

2001

# A Muckraker's Aftermath: The Jungle of Meat-packing Regulation after a Century

Roger I. Roots

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

## Recommended Citation

Roots, Roger I. (2001) "A Muckraker's Aftermath: The Jungle of Meat-packing Regulation after a Century," *William Mitchell Law Review*: Vol. 27: Iss. 4, Article 1.

Available at: <http://open.mitchellhamline.edu/wmlr/vol27/iss4/1>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact [sean.felhofer@mitchellhamline.edu](mailto:sean.felhofer@mitchellhamline.edu).

© Mitchell Hamline School of Law

## A MUCKRAKER'S AFTERMATH: *THE JUNGLE OF MEAT-PACKING REGULATION AFTER A CENTURY*

Roger Roots<sup>†</sup>

|  |      |
|--|------|
| I. INTRODUCTION .....                          | 2413 |
| II. THE JUNGLE .....                           | 2415 |
| III. WHAT WAS DONE .....                       | 2419 |
| IV. THE MICROSCOPIC WORLD ESCAPES CONTROL..... | 2426 |
| V. CONCLUSION.....                             | 2433 |

### I. INTRODUCTION

If Harriet Beecher Stowe can be blamed for the Civil War,<sup>1</sup> then Upton Sinclair must be blamed for the entirety of the government's interdiction into American meat quality regulation during the twentieth century.<sup>2</sup> Sinclair's novel *The Jungle*—set amid the wretched working conditions of Chicago's meat packing plants at the turn of the century—created an immense populist eruption in 1906, and led directly to passage of federal meat inspection laws<sup>3</sup>

---

† Roger Isaac Roots graduated from Roger Williams University School of Law in 1999 and Montana University–Billings (B.S. Sociology) in 1995. He is the founder of the Prison Crisis Project, a non-profit prison and criminal justice law and policy think tank based in Providence, Rhode Island. He has a wide variety of experiences with meat production issues, including employment as a meat-processing lobbyist, work in feedlots and auction yards, and a wonderful youth in Montana surrounded by the cattle industry.

1. Harriet Beecher Stowe's 1852 novel *Uncle Tom's Cabin* is credited by many with having spread virulent abolitionist sentiment to the mainstream of American life in the northern United States prior to the American Civil War. Stowe's book sold a million copies within sixteen months and provoked a wave of hatred against slavery. When Stowe met President Lincoln at the White House a decade later, Lincoln asked, "Is this the little woman whose book made such a great war?" DAVID WALLECHINSKY & IRVING WALLACE, *THE PEOPLE'S ALMANAC* 175 (Carol Orsag et al. eds. 1975).

2. This comparison was first made by Jack London, who once characterized *The Jungle* as "the *Uncle Tom's Cabin* of wage-slavery." LEON HARRIS, UPTON SINCLAIR: *AMERICAN REBEL* 64 (1975). *The Jungle* also achieved a wider circulation than any other American novel except possibly for *Uncle Tom's Cabin*. *Id.*

3. The Pure Food and Drug Act, Pub. L. No. 59-384, 34 Stat. 768 (1906), was enacted within six months of *The Jungle's* release. Emory Elliott, *Afterword to UPTON SINCLAIR, THE JUNGLE*, 344 (Signet Classic ed. 1990)(1906). It required food

and indirectly to a grand alteration of America's economic regulatory structure.<sup>4</sup>

Largely due to this historical backdrop, meat-packing is today among the most regulated industries in America.<sup>5</sup> Yet the impact of this regulation remains a subject of immense controversy. About the only aspect of federal meat inspection laws that all critics agree with is that federal meat quality laws were originally intended to counteract the hysteria created by *The Jungle*.<sup>6</sup> Today it is questionable whether any of this regulation is accomplishing its stated goals. Indeed, the stated goals of meat-packing regulation may be impossible to achieve. The microscopic world of bacterial pathogens most responsible for meat-borne illness are beyond the feasible reach of government inspectors on a general scale.

Instead of protecting the public, federal meat inspection regulations are responsible for immense harms to the economy and baseless politically-driven prosecutions of market participants. Perhaps the greatest harm caused by this regulation is the utterly false assurances it gives the American public—a subject that has

manufacturers introducing food products inter-state to truthfully brand and label their food products and made the failure to do so a misdemeanor. The Pure Food and Drug Act, 34 Stat. 768. Shortly afterward, the Meat Inspection Act was passed, requiring federal inspectors to visually inspect every slaughtered carcass before traveling in interstate commerce. The Meat Inspection Act Pub. L. No. 59-242, 34 Stat. 1260 (1907).

4. Indirectly, *The Jungle's* influence can be said to have caused a number of governmental reforms in the months and years after 1906. During the early twentieth century, Congress passed such reforms as the Packers and Stockyards Act regulating market activity with regard to meat distribution, various wage and hour laws, child labor restrictions, worker compensation statutes and other regulations directed at the meat packing industry specifically and American business in general. Packers and Stockyards Act of 1921, Pub. L. 106-274, 42 STAT. 159 (1921), and 64 U.S.C. 31 (2000). That *The Jungle* and its genre of 'muckraking' literature were responsible for much of this restructuring of America's commercial order cannot be realistically denied. Elliott, *supra* note 3, at 343.

5. There are currently at least twelve federal agencies which have a hand in regulating food processing in America, spending at least one billion annually. Rep. Ed Towns, *Reforming A Flawed Approach to Food Safety*, ROLL CALL, May 23, 1994, available at LEXIS, Roll Call, Genfed.

6. E.g., Pathogen Reduction; Hazard Analysis and Critical Control Point (HACCP) Systems, 60 Fed. Reg. 6774, 6775 (1995) (codified at 9 C.F.R. §§ 308, 310, 318, 320, 325, 326, 327, and 381); James A. Albert, *A History of Attempts by the Department of Agriculture to Reduce Federal Inspection of Poultry Processing Plants—A Return to the Jungle*, 51 LA. L. REV. 1183, 1184 (1991); Dion Casey, *Agency Capture: The USDA's Struggle to Pass Food Safety Regulations*, 7 KAN. J.L. & PUB. POL'Y, 142, 143 (1998).

gone virtually unmentioned in legal scholarship.<sup>7</sup>

This paper will address American meat processing in the aftermath of Upton Sinclair's book *The Jungle*. It will show that, although the book brought on a healthy sense of scrutiny on the part of the American consumer, the governmental mechanisms it spawned failed to provide a sure, safe, and completely hazard-free meat supply. The post-*Jungle* world of American meat-packing regulation is no safer than the pre-*Jungle* world. As many critics have pointed out, the history of American meat quality regulation is typified by political posturing and reaction rather than rational, scientific decision-making.<sup>8</sup>

## II. THE JUNGLE

Upton Sinclair was just twenty-seven years old when his book, *The Jungle*, was first released upon the world.<sup>9</sup> When the book was released, it brought world-wide acclaim for Sinclair which would never be equated in his long and eventful life.<sup>10</sup> *The Jungle* tells the

7. While legal and public health scholars have criticized the American meat inspection system extensively, virtually all of them have called for more stringent, more expensive, and more burdensome regulation as a remedy. See, e.g., Albert, *supra* note 6, at 1184; Casey, *supra* note 6, at 142; Sharlene W. Lassiter, *From Hoof to Hamburger: The Fiction of a Safe Meat Supply*, 33 WILLAMETTE L. REV. 411, 416 (1997) (arguing that "in order to ensure a safe meat supply, the regulatory enforcement mechanism for noncompliance must increase significantly ....").

