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LIVE FOR NOW: TEENS, SODA MARKETING, AND THE LAW

Richard A. Daynard, F. Brendan Burke, ** & Cara L. Wilking****

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I. INTRODUCTION

The alarming rate of overweight and obesity in U.S. children, adolescents, and adults has focused attention on the marketing of unhealthy

foods and beverages.[1] Adolescents are heavily targeted in marketing for beverages, including sugary drinks like soda.[2] They have higher rates of overweight and obesity than children less than five years of age, and are on a path to have a shorter life expectancy than their parents.[3] This article analyzes soda marketing through the lens of teen biological and psychological development, marketing tactics commonly used with teen audiences, and consumer protection law principles.

II. TEENS AND THE OBESITY CRISIS

The prevalence of obesity among U.S. adolescents from twelve to nineteen years of age has increased steadily from 5% in 1980 to 18% in 2008.[4] Researchers have identified sugary drink consumption as a particularly important driver of the epidemic.[5] Obese adolescents are more likely to have high cholesterol or high blood pressure, putting them at greater risk for cardiovascular disease.[6] Obesity also puts adolescents at greater risk for diabetes,[7] and the percentage of teenagers testing positive for diabetes or pre-diabetes more than doubled from 9% in 1999-2000 to

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*** Cara L. Wilking, J.D., is Senior Staff Attorney at the Public Health Advocacy Institute. The authors would like to thank Rachel Rodgers and Andrew Cheyne for their helpful comments on portions of this article and Dale Willett for research assistance.

1. Cornelia Pechmann et al., *Impulsive and Self-Conscious: Adolescents' Vulnerability to Advertising and Promotion*, 24 J. PUB. POL'Y & MKTG. 202, 202 (2005).

2. *Id.*

3. Amir Tirosh et al., *Adolescent BMI Trajectory and Risk of Diabetes Versus Coronary Disease*, 364 NEW ENG. J. MED. 1315, 1316 (2011); Cynthia Ogden & Margaret Carroll, *Prevalence of Obesity Among Children and Adolescents: United States, Trends 1963-1965 Through 2007-2008*, NAT'L CTR. FOR HEALTH STATISTICS 1,1(2010), *available at* http://www.cdc.gov/nchs/data/hestat/obesity_child_ 07_08 /obesity _child_07_08.pdf.

4. Ogden & Carroll, *supra* note 3, at 1.

5. David S. Ludwig et al., *Relation Between Consumption of Sugar-Sweetened Drinks and Childhood Obesity: A Prospective, Observational Analysis*, 357 THE LANCET 505, 507 (2001), *available at* http://nepc.colorado.edu/files/lancet.pdf.

6. David S. Freedman et al., *Cardiovascular Risk Factors and Excess Adiposity Among Overweight Children and Adolescents: The Bogalusa Heart Study*, 150 J. PEDIATRICS 12, 13-15 (2007).

7. Tirosh et al., *supra* note 3, at 1319-20.

23% in 2007-2008.[8] Over their life spans, children and adolescents who are obese are likely to be obese as adults.[9] This means these adolescents are more at risk for health problems such as heart disease, type 2 diabetes, stroke, certain cancers, osteoarthritis,[10] and end-stage renal disease.[11]

III. THE ADOLESCENT BRAIN AND PSYCHOSOCIAL DEVELOPMENT

Compared to adults, adolescents' judgment and decision-making abilities are characterized by developmentally-specific attributes including neurological, psychosocial, and cognitive, which render them vulnerable to risky-decision making.[12] Developmental differences make it more difficult for adolescents to make decisions in their best long-term interests, thereby making them more vulnerable targets for marketers.[13] Research shows that adolescents may be particularly drawn to products that provide "immediate gratification, thrills, and/or social status."[14] Marketers craft advertising campaigns to capitalize on adolescent characteristics such as their susceptibility to peer influence, impulsive behavior, and their focus on the short-term.[15] The marketing of addictive products and substances like alcohol and cigarettes, and foods and beverages high in sugar, fat, salt, and caffeine to adolescents raises special public health concerns because of the potential for adverse long-term health effects.[16]

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8. Roni C. Rabin, *Diabetes on the Rise Among Teenagers*, N.Y.TIMES (May 21, 2012), http://well.blogs.nytimes.com/2012/05/21/diabetes-on-the-rise-among-teenagers/.

9. Shumei S. Guo & William C. Chumlea, *Tracking of Body Mass Index in Children in Relation to Overweight in Adulthood*, 70 AM. J. CLINICAL NUTRITION 145S, 146S (1999).

10. OFFICE OF THE SURGEON GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS, THE SURGEON GENERAL'S VISION FOR A HEALTHY AND FIT NATION: 2010 2-4 (2010), *available at* http://www.surgeongeneral.gov/initiatives/healthy-fit-nation/obesity vision2010.pdf.

11. Asaf Vivante et al., *Body Mass Index in 1.2 Million Adolescents and Risk for End-Stage Renal Disease*, 172 ARCH. INTERN. MED. 1644, 1647 (2012).

12. Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1012-13 (2003), *available at* http://humanservices.vermont.gov/boards-committees/cfcpp/publications/publications-2007/macarthur/publications /Less _Guilty_by_Reason_of_Adolescence.pdf.

13. *Id.*

14. Pechmann et al., *supra* note 1, at 202.

15. *See* DAVID A. KESSLER, THE END OF OVEREATING: TAKING CONTROL OF THE INSATIABLE AMERICAN APPETITE 240 (2009). *See generally* FOOD AND ADDICTION: A COMPREHENSIVE HANDBOOK (Kelly D. Brownell & Mark S. Gold eds., 2012).

16. *Id.*

A. *Brain Development*

Brain development and hormonal changes have a profound effect on adolescent behavioral patterns and decision-making.[17] Changes to the adolescent brain occur due to age and experience, and are independent of puberty.[18] The prefrontal cortex acts in a decision-making capacity using prior experience to guide behaviors;[19] specifically, it plays an important role in inhibiting responses to stimuli so as to promote planned behavior.[20] Importantly, the prefrontal cortex does not fully develop until late adolescence or early adulthood.[21] When fully developed, the inhibitory effect of the prefrontal cortex helps control emotional responses to external stimuli, and thus regulates impulsive behavior.[22]

Adolescents also experience an increased level of circulating hormones.[23] These hormones act on the amygdala, the part of the brain responsible for transforming experience into emotion.[24] Elevated levels of hormones in the body have a number of excitatory effects on adolescents, including hypersensitivity to stressors and strong emotional responses to their environments.[25] The combination of elevated hormone levels and an underdeveloped prefrontal cortex make it harder for adolescents to override the excitatory emotional responses of the amygdala, resulting in poor impulse control.[26] "The mismatch in excitatory drive and inhibitory control during early adolescence has been likened to 'starting the engine with an unskilled driver.'"[27] An inability to exercise inhibitory control of their emotions leads adolescents to exhibit reckless and risky behavior more frequently than either adults or children.[28] This means that adolescents are much less likely than adults to engage in responsible decision-making.[29] At

17. *See* Pechmann et al., *supra* note 1, at 203.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 206.
22. *Id.* at 203.
23. *Id.* at 205.
24. *Id.* at 203.
25. *Id.* at 205.
26. *Id.*
27. *Id.* (quoting Ronald E. Dahl, *Adolescent Brain Development: A Period of Vulnerabilities and Opportunities – Keynote Address*, 1021 ANNALS N.Y. ACAD. SCI. 1, 17 (2004)).
28. *Id.* at 207.
29. *Id.*

the same time they are more likely to experience greater emotional volatility, further disrupting their ability to control their impulses.[30]

B. *Psychosocial Development*

Adolescents also face psychosocial challenges, because psychosocial maturity continues to develop into adulthood.[31] Social immaturity most often leads to feelings of self-consciousness and embarrassment.[32] These feelings occur at the same time that adolescents face the challenges of forming a personal identity and fitting in socially with their peers.[33] Thus, adolescents are very susceptible to peer influences.[34] Two of the primary processes implicated in peer influence are social comparison and social conformity.[35] Social comparison is the process through which adolescents use the behavior of others to measure their own behavior.[36] Upward social comparisons, that is, comparisons with targets who are perceived to be superior role models (for example, more popular adolescents), can be thought of as a means of finding ways for self-improvement.[37] Social conformity is a group process through which adolescents tend to adapt their behavior and attitudes to that of their peers so as to earn acceptance.[38] Direct peer influence and the desire for peer approval may lead adolescents to rely on the consumption of particular brands to project a positive image to their peers.[39]

C. *Characteristic Teen Decision-Making*

The notion of a "rational teenager" may seem laughable to many. Teen decision-making behavior, however, makes perfect, rational sense when viewed from the perspective of a teen. Adolescents do perform risk to reward calculations when they make decisions; it's just that due to their

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30. *Id.* at 207-08.

31. LAURENCE STEINBERG, JUVENILES IN THE JUSTICE SYSTEM: NEW EVIDENCE FROM RESEARCH ON ADOLESCENT DEVELOPMENT, 4 (2007), *available at* http://www.familyimpactseminars.org/s_wifis25c01.pdf.

32. Pechmann et al., *supra* note 1, at 209.

33. *Id.*

34. *Id.*

35. Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 L. & HUM. BEHAV. 221, 230 (1995).

36. *Id.*

37. Jerry Suls et al., *Social Comparison: Why, With Whom, and With What Effect*, 11 CURRENT DIRECTIONS IN PSYCHOL. SCI. 159, 161 (2002).

38. Scott et al., *supra* note 35, at 230.

39. Pechmann et al., *supra* note 1, at 210.

psychological and psychosocial immaturity, their ideas of risks and rewards may sharply differ from those of adults.[40] For example, adolescents focus less on protection against losses than on opportunities for gains, meaning they are driven by rewards and not by risks.[41] In addition, adolescents' temporal perspective[42] tends to put more weight on short-term consequences than on future outcomes[43] leading to impulsive and risky behavior.[44] Heightened susceptibility to peer influence, the need for social acceptance, and the focus on short-term rewards makes it more difficult for an adolescent to make responsible choices. This is especially true when the full negative consequences of their choices may not manifest themselves until later in life.[45] As a result, youth engage in more frequent risky behavior such as unprotected sex, drunk driving, and criminal conduct.[46]

IV. TEEN SUSCEPTIBILITY TO MARKETING

Adolescents are vulnerable targets for marketers. Protecting youth from marketing of harmful products is a public health strategy because "adolescents may be especially tempted to use heavily advertised, popular brands of alcohol and cigarettes because these brands may fulfill their needs for immediate gratification and thrill seeking and their need for high-status consumption symbols."[47] Adolescence also is an important age because teens have a higher likelihood of developing an addiction than adults.[48] Unhealthy foods, similar to alcohol and cigarettes, put teens at great risk for chronic disease later in life.[49] By the time adolescents reach an age of mature decision-making, they may have formed unhealthy food preferences and eating habits that will be extremely difficult to change.

A popular text about marketing to youth notes that "[e]motions are driving tweens – and so are brands."[50] Marketers craft advertising

40. Scott et al., *supra* note 35, at 233.
41. *Id.* at 231.
42. Steinberg & Scott, *supra* note 12, at 1012.
43. Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Development Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 164 (1997).
44. *Id.* at 164-65.
45. *Id.* at 164.
46. *Id.* at 162-63.
47. Pechmann et al., *supra* note 1, at 212.
48. *Id.* at 202.
49. Freedman et al., *supra* note 6, at 13-15.
50. MARTIN LINDSTROM & PATRICIA B. SEYBOLD, BRANDCHILD: REMARKABLE INSIGHTS INTO THE MINDS OF TODAY'S GLOBAL KIDS AND THEIR RELATIONSHIPS WITH BRANDS 279 (2003).

campaigns to capitalize on emotional desires for "immediate gratification, thrills, and/or social status."[51] Food and beverage marketers tailor their campaigns to maximize adolescent consumption of unhealthy foods and beverages.

A. *Soda Marketing to Teens*

Beverage companies put their money where their mouths are when it comes to marketing to teens. Companies invest heavily in developing specialized campaigns to capture the teen market and talk openly about their teen focus. As Sarah Robb O'Hagan, Chief Marketing Officer for PepsiCo's Gatorade products stated during an interview, "[w]hen you're in your teen years is when you develop your sort of deep emotional connection with things . . . So it's such an important time for us [PepsiCo] to begin the brand relationship with the consumer. We've always seen [teens] as our focus."[52]

Soda industry self-regulation does not cover marketing to teens. The American Beverage Association, the trade association for the non-alcoholic beverage industry, has pledged to abide by a Global Policy on Marketing to Children, but it only applies to children twelve and under.[53] This remains the case despite skyrocketing rates of adolescent overweight and obesity and scientific literature demonstrating that adolescents' judgment and decision-making abilities are underdeveloped compared to adults.[54]

In 2006, the food and beverage industry reported $1.08 billion spent marketing to adolescents.[55] That figure decreased slightly to $1.01 billion in 2009.[56] In 2006, carbonated beverage companies spent a total of $508 million promoting their products to adolescents, making them the most

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51. Pechmann et al., *supra* note 1, at 202.

52. Jennifer Zegler, *Primed for Performance: Gatorade Refocuses on Sports Performance Innovation*, BEVERAGE INDUSTRY, June 11, 2010, http://www.bevindustry.com/articles/cover-story-gatorade-refocuses-on-sports-performance-innovation?v=preview.

53. INT'L COUNCIL OF BEVERAGES ASS'NS, GUIDELINES ON MARKETING TO CHILDREN (2008), *available at* http://www.icba-net.org/files/resources/icba-marketing-to-children-guidelines.pdf (last visited Sept. 23, 2013); Press Release, Am. Beverage Ass'n, ABA Reaffirms Commitment to Reduce Marketing to Children (July 29, 2008), http://www.ameribev.org/news—media/news-releases—statements/more/106/.

54. *See* Pechmann et al., *supra* note 1, at 202; INT'L COUNCIL OF BEVERAGES ASS'NS, *supra* note 53.

55. FED. TRADE COMM'N, A REVIEW OF FOOD MARKETING TO CHILDREN AND ADOLESCENTS: FOLLOW-UP REPORT 5 (2012), *available at* http://www.ftc.gov/os/2012/12/121221foodmarketingreport.pdf.

56. *Id.*

aggressive food or beverage marketers to teens.[57] Fast-food restaurants came in second, spending approximately $140 million on advertising to teens.[58] In 2009, carbonated beverage companies were still the most aggressive marketers to adolescents, despite a decrease in spending to $382 million in advertising to that group.[59] Fast-food restaurants increased their advertising targeting teens in 2009, spending $185 million.[60] To put this into perspective, less than 1% of expenditures on advertising all food and beverage to children and teens during the same period were for fruits and vegetables.[61]

Part of the reason for the decline in food and beverage advertising expenditures is that companies rely more heavily on less expensive, new media channels, such as the Internet.[62] For example, in 2006, new media accounted for only 4% of youth-directed marketing by food companies.[63] In 2009, that number increased to 7%.[64] Carbonated beverage companies spent the most of any food category on new media targeted at teens, spending $22.6 million in 2009, a 3.4% increase from 2006.[65]

Multi-layered digital campaigns combining social networks, mobile services, and online videos[66] allow food companies to seamlessly weave advertisements in with content "in an interactive digital environment that pervades [teens'] personal and social lives."[67] Food and beverage marketers use stealth or viral marketing techniques to mask the commercial origin of marketing messages created by companies.[68] And more and more, marketers rely upon user-generated content whereby teen consumers are encouraged to create videos, "like" a product on Facebook, or create content on other social media platforms that integrates food and beverage brands and can be circulated to their peers.[69]

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57. *Id.* at 8.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 10
63. *Id.* at 10.
64. *Id.*
65. *Id.* at 16.
66. Kathryn C. Montgomery & Jeff Chester, *Interactive Food and Beverage Marketing: Targeting Adolescents in the Digital Age*, 45 J. ADOLESCENT HEALTH S18, S19 (2009).
67. *Id.* at S23.
68. *Id.* at S22.
69. *Id.* at S21.

In 2006, Internet food and beverage advertisements produced 9 billion impressions on teen-oriented websites.[70] Further, "two-thirds of carbonated beverage ad impressions and one-third of [fast-food restaurant] ad impressions appeared to have been teen-directed."[71] In 2009, teen-oriented websites generated more than 2.3 billion display ad impressions for food products.[72] The reason for the decrease appears to be the categorization of MySpace, which ceased qualifying as a teen-oriented website in 2007.[73] Regardless, some food companies view general-audience websites such as Facebook and MySpace as an important medium to target teens.[74]

Food retailers that sell candy, beverages, snacks, and ready-to-eat foods, such as convenience stores, also are keen to capture the teen market. A 2005 report by Coca-Cola called "Convenience Teens" encouraged convenience store owners to cultivate teen customers.[75] The report found that while teens differ from older shoppers by spending less per visit, they tend to make more frequent convenience store visits thereby making up for the lower amount spent per visit.[76] The report noted that by encouraging teenagers to shop at convenience stores now, those stores (and by extension brands like Coca-Cola) will gain the teens' loyalty for future years.[77] Soon those teenagers will be in their twenties, and they will have more disposable income and will continue to be valuable convenience store customers.[78]

B. *PepsiCo Tells Teens to "Live for Now"*

While examples of food and beverage campaigns targeting adolescents abound,[79] PepsiCo's 2012 global marketing campaign "Live

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70. FED. TRADE COMM'N, MARKETING FOOD TO CHILDREN AND ADOLESCENTS: A REVIEW OF INDUSTRY EXPENDITURES, ACTIVITIES, AND SELF-REGULATION D-4 (2008), *available at* http://www.ftc.gov/sites/default/files/documents/reports/marketing-food-children-and-adolescents-review-industry-expenditures-activities-and-self-regulation/p064504foodmktingreportappendices.pdf.

71. *Id.*

72. FED. TRADE COMM'N, *supra* note 71, at D-8.

73. *Id.*

74. *Id.*

75. CLICKIN RESEARCH, CONVENIENCE TEENS: BUILDING LOYALTY WITH THE NEXT GENERATION 1-2 (2005), *available* at https://www.ccrrc.org/wp-content/uploads/2012/09/Convenience_Teens_Study_2005.pdf.

76. *Id.* at 4-5.

77. *Id.* at 38.

78. *Id.* at 5.

79. *See, e.g.* DEWMOCRACY, http://digitalads.org/how-youre-targeted/case-studies/dewmocracy/ (last visited Oct. 5, 2013); DORITOS 626, http:// digitalads.org

for Now" is emblematic. Faced with declining sales of its traditional cola drink in the U.S., the campaign seeks to make PepsiCo's full sugar cola beverages more relevant by tying them to music and entertainment trends.[80] When asked about the Live for Now campaign, Brad Jakeman, President of Global Enjoyment and Chief Creative Officer for PepsiCo stated that "[t]he category [carbonated soft drinks] is in decline in this country . . . It lost the cool quotient. If there's any brand that can inspire the category again, it's Pepsi."[81]

Al Carey, CEO of PepsiCo Americas Beverages, made the adolescent focus of the Live for Now campaign clear to investors when he stated that "it's about sports and music, excitement and youth, and I think it is the right kind of feel for this Pepsi business."[82] The campaign emphasizes pop culture and entertainment by partnering with celebrities from sports and music, including pop singer Beyonce, and sponsoring major events like the National Football League's Super Bowl halftime show. The campaign also uses "Pepsi Pulse," a dedicated webpage that serves as the social media nexus for the campaign.[83] The Live for Now campaign is so teen-focused that it has had to be decoded for older investors.[84] At one symposium, after investors were shown a Live for Now commercial the moderator told the audience, "for those of you who are not in tune with popular culture, that was [pop singer] Nicki Minaj."[85] PepsiCo's CFO then shared that he too had to be told who Nicki Minaj was because he doesn't "have teenage girls."[86]

/how-youre-targeted/case-studies/doritos-626 (last visited Oct. 5, 2013); MCDONALD'S AVATAR, http://digitalads.org/how-youre-targeted/case-studies /mcdonalds-avatar/ (last visited Oct. 5, 2013); MYCOKE, http://digitalads.org/how-youre-targeted/case-studies /mycoke (last visited Oct. 5, 2013).

80. Natalie Zmuda, *Pepsi Tackles Identity Crisis; After Fielding Biggest Consumer-Research Push in Decades, Brand Settles on 'Now' Global Positioning*, ADVERTISING AGE, May 7, 2012, http://adage.com/article/news/pepsi-tackles-identity-crisis/234586/.

81. *Id.*

82. Edited Transcript of PEP-Deutsche Bank Global Consumer Conference (June 20, 2012) 4, *available at* http://www.pepsico.com/Download/PEP-Transcript-2012-06-20.pdf [hereinafter *Al Carey Transcript*].

83. PEPSI PULSE, http://www.pepsi.com/ (last visited Oct. 5, 2013).

84. Edited Transcript of PEP - PepsiCo at Goldman Sachs Consumer Products Symposium (May 10, 2012) 4, *available at* http://www.pepsico.com/Download/PEP-Transcript-2012-05-10T15_35.pdf.

85. *Id.*

86. *Id.*

V. CONSUMER PROTECTION CASES INVOLVING TEENS AND BRANDING

State and federal consumer protection laws outlaw deceptive and unfair marketing. Marketing campaigns can focus on the qualities, characteristics, or benefits of a product or seek to create associations between a product and a consumer's desire to be happy, wealthy, healthy, popular, etc.[87] These two approaches to advertising were described at the turn of the twentieth century as "reason-why advertising" and "atmosphere advertising," respectively.[88] Atmosphere advertising is now commonly referred to simply as "branding," and is grounded in the basic principle that consumers generally define themselves by their possessions.[89]

Consumer protection law actions may be necessary to denormalize and discontinue soda marketing to minors. The current consumer protection legal framework is somewhat ill-suited to protect vulnerable consumers from branding with a focus on building positive associations and developing attachment with a brand as opposed to marketing that focuses on factual characteristics like taste, quality of ingredients, price, or volume. In the 2000's, alcohol marketing with appeal to minors was unsuccessfully challenged as a deceptive trade practice in a number of states.[90] In the 1990's, R.J. Reynolds' Joe Camel campaign for tobacco was challenged as an unfair trade practice under state and federal consumer protection law and subsequently outlawed by the Master Settlement Agreement (MSA).[91] In this section we summarize existing consumer protection case law concerning brand-awareness style marketing campaigns for harmful products targeting minors.

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87. MICHAEL BLANDING, THE COKE MACHINE: THE DIRTY TRUTH BEHIND THE WORLD'S FAVORITE SOFT DRINK 41 (2010).

88. *Id.*

89. BRAND IMAGE, http://www.asiamarketresearch.com/glossary/brand-image.htm (last visited Oct. 5, 2013).

90. *See generally* Alston v. Advanced Brands & Importing Co., 494 F.3d 562 (6th Cir. 2007).

91. MASTER SETTLEMENT AGREEMENT 14 (1998), *available* at http://www.naag.org/backpages/naag/tobacco/msa/msapdf/MSA%20with%20Sig%20Pages%20and%20Exhibits.pdf/file_view (follow "Click here to get the file" hyperlink) (last visited Dec. 23, 2013).

A. *Branding with Appeal to Minors as a Deceptive Trade Practice*

In general, a deceptive trade practice is a practice that is likely to mislead a reasonable consumer in a way that is material to a transaction.[92] Deception can involve an affirmative misrepresentation or a material omission of facts.[93] When analyzing a potentially deceptive trade practice, courts typically view the allegedly illegal conduct from the perspective of a reasonable member of the target audience.[94] A wide range of alcohol industry players, including the Beer Institute and major brewers and distillers like Coors and Bacardi, were the subject of a series of private lawsuits by parents alleging that the industry had unlawfully marketed its products to appeal to their minor children.[95] As the result of this marketing, youths allegedly spent family funds to purchase alcoholic beverages.[96] In short, plaintiffs argued that the alcohol industry's "advertising [wa]s responsible for the illegal (underage) purchase of alcoholic beverages by minor children."[97] The suits sought restitution for family funds spent by underage youth to purchase alcohol and injunctive relief barring the industry from using marketing tactics with appeal to minors.[98]

Plaintiffs alleged that the alcohol industry engaged in a marketing scheme designed to increase underage drinking including: a) developing and promoting beverages specifically designed to appeal to new and underage drinkers, often called "alcopops"; b) advertising in media that minors read, see, or use in disproportionate numbers; c) developing promotional themes specifically tailored to appeal to minors, including the portrayal of children flouting authority, and alcohol-enhanced sexual prowess; d) market research to target promotional and advertising efforts at children; e) internet marketing designed to attract and target children, including maintaining web sites that offer games, contests, and other content designed to appeal to children; f) using cartoons, logos, and promotional items such as apparel and toys, and using actors, models, and

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92. Matter of Cliffdale Assocs., Inc., 1984 WL 565319, at *46 app. (F.T.C. Mar. 23, 1984).

93. *Id.*

94. *Id.*

95. *See generally Alston*, 494 F.3d at 562; Goodwin v. Anheuser-Busch Cos., Inc., No. BC310105, 2005 WL 280330 (Cal. Super. Ct. Jan. 28, 2005); Hakki v. Zima Co., No. 03-9183, 2006 WL 852126 (D.C. Super. Ct. Mar. 28, 2006); Tomberlin v. Adolph Coors Co., 742 N.W.2d 74 (Wis. Ct. App. Oct. 25, 2007).

96. *See generally Tomberlin*, 742 N.W.2d at 74.

97. *Alston*, 494 F.3d at 564.

98. *See generally Tomberlin*, 742 N.W.2d at 74; *Goodwin*, 2005 WL 280330; *Hakki*, WL 852126.

spokespersons who appear younger than the legal drinking age so that the promotions appeal to minors; and g) sponsoring promotional events designed to appeal to minors, including beach and spring break "parties."[99]

These complaints were all ultimately dismissed either for lack of standing or for failure to state a claim.[100]

While standing varies from jurisdiction to jurisdiction, at its most basic standing requires that a plaintiff suffered an injury to a legally protected interest.[101] The primary injury alleged by parent plaintiffs was the loss of family funds incurred when their children made illegal purchases of alcohol.[102] Courts rejected the theory that a loss of family funds could provide a form of economic injury which would give the parents standing to sue.[103] As one judge noted, "the Court is not aware of any legal doctrine that would recognize a parent's legal possessory interest in the monies given to and spent by their children. Once the Plaintiffs gave money to their children, that money is viewed as a gift and thereby a possession of the children."[104] Therefore, only the children themselves could have had standing—not their parents. The Sixth Circuit took its standing analysis even further, opining that in order for the parents to have standing they would have to seek to recover "from their children the money those children converted from . . . [them] in order to violate the law prohibiting underage purchase of alcohol."[105] In other words, under the theory presented in the complaints, possible defendants included the underage children who illegally purchased alcohol, but not the alcohol industry.

All of the cases were dismissed without leave to amend.[106] Plaintiffs were not granted leave to amend any of the complaints because courts

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99. Alston v. Advanced Brands & Importing Co., No. Civ. 05-72629, 2006 WL 1374514 at *1 (E.D. Mich. May 19, 2006), *vacated and remanded*, 494 F.3d 562 (6th Cir. 2007).

100. *See, e.g., Alston*, 494 F.3d at 562 (denying standing for lack of causation or redressability); *Goodwin*, 2005 WL 280330 (denying standing for lack of injury and failing to allege a violation of the California consumer protection law); *Hakki*, 2006 WL 852126 (denying standing for lack of injury); Tomberlin v. Adolph Coors Co., No. 05-CV-545, 2006 WL 4808298 (Wis. Cir. Feb. 16, 2006) (trial order) (denying standing for lack of injury or causation).

101. *Tomberlin*, 2006 WL 4808298.

102. *Id.*

103. *Id.*

104. Eisenberg v. Anheuser-Busch, Inc., 2006 WL 290308 at *3 (N.D. Ohio Feb. 2, 2006), *vacated and remanded sub nom. Alston*, 494 F.3d at 562.

105. *Alston*, 494 F.3d at 565.

106. *Alston*, 494 F.3d 562, 566; Goodwin v. Anheuser-Busch Cos., Inc., No. BC310105, 2005 WL 280330 at *5 (Cal. Super. Ct. Jan. 28, 2005); Hakki v. Zima Co.,

found that even if teens were named as plaintiffs, they could not maintain claims for violations of state consumer protection laws.[107] Plaintiffs alleged that alcohol marketing with appeal to minors was unfair and deceptive and that it violated certain enumerated deceptive trade practices.[108] The two enumerated practices plaintiffs alleged in the various cases were "representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have" and that the marketing contained omissions of material facts that tended to mislead or deceive teen consumers.[109]

With respect to representing that certain alcohol marketing tactics conveyed benefits that alcohol does not have, one judge reasoned that there exists "no duty ... to disclose ... either [the] inherent dangers of consuming alcoholic beverages, or that alcohol would not make fantasies come to life."[110] Courts found that "qualities that are not affirmations of fact such as the fun, sexiness, popularity, social acceptance, athleticism, etc. that drinking alcohol can bring" amounted to mere puffery and therefore were not actionable as deceptive trade practices.[111] The fact that it is illegal to sell alcohol to minors also entered into the analysis.[112] The court reasoned that the illegality of underage drinking makes it common knowledge that alcohol is a dangerous product.[113]

The crux of plaintiff's material omission claim was that "because of their age, minors are unable to appreciate or understand the deleterious effects of alcohol, or that Defendant's ads that show 'unrestricted merriment' after consuming alcohol are not true."[114] This argument also was rejected. One judge reasoned that:

> [t]o assert that minors, because of their age, cannot understand that alcohol does not, in fact, make everyone

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No. 03-9183, 2006 WL 852126 at *5 (D.C. Super. Ct. Mar. 28, 2006); *Tomberlin*, 2006 WL 4808298 at *5.

107. *Goodwin*, 2005 WL 280330 at *4; *Hakki*, 2006 WL 852126 at *3; *Tomberlin*, 2006 WL 4808298 at *5.

108. *Alston*, 2006 WL 1374514 at *5.

109. *Id.*

110. *Id.* at *6.

111. *Id.* (citing Overton v. Anheuser-Busch Co., 517 N.W.2d 308, 309 (Mich. Ct. App. 1994)); *see also Goodwin*, 2005 WL 280330 at *5.

112. *Alston*, 2006 WL 1374514 at *6; *Goodwin*, 2005 WL 280330 at *4.

113. *Alston*, 494 F.3d. at 565; *Goodwin*, 2005 WL 280330 at *5; Hakki v. Zima Co., No. 03-9183, 2006 WL 852126 at *3 (D.C. Super. Ct. Mar. 28, 2006); Tomberlin v. Adolph Coors Co., No. 05-CV-545, 2006 WL 4808298 (Wis. Cir. Feb. 16, 2006) (trial order) .

114. *Alston*, 2006 WL 1374514 at *6.

> more attractive, transport them to a tropical paradise, or other similar scenarios that are common themes in alcohol ads is ridiculous at best. Moreover, while minors may be considered incompetent to handle the effects of the intoxication, there is no presumption that minors are incompetent to watch advertising, handle the messages included therein, or that they are incompetent to understand that underage drinking is illegal.[115]

Minors, in this case, were thus deemed competent to handle alcohol marketing with appeal to their demographic.[116]

The Sixth Circuit also expressed a deep skepticism about the impact of the alcohol marketing at issue on actual consumer behavior.[117] When denying plaintiffs standing, the court discussed the lack of a viable remedy for plaintiff parents in light of the fact that it is already illegal to sell alcohol to minors when it stated that "if outlawing the actual sale and purchase [of alcoholic beverages to minors] is insufficient to remedy the alleged injuries . . . , then outlawing mere advertising must be insufficient as well."[118] This reasoning denies the practical reality of underage drinking. Despite its illegality, underage alcohol consumption is an important segment of the market for alcoholic beverages.[119] Underage alcohol consumption is estimated to account for between 11% and 20% of all U.S. alcohol sales.[120] Researchers who study alcohol marketing to youth have found that "[b]randing plays an essential role in alcohol marketing and the relationship of youth to individual alcohol products. Developing brand capital—that is, the meaning and emotion associated with a brand—is perhaps the most important function of alcohol advertising."[121] An evolving body of research about actual underage alcohol consumption patterns has found that exposure to alcohol marketing

115. *Id.*
116. *Id.*
117. *Alston*, 494 F.3d at 564-65.
118. *Id.* at 565-66.
119. *See generally* PAC. INST. FOR RESEARCH & EVALUATION, DRINKING IN AMERICA: MYTHS, REALITIES, & PREVENTION POLICY (2005), *available at* http://www.lhc.ca.gov/lhc/drug/DrinkinginAmericaMosherSep26.pdf.
120. *Id.*; Susan E. Foster et al., *Alcohol Consumption and Expenditures for Underage Drinking and Adult Excessive Drinking*, 289:8 JAMA 989, 994 (2003).
121. Michael Siegel et al., *Brand-Specific Consumption of Alcohol Among Underage Youth in the United States*, ALCOHOLISM: CLINICAL & EXPERIMENTAL RES. 1, 1 (2013).

increases teen alcohol consumption[122], and that the top twenty-five alcohol brands in the U.S. account for about one-half of all underage alcohol consumption by volume.[123] This research demonstrates the effectiveness of atmosphere advertising or branding of alcohol to minors in terms of its impact on actual underage drinking patterns.

Current standards for deceptive practices are designed to address misleading "reason-why" advertising and are ill-equipped to protect vulnerable populations from branding that seeks to build positive associations with harmful products. The various courts' discussions of teenagers' abilities to process marketing messages and act in their own best interest is in sharp contrast with what is known about teen decision-making abilities. Moreover, courts' conceptions of teen "reasonableness" seems to be rooted in societal expectations for teen behavior as opposed to how teens actually make decisions, given their brain and psychosocial development. In order to truly analyze potentially deceptive marketing from the perspective of a target audience of teens, additional insight into teen decision-making capabilities and how marketers intentionally exploit their emotionality and desires is needed.

B. *Branding with Appeal to Minors as an Unfair Trade Practice*

Unfairness focuses on preventing substantial injury to consumers that is not otherwise avoidable or beneficial to competition, or on preventing marketing that offends established public policy. Actions challenging branding campaigns with appeal to minors for cigarettes have fared better in the courts than the subsequent alcohol litigation. In the late 1990's, litigation was embraced as an affirmative public health strategy to combat smoking-related disease. Tobacco litigation continues today on behalf of injured smokers, but state-led litigation efforts culminated with the MSA negotiated between forty-six states and four of the largest tobacco companies in 1998.[124] Prior to the MSA, state Attorneys General (AGs)

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122. Auden C. McClure et al., *Alcohol Marketing Receptivity, Marketing-Specific Cognitions, and Underage Binge Drinking*, 37:S1 ALCOHOLISM: CLINICAL & EXPERIMENTAL RES. E404, E404 (2013).

123. Siegel et al., *supra* note 121, at 6.

124. Kathleen Michon, *Tobacco Litigation: History & Recent Developments*, NOLO, *available at* http://www.nolo.com/legal-encyclopedia/tobacco-litigation-history-and-development-32202.html (last visited Dec. 22, 2013).

filed suit against tobacco companies alleging, *inter alia*, violations of state consumer protection statutes.[125]

For example, the State of Iowa filed suit against R.J. Reynolds Tobacco Company, alleging that the company committed violations of the Iowa Consumer Fraud Act.[126] Alleged violations included: a) misleading the public regarding the addictive nature of cigarettes; b) misleading the public regarding whether cigarettes caused life-threatening illnesses; c) falsely claiming the company had performed an independent study to determine the health effects of smoking; d) failing to disclose added ingredients in cigarettes; e) and engaging in marketing practices oriented towards minors.[127] The Iowa District Court for Polk County denied a motion to dismiss the complaint that included "claims relate[d] to false and misleading public statements and unfair trade practices such as . . . marketing harmful tobacco products to minors."[128] Before such actions were rendered moot in states that signed onto the MSA, other lower courts declined to dismiss consumer protection claims brought by AGs on behalf of the citizens of their states, alleging, in pertinent part, unfair and deceptive marketing of tobacco products to minors.[129]

R.J. Reynolds' use of Joe Camel, a cartoon character depicted in print ads, on billboards, point-of-sale signage, and promotional items, like t-shirts and beach towels, to market its Camel brand cigarettes galvanized opposition to tobacco marketing to minors. Similar to the marketing strategies at the heart of the alcohol cases, R.J. Reynolds appealed to minors through depictions of Joe Camel, a likeable cartoon character often shown in sexual (surrounded by women in bikinis) or cool (riding a motorcycle) situations while smoking Camel cigarettes. Marketing campaigns built around spokes-characters are intended to build brand awareness. A 1991 study found that by the time children reached the age

125. UNIV. CAL. SAN FRANCISCO LIBRARY & CTR. FOR KNOWLEDGE MGMT., TOBACCO LITIGATION DOCUMENTS, http://www.library.ucsf.edu/tobacco/litigation /states (last visited Dec. 22, 2013).

126. Complaint, Iowa v. Phillip Morris Inc., No. CL71048 1, 41-44 (Iowa Dist. Ct., Nov. 27, 1996), *available at* http://www.library.ucsf.edu/sites/all/files/ ucsf_assets/ia complaint.pdf.

127. *Id.*

128. Ruling on Certain Defendants' Motion to Dismiss, Iowa v. R.J. Reynolds, No. CL71048 (Iowa Dist. Ct. Aug. 26, 1997), *available at* http://www.library.ucsf edu /sites/all/files/ucsf_assets/dec8-26.pdf.

129. *See generally, e.g.*, State of Colo. ex. rel. Norton v. R.J. Reynolds Tobacco Co., No. 97CV3432 (Colo. Dist. Ct. Mar. 20, 1998), *available at* http://www.library.ucsf .edu/sites/all/files/ucsf_assets/cocomplaint.pdf; Maryland *v.* Phillip Morris, Inc., No. 96122017/CL211487 (Md. Cir. Ct. May 21, 1997), *available at* http://www.library. ucsf.edu/sites/all/files/ ucsf_assets/3mdcomplaint.pdf.

of six, Joe Camel and Mickey Mouse "were nearly equally well recognized and correctly matched by almost all children."[130]

The Joe Camel campaign was challenged under California consumer protection law in the case of *Mangini v. R.J. Reynolds Tobacco Co.* The plaintiff alleged that the use of Joe Camel to market cigarettes constituted an unfair trade practice[131] because it encouraged minors to illegally purchase cigarettes.[132] *Mangini* was subsequently dismissed on preemption grounds,[133] but an intermediate court opinion in the case is one of the few written opinions applying the elements of unfairness to the target marketing of minors. In the opinion, the California appellate court applied the following test for unfairness: "(1) whether [the alleged conduct] . . . offends public policy as established by statutes, the common law, or otherwise; 2) whether it is immoral, unethical, oppressive or unscrupulous; and 3) whether it causes substantial injury to consumers."[134]

The court found the use of Joe Camel offended California's "statutory policy of keeping children from starting on the road to tobacco addiction."[135] The court cited a number of state statutes intended to prevent tobacco use, including bans on tobacco sales to minors and free tobacco sampling.[136] While the court found the question of ethics and morals too subjective, it did find the targeting of minors by tobacco companies to be oppressive and unscrupulous in that "it exploits minors by luring them into an unhealthy and potentially life-threatening addiction before they have achieved the maturity necessary to make an informed decision whether to take up smoking despite its health risks."[137] The court also recognized findings by the California State Legislature that tobacco advertising was an important contributor to smoking by children.[138] The court concluded that "[a] persuasive argument can be made that the targeting of minors causes substantial physical injury to them."[139]

In a footnote, the court went on to say that the question of "unfair" marketing is one of degree.[140] The question is whether the defendants had

130. Paul M. Fischer et al., *Brand Logo Recognition by Children Aged 3 to 6 Years*, 266:22 JAMA 3145, 3147 (1991).
131. Mangini v. R.J. Reynolds Tobacco Co., 875 P.2d 73, 75 (Cal. 1993).
132. *Id.*
133. In re Tobacco Cases II, 41 Cal. 4th 1257, 1276 (Cal. 2007).
134. Mangini v. R.J. Reynolds Tobacco Co., 21 Cal. Rptr. 2d 232, 241(Cal. Ct. App. 1993).
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 242 n. 2.

crossed a boundary in their efforts to market their cigarettes.[141] "If R.J. Reynolds had, for example, presented Teenage Mutant Ninja Turtles on children's lunch boxes to promote cigarette smoking, we have little doubt there would be a statutory cause of action for unfair advertising."[142] The court relied on how blatantly the defendant marketed its products to minors to determine if its efforts were unfair.[143] It held that the Joe Camel advertisements could be found to be unfair under the California consumer protection law if the factual record showed they violated "public policy by luring minors into unlawfully purchasing and consuming cigarettes."[144]

The Joe Camel campaign also was the subject of an enforcement action by the Federal Trade Commission (FTC) as an unfair trade practice under the Federal Trade Commission Act.[145] In its complaint, the FTC alleged that the campaign made smoking attractive to children and adolescents under the age of eighteen, inducing them to smoke, or at least increasing the risk that they would smoke.[146] The complaint alleged that the Joe Camel campaign accomplished its goal of getting teens to smoke because "after the initiation of the Joe Camel campaign, the percentage of smokers under the age of 18 who smoked Camel cigarettes became larger than the percentage of all adult smokers aged 18 and older who smoked Camel cigarettes."[147] It is of note that two dissenting Commissioners specifically noted that they did not find sufficient evidence to support a causal connection between the Joe Camel campaign and underage smoking.[148]

The complaint also alleged that R.J. Reynolds knew or should have known that its advertising campaign would appeal to individuals under the

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141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 242.

