Choosing Big Food

Who is responsible for widespread malnutrition in America?

Critical Corporate Theory Collection

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Acknowledgements

Special thanks to Rebecca Garverman and Alex Tobin for advice, feedback, and suggestions.

About the Critical Corporate Theory Collection

The Critical Corporate Theory Collection is part of the *Systemic Justice Journal*, published by the Systemic Justice Project at Harvard Law School. The Collection is comprised of papers that analyze the role of corporate law in systemic injustices. The authors are Harvard Law students who were enrolled in Professor Jon Hanson's Corporations course in the spring of 2021.

The Collection addresses the premise that corporate law is a core underlying cause of most systemic injustices and social problems we face today. Each article explores how corporate law facilitates the creation and maintenance of institutions with tremendous wealth and power and provides those institutions a shared, single interest in capturing institutions, policies, lawmakers, and norms, which in turn further enhance that power and legitimates its unjust effects in producing systems of oppression and exploitation.

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ABSTRACT

Unhealthy diets are extremely common in America, and they directly affect people's health and wellbeing. Most people assume that poor diets are driven entirely by poor choices, but this narrative does not adequately account for the role of "Big Food"—the relatively small number of multinational conglomerates that dominate the food industry. Big Food, which produces much of the food available on the market, is incentivized to produce and heavily market unhealthy food over all other kinds of food because unhealthy foods are particularly profitable and corporations have a fiduciary obligation to maximize profits for their shareholders. Big Food became "Big" by consolidating into a handful of massive companies that push out any competitors that might offer more healthy products. It has used its size, influence, and money to engage in regulatory and academic capture, heavily influencing both legal rules and nutritional studies. When these corporations receive pushback against their unhealthy products, anticompetitive practices, or other bad effects on the world, they tend to advocate for light "self-regulation" measures that fail to truly address their underlying incentives to sell harmful products. A number of movements have emerged to combat the bad effects of Big Food. They advocate for more strict governmental regulation, localized food production outside of the traditional food markets, and an emphasis on racial equity, as many of the inequalities in food distribution and Big Food marketing tactics affect communities of color most harshly.

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A HEALTH CRISIS IN AMERICA

As part of the food nutrition unit of my high school health class, we were shown Morgan Spurlock's documentary *Super Size Me*. The premise is that Spurlock, for 30 days in a row, must eat breakfast, lunch, and dinner at McDonald's and accept all offers to "Super Size" his meals. Over the course of the month, he gains 24 pounds, his cholesterol skyrockets, and he generally feels terrible. A typical monologue from the documentary went like this:

> Right now I've got some McGas that's rockin'. My arms... I feel like I've got some McSweats goin'. My arms got the McTwitches going in here from all the sugar that's going in my body right now. I'm feeling a little McCrazy.

My 14-year-old classmates and I were taught that *Super Size Me* demonstrates the dangers of choosing to eat too much fast food. The remainder of the nutrition unit reviewed the food pyramid, the USDA's now-outdated dietary guidance chart, which recommended 2 to 3 times more bread than vegetables and used portions measured in unhelpfully abstract "servings." After these classes on food education, we had our lunch period. Pizza and Coca-Cola products were almost always on sale in the cafeteria.

There is a fundamental disconnect between the ideal of healthy eating and the unhealthy realities of what is most conveniently available to us, and that disconnect is partly to blame for America's severe malnutrition problem. Malnutrition—literally "bad nutrition"—can describe any type of unbalanced diet, including too much or too little food. Medical and public health professionals often use weight as a proxy for nutritional intake, and the weight statistics in America are well-known: 42.4% of

adults and 19.3% of children are obese, while 1.5% of adults and 3.8% of children are underweight.[1]

Malnutrition is correlated with many different quality-of-life problems, including skin, hair, and teeth problems for those who are underweight and sleeping and breathing problems for those who are overweight. Both groups are susceptible to lower energy levels than those who are at healthy weights. Beyond these more manageable conditions, both groups are also significantly more likely to have certain diseases. Those who are underweight are much more likely to die of non-cancer and non-cardiovascular diseases than a healthy person, while people who are overweight are at significantly higher risk of diabetes, cardiovascular disease, kidney disease, and certain cancers.[2]