8. E.g., *The Hidden Cost of Gov't Regulations: Hearing Before the Subcomm. on Nat'l Econ. Growth, Natural Res., and Regulatory Affairs of the Comm. on Gov't Reform and Oversight House of Representatives*, 104th Cong. 93 (1996), microformed on CIS No. 97-H401-155 (Cong. Info. Serv.) [hereinafter *The Hidden Cost Hearings*] (statement of Larry McFerron, operator of McFerron's Quality Meats, Inc.) ("[T]hese regulations were proposed not out of science or real concern for food safety, but, rather, as a response to political posturing by special interest groups bent on destroying the beef industry."); *Reinventing the Fed. Food Safety System: Hearings Before the Human Res. and Intergovernmental Relations Subcomm. and Info., Justice, Transp., and Agric. Subcomm. of the Comm. on Governmental Operations House of Representatives*, 103d Cong. Vol. 1, at 2 (1993-1994), microformed on CIS No. 97-H401-58 (Cong. Info. Serv.) [hereinafter *Reinventing the Fed. Food Safety System Hearings*] (statement of Edolphus Towns, Chairman, House Comm. on Governmental Operations) ("Historically, as a country we have revised Federal food safety responsibilities only in response to a crisis or calamity.").

9. Elliot, *supra* note 3, at 342.

10. When Sinclair died in 1968, he had written ninety books on a wide variety of subjects, along with thousands of articles, book reviews, letters to the editor, and essays. HARRIS, *supra* note 2, at 4 (stating "[w]hoever chooses to write conscientiously a biography of Sinclair must want to do so very much indeed, because the material available is excessive."). The Sinclair Collection at the Lilly Library at Indiana University is said to contain between eight and nine tons of material in-

tale of Jurgis (pronounced *Yoorghis*)<sup>11</sup> Rudkis, a heavily-muscled and hard-working Lithuanian immigrant who lands in Chicago at the turn of the century.<sup>12</sup> With his pretty young wife Ona, the wide-eyed Jurgis settles into a Polish, Slavic, and Baltic enclave in the heart of Chicago.<sup>13</sup> His field of associates consists of his father and dozens of in-laws. The entire lot is consumed by life in Chicago's 'Packingtown' district, a city unto itself with over 250,000 inhabitants.<sup>14</sup>

Soon after the scene is set, the reader becomes aware that these innocent and energetic people are in decline. They have come halfway around the world only to find a far more bleak existence than life in the forests of Lithuania. The daily toils and troubles of Jurgis' relatives occupy every hour of the day:

There are able-bodied men here who work from early morning until late at night, in ice-cold cellars with a quarter of an inch of water on the floor—men who for six or seven months in the year never see the sunlight from Sunday afternoon till the next Sunday morning—and who cannot earn three hundred dollars in a year. There are little children here, scarce in their teens, who can hardly see the top of the work benches—whose parents have lied to get them their places—and who do not make the half of three hundred dollars a year, and perhaps not even the third of it.<sup>15</sup>

Sinclair's fictitious "Durham's" meat-packing firm was intended to represent any one of the five meat-packing companies which dominated American meat-packing at the turn of the century: Armour, Cudahy, Morris, Swift, and Wilson, which together slaughtered some eighty percent of America's cattle.<sup>16</sup> By every ac-

---

cluding more than 250,000 pieces of Sinclair's correspondence. *Id.* (saying that Sinclair's correspondence involved such people as Krupskaya, Kennedy, Mencken, Mann, Gorki, Gandhi, Trotsky, Shaw, and the two President Roosevelts). "I point out even if one were able to read sixty letters an hour for eight hours a day, it would take five hundred working days just to read a quarter of a million letters." *Id.* Of this mountain of writing, Sinclair's *The Jungle* stands out as by far the most important in terms of its effect upon the reading world.

11. UPTON SINCLAIR *THE JUNGLE* 4 (Robert Bentley, Inc. 1971) (1906).

12. *Id.*

13. *Id.* at 27.

14. *Id.* at 41.

15. *Id.* at 13.

16. Peter C. Carstensen, *How to Assess the Impact of Antitrust on the American Economy: Examining History or Theorizing?*, 74 IOWA L. REV. 1175, 1206 n.184 (1989) (citing 1916 figures for federally-inspected cattle).

count, the major packers engaged in predatory business practices, including acting in concert to drive down cattle prices and wages, buying and loaning refrigerator cars to the railroads with agreements that their own freight costs be rebated, contracting with the railroads to require other smaller companies to pay exorbitant freight costs for use of the same refrigerated cars, and other allegedly brutal practices.<sup>17</sup>

“No tiniest particle of organic matter was wasted in Durham’s [packing plant].”<sup>18</sup> The operation was carefully orchestrated into an efficient array of separate operations, each with its own peculiar purpose and product. The Chicago stockyards, in Sinclair’s class-struggle-oriented language, represented “the greatest aggregation of labor and capital ever gathered in one place.”<sup>19</sup> The stockyards contained thirty-thousand workers, who supported a quarter million directly in the “Packingtown” neighborhood and a half million indirectly.<sup>20</sup> The stockyards sent its products to every country in the civilized world, and provided meat products for thirty-million human beings.<sup>21</sup>

Although Sinclair clearly intended *The Jungle* to hit hardest at the social inequities suffered by the laboring classes of the meat plants, the book’s impact fell most heavily upon the meat itself.<sup>22</sup> *The Jungle’s* readers focused more on the vile and despicable product of Durham’s plants than on the other myriad horrors revolving around the plants. Sinclair described how Durham’s workers would treat diseased meat with kerosene to hide its foul smell and

---

17. SINCLAIR, *supra* note 11, at 313-14. These accusations closely mirrored those of the Teddy Roosevelt Administration against the major packers in the famous case *Swift & Co. v. United States*, 196 U.S. 375, 375 (1905). Indeed, both the fictitious packers of *The Jungle* and the real-life packers of the *Swift* case were likewise accused of regularly refraining from bidding against each other in good faith, combined to bid up prices of livestock for a few days so that market reports would show high prices “thereby inducing stock-owners ... to make large shipments to the stockyards to their disadvantage,” held secret meetings to fix prices, kept black lists of delinquent customers, and combined to keep newcomers out of the processing business. 196 U.S. 375, *passim*, and at 392; SINCLAIR, *supra* note 11, at 312-14, 319-20.

18. SINCLAIR, *supra* note 11, at 40.

19. *Id.* at 41.

20. *Id.*

21. *Id.*

22. Sinclair lamented years later, “I aimed at the public’s heart and by accident I hit it in the stomach.” Elliott, *supra* note 3, at 342 (commenting on the irony of *The Jungle’s* greater impact upon food quality laws than upon reforms to the social structure).

then place it on the market. This “embalmed beef,” according to Sinclair, had killed several times as many American soldiers as all the bullets of the Spaniards in the Spanish-American War.<sup>23</sup> Furthermore, cans of advertised “potted chicken” included everything from tripe, pork fat, beef suet, and the waste ends of veal. The packers, according to Sinclair, performed “miracles of chemistry”<sup>24</sup> upon diseased and rejected meat products. Sausage returned moldy and white was dosed with borax and glycerin, and simply dumped into hoppers with other meat to be reground. In the fictitious Durham’s plant, mounds of meat were stored in great piles under leaky roofs and layers of dried rat dung.<sup>25</sup> The incessant rat nuisance was solved with liberal doses of breaded bait and poison, and after the rats died, “rats, bread, and meat would go into the hoppers together.”<sup>26</sup> When the waste barrels were cleaned out every spring, the dirt, rust, and old nails inside were shoveled into meat carts and sent out to the public’s breakfast.<sup>27</sup>

Almost immediately, *The Jungle* set off a storm of controversy across the nation. Meat-packing magnate J. Ogden Armour himself responded in an essay published in *The Saturday Evening Post* denying the substance of Sinclair’s assertions.<sup>28</sup> It was, however, President Theodore Roosevelt who was responsible for suddenly metamorphasizing Sinclair “from a starving unknown to a world figure.”<sup>29</sup> Upon reading *The Jungle* in the spring of 1906, Roosevelt reportedly cast his breakfast sausages out his window.<sup>30</sup>

As much by chance as by design, *The Jungle* was published in the midst of a national hysteria over meat and food quality.<sup>31</sup> A growing agitation for stronger food laws was arising, but consumers as a whole remained unorganized. “*The Jungle* helped the final

23. Indeed there was a controversy over the embalmed beef fed to soldiers in the war in the years prior to *The Jungle*’s release. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 460-61 (2d ed. 1985).

