not often made. This may produce a general misunderstanding about the sources of the obesity of the inhabitants of low-income minority communities.

(3) Fast-food restaurants have a special nutritional significance in communities with a scarcity of grocery stores and supermarkets and a dearth of restaurants of other kinds. Fast-food outlets also have a special social significance as sites of entertainment and amusement. The poor, the elderly, and the homeless particularly benefit from these advantages. However, after a slow start, influenced by what some regard to be racism, fast food chains have established franchises in such numbers that local ordinances are being considered to regulate their presence in communities like the Bronx.

(4) Furthermore, given the emphasis on fried fare, fast food greatly resembles soul food. Fast food is also served in a relaxed, informal setting that is conducive to the good fellowship blacks associate with eating soul food. The linkage between soul food and fast food is problematic, however, as both are associated with food-related chronic conditions like hypertension and diabetes.

(5) Controlling weight or even determining what is a healthy weight is a culturally loaded subject for black women, among other minority women. On the one hand, black cultural norms appreciate curvaceous women; this may be salutary for their self-esteem but leaves them carrying more weight than is good for their health. On the other hand, black culture, in addition to mainstream culture, denigrates large, sassy women who speak their minds; this stereotype is bad for black women's psyches, although it does challenge the conceit that respect is a matter of size. General admonitions to heavy black female teenagers to eat healthy and watch their weight may not be as effective as those aimed at young white women who do not have to negotiate the same sort of middle course between self-

acceptance and ill-health.

(6) Finally, the residents of poor minority urban communities may also have difficulties controlling their weight with exercise. Restraints on leisure have a number of sources including cultural norms that limit physical exertion by women, governmental barriers to access, and the lack of private investment in recreational space in poor and minority communities.

Assuming, then, that *Super Size Me* might have had content of greater relevance to the young women whose lawsuit prompted the film, there are reasons why such a film might have been difficult to make and distribute. As has already been suggested, a documentary that appeals to the interests of mainstream audiences or confirms their assumptions about their place in the world is more likely to be successful than one that deals with the problems of a marginalized segment of the population with which the general mass does not identify. In addition, Spurlock, as a white director, might have encountered problems in making a film that focused on the experience of black subjects with fast food and obesity.

III. A CONTEMPORARY DOCUMENTARIAN'S ATTEMPTS TO GRAPPLE WITH THE "OTHER"

The impact of fast food on Americans' waistlines and health is to some extent a pervasive problem, but its severity and the means of managing it vary with race/ethnicity, gender, and class. Nowhere is this mentioned in *Super Size Me*. Nor is any attention paid to the young women whose lawsuit stimulated the film. Perhaps focusing on the *Pelman* plaintiffs might have suggested that blacks (i) have less willpower, (ii) are more ignorant of the requirements of healthy living, or (iii) are more gullible to claims about the advantages of eating fast food than others. Perhaps Spurlock lacked access to minority subjects. Maybe he did not believe that he had the cultural competence to address the health, nutritional, and weight issues of black subjects with adequate sensitivity and that he could not or did not want to do the research that was necessary to overcome his ignorance. Spurlock imbued *Super Size Me* with just the right amount of humor; it might have been harder for him to achieve the same tone in a film where levity of an ethnic or racial nature would have been in order. Perhaps the issue of black and Hispanic obesity is *best left* to Spike Lee or some other minority documentary film-

maker, as one lawyer connected with the obesity cases suggested.[98]

White documentarians have been severely criticized in the past for tackling black issues with arrogance and without reflexivity.[99] While the filmmakers profit professionally if not financially, the subjects become the objects of derision, suffer encroachments on their privacy, and receive little of material value in return for their public exposure.[100] Of course, white directors are still producing observational or vérité films about low-income black subjects without generating a great deal of consternation.[101] Nonetheless, focusing on black obesity might have put Spurlock smack in the middle of a debate over the practical and ethical issues that arise when filmmakers focus on marginalized or deviant characters.

Super Size Me is an unusual documentary in that the director makes himself the subject of an experiment and films himself as he

98. Though best known as a feature filmmaker, Spike Lee has directed a handful of noteworthy documentaries. *See, e.g.*, 4 LITTLE GIRLS (40 Acres & A Mule Filmworks & HBO 1997) (recounting the lives of four young black girls who died in the 1963 bombing of the 16th Street Baptist Church in Birmingham, Alabama following massive civil rights demonstrations); WHEN THE LEVEES BROKE: A REQUIEM IN FOUR ACTS (40 Acres & A Mule Filmworks & HBO 2006) (chronicling the monumental governmental failures that led to the suffering and massive displacement of scores of New Orleans' poor black residents in the wake of Hurricane Katrina).