145. Complaint, In the Matter of R.J. Reynolds Tobacco Co., F.T.C. No. 9285 1, 2-3 (May 28, 1997), *available at* http://www.ftc.gov/sites/default/files/documents/cases/1997/05/d9285cmp.pdf [hereinafter Complaint, *R.J. Reynolds*]. Two Commissioners dissented from the decision to issue the complaint, relying heavily on the fact that the Commission declined to file the same claim against R.J. Reynolds three years earlier. *In the Matter of R.J. Reynolds Tobacco Co.*, F.T.C. No. 9285 (May 28, 1997) (Starek, J., dissenting), *available at* http://www.ftc.gov/sites/default/files/documents/cases/1997/05/jcrbs3.htm [hereinafter Starek dissent]; *In the Matter of R.J. Reynolds Tobacco Co.*, F.T.C. No. 9285 (May 28, 1997) (Azcuenaga, J., dissenting), *available at* http://www.ftc.gov/sites/default/files/documents/cases/1997/05/rjrmla.htm [hereinafter Azcuenaga dissent].

146. Complaint, *R.J. Reynolds*, *supra* note 145, at 2.

147. *Id.*

148. Azcuenaga dissent, *supra* note 146; Starek dissent, *supra* note 146.

age of eighteen, and the campaign therefore would cause teens under eighteen to smoke.[149] Moreover, by 1984 the defendant allegedly had identified the need to attract younger, "first usual brand" smokers.[150] The FTC asserted that "children and adolescents do not adequately comprehend the nature of the risk or the seriousness of nicotine addiction, or the other dangerous health effects of smoking cigarettes."[151] Therefore, due to the harmful nature of cigarettes and nicotine addiction, the Joe Camel campaign was likely to cause substantial injury to children under the age of eighteen.[152]

In its proposed order, the FTC ordered the defendant to "cease and desist from advertising to children its Camel brand cigarettes through the use of the images or themes relating or referring to . . . the Joe Camel figure."[153] The proposed order also required R.J. Reynolds to supply data concerning each of its cigarette brands' share of smokers under the age of eighteen, and to issue public education messages discouraging people under eighteen from smoking.[154]

Ultimately, the use of cartoon characters, like Joe Camel, to promote tobacco products was prohibited by the MSA.[155]

VI. IS "LIVE FOR NOW" THE JOE CAMEL OF SODA MARKETING?

In this section we examine the Live for Now campaign as a potentially unfair trade practice. The legal actions taken to address the Joe Camel campaign were a key element in an overall tobacco control strategy. There are a wide range of factors contributing to the obesity crisis, and as discussed above, research has shown that sugary drinks are a driver of the epidemic. In this section we explore whether, much like the Joe Camel campaign, Live for Now is susceptible to a challenge as an unfair trade practice.

Interpretations of unfair marketing vary from state to state.[156] Federal consumer protection law currently defines an unfair act as a trade practice that "is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by

149. Complaint, *R.J. Reynolds*, *supra* note 145, at 2.
150. *Id.* at 1.
151. *Id.* at 3.
152. *Id.*
153. *Id.* at 5.
154. *Id.*
155. MASTER SETTLEMENT AGREEMENT, *supra* note 91, at 14.
156. *See generally* MARY DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW § 3:15 (2012).

countervailing benefits to consumers or competition."[157] When determining if an act constitutes an unfair trade practice, "the Commission may consider established public policies as evidence to be considered with all other evidence."[158] However, "public policy considerations may not serve as a primary basis" for determining whether a trade practice is unfair.[159]

As an initial matter, it is important to distinguish soda marketing to teens from alcohol and tobacco marketing to teens. The private alcohol cases alleging deceptive marketing discussed above failed to establish standing primarily because the cases were filed by parents to recover so-called "family assets." Soda, unlike alcohol and cigarettes, is a legal product that teens buy with their own spending money. A State Attorney General could certainly investigate and issue a complaint on behalf of the adolescents in her particular state. Any private cases filed alleging unfair target marketing of soda to teens should be filed on behalf of a class of teens who purchased soda products for themselves with their own spending money. Moreover, since soda is a legal product, there would be no issue of intervening criminal activity in the course of the sale to insulate beverage companies that engage in marketing to teens from liability.

With respect to substantial injury to consumers, full-sugar carbonated soft drinks like Pepsi Cola are one of the most obesogenic categories of beverages. One twenty ounce bottle of full sugar Pepsi Cola contains 250 calories and sixty-nine grams of sugar, which equates to approximately eighteen teaspoons of sugar.[160] While evidence of sugar addiction is preliminary and controversial, Pepsi Cola also contains caffeine, which is a mildly addictive substance that can drive consumption.[161] There is evidence that food and beverage marketing is a significant contributor to obesity.[162] The purpose of branding campaigns like Live for Now is to secure lifelong brand loyalty and a lifetime of consumption. The stated purpose of the teen-focused campaign, as expressed by PepsiCo executives, is to make full sugar soda "cool" and to prop-up a slumping category of

157. 15 U.S.C. § 45(n) (2013).

158. *Id.*

159. *Id.*

160. PEPSICO, THE FACTS ABOUT YOUR FAVORITE BEVERAGES, http://www.pepsicobeveragefacts.com/infobyproduct.php?prod_type=1026&prod_size=20&brand_fam_id=1051&brand_id=1000&product=Pepsi (last visited Dec. 23, 2013).

161. Jennifer L. Temple, *Caffeine Use in Children: What We Know, What We Have Left to Learn, and Why We Should Worry*, 33 NEUROSCI. & BIOBEHAV. REV. 793, 799 (2009).

162. Mary Story & Simone French, *Food Advertising and Marketing Directed at Children and Adolescents in the U.S.*, 1 INT'L J. BEHAV. NUTR. & PHYS. ACTIVITY 3, 13 (2004).

beverages.[163] Similar to the Joe Camel campaign, which reversed a decline in teenage smoking, the Live for Now campaign threatens to do the same for teenage soda consumption. Like tobacco, the health harms of soda accrue as one continues to consume the product. Obesity, especially higher levels of obesity, is associated with increased mortality compared with people of normal weight.[164] For example, one study found that obesity was associated with a substantial number of excess deaths, the majority of which occurred in individuals less than seventy years old.[165] Obesity-related conditions include heart disease, stroke, type-2 diabetes, and certain types of cancer.[166] These conditions are some of the leading causes of preventable death in the U.S.[167]

Whether or not harms caused by a trade practice are easily avoidable by a consumer depends, among other factors, upon the target audience and the tactics used. The Live for Now campaign itself is not easily avoided by adolescents because it is designed to pervade virtually every aspect of their lives via television, internet, mobile marketing, and social media. With respect to the content of the campaign, Live for Now is a clear directive to teens that they should ignore the health risks of full sugar soda like Pepsi Cola. Marketers understand that "reasonable" adolescents have a hard time grasping the idea of long-term consequences, and instead focus on the short-term when making purchase decisions for products like soda.[168] Live for Now is designed to capitalize on this cognitive vulnerability through depictions of healthy and happy young people and the use of popular and successful musicians, athletes, and celebrities as spokespeople for the brand. The target audience of adolescents and the tactics used create a trade practice that leads to future health harms that are not reasonably avoided by adolescents when viewed from their perspective as a target audience of consumers.

No countervailing benefits to consumers or competition of a campaign like Live for Now are readily apparent. The campaign is designed to build brand awareness and brand loyalty as opposed to conveying factual information about the product to consumers or its benefits relative to other similar products in the marketplace. Nothing in

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163. *Al Carey Transcript*, *supra* note 82, at 4.

164. Katherine M. Flegal et al., *Excess Deaths Associated with Underweight, Overweight, and Obesity*, 293:15 JAMA 1861, 1863-64 (2005).

165. *Id.* at 1864.

166. CTRS. FOR DISEASE CONTROL & PREVENTION, ADULT OBESITY FACTS, http://www.cdc.gov/obesity/data/adult.html (last visited Sept. 7, 2013).

167. *Id.*

168. Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 231 (1995).

the campaign appears to be designed to spur a competitor to improve its offerings in terms of nutritional profile, price, or quality of ingredients.

Similar to the public health policies to curb youth smoking discussed in the *Mangini* case, public health nutrition policy continues to expand to reduce adolescent consumption of sugary drinks. For example, California state law currently prohibits the sale of full-sugar soft drinks like Pepsi Cola in schools.[169] Pepsi Cola is not an allowable beverage under the U.S. Department of Agriculture's proposed nutrition standards for competitive beverages sold in schools that, when finalized, will apply to all schools participating in the National School Lunch Program.[170] Pepsi Cola is not currently allowed to be sold in middle or high schools under the American Beverage Association's voluntary School Beverage Guidelines established in partnership with the Alliance for a Healthier Generation.[171] In addition, the U.S. Department of Agriculture recommends limiting consumption of empty calories from added sugars and solid fats and includes soda in its list of foods that contribute the most empty calories to the U.S. diet.[172] One twenty ounce bottle of full sugar Pepsi Cola contains 250 calories and approximately eighteen teaspoons of sugar.[173] This amount exceeds the U.S. Department of Agriculture's current total daily empty calorie recommendation for sedentary girls between the ages of fourteen and eighteen of 160 calories per day and is almost equal to the total 265 calorie limit recommended for sedentary boys between the ages of fourteen and eighteen.[174] The target marketing of full sugar soda to teens through campaigns like Live for Now is at odds with these policies.

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169. CAL. CODE REGS. tit. 5, § 15576 (2013); CAL. EDUC. CODE § 49430 (2013); CAL. EDUC. CODE § 49431.5 (2013).

170. National School Lunch Program and School Breakfast Program: Nutrition Standards for All Foods Sold in School as Required by the Healthy, Hunger-Free Kids Act of 2010, 78 Fed. Reg. 27: 9530 (proposed Feb. 8, 2013) (codified at 7 C.F.R. pts. 210, 220).

171. AM. BEVERAGE ASS'N, SCHOOL BEVERAGE GUIDELINES, http://www.ameribev.org/nutrition-science/school-beverage-guidelines/ (last visited Jan. 27, 2014).

172. U.S. DEP'T OF AGRIC., WHAT ARE EMPTY CALORIES?, http://www.choosemyplate.gov/weight-management-calories/calories/empty-calories.html (last visited Jan. 27, 2014).

173. PEPSI, http://www.pepsicobeveragefacts.com/infobyproduct.php?prod_type=1026&prod_size=20&brand_fam_id=1051&brand_id=1000&product=Pepsi (last visited Jan. 27, 2014).

174. U.S. DEP'T OF AGRIC., HOW MANY CAN I HAVE?, http://www.choosemyplate.gov/weight-management-calories/calories/empty-calories-amount.html (last visited Jan. 27, 2014).

VII. CONCLUSION

It remains to be seen when or whether State AGs or the private bar will take up cases to protect adolescents from aggressive marketing of unhealthy food and beverage products like the Live for Now campaign. The very fact that such actions will involve adolescent consumers makes already complicated legal issues that much more complex. What little case law exists with respect to adolescents and branding is inconsistent at best. Both cigarettes and alcohol are illegal to sell to minors and are addictive products. Pepsi Cola contains high levels of sugar and is caffeinated. The marketing strategies challenged in the alcohol cases had the same goal as the Joe Camel campaign—to persuade adolescents to use an unhealthy product that adults were abandoning in droves. The legal standards for deception and unfairness are quite different. This does not fully explain why the *Mangini* court and the FTC's unfairness analysis acknowledged the diminished capacity of adolescents to make decisions in their long-term interest with respect to tobacco, yet the deception analysis in the alcohol cases was primarily dismissive of teens' diminished ability to process alcohol marketing messages. Actions to address food and beverage marketing to adolescents must take great care to include evidence-based arguments about teen decision-making and how their development impacts their behavior as consumers. Exposing the deliberate exploitation of teen biological and psychological development by marketers to increase their consumption of unhealthy products will be equally important. The fact that PepsiCo openly touts to its shareholders and the press that Live for Now is specifically designed to increase teen consumption of one of its most unhealthy beverages also demonstrates that much more work is needed at the broader societal level to denormalize sugary drinks.

FOOD CHOICE IS A FUNDAMENTAL LIBERTY RIGHT

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"[P]laintiffs do not have a fundamental right to obtain any food they wish."[1]

"When did we lose our right to buy whatever food we want directly from farmers and assorted food producers, outside of the regulatory system of permits and inspections?"[2]

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1. Br. in Supp. of United States' Mot. to Dismiss Pl.'s Am. Compl. at 26, Farm-To-Consumer Legal Def. Fund v. Sebelius, No. 5:10-cv-04018-MWB (N.D. Iowa, filed Apr. 26, 2010).

I. THE FOOD MOVEMENT RISES

For millennia, humans either caught or raised their own food or purchased it from local farmers or shopkeepers; however they obtained their food, they knew where it came from.[3] In fact, obtaining one's food directly from the farmer who grew it is one of the most traditional economic practices that there can be. But with the industrial age came industrial food, which has broken the local food connection between producer and consumer.[4] For example, two companies now grow 85% of all of the carrots eaten in the U.S.[5] The four largest beef slaughterers have sold between 65% and 70% of all beef consumed nationally since 2000.[6] But local food is making a comeback; locavores look for locally grown or raised food, and other epicurean consumers seek organic and naturally produced food.[7] These alternative food movements are a "challenge to and a denouncement of the current industrial food system," which writer Michael Pollan, champion of the food movement, calls "Big Food."[8]

Pollan explains that the alternative food movement is about many things, including consumer health, food safety regulation, farmland preservation, and efforts to promote urban agriculture, as well as "community, identity, pleasure, and, most notably, about carving out a new social and economic space removed from the influence of big corporations on the one side and government on the other."[9] For Pollan, eating is a political act[10]

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2. DAVID E. GUMPERT, LIFE, LIBERTY AND THE PURSUIT OF FOOD RIGHTS: THE ESCALATING BATTLE OVER WHO DECIDES WHAT WE EAT 5 (2013).

3. Nicholas R. Johnson & A. Bryan Endres, *Small Producers, Big Hurdles: Barriers Facing Producers of "Local Foods,"* 33 HAMLINE J. PUB. L. & POL'Y 49, 55 (2012).

4. *Id.* at 50.

5. Mark Bittman, *Everyone Eats There*, N.Y. TIMES, Oct. 12, 2012, http://www.nytimes.com/2012/10/14/magazine /californias-central-valley-land-of-a-billion-vegetables.html?pagewanted=all&_r=0.

6. U.S. DEP'T OF AGRIC., PACKERS & STOCKYARDS PROGRAM, 2011 P&SP ANNUAL REPORT: GRAIN INSPECTION, PACKERS AND STOCKYARDS ADMINISTRATION 30 (2012), *available at* http://www.gipsa.usda.gov/Publications/psp/ar/2011_psp_ annual_report.pdf.

7. Jaime Bouvier, *The Symbolic Garden: An Intersection of the Food Movement and the First Amendment*, 65 ME. L. REV. 426, 430 (2013).

8. *Id.*

9. Michael Pollan, *The Food Movement, Rising*, N.Y. REVIEW OF BOOKS, June 10, 2010, http://www.nybooks.com/articles/archives/2010/jun/10/food-movement-rising /?pagination=false.

10. MICHAEL POLLAN, THE OMNIVORE'S DILEMMA: A NATURAL HISTORY OF FOUR MEALS 11 (2006).

and the food movement is a way "to foster new forms of civil society."[11]

Activists, journalists, and researchers take Pollan's theories even further; for them, food choice expresses one's self-identity,[12] and the food movement is a political, communicative, and self-expressive act that is based in substantial part on consumers' desire to reconnect with food production and regain trust in the producers of their food.[13]

Food movement participants want to demonstrate their support for local farmers, communicate their positions, pro and con, on food-related laws and regulations, associate with like-minded people, and advocate locavorism.[14] Their advocacy for small food and against intrusive governmental regulations necessarily questions Big Food, seeks liberty, and creates social change.[15] But it is not just locavores who have historically prized small, local farmers. Over a century ago, the North Carolina Supreme Court recognized the value of small farmers in a vendor's licensing appeal. In North Carolina, the court held that public policy favored the farmer exception because it encouraged "the general raising of live stock by the small farmer, which will not only be profitable to the individual, but adds[s] to the aggregate wealth of the community."[16] This is not just old law and an old way of thinking; still on the books today are a number of state and federal statutes that explicitly value the small farmer and the family farm.[17]

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11. POLLAN, *supra* note 10.

12. Carole A. Bisogni et al., *Who We Are and How We Eat: A Qualitative Study of Identities in Food Choice*, 34 J. NUTR. EDUC. & BEHAV., 128, 129 (2002).

13. *See generally, e.g.,* Bouvier, *supra* note 7, at 430; Marne Coit, *Jumping on the Next Bandwagon: An Overview of the Policy and Legal Aspects of the Local Food Movement*, 4 J. FOOD L. & POL'Y 45, 46-50 (2008); Jeffrey R. Follett, *Choosing a Food Future: Differentiating Among Alternative Food Options*, 22 J. AGRIC. & ENVTL. ETHICS 31, 33 (2009); Johnson & Endres, *supra* note 3, at 56-57; Molly Kate Bean, Consumer Support for Local and Organic Foods in Ohio (2008) (unpublished Ph.D. dissertation, The Ohio State University) (on file with The Ohio State University).

14. Bouvier, *supra* note 7, at 431; Follett, *supra* note 13, at 33; Johnson & Endres, *supra* note 3, at 57-58.

15. Follett, *supra* note 13, at 37, 42.

16. State v. Spaugh, 129 N.C. 564, 567, 40 S.E. 60, 61 (1901).

17. *See, e.g.*, 7 U.S.C. § 2266 (2012) ("Congress reaffirms the historical policy of the United States to foster and encourage the family farm system of agriculture in this country. Congress believes that the maintenance of the family farm system of agriculture is essential to the social well-being of the Nation"); ALA. CODE § 2-6B-1 (1975); IOWA CODE § 175.4(10) (2013); ME. REV. STAT. ANN. tit. 7, § 1-A (2002 & Supp. 2012); MINN. STAT. ANN. § 500.24 (2010); S.D. CODIFIED LAWS § 47-9A-1 (2012) ("[t]he Legislature of the State of South Dakota recognizes the importance of the family farm to the economic and moral stability of the state").

Locavores and other food movement participants do not want food from far away agribusinesses; they seek to buy their food locally and connect with the farmers who produced the food.[18] Buying locally allows them to meet and speak with those who grew their vegetables and raised their beef; one can hardly shake hands with someone at Kellogg's cereals or ask Mr. Dole about how he grew his pineapples.[19] In contrast, anyone at a farmers' market can walk up to the farmer and ask, before buying any food, how he grew his lettuce or how she raised her pigs. Learning about where their food came from empowers consumers to develop or regain their connection with their community and with their food, and helps them recover or even discover a sense of place.[20] Finally, it helps consumers gain or regain trust in their food's safety and quality. Traditionally, "perceptions of food quality were often the result of personal observation and social networks in the local community."[21] Industrial food made this impossible. But when a buyer can see the seller and ask her about her products, the buyer regains trust in his food.[22]

II. AN ARGUMENT FOR FOOD RIGHTS

This article will explore consumers' rights to purchase meat and poultry directly from the food's producer without mandatory governmental inspection. It expands former University of Nevada law student Kammi L. Rencher's recent proposition that food choice may deserve at least some degree of heightened constitutional protection.[23] Rencher suggested that health, religious expression, cultural expression, self-expression, and speech can explain a person's food choice, but did "not attempt to establish that food choice is a fundamental right."[24] I take the next step and demonstrate that: a) the consumer's desire to purchase and consume meat and poultry from the farmer who raised the animals, without governmental interference, are indeed statements of self-identity and self-expression and forms of political speech and political action that are aspects of our constitutionally protected liberty interests; and b) our national customs and practices of purchasing meat and poultry directly from the farmer who produced that food, without mandatory governmental inspection, is so deeply

18. Coit, *supra* note 13, at 48-50.
19. Johnson & Endres, *supra* note 3, at 92.
20. *Id.* at 50.
21. Bean, *supra* note 13, at 62.
22. Johnson & Endres, *supra* note 3, at 93.
23. Kammi L. Rencher, Note, *Food Choice and Fundamental Rights: A Piece of Cake or Pie in the Sky?*, 12 NEV. L.J. 418, 420 (2012).
24. *Id.*

rooted in our nation's history and tradition that it should constitute a fundamental liberty right guaranteed under the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution.[25]

Although health, religious, and cultural expression may indeed be fundamental rights in the context of food choice, I do not make those arguments here.[26] The Supreme Court accepts as fundamental the rights to make decisions as to one's health care and the right of bodily integrity, but has not extended those rights beyond actual illnesses, diseases, or protecting against governmental desires to invade one's bodily integrity.[27] Accordingly, analysis of those rights, as well as the rights of religious and cultural expression, which involve a whole new ball of wax, are best explored in a separate article.

While American food regulation laws date back to the founding of the colonies and were surprisingly detailed in certain areas, a detailed review of these laws reveals that they were narrow in scope.[28] Until the twentieth century, colonial and state statutes focused on food packing and exporting, food adulteration, vendor licensing, and weights, measures, and assizes; food inspection was a secondary aim.[29] The comprehensive food safety laws as we know them today are a modern invention.[30] Thus, while state statutes regulated numerous aspects of the food sale transaction, they rarely affected consumers' rights to purchase food directly from the farmer, especially when the transaction occurred on the farm.[31] Most early state food inspection statutes applied only to food sold at municipal markets, food sold in barrels, or food sold to middlemen for resale elsewhere, either for export or at markets.[32] Until well into the twentieth century, farmers and food producers in most states remained free to sell the products of their farms directly to consumers without any government regulation.[33]

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25. It should be noted that Florida State University College of Law Professor Samuel R. Wiseman recently argued that food choice is not a fundamental right. While I respectfully disagree with Professor Wiseman, this article is not intended to be a rebuttal of Professor Wiseman's article. Instead, I will let my analysis of the legal issues speak for itself. Samuel R. Wiseman, *Liberty of Palate*, 65 ME. L. REV. 738 (2013).

26. Rencher, *supra* note 23, at 425-26, 431-37.

27. Deana Pollard Sacks, *Elements of Liberty*, 61 SMU. L. REV. 1557, 1580-82 (2008).

28. Peter Barton Hutt & Peter Barton Hutt II, *A History of Government Regulation of Adulteration and Misbranding of Food*, 39 FOOD DRUG COSM. L.J. 2, 35-44 (1984).

29. *Id.* at 39, 40.

30. *Id.* at 41.

31. *See infra* Section V.B.

32. *Id.*

33. *Id.*

Meat inspection statutes were no different. Before the twentieth century, almost all state meat inspection statutes applied only to cured meat packaged in barrels for export.[34] Some statutes required inspection of all meats packaged in barrels, whether for export or not.[35] Others set up voluntary inspection procedures on the theory that inspected and certified food would be more valuable in the marketplace than uninspected food.[36] Still other states required farmers to keep the hide of cattle that they slaughtered for market, but only a few states required mandatory inspections prior to the sale of food products such as beef and pork.[37] Even in the modern meat inspection era in the twentieth century, eighteen states had at one time or another explicitly excluded from otherwise all-encompassing inspection statutes meat slaughtered by the farmers who raised the animals or meat slaughtered in rural districts, where an inspector could not conveniently access the meat. The significance of this number is illustrated by the fact that only twenty-eight states even required inspection of all meat sold intrastate as late as 1967.[38] In fact, farm slaughtered exemption statutes were on the books of twelve states until the federal Wholesome Meat Act of 1967 mandated federal or state inspection of all meat slaughtered for sale for the first time. Poultry was even less regulated.[39] No state required inspection of poultry products prior to sale until well into the twentieth century.[40] The federal government required no poultry inspection until 1957.[41]

This article lays out my argument step by step. Section III will review the law of substantive due process, with emphasis on defining a fundamental right and attempting to make a claim for a new, as yet undeclared, fundamental right. Section IV defines my proposed right in a way that should meet the Supreme Court's restrictive specifications. Section V shows that the right to purchase meat and poultry from the farmer who raised the animals is deeply rooted in our national tradition. Section VI explains our constitutionally protected liberty rights and demonstrates that courts should consider food choice to be an aspect of liberty. Finally, Section VII provides a brief conclusion.

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34. *Id.*
35. *Id.*
36. FEDERAL MEAT INSPECTION ACT, H.R. REP. NO. 90-653, at 4 (1967).
37. *See infra* Section V.B.
38. *Id.*
39. *See infra* Section V.E.
40. GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916 98 (1963).
41. WHOLESOME POULTRY PRODUCTS ACT, H.R. REP. NO. 90-1333, at 4 (1968).

III. SUBSTANTIVE DUE PROCESS: HOW TO DEFINE A FUNDAMENTAL RIGHT

Substantive due process claims arise under the Fifth and Fourteenth Amendments to the Constitution.[42] The Fifth Amendment Due Process Clause applies to the federal government, and the Fourteenth Amendment Due Process Clause applies to state and local governments.[43] Substantive due process claims address whether the government's claimed deprivation of a person's life, liberty (including the right to privacy),[44] or property is justified by a sufficient purpose.[45] In order to determine whether the government's deprivation of one's life, liberty, or property is justified by a sufficient purpose, "one must first determine what kind of means-end scrutiny applies and, second, whether the deprivation is justified under that test."[46] If the deprivation infringes a fundamental right, the strict scrutiny test applies. If the deprivation infringes a non-fundamental right, the rational review test applies.[47] Under the strict scrutiny test, the government must prove that the infringement is necessary to further a compelling governmental interest. Under the rational review test, the citizen "normally has the burden of proving that the deprivation is not a rational means for furthering any valid government interest."[48]

Because the strict scrutiny test is far more favorable to the litigant objecting to governmental action (it has been described as "fatal" to the government's case),[49] plaintiffs in constitutional rights litigation naturally seek to show that the right at issue is a fundamental right, which would re-

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42. The Fifth Amendment Due Process Clause states that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Fourteenth Amendment Due Process Clause states that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

43. Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. REV. 625, 625 n. 1 (1992).

44. Jacobson v. Tahoe Reg'l Planning Agency, 558 F.2d 928, 936 (9th Cir. 1977); Aznavorian v. Califano, 440 F.Supp. 788, 799 n. 11 (S.D. Cal. 1977) (citing Bolling v. Sharpe, 347 U.S. 497, 500 (1954); Providence Journal Co. v. Fed. Bureau of Investigation, 460 F.Supp. 762, 771 n. 27 (D.R.I. 1978); United States v. Hubbard, 650 F.2d 293, 304-305, n. 38-39 (D.C. Cir. 1980); *see also* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

45. Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501 (1999).

46. Galloway, *supra* note 43, at 627.

47. *Id.*

48. *Id.* at 627-28.

49. Lawrence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1057 (1990).

quire application of the strict scrutiny test. The critical issue in substantive due process claims is thus how to define a fundamental right.

The Supreme Court has employed two approaches for addressing fundamental rights claims.[50] The first approach evaluates the claimed right on the basis of "personal dignity and autonomy,"[51] which is also called the theory of "reasoned judgment."[52] Under this approach, "the Court itself evaluates the liberty interest of the individual and weighs it against competing governmental concerns, determining on this basis whether the liberty interest deserves protection as a constitutional right."[53] The Court used this approach most notably in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, an abortion case, in which it proclaimed, "[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects."[54] *Casey* held that "adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment."[55] The Court has most recently approved of *Casey* in the 2003 gay rights case of *Lawrence v. Texas*.[56]

The second, more restrictive, approach looks to the "[n]ation's history and legal tradition."[57] The Court notably employed this approach in the 1934 case of *Snyder v. Massachusetts*, which held that "[t]he Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless, in so doing, it offends some principle of justice so rooted in the traditions and

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50. Abigail Alliance for Better Access to Developmental Drugs v. C. Von Eschenbach, M.D., 445 F.3d 470, 476 (D.C. Cir. 2006), *rev'd en banc*, 495 F.3d 695 (D.C. Cir. 2007).

51. *Abigail Alliance for Better Access to Developmental Drugs*, 445 F.3d at 476 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

52. Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 66-67 (2006).

53. *Id.*

54. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

55. *Id.* at 849.

56. Lawrence v. Texas, 539 U.S. 558, 578 (2003); Conkle, *supra* note 52, at 67.

57. Abigail Alliance for Better Access to Developmental Drugs v. C. Von Eschenbach, M.D., 445 F.3d 470, 478 (D.C. Cir. 2006) (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)), *rev'd en banc*, 495 F.3d 695 (D.C. Cir. 2007). It should also be noted that the reasoned judgment approach also considers history and tradition. The Court in *Roe v. Wade* used this approach, and "spent a substantial portion of its opinion exploring tradition." Gregory C. Cook, Note, *Footnote 6: Justice Scalia's Attempt to Impose a Rule of Law on Substantive Due Process*, 14 HARV. J.L. & PUB. POL'Y 853, 862 n. 56 (1991).

conscience of our people as to be ranked as fundamental."[58] The Court best explained the history and tradition approach in the 1997 right to die case, *Washington v. Glucksberg*, which intoned, "[w]e begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices" in order to determine whether the "asserted right has any place in our Nation's traditions."[59] In order to prove that a supposed right has a place in American history and traditions, a plaintiff must: a) provide "a careful description of the asserted fundamental liberty interest;" and b) show that the alleged fundamental right is "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."[60]

While the Court has been traditionally "reluctant to expand the concept of substantive due process,"[61] *Glucksberg* did leave the door open for new fundamental rights claims by acknowledging that the "outlines" of the liberty protected by the Fourteenth Amendment have never been "fully clarified" and that they may never be "capable of being fully clarified."[62]

The Court has therefore left constitutional rights advocates with the problem of two independent, incompatible approaches to substantive due process claims. However, because *Lawrence* interpreted *Casey* as applying strictly to "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," the cautious food rights advocate may not want to advocate the *Casey* approach for rights other than those specifically identified in *Casey*.[63] Consequently, the soundest, most practical solution is to employ the test that allows for the broadest definition of a fundamental right, but also defines the right in the way that has the lowest chance of being overruled at the appellate level. Practically, this means following *Glucksberg*; for the past decade and a half, the lower courts have been "overwhelmingly relying on *Glucksberg* and ignoring *Lawrence*."[64] While the *Casey* "reasoned judgment" approach

58. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

59. Washington v. Glucksberg, 521 U.S. 702, 723 (1997) (citations omitted).

60. *Id.* at 720-21 (citations and internal punctuation omitted).

61. Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992).

62. *Glucksberg*, 521 U.S. at 722.

63. Lawrence v. Texas, 539 U.S. 558, 573-74 (2003) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992); *see also* URI Student Senate v. Town Of Narragansett, 707 F.Supp.2d 282, 291 (D.R.I. 2010), *aff'd*, 631 F.3d 1 (1st Cir. 2011) (stating that the types of choices that are "central to [*Casey's*] personal dignity and autonomy" are "personal decisions" that relate to "marriage, procreation, contraception, family relationships, child rearing, and education") (citation omitted).

64. Abigail Alliance for Better Access to Developmental Drugs v. C. Von Eschenbach, M.D., 445 F.3d 470, 476 n.8 (D.C. Cir. 2006) (noting that other circuits have either treated the *Glucksberg* analysis as controlling after *Lawrence* or viewed *Lawrence*

is certainly more open to new fundamental rights claims than *Glucksberg*, it is a red herring. As will be shown in Section V, *infra*, the consumer's right to purchase meat and poultry directly from the farmer who raised the animals is indeed deeply rooted in American history and tradition and so fits quite easily into the *Glucksberg* pigeonhole.

A. *Creating a Careful Description*

The food rights advocate's first problem under *Glucksberg* is to provide a "careful description" of the alleged fundamental right. But what is a "careful description?" Unfortunately, the Court "has not settled on how precisely formulated the right must be."[65] *Glucksberg* did not define "careful description," instructing only that the proposed right be "carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition."[66] Nor has the Court offered much additional guidance. At the most restrictive end of the continuum, Justice Scalia argued in a footnote to his plurality opinion in an earlier case, *Michael H. v. Gerald D.*, that the claimed right should be defined at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[67] However, this footnote, which was joined by only one other Justice, Chief Justice Rehnquist, the author of *Glucksberg*, was immediately controversial. Justices O'Connor and Kennedy, who later authored *Casey*'s plurality opinion, concurred in the opinion, but rejected the footnote, contending that:

> [t]his footnote sketches a mode of historical analysis to be used when identifying liberty interests protected by the Due Process Clause of the Fourteenth Amendment that may be somewhat inconsistent with our past decisions in this area . . . On occasion, the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be "the most specific level" available.[68]

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as not, properly speaking, a substantive due process decision) (citations and punctuation omitted); Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517, 1527 (2008) (citing Brian Hawkins, Note, *The Glucksberg Renaissance: Substantive Due Process Since Lawrence v. Texas*, 105 MICH. L. REV. 409, 411 (2006)).

65. *Abigail Alliance for Better Access to Developmental Drugs*, 445 F.3d at 477.

66. Washington v. Glucksberg, 521 U.S. 702, 722 (1997).

67. Michael H v. Gerald D., 491 U.S. 110, 127-28 n.6 (1989).

68. *Id.* at 132.

Three years later, they reiterated their disapproval in *Casey*.[69] More recently, a 2003 case reaffirmed only that "vague generalities, such as 'the right not to be talked to [in a Fifth Amendment case],' will not suffice."[70] This dispute is not just an ivory tower argument; it has practical implications for the food rights advocate. As Tribe and Dorf succinctly stated, "[t]he more abstractly one states the already-protected right, the more likely it becomes that the claimed right will fall within its protection."[71]

The lower courts have been slightly more instructive. The Seventh Circuit termed a "careful description" as "one that is specific and concrete, one that avoids sweeping abstractions and generalities."[72] The court's duty is to "carefully define the contested right, employing sufficient specificity to ground the right in a concrete application and sufficient generality to connect the right to its animating principles."[73] The Eleventh Circuit advised that grounding the right in a concrete application means that the claimed right "be dictated 'by the precise facts' of the immediate case."[74] The District of Columbia Circuit views the careful description requirement "as a means of constraining the inadvertent creation of rights that could fall within the scope of loosely worded descriptions and thus threaten the separation of powers."[75]

While definitions are helpful, examples are even better. In a school immunization case, the court noted that "whether a parent has a fundamental right to decide whether her child should undergo a medical procedure such as immunization," was a right too broadly claimed.[76] The court reformatted the "careful description" by stating that, "the question presented by the facts of this case is whether the special protection of the Due Process Clause includes a parent's right to refuse to have her child immunized before attending public or private school where immunization is a precondition to attending school."[77] Another example comes from a convicted sex

69. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992).

70. Chavez v. Martinez, 538 U.S. 760, 776 (2003).

71. Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990).

72. Doe v. City of Lafayette, 377 F.3d 757, 769 (7th Cir. 2004).

73. *Id.* (quoting Hutchins v. D.C., 188 F.3d 531, 554 (D.C. Cir. 1999)) (Rogers, J., concurring in part and dissenting in part).

74. Williams v. Attorney Gen. of Ala., 378 F.3d 1232, 1240 (11th Cir. 2004).

75. Abigail Alliance for Better Access to Developmental Drugs v. C. Von Eschenbach, M.D., 445 F.3d 470, 478 (D.C. Cir. 2006); *see also Williams*, 378 F.3d at 1240 (noting that "the requirement of a 'careful description' is designed to prevent the reviewing court from venturing into vaster constitutional vistas than are called for by the facts of the case at hand").

76. Boone v. Boozman, 217 F.Supp.2d 938, 956 (E.D. Ark. 2002).

77. *Id.*

offender's appeal of his banishment from public parks in his city. A "generalized right to movement" was too broad; more careful was "a right to enter the parks to loiter or for other innocent purposes."[78] A more restrictive example comes from a municipal employment rights case stemming out of a policewoman's affair with another police officer, where the Tenth Circuit rejected "a right to private sexual activity" in favor of the right to engage in "off-duty [sexual] conduct with a fellow officer at a training conference paid for in part and supported by the department."[79] Finally, *Glucksberg* itself provided an excellent example. The Supreme Court rejected the Court of Appeals' "liberty interest in determining the time and manner of one's death" in favor of a more specific "right to commit suicide which itself includes a right to assistance in doing so."[80]

Boone, *Doe*, and *Glucksberg* all illustrate how a reasonably narrow – but not too narrow – right can be constructed out of the facts of the case. In contrast, *Seegmiller* dictates the opposite conclusion. Such a constricted "right" is impossible to defend or substantiate, and in fact the Tenth Circuit quickly found that the petitioner failed to show that this "right" is deeply rooted in American history and tradition.[81]

B. *Proving a Deeply Rooted Tradition*

The second *Glucksberg* factor requires proof that the right in question is "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty."[82] The nation's history, legal traditions, and practices include not just American legal traditions, but also the American philosophical and cultural heritages.[83] Courts have, on occasion, reviewed our nation's history, traditions, and practices extensively. For example, *Glucksberg* analyzed seven hundred years of Anglo-American history on suicide and assisting suicide going back to the thirteenth century.[84] Just a few years ago, in the Second Amendment case of *McDonald v. City of Chicago*, the Supreme Court examined the Anglo-American historical and legal traditions of gun rights and usage dating back to the seventeenth century.[85] In *Abigail Alliance II*, a drug regulation case, the District of Columbia

78. Doe v. City of Lafayette, 377 F.3d 757, 769 (7th Cir. 2004).
79. Seegmiller v. LaVerkin City, 528 F.3d 762, 770 (10th Cir. 2008).
80. Washington v. Glucksberg, 521 U.S. 702, 722-23 (1997).
81. *Seegmiller*, 528 F.3d at 770.
82. *Glucksberg*, 521 U.S. at 711.
83. *Glucksberg*, 521 U.S. at 711.
84. *Id.* at 711-719.
85. McDonald v. City of Chicago, 130 S.Ct. 3020, 3036-42 (2010).

Circuit explored the Anglo-American tradition of drug regulation going back to the fifteenth century.[86]

However, too much historical evidence or unrelated historical evidence is as bad as not enough historical evidence. For example, in *Williams*, a case involving the right to sell sexual devices, the Eleventh Circuit criticized the district judge for too much historical analysis as a result of defining the right too broadly. The district judge's first problem was defining the question too broadly, as a "fundamental right to sexual privacy,"[87] which the Court of Appeals rejected, instead defining the right as a right to use sexual devices.[88] This overbroad description led directly into the district judge's second problem, too much history. The district judge provided a sixteen page study of American sexual practices and laws from colonial times to the present day,[89] which the Court of Appeals dismissed as an "irrelevant exploration of the history of sex in America."[90] The Court of Appeals held that the "inquiry should have been focused not broadly on the vast topic of sex in American cultural and legal history, but narrowly and more precisely on the treatment of sexual devices within that history and tradition."[91] *Williams*' message is that the historical analysis in a fundamental rights question should match up perfectly with the definition of the right. The parties and the court should only analyze the American history and traditions that directly support the carefully described right in question.

C. *The Problem of Traditionally Unregulated Rights*

A challenge in discerning our national history and traditions involves the distinction, if any, between a right that has been traditionally protected and one that has been merely "traditionally unregulated."[92] Traditionally protecting a right means that the government has affirmatively acted to protect the right. A traditionally unregulated action is the opposite; the government has neither protected, nor prohibited, the action. Thus, showing "a lack of government interference throughout history" with citi-

86. Abigail Alliance for Better Access to Developmental Drugs v. C. Von Eschenbach, M.D., 495 F.3d 695, 703-05 (D.C. Cir. 2007); *see also* Nordyke v. King, 563 F.3d 439, 451 (9th Cir. 2009) (stating that "[w]e must trace this right, as thus described, through our history from the Founding until the enactment of the Fourteenth Amendment").

87. Williams v. Pryor, 220 F.Supp.2d 1257, 1277 (N.D. Ala. 2002), *rev'd sub nom.* Williams v. Attorney Gen. of Ala., 378 F.3d 1232 (11th Cir. 2004).

88. *Williams*, 378 F.3d at 1242.

89. Williams v. Pryor, 220 F.Supp.2d 1257, 1277-1294 (N.D. Ala. 2002).

90. Williams v. Attorney Gen. of Ala., 378 F.3d 1242 (11th Cir. 2004).

91. *Id.* at 1243.

92. Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1489 (2008).

zens' assertion of a right is "some evidence" that the right is "deeply rooted," but, for two Courts of Appeals, was not itself enough proof.[93] In *Abigail Alliance II*, the District of Columbia Circuit recently pointed out that:

> [a] prior lack of regulation suggests that we must exercise care in evaluating the untested assertion of a constitutional right to be free from new regulation. But the lack of prior governmental regulation of an activity tells us little about whether the activity merits constitutional protection: "The fact that powers long have been unexercised well may call for close scrutiny as to whether they exist; but if granted, they are not lost by being allowed to lie dormant, any more than nonexistent powers can be prescripted by an unchallenged exercise."[94]

Indeed, creating constitutional rights to be free from regulation based solely upon a prior lack of regulation would undermine much of the modern administrative state, which, like drug regulation, has increased in scope as changing conditions have warranted.

In *Williams*, the Eleventh Circuit criticized the district court for accepting as a deeply rooted tradition what the Eleventh Circuit considered to be traditionally unregulated actions. "[R]ather than look for a history and tradition of *protection* of the asserted right, the district court [wrongly] asked whether there was a history and tradition of state *non-interference* with the right."[95] For the Court of Appeals, the district court's key findings, "the relative scarcity of statutes explicitly banning sexual devices and the rarity of reported cases of sexual-devices prosecutions . . . essentially inverted *Glucksberg's* history and tradition inquiry."[96] Instead of showing "that the right to use sexual devices is 'deeply rooted in this Nation's history and tradition,' [the district court] looked for a showing that proscriptions against sexual devices are deeply rooted in history and tradition."[97] However, one Eleventh Circuit judge has powerfully argued, albeit in dissent, that the argument that "the panel misreads *Glucksburg* to say the only relevant historical inquiry is whether there has been a tradition of laws affirma-

93. Abigail Alliance for Better Access to Developmental Drugs v. C. Von Eschenbach, M.D., 495 F.3d 695, 706 (D.C. Cir. 2007).

94. *Id.* at 707 (quoting U.S. v. Morton Salt Co., 338 U.S. 632, 647 (1950)).

95. Williams v. Attorney Gen. of Ala., 378 F.3d 1242 (11th Cir. 2004) (emphasis in original).

96. *Id.* at 1244.

97. *Id.*

tively protecting the conduct at issue."[98] That judge, Judge Rosemary Barkett, argued that the Eleventh Circuit panel "made up" that requirement, which was "entirely unsupported by any Supreme Court case," and that, if "the Supreme Court required affirmative governmental protection of an asserted liberty interest, all of the Court's privacy cases would have been decided differently."[99]

An analogous way to view this issue is through federal preemption law. In *Freightliner Corp. v. Myrick*,[100] a personal injury case involving faulty truck brakes, the Supreme Court held that federal highway safety laws did not preempt state trucking regulations and thus permitted the plaintiffs' suit to proceed.[101] A federal law, the National Traffic and Motor Vehicle Safety Act, expressly preempted state law whenever a Federal motor vehicle safety standard was in effect.[102] The predecessor to the National Highway Traffic Safety Administration (NHTSA) had issued regulations concerning truck brakes, known as Standard 121, but a Court of Appeals suspended the standard because it "was neither reasonable nor practicable."[103] The NHTSA amended Standard 121, but never took final action to reinstate the standard, and thus it remained suspended.[104] Despite the fact that Standard 121 was suspended, Freightliner argued that "the absence of regulation itself constitutes regulation."[105] The Court rejected that contention, holding that "the lack of federal regulation did not result from an affirmative decision of agency officials to refrain from regulating air brakes."[106] The Court justified its conclusion by noting that the NHTSA did not affirmatively decide anything. "Rather, the lack of a federal standard stemmed from the decision of a federal court that the agency had not compiled sufficient evidence to justify its regulations."[107]

The logic of *Abigail Alliance*, *Williams*, and *Freightliner* places no roadblocks in the food advocate's way. If legislative "affirmative action" is the difference between a traditionally protected and a traditionally un-

98. Lofton v. Sec'y of Dep't of Children & Family Servs., 377 F.3d 1275, 1308 (11th Cir. 2004) (Barkett, J., dissenting from the denial of rehearing *en banc*).

99. *Id.* at 1309; *see also id.* at 1309 n.49 (noting that "there was no lengthy tradition of protecting abortion and the use of contraceptives, yet both were found to be protected by a right to privacy under the Due Process Clause").

100. Freightliner Corp. v. Myrick, 514 U.S. 280, 284 (1995).

101. *Id.*

102. *Id.* at 284.

103. *Id.* at 285 (quoting Paccar, Inc. v. NHTSA, 573 F.2d 632, 640 (9th Cir. 1978), *cert. denied*, 439 U.S. 862 (1978)).

104. *Id.* at 286.

105. *Id.*

106. *Id.* at 286.

107. *Id.* at 286-287.

regulated right, review of state and federal legislative action with respect to farm slaughtered meat and poultry shows that state legislatures and Congress have acted affirmatively for hundreds of years to protect farm to consumer transactions.[108] As will be shown in Section V, *infra*, the American colonies and states had a long tradition of regulating food safety dating back to 1641.[109] For centuries, states regulated many different aspects of food sales, but always carefully left farm to consumer transactions alone.[110] Such carefully considered inaction was clearly an affirmative decision to not regulate farm to consumer transactions. Even when states began requiring meat inspection at the turn of the twentieth century, they often left farm to consumer transactions unregulated.[111] And, when Congress began regulating food safety in the late nineteenth century, it followed suit and also left farm to consumer transactions unregulated until as late as 1967, only forty-seven years ago.[112] Thus, for the vast majority of our nation's history, our government has studiously avoided regulating farm to consumer meat and poultry sales even though it regulated many other aspects of food safety.[113]

IV. DEFINING THE PROPOSED RIGHT CAREFULLY

Defined broadly, we are talking about the individual's right to purchase and consume food of her choice. While that argument may work in philosophy, it is too broad for constitutional law, and especially for constitutional law as marked by *Glucksberg*. Because the right to food choice must be defined very narrowly in order to satisfy *Glucksberg*, a right to purchase and consume food of one's choice is far too sweeping and general.[114] More to the point is an individual's right to purchase food of her choice directly from the producer or grower of that food. But even that is too broad for *Glucksberg*; the category of "food" includes many different types of food, all of which are grown or produced in different ways and so

108. *See infra* Sections V.C & V.E.

109. Hutt & Hutt, *supra* note 28, at 35.

110. Gary D. Libecap, *The Rise of the Chicago Packers and the Origins of Meat Inspection and Antitrust*, 30 ECON. INQUIRY 242, 252 (1992).

111. *See infra* Section V.B.

112. Wholesome Meat Act, Pub. L. No. 90-201, 81 Stat. 584 (1967).

113. Washington v. Glucksberg, 521 U.S. 702, 723 (1997) (stating that "[i]f a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it") (quoting Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922)); *see also id.*; Walz v. Tax Comm'n of New York, 397 U.S. 664, 678 (1970) (an "unbroken practice . . . openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside").

114. *See generally, e.g.*, Doe v. City of Lafayette, 377 F.3d 757, 769 (7th Cir. 2004).

have different means of preparation for sale and different safety concerns. In order to keep the right as narrow as possible, the right to purchase food should be limited to food that is grown or produced similarly. Meat and poultry are more similar than vegetables. Meat and poultry are live animals that must be raised, slaughtered, and then kept cold so that they do not spoil. Vegetables certainly have safety issues, but at the very least, they do not need to be slaughtered, and some vegetables do not need to be kept cold to avoid spoilage. For this reason, the consumer's right to purchase vegetables of her choice directly from the farmer should be treated separately.

A second issue is that, because we are concerned with purchasing food free from governmental interference, the proposed right must include that limitation. Finally, because we are also talking about farm slaughtered meat and poultry, that qualification must also be included in the proposed right.

Thus, the narrowest and most reasonable definition of our proposed right that is based on the Nation's historical traditions is an individual's right to purchase meat and poultry directly from the person who raised and participated in the slaughtering of that meat or poultry without mandatory governmental inspection. Such a restricted, focused definition satisfies *Glucksberg's* requirement that one must "exercise the utmost care whenever [breaking] new ground" in substantive due process litigation,[115] as well as the requirement that the careful description be dictated by the precise facts of the case.[116]

V. THE RIGHT TO PURCHASE MEAT AND POULTRY DIRECTLY FROM THE FARMERS WHO RAISED THE ANIMALS, WITHOUT GOVERNMENTAL INSPECTION, IS DEEPLY ROOTED IN AMERICAN HISTORY AND TRADITION

The federal government and a majority of the states have traditionally preserved the consumer's right to purchase meat and poultry from the farmer without government inspection throughout the vast majority of American history.[117] From the Pilgrims' landing at Plymouth Rock in 1620 until 1897, almost three centuries later, no American colony or state had ever legally required mandatory inspection of meat or poultry sold by a farmer on the farm directly to the consumer.[118] By 1907, only four states had such requirements for meat.[119] As late as 1967, only twenty-eight

115. *Glucksberg*, 521 U.S. at 720.
116. Williams v. Attorney Gen. of Ala., 378 F.3d 1232, 1240 (11th Cir. 2004).
117. *See infra* Sections V.B & V.C.
118. *See infra* Section V.B.
119. 1905 Ariz. Sess. Laws 65, 89 (codified as REV. CODE ARIZ. § 3739 (1913)); REV. LAWS MASS. ch. 75, § 105 (1901)); 1897 Okla. Sess. Laws 237, 246 (codified as

states had passed laws requiring such inspections, and eleven of those states specifically exempted farm slaughtered meat from mandatory inspection.[120] Thus, only forty-five years ago, a majority of states still had no laws requiring inspection of farm slaughtered meat. Nor did the federal government enact any such requirements until Congress passed the Wholesome Meat Act in 1967, 191 years after the Revolution.[121]

Laws requiring inspection of poultry were even fewer and further between. Congress passed no national poultry inspection law until 1957.[122] By 1968, when Congress passed the more comprehensive Wholesome Poultry Products Act,[123] only twelve states had mandatory poultry inspection laws, and only four of those had active inspection programs.[124]

Analysis of state meat inspection laws shows that there can be no question that the right to purchase meat and poultry directly from the farmer is deeply rooted in American history and tradition. American history includes centuries of direct farm to consumer purchases of meat and poultry without governmental inspection. American legal traditions include acknowledging the value of the local farm and ensuring the continuation of farm to consumer purchases of meat and poultry without governmental inspection. [125]

A. *A Brief History of the Meat Trade: From the Local Farmer to the National Meatpacking Industry*

1. The Beginnings

From the earliest days of the American colonies until after the Civil War, consumers slaughtered their own meat or purchased it locally, either directly from the farmer or from a local butcher.[126] The slaughtered meat

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REV. STAT. OKLA. ch. 3, (37) §19 (1903)); 1907 Utah Laws 223 (codified as COMP. LAWS UTAH §1990 (1917)).

120. FEDERAL MEAT INSPECTION ACT, H.R. REP. NO. 90-653, at 4 (1967).

121. Wholesome Meat Act, Pub. L. No. 90-201, 81 Stat. 584 (1967).

122. Poultry Products Inspection Act, Pub. L. No. 85-172, 71 Stat. 441 (1957) (codified as 21 U.S.C. § 451 (1958)).

123. *Id.*

124. *Id.*; *see also* WHOLESOME POULTRY PRODUCTS ACT, H.R. REP. NO. 90-1333, at 4 (1968).

125. *See generally* State v. Spaugh, 129 N.C. 564, 567, 40 S.E. 60, 61 (1901); Follett, *supra* note 13 at 37, 42.

126. *See generally, e.g.*, RUDOLF A. CLEMEN, THE AMERICAN LIVESTOCK AND MEAT INDUSTRY 3 (1966); GARY FIELDS, TERRITORIES OF PROFIT: COMMUNICATIONS, CAPITALIST DEVELOPMENT, AND THE INNOVATIVE ENTERPRISES OF G.F. SWIFT AND DELL COMPUTER 92 (2004); George K. Holmes, *The First American Farmers*, in THE

trade in those days was so rudimentary as to not even be considered a formal industry.[127] As historian Charles W. McCurdy wrote, "[w]hen fresh meat was available, consumers knew it had been slaughtered nearby."[128] Until the second half of the nineteenth century, slaughtered beef remained a local product, regardless of how it was slaughtered; it rarely traveled more than fifteen miles to its ultimate destination.[129]

Cattle and hogs grazed all spring and summer, and were slaughtered in the fall.[130] Livestock could only be slaughtered in the fall because the flesh was not suitable for butchering in the spring, and, in the summer, warm temperatures created a high risk of the meat spoiling before it was cured.[131] Because fresh meat did not last long, farmers would it eat it quickly, share it with their neighbors, sell it locally for immediate consumption, or cure and pack it for storage and sale.[132] Once the slaughtering season ended, there would be no more fresh meat until the next fall, and families ate cured, packed meat or no meat at all. Prior the development of refrigeration in the early 1870's, the only way to store beef was to cure it and pack it in barrels.[133] The packed beef would be sold locally or exported, either to other colonies or abroad.[134]

2. The Modern Meat Industry Changes the Way Americans Purchase Meat

The modern, industrial food era began in the second half of the nineteenth century. New food products and technologies appeared, which allowed items such as baking powder, oleomargarine, canned foods, and

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MAKING OF AMERICA (Robert M. La Follette ed. 1907); Joanne Bowen, *To Market, to Market: Animal Husbandry in New England*, 32 HIST. ARCHAEOLOGY 137, 141 (1998); Karen J. Friedmann, *Victualling Colonial Boston*, 47 AGRIC. HIST. 189, 197-204 (1973); Elmer R. Kiehl & V. James Rhodes, *Historical Development of Beef Quality and Grading Standards* 728 U. MO. C. AGRIC. RES. BULL. 1, 10-11 (1960). Sarah F. McMahon, *A Comfortable Subsistence: The Changing Composition of Diet in Rural New England, 1620-1840*, 42 WM. & MARY Q. 26, 34-37 (1985).

127. FIELDS, *supra* note 126, at 96.

128. Charles W. McCurdy, *American Law and the Marketing Structure of the Large Corporation, 1875- 1890*, 38 J. ECON. HIST. 631, 643 (1978).

129. FIELDS, *supra* note 126, at 96.

130. *Id.*; SUSANNE FREIDBERG, FRESH: A PERISHABLE HISTORY 53 (2009); McMahon, *supra* note 126, at 36.

131. McMahon, *supra* note 126, at 36.

132. CLEMEN, *supra* note 126, at 25, 92; FREIDBERG, *supra* note 130, at 53; McMahon, *supra* note 126, at 35.

133. CLEMEN, *supra* note 126, at 8; McMahon, *supra* note 126, at 34-35.

134. CLEMEN, *supra* note 126, at 3.

chemical preservatives to be shipped from afar without fear of spoilage.[135] The nation underwent wrenching changes that affected the food industry and food safety. As a result of the Civil War, the country began to industrialize and urbanize.[136] The new national railroad network allowed more food to be transported into the growing cities.[137] The railroads, as well as the development of new lands in the West, where livestock could be pastured, and the invention of the refrigerated boxcar, allowed a national beef industry to develop and thrive in the 1870's.[138] For the first time, ranchers and meatpackers could ship live cattle and dressed meat long distances. Unfortunately, these developments came with a dark side; the large Midwestern meatpackers[139] centered in Chicago now had the power, which they used collusively to destroy the traditional, local meat trade.[140]

The newly industrializing and urbanizing cities became overcrowded, increasing the spread of disease,[141] and ultimately leading to federal food regulation.[142] The increased urbanization also damaged the relationship between the consumer and the food producer; consumers were now increasingly buying products about which they knew little.[143] With the loss of the consumer's relationship with the food producer came a loss of trust. This new dependence on impersonal markets "eroded consumers' traditional methods of identifying quality food, beverage, and drug products," which was the connection with the local producer or seller.[144] But even in-

135. Dennis R. Johnson, *The History of the 1906 Pure Food and Drugs Act and the Meat Inspection Act*, 37 FOOD DRUG COSM. L.J. 5, 6 (1982); Marc T. Law, *The Origins of State Pure Food Regulation*, 63 J. ECON. HIST. 1103, 1105 (2003) [hereinafter Law, *Origins*]; MARC T. LAW, HISTORY OF FOOD AND DRUG REGULATION IN THE UNITED STATES, http://eh.net/encyclopedia/history-of-food-and-drug-regulation-in-the-united-states/ (last visited Dec. 26, 2013) [hereinafter Law, *History*].

136. Johnson, *supra* note 135, at 5.

137. FIELDS, *supra* note 126, at 98; Peyton Ferrier & Russell Lamb, *Government Regulation and Quality in the U.S. Beef Market*, 32 FOOD POL'Y 84, 87 (2007); Johnson, *supra* note 135, at 5.

138. CLEMEN, *supra* note 126, at 6; Ferrier & Lamb, *supra* note 137, at 86.

139. CLEMEN, *supra* note 126, at 3 (noting that the term "packing" originally meant to cure and smoke meat for local use during the winter).

140. *Id.* at 173, 225; FIELDS, *supra* note 126, at 92, 95; Ferrier & Lamb, *supra* note 137, at 87; McCurdy, *supra* note 128, at 643.

141. Johnson, *supra* note 135, at 6.

142. Ilyse D. Barkan, *Industry Invites Regulation: The Passage of the Pure Food and Drug Act of 1906*, 75 AM. J. PUB. HEALTH 18, 21-22 (1985).

143. *Id.* at 20; Johnson, *supra* note 135, at 6; Law, *Origins*, *supra* note 135, at 1105; Law, *History*, *supra* note 135.

144. Barkan, *supra* note 142, at 20.

to the twentieth century, farmers continued to sell slaughtered animals directly to the consumer.[145]

B. *Meat Inspection Under Colonial and State Law*

1. The Earliest Days

Much has been written about the ubiquity of colonial and state food regulations prior to the modern, federal food regulation era,[146] but the earliest colonial food safety laws were "largely designed to protect colonial trade."[147] Dating back to 1641,[148] these laws focused on inspection of exports, food adulteration, and weights and measures.[149] Just about every colony and state regulated food to some degree.[150] Nevertheless, despite the occasional food adulteration law, in those days, as one historian put it, consumers "were their own food and drug inspectors."[151] After the Revolution, the majority of early state food safety laws continued to focus on the export trade,[152] requiring that the merchant submit the product for inspection and repacking before export.[153]

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145. LOUIS D. HALL ET AL., U.S. DEP'T OF AGRIC., MEAT SITUATION IN THE UNITED STATES, PART V, METHODS AND COST OF MARKETING LIVE STOCK AND MEATS 5, 8, 60 (1916), *available at* https://ia601809.us.archive.org/26/items/meats ituationinu11unit_2/meatsituationinu11unit_2.pdf.

146. See, *e.g.*, ALBERT A. GIESECKE, AMERICAN COMMERCIAL LEGISLATION BEFORE 1789 74-80 (1910); WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA 84-112 (1996); Hutt & Hutt, *supra* note 28, at 35-44; Wallace F. Janssen, *America's First Food and Drug Laws*, 30 FOOD DRUG COSM. L.J. 665, 666-69 (1975); Arthur L. Jensen, *The Inspection of Exports in Colonial Pennsylvania*, 78 PENN. MAG. HIST. & BIOGRAPHY 275, 276-77 (1954); Law, *Origins*, *supra* note 135, at 1103.

147. Hutt & Hutt, *supra* note 28, at 38.

148. *Id.* at 35.

149. GIESECKE, *supra* note 146, at 75; Hutt & Hutt, *supra* note 28, at 38-39; Janssen, *supra* note 146, at 667; Jensen, *supra* note 146, at 276 (stating that "[n]o economic legislation of the eighteenth century was more characteristic than the attempt to maintain the quality of exports by means of compulsory inspection laws").

150. *See* GIESECKE, *supra* note 146, at 74-80; NOVAK, *supra* note 146, at 88-89.

151. Janssen, *supra* note 146, at 665.

152. Hutt & Hutt, *supra* note 28, at 38-39.

153. Jensen, *supra* note 146, at 277-278.

2. Early State Meat Inspection Statutes

Using the HeinOnline databases,[154] I researched colonial and state food inspection statutes prior to the enactment of the comprehensive 1907 Meat Inspection Act to determine whether they affected farm to consumer sales of fresh meat or poultry in any way. This search revealed that, while many states had some type of meat inspection statute, these statutes typically did not affect direct farm to consumer meat purchases. The statutes fell into a number of categories. First, there were the meat inspection statutes that applied only to exports.[155] Second, while some states did require inspection of intrastate meat sales, they almost invariably governed only cured meat that was sold in barrels.[156] The third category consisted of inspection statutes that applied only to public markets.[157] The fourth category required only inspection of the slaughtered animal's ears and hide.[158] A fifth category provided for mandatory meat inspection, but only for meat sold in urban areas.[159] Sixth were the four states that passed mandatory meat inspection laws in the late 1880's, however, these statutes were not based on safety concerns. Rather, these laws were passed solely on economic grounds, and the Supreme Court almost immediately held these statutes to be unconstitutional in 1890, as will be discussed in Section V.C.2, *infra*.

Only the following four states and territories required either antemortem or postmortem inspection, or both, of all meat, fresh or cured, sold within the state by 1907: a) Arizona;[160] b) Massachusetts;[161] c) Oklaho-

154. HeinOnline has two important databases of historical state statutes. The first is its Session Laws Library, which "contains exact replications of the official bound session laws of all fifty states" back to inception. HEINONLINE, SESSION LAWS LIBRARY, http://heinonline.org/HeinDocs/DigitalSessionLaws.pdf (last visited Dec. 26, 2013). The second is the HeinOnline State Statutes: A Historical Archive, which contains superseded statutes for all fifty states going back to 1717. HEINONLINE STATUTES, A HISTORICAL ARCHIVE, http://heinonline.org/HOL/Welcome?collection=ssl (last visited Dec. 26, 2013). These databases give a nearly complete picture of state and colonial laws going back to the seventeenth century.

155. *See, e.g.*, Act to Regulate the Inspection of Beef and Pork, ch. CXLVIII (codified as 1821 Me. Laws 499).

156. *See, e.g.*, An Act to Provide for Inspecting Pork and Beef, 1840 Mo. Laws 92.

157. NOVAK, *supra* note 146, at 97.

158. *See, e.g.*, 1895 Tex. Rev. Civ. Stat. art. 4949.

159. *See, e.g.*, 1889 Ind. Acts 150 (codified as IND. CODE § 8145 (1881)), *invalidated by* State v. Klein, 126 Ind. 68, 25 N.E. 873 (1890); 1901 Mont. Laws 65 (codified as MONT. CODE ANN. §§ 1540-43 (1907)), *repealed by* 1921 Mont. Laws 582.

160. 1905 Ariz. Sess. Laws 65, 89 (codified as ARIZ. REV. STAT. § 3739 (1913)).

161. MASS. GEN. LAWS ch. 75, § 105 (1901).

ma;[162] and d) Utah.[163] This left forty-four states and territories with no comprehensive mandatory inspection requirements at that time.[164]

States remained reluctant to require comprehensive meat inspection until well into the twentieth century. Even as late as 1967, the year Congress enacted the Wholesome Meat Act, which required inspection of intrastate meat sales for the first time, only twenty-eight states had mandatory antemortem and postmortem meat inspection laws.[165] Moreover, at least six of those states had only passed their laws within the previous six years.[166] By 1967, about 15% of commercially slaughtered animals and 25% of commercially processed meat food products were sold intrastate, and so they were still not federally or state inspected to a significant degree.[167]

3. Meat Inspection: The Exemptions

Many states had exemptions in their meat inspection statutes large enough to drive a truck through. The statutes featured two types of exemptions: a) the farm slaughtered meat exemption; and b) the rural district, or "no inspector available" exemption. The ubiquity of the farm slaughtered exemption shows that many state legislatures had carefully considered the need to regulate meat sales, but affirmatively decided that the safety of farm slaughtered meat meant that it did not warrant regulation.[168]

The farm slaughtered exemption typically exempted all meat slaughtered by a farmer from otherwise mandatory state meat inspection. At least fourteen states had enacted such exemptions over the years. Of the twenty-eight states with mandatory meat inspection laws in 1967, twelve had farm or other type of local slaughtered exemption.[169] These statutes

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162. 1897 Okla. Sess. Laws 237, 246 (codified as OKLA. STAT. tit. 3, § 19 (1903)).

163. 1907 Utah Laws 223 (codified as UTAH CODE ANN. § 1990 (West 1917)).

164. South Dakota passed a comprehensive mandatory meat inspection law in 1905, but repealed it two years later. 1905 S.D. Sess. Laws 62, *repealed by* 1907 S.D. Sess. Laws 80.

165. FEDERAL MEAT INSPECTION ACT, H.R. REP. NO. 90-653, at 4 (1967).

166. 1967 Ark. Acts 761; 1965 Iowa Acts 264; 1967 Mo. Laws 371; 1967 Nev. Stat. 1350; 1961 N.C. Sess. Laws 900; 1966 Vt. Acts & Resolves 572.

167. FEDERAL MEAT INSPECTION ACT, H.R. REP. NO. 90-653, at 2 (1967).

168. Freightliner Corp. v. Myrick, 514 U.S. 280, 286 (1995).

169. California (CAL. AGRIC. CODE § 307 (Deering 1933), *as amended by* 1963 Cal. Stat. 1223); Illinois (1959 Ill. Laws 1944); Indiana (1967 Ind. Acts 1104); Iowa (1965 Iowa Acts 264); Michigan (MICH. COMP. LAWS § 327.111 (1948)); Missouri (1967 Mo. Laws 371); North Carolina (1937 N.C. Sess. Laws 459 and 1961 N.C. Sess. Laws 900); Oregon (1961 Or. Laws 156); Utah (1907 Utah Laws 223 (codified as UTAH CODE ANN. § 3-10-68 (1943), *as amended by* 1957 Utah Laws 24 (limiting consumption of meat to the farmer's own family)); Vermont (1966 Vt. Acts & Resolves 572); Wash-

were passed at various times from 1901 to as late as just months before the passage of the federal Wholesome Meat Act in 1967, and were from two of the top three cattle producing states in 1966, Iowa and California, and four of the top nine.[170] Two other states, Idaho and Montana, had passed meat inspection acts with farm slaughtered exemptions that were repealed or superseded before World War II.[171] Indiana also had a prior farm slaughtered exemption that was included in a state inspection statute that the Supreme Court invalidated in *Minnesota v. Barber* in 1890, as will be discussed in Section V.C.2, *infra*.[172] Thus, of all of the states that had even passed comprehensive meat inspection statutes prior to the passage of the comprehensive 1967 Wholesome Meat Act, fully half of them had specifically exempted farm or other locally slaughtered meat.

The second type of exemption was the rural district or "no inspector available" exemption. In states with this exemption, if no inspector was available or if an inspector could not conveniently get to the farm in question to inspect the meat, the farmer need not have the meat inspected before sale. Four states had enacted such statutes over the years: a) Colorado; b) Florida; c) Montana; and d) Oklahoma.[173]

That the American colonies and states had for centuries carefully and affirmatively regulated food safety is obvious from the plethora of such statutes. That many states carefully and affirmatively exempted fresh meat from inspection for hundreds of years is also obvious from the sheer number and scope of food safety statutes. The only way to buy fresh meat until after the Civil War was from one's local butcher, and, as discussed previously, no state required inspection of fresh meat for any reason until well after then. Because most states required inspection of goods other than fresh meat, putting two and two together tells us that state legislatures presumably considered whether fresh meat needed to be inspected, and concluded that it did not. Finally, that many states carefully and affirmatively

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ington (WASH. REV. CODE §16.49.210 (1951)); and West Virginia (1966 W. Va. Acts 685).

170. STATISTICAL REPORTING SERV, U.S. DEP'T OF AGRIC., LIVESTOCK SLAUGHTER 40 (1966).

171. Idaho (1911 Idaho Sess. Laws 607, *amended by* 1913 Idaho Sess. Laws 365 (codified as IDAHO CODE ANN. § 36-1326 (1932)), *superseded by* 1933 Idaho Sess. Laws 108); Montana (MONT. CODE ANN. § 1542 (1907), *repealed by* 1921 Mont. Laws 582).

172. IND. CODE § 8145 (1881), *invalidated by* State v. Klein, 126 Ind. 68, 25 N.E. 873 (1890).

173. 1889 Colo. Sess. Laws 244, *invalidated by* Schmidt v. People, 18 Colo. 78, 31 P. 498 (1892); 1885 Fla. Laws 57, *repealed by* 1891 Fla. Laws 84; 1901 Mont. Laws 65 (codified as MONT. CODE ANN. §§ 1540-43 (1907)), *repealed by* 1921 Mont. Laws 582; 1905 Okla. Sess. Laws 44, 47 (codified at OKLA. STAT. tit. 2 § 8807 (1931)).

exempted farm slaughtered meat from otherwise mandatory inspection is similarly apparent from the number of such exemptions. Thus, farm-to-consumer transactions can by no means be considered a traditionally unregulated area of commerce such that it is not deeply rooted in American history and tradition.

C. Federal Law Affirmatively Preserved the Consumer's Right to Purchase Meat Directly from the Farmer Without Inspection Until 1967

1. The Meat Inspection Acts

Consideration of the federal Meat Inspection Acts of 1890, 1891, 1906, and 1907, plus the 1938 amendment, dictates the same conclusion that can be drawn from the state laws; until 1967, Congress affirmatively regulated meat sales and affirmatively exempted farm slaughtered meat from regulation. The original Meat Inspection Act of 1890 was very limited, requiring inspection only of "salted pork and bacon intended for exportation."[174] The revised 1891 Act was more comprehensive, requiring inspection of all live cattle intended for export and antemortem inspection of "all cattle, sheep, and hogs which are subjects of interstate commerce and which are about to be slaughtered at slaughter-houses, canning, salting, packing or rendering establishments in any State or Territory."[175] Postmortem inspection was made optional.[176] The Act contained an explicit farm slaughtered exemption that stated that "none of the provisions of this act shall be so construed as to apply to any cattle, sheep, or swine slaughtered by any farmer upon his farm, which may be transported from one State or Territory or the District of Columbia into another State or Territory or the District of Columbia."[177]

The 1906 and 1907 Meat Inspection Acts[178] then reversed the 1891 Act's inspection requirements.[179] Previously, antemortem examinations of

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174. An Act Providing for an Inspection of Meats for Exportation, Prohibiting the Importation of Adulterated Articles of Food or Drink, and Authorizing the President to Make Proclamation in Certain Cases, and for Other Purposes, 26 Stat. 414 (1890).

175. An Act to Provide for the Inspection of Live Cattle, Hogs, and the Carcasses and Products Thereof Which are the Subjects of Interstate Commerce, and for Other Purposes, 26 Stat. 1089 (1891).

176. *Id.*

177. *Id.*

178. An Act Making Appropriations for the Department of Agriculture for the Fiscal Year Ending June Thirtieth, Nineteen Hundred and Seven, 34 Stat. 669, 674-79 (1906); An Act Making Appropriations for the Department of Agriculture for the Fiscal Year Ending June Thirtieth, Nineteenth Hundred and Eight, 34 Stat. 1256, 1260-65 (1907),

animals intended for interstate commerce had been compulsory, and postmortem examinations were discretionary. Now, postmortem inspections became mandatory and antemortem inspections became discretionary. Both Acts retained the farm slaughtered exemption. The 1907 Act stood, with only minor change, for sixty years until Congress replaced it in 1967 with the Wholesome Meat Act, which, for the first time, subjected all intrastate meat sales to mandatory inspection and also removed the farm slaughtered exemption for meat to be sold, substituting it with very limited exemptions from inspection for meat to be used exclusively by the farmer's family and for custom slaughtered beef.[180]

2. The History of the Meat Inspection Acts

The legislative history of the Meat Inspection Acts, combined with the history of non-Congressional events of those eras, shows that Congress had never been concerned about the safety of farm slaughtered meat and that it had "affirmatively determined that requiring [mandatory inspection of farm slaughtered beef] was substantively inappropriate."[181] Thus, these Acts do not raise the problem of the traditionally unregulated right questioned by Professor Barnett, *Abigail Alliance II*, and *Williams*.

a. *Economic Concerns, Not Safety, Drove the Passage of the First Meat Inspection Act*

The 1890 Act's legislative history reveals that it was not food safety concerns, but two unrelated economic concerns, that motivated Congress. First, Europe started boycotting American pigs and pork in 1879 due to alleged safety concerns.[182] Wanting to reclaim their business, the large meatpackers sought governmental inspection as a way to demonstrate the wholesomeness of their products.[183] Second, local butchers had been trying

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codified as 21 U.S.C. §71 (1925). The farm slaughtered exemption appeared at 21 U.S.C. § 91.

179. 29 Op. Att'y Gen. 355, 358 (1912).

180. Wholesome Meat Act, Pub. L. No. 90-201, 81 Stat. 584 (1967) (codified as 21 U.S.C. § 601 (2012)). The current exemption appears at 21 U.S.C. § 623.

181. Freightliner Corp. v. Myrick, 514 U.S. 280, 286 (1995) (stating that "the lack of federal regulation did not result from an affirmative decision of agency officials to refrain from regulating"); Lady v. Neal Glaser Marine, Inc., 228 F.3d 598, 612 (5th Cir. 2000) (applying *Freightliner* in a preemption case), *abrogated by* Sprietsma v. Mercury Marine, 537 U.S. 51 (2002).

182. CLEMEN, *supra* note 126, at 320; KOLKO, *supra* note 40, at 98; Barkan, *supra* note 142, at 23.

183. KOLKO, *supra* note 40, at 98; Kiehl & Rhodes, *supra* note 126, at 15.

to stave off the large meatpackers' intrusion into their markets by claiming that the national meatpackers slaughtered diseased cattle and that "dressed beef was unwholesome."[184] In the hopes of slowing the national meatpackers' incursion into their livelihood, they lobbied state governments to pass meat inspection laws requiring local antemortem inspection of cattle, ultimately convincing three states and one territory, Minnesota, Indiana, Colorado, and New Mexico, to pass such laws.[185] Nothing was said about food safety; the rationale for these laws was strictly economic.[186] Such a requirement would have made the interstate meat trade economically infeasible, and so the national meatpackers challenged the constitutionality of these laws, ultimately convincing the Supreme Court in 1890 to invalidate the laws on the grounds that they unfairly affected interstate commerce.[187] To solve these two problems, a Senate Committee (the Vest Committee) recommended in 1890 a national meat inspection scheme, as well as antitrust legislation (which became the Sherman Antitrust Act).[188] After *Barber*, the national meatpackers then joined the Vest Committee's call for federal inspection as a permanent solution to the problem of local inspection.[189]

Either way, no evidence of any significant health issues over domestic beef consumption emerged,[190] and the demand for federal meat inspection requirements was certainly "not because Congress had in view the protection of the people of this country from the result of eating diseased meats."[191] In fact, the House Agriculture Committee report on the 1890 meat inspection bill flatly stated that the Committee did not believe the European allegation of diseased pork and that it had no knowledge of the existence of disease in American pork, but that it was the Committee's duty to do what needed to be done to satisfy European concerns over American pork.[192]

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184. Libecap, *supra* note 110, at 244.

185. INSPECTION OF LIVE CATTLE, ETC., H.R. REP. NO. 51-3262, at 1 (1890); Libecap, *supra* note 110, at 253.

186. McCurdy, *supra* note 128, at 646.

187. Minnesota v. Barber, 136 U.S. 313 (1890); FIELDS, *supra* note 126, at 133-34.

188. Libecap, *supra* note 110, at 255.

189. McCurdy, *supra* note 128, at 643-48.

190. Libecap, *supra* note 110, at 246, 251.

191. CLEMEN, *supra* note 126, at 323.

192. FUNSTON, INSPECTION OF MEATS FOR EXPORTATION, ETC., H.R. REP. NO. 51-1792, at 1 (1890) (Conf. Rep.).

b. *Congress was not Concerned with the Safety of Farm Slaughtered Meat*

In passing the Meat Inspection Acts, Congress implicitly and explicitly concerned itself only with food safety at the big meatpacking plants, not with the safety of farm slaughtered fresh meat. For example, a clue to Congress's implicit intent comes from an unusual juxtaposition of Congressional findings for the 1891 Act. On the one hand, Congress acknowledged that the layman could not detect unsafe or unwholesome meat, but, on the other hand, in the same document, it considered inspection of farm slaughtered meat to be impractical. First, the House Commerce Committee, in considering the Senate bill that became the basis for the 1891 Act, quoted quite positively a letter from the Minnesota state veterinarian that opined that "it is impossible for the masses" to determine the safety of meat.[193] Nevertheless, the House subsequently "almost unanimously revolted"[194] against the Senate bill and demanded, among other changes, the farm slaughtered exemption, which had not been in the original bill,[195] as the price of passing the 1891 Act.[196] The most reasonable inference to draw from this combination of statements is that Congress simply was not concerned with any safety issues from farm slaughtered meat. Otherwise, how else could the House pronounce the average consumer incapable of ascertaining meat quality, but then allow farm slaughtered meat to be sold to the consumer without inspection?

The year of 1906 proved no different. A House Committee report that year pleaded that "the most rigid inspection of the meat and meat food products which constitute so large a part of the food of the country must be insured."[197] But the plea fell on deaf ears. The Committee approved the continued exemption from inspection of farm slaughtered meat.[198]

More explicitly that year, in the House Agriculture Committee hearings for an amendment (the Beveridge Amendment) to the bill that became the 1906 Act, a Department of Agriculture solicitor, George P. McCabe, testified that "[t]he impression that we have had in regard to that is that this legislation was directed toward the proprietors of canning, slaughtering,

193. STOCKBRIDGE, INSPECTION OF LIVE CATTLE, ETC., H.R. REP. NO. 51-3262, at 1 (1890) (Conf. Rep.).
194. 22 CONG. REC. 43,713 (1891).
195. 22 CONG. REC. 1422 (1891).
196. HATCHER, INSPECTION OF LIVE CATTLE, ETC., H.R. REP. NO. 51-3761, at 1 (1891) (Conf. Rep.).
197. WADSWORTH, AMENDMENTS TO AGRICULTURE APPROPRIATION BILL, H.R. REP. NO. 59-4953, at 5 (1906) (Conf. Rep.).
198. *Id.*

rendering, and packing establishments."[199] For McCabe, the conditions in the Chicago packing houses were the single reason for the passage of the Meat Inspection Act.[200] In fact, "Conditions in Chicago Stock Yards" was the running header of the hearing testimony published by the House Agriculture Committee.[201]

President Roosevelt agreed with McCabe. The only area of concern to the President was the conditions in the Chicago stock yards.[202] A 1906 Attorney General opinion confirmed that:

> [i]t is well known that [the 1906 Meat Inspection Act] was enacted by Congress immediately in response to the message of the President of June 4, 1906, transmitting the report of Messrs. Reynolds and Neill, who had been appointed by him to investigate the conditions in the Chicago stock yards and packing houses.[203]

And even when focus is limited to the conditions in the Chicago stockyards, freshly slaughtered (dressed) beef was not a concern; it was only packaged beef that people were worried about. Solicitor McCabe later wrote that, "[a]t no time during the investigation of the packing-house conditions was there any considerable complaint against fresh meats (which would have included farm slaughtered meat). The criticism was directed

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199. *Hearings Before the Committee on Agriculture on the So-called "Beveridge Amendment" to the Agricultural Appropriation Bill (H.R. 1853) as Passed by the Senate May 25, 1906 – To Which are Added Various Documents Bearing Upon the "Beveridge Amendment,"* 59th Cong. 93 (1906) (statement of George P. McCabe, Solicitor for the Department of Agriculture) [hereinafter *Hearings on the Beveridge Amendment*].

200. George P. McCabe, *The New Meat-Inspection Law and its Bearing Upon the Production and Handling of Meats,* 101 U.S. DEP'T OF AGRIC. BUREAU OF ANIMAL INDUS. CIRCULAR 5, 14 (1907).

201. *See Hearings on the Beveridge Amendment*, *supra* note 199, at 261.

202. *Id.*

203. 26 Op. Att'y Gen. 50, 51 (1906). Later, an opinion repeated this position, stating that:

> [t]he meat inspection and sanitation provisions were . . . introduced late in the debate and was directed to curing the "evils" of the packing industry. The debate in the Senate centered not on the types of establishments to be subjected to the inspection and sanitation requirements, but on the issue of whether the "packers" or the federal government should pay the costs of inspection.

42 Op. Att'y Gen. 459, 462 (1972).

against conditions of filth and uncleanliness in the preparation and handling of prepared meat-food products."[204]

The following year, the Chief of the Department of Agriculture's Bureau of Animal Industry, Dr. Alonzo D. Melvin, testified in the committee hearings for the 1907 Act in response to questions about whether the previous year's exposé of unsafe conditions in the meatpacking industry (as depicted in Upton Sinclair's *The Jungle*) had affected American meat exports. He testified that, "I think that the meat that was affected by this agitation was almost entirely confined to canned meats. I do not think our fresh meat suffered at all."[205] Farmers, of course, produced fresh meat.