24. SINCLAIR, *supra* note 11, at 134-35.

25. *Id.* at 135.

26. *Id.*

27. *Id.*

28. HARRIS, *supra* note 2, at 81-82 (noting that Armour did not name Sinclair or *The Jungle* in his essay but responded to general concerns).

29. *Id.* at 84.

30. ELLIOT, *supra* note 3, at 344. President Roosevelt invited Sinclair to the White House in the spring of 1906 and briefly took up Sinclair as an unofficial adviser on the meatpacking problem. HARRIS, *supra* note 2, at 85-86. Sinclair’s radicalism, however, cost him the position. *Id.* at 88-89.

31. In Congress, 190 food bills were introduced between 1879 and 1906. FRIEDMAN, *supra* note 23, at 461-62.

push immeasurably,” according to legal historian Lawrence Friedman:

The reading public nearly retched at the thought that their meat products were moldy, that pieces of rat were in their sausage, that acid and spices hid putrefaction in canned goods, and, worst of all, that their lard might make cannibals of them all [due to *The Jungle's* description of workers falling into acid vats and being processed through with the meat].<sup>32</sup>

The health horrors described in *The Jungle* cut the sale of meat products almost in half.<sup>33</sup> Sales resistance became so damaging to the pocketbooks of meat-packing companies that many of them actually *sought out* government regulation, in order to have some governing body certify their meat as edible.<sup>34</sup> If food quality legislation would restore public confidence in processed meat products, it was thought to be well worth the price of regulation to the major firms.<sup>35</sup>

### III. WHAT WAS DONE

*The Jungle* changed forever the traditional constitutional understanding that public health and safety were the exclusive province of the several states.<sup>36</sup> Immediately upon the heels of the novel's acclaimed release, Congress enacted the Food and Drug Act of 1906<sup>37</sup> and the Federal Meat Inspection Act of 1907 (hereinafter “the 1907 Act”).<sup>38</sup> The short-term impact of these acts established mandatory antemortem inspection of stock animals and postmortem inspection of every carcass. The long-term impact was an ever-expanding intrusion by the federal government into matters of the

---

32. *Id.* at 681.

33. *Id.*

34. *Id.* at 461 (saying that sagging profits frightened companies into accepting or even asking for regulation).

35. *Id.* at 681.

36. Before *The Jungle's* release, it was widely thought that the national government in Washington had no constitutional authorization to protect the health, welfare, or morals of the public. JOAN BISKUPIC & ELDER WITT, *THE SUPREME COURT AND THE POWERS OF THE AMERICAN GOVERNMENT* 81 (1997) (saying that in the late 1800s, Congress began using its constitutional grant of power over interstate commerce to justify regulation over public health); see also *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (citing prior U.S. Supreme Court precedents).

37. Food and Drug Act, ch. 3915, 34 Stat. 768 (1906) (codified as amended at 21 U.S.C. §§ 301-395 (1994)).

38. Federal Meat Inspection Act, ch. 2907, 34 Stat. 1260 (1907).

public health.<sup>39</sup> For the first time under the American constitutional order, federal regulators oversaw the daily inner workings of an American industry. The 1907 Act required every establishment that processed meat products for interstate sale to submit to continuous federal inspection.

*The Jungle* tipped off a century of charlatanism, heavy-handed punditry, and political patronage in federal meat regulation. Upon the precedent established by Sinclair's novel, federal inspection controls have ebbed and flowed along with periodic public outrages.<sup>40</sup> In 1938, yet another crisis hit. Between seventy-three and ninety people died from ingesting *Elixir Sulfanilamide*, a European wonder drug touted as a cure for infections.<sup>41</sup> The disaster prompted amendment to the 1906 Pure Food and Drugs Act requiring federal pre-approval of all drugs before marketing.<sup>42</sup> The amendments also brought livestock and poultry feeds under federal regulation and brought the Food and Drug Administration (FDA) into meat quality regulation alongside the Department of Agriculture. In 1957, poultry and egg products were added to this federal scheme,<sup>43</sup> followed by all egg products in 1970.<sup>44</sup> In 1968, Congress virtually nationalized the entire field of meat quality standards, requiring even meat marketed for solely intra-state markets to comply with federal regulations and extending federal jurisdiction over even tangentially-related concerns such as trucking, refrigeration,

---

39. *Medtronic, Inc.*, 518 U.S. at 475 ("In recent decades the Federal Government has played an increasingly significant role in the protection of the health of our people.").

40. George Burditt, *The History of Food Law*, 50 FOOD & DRUG L.J. 197, 200 (1995) ("History keeps repeating itself: deplorable conditions spurred the passage of the 1906 act; several sulfanilamide fatalities facilitated the passage of the 1938 act; and [other regulations] also were precipitated by unfortunate events."); Ann O'Hanlon, *Where's the Beef Been?*, 25 WASH. MONTHLY, No. 6 (1993), LEXIS, Wash. Monthly File (saying meat regulation administration traditionally follows a pattern of governmental promises, media applause, failure to implement new policies, and recurring food poisoning outbreaks).

41. *Reinventing the Fed. Food Safety System Hearings*, *supra* note 8, Vol. 2, at 99 (Donna U. Vogt & Karen L. Alderson, CRS Report for Congress: Selected Recommendations for Changes in the Federal Organization of Food Safety Responsibilities, 1949-1993 (1993)).

42. The Federal Food, Drug, and Cosmetic Act of 1938, Pub. L. No. 75-717, 52 Stat. 1040 (1938). For an in-depth analysis of the impact of the 1938 amendments, see MICHAEL BRANNON, ORGANIZING AND REORGANIZING FDA: SEVENTY-FIFTH ANNIVERSARY COMMEMORATIVE VOLUME OF FOOD AND DRUG LAW 135 (1984).

43. Poultry Products Inspection Act, Pub. L. No. 85-172, 71 Stat. 441 (1957).

44. Egg Products Inspection Act, Pub. L. No. 91-597, 84 Stat. 1620 (1970).

and retailing.<sup>45</sup> Today some thirty-five different congressional enactments and twelve federal agencies oversee federal food safety.<sup>46</sup>

For years the senseless universal carcass inspection mandated by the 1907 Act sapped the USDA budget while achieving little more than imposing Congress's will upon meat packers. By the 1970s, virtually no authority on meat contamination viewed the inspection process as anything more than an expensive government ritual.<sup>47</sup> Occasional food poisoning outbreaks as well as periodic sampling attempts by the public and private sectors easily demonstrated that the looking, sniffing, and poking of federal meat inspectors did little to protect the public from actual bacterial contamination. In 1980, a so-called "self-monitored" program was established which allowed USDA inspectors to examine a meat processing facility's production records instead of mere carcass inspection.<sup>48</sup> Although more intrusive upon the business operations of meat processors, this technique helped relieve the USDA by decreasing the number of inspectors required in meat inspection. Although thoroughly criticized by some commentators,<sup>49</sup> the move signaled a desperately needed transition in meat inspection regulation.