BIG FOOD'S ROLE IN PEOPLE'S FOOD CHOICES

Although most people acknowledge that malnutrition and its health outcomes are bad, they are largely accepted as the natural result of individuals' poor food choices. In my high school health class, I learned that people could choose what they ate, that fast food and sweets were unhealthy, and that unhealthy eating was correlated with disease. I also knew, simply by existing in the world, that unhealthy options are delicious and ubiquitous: in the grocery aisles, in vending machines, on billboards and other roadside advertisements, in television commercials, and anywhere else. I considered it a simple fact of life that it's hard to eat healthy all the time. While temptations are everywhere, nearly everyone believes in their own personal agency over what they eat. Under this theory, the American nutritional crisis is nothing more than the public's failure to prioritize healthy food.

While a person has some autonomy in their individual food choices, a select set of unhealthy options have come to dominate the American food landscape. This constraint of choice has come about in large part because a handful of multinational conglomerates—"Big Food"—control much of our nation's food supply. Once the methods and societal role of the food industry are considered, an alternative explanation for America's health crisis emerges—one where the power of individual decision making loses some of its force.

The economic domination of Big Food combined with the uniqueness of food as a product challenges the traditional market-based narrative that food companies make money by providing any and all options that

people like to buy. Instead of all-powerful consumers making demands that subservient corporations compete to fulfill, the reality shows a small number of industrial food conglomerates offering the public a limited selection of high-margin food options and then successfully manipulating buyers to over-consume the least healthy products. This result is achieved through pervasive advertising that has come to affect America's very conception of food, structural market domination, and regulatory and academic capture. The profit-maximizing incentive has led to a public health crisis that can only be addressed through radical solutions.

Marketing What's Most Profitable

Food corporations, like all corporations, have a fiduciary duty to shareholders to maximize profits. According to basic supply-and-demand economics, the two main ways to increase overall profits are either increasing profit margins per product or selling more products. Big Food has enjoyed enormous success through both methods at the expense of their products' nutritional value and the health of their customers. The most processed foods are simultaneously the least healthy and the most profitable to make, and the vast majority of food advertising dollars are spent promoting these types of unhealthy products.

Industrially processed food has significantly higher profit margins than fresh foods for a number of reasons. To start, the ingredient and processing costs of junk foods are particularly cheap when compared to the final retail value. Soda production is one of the most profitable industrial activities in the world, with net profits that are around 25% of the retail price.[3] Unlike fresh produce, which has a short shelf life before spoiling, many packaged foods can remain on shelves for months or years before expiration. This fact makes the supply chain and storage logistics of shelf-stable products significantly less expensive, and the final product is much more likely to ultimately find a buyer in time. Most of these final processed products have particularly high quantities of fat, salt, and sugar which, despite nutritional concerns, continue to be added for palatability—and marketability.[4]

Big Food drives demand for these unhealthy products by spending billions of dollars per year on advertising across all types of media. In modern American food advertising, people are overwhelmingly encouraged to prefer soda and other processed, ready-to-eat foods over raw, nutritious foods. Unhealthy foods have always been heavily marketed, but their current, near-total dominance of food advertising is

part of a larger trend correlated with the shift from "at home" to "away from home" eating patterns over the past half century. In 1954, canned fruits and vegetables were a substantially advertised food product.[5] Today, nearly all food advertising dollars are spent on sodas, fast food, and other low-nutrient, highly processed food products.[6]

The billions of corporate dollars that go towards advertising are well-spent: ubiquitous advertising makes people more likely to want the types of food products that are advertised.[7] One striking example is in children, who consume 45% more food after exposure to food ads, independent of their conscious levels of hunger.[8] Due to children's general susceptibility to advertising, Big Food deploys multiple marketing strategies to develop food brand awareness through targeted ads, starting at the toddler age.[9] Half of all advertisements directed at children are for food, the majority of which are for unhealthy products.[10]

The profit motive incentivizes corporations to aggressively produce high-profit, unhealthy foods and advertise those foods in a way that encourages as many people as possible to eat as much of it as possible. Turning the traditional supply-and-demand model on its head, Big Food controls the supply, produces what is most profitable, and then uses advertising to shape the demand for what it has put on the market.