Three decades later, Congress amended the Meat Inspection Act.[206] It was a minor amendment, but it should be interpreted as another affirmative Congressional statement of confidence of the safety of farm-raised meat. The amendment was passed in order to define the term "farmer," because unscrupulous livestock buyers were buying unwholesome calves and taking advantage of the farm slaughtered exemption (which also included a limited retailer exemption) to sell them without inspection.[207] Congress could have shut the whole thing down right then and there; it could have simply eliminated the farm slaughtered exemption and moved on. But it did not. The amendment was an unspoken Congressional vote of confidence in the farmer's continued ability to provide safe meat for the consumer.

Finally, and significantly, at no point in any of the Congressional debates on any of the four Meat Inspection Acts did any legislator raise any concerns over the safety of farm slaughtered meat.[208] Nor did Congress, when it eliminated the farm slaughtered exemption in 1967, express any concerns over the safety of farm slaughtered meat.[209]

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204. McCabe, *supra* note 200, at 14.

205. *Hearings Before the Committee on Agriculture on the Estimates of Appropriations for the Department of Agriculture for the Fiscal Year Ending June 30, 1908*, 59th Cong. 244 (1907) (statement of Alonzo D. Melvin, Chief of the Bureau of Animal Industry).

206. Meat Inspection Act of March 4, 1907, 34 Stat. 1260 (codified as 21 U.S.C. § 71).

207. FLANNAGAN, AMEND. MEAT INSPECTION ACT, H.R. REP. NO. 75-2310, at 3 (1938) (Conf. Rep.).

208. GEORGE P. MCCABE, U. S. DEP'T OF AGRIC., INDEX TO LEGISLATIVE HISTORY OF ACTS OF CONGRESS INVOLVING THE UNITED STATES DEPARTMENT OF AGRICULTURE 1, 6-7, 26-27, 30 (1912). This publication contains an index to the Congressional debates for, among other acts, the four Meat Inspection Acts. With this document as a guide, I was able to read the Congressional debates for the Meat Inspection Acts. Whenever any Congressman raised food safety, it was always about the meatpackers. There were no negative statements about farm-raised meat.

209. *See, e.g.*, 113 CONG. REC. 30,508-551 (1967).

This evidence is more than sufficient to show that farm raised meat is not a traditionally unregulated right. For eight decades, Congress had considered national meat safety and always believed that farmers could be trusted to raise and produce safe meat.

D. *Farm Slaughtered Meat: The Statistics*

Farm slaughtered meat was still very common at the turn of the twentieth century. By 1903, 11% of American cattle was still farm slaughtered.[210] By 1909, after the passage of the 1906 and 1907 Meat Inspection Acts, that figure had decreased only slightly, to 10.3%.[211] However, it was far higher for veal calves (17.4% of the total) and for hogs (28.9% of the total).[212] By 1916, farm slaughtered cattle maintained a substantial presence in many states, including New Hampshire (13% of the total), Maine (12.3%), North Carolina (11.7%), and Florida (11.0%).[213] While farm slaughtered animals were generally sold to local butchers, farmers would still sell them on the farm directly to consumers at that time.[214] The amount of farm slaughtered beef decreased substantially during the twentieth century, but even as late as 1961, six years before the passage of the 1967 federal Wholesome Meat Act, farmers still farm slaughtered 3.2% of American cattle, and, in 1965, 2.5% of cattle were still farm slaughtered.[215]

E. *Poultry Develops from a Trade to an Industry*

Poultry was a strictly local commodity that did not become big business until well after World War II.[216] As late as the early 1920's, there was still no American poultry industry to speak of.[217] Approximately 90% of all American farms as of that time kept a small flock of chickens for eggs; chicken sales in this era were primarily a byproduct of egg produc-

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210. HALL ET AL., *supra* note 145, at 16.
211. *Id.* at 12.
212. *Id.* at 15.
213. *Id.* at 8-9.
214. *Id.* at 60.
215. STATISTICAL REPORTING SERV, U.S. DEP'T OF AGRIC., *supra* note 170, at 5.
216. 103 CONG. REC. 11,123 (1957) (statement of Rep. Leonor Sullivan); STEVE STRIFFLER, CHICKEN: THE DANGEROUS TRANSFORMATION OF AMERICA'S FAVORITE FOOD 32 (2005); 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).
217. Marc Linder, *I Gave My Employer a Chicken that Had No Bone: Joint Firm-State Responsibility for Line-Speed-Related Occupational Injuries*, 46 CASE W. RES. L. REV. 33, 43 (1995).

tion.[218] The modern broiler industry began in the mid 1920's in Delaware, although it was not until the 1940's and 1950's that it really began to take off due in part to American war policies and price subsidies during World War II.[219] One can better appreciate how the broiler industry went from zero to a chicken in every pot by taking in the consumption statistics—from 0.5 pounds of chicken eaten per capita in 1934 to 60.3 pounds per capita in 1987.[220]

1. State Poultry Inspection Statutes

Even as late as 1968, only twelve states had mandatory poultry inspection laws, and only four had active inspection programs.[221] Moreover, eight of those twelve states exempted either farm slaughtered poultry or poultry sold very locally.[222] A total of 13% of American poultry was still slaughtered without federal inspection at that time.[223] However, this paucity of regulation should still not be interpreted as a traditionally unregulated industry. As stated above, poultry was barely an industry until the Great Depression; Americans simply did not eat poultry in any significant amount until after World War II. They ate eggs and the occasional chicken. Accordingly, poultry was not a traditionally unregulated industry; rather, it had not been an industry at all until the 1930's and 1940's. To be

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218. *Hearings Before the Subcommittee on Legislation Affecting the Food and Drug Administration of the Committee on Labor and Public Welfare,* 84th Cong. 23 (1956) (statement of Earl L. Butz, Assistant Secretary of Agriculture) [hereinafter Statement of Earl L. Butz]; WRIGHT PATMEN ET AL., PROBLEMS IN THE POULTRY INDUSTRY, H.R. REP. NO. 85-2717, at 2 (1959); DONALD D. STULL & MICHAEL J. BROADWAY, SLAUGHTERHOUSE BLUES: THE MEAT AND POULTRY INDUSTRY IN NORTH AMERICA 43-44 (2nd ed. 2013).

219. Statement of Earl L. Butz, *supra* note 218, at 23. (noting that "[c]ommercial broiler production was hardly recognized as an industry in the late thirties"); STRIFFLER, *supra* note 216, at 33-35, 43.

220. FLOYD A. LASLEY ET AL., U.S. DEP'T OF AGRIC., AGRICULTURAL ECONOMIC REPORT NO. 591: THE U.S. BROILER INDUSTRY 8-9 (1988).

221. WHOLESOME POULTRY PRODUCTS ACT, H.R. REP. NO. 90-1333, at 4 (1968) (Conf. Rep.).

222. California (1955 Cal Stat. 3417, 3418-19), Delaware (191 Del. Laws 628, 638 (1967)), Illinois (1959 Ill. Laws 1944), Iowa (1965 Iowa Acts 264), and Missouri (1967 Mo. Laws 371) had straightforward farm slaughtered exemptions. Indiana (1967 Ind. Acts 1104) and North Carolina (1961 N.C. Sess. Laws 1183, 1184) exempted intra-country poultry sales from inspection. Tennessee exempted farm slaughtered poultry from inspection when the farmers slaughtered the animals for their own consumption and sold the excess directly to consumers. 1967 Tenn. Pub. Acts 261.

223. WHOLESOME POULTRY PRODUCTS ACT, S. REP. NO. 90-1449, at 3 (1968) (Conf. Rep.).

concerned with the lack of poultry regulations before World War II would be equivalent to being concerned with the lack of internet regulations prior to the 1990's. Then, once the industry arose, governmental regulation followed. But, just as with meat inspection, a substantial number – in fact, a majority – of state poultry inspection statutes recognized the safety of farm slaughtered or locally raised poultry and exempted such poultry from otherwise mandatory inspection.

2. The Poultry Inspection Acts

Although an early draft of the 1906 meat inspection bill called for poultry inspection, only meat remained in the final bill,[224] and so the Poultry Products Inspection Act of 1957 became the first federal poultry inspection act.[225] The Act required both antemortem and postmortem inspection of all poultry slaughtered in "any official establishment processing poultry or poultry products for commerce or in, or for marketing in a designated city or area."[226] Like the Meat Inspection Acts, the Poultry Products Inspection Act exempted from inspection poultry raised by poultry producers on their own farms which are sold directly to household consumers or restaurants, hotels, and boarding houses for use in their own dining rooms or in the preparation of meals for sales direct to consumers only.[227] But only eleven years later, Congress passed the Wholesome Poultry Products Act, which substantially limited the farm slaughtered exemption.[228] As rewritten, the Act exempted farm slaughtered poultry from inspection only for farmers who slaughter or process the products of more than 5000 turkeys or 20,000 chickens or other domesticated birds per year.[229] Congress later revised the exemption to eliminate the chicken and turkey distinction, and the exemption now applies to all farmers who slaughter fewer than 20,000 birds per year.[230]

224. KOLKO, *supra* note 40, at 104.
225. Poultry Products Inspection Act, Pub. L. No. 85-172, 71 Stat. 441 (1957) (codified as 21 U.S.C. §451 (1958)).
226. *Id.* at § 6(a).
227. *Id.* at § 15(a)(1).
228. Wholesome Poultry Products Act, Pub. L. No. 90-492, 82 Stat. 791 (1968) (codified as 21 U.S.C. §451 (2012)).
229. *Id.* at § 14(c)(3).
230. 21 U.S.C. § 464(c)(1)(A-D) (2006).

3. The Poultry Inspection Acts: Legislative History

In debating the Poultry Inspection Acts, Congress strongly vouched for the safety of farm raised and slaughtered poultry. Congressmen and Congresswomen went out of their way to emphasize the safety of the poultry raised by the local farmer. For example, in debating the 1957 Act, several legislators pointedly recounted, without rebuttal, how they and their neighbors would buy their poultry from the local farmer without any need for inspection and without any safety concerns over potentially unsanitary processing.[231] It was Congresswoman Leonor Sullivan who hit the nail right on the head by stating:

> Now let me explain how the need for this poultry legislation has arisen. One might ask why we suddenly need poultry inspection laws when we have managed to get along for 51 years since the passage of the Meat Inspection Act without having poultry included along with the red meats—beef, pork, lamb—under a compulsory inspection system.
>
> There are two answers to that question. One is that until food technology and refrigeration engineering made possible freezing and nationwide distribution of poultry by big firms, you usually bought a chicken or turkey raised not far from where you lived, and sold by a farmer from his truck or sold by a neighborhood storekeeper whom you knew had a good reliable supplier from a nearby farm.
>
> But in recent years, poultry has gone bigtime and big business. The small farmer is not a factor. As a matter of fact, under this bill, the farmer can still raise his chickens and take them to town and sell them directly to the housewife without having to worry about inspection. But when you buy his poultry you know where that chicken comes from.[232]

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231. *Hearings Before the Subcommittee on Legislation Affecting the Food and Drug Administration of the Committee on Labor and Public Welfare United States Senate*, 84th Cong. 2 (1956) (statement of Senator James Murray) (stating that "I have been convinced that S. 3176 should be amended to exempt from inspection poultry slaughtered, dressed, and sold to the ultimate consumer by farmers themselves"); 103 CONG. REC. 11,122-123 (1957) (statements of Congresswomen Cornelia Knutson and Leonor Sullivan).

232. 103 CONG. REC. 11,123 (1957).

Congresswoman Sullivan told the truth that dared not to be told. Small and local was safer than big and distant, or so people believed. As was seen in Section I, *supra*, this is one of the factors that now drives the local food movement.

The House Agriculture Committee's formal reason for the farm slaughtered exemption was twofold and particularly telling: first, it did not want to burden small farmers "who are marketing wholesome poultry products" as a side business, and second, requiring inspection of all poultry sold in the country would simply be impracticable.[233] The Committee thus assumed that the small farmers would be marketing wholesome poultry products.

F. *Conclusion*

The main conclusion to be drawn from the history of the Meat and Poultry Inspection Acts is that meat has been subject to heavy governmental regulation since the 1600's, but that governments, both state and federal, maintained a hands-off approach to farm to consumer meat transactions until relatively recently in our history. There was far less government regulation of poultry throughout the years, but there was also far less commerce in poultry. Once the poultry trade matured into an industry, governmental regulation appeared to control it, again with a hands-off approach to farm to consumer poultry transactions. For these reasons, Americans can make a strong argument that they have a deeply rooted tradition of purchasing meat and poultry directly from their local farmer without governmental interference.

VI. THE CONSUMER'S RIGHT TO PURCHASE MEAT AND POULTRY DIRECTLY FROM THE FARMER WITHOUT MANDATORY GOVERNMENT INSPECTION IS A FUNDAMENTAL RIGHT

In Section IV, I defined the proposed right carefully. In Section V, I showed that the right is deeply rooted in American history and tradition. Now we will see that the right to purchase meat and poultry of one's choice directly from the farmer who raised the animals, without mandatory governmental inspection, is indeed a fundamental liberty right protected by the Due Process Clauses of the U.S. Constitution.

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233. WHOLESOME POULTRY PRODUCTS ACT, H.R. REP. NO. 90-1333, at 14 (1968) (Conf. Rep.).

A. *The Surprisingly Inclusive Definitions of Liberty and Privacy*

The Supreme Court has defined liberty very broadly over the years. One seeking to show that he has a protected right to purchase food of his choice directly from the farmer or producer, or that food choice is essential to one's self-identity or self-expression, can point to many expansive definitions of the concept over the years. A logical starting point is the Supreme Court's famous 1923 definition, in which it stated that liberty:

> denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[234]

Given that American history and traditions have long included the right to purchase meat and poultry directly from the farmer without governmental interference, the common law surely recognizes that activity as essential to the orderly pursuit of happiness by free men. And with respect to the pursuit of happiness, our most philosophical Founding Father, Thomas Jefferson, who knew a little about that quest, once warned that:

> [t]he legitimate powers of government extend to such acts only as are injurious to others. . . . Was the government to prescribe to us our medicine and diet, our bodies would be in such keeping as our souls are now. Thus in France the emetic was once forbidden as medicine, and the potatoe as an article of food.[235]

Today, by barring the door to the purchase of farm slaughtered meat and poultry without governmental interference, governments are, as Jefferson counseled against, prescribing our diet to us.

Governmental prohibition of private farm to consumer transactions also limits Americans' liberty to take the risks that they wish to take. As food lawyer Peter Hutt wrote:

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234. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

235. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 235-36 (3d American Ed. 1801).

> even the most unsophisticated citizen can readily determine that the risks from some of the dangers charged to the food supply are far smaller than the risks that we willingly accept without question as we go about our daily business. . . . Since we are free to choose or reject many other risks, it is difficult for the public to perceive why we should not also be free to choose, on an individual basis, the risks that we will accept in the food we eat.[236]

All forms of living entail some amount of risk. To the extent that eating uninspected, farm slaughtered meat and poultry is riskier than consuming industrial meat and poultry from Big Food, which is a subject beyond the scope of this article, it should be for the consumer to determine how much governmental protection and how much risk she wants.

The Food and Drug Administration's (FDA) Assistant Commissioner for Professional and Consumer Programs acknowledged decades ago that "[c]onsumers want to know, 'How much risk exists?' At the same time, they want to retain the right to take risks, if they feel the benefits are great enough," and that "[r]ealistically, we know that consumers do not and will not have their food habits dictated to them by a regulatory agency."[237] The then Acting Director of the FDA's Bureau of Foods bluntly stated that "we should stop pretending that absolute safety for food is possible. It isn't, for there is virtually no food that is without some risk to some person. We should acknowledge and explain this to the public."[238] A dissenting opinion from the Minnesota Supreme Court in a dispute over the sale of uninspected meat touched on this issue, perhaps even touching a nerve with a demand for the evidence of comparative risk between farm slaughtered meat and Big Food's meat, opining that:

> [d]espite the fact that custom processors may return uninspected, processed meats to an unlimited number of qualifying persons for individual use, a farmer may not sell his own custom-processed meats to the public. If the former does not present a public health risk, it is difficult to see

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236. Peter Barton Hutt, *The Basis and Purpose of Government Regulation of Adulteration and Misbranding of Food*, 33 FOOD DRUG COSM. L.J. 505, 528 (1978).

237. William V. Whitehorn, *Consumer Interests – Do We Get the Foods We Want?*, 31 FOOD DRUG COSM. L.J. 656, 657, 661 (1976).

238. Peter Barton Hutt, *Unresolved Issues in the Conflict between Individual Freedom and Government Control of Food Safety*, 33 FOOD DRUG COSM. L.J. 558, 563 (1978) (citing 124 CONG. REC. E1310 (1978)).

> how the latter does, especially considering the low volume of sales normally associated with sales by a single farmer.[239]

B. *Liberty and Philosophy*

For the philosophers, the idea of liberty means that a person has "the 'right' to make his own choices no matter how foolish or self-defeating such choices may be."[240] Advocates of this school of thought included John Locke, "the ideological father of the American revolution,"[241] and John Stuart Mill, the great nineteenth century proponent of liberty. For Locke, "individuals do not give up to the government those rights of self-autonomy that do not threaten to invade the rights of others or to cause harm to others."[242] Mill wrote more explicitly, stating that:

> the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise or even right.[243]

Liberty, for Mill, clearly "entails the right to make bad decisions and poor choices."[244] According to Mill, "[t]he only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign."[245] While the Supreme Court has not explicitly adopted this position,

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239. Minnesota v. Hartmann, 700 N.W.2d 449, 461 (Minn. 2005) (G. Barry Anderson, J., dissenting).

240. ROBERT YOUNG, PERSONAL AUTONOMY: BEYOND NEGATIVE AND POSITIVE LIBERTY 63 (1986).

241. In re Cincinnati Radiation Litigation, 874 F. Supp. 796, 815 (S.D. Ohio 1995).

242. Mark C. Niles, *Ninth Amendment Adjudication: An Alternative To Substantive Due Process Analysis Of Personal Autonomy Rights*, 48 UCLA L. REV. 85, 112-13 (2000); Kevin S. Toll, *The Ninth Amendment and America's Unconstitutional War on Drugs*, 84 U. DET. MERCY L. REV. 417, 420 (2007).

243. John Stuart Mill, *On Liberty*, in THREE ESSAYS 5, 15 (1966).

244. THOMAS FLEINER-GERSTER & LIDIJA R. BASTA FLEINER, CONSTITUTIONAL DEMOCRACY IN A MULTICULTURAL AND GLOBALISED WORLD 205 (2009).

245. Mill, *supra* note 243.

lower courts have traced the modern American notions of personal autonomy and the right of self-determination back to Locke and Mill's ideas on liberty.[246] At least several lower court judges have explicitly agreed with Mill's idea that liberty grants one the right to be wrong.[247] Locke's and Mill's views on liberty and autonomy thus clearly point the way to a constitutional right to be free from governmental involvement in a private farm to consumer meat or poultry sale.

However, the food rights advocate should be aware that Mill is not the last word on liberty. Although courts, including the Supreme Court, have invoked Mill from time to time,[248] Supreme Court Justice Powell, sitting by designation on the Eleventh Circuit after his retirement from the Supreme Court, sniffed that "the impressive pedigree of [Mill's] political ideal does not readily translate into a constitutional right."[249]

C. *Liberty Includes the Right to Self-Identity*

In 1984, the Supreme Court explicitly included self-identity within the ambit of protected liberty interests, holding in a case involving the right to association that the ability to "define one's identity" is "central to any concept of liberty."[250] Another indispensable element of liberty is the abil-

246. *See, e.g., In re Cincinnati Radiation Litigation*, 874 F. Supp. at 815-16; Armstrong v. State, 989 P.2d 364, 372-73 (Mont. 1999); Brophy v. New England Sinai Hospital, Inc., 497 N.E.2d 626, 633 (Mass. 1986); In re Gardner, 534 A.2d 947, 950 (Me. 1987).

247. In re Fisher, 552 N.Y.S.2d 807, 813 n. 17 (N.Y. Sup. Ct. 1989) (noting that "[t]he fact that someone else might, or could make better choices is not the point. In a constitutional system such as ours which prizes and protects individual liberties to make decisions, even bad ones, the right to make those decisions must be preserved"); Richards v. State, 743 S.W.2d 747, 751 (Tex. Ct. App. 1987) (noting that "'[l]iberty' also necessarily implies one's acceptance of the risks involved in being free to make mistakes, to be foolish, to err, to blunder, without being punished by the social organization unless harm is thereby inflicted on others") (Levy, J., dissenting); State v. Betts, 21 Ohio Misc. 175, 184 (1969) (noting that "[i]ncluded in man's 'liberty' is the freedom to be as foolish, foolhardy or reckless as he may wish, so long as others are not endangered thereby. The State of Ohio has no legitimate concern with whether or not an individual cracks his skull while motorcycling; that is his personal risk").

248. *See, e.g.*, Furman v. Georgia, 408 U.S. 465, 467 (1972) (Rehnquist, J., dissenting) (stating that "[t]he Framers of the Constitution would doubtless have agreed with the great English political philosopher John Stuart Mill"); New York Times Co. v. Sullivan, 376 U.S. 254, 272 n. 13 (1964).

249. Picou v. Gillum, 874 F.2d 1519, 1522 (11th Cir. 1989); *see also* Williams v. Attorney Gen. of Ala., 378 F.3d 1232, 1240 (11th Cir. 2004) (stating that "[r]egardless of [Mill's] force as a policy argument, however, it does not translate *ipse dixit* into a constitutionally cognizable standard").

250. Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984).

ity to further personal bonds "by cultivating and transmitting shared ideals and beliefs."[251] Then there is the plurality opinion in *Casey*, which stated that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[252] The right to define one's own concept of existence surely includes the right to decide what foods one wants to eat and where and how one wants to purchase them. [253] *Lawrence* continued this theme, holding that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct . . . [both in] its spatial and in its more transcendent dimensions."[254] Even brief definitions from the Supreme Court include such pronouncements as: "[i]n a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed,"[255] and liberty "extends to the full range of conduct which the individual is free to pursue."[256] Once again, the full range of conduct that one might want to pursue is buying one's meat and poultry in a private transaction, without governmental interference, from the farmer who raised the animals.

D. *Liberty Includes the Right to Self-Expression*

Americans' liberty rights have long since included self-expression.[257] As the Supreme Court has held, "it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."[258]

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251. *Id.*

252. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

253. *See* Alan Rubel, *Local Trans Fats Bans and Consumer Autonomy*, 10 AM. J. BIOETHICS 41, 42 (2010) (stating that "[t]he freedom to choose what we eat is important insofar as it is a function of persons' autonomy over their food choices. That is, personal autonomy is what underwrites the value of choosing what we eat.").

254. Lawrence v. Texas, 539 U.S. 558, 562 (2003).

255. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 572 (1972).

256. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

257. Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, 847 F. Supp. 178, 196 (D. Mass. 1994) (noting that "[o]f course, the party seeking to communicate has an individual liberty interest in self-expression.").

258. Bridges v. California, 314 U.S. 252, 270 (1941); *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 783 (1985) (stating that "[t]he free speech guarantee gives each citizen an equal right to self-expression").

E. *Concurring and Dissenting Supreme Court and Lower Court Opinions on Liberty are Even Broader*

Concurring and dissenting opinions from the Supreme Court have been particularly far reaching. Justice Blackmun wrote in *Casey* that "personal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of government."[259] Concurring in *Glucksberg*, Justice Stevens cited his earlier Seventh Circuit holding that the liberty clause "brings to mind the origins of the American heritage of freedom – the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable.'"[260] Justice Douglas' concurring opinion in *Doe v. Bolton*, the companion case to *Roe v. Wade*, contains as broad a definition of liberty as has been seen in American jurisprudence. For Justice Douglas, liberty includes, among other rights: a) "the autonomous control over the development and expression of one's intellect, interests, tastes, and personality;" and b) "the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf."[261]

Appellate decisions also paint with a broad brush. In reversing summary judgment for the defendant police department in a hair grooming case, the Second Circuit held that "[p]ersonal liberty is not composed simply and only of freedoms held to be fundamental but includes the freedom to make and act on less significant personal decisions without arbitrary government interference."[262] In another hair length case, the First Circuit held that liberty "seems to us an incomplete protection if it encompasses only the right to do momentous acts, leaving the state free to interfere with those personal aspects of our lives which have no direct bearing on the ability of others to enjoy their liberty."[263] Given that food choice is somewhat less momentous than such life-altering decisions as abortion or marriage,

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259. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 927 (1992) (Blackmun, J., concurring and dissenting).

260. Washington v. Glucksberg, 521 U.S. 702, 744-45 (1997) (Stevens, J., concurring) (quoting Fitzgerald v. Porter Mem'l Hosp., 523 F.2d 716, 719-20 (7th Cir. 1975) (footnotes omitted).

261. Doe v. Bolton, 410 U.S. 179, 211-13 (1973) (Douglas, J., concurring). A federal judge cited this concurrence in ruling that the constitutional liberty guarantee protected parents' right to name their child whatever they wanted. Jech v. Burch, 466 F. Supp. 714, 719 (D. Haw. 1979).

262. Dwen v. Barry, 483 F.2d 1126, 1130 (2d Cir. 1973); *see also* BAM Historic Dist. Ass'n v. Koch, 723 F.2d 233, 237 (2d Cir. 1983) (stating that liberty "includes the opportunity to make a range of personal decisions concerning one's life, family, and private pursuits").

263. Richards v. Thurston, 424 F.2d 1281, 1284-85 (1st Cir. 1970).

Dwen and *Richards*, as well as Justice Douglas's *Doe* concurrence, protect a right to food choice by showing that our constitutional liberty rights protect the smaller things in life as well as the big.

F. *Defining Privacy*

The Supreme Court has recognized two separate types of privacy rights: a) "the individual interest in avoiding disclosure of personal matters;" and b) "the interest in independence in making certain kinds of important decisions."[264] The first right is often referred to as the "confidentiality" branch, and the second the "autonomy" branch.[265] Only the autonomy branch is relevant for the practitioner advocating a consumer's right to food choice. While the Court has not defined the "outer limits" of the right to privacy,[266] it has only explicitly found privacy rights in matters involving marriage, procreation, contraception, family relationships, and childrearing and education.[267] However, Justice Douglas would add to the right to privacy "the privilege of an individual to plan his own affairs, for, 'outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases.'"[268]

Lower courts have made clear that, at least in the medical treatment context, the right to privacy means "the sanctity of individual free choice and self-determination."[269] In finding a privacy right in a patient's right to receive acupuncture from a traditional acupuncture practitioner, as opposed to a licensed physician, the Southern District of Texas in *Andrews v. Ballard* defined *Carey's* "important decision" requirement as a decision that "must profoundly affect one's development or one's life."[270] *Andrews'* reasoning is helpful to the food rights campaign. If choices in food are important decisions, perhaps even very important decisions that profoundly affect one's life, then certainly our constitutional right to privacy should protect such choices.

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264. Carey v. Population Servs. Int'l, 431 U.S. 678, 684 (1977); Whalen v. Roe, 429 U.S. 589, 599-600 (1977).

265. Pouliot v. Town of Fairfield, 226 F. Supp.2d 233, 247 (D. Me. 2002).

266. *Carey,* 431 U.S. at 684-85.

267. Roe v. Wade, 410 U.S. 113, 152-53 (1973).

268. Doe v. Bolton, 410 U.S. 179, 213 (1973) (Douglas, J., concurring).

269. Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 426 (Mass. 1977).

270. Andrews v. Ballard, 498 F. Supp. 1038, 1046 (S.D. Tex. 1980).

G. *You Are What You Eat: Food Choice as a Part of Self-Identity and Self-Expression*

1. What are Self-Identity and Self-Expression?

As an academic term, "self-identity refers to the understanding that an individual has of himself or herself."[271] Another way to put it is that self-identity is one's "life story."[272] Self-expression is closely related to self-identity. Then, if self-identity is one's life story, self-expression is telling one's life story to someone else; it is the "assertion of one's individual traits."[273] A person might use his self-identity and self-expression to answer the question, "who am I?"[274] And, in academia, the question "who am I?" necessarily incorporates the question "what do I eat?"

2. What is Food Choice?

Modern sociological research has confirmed the obvious; you truly are what you eat. Human food preferences are some of the oldest human inclinations; in fact, food choice is "close to the center of [human] self-definition."[275] It is religious and cultural expression.[276] For millennia, humans have traditionally thought of food choice as a means of distinguishing between their tribe, group, or culture and the alien, enemy tribes or groups.[277] Modern social science research recognizes that food choice is "fundamental to our sense of self,"[278] a method of assigning identity to oneself and to others,[279] a way to act upon one's personal ideologies,[280] a

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271. RONALD L. JACKSON II, ED., 1 ENCYCLOPEDIA OF IDENTITY 547 (2010).
272. *Id.*
273. Heejung S. Kim & David K. Sherman, *"Express Yourself": Culture and the Effect of Self-Expression on Choice*, 92 J. PERSONALITY & SOC. PSYCHOL. 1, 1 (2007) (quoting MERRIAM-WEBSTER DICTIONARY (2006)).
274. *E.g.*, PAMELA GOYAN KITTLER & KATHRYN P. SUCHER, FOOD AND CULTURE 15 (4th ed. 2004); Jostein Rise et al., *The Role of Self-Identity in the Theory of Planned Behavior: A Meta-Analysis*, 40 J. APPLIED SOC. PSYCHOL. 1085, 1087 (2010).
275. SIDNEY W. MINTZ, SWEETNESS AND POWER: THE PLACE OF SUGAR IN MODERN HISTORY 3 (1986).
276. *See* Rencher, *supra* note 23, at 431-36.
277. *Id.*
278. Avi Brisman, *Fair Fare? Food as Contested Terrain in U.S. Prisons and Jails*, 15 GEO. J. ON POVERTY L. & POL'Y 49, 52 (2008).
279. Bisogni, *supra* note 12, at 129.
280. J. Pollard et al., *Factors Affecting Food Choice in Relation to Fruit and Vegetable Intake: A Review*, 15 NUTRITION RES. REV. 373, 381-82 (2002).

way to make sense of the world,[281] a political statement,[282] and a way to create meaning in one's life.[283] Food choice is "a basic form of self-creating, self-expression, and self-definition."[284] It is so basic that the "correlation between what people eat, how others perceive them, and how they characterize themselves [has been called] striking."[285] Even a brief review of the social science literature on the subject shows that there are no contrary views.

3. Social Science is Valid Evidence

While American courts have not yet acknowledged food choice as a component of self-identity or self-expression, this does not necessarily preclude the possibility in the future. American jurisprudence unquestionably accepts social science opinions. For more than a century, the Supreme Court has employed social science opinions in constitutional disputes,[286] notably utilizing it in *Brown v. Board of Education*, in which it cited numerous such studies in support of its opinion.[287] Since *Brown*, the Court has frequently consulted social science research in cases involving school desegregation, the death penalty, obscenity, and juvenile delinquency, among other topics.[288] As of 1986, all nine sitting Justices of the Supreme Court had "either authored or joined opinions using social science research to establish or criticize a rule of law."[289] Parties can present social science research through expert testimony or include it in a brief (e.g., the famous "Brandeis" brief),[290] although such evidence would certainly be more cred-

281. Bruce Pietrykowski, *You Are What You Eat: The Social Economy of the Slow Food Movement*, 17 REV. OF SOC. ECON. 307, 310 (2004).

282. Johnson & Endres, *supra* note 3, at 56; Bean, *supra* note 13, at 50.

283. Bean, *supra* note 13, at 37-40.

284. Assya Pascalev, *You Are What You Eat: Genetically Modified Foods, Integrity, and Society*, 16 J. AGRIC. & ENVTL. ETHICS 583, 588 (2003).

285. KITTLER & SUCHER, *supra* note 274, at 3, quoted in Rencher, *supra* note 23, at 426.

286. John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 477-78 (1986).

287. Bolling v. Sharpe, 347 U.S. 497, 494 n.11 (1954); Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 494 n. 11 (1954); *see also* Williams v. Florida, 399 U.S. 78, 101-02 (1970) (citing social science studies on jury size).

288. Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 111-12 (1993).

289. Monahan & Walker, *supra* note 286, at 477 n. 2.

290. *Id.* at 496; *see also* McCleskey v. Kemp, 753 F.2d 877, 888 (11th Cir. 1985) (noting that "[h]istorically, beginning with 'Louis Brandeis' use of empirical evidence before the Supreme Court . . . persuasive social science evidence has been presented to the courts'") (quoting Forst, Rhodes & Wellford, *Sentencing and Social Science: Re-*

ible if a qualified expert testified and was subject to cross-examination on the issue. But either way, a trial court must consider properly introduced social science opinions as to the significance of food choice.

H. *American Jurisprudence Has Acknowledged the Significance of Food Choice*

The legal world uses the same definition as the academic world for self-identity and self-expression.[291] In the courts, just as in academia, a person would employ his self-identity and self-expression to answer the question, "who am I?"[292] However, no decision has addressed the relationship between liberty, self-identity and self-expression, and food choice. The question of whether any aspect of food choice is a fundamental right has not to date been presented to an American court.

But the courts have offered some fleeting acknowledgments of the significance of food choice. The first known instance of an American court recognizing, even in passing, a citizen's right of food choice was in a nineteenth century dispute over a Missouri oleomargarine statute.[293] In that case, the Missouri Court of Appeals criticized the nascent oleomargarine industry, stating that:

> [a] practice has sprung up which operates to defraud the people of their right of choice as to what they will eat [i.e., ostensibly counterfeit food such as oleomargarine], with reference to an article of food of constant and universal consumption. The legislature has passed an act which, if properly administered, will nip the practice in the bud.[294]

Most significant for the food rights advocate is that the court cited no authority for its proposition that food choice is a right.[295] In 1882, in Missouri, the right to food choice was so natural that the Court of Appeals did not need to look in any law book to determine whether it was a right or not.

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search for the Formulation of Federal Guidelines, 7 HOFSTRA L. REV. 355, 355 (1979)).

291. Richenberg v. Perry, 909 F.Supp. 1303, 1310 (D. Neb. 1995).

292. *Id.* (noting that a prohibition on plaintiff stating that he is a homosexual "may result in a denial of self-identity").

293. *See generally* Missouri v. Addington, 12 Mo. App. 214, 225 (1882), *aff'd*, 77 Mo. 110 (1882).

294. *Id.*

295. *Id.*

In the Show-Me state, the Court of Appeals did not need to be shown. The right to food choice is no less natural and obvious for us today.

The most eloquent account of the American's right to choice in food came from Supreme Court Justice Stephen Field in his dissenting opinion in *Powell v. Pennsylvania*, another oleomargarine case.[296] The majority had upheld the constitutionality of a Pennsylvania statute banning the sale of certain types of imitation dairy products, and Field dissented.[297] He argued that the right to one's choice of food was part of the liberty right guaranteed by the Constitution.[298] He began bluntly, "I have always supposed that the gift of life was accompanied with the right to seek and produce food, by which life can be preserved and enjoyed, in all ways not encroaching upon the equal rights of others."[299] He even connected the pursuit of happiness with food rights in stating that:

> [t]he right to procure healthy and nutritious food, by which life may be preserved and enjoyed, and to manufacture it, is among these inalienable rights, which, in my judgment, no state can give, and no state can take away, except in punishment for crime. It is involved in the right to pursue one's happiness.[300]

But this was no mere dissenting rant; Field fit food rights into a magisterial portrayal of liberty that is the law today. For Field, liberty meant the freedom "to follow such pursuits as may be best adapted to his faculties, and which will give to him the highest enjoyment."[301] Field's interpretation thus differed only insubstantially from the Supreme Court's 1954 version, in which "[l]iberty under law extends to the full range of conduct which the individual is free to pursue."[302] And the full range of conduct that the locavore wishes to pursue includes purchasing her meat and poultry from the farmer of her choice, without governmental interference.

Finally, two more recent cases briefly touched on food's significance and meaning. In 1973, the North Carolina Supreme Court weighed a workers' compensation claim with a most unfortunate set of facts involving food.[303] An employee had been on a business trip and met a friend for din-

296. *See generally* Powell v. Pennsylvania, 127 U.S. 678 (1888).
297. *Id.* at 690 (Field, J., dissenting).
298. *Id.* at 698.
299. *Id.*
300. *Id.* at 692.
301. *Id.*
302. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).
303. Bartlett v. Duke Univ., 200 S.E.2d 193 (N.C. 1973).

ner at a restaurant, where he accidentally choked to death on his food.[304] The court, in justifying its ruling that the employee's death did not arise out of his employment, noted that "eating is not peculiar to traveling; it is a necessary part of daily living, and one's manner of eating, as well as his choice of food, is a highly personal matter."[305] This statement was not dicta; it was an integral part of the framework for the court's opinion that eating was not related, at least in this instance, to one's employment.

Most recently, the Washington Supreme Court, in answering a certified question regarding emotional distress damages in a contaminated food tort case, noted, "[c]ommon sense tells us that food consumption is a personal matter."[306] This aphorism succinctly illustrated the court's belief that every person has different and independent views on food and that every person must be allowed the freedom to react differently to food related issues.

VII. CONCLUSION: FOOD CHOICE, AS NARROWLY DEFINED, IS A LIBERTY RIGHT DEEPLY ROOTED IN AMERICAN HISTORY AND TRADITION

If liberty is the freedom to make one's own choices in life, why can we not make those choices with respect to our food? This dilemma was foremost in food lawyer Peter Hutt's mind when he wrote, "the constitutional authority of the government to determine the food that can lawfully be marketed, and the constitutional right of the individual to personal freedom and control over his own destiny, will at some junctures inevitably conflict."[307] The day of this conflict has now arrived.

A court hearing a food right claim must accept that the Bill of Rights is not the final word on our liberty rights,[308] and that even *Glucksberg* conceded that our constitutional liberty rights have never been "fully clarified."[309] The courts must acknowledge that the right to purchase certain types of food free from governmental interference can be carefully described and that the American custom and practice of buying meat and poultry directly from the farmer is deeply rooted in American history and tradition. That leaves the advocate with trying to prove that this custom and practice is indeed a liberty right, which can be shown with the following syllogism: the Supreme Court has placed such rights as self-identity and self-expression squarely within liberty's domain; social science em-

304. *Id.* at 195.
305. *Id.* at 234.
306. Bylsma v. Burger King Corp., 293 P.3d 1168, 1171 (en banc) (Wash. 2013).
307. Hutt, *supra* note 238, at 513.
308. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 848 (1992).
309. Washington v. Glucksberg, 521 U.S. 702, 722 (1997).

braces food choice as part of self-identity; the courts, from the Supreme Court on down, accept social scientists' opinions; thus, the courts should logically accept food choice as part of liberty. If only it were that easy.[310]

Food choice is not a new right; it is a right and a practice as old as civilization. It allows us to "define [our] own concept of existence, of meaning, of the universe, and of the mystery of human life."[311] As one sociologist put it, governmental limitation on one's right "to choose what goes into her body represents a violation of one's authenticity and authorship in life that limits greatly that person's ability to live according to her conception of the good life."[312] However, it was not until industrialization and regulation that citizens felt the need to assert such a right, and now courts and legislators will increasingly have to take this right into account.

But, to the extent that the right to food choice might be considered a new right, it can be analogized to John Adams' famous May 12, 1780, letter to his wife Abigail, where he lamented and prophesied, "I must study Politicks and War that my sons may have liberty to study Mathematicks and Philosophy. My sons ought to study Geography, natural History, Naval Architecture, navigation, Commerce and Agriculture, in order to give their Children a right to study Painting, Poetry, Musick, Architecture, Statuary, Tapestry and Porcelaine."[313] Perhaps the search for food, too, can be compared to the passage of the generations. First, our distant ancestors hoped to find food – any food; second, our forefathers sought food that would allow them to thrive physically; and third, locavores and alternative food movement advocates now seek the liberty to consume food that allows them to thrive mentally and live their version of the good life.

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310. Chemerinsky, *supra* note 45, at 1521-22 (stating that "I think that when you read *Bowers v. Hardwick* and *Washington v. Glucksberg* together, it becomes extremely difficult for plaintiffs to persuade courts to recognize any additional unenumerated rights, given the importance of the interests involved in those cases and the fact that they were not recognized"); *see also* Minnesota v. Wright, 588 N.W.2d 166, 168 (Minn. Ct. App. 1998) (noting that "[t]he right to sell or peddle farm products is not a fundamental liberty").

311. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

312. Pascalev, *supra* note 284, at 588.

313. JOHN FERLING, JOHN ADAMS: A LIFE 174-75 (1992).

THE MARKET FOR DRUG-FREE POULTRY: WHY ROBUST REGULATION OF ANIMAL RAISING CLAIMS IS THE RIGHT PRESCRIPTION TO COMBAT ANTIBIOTIC RESISTANCE

*Dorinda L. Peacock**

I. INTRODUCTION

Since their introduction in the mid-twentieth century, antibiotics have become a mainstay of poultry production for purposes ranging from growth promotion to disease treatment and control. Nevertheless, for almost as long, there have been concerns about the role that these agricultural uses play in the development of antibiotic resistant bacteria. The issue of antibiotic resistance in general is fast becoming a public health crisis and scrutiny of agriculture as a contributing cause continues. Nevertheless, to date, neither regulatory efforts to curb agricultural usage nor private sector actions in response to consumer demand and public-interest campaigns have led to significant changes in addressing the problem.

This article will argue that the most effective course for dealing with the role of agriculture in this public health issue is to enact regulations that

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allow the Food Safety Inspection Service (FSIS)[1] to promulgate more robust labeling requirements for companies making claims about antibiotics use on their poultry products. These requirements should empower consumers with the information they need to encourage change in the industry and align consumer choices with principles for the judicious use of antibiotics backed by the U.S. Food and Drug Administration (FDA),[2] without prematurely forcing producers to abandon tools valuable in protecting food safety and animal welfare.

Part I will set forth the issue presented by antibiotic resistant bacteria and the role the poultry industry plays in its development. In Parts II and III, respectively, this article will describe the regulatory and marketplace responses to antibiotic resistance, including the labeling of poultry products produced without antibiotics. Part IV will take a closer look at the use of antibiotics in the poultry industry, and Part V will consider the problem presented by confusing, inaccurate, or misleading labeling by looking specifically at an advertising and labeling campaign launched by poultry giant Tyson Foods, Inc. (Tyson) in 2007. Finally, in Part VI, this article will suggest that the adoption of improved labeling policies would not only prevent future problems such as those presented by Tyson's campaign, but would strengthen the market for poultry raised either without antibiotics or through the judicious use of antibiotics by empowering consumers with clear and consistent information.

II. THE PROBLEM OF ANTIBIOTIC RESISTANCE

Antibiotics are powerful medical tools for treating bacterial infections in both humans and animals.[3] Their availability has made previously

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1. FSIS is an agency within the U.S. Department of Agriculture with responsibility for, among other things, making sure that poultry products are safe, safely packaged, and labeled in compliance with the Poultry Products Inspection Act. U.S. DEP'T OF AGRIC., ABOUT FSIS, http://www.fsis.usda.gov/About_FSIS/index.asp (last visited Jan. 6, 2014).

2. The FDA is an agency within the U.S. Department of Health and Human Services. As part of its broad jurisdiction over the safety of food and drugs pursuant to the Food, Drug and Cosmetic Act, it has responsibility over approval of new animal drugs, including those used in food-producing animals. *See generally* U.S. FOOD & DRUG ADMIN., FDA ORGANIZATION, http://www.fda.gov/AboutFDA/CentersOffices/default.htm (last visited Jan. 6, 2014).

3. *See generally* Ctr. for Veterinary Med.., U.S. Dep't of Health & Human Servs., *Guidance for Industry: The Judicious Use of Medically Important Antimicrobial Drugs in Food-Producing Animals,* 209 GUIDANCE FOR INDUSTRY 1 (2012), *available at* http://www.fda.gov/downloads/animalveterinary/guidancecomplianceenforcement/guidanceforindustry/ucm216936.pdf [hereinafter Guidance for Industry # 209]; Ian Phillips et al., *Does the Use of Antibiotics in Food Animals Pose a Risk to Human*

deadly conditions highly treatable, but the use of an antibiotic naturally results in bacteria gradually becoming resistant to it.[4] When this occurs, a drug that once was capable of curing an infection will no longer be effective against it.[5] There is wide agreement that the misuse or overuse of antibiotics leading to more rapid development of resistant bacteria is a major public health concern.[6] However, the issue is complex and there is little agreement over how best to address it, as antibiotics are used extensively in both human and animal medicine.[7] Nevertheless, because agriculture is a major consumer of antibiotic drugs, food producers have come under scrutiny.[8]

Specifically, there is evidence that animals treated with antibiotics become carriers of strains of bacteria that are resistant to antibiotics of that type or class.[9] When humans consume products from those animals, they are exposed to those drug-resistant bacteria.[10] If a person exposed to drug-

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Health? A Critical Review of Published Data, 53 J. ANTIMICROBIAL CHEMOTHERAPY 28 (2003), *available at* http://www.vet.k-state.edu/depts/dmp /pdf/ANTIBIOTICS.pdf; *see also* Natural Res. Def. Council v. U.S. Food & Drug Admin., 884 F. Supp.2d 127, 127 (S.D.N.Y. 2012); Natural Res. Def. Council v. U.S. Food & Drug Admin., 872 F. Supp.2d 318, 318 (S.D.N.Y. 2012). Antibiotics are a kind of antimicrobial agent and this article, as well as much of the literature on this subject, sometimes uses the terms interchangeably. The Centers for Disease Control and Prevention define antimicrobial agents this way: "[a] general term for the drugs, chemicals, or other substances that either kill or slow the growth of microbes. Among the antimicrobial agents in use today are antibacterial drugs (which kill bacteria), antiviral agents (which kill viruses), antifungal agents (which kill fungi), and antiparisitic drugs (which kill parasites)." CTRS. FOR DISEASE CONTROL, GLOSSARY, http://www.cdc.gov/drugresistance /glossary.html#antimicrobialagents (last visited Jan. 6, 2014).

4. Phillips et al., *supra* note 3, at 28; Ctr. for Veterinary Med., U.S. Dep't of Health & Human Servs., *supra* note 3, at 4; *see also Natural Res. Def. Council*, F. Supp. 2d at 131; *Natural Res. Def. Council*, F. Supp. 2d at 323.

5. Phillips et al., *supra* note 3, at 28; Ctr. for Veterinary Med., U.S. Dep't of Health & Human Servs., *supra* note 3, at 4; *see also Natural Res. Def. Council*, F. Supp. 2d at 131; *Natural Res. Def. Council*, F. Supp. 2d at 322.

6. *See generally* Ctr. for Veterinary Med., U.S. Dep't of Health & Human Servs., *supra* note 3, at 5-17; *see also Natural Res. Def. Council*, F. Supp. 2d at 131; *Natural Res. Def. Council*, F. Supp. 2d at 323.

7. Phillips et al., *supra* note 3, at 29; *see also Natural Res. Def. Council*, F. Supp. 2d at 131-34; *Natural Res. Def. Council*, F. Supp. 2d at 322.

8. Phillips et al., *supra* note 3, at 28-29; Ctr. for Veterinary Med., U.S. Dep't of Health & Human Servs., *supra* note 4, at 3; *Natural Res. Def. Council*, F. Supp. 2d at 131-132; *Natural Res. Def. Council*, F. Supp. 2d at 322-23.

9. Phillips et al., *supra* note 3, at 32-33.

10. Phillips et al., *supra* note 3, at 33 (stating that "[i]t is well known that antibiotic-resistant bacteria that have been selected in animals may contaminate meat derived from those animals and that such contamination also declines when the selecting antibiotics are not used").

resistant bacteria in this way becomes ill, the infection may not be treatable by the antibiotic to which those bacteria are resistant or by others in its class.[11] Evidence also suggests that farm workers exposed to these animals may become infected with these bacteria, whether or not they become ill.[12] The drug-resistant bacteria may spread to the environment as well.[13] While there is not agreement on how to fix the problem, concern continues to grow.[14]

III. MARKETPLACE RESPONSE TO ANTIBIOTIC RESISTANCE

In response to growing consumer awareness of the dangers of antibiotic resistance, however poorly understood by consumers, food companies have begun to take steps to curb their use.[15]

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11. Ctr. for Veterinary Med., U.S. Dep't of Health & Human Servs., *supra* note 3, at 4.

12. Phillips et al., *supra* note 3, at 33 (stating that "[a]nimals that carry, or in certain cases are infected by, resistant organisms are a hazard to those who work with them since the organisms can be transferred by direct contact").

13. THE PEW COMMISSION ON INDUSTRIAL FARM PRODUCTION, PUTTING MEAT ON THE TABLE: INDUSTRIAL FARM ANIMAL PRODUCTION IN AMERICA, 23, 25 (2008), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Industrial_Agriculture/PCIFAP_FINAL.pdf (noting that antibiotics are present in animal waste and have been found in surface waters near agricultural facilities) [hereinafter PEW COMMISSION].

14. There does not appear to be agreement even among scientists as to the extent of the problem or the best way to address it. For example, some have advocated banning the use of antibiotics for growth promotion in agriculture, as has been done in a number of European Union countries, including Denmark and Sweden. Phillips et al., *supra* note 3, at 44. However, a coalition of scientists reviewing the evidence regarding use of antibiotics in agriculture point out a countervailing argument to that approach:
An important finding, for policy purposes, is that risk management strategies that focus on eliminating resistance are expected to create less than one percent of the public health benefit of strategies that focus on reducing microbial loads (resistant or not). An even more disturbing conclusion was that, if the banning of fluoroquinolones gave even a modest increase in the variance of microbial loads on chickens leaving the processing plant, it would create far more cases of human infection than cases of resistant infection that it might prevent. *Id.* at 42.

15. *See* Elizabeth Weise, *'Natural' Chickens Take Flight,* USA TODAY, Jan. 23, 2006, http://usatoday30.usatoday.com /news/health/2006-01-23-natural-chickens_x.htm. Ms. Weise notes that:

> [f]our of the nation's top 10 chicken producers have virtually ended a practice that health and activist groups for years charged was causing a public health crisis: feeding broiler chickens low doses of antibiotics to make them grow faster and stay healthy. Tyson Foods, Gold Kist, Perdue Farms and Foster Farms say they stopped using

A recent survey by *Consumer Reports* indicated that eighty-six percent of those surveyed thought that meat raised without antibiotics should be available for purchase in their local market.[16] Customer surveys by Tyson, conducted in preparation for a failed "raised without antibiotics" marketing campaign it launched in 2007, indicated that ninety-one percent of consumers thought it was "important to have chicken produced and labeled 'raised without antibiotics'" and that they were willing to pay more for such a product.[17]

Representative Louise Slaughter, a member of the House of Representatives for the Twenty-Eighth District of New York and a microbiologist, has made antibiotic resistance one of her signature issues.[18] In February 2012, she surveyed over sixty food companies and producers to determine their stance on the issue.[19] Thirty-one companies and producers responded to the request for information and Representative Slaughter gathered information from publicly available sources on the policies of an additional twenty-two companies and producers.[20] Responses indicated that many national brands have moved away from the routine use of antibiotics for growth promotion, though they are still used regularly by most companies for prevention and control of disease.[21] The

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> antibiotics for growth promotion. In addition to ending a practice that Europe banned and McDonald's ended a month ago, the four companies also have severely limited antibiotic use for routine disease prevention, though antibiotics are still used to treat disease outbreaks.

16. CONSUMER REPORTS, MEAT ON DRUGS: THE OVERUSE OF ANTIBIOTICS IN FOOD ANIMALS & WHAT SUPERMARKETS AND CONSUMERS CAN DO TO STOP IT 3 (2012), http://www.consumerreports.org/content/dam/cro/news_articles/health/CR%20Meat%20On%20Drugs%20Report%2007-12b.pdf.

17. *Tyson Chickens 'Raised Without Antibiotics,'* WORLD POULTRY, June 20, 2007, http://www.worldpoultry.net /Home/General/2007/6/Tyson-chickens-Raised-Without-Antibiotics-WP001465W/ [hereinafter WORLD POULTRY].

18. BIOGRAPHY, http://www.louise.house.gov/biography/ (last visited Jan. 6, 2014).

19. Press Release, Slaughter Asks Fast Food Companies, "What's in the Beef?" (Feb. 16, 2012), *available at* http://www.louise.house.gov/index.php?option=com_content&task=view&id=2662&Itemid=100069; *see also* Letter from Louise M. Slaughter, Congresswoman, to Fast Food Restaurant Companies (Feb. 16, 2012), *available at* http://louise.house.gov/images/user_images/gt/stories/Fast_Food_Letter.pdf.

20. "WHAT'S IN THE BEEF?" SURVEY RESULTS, http://www.louise.house.gov/survey-results (last visited Jan. 6, 2014) [hereinafter *Survey Results*]; DIRECT SURVEY RESPONSES, http://www.louise .house.gov/uploads/master_list_responses_FINAL_final.pdf (last visited Jan. 6, 2014).

21. *Survey Results*, *supra* note 20; *see also* DIRECT SURVEY RESPONSES, *supra* note 20.

response rate as well as the ready availability of corporate policies on antibiotic use speaks to the level of prominence the issue has gained in corporate consciousness.

IV. REGULATORY RESPONSE TO ANTIBIOTIC RESISTANCE

At the same time that companies and producers have been voluntarily moving away from reliance on antibiotics in production, efforts to address this public health issue head on by banning or restricting the use of antibiotics in agricultural production have moved forward in fits and starts in the courts and the legislative and administrative branches.

As far back as 1970, the FDA was sufficiently concerned about the potential risks raised by the use of medically important antibiotics in livestock production to convene a task force to study the issue.[22] As the regulatory body with jurisdiction over approval of all new animal drugs, the FDA was responsible for having approved the use of antibiotics in food producing animals, as well as the conditions and restrictions on such use. In order for it to approve a new drug, the FDA must find that it is safe and effective; in the case of food-producing animals, this means safe for the humans that will consume that food, as well as safe for the animals.[23] Once a drug is approved, the FDA may suspend the drug's application if new evidence (or other information) shows that the drug is not, in fact, safe.[24] The FDA's task force concluded that the use of antibiotics, "especially in growth promotant and subtherapeutic amounts" encourages the development of bacteria strains resistant to antibiotics.[25] The task force set forth recommendations that included restricting the use of specific antibiotics in animal feeds for certain uses.[26] In response to the task force's recommendations, the FDA initiated a process with respect to the specified

22. Ctr. for Veterinary Med., U.S. Dep't of Health & Human Servs., *supra* note 3, at 6.

23. 21 C.F.R. § 514.1(b)(8) (2013).

24. 21 U.S.C. § 360b(e)(1)(B) (2013). The FDA also establishes safe residue levels for all animal drugs and withdrawal periods necessary to remain below those maximum residue levels. *See infra* note 101. The approved uses of the drug are set forth in its label, but "extralabel" uses—uses different from what is set forth in the label, such as variations in doses, frequencies, routes of administration, species, etc.—are also permitted pursuant to the Animal Medicinal Drug Clarification Act of 1994. 21 U.S.C. § 360b(a)(4)(A). However, the FDA may prohibit extralabel use by order if it finds that the extralabel use could lead to an adverse event affecting the public health. 21 U.S.C. § 360b(a)(4)(D).

25. Antibiotic and Sulfonamide Drugs in Animal Feeds, 37 Fed. Reg. 2444 (Feb. 1, 1972).

26. *Id.* at 2445.

antibiotics to withdraw approval unless such drugs were shown to be safe based on criteria established by the FDA.[27] However, the process stalled for myriad reasons, including the complexities of the scientific and political issues that surrounded it and was ultimately given up more than twenty-five years later.[28]

A similar initiative to ban the extralabel use of cephalosporin, a critically important and widely used antibiotic for the treatment of disease in humans, in food producing animals was published in the Federal Register in 2008, pursuant to the FDA's authority under § 512(e)(1)(B) of the Food Drug & Cosmetic Act.[29] Cephalosporins are commonly used in food-producing animals, including for controlling *E. coli* infections that often lead to early mortality in newly-hatched chicks and turkey poults.[30] However, they are also the most frequently prescribed antibiotic for human diseases, and certain cephalosporins are the preferred drug for treating a number of serious infections in people, including systemic infections arising from *Salmonella.* [31] Nevertheless, the action was withdrawn some months later in order to allow the FDA the opportunity to consider the numerous comments it received from various concerned parties on the matter.[32] In 2012, FDA issued a more narrowly tailored notice regarding cephalosporin in response to the comments received in 2008.[33] The modified response would limit certain uses, but continue to allow others.[34]

The FDA's current policy relies on other strategies it deems more expedient and, perhaps, less controversial than those reflected in these earlier initiatives.[35] Currently, the FDA's stated approach is to seek

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27. Ctr. for Veterinary Med., U.S. Dep't of Health & Human Servs., *supra* note 3, at 6; *see also* Natural Res. Def. Council v. U.S. Food & Drug Admin., 884 F. Supp.2d 127, 136 (S.D.N.Y. 2012); Natural Res. Def. Council v. U.S. Food & Drug Admin., 872 F. Supp.2d 318, 322-325 (S.D.N.Y. 2012).

28. Ctr. for Veterinary Med., U.S. Dep't of Health & Human Servs., *supra* note 3, at 6-7; *see also Natural Res. Def. Council*, 884 F. Supp. 2d at 136.

29. New Animal Drugs; Cephalosporin Drugs; Extralabel Animal Drug Use; Order of Prohibition, 73 Fed. Reg. 38,110 (July 3, 2008) (to be codified at 21 C.F.R. pt. 30).

30. *Id.*

31. *Id.*

32. New Animal Drugs; Cephalosporin Drugs; Extralabel Animal Drug Use; Revocation of Order of Prohibition; Withdrawal, 73 Fed. Reg. 71,923 (Nov. 21, 2008) (to be codified at 21 C.F.R. pt. 530).

33. New Animal Drugs; Cephalosporin Drugs; Extralabel Animal Drug Use; Order of Prohibition, 77 Fed. Reg. 735 (Jan. 6, 2012) (to be codified at 21 C.F.R. pt. 530).

34. *Id.*

35. *See generally* Antibiotic and Sulfonamide Drugs in Animal Feeds, 37 Fed. Reg. 2444, 2445 (Feb. 1, 1972); *see also* Natural Res. Def. Council v. U.S. Food & Drug Admin., 884 F. Supp.2d 127, 134 (S.D.N.Y. 2012); Natural Res. Def. Council v. U.S. Food & Drug Admin., 872 F. Supp.2d 318, 322-23 (S.D.N.Y. 2012). *See generally*

voluntary compliance by all stakeholders in the judicious use of antibiotics as outlined in its Guidance for Industry #209 and supplemented with specific recommendations in its Guidance for Industry #213.[36] This would include adoption of two basic principles:

Principle 1: The use of medically important antimicrobial drugs in food-producing animals should be limited to those uses that are considered necessary for assuring animal health.[37]

Principle 2: The use of medically important antimicrobial drugs in food-producing animals should be limited to those uses that include veterinary oversight or consultation.[38]

With respect to medically important antibiotics currently available on an over-the-counter basis, FDA's Guidance for Industry #213 calls on pharmaceutical companies to take action voluntarily in furtherance of the above principles by revising their labeling to require a prescription from or oversight by a veterinarian for use in food-producing animals.[39]

Frustrated with the time it would take the FDA to review use of existing antibiotic drugs on a case-by-case basis under the current regulatory framework, Representative Louise Slaughter sponsored a bill called the Preservation of Antibiotics for Medical Treatment Act of 2011 (PAMTA).[40] If enacted, PAMTA would require approval for the non-therapeutic use in food-producing animals of any drug used or intended for

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FOOD & DRUG ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., FDA'S STRATEGY ON ANTIMICROBIAL RESISTANCE - QUESTIONS AND ANSWERS, http://www.fda.gov/AnimalVeterinary/GuidanceComplianceEnforcement/GuidanceforIndustry/ucm216939.htm (last visited Jan. 6, 2014).

36. Guidance for Industry #209, *supra* note 3, at 20; *See generally* Ctr. for Veterinary Med, U.S. Dep't of Health & Human Servs., *Guidance for Industry: New Animal Drug Combination Products Administered in or on Medicated Feed or Drinking Water of Food-Producing Animals: Recommendations for Drug Sponsors for Voluntarily Aligning Product Use Conditions with GFI #209* , 213 GUIDANCE FOR INDUSTRY 1 (2013), *available at* http://www.fda.gov/downloads/AnimalVeterinary/GuidanceComplianceEnforcement/GuidanceforIndustry/UCM299624.pdf [hereinafter Guidance for Industry #213].

37. Guidance for Industry #209, *supra* note 3, at 21.

38. *Id.* at 22. For an analysis of the unique ways these principles would affect the poultry industry, *see* David A. Pyle, *Judicious Use of Antimicrobials in Poultry Production,* ZOOTECNICA INT'L (July 1, 2006), http://www. zootecnicainternational. com/article-archive/veterinary/755-judicious-use-of-antimicrobials-in-poultry-production-.html.

39. Guidance for Industry #213, *supra* note 36, at 4-5.

40. H.R. 965, 112th Cong. (1st Sess. 2011).

use in humans to prevent or treat disease or infection caused by microorganisms within two years of enactment, unless there has been shown a "reasonable certainty of no harm to human health due to the development of antimicrobial resistance that is attributable in whole or in part" to such use.[41] The bill was referred to the House Subcommittee on Health on March 14, 2011.[42] No further action has been taken.[43]

In June 2012, Judge Theodore H. Katz issued the second of two orders likely to lead to further restrictions on the use of certain medically important antibiotics in livestock production.[44] The first order required the FDA to follow through on the actions it initiated back in the 1970's with respect to penicillin and tetracycline-related drugs.[45] The second requires it to reconsider its response to two citizen petitions asking the FDA to ban certain uses of all antibiotics in the production of food animals.[46] The FDA had argued in both cases that withdrawal hearings would be too time consuming and resource-intensive and that, instead, it was addressing the public health concern through the voluntary process set out in its guidance documents.[47]

Thus, in many ways the voluntary response of food companies to consumer demands has effected greater and speedier change than the legal maneuvering has or is likely to do in the near future. However, as will be discussed below, the current labeling process at FSIS is an impediment to the effective working of the market.

V. USE OF ANTIBIOTICS IN COMMERCIAL POULTRY PRODUCTION

In May 2007, FSIS approved Tyson's proposed use of the label "raised without antibiotics" on chicken products,[48] and Tyson launched a $70 million advertising and marketing campaign related to its new product

41. *Id.*

42. LIBRARY OF CONGRESS, BILL SUMMARY & STATUS, 112TH CONGRESS (2011 - 2012), H.R. 965, ALL INFORMATION, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR00965:@@@L&summ2=m& (last visited Jan. 7, 2014).

43. LIBRARY OF CONGRESS, BILL SUMMARY & STATUS, 112TH CONGRESS (2011 – 2012), H.R. 965, ALL CONGRESSIONAL ACTION, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR00965:@@@X (last visited Jan. 7, 2014).

44. *See generally* Natural Res. Def. Council v. U.S. Food & Drug Admin., 884 F. Supp.2d 127 (S.D.N.Y. 2012); *see also* Natural Res. Def. Council v. U.S. Food & Drug Admin., 872 F. Supp.2d 318, 318 (S.D.N.Y. 2012).

45. *Natural Res. Def. Council*, 884 F. Supp.2d at 151.

46. *Natural Res. Def. Council*, 872 F. Supp.2d at 341-42.

47. *Natural Res. Def. Council*, 884 F. Supp.2d at 140; *Natural Res. Def. Council*, 872 F. Supp.2d at 325.

48. WORLD POULTRY, *supra* note 17.

line.[49] Tyson had determined that a large proportion of its customer base—over ninety percent—may be willing to purchase chicken raised without antibiotics and were willing to pay a premium to do so.[50] Tyson's then-Senior Vice President of Fresh Meal Solutions, Dave Hogberg, was quoted as saying, "[w]e are the first major poultry company to offer fresh chicken raised without antibiotics on a large scale basis and at an affordable price for mainstream consumers."[51]

Intensive animal agriculture began in the early twentieth century, when the production of crops such as corn and soybeans outstripped the food demands of population growth and could be redirected to feed for animal production.[52] "Vertically integrated" poultry production is now the norm, meaning that one company controls all aspects of production from when the eggs are laid to when the packaged meat product is stocked at the grocery.[53] While large-scale production has enabled greater quantities of a more cost-effective, consistent-quality product to be produced, it also increases the risks associated with disease in flocks. More animals raised

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49. *Tyson and USDA Reach an Agreement on Antibiotics Label,* WORLD POULTRY, Dec. 21, 2007, http:// www.worldpoultry.net/Home/General/2007/12/Tyson-and-USDA-reach-an-agreement-on-antibiotics-label-WP002026W/.

50. WORLD POULTRY, *supra* note 17.

51. *Id.*

52. PEW COMMISSION, *supra* note 13, at 5. Traditionally, in the United States, individuals and families raised small crops of grains, fruits, and vegetables and small numbers of farm animals in order to produce the food needed to support themselves. *Id.* at 1. This "subsistence farming" continued on a widespread basis until well into the 1800's when the development of mechanical agricultural tools made more intensive production possible. *Id.* The production of crops on an industrial scale, supported by advances in transportation, food preservation, genetic selection, chemical fertilizers and pesticides, etc., fueled the growing urbanization of the country. *Id.* at 1, 3. Food could now be produced in the countryside and transported to cities. *Id.*

53. *Id.* at 5. The poultry company typically contracts with independent growers to raise the chicks or turkey poults until they are ready to be slaughtered and processed, but supplies and controls what they are fed, whether and how they are medicated, and other aspects of their care. *Id. See also* AM. ACAD. OF MICROBIOLOGY, THE ROLE OF ANTIBIOTICS IN AGRICULTURE (2002), *available at* http://www.fws.gov/fisheries /aadap/PDF/the%20role%20of%20antibiotics%20in%20agriculture%202002%20Amer %20Acad%20Microbiologistspdf.pdf. This vertical integration grew out of the process employed in meeting contracts with the War Department during World War II for poultry products for the troops and has continued as the preferred model for large scale animal production. PEW COMMISSION, *supra* note 13, at 5; *see also* H. STEINFELD ET AL., LIVESTOCK'S LONG SHADOW: ENVIRONMENTAL ISSUES AND OPTIONS (2006), *available at* ftp://ftp.fao.org/docrep /fao/010/a0701e/a0701e.pdf. Vertical integration allows the producer to take advantage of economies of scale and exercise greater control over all the factors affecting the quality and safety of the product. PEW COMMISSION, *supra* note 13, at 5; *see also* STEINFELD ET AL., *supra.*

in close quarters means greater possibility of disease outbreaks, the ability for disease to spread more quickly and for the producer to experience greater losses if it does. [54] As a result, availability of antibiotics has been essential to the success of large-scale animal production.

Antibiotics are used to treat disease outbreaks in livestock as they are in humans.[55] In poultry production, though, rather than treating individual sick birds, medicine is administered in food or water to the entire flock.[56] The reasons for this are two-fold: a) due to the large numbers of birds comprising a flock, it is impractical to identify, separate, and treat each individual chicken or turkey experiencing symptoms;[57] and b) because of the close quarters and densely populated houses, the remainder of the flock is at great risk of contracting or having already contracted the illness by the time an outbreak is identified.[58] Accordingly, treatment of the whole flock serves both a therapeutic and prophylactic role.

In addition, in the 1940's, researchers trying to understand the makeup of animal proteins accidentally discovered that poultry fed antibiotics grew faster than others.[59] As a result, producers began routinely

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54. David Tilman et al., *Agricultural Sustainability and Intensive Production Practices*, 418 NATURE 671, 671 (2002), *available at* http://www.nature.com/nature/journal/v418/n6898/pdf/nature01014.pdf.

55. Phillips et al., *supra* note 3, at 28.

56. *Id.* at 29 (stating that "[w]hen antibiotic treatment is necessary, it often has to be administered to food animals in feed or water. Individual animal treatment is almost never practical for poultry").

57. *Id.*; *see also* AM. ACAD. OF MICROBIOLOGY, *supra* note 53, at 3 (noting that "[p]oultry generally are given antibiotics in feed or water since individual treatment is impractical and not economical; this method of dispensing antibiotics exposes all the animals to antibiotics, but the individual dose is unknown and inconsistent").

58. Phillips et al., *supra* note 3, at 29 (stating that "[i]n livestock production, the objective is to limit progression of disease in the population, since illness decreases animal performance. Herd or flock treatment is often indicated when illness is first recognized in a small proportion of the animals").

59. F.T. Jones & S.C. Ricke, *Observations on the History of the Development of Antimicrobials and Their Use in Poultry Feeds*, 82 POULTRY SCI. 613, 613 (2003), *available at* http://ps.fass.org/content/82/4/613.full.pdf+html; Phillips et al., *supra* note 3, at 29. Phillips et al. note that:

> [t]he growth promoting effects of antibiotics were first discovered in the 1940s when chickens fed by-products of tetracycline fermentation were found to grow faster than those that were not fed those by-products. Since then, many antimicrobials have been found to improve average daily weight gain and feed efficiency in livestock in a variety of applications, and this is known as 'growth promotion'.

adding antibiotics to feed to promote growth.[60] Veterinarians now understand that the antibiotics work to prevent or control coccidiosis and other diseases of the intestinal tract which interfere with effective feed conversion.[61] Thus, even though still referred to as "growth promotants," they are doing so by preventing or controlling disease.[62]

VI. CONFUSING, INACCURATE, AND MISLEADING LABELING

After Tyson's new products had already gone to market, FSIS withdrew its consent for the label after realizing that Tyson used ionophores in its feed to prevent coccidiosis.[63] Ionophores are a class of antibiotics used, not for treating bacterial infections but, rather, to treat parasites in the intestinal tract.[64] Though not used in human medicine and not deemed antibiotics by the FDA, ionophores were considered antibiotics by FSIS.[65] After negotiations, FSIS and Tyson agreed on a new, revised

60. The goal of large-scale, intensive animal production is to produce the greatest number of pounds of safe, high-quality product for the lowest cost. *See generally,* Jay P. Graham et al., *Growth Promoting Antibiotics in Food Animal Production: An Economic Analysis,* 122 PUB. HEALTH REP. 79 (2007), *available at* http://www.jhsph.edu/sebin/s/a/ antibiotics_poultry07.pdf. To measure success in this effort, the poultry industry uses the feed conversion ratio. *Id.; see also* PEW COMMISSION, *supra* note 13, at 5. Factors that affect the cost of feed, the amount of feed consumed, or the amount of weight gained will all affect the feed conversion ratio. In addition, disease also affects the cost of production, as money spent on raising the chicks or turkey poults prior to the death of the animal will not contribute to marketable product, additional expense will be incurred in dealing with the consequences of the outbreak (including treatment of animals and disposition of carcasses). Further, even if diseased birds do not die, they may, nevertheless, be excluded from sale due to safety or quality issues—known in the industry as "condemnations." Something that increases weight gain without requiring additional feed (after taking into account the cost of the growth-promoting additive) will improve the feed conversion ratio. *See* Graham et al., *supra,* at 83.

61. *Video: Poultry Insight: Why and When are Antibiotics Used in Poultry Production?,* WORLD POULTRY, Nov. 13, 2012, http://www.worldpoultry.net/Home/General/2012/11/Poultry-Insight-Why-and-when-are-antibiotics-used-in-poultry-production-1104566W/ [hereinafter *Poultry Insight*].

62. *Id.*

63. *USDA Wants Removal of Tyson's "No Antibiotics Label",* WORLD POULTRY, Nov. 20, 2007, http://www.worldpoultry.net/Broilers/Markets—Trade/2007/11/USDA-wants-removal-of-Tysons-ano-antibiotics-labela-WP001924W/ [hereinafter WORLD POULTRY II].

64. *Poultry Insight, supra* note 61.

65. WORLD POULTRY II, *supra* note 63.

label — "raised without antibiotics that impact antibiotic resistance in humans."[66]

In January, however, Tyson was sued by several of its major competitors, claiming that the labeling was inaccurate and misleading, initially because the label implies that the other producers are using those types of drugs, which is not the case, and later because Tyson, in fact, injected the eggs with the antibiotics gentamicin and ceftiofur, in conjunction with certain vaccinations made prior to hatch.[67] The suit by competitors was followed by a class action lawsuit by consumers[68] and a withdrawal of approval of the label by the FSIS, in light of the new information about *in ovo* injections of antibiotics that are approved for use with humans.[69]

Ultimately, Tyson stopped using the labeling and brought suit against the USDA, saying that the regulatory process was flawed.[70]

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66. *Tyson and USDA Reach an Agreement on Antibiotics Label, supra* note 49; *Tyson to Use New Label for 'Raised Without Antibiotics Chicken'*, WORLD POULTRY, Jan. 2, 2008, http://www.worldpoultry.net/Broilers/Markets—Trade/2008/1/Tyson-to-use-new-label-for-Raised-Without-Antibiotics-Chicken-WP002036W/.

67. Sanderson Farms, Inc. v. Tyson Foods, 547 F. Supp. 2d 491 (D. Md. Apr. 22, 2008); *Tyson Appeal Denied in 'Raised Without Antibiotics' Case,* WORLD POULTRY, May 2, 2009, http://www.worldpoultry.net/Home/General/2008/5/Tyson-appeal-denied-in-raised-without-antibiotics-case-WP002485W/; *U.S. Court Says Tyson Must Stop Advertising Claims*, WORLD POULTRY, Apr. 24, 2008, http://www.worldpoultry.net/Broilers/Markets—Trade/2008/4/US-court-says-Tyson-must-stop-advertising-claims-WP002460W/; *U.S. Poultry Giants Fight Over Antibiotic Use,* WORLD POULTRY, Apr. 11, 2008, http://www.worldpoultry.net/Broilers/Markets—Trade/2008/4/US-poultry-giants-fight-over-antibiotic-use-WP002411W/; *see also* Second Amended Complaint, Sanderson Farms, Inc. v. Tyson Foods, No. 1:08-cv-00210, 2008 WL 4334901 (D. Md. May 5, 2008) (noting that "[g]entimicin is an antibiotic approved for use in human medicine" and "[c]eftiofur is a third generation cephalosporin; cephalosporins are approved for use in human medicine").

68. Rory Harrington, *Tyson Agrees to Pay $5m in "Antibiotic-free" Chicken Settlement,* FOODPRODUCTIONDAILY.COM, Jan. 15, 2010, http://www.foodproductiondaily.com/Processing/Tyson-agrees-to-pay-5m-in-antibiotic-free-chicken-settlement; *Tyson Removes 'Raised Without Antibiotics' Label,* WORLD POULTRY, June 4, 2008, http://www.worldpoultry.net /Broilers/Markets—Trade/2008/6/Tyson-removes-raised-without-antibiotics-label-WP002596W/; *Tyson Settles Suit Over Antibiotic Labeling,* WORLD POULTRY, Jan. 22, 2010, http://www.worldpoultry.net/Home/General/2010/1/Tyson-settles-suit-over-antibiotic-labelling-WP006982W/.

69. Am. Veterinary Med. Ass'n, *USDA Rescinds "Raised Without Antibiotics" Label on Tyson Chicken*, July 15, 2008, https://www.avma.org/News/JAVMANews/Pages/080715s.aspx.

70. *Antibiotic-free Labelling - Tyson Sues USDA,* WORLD POULTRY, June 17, 2008, http://www.worldpoultry.net/Broilers/Markets—Trade/2008/6/Antibiotic-free-labelling—-Tyson-sues-USDA-WP002639W/.

FSIS is responsible for approving the types of claims a company may make on its labeling regarding use of antibiotics.[71] Unlike food labels regulated by the FDA, the content of all meat and poultry food labels must be approved by FSIS in advance.[72] Certain information is mandatory, such as product name, country of origin, list of ingredients, and certain nutrition information, but other information may be included at the discretion of the producer, if it is truthful and not misleading.[73]

A particular category of discretionary information is known as "animal raising claims" or "production claims" and has to do with how the animal that produced the food product was raised.[74] Examples include "vegetarian fed diet," "free-range," or "not fed animal by-products."[75] Within this category are claims about whether or under what circumstances the animal was treated with antibiotics.[76]

Currently, while any such claim must be approved by FSIS, there is not a defined set of acceptable claims or claim language dictated by FSIS or established guidelines for how an animal must be raised to satisfy the requirement that the claim is truthful and not misleading.[77]

The Agricultural Marketing Service (AMS) of the USDA plays a different but related role in the labeling of meat products, by offering voluntary "Process Verified" programs.[78] These programs enable companies to have their facilities audited to verify specific production or animal raising claims.[79] Once verified, they may include a "USDA Process

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71. Poultry Products Inspection Act, 21 U.S.C. §§ 451-72 (2012).

72. *Id.*; OFFICE OF POLICY, PROGRAM, & EMP. DEV., U.S. DEP'T OF AGRIC., A GUIDE TO FEDERAL FOOD LABELING REQUIREMENTS FOR MEAT, POULTRY, AND EGG PRODUCTS 4 (2007), *available at* http://www.fsis.usda.gov/PDF/Labeling_Requirements_Guide.pdf [hereinafter GUIDE]; *See generally* 9 C.F.R. §§ 300-592.

73. *See* Am. Veterinary Med. Ass'n, *supra* note 69.

74. OFFICE OF POLICY, PROGRAM, & EMP. DEV., U.S. DEP'T OF AGRIC., ANIMAL PRODUCTION CLAIMS OUTLINE OF CURRENT PROCESS 1, *available at* http://www.fsis.usda.gov/OPPDE/larc/Claims/RaisingClaims.pdf.

75. FOOD SAFETY & INSPECTION SERV., U.S. DEP'T OF AGRIC., ANIMAL RAISING CLAIMS IN THE LABELING OF MEAT AND POULTRY PRODUCTS, POWERPOINT PRESENTATION FROM PUBLIC MEETING REGARDING ANIMAL RAISING CLAIMS SLIDE 4 (2008), *available at* http://www.fsis.usda.gov/PDF/Claims_Poretta_101408.pdf.

76. GUIDE, *supra* note 72, at 18, 21.

77. *Id.* at 18-21; *see also* FOOD SAFETY & INSPECTION SERV., U.S. DEP'T OF AGRIC., *supra* note 75, at slides 6-8.

78. AGRIC. MKTG. SERV., U.S. DEP'T OF AGRIC., GRADING, CERTIFICATION, VERIFICATION, http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateN&navID=GradingCertificationandVerfication&leftNav=GradingCertificationandVerfication&page=ProcessVerified.usda.govHomePage (last visited Jan. 8, 2014).

79. *Id.*

Verified" seal on their labels along with the approved claim.[80] As with animal raising claims in general, most claims that have been verified through this program were put forth by the company and include "All Vegetarian Diet," "No Animal By-Products," "Humanely Raised,"[81] "Raised Cage Free," and "No Antibiotics Ever," among others.[82] However, the AMS also develops programs with which companies and producers may choose to comply, with the expectation that it will bring added value to their products.[83] One such program that touches on antibiotics usage is called "Never Ever 3": no antibiotics, no growth promotants, and no animal by-products—"never ever".[84] This program was launched in April 2009, but does not appear to have gotten much traction; as of the October 4, 2012, update, no poultry products are listed on the Official Listing of

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80. AGRIC. MKTG. SERV., U.S. DEP'T OF AGRIC., QUALITY SYSTEMS VERIFICATION PROGRAMS GENERAL POLICIES AND PROCEDURES 1 (2010), *available at* http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=stelprdc5073953 [hereinafter *Quality Systems*]; AGRIC. MKTG. SERV., U.S. DEP'T OF AGRIC, USDA PROCESS VERIFIED PROGRAM 9 (2011), *available at* http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=stelprdc5097560 [hereinafter *Verified Program*].

81. AGRIC. MKTG. SERV., U.S. DEP'T OF AGRIC., OFFICIAL LISTING OF APPROVED USDA PROCESS VERIFIED PROGRAMS 9 (2013), http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5081908 [hereinafter *Approved Programs*], noting that the Humanely Raised Program claim is in accordance with Perdue's Best Practices, which include:

- Education, training, and planning
- Hatchery Operations
- Proper Nutrition and Feeding
- Appropriate Comfort and Shelter
- Health Care
- Normal Patterns of Behavior
- On-Farm Best Practices
- Catching and Transportation
- Processing

Humanely Raised Program claim is based on the principles outlined in the National Chicken Council's Animal Welfare Guidelines to ensure the proper care, management, and handling of broiler chickens. *See generally* NAT'L CHICKEN COUNCIL, ANIMAL WELFARE GUIDELINES AND AUDIT CHECKLIST FOR BROILERS, *available at* http://www.nationalchickencouncil.org/wp-content/uploads/2012/01/NCC-Animal-Welfare-Guidelines-2010-Revision-BROILERS.pdf.

82. *Approved Programs*, *supra* note 81, at 1.

83. AGRIC. MKTG. SERV., U.S. DEP'T OF AGRIC., ANIMAL RAISING CLAIMS 25-27 (2008), *available at* http://www.fsis.usda.gov/PDF/Animal_Raising_Claims_101408.pdf [hereinafter Transcript].

84. AGRIC. MKTG. SERV., U.S. DEP'T OF AGRIC., NEVER EVER 3 (NE3) 2 (2009), *available at* http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5066028.