Countless congressional hearings and reports hammered home an alleged need to add microbiotic testing on a broad and general scale to the already-overcomplicated federal meat inspection system. The result of this decade of debate was the Hazard Analysis and Critical Control Point program (HACCP), a conglomeration of ideas to improve federal meat inspection by introducing microscopic testing of occasional meat samples to the 1907 inspection system.<sup>50</sup>

---

45. Pathogen Reduction: Hazard Analysis and Critical Control Point (HACCP) Systems, 60 Fed. Reg. 6774, 6776 (1995) (codified at 9 C.F.R. §§ 308, 310, 318, 320, 325, 326, 327, and 381) (describing the Wholesome Meat Act of 1967 and the Wholesome Poultry Products Act of 1968).

46. *Reinventing the Fed. Food Safety System Hearings*, *supra* note 8, Vol. 1, at 63.

47. *E.g.*, *Food Safety: Oversight of the Ctr. For Disease Control Monitoring of Food-borne Pathogens: Hearings Before the Subcomm. on Human Res. and Intergovernmental Relations of the Comm. on Government Reform and Oversight House of Representatives*, 104th Cong. 2 (1996), *microformed on* CIS No. 97-H401-158 [hereinafter *Food Safety Oversight Hearings*] (saying the food safety techniques traditionally relied upon now appear "fragmented and time-locked").

48. Casey, *supra* note 6, at 144.

49. *See, e.g., id.*

50. For a detailed outline of the HACCP program and its history, *see* Pathogen Reduction: Hazard Analysis and Critical Control Point (HACCP) Systems, 60 Fed. Reg. 6774 (1995) (codified at 9 C.F.R. §§ 308, 310, 318, 320, 325, 326, 327,

More than one thousand pages of the *Code of Federal Regulations* now govern animal inspection, processing, and commerce.<sup>51</sup> Many of these regulations bear little relationship to the end of meat safety and seem designed more for makeweight purposes.<sup>52</sup> The long-time 1907 Act requirement that a federal inspector individually inspect every processed beef, hog, and goat carcass,<sup>53</sup> for example, has been almost universally condemned as unnecessary and too costly by industry experts.<sup>54</sup> The government has been reluctant to repeal this requirement out of concern of public backlash. Instead of repealing the requirement, the USDA's Food Safety and Inspection Service (FSIS) long ago adopted rules which allow certain meat packers to self-monitor certain carcasses and provide reports to the agency on a daily basis.

Despite the presence of the gargantuan regulatory monolith created by the aftermath of Upton Sinclair's 1906 novel, America's meat supply remains hardly safer than it would be otherwise. More than eighty percent of all food-poisoning illnesses and deaths are caused by contaminated meat and poultry products.<sup>55</sup> Food poisoning outbreaks caused by contaminated meat continue to abound,<sup>56</sup>

---

and 381).

51. 9 C.F.R. §§ 1-399 (1998).

52. A 1993 GAO report revealed that the decision to place "open-face" meat sandwiches (i.e., made with one slice of bread) under the jurisdiction of the USDA while simultaneously placing meat sandwiches with two slices of bread under the jurisdiction of the FDA was made to conserve the USDA's resources. JOHN W. HARMAN, U.S. GENERAL ACCOUNTING OFFICE REPORTS & TESTIMONY, *FOOD SAFETY: A UNIFIED, RISK-BASED SYSTEM NEEDED TO ENHANCE FOOD SAFETY* 64-65 (1993). Plants manufacturing open-face sandwiches face inspection daily by the USDA while those manufacturing closed-face sandwiches face FDA inspection only about once every three to five years. *Id.* Officials for both agencies say there is no difference in the risk posed by these products. *Id.* In 1998, a media outcry over contamination rates in processed poultry prompted the USDA to alter its inspection policies in poultry plants to require cooking or washing of fecally contaminated chicken in chlorinated water. Yet experts say neither procedure proves to rid the poultry of bacteria. Indeed, one study found that chlorinated washing even ten times more stringent than the USDA requires had *no effect* on fecal bacteria. *Safe Food Supply is Crucial*, AUSTIN AMERICAN-STATESMAN, June 16, 1998, at A8.

53. Casey, *supra* note 6, at 142.

54. *E.g.*, HARMAN, *supra* note 52, at 2-3 (referring to the individual carcass inspection system as "inflexible and outdated").

55. O'Hanlon, *supra* note 40.

56. *E.g.*, *Common Bacteria Favors Salty Ham*, ENVIRONMENTAL NUTRITION, Mar. 1, 1998, at 3 (reporting that eighteen celebrants at a retirement party in Florida became ill from contaminated ham); Caroline Smith DeWaal, *One Agency for Food Safety*, N. Y. TIMES, Aug. 25, 1997, at A23 (reporting hamburger recall following poisoning of seventeen people in Colorado); Rachel Melcer, *Kroger Co. Recalls*

and such outbreaks are reportedly on the increase.<sup>57</sup> A 1998 *Consumer Reports* study found that seventy-one percent of uncooked chicken bought in stores was contaminated with fecal bacteria.<sup>58</sup> Testing of chicken in poultry production plants found eighty-eight percent contaminated.<sup>59</sup> Even with a billion dollars spent yearly on government regulation of meat processing, some 20,000 people are infected with *E. coli* each year, of which about 250 die from resulting organ damage.<sup>60</sup>

Congressional hearings in 1996 found as many as 9,000 deaths per year are directly attributable to food-borne pathogens<sup>61</sup> and that between six and eighty-one million illnesses per year are attributable to poor food quality.<sup>62</sup> The annual costs of medical

*Meat, Cheese Combos: Contamination at Plant Noted*, CINCINNATI ENQUIRER, Jan. 24, 1999, at C1 (reporting a recall of packaged luncheon products due to plant contamination); Jeanne Meserve & Elizabeth Cohen, *The World Today: E-Coli Found in Beef Patties* (CNN television broadcast, Aug. 16, 1997) (reporting that an outbreak of illness related to *E. coli* contamination has prompted the recall of over a million pounds of hamburger meat); Edward D. Murphy, *State Doctors Still Searching For Source of E. Coli*, PORTLAND PRESS HERALD, July 16, 1998, at 1B (reporting an outbreak of *E. Coli* responsible for sickening at least fifteen people in Maine, one of whom died after infection); John Taylor, *Troubles Stem From Reprocessing: Broken Patties, New Meat Mixed*, OMAHA WORLD-HERALD, Aug. 22, 1997, at 11 (reporting that the USDA has ordered a Columbus, Nebraska meat plant closed down because of *E. coli* contamination).

57. E.g., *Escherichia Coli: E. Coli Infections Appear To Be Increasing, Experts Say*, DISEASE WEEKLY PLUS, June 9, 1997 (LEXIS IAC-ACC No. 069255967) (stating that experts at 1997 World Health Organization conference say *E. Coli* infections are on the rise); DeWaal, *supra* note 56, at A23 (reporting that the DHHS suggest the incidence of food-borne illnesses and deaths is likely to grow ten to fifteen percent over the next decade).