Advertising and American Culture

Big Food advertising is so pervasive that it has guided a cultural shift in how Americans think about food. Over the past half-century, our definition of food has changed from an assemblage of raw products prepared and consumed at home into a product prepared industrially and ready for consumption anywhere.[11] In addition to the sugar and fat content that make processed foods appealing to taste, major emphasis has been placed on their convenience. Fast food, frozen meals, and other ready-to-eat products are for people "on the go": those too busy with the daily obligations of modern life to spend further time on food preparation. New conveniences are associated with progress, a virtue that is transferred to these emerging food options.[12]

Eating unhealthy—but convenient!—food has been thoroughly normalized in America, and these food products are now culturally entrenched. The first generation of kids to grow up with industrial food marketing are now themselves parents. They are more likely than earlier generations to feed their children fast food and heavily processed meals because they think such foods are normal.[13] Big Food advertising has not only changed what food we consume, but how and where we

consume it.

Even more importantly, these foods have merged into the American cultural identity. Food is one of the most highly branded commodities, and food commercials, logos, slogans, and jingles have become part of each generation's collective cultural identity. Many corporations use American identity directly in their branding, as in "America runs on Dunkin'," "America spells cheese.... K-R-A-F-T," and Hershey's "great American chocolate bar." As food supply is increasingly consolidated into a handful of American national (and multinational) brands with uniform offerings, regional and cultural food heritages are gradually replaced with nationally homogeneous food identities staked in corporate branding.[14] Everyone has a favorite candy or snack brand, and people fervently argue over which fast food chain makes the best hamburger. The unhealthy products of the food industry are not merely accepted in American diets, they are now celebrated as part of ourselves.

The Market Domination of Big Food

The premise of a market economy is that supply and demand forces correctly determine what should be made and that competitive innovation will produce a wide variety of goods that collectively address all consumer needs. Some people believe that the food industry embodies these free market ideals: Americans pay generally low prices for food staples, most foods are available year-round, and supermarkets are infamous for the staggering variety of options available per generic food product like cereal or pasta sauce. The food industry is described to both supply everything consumers currently want and have the flexibility to respond to any changing consumer demands—a complete representation of all consumer desires.

The problem with this framing is that a market economy relies on meaningful competition between companies. That is not the case in the food industry, where every sector is dominated by an ever-diminishing handful of massive corporations. To give just a few examples: four companies control almost 90% of grain trade globally, Dean Foods produces 30% of all milk sold in America, four firms control 85% of the beef packing industry, McCormick sells just under 50% of all spices, PepsiCo sells 60% of all chips, and Wal Mart controls 25% of all grocery sales.[15] From farm to processing plant to grocery store, each stage of food production and distribution is controlled by a small number of multinational conglomerates.

Concentrated economic power means corporations can avoid true

competition in consumer offerings. Big Food is certainly guilty of the most obvious form of anticompetitive behavior: price fixing. Tyson paid $225.1 million to settle a multi-year chicken price fixing suit that cost the average family about $330 per year, and Bumblebee and StarKist both recently pled guilty to allegations of price fixing in the canned tuna industry.[16] In addition to overt price fixing, food conglomerates can also easily afford to undercut the prices of any popular new products offered by smaller companies. As long as the rest of the company continues to turn a profit, one subsidiary or brand can operate at a loss to drive any truly threatening newcomers out of business.[17]

Lack of competition also means that companies can make their products less desirable without sacrificing market share or profitability. For example, Bayer, which recently acquired Monsanto, owns patents to 90% of U.S. soybean seeds, and those seeds have been intentionally engineered to germinate for only one harvest, requiring farmers to rebuy seeds every season.[18] Big Food market consolidation also depends on economies of scale, which, by necessity, standardizes much of food production. Industrial farming relies on crop monocultures, and raw foods are processed by a handful of companies that aim for consistency in their final product.[19] Variety is inevitably lost along the way. Although grocery store aisles give the illusion of hundreds of distinct products, the major Big Food players produce the majority of them, with each corporation using identical food processing pipelines to produce roughly identical foods under dozens of different brands.[20]