Approved USDA Process Verified Programs as complying with this program.[85]

Tyson's foray into the market for no antibiotic products is illustrative of the dilemmas posed by the current labeling system. But it is not an isolated incident. In conjunction with *Consumer Reports*' survey of consumers noted above, the organization also researched the availability of meat that was labeled in a manner indicating that antibiotics had not been used in its production.[86] Their researchers identified a plethora of labels in the marketplace, not all of which had been approved by the USDA and many of which had the potential to be confusing if not actually misleading.[87]

In response to the Tyson fiasco, USDA began a process of reviewing its policies with respect to animal raising claims in meat and poultry product labels.[88] The agency published a notice to solicit public input and held a public meeting.[89]

VII. TRUTHFUL AND NON-MISLEADING LABELING ABOUT ANTIBIOTICS IS NEEDED

Participants in the meeting represented stakeholders ranging from farmers to the Union of Concerned Scientists, poultry production companies to consumer protection interest groups.[90] Surprisingly, given the diverse backgrounds of the group, the comments were consistent in calling on the USDA to promulgate clear and coherent standards for animal raising claims, rather than approving such claims on a case-by-case basis, and for making the standards and the process more transparent.[91] Comments also highlighted the need for compliance with standards to be verified by either the AMS process verified program or certified third party

85. *See generally Approved Programs*, *supra* note 81.

86. CONSUMER REPORTS, *supra* note 16, at 3.

87. *Id.* at 3-4; *see also* Joanne Chen, *Meaty Confusion, Clarified,* HEALTH, Apr. 2006, at 161, *available at* http://www.keepantibioticsworking.com/new/KAW files/64_2_80789.pdf, Gosia Wozniacka, *Food Labels Confuse Consumers As 'Eco-Label' Options Multiply,* HUFFINGTON POST, Nov. 11, 2012, http://www.huffington post.fr/2012/11/12/food-labels-confusing_n_2116609.html.

88. Am. Veterinary Med. Ass'n, *supra* note 69.

89. Product Labeling: Use of the Animal Raising Claims in the Labeling of Meat and Poultry Products, 73 Fed. Reg. 60,228 (Oct. 10, 2008); FOOD SAFETY & INSPECTION SERV., U.S. DEP'T OF AGRIC., *supra* note 75, at slides 24-30; Transcript, *supra* note 83, at 16-17.

90. *See generally* Transcript, *supra* note 83.

91. *See generally id.*

auditors.[92] Participants in the meeting were clear that both producers and consumers suffer when false or confusing claims are put forth in the marketplace.[93]

We have seen that consumer demand affects supply in the context of antibiotic use. When a purchaser, such as McDonalds or Bon Appetit, adopts a policy precluding or restricting antibiotics usage, then their suppliers will follow suit.[94] Large purchasers have the leverage to negotiate requirements in supply contracts not only regarding how product is produced, but also rights to audit production facilities or take other steps to ensure compliance. Consumers, however, do not have these options. They are handicapped by a lack of adequate, trustworthy information to make the purchasing decision before them. The issue is complex, as consumers do not understand the potential risks and the tradeoffs, companies control information about production methods, and there is no way for consumers to verify claims being made.

The Tyson case highlights these dilemmas: Are ionophores antibiotics or not and why are they used? What is meant by "raised" without antibiotics"? Do other poultry companies use antibiotics? Which antibiotics impact antibiotic resistance in humans? Are there other risks associated with using antibiotics? Without an understanding of the scientific issues raised by these questions or the information about the production practices of the various producers offering products in the marketplace, consumers are unable to evaluate the superiority of a product. They cannot determine whether additional value is present (e.g., whether the differentiating factor really does make the product safer) or trust that the product is what it purports to be (i.e., that the company is telling the truth about its unique production practices). As a result of this "asymmetrical information," the consumer will not be willing to pay a premium for specially labeled products.[95] In turn, if consumers are

92. *Id.*

93. *Id.*

94. Weise, *supra* note 14.

95. *See generally* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism,* 84 Q. J. ECON. 488 (1970). George A. Akerlof was awarded the Nobel Prize in Economics in 2001 jointly with A. Michael Spence and Joseph E. Stiglitz "for their analyses of markets with asymmetric information." *See* THE SVERIGES RIKSBANK PRIZE IN ECONOMIC SCIENCES IN MEMORY OF ALFRED NOBEL 2001, http://www.nobelprize.org/nobel_prizes/economics /laureates/2001/ (last visited Jan. 10, 2014). Akerlof's work was set forth in this article exploring the effect of asymmetrical information on markets in the context of the market for used cars. *See generally* Akerlof, *supra.* He noted that though some used cars were high quality and other used cars were "lemons," only sellers had access to the information needed to evaluate the quality of a given used car. *Id.* at 489. As a result,

unwilling to buy any "no antibiotic" products because their trust has been compromised, then companies will not choose to incur added expense to change production methods.[96]

The USDA has developed new guidance on such labeling, currently in the process of being cleared for release to the public, which will establish the minimum requirements for a "no antibiotics" label.[97] However, it will allow producers to make such a claim on a time limited basis, such as "within X days of finish."[98] Claims will not be required to be verified by third party certification.[99]

It remains to be seen what the new guidance will actually be. However, what has been suggested does not look promising. While it would establish a minimum standard for a "no antibiotics claim," it would not ensure such claims were verified, and would allow for the possibility of different versions of similar claims, some of which may not be meaningful in terms of having an appreciable difference in combating the spread of antibiotic resistance (for example, as to the number of days prior to finish that antibiotic usage is withdrawn). Likewise, no allowance seems to have been made for appropriate and beneficial uses of antibiotics supporting food safety or animal welfare, such as the use of antibiotics to treat diagnosed disease outbreaks under the supervision of a veterinarian.

It appears that FSIS will be proposing clear requirements for what "no antibiotics" means and that standard will likely specify that there be no *in ovo* injections of antibiotics and no usage of ionophores in raising poultry.[100] If this standard is adopted, it will be a step forward from the current state of the law. It will most likely be used by smaller operations that are set up to employ the husbandry and management practices conducive to protecting animal welfare and food safety at a premium price

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because buyers could not tell a "lemon" from a high-quality used car, they would be unwilling to pay a price representative of the value of the quality cars for fear that they might, in fact, be over-paying for a lemon. *Id.* As a result, sellers of good cars would be unlikely to sell in a market where they could not command a fair price and, eventually, the market would be made up entirely of lemons. *Id.* at 490. Akerlof saw government regulation mandating disclosure as one possible method for allowing buyers and sellers to reach the equilibrium of information necessary to allow the market to function properly. *Id.* at 488.

96. *See generally* Akerlof, *supra* note 95.

97. Letter from Thomas J. Vilsack, Secretary, U.S. Dep't of Agric., to Urvashi Rangan, Director of Consumer Safety and Sustainability, Consumer Reports (July 6, 2012), *available at* http://www.consumersunion.org/pdf/USDA_meat_ antibiotics _Ltr_712.pdf.

98. *Id.*

99. *Id.*

100. *Id.*

as well as larger producers who can dedicate a portion of their operations to these practices. For larger producers, if antibiotic treatment becomes necessary to respond appropriately to disease outbreaks, they have the option to re-direct treated flocks to conventional markets.

Nevertheless, verification is essential. As FSIS's experience with Tyson illustrates, relying on company-provided information to establish the appropriateness of a claim is insufficient. Whether this inability is as a result of intentional misrepresentation by an applicant or more benign causes, FSIS will not always be able to determine whether a claim is, in fact, truthful and not misleading. There may be confusion arising from a lack of standardized terms, or from a failure by FSIS to ask for additional information or clarification regarding an applicant's practices or procedures. In any case, onsite verification is needed to overcome this problem. Currently, FSIS does not have the authority to compel companies to obtain third-party verification nor the jurisdiction to conduct such verification procedures directly. Accordingly, legislative action would be required to enact this requirement. However, obtaining approval from Congress for such regulatory authority may well be easier than obtaining the approval of more sweeping legislation dealing with antibiotic resistance, such as PAMTA. PAMTA would immediately restrict the production practices of the majority of meat and poultry producers, potentially having an adverse impact on the cost of consumer products with a corresponding effect on sales, production levels, jobs, and grower contracts, as well as, ultimately, company profits and share prices. By contrast, authorizing FSIS to require verification of animal raising claims would involve merely an additional regulatory burden on companies choosing to adopt a voluntary marketing label on their products. This should make it more palatable to members of Congress and, therefore, more likely to be enacted. In addition, a similar program has already been successfully put into practice in the National Organic Program, allowing companies to use either third party certification or the AMS "Process Verified" program.[101]

In addition, the diversity of language that is likely to arise as a result of FSIS evaluating and approving claims on a case-by-case basis, means that the confusion associated with labeling will remain, as well as the potential for misleading claims and misinformation. As with Tyson, labeling that indicates a distinction that is not scientifically meaningful or

101. 7 C.F.R. § 205; AGRIC. MKTG. SERV., U.S. DEP'T OF AGRIC., NATIONAL ORGANIC PROGRAM, http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateA&navID=NationalOrganicProgram&leftNav=NationalOrganicProgram&page=NOPNationalOrganicProgramHome&acct=AMSPW (last visited Jan. 10, 2014).

advertises a practice that does not differ materially from that of the industry in general are or have the potential to be misleading. By way of example, is there scientific evidence that treating food producing animals with antibiotics for a portion of their lives but then removing them from the drugs for a specified period before processing would make an appreciable difference in the levels of antibiotic-resistant microorganisms such animals carried? By law, food producing animals are already required to be removed from antibiotics for a mandated withdrawal period sufficient to ensure no antibiotic drug residue remains in their tissues, so a label highlighting such a practice must not imply that the purpose of such extended time period is related to residues, or suggest that this practice is superior to that of competitors in removing residues.[102] If there is no evidence that fewer antibiotic-resistant microorganisms are present in such animals than in others which are merely removed from antibiotics for the mandatory withdrawal period, then the claim would be misleading in implying superiority in this respect as well.

In the Tyson case, the court found, based on consumer survey data provided by the plaintiff, that "[p]laintiffs have demonstrated that consumers are in fact misled by [Tyson's] advertisements," even the qualified version stating "raised without antibiotics that impact antibiotic resistance in humans."[103] Given the difficulty with this language, other

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102. The FDA is responsible for establishing tolerances for animal drugs under the Federal Food, Drug, and Cosmetic Act. Under the authority of the Poultry Products Inspection Act, as well as the Federal Meat Inspection Act and the Egg Products Inspection Act, and as spelled out in the National Residue Program, FSIS monitors chemical residues in poultry, meat, and egg products to ensure they fall within the FDA-established tolerances. *See generally* FOOD SAFETY & INSPECTION SERV., U.S. DEP'T OF AGRIC., NATIONAL RESIDUE PROGRAM 2010 SCHEDULED SAMPLING PLANS (2011), *available at* http://www.fsis.usda.gov/PDF/2010_blue_book.pdf; OFFICE OF PUB. HEALTH SCI., U.S. DEP'T OF AGRIC., 2008 FSIS NATIONAL RESIDUE PROGRAM DATA (2009), *available at* http://www.fsis.usda.gov/PDF/2008_Red_Book.pdf.

103. Sanderson Farms, Inc. v. Tyson Foods, 547 F. Supp. 2d 491, 503 (D. Md. Apr. 22, 2008). Plaintiff's expert, Professor Mazis, conducted a consumer survey regarding the advertising language (which mirrored the labeling) used by Tyson in its new product line. *Id.* at 498-99. Based on the survey results, he reached the following conclusions:

> First, the individuals that participated in the survey largely responded the same way to the qualified "Raised Without Antibiotics that impact antibiotic resistance in humans" claim as they did to the unqualified "Raised Without Antibiotics" claim. Second, participants viewed both the unqualified and qualified claims as implying that Tyson's chicken is safer and healthier than competitors' chicken. *Id.* at 499.

qualifications or nuanced distinctions are likely to be similarly confusing, if not misleading. Terms like subtherapeutic, therapeutic, growth promotion, prevention, prophylaxis, or control do not have standard definitions and there is disagreement even within the industry and scientific community as to how to define and monitor the use and purpose of antibiotics. For example, in the poultry industry, would it be possible to assert that antibiotics are used solely for therapeutic uses given the practice of treating an entire flock when an outbreak is detected in some birds? Some birds within a flock may be treated for disease while the rest of the flock is considered at risk and treated as well. Would such use necessarily be both therapeutic and preventative? How would such a determination be made? Without an in depth understanding of husbandry practices, the consumer would not be able to appreciate the issues surrounding such use. Therefore, any use of these terms in labeling should not be permitted.

Clearly, evaluating differing claims regarding antibiotics requires a knowledge and understanding of complex scientific issues with respect to which the scientific community is, as yet, unable to agree. Accordingly, case-by-case approval of claims should give way to a limited set of acceptable claims, designed to convey information and allow consumers to choose between reasonable alternatives.

One of those alternatives should take into account the issue of animal welfare and allow consumers to support the continued move to more responsible uses of antibiotics in the industry that is beginning to take place, with the assurance that animal welfare and food safety issues will not be compromised during the transition. Certainly, the industry is implementing improvements to husbandry and management practices that make routine use of antibiotics for disease prevention less necessary.[104] However, in the context of large-scale animal production, it is not possible to completely eliminate disease outbreaks and alternative therapies are not widely available, if at all.[105] If companies were unable to market products

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In addition, the court noted that, based on a series of open-ended questions asked to consumers about the advertising, covering both the original "Raised Without Antibiotics" claim and the later, qualified, "Raised Without Antibiotics That Impact Antibiotic Resistance in Humans" claim, "consumers process [both] messages in the same fashion. In short, consumers believe that there are no antibiotics given to Tyson's chickens." *Id.* at 499-500.

104. *Video: Poultry Insight: What Would Happen if We Stop Using Antibiotics All Together in the Poultry Industry?,* WORLD POULTRY, Nov. 13, 2012, http://www.worldpoultry.net/Home/General/2012/11/Poultry-Insight-Why-and-when-are-antibiotics-used-in-poultry-production-1104566W/ [hereinafter *Poultry Insight II*].

105. *Id.*; *see also* Michael J. Crumb, *Organic Livestock: Few U.S. Vets Trained To Treat Organic Livestock,* SALON, Jan. 4, 2012, http://www.salon.com/2012/01/04/few_us_vets_trained_to_treat_organic_livestock_2/.

from animals treated with antibiotics, the concern is that treatment would be withheld or delayed, with animal suffering or poorer food safety compliance being the result.[106] Judicious use of antibiotics for treatment, under the supervision of a veterinarian, represents a step in the right direction for purposes of combating antibiotic resistance, and companies complying with this standard should be able to inform consumers of their policies and practices. In addition, adopting this standard as an acceptable raising claim would not only help along the changes already underway in the market but would align with the process unfolding more slowing at FDA. By permitting companies to label their products "judicious use of antibiotics only," or words to that effect, companies should be able to market a product at a somewhat higher price than products unable to make this claim. This would incentivize them to adopt and comply with the voluntary principles set forth in FDA's Guidance for Industry #209, as the additional market price would compensate for the added costs associated with the more labor intensive husbandry and management practices required to comply with these principles.[107]

Consumers, in turn, would have the option of purchasing conventionally raised products at the lowest available price, products "raised without antibiotics," presumably offered at the highest price (other than organic products, which impose a variety of requirements on the raising of the animal in addition to prohibiting use of antibiotics at any time in the lifecycle), or products complying with the FDA's voluntary principles for the judicious use of antibiotics, which would presumably be offered at a price somewhere in between.

In addition to allowing for the free flow of information that should positively impact buying and selling decisions in the market, this robust, mandatory labeling scheme can also serve a consumer education role. By aligning FSIS and AMS labeling guidelines regarding antibiotics with the FDA's current thinking on judicious antibiotic usage, the agencies can present a unified message regarding the issue and better inform the public

106. *See generally* Letter from Members of the Coalition for Animal Health to Nancy Pelosi & Steny Hoyer, U.S. House of Rep. (July 20, 2009), *available at* http://www.meatami.com/ht/a/GetDocumentAction/i/51781; JOINT AVMA-FEDERATION OF VETERINARIANS OF EUROPE STATEMENT ON RESPONSIBLE AND JUDICIOUS USE OF ANTIMICROBIALS, https://www.avma.org /KB/Policies/Pages/Joint-AVMA-Federation-of-Veterinarians-of-Europe-Statement-on-Responsible-and-Judicious-Use-of-Antimicrobials.aspx (last visited Jan. 11, 2013); *Video: Poultry Insight: Why and When are Antibiotics Used in Poultry Production?,* WORLD POULTRY, Nov. 13, 2012, http://www.worldpoultry.net/Home/General /2012/11/Poultry-Insight-Why-and-when-are-antibiotics-used-in-poultry-production-1104566W/.

107. Ctr. for Veterinary Med., U.S. Dep't of Health & Human Servs., *supra* note 3, at 20.

of the different roles each agency plays in addressing the public health issues related to it.

VIII. CONCLUSION

This article has provided a brief overview of the myriad and complex issues related to the role the agricultural industry and, specifically, poultry companies and producers, play in the development of antibiotic resistant bacteria. As with any complex problem, there is no one solution—no magic pill—that will effect a cure. The FDA must protect the efficacy of antibiotics and other antimicrobial drugs on a case-by-case basis through its jurisdiction over new animal drugs. As new evidence emerges, the withdrawal of drugs or restriction of their use may be appropriate as well, but the process to do so is necessarily time consuming and demanding on the resources of the agency. As such, realistically, these changes can be instituted only at a slow pace.

Even while we wait for FDA to take action, industry may be spurred to action by the demands and preferences of the consumer, provided they are able to recoup the added cost of transition and innovation and consumers have the confidence needed in the improved product to pay more for it. If these incentives are reinforced by appropriate regulation enforced by FSIS, then before the FDA is able to reconsider all of the existing animal drug approvals, the industry's reliance on antibiotics in poultry production may have flown the coop.

YEA OR NEIGH? THE ECONOMICS, ETHICS, AND UTILITY OF THE HORSEMEAT FILET

L. Leon Geyer & Dan Lawler***

I. INTRODUCTION

While staying surprisingly low profile amongst the general populace, the issue of horse slaughter has become hotly contested in the last decade, evolving into a multifaceted controversy that intertwines questions regarding ethics, international commerce, and contemporary law and politics. Horses were slaughtered in the U.S. in United States Department of Agriculture (USDA) regulated plants until 2007, when an appropriations bill suspended funding for federal inspections of horsemeat.[1] The U.S. was home to three domestic slaughterhouses—two in Texas and one in Illinois[2]—that slaughtered an average of about 115,003 horses per year from 1990 to 2007.[3] Currently, American horses are shipped by the thousands to Canada and Mexico for slaughter and processing[4] or are sent

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1. Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006, Pub. L. 109-07, 119 Stat. 2120 (2005).

2. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-228, HORSE WELFARE: ACTION NEEDED TO ADDRESS UNINTENDED CONSEQUENCES FROM CESSATION OF DOMESTIC SLAUGHTER 8 (2011).

3. *Id.*

4. *Id.* at 9.

to horse retirement at a horse hostel.[5] Following a 2012 appropriations bill that technically allows horse slaughter[6] in the U.S., strong efforts have been put forth to open equine slaughterhouses in the U.S.,[7] sparking controversy and causing groups against domestic equine slaughter to mobilize.[8] Although polls show that eighty percent of Americans oppose slaughtering horses,[9] many groups support its renewal on grounds of ensuring humane slaughter,[10] decreasing horse abandonment,[11] more efficiently allocating tax dollars,[12] and improving economic efficiency.[13] Anti-slaughter groups claim that horse slaughter can never be truly humane,[14] is a betrayal to a useful companion animal,[15] and that responsible breeding is the solution to horse abandonment.[16] Though seemingly narrow and specific, North American horse slaughter affects a large plurality of stakeholders,

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5. T.D. Byars et al., *Retirement and Adoption Farms: A Step in the Right Direction*, 50 AAEP PROCEEDINGS 171, 171 (2004), *available at* http://www.unwantedhorsecoalition.org/resources/RetirementAdoptionFarms_AAEP.pdf.

6. Consolidated and Further Continuing Appropriations Act, H.R. 2112, 112th Cong. § 4 (2012).

7. Charles Abbott, *Iowa Horse Slaughterhouse Approved by U.S. Government*, HUFFINGTON POST, July 2, 2013, http://www.huffingtonpost.com/2013/07/02/iowa-horse-slaughterhouse_n_3535096.html.

8. *Id.*

9. Vickery Eckhoff, *Over Public Outcry, Governor Signs Horse Slaughter Bill*, FORBES, Apr. 2, 2013, http://www.forbes.com/sites/vickeryeckhoff/2013/04/02/over-public-outcry-governor-signs-horse-slaughter-bill/.

10. *See generally* Brief of The Am. Quarter Horse Ass'n as Amici Curiae Supporting Petitioners, Cavel Int'l, Inc. v. Madigan, No. 07-962, 2008 WL 1803448 (U.S. Apr. 16, 2008).

11. *Id.* at *10.

12. Dan Flynn, *Letter From The Editor: Thoughts About Elderly Victims,* FOOD SAFETY NEWS, July 28, 2013, http://www.foodsafetynews.com/2013/07/letter-from-the-editor-thoughts-about-elderly-victims/#.UoFCID-6evw.

13. Economic inefficiency is inherent in a process where commodities (horses) are shipped long distances from their places of origin to places of processing (Canadian and Mexican slaughterhouses) before being exported, especially when compared to a system that could locate processing facilities nearer to horses' places of origin.

14. Mike Stuckey, *Debate Over Slaughtering Horses Gains New Life: Congress Pressed to Ban U.S. Trade in Meat Destined for Dinner Tables*, NBC NEWS, Sept. 24, 2008, http://www.nbcnews.com/id/26860570/ns/us_news/t/debate-over-slaughtering-horses-gains-new-life/.

15. ANIMAL WELFARE INSTITUTE, HORSE SLAUGHTER, https://awionline.org/content/horse-slaughter (last visited Jan. 16, 2014).

16. UNWANTED HORSE COALITION, OWN RESPONSIBLY, http://www.unwantedhorsecoalition.org/?id=3 (last visited Jan. 16, 2014).

involving the meat processing industry,[17] farmers and ranchers,[18] international horsemeat consumers,[19] animal welfare groups,[20] equestrian industry organizations,[21] horse rescue programs,[22] and taxpayers.[23] Horse slaughter is an issue immersed in complexity and riddled with intricacies that make practical solutions difficult to find; like many problems in our world, all possible actions to remedy the issue carry significant tradeoffs, ensuring that some parties will suffer economic or ideological losses.

II. JUST THE FACTS— HORSEMEAT

Horsemeat is the major product of horse slaughter.[24] Horsemeat has been served since man has been able to harness or kill horses[25] and has been served in the finest establishments—it even held a revered place on the Harvard Faculty Club luncheon menu until the 1980's.[26] Nutritionally speaking, horsemeat is healthy and useful.[27] Some critics of horse slaughter worry about the possibility of "bute," an equine painkiller, having

17. Jeri Clausing, *Horse Slaughterhouse in New Mexico Gets Go-Ahead From USDA Officials*, HUFFINGTON POST, June 28, 2013, http://www.huffingtonpost.com /2013/06/28/horseslaughterhouse_n_3517963.html.

18. *Feds Consider Euthanizing Wild Horses in West: Population in Holding Pens Jumps in Nevada, Elsewhere as Adoptions Dip,* NBC NEWS, June 30, 2008, http://www.nbcnews.com/id/25465974/ns/us_news-environment/t/feds-consider-euthanizing-wild-horses-west/#.UdxrQWD5bH8 [hereinafter *Euthanization*].

19. HUMANE SOC'Y INT'L, AN INVESTIGATION INTO THE AVAILABILITY OF HORSEMEAT IN BELGIUM, FRANCE AND THE NETHERLANDS 7 (2012), *available at* http://www.hsi.org/assets/pdfs/horses_EU_horsemeat_retail_investigation_Oct 2012 .pdf.

20. ANIMAL WELFARE INST., ORGANIZATIONS AND INDIVIDUALS OPPOSED TO HORSE SLAUGHTER, https://awionline.org/content/organizations-and-individuals-opposed-horse-slaughter (last visited Jan. 16, 2014).

21. *Id.*

22. *Id.*

23. HUMANE SOC'Y OF THE U.S., FACT SHEET: OPPOSE HORSE SLAUGHTER, http://www.humanesociety.org /assets/pdfs/legislation/horse_slaughter_key_points.pdf (last visited Jan. 16, 2014).

24. A MILLION HORSES: DOCUMENTING ABANDONED, ABUSED & NEGLECTED HORSES, THE HISTORY OF HORSE MEAT, http://amillionhorses.com/horsemeat.htm (last visited Jan. 16, 2014).

25. *Id.*

26. Christopher Moraff, *What's Wrong With Eating Horse Meat? 5 Fun Facts About the "Other Red Meat,"* PHILADELPHIA, Feb. 21, 2013, http://blogs.philly mag.com/the_philly_post/2013/02/21/eat-horse-meat-ok-wrong/.

27. Darya Pino, *How Nutritious is Horse? The Other Read Meat*, QUEST, Jan. 7, 2011, http://science.kqed.org/ quest/2011/01/07/how-nutritious-is-horse-the-other-red-meat/.

a dangerous presence in horsemeat.[28] Veterinary experts say there is little risk from consuming small amounts in horsemeat,[29] yet the European Union (EU) still requires that slaughter-bound horses have traceable veterinary records in order to keep contaminated meat out of the market.[30] The following table compares important nutritional values of horsemeat, beef, chicken, pork, and lamb per 100 gram serving of cooked, roasted meat:

Nutritional Data for Selected Meats (per 100 g serving)

	Horsemeat[31]	Beef[32]	Chicken[33]	Pork[34]	Lamb[35]
Calories	175	242	165	142	235
Protein	28g	21g	31g	24g	26g
Fat	6g	14g	4g	5g	14g
Cholesterol	68mg	86mg	85mg	53mg	85mg
Sodium	55mg	79mg	74mg	234mg	64mg

In addition, horsemeat is leaner and "slightly sweeter in taste" when compared to beef.[36] The most popular cuts of horsemeat are "tenderloin,

28. Eckhoff, *supra* note 9.

29. Jill Lawless, *Britain Finds Horsemeat in School Meals, Hospitals and Restaurants as Scandal Spreads*, STAR TRIBUNE, Feb. 15, 2013, http://www.startribune.com/world/191375971.html.

30. Ben Bouckley, *Tainted U.S. Horse Meat Puts World Consumers at Risk: Welfare Body*, FOOD PRODUCTION DAILY, Sept. 29, 2011, http://www.foodproductiondaily.com/Safety-Regulation/Tainted-US-horse-meat-puts-world-consumers-at-risk-welfare-body.

31. FOOD SAFETY & INSPECTION SERV., U.S DEP'T OF AGRIC., U.S.D.A. PROMOTES HORSE & GOAT MEAT, http://www.igha.org/USDA.html (last visited Jan. 16, 2014).

32. U.S. DEP'T OF AGRIC., HOUSEHOLD USDA FOODS FACT SHEET: BEEF, GROUND, FROZEN, http://www.fns.usda.gov/sites/default/files/HHFS_BEEF_GROUND_100159October2012.pdf (last visited Jan. 16, 2014).

33. SELF NUTRITION DATA, NUTRITION FACTS: CHICKEN, BROILERS OR FRYERS, BREAST, MEAT ONLY, COOKED, ROASTED, http://nutritiondata.self.com/facts/poultry-products/703/2 (last visited Jan. 16, 2014).

34. SELF NUTRITION DATA, NUTRITION FACTS: PORK, FRESH, ENHANCED, LOIN, TOP LOIN (CHOPS), BONELESS, SEPARABLE LEAN AND FAT, COOKED, BROILED, http://nutritiondata.self.com/facts/pork-products/10299/2 (last visited Jan. 16, 2014).

35. SELF NUTRITION DATA, NUTRITION FACTS: LAMB, AUSTRALIAN, IMPORTED, FRESH, LEG, SIRLOIN CHOPS, BONELESS, SEPARABLE LEAN AND FAT, TRIMMED TO 1/8" FAT, COOKED, BROILED, http://nutritiondata. self.com/facts/lamb-veal-and-game-products/4772/2 (last visited Jan. 16, 2014).

36. FOOD SAFETY & INSPECTION SERV., U.S DEP'T OF AGRIC., *supra* note 31.

sirloin, fillet steak, rump steak and rib," usually consumed as a roasted cut or in ground-up form.[37] According to a retail study conducted by Humane Society International[38] in Belgium, France, and the Netherlands in 2012, market prices for chilled, fresh horsemeat ranged from €8.40 to €31.11 per kilogram, with the average price for all products recorded at €18.05 per kilogram.[39] These numbers equate to $10.81, $40.02, and $23.22 per kilogram respectively. Additionally, the prices of individual packages of processed horsemeat products ranged from €1.45 to €3.05, or $1.87 and $3.92 respectively.[40] In comparison, the price of a fresh cut of beef in the Netherlands in 2012 was €28 per kilogram, which equates to $37.17, while a 500g package of processed, minced beef cost €3, which equates to $3.98.[41]

Horsemeat is eaten in many different cultures and countries around the globe.[42] The EU is the largest regional importer of equidae meats, with France and Italy accounting for two-thirds of all intra-EU horsemeat imports and nations such as Belgium, the Netherlands, Bulgaria, Finland, and Hungary also importing significant amounts of horsemeat.[43] In total, the EU imported 54,853,400 kg (54,853.4 metric tons) of horsemeat in 2012.[44] Russia, however, leads all nations in horsemeat imports, having brought 28,574 metric tons into the country in 2012.[45] In addition, horsemeat is consumed in other countries such as Chili, China, Iceland, Indonesia, Japan, Kazakhstan, and Mongolia.[46] Currently, China is far and away the world leader in horsemeat exports after supplying 170,848 metric

37. *Id.*

38. Humane Society International is the international division of the Humane Society of the United States.

39. HUMANE SOC'Y INT'L, *supra* note 19, at 7.

40. *Id.*

41. COST OF LIVING AMSTERDAM - SUPERMARKET, http://www.amsterdamtips.com /tips/cost-of-living-supermarket-amsterdam.php (last visited Jan. 17, 2014).

42. A MILLION HORSES: DOCUMENTING ABANDONED, ABUSED & NEGLECTED HORSES, THE HISTORY OF HORSE MEAT, *supra* note 24.

43. Mona Chalabi, *Horsemeat: EU Imports and Exports Data*, THE GUARDIAN, Feb. 13, 2013, http://www.guardian.co.uk/news/datablog/2013/feb/13/horsemeat-uk-eu-imports-exports#table.

44. *Id.*

45. Mike Stewart, Australian Inst. of Food Safety, *The Great Horsemeat Scandal Explained*, Feb. 27, 2013, http://www.foodsafety.com.au/2013/02/the-great-horsemeat-scandal-explained/.

46. A MILLION HORSES: DOCUMENTING ABANDONED, ABUSED & NEGLECTED HORSES, THE HISTORY OF HORSE MEAT, *supra* note 24.

tons to the global market in 2012.[47] Kazakhstan and Mexico followed with 73,088 and 69,130 metric tons of horsemeat exported respectively.[48]

Until domestic slaughter operations ceased in 2007, the U.S. supplied large amounts of horsemeat to international consumers.[49] In 2006, the last full year of operations for equine slaughterhouses in the U.S., domestic facilities slaughtered 104,899 horses for human consumption,[50] equating to over 17,000 metric tons of horsemeat for export, which was valued at about $65 million.[51] While there is no current domestic demand for horsemeat and no equine slaughterhouses currently operate in the U.S., the number of American horses slaughtered for human consumption has not seen any profound changes. In 2008, the year after the closing of all U.S. equine slaughterhouses, 99,049 American horses were exported to Mexico and Canada for the purpose of slaughter, a number that rose to 109,487 in 2009, and then again to 137,984 in 2010.[52] This is because horse auctions continued to operate throughout the U.S., allowing kill buyers to continue their business with no difference other than longer and costlier transportation to slaughter facilities.[53]

Horse auctions are an important part of the argument presented by groups supporting the renewal of domestic slaughter.[54] Many people, including individuals employed by the auction and horse sellers, rely on horse auctions to supplement their incomes.[55] According to the GAO report on horse welfare, "the cessation of domestic horse slaughter led to an 8- to 21-percent decline—depending on sale price—in the per head price of horses sold at those auctions."[56] This lowers the total revenue acquired per auction, thereby lowering the income earned by auction employees and horse sellers; this drop in income can be devastating when auctions are in low income areas, such as the New Holland auction site operated and attended by people of Amish and Mennonite communities.[57] Groups supporting the renewal of domestic horse slaughter often use the decreasing prices of horses and its harmful impacts on sellers and auctions as a key component of their argument.

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47. Mike Stewart, Australian Inst. of Food Safety, *supra* note 45.
48. *Id.*
49. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 2, at 3.
50. *Id.* at 11.
51. *Id.* at 8.
52. *Id.* at 12-13.
53. Lisa Couturier, *Dark Horse*, ORION MAGAZINE, July/Aug. 2010, http://www.orionmagazine.org/ index.php/articles/article/5620/.
54. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 2, at 13.
55. *Id.* at 14.
56. *Id.* at 16.
57. Couturier, *supra* note 53.

Though the U.S. played a significant role as a supplier, horsemeat is not consumed in the country. This is due to the way that Americans perceive the horse with regard to American history and companionship. Many Americans are against the consumption of horsemeat due to "the horse's iconic role in helping to settle the American West; its former importance as a work and transportation animal on farms and in rural communities; and its continued value as a show, racing, and recreation animal."[58] In addition, many believe that "horses are companion animals, similar to dogs, cats, or other domestic pets,"[59] although equines are technically classified as livestock under the Code of Federal Regulations.[60] Opponents of horse slaughter often employ comparisons that question the ethics of killing companion animals, even asking if one would open up a puppy mill just because "people in China and France want to eat dog meat."[61] They also argue that current human society is above eating horsemeat, saying that we have "standards" and "values in society."[62]

This raises some important questions regarding the relationship dynamics between animals and humans because even though American society has deemed horse slaughter as taboo, equines are viewed differently and perform varying roles depending on the culture and country.[63] For example, horse sausage is considered an essential delicacy to Kazakhstan cuisine and is eaten with pleasure.[64] Do the ethical sentiments of horse slaughter opponents in the U.S. justify the domestic shutdown of an entire industry, especially when the product in question is exported directly to international consumers that have no cultural or ethical problem with eating horsemeat? And how should horses be addressed with regard to ethics and economics when federal classification of that animal[65] fails to reflect society's widely accepted designation of horses as pets or companion animals?[66] Understanding the economic, ethical, and social implications of these questions is central to finding comprehensive solutions for the issue

58. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 3, at 1.

59. *Id.*

60. 9 C.F.R. § 301.2 (2012).

61. Frank Morris, *Pets or Livestock? A Moral Divide Over Horse Slaughter*, NPR: THE SALT, Sept. 11, 2013, http://www.npr.org/blogs/thesalt/2013/09/11/221371617/pets-or-livestock-a-moral-divide-over-horse-slaughter.

62. *Id.*

63. Eckhoff, *supra* note 9.

64. Peter Kenyon, *In Kazakhstan, No Horror At Horse Meat*, NPR: THE SALT, Mar. 4, 2013, http://www.npr.org/blogs/thesalt/2013/03/04/173448013/in-kazakhstan-no-horror-at-horse-meat.

65. 9 C.F.R. § 301.2 (2012).

66. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 2, at 1.

of horse slaughter that maximize the utility and happiness of those both in support of equine slaughter and against it.

III. IS THE PROCESS OF HORSE SLAUGHTER HUMANE?

In order to evaluate whether the suspension of domestic horse slaughter improves or degrades overall welfare for American horses, it is necessary to investigate how humane the industry was before its domestic cessation versus how humane its current continuation is in Mexico and Canada. An analysis of the transportation process for slaughter-bound horses is a fitting place to begin. Although the domestic slaughter of horses ceased in 2007, the USDA's Slaughter Horse Transport Program (SHTP) continues to operate, intending "to ensure that horses traveling to slaughter are fit to travel and handled humanely en route."[67] The program has adopted a rule that specifically details the regulations on the transport of slaughter bound horses. It requires that:

> the equines have access to food, water and the opportunity to rest for at least 6 hours prior to transit and following 28 consecutive hours or more of transit; adequate space during transit to prevent injury or discomfort; segregation of stallions or other aggressive equines; use of electric prods only in life-threatening situations; and certification of each equine's fitness to travel, including notation of any special handling needs.[68]

In addition, the rule bans the use of double-deck trailers when transporting equines and applies "to entities that transport equines within the United States for slaughter in Canada and Mexico."[69]

Although the regulations are clearly stated and publicly available, many violations occur because enforcement is made difficult due to funding issues with the USDA[70] and insufficient controlling methods used by the Animal and Plant Health Inspection Service (APHIS).[71] One of the violations often recorded is the transportation of late term pregnancy mares. Out of a sample of 505 horses transported by horse kill buyer Dennis Chavez during three separate deliveries in April of 2010, three late term

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67. *Id.* at 3.

68. Commercial Transportation of Equines to Slaughter, 76 Fed. Reg. 55,213 (Sept. 7, 2011) (to be codified at 9 C.F.R. pt. 88).

69. *Id.*

70. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 2, at 1.

71. *Id.* at 9.

pregnancy mares were discovered; two of these mares had their aborted foals hanging halfway out of their vulva, while the third calved her foal in a holding pen at the inspection facility.[72] Subsequently, Chavez was fined $3750.[73] Other common violations associated with the physical and mental welfare of horses during the transport process include shipping equines that are blind, injured, or unable to bear their own weight, failure to separate aggressive equines from the general population, and transporting equines for over twenty-eight hours without rest breaks.[74] In 2010 there were a total of approximately seventy violators of the SHTP that committed violations such as the ones previously listed, reflecting growing effectiveness of SHTP regulations, as a steady downward trend can be seen from the 162 violators documented in 2005.[75]

Investigating the treatment of equines at slaughter facilities before domestic slaughter ceased is essential to revealing how humane the process of horse slaughter actually was prior to its transfer to Mexico and Canada. According to the Code of Federal Regulations, horses must "be stunned in a manner that they will be rendered unconscious with a minimum of excitement and discomfort."[76] In all three of the horse slaughter facilities formerly located in the U.S., the preferred method of achieving humane slaughter was through use of the captive bolt gun, which fires a blank rifle cartridge, driving a piston-like bolt forward and delivering a lethal blow to the brain.[77] If performed properly, this method of euthanasia is classified as humane by the U.S. government.[78]

However, there is much dissent as to whether captive bolt guns actually deliver a humane death. According to the testimony of Dr. Nicholas H. Dodman, a highly accredited veterinarian and founding member of the Veterinarians for Equine Welfare, use of the captive bolt method is "one of the most egregious aspects of horse slaughter."[79] In a

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72. EQUINE WELFARE ALLIANCE & WILD HORSE FREEDOM FED'N, INVESTIGATION REPORT 4 (2013), *available at* http://www.equinewelfarealliance.org/uploads/FOIA.Response.transport.2013.02.11.pdf.

73. *Id.* at 53.

74. FOIA REQUESTS, http://www.animalsangels.org/the-issues/horse-slaughter/foia-requests.html (last visited Jan. 17, 2014).

75. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 4, at 39.

76. 9 C.F.R. § 313.15 (2011).

77. BOB WRIGHT ET AL., ONT. MINISTRY OF AGRIC., FOOD & RURAL AFFAIRS, EUTHANASIA OF HORSES 2 (2009), *available at* http://www.omafra.gov.on.ca/english/livestock/horses/facts/info_euthanasia.htm.

78. 9 C.F.R. § 313.15 (2011).

79. *The Prevention of Equine Cruelty Act: Hearing Before the Subcomm. On Crime, Terrorism, and Homeland Security,* 110th Cong. 4 (2008) (statement of Dr. Nicholas H. Dodman).

hearing before a United States House of Representatives subcommittee, he went on to say:

> [a]ccording to the AVMA's guidelines, the head of the animal to which the captive bolt is being applied must be restrained or still and a highly skilled individual must administer the fatal blow. In the slaughterhouse none of these scenarios is in place: the horse is often panicked, its head is unrestrained, and the person administering the captive bolt is a low-paid worker who is expected to move horses through the kill line at high speed. Herein lays the problem with the use of the captive bolt in horse slaughter.[80]

Assuming that Dr. Dodman's statement is accurate, captive bolt euthanasia would then fail to render the horse "unconscious with a minimum of excitement and discomfort" in some cases.[81] Captive bolt euthanasia is fundamentally humane; in practice, however, it relies on the ability of the worker to place the gun on the correct spot on the equine's head to ensure a humane death.[82] Therefore, the actual act of killing horses in American slaughter plants operates within humane parameters, but it is impossible to tell how many equines have suffered from panic, discomfort, and improper captive bolt firing due to the mistakes or apathy of workers.