58. *Food Safety Test Chicken: What You Don't Know Can Hurt You*, CONSUMER REPORTS, Mar. 1998, at 12. In October 1998, Consumer Reports conducted further tests that seventy-four percent of birds had one or two contaminants. *Food Safety. Update Test: A Fresh Look at Chicken Safety*, CONSUMER REPORTS, Oct. 1998, at 26.

59. *Editorial: Safe Food Supply is Crucial*, AUSTIN AMERICAN-STATESMAN, June 16, 1998, at A8.

60. *Editorial & Comment: Beating Bacteria; A Little Bit of Hay Could Keep E. Coli Away*, THE COLUMBUS DISPATCH, Sept. 16, 1998, at A10.

61. *Food Safety Oversight Hearings*, *supra* note 47, at 1 (introductory statement of Rep. Christopher Shays). Rep. Shays said further:

[E]ven those figures don't describe the full extent of the problem. Many food-related illnesses are treated only symptomatically, without any identification of the offending pathogen. Even when the cause of an illness is known to be contaminated food, the necessary data is not always reported by physicians and State health authorities. As a result, national surveillance data on the prevalence and sources of foodborne pathogens is obviously inadequate.

*Id.* at 1-2.

62. DeWaal, *supra* note 56, at A23 (editorial by director of food safety at the

treatment and lost productivity range from five billion to twenty-two billion, and may be even higher.<sup>63</sup> The governmental response to this is predictably placative; a number of intertwining agencies with duplicative and often-uncertain duties enforce some thirty-thousand laws and regulations designed to police food quality.

In the aftermath of *The Jungle*, the American public is regularly treated to a circus of media-packaged federal prosecutions against wayward meat packers who, the public is led to believe, are responsible for producing intolerable amounts of unwholesome meat. In 1984, for example, the United States Justice Department brought a lengthy indictment against the owners of Cattle King Company and Nebraska Beef Company in Denver, Colorado following a series of media stories depicting the owners as responsible for a food poisoning outbreak.<sup>64</sup> About forty semi-truck loads of ground beef were seized and tested for contamination without conclusive results.<sup>65</sup> Both companies were destroyed financially and one owner sentenced to six years in federal prison, although not a single ounce of definitively unwholesome meat was shown to have been produced.<sup>66</sup> In Pennsylvania, five people were sentenced to up to five years in federal prison for slaughtering disqualified cattle outside the presence of USDA inspectors.<sup>67</sup> In 1995, proprietors of a Boston meat wholesaling firm faced up to fourteen years in prison for allegedly operating a warehouse with too many rat hairs and droppings.<sup>68</sup> Much of this enforcement is demonstrably uneven and discriminate, with agencies tending to react overbearingly upon meat processors who garner adverse media publicity while

---

Center for Science in the Public Interest). The number of Americans who become sick yearly from food-borne disease is approximately 6.5 million. Rep. Ed Towns, *supra* note 5. A better estimate, taking into consideration the number of non-reported cases, may be *eighty million* per year, or about a third of the population. *Id.*

63. *Food Safety Oversight Hearings*, *supra* note 47, at 9. Rep. Edolphus Towns stated, "We are not even sure what the numbers are." *Id.*

64. For a detailed account of this prosecution from the perspective of one defendant, see RUDY 'BUTCH' STANKO, *THE SCORE* (1986).

65. *Id.* at 274-75 (reproducing newspaper editorials about the case).

66. Indeed, most of the violations alleged against Cattle King had gone on under the very noses of USDA inspectors whose periodic reports recorded Cattle King and Nebraska Beef plants as operating under satisfactory conditions. *Id.*

67. Molly Sinclair, *Troubling Situations at Two Plants; Greater Meat Inspection Authority Sought*, WASHINGTON POST, June 12, 1984, at A17.

68. John Milne, *U.S. Charges Boston Firm Flouted Sanitation Rules With Tainted Meat*, THE BOSTON GLOBE, Sept. 19, 1995, at 21 (stating that federal inspectors found mold, rodent droppings and rodent carcasses at an old meat warehouse).

trodding delicately upon processors who do not.<sup>69</sup>

Like the now-horrendously-complicated 1907 Act itself, such prosecutions are for the most part designed to placate the public after an eruption of meat contamination publicity.<sup>70</sup> Political expedience rather than meaningful protection of the public has become the touchstone of all federal meat quality regulations.<sup>71</sup>

Health experts have long ago conceded that the billion-dollar-per-year USDA regulatory juggernaut is mostly smoke and mirrors. The reality is that very little can be done to ensure a totally safe meat supply without stark increases in meat transaction costs.<sup>72</sup> After thousands of years of human consumption of meat, there remains no better method to ensure its safety than for the individual

---

69. John Bacon, *Nationline: Report: USDA Pressures Fed. Meat Inspectors*, USA TODAY, Nov. 16, 1998, at A5 (reporting that some veterinarians in charge of federal meat inspections say the USDA has pressured them to certify products that do not meet export requirements, even to the extent of forcing one veterinarian to retire for refusing to certify cattle as disease-free).

70. STANKO, *supra* note 64, at 5-8 (accusing the Justice Department of reacting to unsubstantiated media stories in electing to prosecute Stanko).

71. See Sarah Lyall, *Britain's Daunting Prospect: Killing 15,000 Cows a Week*, N. Y. TIMES, Apr. 3, 1996, at A1. The responses of both the United States and the British government to the "mad cow disease" scare of the 1990s illustrate that governmental meat certification operations tend to place public perception above reality. In March of 1996, British scientists reported that mad cow disease—a relative of a rare brain disease found in humans—was linked to the deaths of eight people in Britain since the 1980's. British officials announced a plan to kill some 4.7 million cows. *Id.* (quoting a British agricultural minister as saying, "[t]his crisis is 100 percent about consumer confidence."). Cow-killings also were announced in France, Germany, and Switzerland. *Id.*

The reaction by U.S. authorities was severe. U.S. officials searched for mad cow disease for ten years but never found it in American cattle. Tim Novak, *Taking No Chances; Imported Cattle Killed in Attempt to End Fears*, CHICAGO SUN-TIMES, July 23, 1996, at 8. Nonetheless, U.S. officials opted to kill all British cattle in the U.S. imported before 1989 to assure the public and protect the multi-billion-dollar cattle industry. *Id.* The measure was described as "above scientific validity" by a spokesman for the beef industry. *Id.* "We want those cows gone because of the whole perception issue," according to Tim O'Connor of the Illinois Beef Association. *Id.* "We want to eliminate any perceived consumer concern. We recognize it appears to be overkill." *Id.*

72. *Food Safety Oversight Hearings*, *supra* note 47, at 2. In addition to the numerous known bacterial agents which cause meat-borne illnesses, scientists are increasingly confronted with newly discovered strains which no inspection methodology could conceivably detect. *Id.* "Three of the four pathogens considered most important by the Center for Disease Control and Prevention [CDC] were unrecognized as causes of foodborne illnesses just 20 years ago." *Id.* (introductory statement of Rep. Christopher Shays) (noting that the infamous *E. coli* bacteria was only first identified in 1982).

consumer to ensure it.<sup>73</sup> Americans who believe earnestly that the federal inspection system protects them from the threat of meat-borne illnesses are in essence believing a "fiction."<sup>74</sup> The sad reality is that federal meat inspection laws have never been seriously designed to do anything other than placate the public's post-jungle fears of meat contamination.<sup>75</sup>

#### IV. THE MICROSCOPIC WORLD ESCAPES CONTROL

Although the organoleptic methods<sup>76</sup> employed by federal inspectors no doubt serve to identify and eliminate such epithelial abnormalities as tumors, abscesses and visible infections, they cannot identify microscopic pathogens in meat.<sup>77</sup> Beyond the view of inspectors lies a microscopic world teeming with potential risks to the wholesomeness of meat products.<sup>78</sup> Biological degradation of meat commences immediately upon the death of a stock animal, when the animal's living immune system is no longer present to prevent the growth of microorganisms.<sup>79</sup> Indeed, complete assurance that raw meat is without microorganisms is an utter impossibility so long as meat is exposed to open air or any natural elements.<sup>80</sup>

---

73. *Food Safety. Update Test. A Fresh Look at Chicken Safety*, CONSUMER REPORTS, Oct. 1998, at 26 (warning readers, "[y]ou are still the last line of defense in protecting yourself and others from unsafe food.").