99. *See* BELL HOOKS, BLACK LOOKS: RACE AND REPRESENTATION 151–55 (1992) (criticizing white lesbian filmmaker Jennie Livingston, who directed *Paris Is Burning*, the 1991 documentary about the groups or "houses" of gay black and Puerto Rican men who participated in the drag balls of Harlem, for her failure to interrogate her position as an outsider to that community and "the way racism might [have] shape[d] and inform[ed] how she . . . interpret[ed] black experience on the screen"); Kimberly Chabot Davis, *White Filmmakers and Minority Subjects: Cinema Vérité and the Politics of Irony in "Hoop Dreams" and "Paris Is Burning"*, 64 S. ATLANTIC REV. 26, 43–44 (1999) (concluding that the use of irony by the white filmmakers of both documentaries put the viewers in a hierarchically superior position relative to the black subjects and generated pity, not empathy). *But see* MICHELE WALLACE, DARK DESIGNS & VISUAL CULTURE 443, 449–50 (2004) (finding the visual images of *Paris Is Burning* "urgently compelling" and concluding that the balls were not "just the visual manifestation of failure, loss and shame," but were also evidence of the "strength, resourcefulness, performativity, and creativity under fire" that the ball-goers managed to build).

100. *See generally* Brian Winston, *Documentary: I Think We Are in Trouble*, *in* NEW CHALLENGES FOR DOCUMENTARY 21 (Alan Rosenthal ed., 1988) (criticizing vérité filmmakers for, among other things, failing to protect their subjects).

101. *See* BOYS OF BARAKA (Loki Films 2005) (chronicling the impact of a year at the Baraka School in the Kenyan bush on the lives of four boys from inner city Baltimore); DESIRE (Women Make Movies 2005) (tracking the coming of age of four teenaged girls from pre-Katrina New Orleans, two (one white, the other Asian American) from a prestigious private school and two (both black and single mothers) from the Desire housing project); HOME (Kikker Arts LLC 2005) (tracing the difficulties encountered by a black divorced working mother of six in her attempt to move her family out of public housing in Newark); LOVE & DIANE (AMIP et al., 2002) (following the lives of three generations of a black family as it deals with a history of crack addiction, abandonment, AIDS, and psychological problems, as well as the state's public assistance and child welfare bureaucracies).

undergoes it, rather than capturing actual persons pursuing a nearly identical existence as a matter of real life. Observational or vérité filmmaking of the latter sort demands a level of engagement between the filmmaker and her or his subjects that is quite intense. Spurlock's approach, on the other hand, avoids the exploitation of vulnerable subjects that is a major criticism of much observational or vérité documentary filmmaking. Spurlock does not take advantage of anyone other than himself, his loved ones, and his doctors. Spurlock has no need to involve himself with young minority women residing in a poor urban community who were actually McDonald's heavy or superheavy users.

The plaintiffs in the case—two black female teenage patrons of McDonald's establishments in the Bronx—are kids whose choices as to food, exercise, weight control, and body image were more circumscribed than most. The circumstances of their lives would have required any filmmaker involved in capturing them on film to ask tougher questions than were asked on behalf of the children who appeared in *Super Size Me*, questions, such as, in what ways did McDonald's create or exploit the circumstances that limited the choices of the *Pelman* plaintiffs as to where and what to eat?[102] The filmmaker would have had to pay attention to not only the environmental factors, but also the social and individual factors that might have made the young women vulnerable to being harmed by the business practices of McDonald's. That might have entailed giving them the opportunity to reveal their views and attitudes about themselves, their bodies, their community, and their place in the world. Of course, it might have been painful to watch the young women reflect on their appearances, their tastes in food, and the material conditions that circumscribed their behavior and their beliefs with regard to how they looked and what and where they ate. Giving voice and face to the plaintiffs might have been a way of helping them to work through the complexity of their situations. Consider the statement attributed to Ms. Bradley by *People* magazine: "'I'll take some of the blame . . . but they should too.'"[103]

102. *See* Austin, *supra* note 36, at 839–42 (arguing that documentaries should be judged on the extent to which they provoke reflexivity or self-criticism on the part of the subjects, filmmaker, and audience).

103. *Big Mac Attack: Two New York City Teens Say McDonald's Food Made Them Obese; Now They're Taking the Company to Court*, PEOPLE, Dec. 9, 2002, at 82.

Tackling fast food, obesity, and ill-health as they are experienced by people in the circumstances of the *Pelman* plaintiffs would have required more reflexivity on the part of the filmmaker with regard to her or his possible exploitation of the subjects and on the part of the audience with regard to the impact of its self-interest and prejudices on its reception of the film and the problems it exposes.