Distributional inequities deal a final blow to the theory that Big Food adequately provides a satisfactory set of food options to all consumers. 10.5% of U.S. households were food-insecure at some point during 2019[21]—a number estimated to have doubled over the course of the COVID-19 pandemic[22]—and approximately 5.6% of Americans live in communities with limited access to grocery stores or other sources of healthy food.[23] Consumers in these areas either have to travel longer distances for their groceries (a large barrier for low-income families who do not own a car) or settle for local food offerings that are typically skewed towards highly processed junk foods. Dollar store chains have recently taken the place of supermarkets in these neighborhoods and sell high-profit-margin junk foods alongside a select number of fresh food products, which are sold at a markup. These low food access areas were originally termed "food deserts," but food activists have increasingly used the term "food apartheid" to describe the phenomenon and its outsized impact on communities of color.[24]

Big Food's Regulatory and Scientific Capture

To the extent that food companies concede that accurate labeling requirements are important for individual choice, they are likely to claim that whatever the current FDA guidelines are for nutritional labeling are all that is necessary to create an "informed" consumer who has enough information to make good food choices. The responsibility for informed decisions can then shift from the corporation to the consumer as soon as the label is printed.

What is left unsaid is that Big Food corporate actors affect what information makes it onto the label in the first place, as well as our understanding of nutrition more broadly. Nutrition labels appear to be objective lists of ingredients and dietary facts, but the details of which nutritional categories and facts are considered important is an ongoing struggle between regulators and Big Food lobbyists. Past labeling disputes have included whether to count trans fats and saturated fats separately and whether to list the number of calories from added sugar.[25] Related disputes with the Department of Health and Human Services occur over the national dietary guidelines, which, in addition to food labeling standards, inform school lunch programs, food aid benefits, and nutrition research grants.[26]

Big Food spends enormous sums on lobbying to influence these regulatory bodies so effectively—not to mention monetary contributions to individual politicians. Targeted lobbying campaigns aimed towards the agricultural and appropriations committees have repeatedly forestalled the addition of new anticompetitive measures to the farm bill.[27] The food industry also has a severe revolving door problem: a full ⅔ of food industry lobbyists are former regulators themselves.[28]

Beyond regulatory capture of government agencies, Big Food has also made significant strides towards "capturing" the academic field of nutritional science. About 13% of all food research is directly sponsored by agribusiness,[29] and the results of those studies are anywhere from four to eight times more likely to reach conclusions that are favorable to their industry.[30] Despite—or because of—flagrant conflicts of interest present in their own studies, Big Food has vilified and cast doubt on the results that conflict with theirs, insisting that their own research is what deserves people's trust.[31]

Having substantial control over both governmental labeling requirements and people's knowledge of nutritional science, Big Food unsurprisingly has wide discretion in its food labels, usually suggesting

that the products are healthier than they actually are. Brand names such as "Healthy Choice" and "Lean Cuisine" may overstate the nutritional value of frozen meals, and "organic" or "vegan" labels mean various things that do not always translate into health benefits.[32] Corporations should be held responsible for both the information and misinformation they provide. To hold consumers completely responsible for unhealthy food choices is to ignore tremendous corporate effort to mislead consumers into overestimating the nutritional value of their foods.

SOLUTIONS TO BIG FOOD'S HARM ON NUTRITIONAL HEALTH

If poor health is due solely to individual consumer choice and corporations adequately oversee themselves, there is no systemic problem to solve. The solution to the current public health crisis is an individualized internal battle to choose healthy foods, to be waged millions of times over by the majority of Americans.

This assignment of blame is evident even when corporations themselves offer to self-regulate, relying on public and governmental trust in the company's goodwill.[33] In the food industry, "self-regulation" often takes the form of corporate social responsibility campaigns, which usually claim to address a wide range of problems but often ignore the conflicts of interest inherent in curbing practices that are integral to how a company makes money. The food industry tends to use these campaigns to subtly shift the blame for American malnutrition onto consumers by focusing on fitness initiatives or nutritional education.[34]

Even where the campaigns are marginally useful, they do not reform harmful practices that increase the company's profitability. Some nutritional victories attributed to self-regulatory programs were actually accomplished under threat of lawsuit, like Kraft's ban on trans-fats.[35] A commonly requested reform is restriction of junk food advertising to children, but self-regulation has not curbed this practice for obvious profit-motivated reasons.[36] New legal requirements are necessary to make unprofitable corporate improvements—corporate social responsibility campaigns will never effectively reduce these types of harmful corporate behaviors on their own.