74. This word was coined by Associate Professor Sharlene W. Lassiter, of Salmon P. Chase College of Law, Northern Kentucky University. Lassiter, *supra* note 7, at 412-13.

75. *Reinventing the Fed. Food Safety System Hearings*, *supra* note 8, Vol. 1, at 83 (report by Catherine E. Woteki, Ph.D., R.D., *The Scientific Basis for Meat and Poultry Inspection*, at 5-6 (Nov. 4, 1993)) (saying traditional USDA carcass inspections "are more helpful in assuring quality aspects of meat products, such as palatability and appearance, rather than their safety.").

76. Methods based on sight, touch, and smell. Pathogen Reduction; Hazard Analysis and Critical Control Point (HACCP), 60 Fed. Reg. 6774, 6775 (1995) (codified at 9 C.F.R. §§ 308, 310, 318, 320, 325, 326, 327, and 381).

77. *Cf.* Pathogen Reduction; Hazard Analysis and Critical Control Point (HACCP), 60 Fed. Reg. at 6775 (saying the USDA's organoleptic inspection methods have been aimed at eliminating from commerce "unpalatable signs" of diseased meat).

78. Don Harkins, *Statistics Say Doctors Are Third Leading Cause of Death in America*, SPOTLIGHT, March/April 1999, at B-15 (saying germs are everywhere and are naturally attracted to any dead matter).

79. *Food Processing*, 19 *The New Britannica Encyclopaedia*, 356 (15th ed. 1997) (describing the slaughtering process as introducing the first major contamination by severing the vascular system).

80. *Cf.* O'Hanlon, *supra* note 40 (agreeing with USDA spokespersons that

Prior to the release of *The Jungle*, it was utterly unthinkable that the duty to ensure the safety of the meat entering a consumer's mouth fell anywhere other than on the consumer himself.<sup>81</sup> In the years that have followed, countless plaintiffs have sued meat processors for failure to assure that their products are bacteria-free. Most have failed to prove such a duty exists, confronted by the fact that technological progress has not yet made bacterial screening feasible on a universal scale.<sup>82</sup> Indeed, courts have taken judicial notice of the fact that reasonable consumers know or should know that raw meat requires cooking to a reasonable temperature before eating.<sup>83</sup> The omnipresence of various bacteria in uncooked meat means that, for all practical purposes, the consumer is always the "least cost avoider" in any analysis of negligence regarding bacterial contaminants in meat.<sup>84</sup> It is almost always easier for the consumer to prepare his meat properly before he ingests it than for the meat

---

such analysis of every carcass would be impossible).

81. Before refrigeration, meat preservation was particularly problematic, and Americans fashioned recipes to treat, salt, and dry spoiled meat in order to ensure its edibility. E. SMITH, *THE COMPLETE HOUSEWIFE, OR ACCOMPLISHED GENTLEWOMAN'S COMPANION* 36 (n.p. 1737) (offering a recipe to "recover venison when it stinks").

82. In 1986, the Michigan Supreme Court concluded for the first time that scientific and technological advances in bacteriology warranted the overturning of prior precedents which found the inspection of pork for trichinosis unfeasible. *Kircos v. Holiday Food Ctr., Inc.*, 381 N.W.2d 404, 406 (Mich. 1986). Instead, meat sellers could be made to defend an action on grounds that they breached a duty to detect and eliminate trichinella-contaminated meat from their meat products. *Id.* The *Kircos* decision may mark a minor point of legal revolution in the area of meat quality liability; however, the law in other jurisdictions clearly recognizes the unlikelihood that meat processors can completely eliminate and insure the unadulterated status of their products. Indeed, on remand the plaintiff in *Kircos* failed to establish the breach of any duty on the part of the meat seller to detect trichinae given modern meat inspection methods. *Kircos v. Holiday Food Ctr., Inc.*, 477 N.W.2d 130, 132 (Mich. Ct. App. 1991). *Cf.* *Trabaud v. Kenton Ruritan Club, Inc.*, 517 A.2d 706, 708 (Del. Super. Ct. 1986) (finding that a burden on sellers to inspect and treat all pork for trichinae is not justified by the relatively small risk to consumers of contracting trichinosis and the impracticality of inspection for trichinae on a general basis).

83. *E.g.*, *Kircos*, 381 N.W.2d at 406 (taking judicial notice that cooking pork in a normal or reasonable fashion would kill trichinae bacteria); *Leno v. Ehli*, 339 N.W.2d 92, 99 (N.D. 1983) ("We take judicial notice that people have been cooking and eating poultry for hundreds of years, presumably without knowing the exact temperature and amount of cooking time required ... [w]e thus think it is common knowledge that there is a danger of illness from eating poultry which has not been properly prepared.").

84. *But see* *Swift & Co. v. Wells*, 110 S.E.2d 203, 209 (Va. 1959) (pointing out that the manufacturer is the least cost avoider with regard to meat *at the time of* processing).

packer to ensure that all out-going meat is contaminant-free.<sup>85</sup>

There is constant talk in food and public health literature of “modernizing” the inspection process to include bacterial inspection techniques supposedly made available by modern technological advances.<sup>86</sup> What often goes unsaid, however, is that such testing on a general scale has been found unfeasible by the USDA itself. Because the typical refrigerated storage life for fresh meat is only five to seven days<sup>87</sup> and microbes such as *E. coli* can only be detected by a test requiring as much as six days,<sup>88</sup> any delay for microbe testing would likely decrease meat quality at the time of retail purchase. The USDA has estimated that spot-testing only twenty percent of all carcasses for microscopic contaminants would cost fifty-eight billion per year.<sup>89</sup> The liability implications are even more astronomical. If the government actually became duty-bound to microscopically test American meat before its entry into the market, the agencies in charge would no doubt face a barrage of political condemnation after every food poisoning outbreak.<sup>90</sup> Additionally, given known rates of contamination, it is virtually certain that any microscopic inspection methodology would eliminate far more meat products from the market than are now eliminated, raising drastically the processing costs, and ultimately the market price of American meat products.<sup>91</sup>

---

85. In line with this reality, cases in which meat packers or slaughterhouses have been held liable for bacterial pathogens in sold meat seem to be limited to cases involving processed meats such as hot dogs or sausages. Lassiter, *supra* note 7, at 440 n. 162. These products, unlike raw meat intended for cooking by the consumer, are sold for immediate consumption. *Id.*

86. *E.g.*, O’Hanlon, *supra* note 40 (saying “the notion of testing for microbes is neither new nor part of a fringe-group agenda”).

87. *Food Processing*, 19 New Encyclopaedia Britannica 356 (15th ed. 1997) (noting the shelf life of refrigerated fresh meat is influenced by the amount of contamination before refrigeration).