Although the actual euthanasia of horses in slaughter facilities is the focal point of regulations regarding humane treatment of these animals, other aspects of slaughter facilities can play host to inhumane activity as well. The handling and driving of equines from trailers to holding pens and other parts of the slaughter facility is another activity that sees frequent violations concerning the humane treatment of animals. According to a USDA Food Safety and Inspection Service noncompliance record from 2006, a USDA inspector witnessed and investigated an incident at the Beltex Corporation's facility in Fort Worth, Texas, where a plant worker engaged in activities that caused unprovoked and unnecessary cruelty to equines.[83] The inspector stated:

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80. *Id.*

81. 9 C.F.R. § 313.15 (2011).

82. *Id.*

83. FOOD SAFETY & INSPECTION SERV., U.S. DEP'T OF AGRIC., NONCOMPLIANCE RECORD 1 (2009), *available at* http://www.animalsangels.org/images/stories/pdf/Beltex%20Humane%20Slaughter%20Act%20Violations.pdf.

> [w]e observed a plant employee attempt to drive three horses from one pen to the next by whipping three horses across the face with a fiberglass rod. These rods are normally used as prods to move the horses but this employee used his as a whip. One bay horse ran forward into a gate and then reared up and flipped over backwards, landing on his head. He received a laceration above one eye and a contusion above the left eye. After getting to his feet, the horse shook his head and continued to open and close his mouth.[84]

The actions of the worker clearly violate the provisions of the Code of Federal Regulations, as the driving of livestock must be done with a minimum of excitement and discomfort to the animals and "electric prods, canvas slappers, or other implements employed to drive animals shall be used as little as possible in order to minimize excitement and injury."[85]

Although this is but one violation observed in slaughter facilities, one must consider the fact that this worker violently whipped these horses, causing lacerations and contusions as if it were not out of the ordinary and without fear of reprimand from supervisors; what's even more indicative of these actions being considered acceptable by employees is that the worker did so in the presence of a USDA inspector. Though not certain by any means, it is likely that cruel handling of equines in domestic slaughter facilities is commonplace (especially when USDA officials are not present) if the worker was so comfortable with his actions. Undercover videos taken by the Humane Society of the United States have uncovered similar type violations in the pork,[86] beef,[87] and poultry[88] industries.

When horse slaughter facilities moved across borders to Canada and Mexico in 2007, many concerns were raised regarding equine welfare and humane treatment because horses were no longer protected under U.S. laws and regulations. One widely held concern pertains to increased travel distances for slaughter bound horses. According to a Government

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84. *Id.*

85. 9 C.F.R. § 313.2 (2011).

86. Press Release, Humane Soc'y of the U.S., Undercover Video Documents Abuse of Pigs at Okla. Factory Farms (Jan. 31, 2012), *available at* http://www.humanesociety.org/news/press_releases/2012/01/pig_gestation_ investigation_013112.html.

87. Press Release, Humane Soc'y of the U.S., Rampant Animal Cruelty at California Slaughter Plant (Jan. 30, 2008), *available at* http://www.humanesociety.org/news/news/2008/01/undercover_investigation_013008.html.

88. Eric Fiegel, *Humane Society: Undercover Video Shows Alleged Abuse at Egg Farm*, CNN, Nov. 17, 2010, http://www.cnn.com/2010/US/11/17/humane.society.abuse/index.html.

Accountability Office (GAO) report on horse welfare, "before domestic slaughter ceased, horses traveled an average of 550 miles after being designated for slaughter," while after domestic slaughter ceased, their "analysis showed horses intended for slaughter traveled an average of 753 miles—an increase of about 203 miles."[89] This increase in travel time and distance makes it much more difficult for APHIS to effectively implement transport regulations such as the twenty-eight hour rule, as well as ensuring that equines have sufficient food, water, rest, and space.[90] Cooperation between APHIS and the Canadian Food Inspection Agency (CFIA) led to their mutual signing of a letter of intent to help each other enforce their respective regulations, making horse shipping regulation enforcement much less of an issue in the northern U.S.[91] Once horses have entered Canada, however, they can legally be transported without food, water, or rest for up to thirty-six hours,[92] and the use of dangerous and uncomfortable double-deck trailers is allowed,[93] both of which pose greater risks for horse welfare than those seen in the U.S. After completing the transport process and arriving at Canadian slaughter facilities, horses are protected from avoidable distress and pain, as well as from goading and prodding in sensitive areas under the Canadian Meat Inspection Regulations of 1990.[94] Similar to the U.S., many alleged animal rights violations in Canadian slaughter facilities have been recorded and publicized. These violations include a fear-inducing environment, lack of food and water in holding pens, injured and unfit horses, faulty documentation, and improper stunning.[95]

Contrary to those of American and Canadian equine slaughter facilities, conditions in the Mexican horse slaughter industry are alleged to be inhumane and brutal.[96] According to an amicus curiae brief submitted in support of the legality and practicality of American horse slaughter,

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89. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 2, at 40.

90. *Id.*

91. *Id.* at 33.

92. HUMANE SOC'Y INT'L, FAST FACTS ON HORSE SLAUGHTER IN CANADA 1, *available at* http://www.hsi.org /assets/pdfs/horse_slaughter_in_canada.pdf.

93. CANADIAN HORSE DEF. COAL., HORSES AND DOUBLE DECKER TRAILERS 1, *available at* http://defendhorsescanada.org/doubledeckerdoc.pdf

94. MINISTER OF JUSTICE, GOV'T OF CANADA, MEAT INSPECTION REGULATIONS, 1990 57 (2013), *available at* http://laws-lois.justice.gc.ca/PDF/SOR-90-288.pdf.

95. CANADIAN HORSE DEF. COAL., PASTURE TO PLATE: THE TRUE COST OF CANADA'S HORSEMEAT INDUSTRY 9-18 (2011), *available at* http://canadianhorse defencecoalition.files.wordpress.com/2011/12/pasture-to-plate.pdf.

96. Animal Law Coal., *Horse Slaughter in Mexico's San Bernabe Market*, May 18, 2008, http://animallawcoalition.com/horse-slaughter-in-mexicos-san-bernabe-market/ (last visited Jan. 17, 2014).

horse owners who previously might have sold their unwanted horses to the regulated and inspected facilities formerly in the U.S. now sell them to slaughter houses in Canada and Mexico.[97] Mexico subjects the equines to "longer (and unregulated) trailer rides and less regulated or unregulated, and potentially less humane methods."[98]

The most brutal and publicized of these methods is known as puntilla, "a traditional slaughter method in which a knife is plunged into the back of the neck to sever the spinal cord." [99] According to Temple Grandin,[100] a renowned animal rights and livestock slaughter expert, while some horses are lucky enough to be slaughtered in an E.U. inspected plant, there are only two in Mexico,[101] and therefore many others are sent to local abattoirs that use the puntilla knife technique.[102] Horses in unregulated Mexican slaughter facilities are "stabbed repeatedly in the neck," an action that "simply paralyzes the animal," leaving the horse "fully conscious at the start of the slaughter process, during which he or she is hung by a hind leg, his or her throat slit and body butchered."[103] An article in the journal *Animal Welfare* that analyzes puntilla as a slaughter method found that "it is difficult in practice to penetrate the spinal cord with a single puntilla stab" and that it is "highly likely that the animals remain conscious in at least some modalities for the next part of the slaughter procedure."[104] This confirms that the process described has a high potential for brutality and causes pain, terror, and unnecessary excitement to the equine. In the words of Temple Grandin, "the worst outcome from an animal welfare perspective is a horse going to a local Mexican abattoir.[105]

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97. Brief of The Am. Quarter Horse Ass'n as Amici Curiae Supporting Petitioners, Cavel Int'l, Inc. v. Madigan, No. 07-962, 2008 WL 1803448, at *16 (U.S. Apr. 16, 2008).

98. *Id.*

99. G Limon et al., *A Review of the Humaneness of Puntilla as a Slaughter Method*, 21 ANIMAL WELFARE 1, 3 (2012).

100. BIOGRAPHY: TEMPLE GRANDIN, PH.D., http://www.grandin.com/temple.html (last visited Jan.18, 2014).

101. INT'L FUND FOR HORSES, HORSE SLAUGHTER: IMAGES AND DESCRIPTION, http://www.horsefund.org/horse-slaughter-images.php (last visited Jan. 18, 2014).

102. TEMPLE GRANDIN, ANSWERING QUESTIONS ABOUT ANIMAL WELFARE DURING HORSE SLAUGHTER, http://www.grandin.com/humane/questions.answers.horse.slaughter.html (last visited Jan. 18, 2014).

103. ANIMAL WELFARE INST., HORSE SLAUGHTER, https://awionline.org/content/horse-slaughter (last visited Jan. 18, 2014).

104. Limon et al., *supra* note 99, at 3.

105. GRANDIN, *supra* note 102.

IV. HOW DO HORSE SLAUGHTER FACILITIES IMPACT THEIR HOST COMMUNITIES?

In order to gain a thorough understanding of the benefits and drawbacks of the cessation of U.S. domestic horse slaughter, it is necessary to examine the impact that horse slaughter facilities have on the communities surrounding them. A case study of the former slaughter town of Kaufman, Texas is a fitting way to achieve this. According to an official report prepared for the United Nations Environment Programme, "the main environmental issues associated with meat processing are the high consumption of water, the discharge of high-strength effluent and the consumption of energy," while "noise, odour, and solid wastes may be issues for some plants."[106]

Dallas Crown, a Belgian owned horse slaughter plant, imposed these environmental and social costs of operation upon their former host town of Kaufman, Texas, a community of 7000 residents located thirty miles southeast of Dallas.[107] Slaughter operations like Dallas Crown's consume immense amounts of water in order to carry out actions such as cleaning, hide treatment, and casing and offal processing.[108] In turn, high rates of water consumption can strain local water resources used by communities and hasten the depletion of reservoirs and regional aquifers.[109]

In addition to consuming large quantities of water, Dallas Crown placed major burdens on the Kaufman community through issues with its effluent discharge. It is important to note that effluent from horse slaughter facilities is particularly difficult to deal with because "[h]orses have 1.74 times as much blood per pound of body weight as cows, and it is harder to treat because the antibiotics in the blood kill bacteria used in the treatment process."[110] According to a court affidavit submitted by the former mayor of Kaufman, Paula Bacon, "[t]wenty-nine citations for wastewater violations [had] been issued to Dallas Crown, each carrying with them a

106. POUL-IVAR HANSEN, KIM CHRISTIANSEN & BENT HUMMELMOSE, COWI CONSULTING ENG'RS & PLANNERS AS, DENMARK, CLEANER PRODUCTION ASSESSMENT IN MEAT PROCESSING 14 (Bob Pagan et al. eds., 2000), *available at* http://info house.p2ric.org/ref/24/23224.pdf.

107. COMMUNITY PROFILE, http://www.kaufmantx.org/business/community_profile 12.html (last visited Jan. 18, 2014).

108. HANSEN, CHRISTIANSEN & HUMMELMOSE, COWI CONSULTING ENG'RS & PLANNERS AS, DENMARK, *supra* note 106, at 14-17.

109. ARIZ. DEP'T OF WATER RES., SECURING ARIZONA'S WATER FUTURE, http://www.azwater.gov/AzDWR/PublicInformationOfficer/documents/supplydemand. pdf (last visited Jan. 18, 2014).

110. Laura Allen, *Horse Slaughter a Fraud on the Public*, ANIMAL LAW COAL. (Mar. 23, 2012), http://animal lawcoalition.com/horse-slaughter-a-fraud-on-the-public/.

potential fine of $2,000."[111] These violations and other instances of misconduct concerning the handling of wastewater were "about to cost Kaufman $6 million for a new waste water treatment plant," but "[w]ithin two weeks of the plant's closure, waste water plant capacity increased dramatically."[112] If Dallas Crown had been allowed to continue operations, the cost of internalizing the consequences of their actions (i.e. building a new water treatment plant) would have been paid by taxpayers, an unfair and burdensome prospect for the city of Kaufman. Dallas Crown also negatively impacted the Kaufman community through carelessness and lack of responsibility with regard to waste disposal.[113] In May 2002, city officials identified a serious public health hazard from bones and horseflesh that had fallen off of the company's trailers and been dispersed throughout the community by dogs and other animals.[114] As a result, "vultures, snakes, cockroaches, and flies plagued neighbors while Dallas Crown was operating,"[115] making the spread of sickness and disease amongst humans a real threat.

In addition to dealing with the environmental consequences of hosting a horse slaughter facility, Kaufman also experienced serious economic and social issues resulting from Dallas Crown's presence. Robert Eldridge, a resident of a Kaufman neighborhood that bordered the processing facility, recalls that "one by one, [his] neighbors couldn't take it and left the neighborhood," asserting that "it stunk like manure and decaying flesh" and that "the noise from clanging and whinnying when they unloaded the horses at midnight was just awful."[116] Paula Denmon, a licensed, experienced, and successful realtor who specializes in equine properties, saw firsthand the effects that horse slaughter operations have on property values and development in their host communities. In a letter she wrote to Congress, Denmon says she was "completely stunned to find that clients completely ruled out very nice properties at extremely good prices in and

111. Bacon Aff. ¶ 5, Humane Soc'y of the U.S. v. Johanns, No. 06-265, 2007 WL 1120404 (D.D.C. Feb. 22, 2006).

112. *Life in a Slaughter Town: Kaufman, Texas*, FORBES, http://www.forbes.com/pictures/eldj45jfi/dallas-crown-horse-slaughter-plantkaufman-texas-2005/.

113. Lisa Sorg, *Violations Dog Beltex, Dallas Crown*, SAN ANTONIO CURRENT, June 26, 2003, http://www2. sacurrent.com/news/story.asp?id=57194.

114. *Id.*

115. *Life in a Slaughter Town: Kaufman, Texas*, FORBES, http://www.forbes.com/pictures/eldj45jfi/vulture-in-treekaufman-texas-2005/.

116. *Life in a Slaughter Town: Kaufman, Texas*, FORBES, http://www.forbes.com/pictures/eldj45jfi/dallas-crown-holding-penskaufman-texas-2006/.

around Kaufman."[117] She goes on to say this about why her clients refused to buy property in the area:

> [m]y clients did not want to buy property in the county. They were worried that they would come home from work to find their horses gone, stolen, and already slaughtered at the nearby plant. Others had heard that the town was "[r]ough", teeming with aliens and [e]x-convicts who were the only ones that would do this disgusting work. And some just loved horses, and did not want anything to do with an area close to where people killed them to be food.[118]

After Dallas Crown was shut down via litigation,[119] Kaufman saw a rise in real estate prices and began to attract business that had been previously deterred due to Kaufman's former reputation as "that place that slaughtered horses."[120]

Another effective way to evaluate the economic and social impact that horse slaughter facilities have on their host communities is to analyze crime rates from before and after the closing of said facilities. From 2002 to 2007 there were nineteen total rapes recorded in the city of Kaufman; no rapes have been recorded from Dallas Crown's closure in 2007 through 2011.[121] Kaufman also experienced a significant drop in many other types of crimes after Dallas Crown's closure. When comparing the four years before the slaughterhouse shut down (2004-2007) to the four years after (2008-2011), one can see that burglaries decreased by 58%,[122] theft decreased by 42%,[123] and auto theft decreased by 63%.[124] When comparing the three years

117. Letter from Paula Denmon, Realtor, Town & Country Girls Real Estate, to the U.S. Congress (Dec. 9, 2011), *available at* http://blogs.usda.gov/2011/12/09/setting-the-record-straight-on-congress%E2%80%99-lifting-of-the-ban-on-horse-slaughter/.

118. *Id.*

119. *See generally* Empacadora de Carnes de Fresnillo, S.A. de C.V., v. Curry, 476 F.3d 326 (5th Cir. 2007) (reviewing the legality of processing, selling, or transferring horsemeat for human consumption in Texas).

120. Vickery Eckhoff, *Texas Mayor Paula Bacon Kicks Some Horse Slaughter Tail*, FORBES, Jan. 10, 2012, http://www.forbes.com/sites/vickeryeckhoff/2012/01/10/texas-mayor-paula-bacon-kicks-some-tail/4/.

121. CRIME RATE IN KAUFMAN, TEXAS: MURDERS, RAPES, ROBBERIES, ASSAULTS, BURGLARIES, THEFTS, AUTO THEFTS, ARSON, LAW ENFORCEMENT EMPLOYEES, POLICE OFFICERS, CRIME MAP, http://www.city-data.com/crime/crime-Kaufman-Texas.html (last visited Jan. 18, 2014).

122. *Id.*

123. *Id.*

124. *Id.*

before and after the closing of Dallas Crown, a 25% drop in violent crimes can be seen.[125] This trend indicates that workers employed by the slaughterhouse and other individuals involved with its operation may be more likely to increase crime rates of the host community. Research done by University of Windsor criminologist Amy Fitzgerald supports this notion, as her "findings indicate slaughterhouse employment increases total arrest rates, arrests for violent crimes, arrests for rape, and arrests for other sex offenses in comparison with other industries," which is probably due to "the existence of a 'Sinclair effect' unique to the violent workplace of the slaughterhouse."[126]

Another way that the Dallas Crown slaughter operation had a negative impact on Kaufman can be seen through the facility's direct economic costs to the city. According to a document submitted by Paula Bacon, former mayor of Kaufman, to the Montana state senate, Dallas Crown requested twenty-nine separate jury trials in response to twenty-nine wastewater violation citations, greatly increasing legal costs for the city.[127] In the same document, Bacon stated that one year the city had to "spend $70,000 in legal fees because of Dallas Crown problems, which was the entire legal budget for the fiscal year."[128] Along with expenses associated with the environmental ramifications of Dallas Crown (e.g., high water usage,[129] organic waste cleanup,[130] and wastewater treatment),[131] these costs unfairly hinder the community. What's worse is that Dallas Crown's tax records show little reinvested in the city of Kaufman. In 2004, Dallas Crown paid only $5 in federal taxes on a gross income of over $12 million.[132] This proves that the industry is not overly profitable for the community; the difference between Dallas Crown's costs imposed on Kaufman and revenue generated for Kaufman highlights the extent of horse slaughter's negative economic impact on the city.

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125. KAUFMAN, TX PROFILE, http://www.idcide.com/citydata/tx/kaufman.htm (last visited Jan.18, 2014).

126. Amy J. Fitzgerald et al., *Slaughterhouses and Increased Crime Rates: An Empirical Analysis of the Spillover From "The Jungle" Into the Surrounding Community*, 22 ORG. & ENV'T 158, 158 (2009).

127. Animal Law Coal., *Open Letter to State Legislatures Considering Pro-Horse Slaughter Resolutions*, Feb. 13, 2009, http://animallawcoalition.com/open-letter-to-state-legislatures-considering-pro-horse-slaughter-resolutions/ (last visited Jan. 18, 2014).

128. *Id.*

129. HANSEN, CHRISTIANSEN & HUMMELMOSE, COWI CONSULTING ENG'RS & PLANNERS AS, DENMARK, *supra* note 106, at 117.

130. Sorg, *supra* note 113.

131. *Life in a Slaughter Town: Kaufman, Texas*, *supra* note 112.

132. Eckhoff, *supra* note 120.

One final impact that horse slaughter plants have on their host communities is that they provide employment opportunities. The Dallas Crown facility had forty-six non-unionized employees,[133] while the three slaughterhouses that operated in the U.S. until 2007 employed a total of only 170 individuals.[134] Though these figures seem insignificant when added to state and national employment records, it is important to realize that forty to fifty employment opportunities can make a significant difference in a community's economic well being and in an individual's quality of life. Conversely, one must also consider that the individuals that take slaughterhouse jobs are more likely to commit crimes in the community.[135] In addition, according to Congressman John E. Sweeney's testimony in a subcommittee hearing, "it is widely suspected that many of the laborers in these facilities are undocumented illegal immigrants."[136] Therefore, horse slaughter facilities can provide employment opportunities to their communities that can be instrumental in providing income to individuals who otherwise would have no means of providing for themselves, but it is possible that some of these laborers could negatively impact the community.

V. WHAT IS THE UNWANTED HORSE ISSUE?

The most significant and convincing argument proposed by entities in support of the renewal of domestic horse slaughter hinges on the seriousness and urgency of a problem in the U.S. is known as the unwanted horse issue. According to a study conducted by the Unwanted Horse Coalition (UHC), thousands of horses are abandoned, abused, and neglected because their owners could not or did not wish to properly care for the horse; write-in comments from survey respondents in the report cite equines found tied to strangers' trailers, horses left to die without food or water, and horses turned out into the wild or onto other peoples' properties.[137] Abandoning horses increases the amount of suffering that

133. *Id.*

134. PATIENCE O'DOWD & MARY MCNICHOLS, WILD HORSE OBSERVER ASS'N, EQUINE SLAUGHTERHOUSE FEASIBILITY: UNINTENDED CONSEQUENCES FOR US 34, (2013), *available at* http://whoanm.org/wordpress/wp-content/uploads/2013/02/UNITED-STATES-equine-slaughter-feasibility.pdf.

135. Fitzgerald et al., *supra* note 126, at 158.

136. *The American Horse Slaughter Protection Act: Hearing Before the Subcomm. On Commerce, Trade, and Consumer Protection,* 109th Cong. 26 (2006) (statement of Rep. Sweeney).

137. UNWANTED HORSE COAL., 2009 UNWANTED HORSES SURVEY: CREATING ADVOCATES FOR RESPONSIBLE OWNERSHIP 11 (2009), *available at* http://www.unwantedhorsecoalition.org/resources/uhc_survey_07jul09b.pdf.

they endure because they no longer have the food, water, and care that have been provided to them throughout their lives, usually leading to malnourishment or death.

In addition, the abandonment of horses unjustly imposes the cost of caring for that horse upon an unfortunate property owner. A fitting example of the cost of feral horses imposed on others is seen in the state of Washington on the Yakama Reservation. According to attorney John Dillard, the lands of the Yakama Nation have the carrying capacity to sustain about 1000 wild horses, yet the current population of feral horses exceeds 12,000 and doubles every four years.[138] Dillard asserts that "the lack of domestic horse slaughter has left the Yakama Nation without an economically viable outlet for managing the horse population on their reservation."[139]

The issue of unwanted horses is not limited to just Washington, though. According to the Bureau of Land Management (BLM), there are an estimated 40,605 wild horses and burros on the range in ten Western states;[140] the maximum appropriate management level has been set at 26,677 animals[141] due to budget concerns and the fact that sheep and cattle ranchers see the mustangs as competition for feed.[142] According to a BLM fact sheet, costs from gather and removal efforts and holding operations amounted to $50.8 million, which was approximately 70.1% of the funds appropriated to the agency by Congress in fiscal year 2012.[143] Therefore, owners that abandon their unwanted horses to public lands are actually costing American taxpayers because the money spent to address these horses comes from the federal budget.

There are many reasons that drive horse owners to abandon their animals. The American Veterinary Medical Association listed many of the reasons in a 2012 newsletter:

> '[u]nwanted horses' represent a subset of horses within the domestic equine population. These may be healthy horses that their owners can no longer afford to keep or feed; horses that are dangerous to handle and have injured (or are likely to injure) people; horses with an injury,

138. Flynn, *supra* note 12.
139. *Id.*
140. Tom Gorey, U.S. Dep't of the Interior, *Wild Horse and Burro Quick Facts* (Dec. 30, 2013), http://www.blm.gov/wo/st/en/prog/whbprogram/history_and_facts/quick_facts.html.
141. *Id.*
142. *Euthanization, supra* note 18.
143. Gorey, *supra* note 140.

> lameness, or illness for which their owners are unwilling to [or] unable to provide care; or horses that are no longer able to perform as their owner desires, whether that be for racing, pleasure riding, or some other purpose.[144]

Groups supporting the renewal of domestic horse slaughter contend that the closing of American equine slaughterhouses have contributed greatly to the unwanted horse issue. According to an amicus curiae brief submitted in support of the legality of domestic horse slaughter, "the unavailability of humane horse processing, conducted under federal standards and supervision, has ended what had been a viable humane alternative to neglect or abandonment for many horse owners who were either unable or unwilling to care for their horses."[145] After the closing of this key domestic avenue of unwanted horse disposal, states with large equine industries like California, Texas, and Florida have reported "more horses abandoned on private or state land since 2007," and a rise in investigations for horse neglect, suggesting that the unwanted horse issue could be exacerbated by the prohibition on domestic horse slaughter.[146]

Veterinary euthanasia is another option available to owners of unwanted horses, but it has certain drawbacks that have limited its practicality and popularity. One serious issue with equine euthanasia is its cost.[147] According to the UHC's 2009 survey of horse owners, the average cost of euthanasia and carcass disposal was $385,[148] which can be a "significant obstacle to many owners, more than a third of whom have household incomes of less than $50,000."[149] Another key disadvantage of veterinary euthanasia stems from concerns over the ethicality and morality of voluntarily ending a horse's life, especially if that horse has no health or behavioral issues that would justify euthanasia. According to a survey conducted by the Colorado Unwanted Horse Alliance, sixty percent of

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144. Nat T. Messer IV, *The Unwanted Horse and Horse Slaughter*, AVMA WELFARE FOCUS NEWSLETTER (Am. Veterinary Med. Ass'n/Schaumberg, Ill.), Feb. 2012, *available at* https://www.avma.org/KB/Resources/Reference/AnimalWelfare/Pages/AVMA-Welfare-Focus-Featured-Article-Feb-2012.aspx.

145. Brief of The Am. Quarter Horse Ass'n as Amici Curiae Supporting Petitioners, Cavel Int'l, Inc. v. Madigan, No. 07-962, 2008 WL 1803448, at *5 (U.S. Apr. 16, 2008).

146. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 2, at 1.

147. Malinda Osborne, *Unwanted Horse Survey Sheds Light on Issue's Causes, Extent,* J. AM. VETERINARY ASS'N NEWS, Aug. 15, 2009, https://www.avma.org/News/JAVMANews/Pages/090815d.aspx.

148. UNWANTED HORSE COAL., *supra* note 137, at 19.

149. Brief of The Am. Quarter Horse Ass'n as Amici Curiae Supporting Petitioners, Cavel Int'l, Inc. v. Madigan, No. 07-962, 2008 WL 1803448, *12 (U.S. Apr. 16, 2008).

veterinarians in the state would not euthanize a horse for the convenience of the owner.[150] The inability to find a veterinarian willing to euthanize a horse increases the likelihood of that horse being abused, neglected, or abandoned by its owner because it deprives that owner of another avenue of disposal. Groups supporting veterinary euthanasia and domestic, regulated horse slaughter often stress the point that from a welfare perspective it is important not to confuse longevity with quality of life in order to lessen the aggregate amount of suffering endured by horses.[151]

After the euthanasia process, burial, cremation, and rendering are commonly used methods of carcass disposal.[152] Rendering is the process by which the carcass of a horse is salvaged to make a multitude of products used in items such as feed, fertilizer, car tires, and gelatin.[153] This is done by heating the carcass in high temperature vats that break down any potential contaminants like disease-causing organisms and drug residues.[154] Although renderers typically do not pay for carcasses and often charge a fee for body removal,[155] owners sometimes choose to render their horses because it can be cheaper than burial or cremation or continued feeding of horses.[156] In summary, high euthanasia and carcass disposal costs, along with questions regarding the ethics of voluntary euthanasia, have severely limited the popularity and practicality of veterinary euthanasia of unwanted horses, contributing greatly to the unwanted horse issue.

Donation is another option available to owners of unwanted horses that also has drawbacks that hinder its practicality and viability. Though donating a horse seems like an expense-free action, it actually can be very costly to the owner. The UHC reports the average cost of donating a horse to be over $1000, as reported by horse owners.[157] This is due to expenses from veterinary examinations, transportation, and boarding fees.[158] Unless the owner of the unwanted equine has a specific contact that wishes to own

150. Osborne, *supra* note 147.

151. Brief of The Am. Quarter Horse Ass'n as Amici Curiae Supporting Petitioners, Cavel Int'l, Inc. v. Madigan, No. 07-962, 2008 WL 1803448, at *5 (U.S. Apr. 16, 2008).

152. *Your Horse Just Died - Now What?,* PETRIB ARTICLES & ADVICE BLOG (Apr. 17, 2011, 4:47 PM), http://www.petrib.com/articles-advice/your-horse-just-died-now-what [hereinafter ADVICE].

153. EQUINE PROTECTION NETWORK, HORSE SLAUGHTER - AN AMERICAN DISGRACE, NOT A NECESSARY EVIL, http://www.equineprotectionnetwork.com/slaughter/render.htm (last visited Jan. 19, 2014).

154. *Id.*

155. *Id.*

156. ADVICE, *supra* note 152.

157. UNWANTED HORSE COAL., *supra* note 137, at 19.

158. *Id.*

and care for said equine, it is likely that the owner looking to donate his horse will seek a rescue ranch or horse sanctuary. Living out the remainder of his or her life on a rescue ranch is by far the most humane and relaxing way for a horse to approach death and for an owner of an unwanted horse to be relieved of his or her animal. There are, however, some issues that prevent all horses from retiring to rescue ranches when they are deemed unwanted by their owner.

One barrier to entry concerns the dwindling capacity of rescue ranches.[159] According to an estimate by the National Association of Counties and the UHC, the nationwide capacity of rescue facilities was about 6000 in 2011, though the lack of a national registry for rescue horses indicates that the exact number is unknown.[160] In 2009, 39% of rescue and retirement facilities were at full capacity, while another 30% were near capacity,[161] numbers that are likely increasing because "the high number of retiring horses, economic troubles, or unsuitable adopters can make placement difficult."[162] For example, facilities in Florida have recovered as many as twenty-three horses in a month, imposing high costs on rescue ranches.[163] Individually, horses can cost rescue facilities as much as $2340 per year,[164] a number that can rise in the midst of a troubled economy and high grain and transportation costs.[165] This can cause major capacity limitations because ranches that board horses at too high of a capacity often are financially overwhelmed, imposing starvation and neglect upon the horses.[166]

In addition, tax structures can prevent the successful operation of rescue ranches. In some counties and states, equestrian properties are not classified as agricultural; this is harmful because "reduced taxation for farmland is based on a legislative determination that agriculture cannot reasonably be expected to withstand the tax burden of the highest and best

159. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 2, at 23.
160. *Id.*
161. Osborne, *supra* note 147.
162. Michael T. Olexa, Joshua A. Cossey & Katherine Smallwood, *Protecting Equine Rescue From Being Put Out to Pasture: Whether Ranches Dedicated to Abused, Abandoned, and Aging Horses May Qualify for "Agricultural" Classifications Under Florida's Greenbelt Law*, 16 DRAKE J. AGRIC. L. 69, 87-88 (2011).
163. *Id.*
164. Brief of The Am. Quarter Horse Ass'n as Amici Curiae Supporting Petitioners, Cavel Int'l, Inc. v. Madigan, No. 07-962, 2008 WL 1803448, at *12 (U.S. Apr. 16, 2008).
165. Pat Dawson, *An Epidemic of Abandoned Horses*, TIME, May 28, 2008, http://www.time.com/time/nation /article/0,8599,1809950,00.html.
166. *Id.*

use to which such land might be put."[167] This costly tax classification can prevent the establishment of rescue ranches, depriving areas of an entity that, according to an article in the Drake Journal of Agricultural Law, can "strengthen the equestrian community, create an additional revenue base for municipalities, provide an agricultural benefit to the public, and, perhaps most importantly, foster a humane alternative for all of the potentially useful, yet abused, abandoned, and aging livestock."[168] Therefore, rescue ranches provide the ideal avenue of disposal for owners of unwanted horses but are limited in practicality and functionality in that high costs and rising numbers of unwanted horses leave these facilities with a capacity far lower than the number of horses in need of a new home.

VI. THE HISTORY OF HORSE SLAUGHTER LEGISLATION

In recent decades the issue of horse slaughter has been addressed in many different bills, decisions, and legal proceedings. California became the first state to impose an outright ban on the slaughter of equines under the Prohibition of Horse Slaughter and Sale of Horsemeat for Human Consumption Act of 1998, also known as Proposition 6.[169] New Jersey also imposed an outright ban on horse slaughter when Governor Chris Christie signed bill A.2023/S.1976 into law on September 19, 2012.[170] The first major national attempt to ban the practice of horse slaughter occurred in 2001. On July 25th, the Helping Out to Rescue and Save Equines Act, or H.R. 2622, was introduced to Congress.[171] It was intended to prohibit the interstate transport of horses for the purpose of slaughter or horseflesh intended for human consumption, but died in committee.[172]

In 2005, Congress passed H.R. 2744—45, an agriculture appropriations bill that provided no funds for the inspection of horsemeat, effectively implementing a de facto ban on horse slaughter in the U.S.[173] Then, in response to pressure from the horse slaughter industry, the USDA issued CFR § 352.19 in February 2006, a regulation that allowed horse slaughter facilities to pay for the government inspection mandatory for

167. Straughn v. K & K Land Mgmt., Inc., 326 So. 2d 421, 424 (Fla. 1976).

168. Olexa, Cossey & Smallwood, *supra* note 162, at 88.

169. Prohibition on Slaughter of Horses and Sale of Horsemeat for Human Consumption Act of 1998 (proposed amendment to CA. CONST. art. II, pt. VIII), *available at* http://vote98.sos.ca.gov/VoterGuide/Propositions/ 6text.htm.

170. N.J. STAT. ANN. § 4:22-25.5 (2012).

171. Helping Out to Rescue and Save Equines Act, H.R. 2622, 107th Cong. (2001).

172. *Id.*

173. Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-97, 119 Stat. 2120.

operation and the subsequent export of horsemeat.[174] The next piece of legislation concerning horse slaughter appeared in Congress in 2006. During the 109th Congress, the House of Representatives passed H.R. 503, the American Horse Slaughter Prevention Act, also known as the Horse Slaughter Prohibition Bill.[175] The bill was intended "to amend the Horse Protection Act to prohibit the shipping, transporting, moving, delivering, receiving, possessing, purchasing, selling, or donation of horses and other equines to be slaughtered for human consumption, and for other purposes," but died in the Senate.[176] The American Horse Slaughter Prevention act was reintroduced in both the Senate and the House in January 2007.[177]

Shortly after the American Horse Slaughter Prevention Act's failure to reach a full vote in the Senate, anti-horse slaughter groups gained major ground with regard to their efforts to end American horse slaughter. On January 19, 2007, the slaughter of horses and sale of horsemeat in the state of Texas were declared unlawful by the U.S. Court of Appeals, Fifth Circuit.[178] By upholding Chapter 149 of Texas Agriculture Code, the court effectively ended horse slaughter in the state, forcing Dallas Crown's facility in Kaufman and Beltex Corporation's facility in Fort Worth to cease operations.[179] On March 28, 2007, the last operational slaughterhouse in the U.S., Cavel International, located in DeKalb, Illinois, was informed that the U.S. District Court of the District of Columbia had declared paying for USDA horsemeat inspections illegal, leading to the shutdown of their operations.[180] To ensure that the horse slaughter industry could never renew operations in the state, the governor of Illinois then signed H.B. 1711 on May 24, 2007, making it illegal for a person to slaughter a horse for human consumption.[181] Cavel International's shutdown marks the end of the domestic horse slaughter industry in the U.S..

Though no federal funding was available for horsemeat inspection, the Montana state legislature passed a bill in 2009 that promoted the ability of horse slaughterhouses to build and operate, sparking much controversy

174. 9 C.F.R. § 352.19 (2006).
175. Horse Slaughter Prohibition Bill, H.R. 503, 109th Cong. § 1824 (2006).
176. *Id.*
177. Leslie Potter, *A Timeline of Horse Slaughter Legislation in the United States*, HORSE CHANNEL (Mar. 2012), http://www.horsechannel.com/horse-resources/horse-slaughter-timeline.aspx.
178. Empacadora de Carnes de Fresnillo, S.A. de C.V., v. Curry, 476 F.3d 326, 326 (5th Cir. 2007).
179. *Id.*
180. Humane Soc'y of the U.S. v. Johanns, 520 F. Supp. 2d 8, 8 (D.D.C. 2007).
181. 225 ILL. COMP. STAT. ANN. 635/1.5 (2007).

about horse slaughter.[182] H.B. 418 prohibits certain injunctions that stop or delay construction of horse slaughter facilities, as well as making filers of unsuccessful actions against the slaughterhouse liable for financial losses imposed by injunctions.[183] The passage of this law became much more significant in 2011 when Congress passed H.R. 2112, an agriculture appropriations bill that lacked the specific wording that created the de facto ban on horse slaughter.[184] With horse slaughter no longer prohibited, four states—Iowa,[185] New Mexico,[186] Missouri,[187] and Oregon[188]—became home to companies that have sought and are currently awaiting USDA inspection for horse slaughter.[189] However, lawsuits from animal rights groups are threatening to drag out the process.[190] Recently, Oklahoma joined that list of states. In April of 2013, the governor of Oklahoma signed H.B. 1999 into law, lifting the ban on horse slaughter in the state and allowing companies to apply for inspection.[191]

On June 28, 2013, the USDA's Food Safety Inspection Service (FSIS) issued a grant of inspection to Valley Meat Co. in New Mexico.[192] Then, on July 2, the USDA issued a grant of inspection to Responsible Transportation's slaughterhouse in Sigourney, Iowa.[193] This allowed the facilities to begin hiring employees and the FSIS to put inspectors in place.[194] Inspection, however, will likely be delayed until at least September, as a U.S. District Court in New Mexico granted a temporary restraining order on August 2, 2013, to suspend federal horse meat

182. MONT. CODE ANN. § 81-9-240 (2009).

183. *Id.*

184. Consolidated and Further Continuing Appropriations Act, H.R. 2112, 112th Cong. § 4 (2012).

185. Abbott, *supra* note 7.

186. Clausing, *supra* note 17.

187. Deirdre Shesgreen, *Missouri Horse Slaughter Plant Close to Getting Permit*, KSDK, July 8, 2013, http://www.ksdk.com/news/article/387292/3/Permit-near-for-Missouri-horse-slaughter-plant-.

188. Richard Cockle, *Horse Slaughter Plant Planned for Eastern Oregon After Change in National Rules*, THE OREGONIAN, Mar. 9, 2012, http://www.oregonlive.com/pacificnorthwestnews/index.ssf/2012/03/horse_slaughter_plant_planned.html.

189. Eckhoff, *supra* note 9.

190. Clausing, *supra* note 17.

191. *See generally* An Act Relating to Meat Inspection, H.B. 1999, 54th Leg., 1st Sess., (Okla. 2013)

192. John Dillard, *USDA Gives Go-Ahead on Horse Slaughter . . . For Now,* AG WEB (June 28, 2013), http://www.agweb.com/blog/ag_in_the_courtroom/usda_gives_go-ahead_on_horse_slaughter____for_now/.

193. Sheena Dooley, *Iowa Town Becomes Site of Second U.S. Horse Slaughterhouse*, IOWA WATCHDOG, July 2, 2013, http://watchdog.org/93739/ia-horseslaughterhouse/.

194. Dillard, *supra* note 192.

inspections due to concerns about negative environmental externalities.[195] If restraining orders are not sufficient to prevent horse slaughterhouses from operating, the Humane Society of the United States intends to file a lawsuit based on the negative environmental consequences of slaughter plants[196] and the Endangered Species Act.[197] Although the ongoing legal actions are important in determining whether horse slaughter will take place in the U.S., it is possible that Congress could make that determination through appropriations bills. Currently, committee approved appropriations bills contain wording that eliminates federal funding for horse slaughter inspection;[198] if these bills are passed, the de facto ban on horse slaughter will be reinstated on October 1, 2013.[199]

Funding for horsemeat inspection is very controversial in itself. Horse slaughter is opposed by eighty percent of Americans, yet the money used to pay for horsemeat inspections is federal, allocated by Congress and collected via taxation.[200] Is it right for society to pay for an industry that they do not approve of? The pay for inspection program that horse slaughter companies utilized in 2006 and 2007[201] remedied this issue, but was declared unlawful in March 2007 by a U.S. District Court.[202] If Congress allows horse slaughter for fiscal year 2014, each facility opened would cost taxpayers over $400,000 for inspection and operations, according to Virginia Congressman Jim Moran.[203] The unfair burden imposed on taxpayers by horsemeat inspection costs has quickly become a central argument of those who support a ban on domestic horse slaughter and could very well cause the renewal of the de facto ban through the 2014 agriculture appropriations bill.[204]

These attempts at entering the horse slaughter industry come at an interesting time. In January and February of 2013, millions of beef-based

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195. Front Range Equine Rescue v. Vilsack, No. 1:13-CV-00639-MCA-RHS (D.N.M. Aug. 2, 2013) (order granting preliminary injunction), *available at* http://www.agri-pulse.com/uploaded/Order.pdf.

196. Frank Dubois, *HSUS Intends to Sue Feds on Roswell Horse Processing Plant, AG Gary King Gets Involved*, THE WESTERNER (Apr. 22, 2013, 3:57 AM), http://thewesterner.blogspot.com/2013/04/endangered-species-act-lawsuit-dismissed.html.

197. *See* Endangered Species Act of 1973, Pub. L. No 93-205, 87 Stat. 884 (1973).

198. Dillard, *supra* note 192.

199. *Id.*

200. Eckhoff, *supra* note 9.

201. 9 C.F.R. § 352.19 (2006).