Though Spurlock does little to engage the "Other" in the film, there are indications that he has undergone a metamorphosis in that regard. In his television series *30 Days*, subjects are placed in incongruous situations with their ideological polar opposites to see how well the subjects fare at "trying on someone else's life for size."[104] During the second season, a Cuban-born border vigilante spent a month living with a family of undocumented immigrants from Mexico; during that time he even traveled across the border to the village from which the parents came. Similarly, an atheist was placed in the home of evangelical Christians, and a computer programmer, who had lost his job to foreign outsourcing, spent a month living and working in Bangalore, India, with members of a family holding outsourced telemarketing jobs. In the season finale, Spurlock spent twenty-four days (the amount of time generally served for a thirty-day sentence) in a correctional facility in Richmond, Virginia; this was for Spurlock a much closer engagement with people who are different from himself than he has previously had on screen. Unfortunately, he seemed uncomfortable, tentative, and a bit scared most of the time, while the other inmates seemed uncommonly subdued and unanimated.

Still, the Spurlock of the television series is more sympathetic to the plight of others than the Spurlock of the movie. Self-reflection is the goal all around. The subjects and their hosts are encouraged to do video diaries in which they describe their feelings about their experiences with the "Other" and the viewer is assumed to do much the same. If good documentary or nonfiction film work reflects the intellectual and emotional growth of the subjects and the filmmaker at the same time that it provokes the growth of the audience,[105] then *30 Days* is pretty good reality television.

104. The episodes are summarized on the program's website. *See generally* FX Networks, 30 Days, http://www.fxnetworks.com/shows/originals/30days/index_2.php. (last visited Sept. 7, 2006).

105. *See* Austin, *supra* note 36, at 839–42.

Had *Super Size Me* used the *30 Days* format, an adherent of personal responsibility would have been placed in the home of a family like the Pelmans or the Bradleys that is struggling with the material, cultural, and personal factors associated with obesity. The format might have allowed the family members to be portrayed as deeply contextualized, socially connected, yet individually complex human beings. They would have been able to show that they were reflexive about their situations, their bodies, their eating habits, and the perceptions outsiders to their community have of them.

Finally, in searching for explanations for *Super Size Me's* failure to deal with the race/ethnicity, gender, and class of the *Pelman* plaintiffs in a forthright way, the shortcomings of the law should not be overlooked. As the film suggests, the treatment of civil litigation in the media and in popular culture tends to reflect the racial, ethnic, gender, and class bias that characterizes the tort law and litigation being described. 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.[106] Since the law of torts pays little attention to contextual matters like race/ethnicity, gender, and class, it would appear understandable that a work of popular culture like *Super Size Me*, which tracks the law, would do likewise.

106. *See* Regina, "Black People's Money": The Impact of Law, Economics, and Culture in the Context of Race on Damage Recoveries (Jan. 25, 2007) (unpublished manuscript, on file with the Loyola of Los Angeles Law Review) (exploring the effect the social meaning of money in the hands of black people has in reducing their recoveries in personal injury actions); *see also* Jennifer B. Wriggins, *Torts, Race, and the Value of Injury, 1900–1949*, 49 HOW. L.J. 99 (2005) (finding in an analysis of Louisiana appellate decisions historical proof of racial discrimination in the assessment of tort damages).

IV. CONCLUSION

Super Size Me is a funny, insightful documentary that has enlightened audiences as to the dangers of fast food and spurred activism around food issues in a way that is unique to nonfiction film. Morgan Spurlock is clever, creative, and as *30 Days* illustrates, willing to use nonfiction film to engage an audience in debates over serious social conflicts. It follows that the criticism of *Super Size Me* offered in this Article is not that Morgan Spurlock should have made a different movie, on a different subject, using a different rhetorical style. That would be nonsensical. Rather, the complaint is that he framed what is only a particular take on the issue of fast food and obesity as a general exploration of the problem. The general and the particular are contested categories today. As American society has become more diverse, filmmakers of whatever race, ethnicity, gender, or class whose experience is grounded in the culture and circumstances of a specific subgroup need to be conscious of their tendency to treat a part of a problem or conflict as if it were the whole. Moreover, what seems generally true or relevant based on a rough head count or assessment of socioeconomic power is not necessarily universally true in the sense of being emblematic of the human condition. What could be more global than the struggle not only to have sufficient food to eat, but also to have food that nourishes the body and satisfies the cultural imperatives of the soul, all in the face of man-made scarcity? Isn't that what the *Pelman* case is really about? The point is this. To combat the inclination to make more out of a subject than is warranted, a filmmaker might self-critically put more of her or his strategy for bringing the reality of a situation to the screen . . . *on the screen* itself.