When we correctly identify profit-oriented corporate behavior as a problem that adversely affects our food supply, systemic solutions emerge to America's nutritional crisis. The food advocacy space is broad,

and overlapping coalitions push for changes ranging from the incremental to the fundamental. Despite their vastly different approaches, they all agree that the current food regime of unrestrained corporate conglomerates does not provide an option that they want to choose.

Traditional Legal Approaches: Regulation and Antitrust Suits

The traditional solution to Big Food's many harms is regulatory action. Public health experts could set stricter standards for industrial food products and monitor industry performance, with real legal penalties in place for violations. Advertising, particularly to children, could be severely curtailed, similar to restrictions placed on the tobacco industry decades earlier. Tax incentives could be set such that healthier ingredients and processing methods become the more profitable course of action. In addition to creating these new regulations, the FTC and DOJ could address market domination by pursuing antitrust actions more aggressively.

The main obstacle to achieving these meaningful legal restrictions is the food industry's capture of regulatory bodies, including exorbitant lobbying and a revolving door between industry executives and government regulators. These problems, while formidable, are not insurmountable, and many food advocates remain focused on these types of governmental controls.

Community Food Security Movements: Local Alternatives and Welfare Expansion

Community food security describes an array of movements that support local alternatives to industrial food products. Rather than compete directly against huge corporations, food system alternatives are supplied via new business models like cooperatively owned retail outlets, community gardens, urban greening projects, and direct marketing between farmers and buyers, such as farmers' markets and food coops.[37]

Community food security is squarely focused on localized food production and acquisition and tries to make as many strategic alliances with government, industry, and nonprofits as possible.[38] Additionally, these movements advocate for the expansion of government food aid programs and food banks, so most governmental lobbying efforts are

focused on those programs.[39]

Food Justice: A Focus on Racial Equity

Food justice movements can overlap with community food security movements or food sovereignty movements, but their identifying distinction is a special focus on people of color in low-income communities.[40] The industrial food regime consistently harms communities of color most severely, from targeted junk food advertising to the food access problems of food apartheid. For example, Big Food, borrowing tactics from the tobacco industry, engages in racially targeted advertising campaigns; as a result, Black children view around twice as many food ads as their white peers, suffering a disproportionately severe health impact.[41] Moreover, Black participation and ownership of any aspect of the current food pipeline faces particularly high barriers.[42] Any solution to market concentration and widespread community dispossession must acknowledge these racial disparities. Food justice movements struggle to form broad political alliances around race-conscious wealth redistribution, but advocates recognize that this resource reallocation is necessary to address the fundamental harms of the existing food industry.

Food Sovereignty: Healthy Food as a Human Right

The final, most transformative movement against Big Food is food sovereignty, which asserts that access to food, land, and water is a fundamental human right.[43] The food sovereignty movement was built from a coalition of small farmers, fishing communities, indigenous peoples, trade unions, and environmental activists.[44] The movement is concerned with healthy food access alongside a host of interconnected issues arising from current Big Food practices, including animal cruelty, environmental hazards, and poor labor standards.

Like community food security movements, food sovereignty supports local food production that reflects regional culture and traditions. However, the food sovereignty movement wants to go further and completely dismantle current industrial food systems, with equitable redistribution of seeds, water, land, and food processing and distribution facilities.[45] The movement's resources are thoroughly outmatched by the advertising budgets of agribusiness conglomerates, and building support around a financially disruptive movement is very difficult in the present American political climate.[46] Nonetheless, food sovereignty advocates believe that only the complete destruction of Big Food can

fully remedy its harms.

CONCLUSION

The narrative that over a third of all American consumers are entirely responsible for their heightened health risks ignores corporate power in the products, marketing, and nutritional information that consumers consider when making choices. The corporation has a fiduciary obligation to maximize profits for shareholders, which leads to their production and advertisement of highly lucrative products that are unhealthy. Corporate consolidation throughout all levels of agribusiness has created adverse effects that stifle the development of alternative healthy foods and gives companies the financial and political capital to directly affect nutritional labeling—including through the underlying scientific studies on which foods we believe are healthy. External regulatory solutions to the problems created by Big Food range from incremental legal changes to the complete overthrow of capitalistic forces in food production. Each approach faces its own challenges: while radical change struggles to find broad political support, Big Food has engaged in extensive regulatory capture that stifles even modest legal action. These problems may be difficult to solve, but the first step is to acknowledge the central role that Big Food plays in creating an unhealthy food landscape throughout America.

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