88. This is according to the testimony of Russell Cross, chief of USDA’s meat inspection division. O’Hanlon, *supra* note 40. O’Hanlon refutes this figure, however, noting that scientists at a USDA lab in Philadelphia use a twenty-four hour test to detect *E. coli* and forty-eight hour tests to detect listeria and salmonella. *Id.*

89. *Id.* This figure was apparently based on a predicted administrative cost of fifty dollars per test. *Id.*

90. *See id.* (saying the “USDA is shrewd enough to realize that if it is officially responsible for finding deadly microbes—admittedly no easy task—then it will be the USDA, and not the local burger kitchen, that will be under the gun the next time people die from tainted meat or poultry.”).

91. A 1988 figure shows USDA meat inspectors condemn less than one percent of animals before and after processing. 136 CONG. REC. S4209-02 (daily ed. Apr. 5, 1990) (statement of Sen. Bond). While this small percentage may cause some observers to regard the overall fitness of American processed livestock as very

It is by no means evident that market forces are insufficient to create a quality meat supply.<sup>92</sup> As Sinclair biographer Leon Harris has pointed out, there were fewer problems with the quality of the meat supply when butchering was strictly a local concern.<sup>93</sup> If a local butcher charged too much or sold tainted meat, his competitor would get his business.<sup>94</sup> Indeed, there is much evidence that market forces do more to eliminate improper meat processing than do all of the efforts of the federal bureaucracy. IBP, Inc. ConAgra, and Cargill Corporations reportedly spent some \$150 million on food safety initiatives over three years in the 1990s, costs that the industry cannot easily pass on to consumers, in order to gain market advantages over their competitors.<sup>95</sup> Some larger meat companies independently conduct microbial testing at their own expense to attract contracts from large buyers such as McDonald's.<sup>96</sup>

The fate of the Hudson Foods hamburger plant in 1997 illustrates the power of commercial reputation in the meat packing industry. After twenty non-fatal illnesses in Colorado were traced to

---

high, exposure to microbotic testing might cause inspectors to condemn a markedly higher percentage of animals. Consider, for example, the fact that recent studies show a surprisingly high percentage of processed poultry to be infected with salmonella even though the poultry has passed current USDA inspection processes. CONSUMER REPORTS, *supra* note 58 and accompanying text. Indeed, the application of microscopic or bacterial testing might actually *diminish* public confidence in the quality of the American meat supply, which supporters of federal meat regulation cite as a primary rationale for rigorous inspection standards. Sen. Bond, *supra* note 91, at S4209-02 (saying “[f]ood safety research that results in improved consumer confidence helps build demand for agricultural commodities ...”).

92. A broad view of the meat marketing industry, in regard to purely local markets, actually illustrates the fact that federal regulation plays into the hands of large, conglomerate meat processing companies. The larger companies can both afford close oversight and stand to gain market ground from such regulation by having their products certified as government approved. Smaller companies, with products just as high in quality, do not have a major stake in a federal government approved reputation because their reputation is garnered in localized regions and markets.

93. HARRIS, *supra* note 2, at 68.

94. It was the advent of refrigeration and freight technology that drove the meat market farther from the local community and into the hands of larger companies. *Id.* Firms such as Armour, Swift, Cudahy, and Morris came to dominate American meat processing. *Id.* Large shipping centers, of which Chicago was the world hub, became increasingly strategic to the control of meat markets. *Id.* at 69.

95. *Livestock Issues: Livestock Hearing Testimony Before the Senate Committee on Agriculture, Nutrition and Forestry*, 105th Cong. (1998 WL 12761185) (1998) (testimony of David C. Nelson, Food Agribusiness Analyst, Credit Suisse First Boston) (citing a report by Steve Kay of *Cattle Buyers Weekly*).

96. O'Hanlon, *supra* note 40.

*E. coli*-infected hamburger from the plant, Hudson Foods recalled twenty-five million pounds of beef—the largest recall in U.S. history.<sup>97</sup> When the plant lost Burger King—its largest beef customer—due to public relations fallout, it had to close and sell to IBP, Inc., the nation's largest meat packer.<sup>98</sup> Within months, Hudson Foods went from a rapidly growing and profitable meat packing firm to the brink of insolvency. Loss of reputation in the marketplace, rather than governmental coercion, led to the facility's demise.<sup>99</sup> Similar market-based scrutiny has accounted for heightened quality control at other meat packing plants.<sup>100</sup>

Under tort analysis, a processor's compliance or noncompliance with federal meat laws has no bearing on the issue of negligence.<sup>101</sup> A meat packer is held to the "reasonable meat packer" standard of care, which generally calls for a higher level of care than that required by inspection laws.<sup>102</sup> Since meat packers can be held civilly liable for knowingly selling adulterated meat, it is reasonably certain that packers would themselves eliminate bacterial contamination if it were feasible. While some critics have suggested tort law is insufficient to keep packers from producing bad meat,<sup>103</sup>

97. Pan Demetrakakes, *Hamburger Patsy: Media Criticism About Hudson Foods*, FOOD PROCESSING, Oct. 1997, at 24.

98. *Id.*

99. Indeed, Burger King's distrust of Hudson Food's meat products had actually begun even before the *E. coli* scandal. Hudson discovered trucks with patties destined for the fast food chain that had not been tested. When the patties tested positive for staphylococcus contamination the trucks were recalled to Hudson; this occurred months before the media scandals hit. *Id.* Burger King's own inspectors paid unannounced visits and conducted up to eight lab tests per month on meat from the Hudson Food plant. *Id.* All of this was completely independent of governmental inspection considerations.

100. *E.g.*, Joanna Ramey, *Retailer's Test Leads Monfort to Recall Ground Beef*, SUPERMARKET NEWS, Apr. 8, 1996, at 23 (reporting that Monfort Meat Co. voluntarily recalled 5,500 pounds of ground beef after a retailer detected *E. coli* in its own tests).

101. *E.g.*, *Ketterer v. Armour & Co.*, 247 F. 921, 928 (2d Cir. 1917) (stating "the inspection by government officials of the ... meat products as required by the Acts of Congress does not relieve the packers from any liability for negligence on their part to any one injured thereby."). Indeed, compliance with federal statutes has been found to represent only an "established minimum" standard on the part of a packer, and is by no means exclusive as to a packer's duty of care. *Id.*

102. *Catani v. Swift & Co.*, 95 A. 931, 933 (Pa. 1915) (saying that ordinary care for the meat packer involves independent inspection of its meat products and not mere compliance with federal inspection standards).

103. *E.g.*, Lassiter, *supra* note 7, at 416-44 (suggesting civil litigation has proven unable to force meat packers to produce a perfectly safe meat supply). Lassiter, an associate professor of law at Salmon P. Chase College of Law, suggests that the size

this is hardly proven. Citations submitted to support government regulatory intervention draw readers to cases reporting a number of verdicts and judgments against meat packers from both the distant and the recent past.<sup>104</sup> Meat processors have been held liable to the tune of many thousands of dollars for the unintended presence in food of bones, bacteria, and other contaminants.<sup>105</sup> Recently, numerous multi-million-dollar settlements have been handed down against meat packing companies that have sold contaminated meat.<sup>106</sup> To say that these settlements have no effect upon the conduct of meat packers is absurd.<sup>107</sup>

---

of jury verdicts for the selling of impure meat is insufficient to make sellers improve the quality of meat sold. *Id.* at 414-15 ("Civil suits ... generally have resulted in monetary awards too small to motivate meat producers to provide a safer meat supply.").

104. *Id.* at 415. Professor Lassiter cites for authority a handful of American Law Reports annotations concerning the tort liability of food sellers for tainted, contaminated, or adulterated meat. See Jane Massey Draper, Annotation, *Liability for Injury or Death Allegedly Caused by Foreign Object in Food or Food Product*, 1 A.L.R. 5th 1 (1992); Jane Massey Draper, Annotation, *Liability for Injury or Death Allegedly Caused by Spoilage, Contamination, or Other Deleterious Condition of Food or Food Product*, 2 A.L.R. 5th 1, 1 (1992); Jane Massey Draper, Annotation, *Liability for Injury or Death Allegedly Caused by Food Product Containing Object Related to, but Not Intended to Be Present in, Product*, 2 A.L.R. 5th 189, 189 (1992); Kristine Cordier Karnezis, Annotation, *Liability of Packer, Foodstore, or Restaurant for Causing Trichinosis*, 96 A.L.R. 3d 451, 457 (1980). Yet, contrary to Professor Lassiter's proposition that these sources demonstrate the miniscule aspect of jury verdicts against meat packers found liable for selling tainted meat, a number of cases cited by the A.L.R. articles in question demonstrate surprisingly large judgments against packers. *E.g.*, *Hollis v. Armour & Co.*, 2 S.E.2d 681, 685 (S.C. 1939) (upholding \$1,500 judgment against packer for tainted sausage causing nonfatal illness when packer argued it was excessive); *Armour & Co. v. McMillain*, 155 So. 218, 220 (Miss. 1934) (reducing jury verdict of \$2,999.99 to \$1,500 for a consumer stricken with nausea and indigestion from purchased meat). Jane Massey Draper cited both these decisions in her *Liability for Injury or Death Allegedly Caused by Spoilage, Contamination, or Other Deleterious Condition of Food or Food Product* article, 2 A.L.R. 5th 1, 1 (1992), which Lassiter cited, in turn, for the proposition that jury awards are too small to have an effect on the conduct of meat packers. Lassiter, *supra* note 7, at 415.

105. Massey Draper, *supra* note 104; see also *Hollis*, 2 S.E.2d at 685; *Armour & Co.*, 155 So. at 220.

106. As Lassiter reports, ten civil lawsuits filed in the wake of the infamous 1993 E. coli outbreak in the state of Washington yielded a total of more than twenty-eight million dollars for the plaintiffs, with four plaintiffs receiving more than one million dollars. Lassiter, *supra* note 7, at 443 n.177. The estate of one nine-year-old decedent settled for \$15.6 million. *Id.* Lassiter dismisses the impact of such settlements on meat packers, however, saying that contributions to the settlements were shared by multiple defendants. *Id.* at 444.

107. Testimony before the Senate Committee on Agriculture, Nutrition and Forestry in June of 1998 indicated that the three major packers had spent \$150 million on their own initiative within three years to improve food safety. *Livestock*

*The Jungle's* lasting message that meat quality can be forced from the top down by government measures directed at meat packing plants has distracted generations of Americans from pursuing more realistic food safety measures. By far the most important steps in the assurance of safe meat occur at points on the meat distribution chain other than the packing plant. Researchers have suggested, for example, that feeding cattle hay instead of grain for five days *before slaughter* would drastically reduce *E. Coli* in the animals' intestinal tract.<sup>108</sup> Even epidemiological control of food poisoning outbreaks depends on private actors outside the inspection process as much as government health authorities monitoring meat processors.<sup>109</sup>

The post-*Jungle* politicization of meat quality regulation may actually do more harm than good, giving consumers a false sense of security and causing some to abdicate their responsibility to adequately prepare meat products.<sup>110</sup> While grocery stores and restaurants may be subject to certain health regulations, most of the stringent government scrutiny falls upon the meat packer.<sup>111</sup> The

---

*Issues: Livestock Hearing Testimony Before the Senate Committee on Agriculture, Nutrition and Forestry*, 105th Cong. (1998) (testimony of David C. Nelson). Securities analyst David C. Nelson testified that the potential "landmine" of possible contamination incidents places even formerly strong companies such as Hudson Foods and Beef America into "nonviable" situations. *Id.* Indeed, investors find meatpacking to be a risky investment venture due to the ever-present threat of civil liability. *Id.* (saying "[t]here are no publicly traded companies whose primary business is livestock production.").

108. Editorial, *Beating Bacteria: A Little Bit of Hay Could Keep E. Coli Away*, COLUMBUS DISPATCH, Sept. 16, 1998, at 10A (expressing "wonder that the answer is so simple").

109. The primary component in foodborne disease surveillance is physician-based, rather than government administered, monitoring. *Food Safety Oversight Hearings*, *supra* note 47, at 14 (statement of David Satcher, M.D., director, Centers for Disease Control and Prevention). Thus, without individual physicians recording and reporting food illness incidents, federal efforts to monitor food quality after the fact would be stillborn. Although a carefully managed system of physician-reported outbreaks has been implemented by the Centers for Disease Control and Prevention, it has intrinsic limitations, and only records some 400 to 500 food poisoning outbreaks per year, involving only about 1200 people. *Id.*

110. *E.g.*, *The Hidden Cost Hearings*, *supra* note 8, at 94 (statement of Larry McFerron, operator of McFerron's Quality Meats, Inc.) (saying proposed regulations tend to place too much responsibility for food safety on the processor, neglecting the ultimate consumer).

111. *Id.* at 99 (statement of Don Turner of Turner Brothers' Meats of Nowata, Oklahoma) ("We are inspected daily, yet once our product leaves our plant to other public outlets—grocery stores or restaurants—their establishments are under very little inspection; more contamination takes place after it leaves our plant than while in our plant.").

four deaths attributed to contaminated fast-food hamburgers in the Pacific Northwest in 1993,<sup>112</sup> for example, could not have been prevented by the federal USDA inspection system but *could* have been prevented by appropriate cooking at the restaurant.<sup>113</sup>

## V. CONCLUSION

The federal meat regulations enacted at the turn of the century in the wake of Upton Sinclair's best-selling novel *The Jungle* have cost American taxpayers dozens of billions of dollars without appreciably improving American meat quality.<sup>114</sup> Despite the oft-repeated promise of the application of scientific and technological tools to meat inspection, American meat processing techniques remain virtually identical to those "exposed" by Sinclair in 1906.<sup>115</sup> The lessons learned from *The Jungle* tell us much about how our political and legal system can be preyed upon by the immediacies of national media reporting, by political fads—and even by a work of fiction.

---

112. For details of the 1993 *E. coli* outbreak in Washington, including testimony by family members of victims, see *Reinventing the Fed. Food Safety System Hearings*, *supra* note 8.

113. Rep. Ed Towns, *supra* note 5 (saying the ground meat in question passed the USDA's inspections).

114. What improvements have been made are attributable to advances in refrigeration, transportation and retailing.

115. During 1996 oversight hearings regarding the Centers for Disease Control and Prevention, Rep. Christopher Shays of Connecticut remarked that earlier hearings had promised to reform food quality laws to accommodate more scientific methodologies in food quality regulation. *Food Safety Oversight Hearings*, *supra* note 47, at 2. This promise, however, had eluded lawmakers overseeing the Centers for Disease Control and Prevention. *Id.* at 2-3 ("Today, we ask our witnesses what, if any, progress has been made to address the weaknesses in public health surveillance ... discussed in those hearings ... the health of our Nation depends on the answers.").

\*\*\*