202. Humane Soc'y of the U.S. v. Johanns, 520 F. Supp. 2d 8, 8 (D.D.C. 2007).

203. Press Release, Congressman Jim Moran, Moran Statement on USA Decision Allowing Re-opening of U.S. Horse Slaughter Facility (July 2, 2013), *available at* http://moran.house.gov/press-release/moran-statement-usda-decision-allowing-re-opening-us-horse-slaughter-facility.

204. *Id.*

meals were recalled from supermarket shelves in the EU and Australia after significant traces of equine DNA were discovered in school meals, grocery store meals, hospitals, and restaurants.[205] This has raised major questions and concerns about the trustworthiness of the food supply system and meat processors; it is possible that horse slaughter facilities vying for USDA inspection are attempting to take some market share from European meat processors whose reputations have been marred by the scandal.[206]

Despite significant progress made for horse slaughter's possible revival, there is still the possibility of a national ban on the slaughter of horses and the sale of horsemeat. The Safeguard American Food Exports Act, or H.R. 1094, was introduced to Congress on March 12, 2013.[207] If passed, the act would prohibit the sale or transport of equines and equine parts in interstate or foreign commerce for human consumption.[208] Though its chances of becoming enacted are quite slim, it is the best hope for anti-horse slaughter groups apart from a renewal of the de facto ban through an appropriations bill.[209]

VII. CONCLUSION

North American horse slaughter is an issue rife with conflict. The debate over the legality, morality, and practicality of slaughtering equines in the U.S. pits equestrians against ranchers, communities against corporations, welfare groups against the meat industry, and special interest against public opinion. There is no "magic bullet" to solve the issue—no real, practical system can be put in place to satisfy the desires of all parties and protect them from economic and ideological losses. The existence of regulated slaughterhouses, mitigation of the unwanted horse issue, and decreasing sale price of horses garner significant support for the renewal of domestic horse slaughter. In addition, one must consider the ethics of not slaughtering horses in world plagued by food crises;[210] are those calories wasted and could they be efficiently reallocated?[211] On the other hand, the

205. Stewart, Australian Inst. of Food Safety, *supra* note 45.

206. Lawless, *supra* note 29.

207. Safeguard American Food Exports Act of 2013, H.R. 1094, 113th Cong. § 3 (2013).

208. *Id.*

209. Safeguard American Food Exports Act of 2013, S. 541, 113th Cong. (2013).

210. John Vidal, *UN Warns of Looming Worldwide Food Crisis in 2013,* THE GUARDIAN, Oct. 13, 2012, http://www.theguardian.com/global-development/2012/oct/14/un-global-food-crisis-warning.

211. This is a philosophical and ethical notion only. It is acknowledged that allocating horsemeat to those in need of food may be impractical, uneconomic, or not possible.

negative externalities that horse slaughterhouses impose on their host communities, the inherent nobility and value seen in horses by humans, and lack of a domestic market for horsemeat drive many to support a ban on either domestic horse slaughter or sending American horses across borders for slaughter. Eventually the U.S. government will take action either by inspecting and approving proposed slaughter facilities or by enacting legislation to prohibit domestic slaughter or the slaughter of American horses—the decision on which route to take will have serious implications, effectively displaying what groups, ideas, and practices the government endorses, while also having significant impacts on horse welfare, the relationship between industry and government, and citizens across the nation.

UNDER-REGULATION IN THE STATE PRISON FOOD SYSTEM: CONSEQUENCES AND A PROPOSAL FOR CHANGE

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I. INTRODUCTION

While federal and state government regulations have become commonplace in almost every conceivable facet of the modern American lifestyle, the prison food system has inconspicuously remained under-regulated despite the progress made by the prisoners' rights movement in other areas.[1] Legislatures in most states generally leave prison food regulation to the sole discretion of prison administrators, resulting in a "laissez-faire approach" in the prison food system; an anachronism in contemporary America.[2] Some states' prison systems do in fact self-regulate to an adequate degree despite this under-regulation, while others participate in voluntary, nongovernmental prison accreditation programs.[3] However, many states and localities are not so magnanimous. Serious issues concerning the nature and quality of food offered to prison inmates arise when these governments do not participate in such programs or simply choose to ignore the programs' provisions at their convenience, due to their voluntary nature.[4] As an example of the potential for abuse that can occur when prison food systems are under-regulated, the state of Illinois initiated a large scale plan to substitute meat with soy-based products for budgetary reasons in 2003, resulting in a multitude of health related complaints from its inmates, including digestive disorders, skin problems, and even breast development in males.[5] As such, while there may not necessarily be a nationwide prison pandemic that poses a threat to every

1. Clifford M. Hardin, *The Effects of Over-Regulation*, 34 FOOD DRUG COSM. L.J. 50, 50 (1979) (noting that "the increased involvement of government . . . is affecting nearly all walks of life in America today").

2. Cyrus Naim, Prison Food Law 1 (Spring 2005) (unpublished manuscript), *available at* http://dash.harvard.edu /handle/1/8848245 (last visited Jan. 25, 2014).

3. Dale K. Sechrest, *The Accreditation Movement in Corrections*, 40 FED. PROBATION 15, 17 (1976).

4. AM. CORRECTIONAL ASS'N, AGENCY MANUAL OF ACCREDITATION: POLICY AND PROCEDURE 50-51 (2012), *available at* https://www.aca.org/standards/pdfs/AccreditationPolicyProcedure.pdf (explaining that the only penalty for a violation is revocation of accreditation and that accreditation can be granted again after a violation following a 180-day waiting period).

5. Kimberly Hartke, *Budget Shortfalls Hit Illinois Prison Diet*, WESTON A. PRICE FOUND., July 19, 2010, http://westonaprice.org/press/budget-shortfalls-hit-illinois-prison-diet.

inmate in the U.S., it is clear that the issues involved are serious and impact a significant portion of the inmate population.[6]

Further, one must understand that these issues tend to manifest primarily in state prisons, as a comprehensive system of standards promulgated and enforced by the Federal Bureau of Prisons, complete with the input and oversight of registered dietitians, regulates the federal prison system.[7] So, while the concerns at issue here may not be applicable to prisoners in federal penitentiaries, many inmates are incarcerated in state prisons that choose not to self-regulate or are overly lax regarding enforcement when they do self-regulate.

This article will illustrate the need for pervasive regulation in the U.S. prison food system, focusing primarily on state penitentiaries. Section II begins by demonstrating the adverse effects of an under-regulated prison food system on those incarcerated within our nation's state prisons, as bottom-line budgetary concerns are permitted to reign supreme. Section III then surveys the primary remedial tool available to inmates who feel they have been provided inadequate nourishment, litigation, and seeks to demonstrate why it is wholly insufficient as a curative mechanism. Next, section IV uses federal regulations in the realm of public school lunches as a paradigm for crafting appropriate regulations in the prison food system. Finally, section V addresses the practical limitations of implementing these proposed regulations and suggests how they might be mitigated.

II. FOOD DEFICIENCIES IN STATE PRISONS

Surely, regulation for the sake of regulation in the face of no true and pervasive problem produces the potential for tremendous economic waste.[8] As such, if the lack of food regulation in prisons does not lead to cognizable and verifiable health risks to the inmates housed in these facilities on a meaningful scale, it would be imprudent to impose them.[9]

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6. *See generally* David M. Reutter, Gary Hunter & Brandon Sample, *Appalling Prison and Jail Food Leaves Prisoners Hungry for Justice*, 21 PRISON LEGAL NEWS 1 (2010).

7. FED. BUREAU OF PRISONS, MANAGEMENT OF FOOD ALLERGIES - CLINICAL PRACTICE GUIDELINES 1 (2012), *available at* http://www.bop.gov/news/PDFs/mgmt_food_allergies.pdf.

8. Satish Joshi, Ranjani Krishnan & Lester Lave, *Estimating the Hidden Costs of Environmental Regulation*, 76 ACCT. REV. 171, 194-95 (2001) (contending that government regulation has a substantial impact on prices in the steel mill industry, concluding that the associated hidden costs of regulation are eight to ten times the visible costs at the margin).

9. Christian Henrichson & Ruth Delaney, *The Price of Prisons: What Incarceration Costs Taxpayers,* VERA INST. OF JUSTICE 1, 8 (2012), *available at* http://

This is because taxpayers would ultimately bear the increased "hidden costs" of regulation to fund a sector of the government that already faces significant budgetary unrest.[10] However, it is empirically clear that in the absence of some agency with actual enforcement power presiding over offending prisons, administrators and contractors are motivated to cut corners with food quality, often leading to infirmity in their inmates.

A. *Aramark's Bottom Line*

Perhaps the best illustration of the tendency for prison meals to fall short of generally accepted nutritional standards in the absence of proper regulation is the litany of complaints and allegations brought over the past several decades against Aramark Correctional Services (Aramark). Aramark is a private food contractor responsible for distributing over one million meals per day to inmates across the country.[11] Aramark's business model has resulted in incidents of unsanitary conditions, insufficient portions of food, and inadequate nutritional provisions in at least nineteen states.[12] In addition, numerous inmates have brought lawsuits against Aramark challenging its food service practices.[13] Such infractions range from altering expiration dates on food to instructing its employees responsible for dispensing food to do so parsimoniously, intentionally providing inmates less than the required serving in an effort to increase profits.[14] For example, Aramark contracts with the state of Pennsylvania to provide food services to Northampton County Prison.[15] In 2005, city inspector Ed Ferraro discovered that the prison stored food in a bathroom, did not have hot water or soap for kitchen workers to wash hands, and used refrigerators not cold enough to safely store food.[16] In fact, Ferraro stated

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www.vera.org/sites/default/files/resources/downloads/Price_of_Prisons_updated_version_072512.pdf.

10. *Id.* (noting that of the forty states surveyed, all exceeded the corrections budget by an average of 13.9%).

11. ARAMARK, CORRECTIONAL INSTITUTIONS, http://www.aramark.com/Industries/CorrectionalInstitutions/ (last visited Jan. 25, 2014).

12. John E. Dannenberg, *Aramark: Prison Food Service with a Bad Aftertaste*, 17 PRISON LEGAL NEWS 1, 10 (2006).

13. *See generally, e.g.*, McRoy v. Aramark Correctional Serv., Inc., 268 Fed.App'x 479 (7th Cir. 2008); Drake v. Velasco, 207 F. Supp.2d 809 (N.D. Ill. 2002); Horton v. Sheriff of Cook Cnty., No. 11 C 6064, 2012 WL 5838183 (N.D. Ill. Nov. 16, 2012).

14. Dannenberg, *supra* note 12, at 10.

15. Paul Muschick & Christopher Schnaars, *Easton: Prison Kept Food Unsafely*, MORNING CALL, Aug. 8, 2005, http://articles.mcall.com/2005-08-08/news/3622676_1_prison-officials-inspection-records-kitchen.

16. *Id.*

that would have asked the owner to close the facility if he found the same conditions in a private business' kitchen.[17]

Further, due to the often extreme disparity between Aramark's bid offers and those of its competitors, it seems clear that Aramark employs these tactics with the sole intention of improving its bottom line.[18] For example, a Florida inspector general's cost-value analysis of its contract with Aramark found that Aramark pocketed a $10.5 million windfall in Florida alone by charging for meals it never served and by incorporating cheaper ingredients into recipes despite explicit instructions forbidding this practice.[19] Ultimately, the report recommended terminating Florida's contract with Aramark, primarily because Aramark failed to meet its expectations of "maintaining the current standards of quality in delivering food service."[20] Additionally, the Kentucky Department of Corrections conducted an extensive examination of its food services contract with Aramark, revealing numerous improprieties.[21] For example, despite the fact that the parties' contract specifically required Aramark to disclose documents to the state for purposes of a financial audit and public transparency, Aramark refused to do so at the state's request.[22] Further, the audit revealed numerous instances of Aramark making unauthorized food substitutions and using improper quantities of ingredients.[23] The audit revealed several other examples of Aramark cutting corners in order to

17. *Id.*

18. *Id.*

19. PAUL C. DECKER & DONALD L. MILLER, FLA. DEP'T OF CORRECTIONS, COST-VALUE ANALYSIS: ARAMARK FOOD SERVICE CONTRACT C1927 4-5 (2007), *available at* http://www.privateci.org/private_pics/Aramarkfinal.pdf (noting that during the bid process, Aramark inquired, "[m]ay ground turkey be used to replace ground beef in recipes?" The Florida Department of Corrections responded negatively, stating that "[i]f the recipe specifies ground beef, then ground beef must be used." Despite this, the audit found that Aramark had "virtually eliminated" ground beef from the menu, frequently substituting it with ground turkey).

20. *Id.*

21. *See generally* CRIT LUALLEN, KY. DEP'T OF CORRECTIONS, EXAMINATION OF THE KENTUCKY DEPARTMENT OF CORRECTIONS' FOOD SERVICES CONTRACT WITH ARAMARK CORRECTIONAL SERVICES, LLC (2010), *available at* http://apps.auditor.ky.gov/Public/Audit_Reports/Archive/2010ARAMARKreport.pdf.

22. *Id.* at 9-10 (citing provisions of the parties' contract, stating that Aramark agrees that "the Contracting Agency, the Finance and Administration Cabinet, the Auditor of Public Accounts, and the Legislative Research Commission, or their duly authorized representatives, shall have access to any books, documents, papers, records, or other evidence, which are directly pertinent to the Contract(s) for the purpose of financial audit or program review").

23. *Id.* at 19-20 (noting an instance in which Aramark substituted "[f]our pieces of brownie . . . for a meat" and another "in which the recipe called for 150lbs of beans, but only 100lbs were used").

further its own pecuniary interest.[24] Finally, as its contracts with state corrections departments often compensate Aramark based on the number of inmates housed in the prison rather than the total number of meals actually served, Aramark has little financial incentive to produce meals that inmates actually want to consume.[25]

Lastly, one may be fairly tempted to apportion much of the blame for these unfortunate situations to the individual states for contracting with Aramark despite these complaints and lawsuits. However, Aramark frequently includes provisions in its prison food services contracts which would give the appearance of propriety and therefore induce states into believing that Aramark will adhere to accepted standards of decency when providing food to inmates. Unfortunately, it seems that Aramark includes these provisions, at least in part, for the purpose of appearances, as it often displays a lack of fidelity to these safeguards. For example, when Aramark contracted with the Kentucky Department of Corrections, it conducted a review of its master menu with both its own and the state's dieticians in order to ensure that all meals were of suitable nutritional value to the inmates.[26] However, a subsequent audit of Aramark's food service practices discovered numerous instances in which Aramark deliberately avoided following this mutually agreed upon master menu.[27] Similarly, as a term of the parties' contract, Aramark agreed to prepare all of its meals in

24. *Id.* (noting the following: Aramark billed for a substantially higher rate of kosher meals than appeared necessary; Aramark stored leftover food well beyond acceptable timeframes; Aramark violated the terms of the contract by paying substantially less than fair market value for inmate grown food; Aramark frequently stored food at temperatures below its own guidelines; a significant amount of food preparation equipment required repairs, including thirteen pending repairs at one institution alone; and Aramark failed to address identified sanitation issues).

25. JIM PETRO, OHIO DEP'T OF REHAB. CORRECTIONS, ARAMARK CONTRACT AND THE COLLEGE PROGRAMS: SPECIAL AUDIT 7, *available at* http://www.plunderbund.com/wp-content/uploads/2013/02/AramarkAudit2001.pdf (noting that Aramark's contract with a prison in Ohio permitted it to bill the state under the assumption that 90% of its inmates consumed three meals a day despite findings that only 64% of inmates attended the meals made available to them).

26. Ward v. Aramark Corrections Food Serv., No. 3:09-CV-00802, WL 1833312, at *2 (W.D. Ky. May 18, 2012).

27. LUALLEN, KY. DEP'T OF CORRECTIONS, *supra* note 21, at 18-20 (noting that Aramark frequently substituted ingredients without approval, did not provide written documentation to the Kentucky Department of Corrections of any of the 142 instances in which it substituted ingredients, often substituted foods for other foods that were not even in the same food category, left certain spices entirely out of recipes and dramatically reduced or omitted flour, beef base, and other bulk food ingredients from recipes).

accordance with the Florida Department of Corrections' master menu.[28] Despite a contractual obligation to refrain from doing so, Aramark methodically substituted ground beef with turkey and turkey breast with "turkey ends and pieces" over a nearly two year period, pocketing an estimated $4.9 million windfall in the process.[29] These instances demonstrate that states likely have not tacitly agreed to Aramark's impropriety upon contracting with it. Rather, Aramark promises these states compliance to certain nutritional standards, but deliberately fails to adhere to those standards for the purpose of reaping pecuniary gains.

B. *Illinois' Soy Substitution*

These unhealthy conditions do not only manifest when commercial entities contract to handle food distribution for prisons; deplorable food conditions arise in prisons when the state itself is responsible for procuring and preparing food as well. Perhaps the most systematic, statewide example of this exists in Illinois.[30] Due to budgetary constraints, Illinois began substituting meat for soy-based products in inmate meals on a large scale basis in 2003.[31] While one could certainly construct a healthy diet entirely absent of meat, Illinois' reliance on soy in inmate meals has resulted in inmates routinely consuming approximately four times the daily recommended quantity of soy for a healthy diet.[32] More than two-hundred inmates in Illinois have come forward with complaints stemming from the soy heavy diet, claiming health consequences that run the proverbial gamut: digestive disorders, skin problems, and even breast development in males.[33] A number of these inmates have filed lawsuits against the state for these grievances.[34] One former Illinois inmate who ate the soy heavy diet even claimed that prison doctors recognized that the imbalanced diet may be the cause of his and other inmates' poor health conditions and lamented

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28. DECKER & MILLER, FLA. DEP'T OF CORRECTIONS, *supra* note 19, at 2.

29. *Id.* at 5.

30. Andrea Billups, *Soy Diet Prompts Prisoners' Lawsuit*, WASHINGTON TIMES, Feb. 28, 2012, http://www.washington times.com/news/2012/feb/28/soy-diet-prompts-prisoners-lawsuit/?page=all.

31. *Id.*

32. *Id.*

33. Hartke, *supra* note 5.

34. *See generally, e.g.*, Garcia v. W. Correctional Ctr., No. 11-CV-3420, 2012 WL 589039 (C.D. Ill. Feb. 22, 2012) (noting that the court was unaware of any prisoner's claim seeking a soy-free diet in that district succeeding); Smith v. Illinois, No. 13-cv-220-JPG, 2013 WL 13311818 (S.D. Ill. April 2, 2013); Wheeler v. Wexford Health Sources, Inc., No. 11-CV-0839-MJR-SCW, 2012 WL 3308874 (S.D. Ill. Aug. 13, 2012).

the fact that they could do nothing to change it.[35] Further, Illinois does not provide inmates suffering from soy intolerance with alternative rations and thus these inmates must rely on the commissary as their primary method of sustenance, which prisons traditionally stock with many nutrient poor items.[36]

C. *Alabama's Prison Food Funding Statute*

Illinois is not the only state that has permited pecuniary considerations to take precedence over inmates' health concerns. One 1939 Alabama statute allocates each county's sheriff a fixed amount of money per day for the procurement of food for the county's inmates.[37] Another statute provides that a sum of money intended to cover food service shall be disbursed to each county's sheriff based on the number of inmates located in the prison, in addition to the money disbursed for the cost of the food itself.[38] Alabama's Office of the Attorney General has construed this statute as permitting "any surplus in the sheriff's food service allowance [to be] retained by the sheriff's office unless the county commission has directed" otherwise.[39]

While not explicitly permitting a sheriff to personally benefit financially from this disbursements, the type of abuse and corruption that could arise from this system is plainly obvious. In fact, it has manifested itself on several occasions, including one in which two sheriffs each contributed $500 to purchase a tractor-trailer load of hot dogs and served them "at each meal until they had been depleted" (emphasis in original).[40] It is a fundamental concept of health that nutritional deficiencies abound when an individual consumes the same food exclusively over significant period of time, especially a food as nutrient poor as hot dogs.[41] In fact, a U.S. District Court found Sheriff Greg Bartlett of Morgan County,

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35. Billups, *supra* note 30.

36. Laura A. Bischoff, *Ohio Inmates Spent $38 Million on Essentials, Junk Food*, CORRECTIONSONE, Jan. 23, 2012, http://www.correctionsone.com/corrections/articles/4966936-Ohio-inmates-spent-38M-on-essentials-junk-food (noting that carbonated beverages, candy, and ramen noodles are among the most frequently purchased commissary items among Ohio's 50,000 inmates).

37. ALA. CODE § 14-6-42 (2013).

38. ALA. CODE § 16-6-43 (2013).

39. Sheriffs - Meals - Funds - County Commissions - Prisons and Prisoners, Ala. Op. Att'y Gen. No. 2011-053 (Apr. 20, 2011).

40. Maynor v. Morgan Cnty., Ala., No. 5:01-cv-0851-UWC, at 4 (N.D. Ala. Jan. 8, 2009), *available at* http://www.schr.org /files/morgan_finding_fact.pdf.

41. *See* Virginia McGee, *A Test of a Balanced Diet*, 55 AM. J. NURSING 1386, 1386 (1955); Janet Raloff, *Not so Hot Hot Dogs?*, 145 SCI. NEWS 264, 264 (1994).

Alabama guilty of consistently failing to provide a nutritionally adequate diet, motivated by his financial incentive.[42] The court made substantial findings of fact illustrating the steps Bartlett took to reduce the quality of the inmates' food for his own pecuniary gain.[43] The most inculpatory of these findings was that the sheriff had "deposited in excess of $200,000 to his personal account from the funds allocated to him by the State of Alabama and the federal government for the feeding of inmates."[44]

These examples illustrate the severity and potential for impropriety in both the private and public sector that exists when legislatures essentially leave prisons to self-regulate their inmate food policies; bottom-line budget considerations will routinely prevail over inmate health concerns for a segment of the population that is left with no political recourse.

III. INSUFFICIENCY OF LITIGATION AS A REMEDIAL METHOD

Currently, litigation is the primary remedial method available to inmates who seek to vindicate their constitutional rights.[45] In the prison food context, this litigation most often takes the form of an Eighth Amendment claim of cruel and unusual punishment.[46] However, there are four significant issues inherent in relying solely on the judicial system to ensure that prisons supply inmates with proper food. First, the preliminary injunction is an inadequate tool for ensuring that prisons cease potentially unconstitutional conduct during the often lengthy litigation process. Second, most inmates bring their claims without the assistance of an

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42. *Maynor,* No. 5:01-cv-0851-UWC, at 4.

43. *Id.* at 3 (noting the following: Morgan County Jail never served the inmates milk while under Bartlett's control; the Morgan County Jail sometimes served chicken that was not thoroughly cooked, "with a pinkish appearance and blood still showing;" Morgan County Jail only served its inmates fruit three or four times per year; and Morgan County Jail served meals that were "woefully insufficient to satisfy the normal appetites of adult males").

44. *Id.* at 6.

45. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1557-58 (2003) (noting that inmates filed nearly 40,000 new federal lawsuits in 1995, which constituted nineteen percent of the federal civil docket).

46. *See generally, e.g.,* Adam Cohen, *Can Food be Cruel and Unusual Punishment?*, TIME, Apr. 2, 2012, http://ideas.time.com/2012/04/02/can-food-be-cruel-and-unusual-punishment; Stephen Hudak, *Florida Prisoner's Lawsuit Calls Soy Meals 'Cruel and Unusual' Punishment*, ORLANDO SENTINEL, Nov. 6, 2011, http://articles.orlandosentinel.com/2011-11-06/news/os-soy-prison-meals-20111107_1_soy-foods-soy-products-inmate-food; Bridget Thoreson, *Inmate Files Lawsuit Alleging Cruel and Unusual Punishment*, JOURNAL TIMES, Jan. 15, 2010, http://www.journaltimes.com/news/local/crime-and-courts/inmate-files-lawsuit-alleging-cruel-and-unusual punishment/article_ 4d9b3 6d6-023b-11df-8554-001cc4c002e0.html.

attorney, diminishing the chances that a meritorious claim will succeed. Third, the Prison Litigation Reform Act (PLRA) has imposed even greater statutory limitations on the use of the legal system as a remedial tool for inmates. Fourth, courts have interpreted the Eighth Amendment in a manner highly deferential to the government, facing inmates seeking to challenge prison food practices as cruel and unusual punishment with substantive as well as procedural obstacles to success. Consequently, sole reliance on the court system to cure food related violations in prisons ensures that many inmates are left with no legitimate method of recourse.

A. *The Preliminary Injunction*

The judicial system is unwieldy and inefficient, often leading to large gaps in time between when a case is actually filed and the plaintiff's ultimate day in court. For example, more than one-third of civil cases in federal district court take more than one year to resolve and the longest cases can take more than ten years to resolve.[47] This would have the effect, in the prison food context, of unjustly perpetuating potentially unconstitutional conduct during this time period. Of course, the court system has created a remedy for this problem, the preliminary injunction, which allows a court to force or prevent a party from engaging in certain conduct prior to hearing the merits of the case.[48] The problem with forcing inmates to rely heavily on preliminary injunctions to forcibly discontinue potentially improper conduct regarding their food conditions is that, as one would expect due to the extraordinary power they vest in the courts, the standard for whether or not a plaintiff is entitled to a preliminary injunction is "stringent."[49] As such, it is possible that even when an inmate has a meritorious claim the injustice will be perpetuated during the lag time between filing the initial complaint and the ultimate decision on the merits due to the strict standard that courts abide by when determining whether to issue preliminary injunctions, coupled with the general disapproving disposition that many court officials have regarding inmate pleadings.[50]

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47. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS 4 (2009), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/IAALS,%20Civil%20Case%20Processing%20in%20the%20Federal%20District%20Courts.pdf.

48. Jean O. Lanjouw & Josh Lerner, *Tilting the Table? The Use of Preliminary Injunctions*, 44 J.L. & ECON. 573, 576 (2001).

49. Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975); Winter v. NRDC, Inc., 555 U.S. 7, 9 (2008) (noting that a "preliminary injunction is an extraordinary remedy never awarded as of right").

50. Shon R. Hopwood, *Slicing Through the Great Legal Gordian Knot: Ways to Assist* pro se *Litigants in Their Quest for Justice*, 80 FORDHAM L. REV. 1229, 1229

Thus, despite the fact that courts intend preliminary injunctions to "minimize the irreparable loss of rights" of a litigant, it would be a dubious proposition to suggest that courts achieve this goal in regard to inmate suits.[51]

B. *The* Pro Se *Problem*

The second concern in solely relying on the court system to remedy inmate food claims is that inmates generally do not have the financial ability to hire counsel to assist them in filing their claims.[52] Accordingly, the U.S. government estimates that inmates file approximately two-thirds of all *pro se* cases in the United States.[53] Our legal system has significant barriers to entry for practitioners due to its vastness and complexity and the requisite competency often required to construct a valid and persuasive legal argument.[54] One should not be surprised then that one *pro se* litigant in a federal prison commented that acting as his own advocate without any formal legal education was like "trying to unravel the law without knowing where the ends of the knot began."[55] The same former inmate turned law student posits that court clerks often delay *pro se* complaints due to a general contemptuous disposition toward these generally poorly drafted documents.[56]

Additionally, *pro se* inmate litigants face other barriers to success beyond that which non-incarcerated *pro se* litigants face. For example, many prison inmates do not have access to the Internet and none have access to valuable legal resources freely available to the non-incarcerated.[57] As a consequence, prison inmates pursuing litigation *pro se* must often rely

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(2011); Schlanger, *supra* note 45, at 1594 (explaining that over 80% of inmate litigation is determined pretrial in favor of the government and less than 15% of inmate litigation is ultimately successful).

51. John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 541 (1978).

52. Schlanger, *supra* note 45, at 1609 (noting that over 95% of inmate civil rights cases in 2000 were filed without the assistance of counsel).

53. BLACK'S LAW DICTIONARY 1341 (9th ed. 2009) (defining *pro se* as "one who represents oneself in a court proceeding without assistance of a lawyer); United States Courts, *IN-DEPTH: Leveling the Playing Field: Help for Self-Filers*, THE THIRD BRANCH, July 2011, http://www.uscourts.gov/news/TheThirdBranch/11-07-01/IN-DEPTH_Leveling_the_Playing_ Field_Help_for_Self-Filers.aspx.

54. Reed Olsen, Dean Lueck & Michael Ransom, *Why Do States Regulate Admission to the Bar - Economic Theories and Empirical Evidence*, 14 GEO. MASON L. REV. 253, 261-63 (1991).

55. Hopwood, *supra* note 50, at 1229.

56. *Id.* at 1230.

57. United States Courts, *supra* note 53.

exclusively on the courts to mail them paper versions of documents.[58] Beyond this, at least one legal scholar has substantiated his claim that judges may not be fully sensitive to actions filed by *pro se* inmate litigants and that these preconceived notions may manifest as "inclination[s] to resolve ambiguities in pleadings against" *pro se* inmate litigants.[59] This predisposition of some judges against *pro se* inmate claims may partially explain why judges dismiss such an abundance of inmate claims prior to trial.[60]

C. *The Prison Litigation Reform Act*

If the barriers to the judicial system by prison inmates were not high enough previously, Congress passed the PLRA in 1996 in order to combat the notion that inmates were overly litigious and frequently clogged the court system with frivolous claims.[61] The PLRA has four primary provisions that exacerbate the problem of barriers of entry to the judicial system for inmates.[62] First, the statue imposes financial obligations in the form of filing fees to inmates seeking to instigate litigation, even inmates classified as *in forma pauperis*.[63] By definition, one classified as *in forma pauperis* is indigent to the point that she is permitted to disregard filing fees. Consequently, this obstacle is necessarily a difficult, if not impossible, hurdle for many hopeful inmate litigants to overcome.[64] While it is clear that this provision will cause a potential litigant to reconsider prior to filing a claim with little or no merit and may well serve the purpose of filtering out a great deal of meritless lawsuits, it is over-inclusive in that it potentially filters out many meritorious inmate suits as well.

Second, the PLRA imposes a requirement that an inmate seeking a claim for damages must make a prior showing of physical injury.[65] While many of the claims relevant to this analysis would be injunctive in nature and would thus seem to fall outside of the purview of this provision, some

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58. *Id.*

59. Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 545 (1982).

60. Schlanger, *supra* note 45, at 1572 (noting that approximately 19% of inmate claims are dismissed as frivolous).

61. James E. Robertson, *The Jurisprudence of the PLRA: Inmates as "Outsiders" and the Countermajoritarian Difficulty*, 92 J. CRIM. L. & CRIMINOLOGY 187, 187-88 (2001).

62. Elizabeth Alexander, *Prison Litigation Reform Act Raises the Bar*, 16 CRIM. JUST. 10, 11 (2002).

63. *Id.*

64. BLACK'S LAW DICTIONARY 849 (9th ed. 2009).

65. Alexander, *supra* note 62, at 13.

courts have nonetheless concluded that a claim for a violation of one's constitutional rights is intrinsically a claim to redress mental or emotional injury.[66] In these courts, an inmate seeking to bring litigation claiming a violation of her Eighth Amendment freedom from cruel and unusual punishment, as is typically the case, would have the added burden of proving physical injury prior to being admitted to court.[67]

Third, when an inmate seeks injunctive relief, the PLRA requires that the petition for relief must be "narrowly drawn, extend[ing] no further than necessary to correct the violation of a federal right, and that the relief is the least intrusive means necessary."[68] While such a pleading standard may not pose an issue for an experienced attorney, as mentioned previously, inmates bring a vast majority of these cases *pro se*.[69] Consequently, the likelihood that an inmate untrained in the nuances of the law will violate this standard is elevated significantly.

Finally, the PLRA mandates that prisoners may not file suit regarding prison conditions until exhausting all possible administrative remedies.[70] This requirement may be particularly onerous for three reasons. First, the Supreme Court has ruled that the exhaustion of all possible administrative remedies is a mandatory requirement, and thus district court judges have no discretion to waive this requirement even when equitable concerns may demand it.[71] Second, nine circuits have held that the district court judge must dismiss the prisoner's suit if she has not exhausted all of her administrative remedies prior to filing the suit, even where she exhausts all possible administrative remedies during the course of the lawsuit.[72] Finally, the *pro se* status of most inmate litigants makes it unlikely that the litigant will be aware of every administrative remedy available.

Legislators claim that they intended the PLRA merely to sift out frivolous inmate claims and permit meritorious ones to proceed to court, and the legitimacy of that purpose cannot be doubted due to the clear governmental interest in judicial efficiency. However, despite its intentions, the PLRA simply "shut[s] the courthouse doors to many inmates" regardless of the validity of their claims.[73] This can be demonstrated by the fact that judges frequently rely on the PLRA directly

66. *Id.* at 14.
67. *Id.*
68. *Id.*
69. Schlanger, *supra* note 45, at 1609.
70. Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) (1996).
71. Booth v. Churner, 532 U.S. 731, 740-41 (2001).
72. McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002).
73. Schlanger, *supra* note 45, at 1562.

in dismissing inmate claims.[74] Legal scholars, judges, and legislators alike have lamented this fact and members of each of these groups have joined to call for amendment of the PLRA for these very reasons.[75]

D. *The "Cruel and Unusual Punishment" Standard of the Eighth Amendment*

While hopeful inmate litigants face the significant aforementioned procedural hurdles, they also face a difficult substantive obstacle in the event that they do ultimately reach trial. As mentioned previously, an inmate seeking to challenge the nature of the rations provided to him would find her only recourse in the Eighth Amendment, in the form of a claim of cruel and unusual punishment. The U.S. Supreme Court has offered no static test in determining whether a particular punishment violates the Eighth Amendment.[76] Instead, the constitutionality of a particular prison condition hinges on "evolving standards of decency," commensurate with contemporary understanding of what constitutes acceptable punishment.[77] One might reasonably anticipate that such a subjective standard affords the inmate litigant a greater chance at success due to the flexibility to make a number of varied arguments, but Eighth Amendment jurisprudence has not comported with this idea. Instead, the Court tends to be highly deferential to the government in its Eighth Amendment jurisprudence, often relying on state counting to determine a national consensus of acceptability in regard to punishment, thus often subverting the need for independent Supreme Court review.[78]

Beyond this deference, the Court further decreased the likelihood of success of an inmate's food-based Eighth Amendment claim when it announced that the "Eighth Amendment outlaws cruel and unusual 'punishments,' not 'conditions,' and the failure to alleviate a significant risk that an official should have perceived but did not . . . cannot be

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74. *See, e.g.*, Flowers v. Ahern, 650 F. Supp. 2d 988, 991-92 (N.D. Cal. 2009); Kasiem v. Switz, 756 F. Supp. 2d 570, 575-76 (S.D.N.Y. 2010); Page v. Kirby, 314 F. Supp. 2d 619, 620 (N.D.W.V. 2004).

75. Andrew W. Amend, *Giving Precise Content to the Eighth Amendment: An Assessment of the Remedial Provisions of the Prison Litigation Reform Act*, 108 COLUM. L. REV. 143, 170 (2008).

76. Betsy M. Santini, *Curtailment of Prisoners' Ability to Protect Their Right to be Free from Cruel and Unusual Punishment: A Post-Wilson Circuit Survey of Prison Conditions Cases*, 2 CORNELL J.L. & PUB. POL'Y 421, 423 (1993).

77. *Id.*

78. Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 WASH. U. L. REV. 1, 17 (2010).

condemned as the infliction of punishment."[79] In so holding, the Court refused the notion that all state-created prison conditions should presumptively be regarded as punishment for Eighth Amendment purposes.[80] Rather, an inmate litigant seeking to base her claim on prison conditions must make two showings.[81] First, she must show that she suffered a sufficiently serious deprivation.[82] Second, the Eighth Amendment contains an intent requirement mandating that, at minimum, the prisoner must establish that a prison official demonstrated a subjective "deliberate indifference" towards the prisoners' needs; mere negligence will never suffice.[83] As such, inmate litigants utilizing the Eighth Amendment have a cross to bear in proving prison officials' subjective awareness, particularly in regard to macro-level failures, due to their lack of resources as incarcerated, often *pro se*, litigants.[84]

This high Eighth Amendment standard thus serves as a final barrier to an inmate's food-related litigation should she successfully navigate through the aforementioned procedural difficulties.[85] Where then are prisoners left to turn to seek a remedy in the face of such limitations? The implementation of a federal standardization of prison food law, complete with the authorization to regulate and discipline offending institutions is the only viable solution to ensure that the rights of our nation's incarcerated are not routinely violated in the context of food related impropriety.

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79. Farmer v. Brennan, 511 U.S. 825, 835 (1994).

80. Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 890 (2009).

81. *Id.* at 889-90.

82. *Id.*

83. *Farmer*, 511 U.S. at 825 (1994); Wilson v. Seiter, 501 U.S. 294, 301 (1991).

84. Dolovich, *supra* note 80, at 948.

85. *See e.g.*, Stanley v. Page, 44 Fed.App'x 13 (7th Cir. 2002) (affirming dismissal of inmates' class action suit alleging that they received diminished food portions, were denied utensils for meals, were served scrambled eggs with a greenish tint, and were served ice cubes containing roaches; these conditions constituted "temporary inconveniences" and not "extreme deprivations cognizable under the Eighth Amendment"); Islam v. Jackson, 782 F. Supp. 1111 (E.D. Va. 1992) (dismissing inmate's suit where he alleged that he and other inmates were served maggot infested meat for one meal and were served food for thirteen subsequent days prepared in unsanitary conditions, including being prepared without gloves and by individuals without certifications or medical examinations to work with food); Tucker v. Rose, 955 F. Supp. 801 (N.D. Ohio 1997) (granting summary judgment in favor of state regarding prisoner's allegations that the prison served food tainted by rodents because the incidents were not frequent enough to constitute a sufficiently serious deprivation and there was no evidence that food service managers were aware of the problem at the time the allegedly tainted food was served).

IV. PUBLIC SCHOOL REGULATION AS A MODEL FOR PRISONS

Section IV begins by analyzing the constitutionality of the promulgation of federal regulations to govern state prisons. It then uses the federal regulation of food in the public school system as a paradigm for the federal regulation of food in the prison food context. Finally, this section focuses on the adjustments that legislators must make in order to ensure that these regulations function properly, taking into consideration the difference in context between public schools and prisons. This article assumes that this agency would promulgate standards for prison food that would promote the good health and nutrition of inmates, as it is beyond the scope of the article to prescribe the specific nutritional standards that would be necessary to achieve these goals. Further, as the U.S. Department of Agriculture (the Department) is already responsible for carrying out the federal regulation of public school food, the proposition offered in this article would not require the costly creation of an additional federal agency.[86] Rather, Congress could simply and logically expand the purview of the Department to include the dominion of prison food regulation.

A. *Constitutional Authority*

Perhaps the most useful method of ensuring compliance with federal prison food regulations on a local scale is one used in the context of the public school system routinely in order to further the congressional agenda — federal grants.[87] While the notion of federalism traditionally leaves education regulation to the states as a function of their general police powers, the federal government nonetheless has a hand in forming regulatory schemes for public schools. It accomplishes these goals through its spending power, both providing federal grants with strings attached and withholding federal funds in order to incentivize states to participate in its regulatory programs.[88] Despite the fact that Congress' ability to influence state regulatory schemes through its spending power does indeed have limits when taken to the extreme, Congress has "virtually unfettered discretion to spend federal monies on projects it deems worthwhile and,

86. Clint G. Salisbury, *Make an Investment in Our School Children: Increase the Nutritional Value of School Lunch Programs*, 2004 BYU EDUC. & L.J. 331, 334 (2004).

87. U.S. DEP'T OF EDUC., 10 FACTS ABOUT K-12 EDUCATION FUNDING, http://www2.ed.gov/about/overview/fed /10facts/index.html (last visited Jan. 25, 2014).

88. South Dakota v. Dole, 483 U.S. 203, 211-12 (1987).

moreover, to condition such spending as it thinks best."[89] Accordingly, our courts have interpreted the Constitution to authorize Congress to spend in the form of grants to the states and to create federal agencies in order to pursue its regulatory goals.[90] As such, Congress would have the ability under the authority granted to it by the Spending Clause to effectuate the regulation of food standards in state prison systems.

B. *The National School Lunch Program and the Healthy, Hunger-Free Kids Act of 2010*

A set of regulations recently promulgated by the Department concerning minimum required standards for nutrition in public school systems that participate in the National School Lunch Program (the Program), coupled with the more recent Healthy, Hunger-Free Kids Act of 2010 (the Act) illustrates the type of comprehensive and pervasive influence that the federal government exercises over the public school system and could exercise over state prison systems.[91] This section specifically evaluates four critical components of the Act and its corresponding regulations. First, as the backbone of the regulatory scheme, they impose a set of nutritional standards upon participating schools intended to promote proper nutrition among our nation's youth. Second, they require substantial training and certification of food service personnel in participating schools in order to maintain those nutritional standards. Third, they include a periodic review process to ensure compliance with

89. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566, 2603-04 (2012) (holding that Congress' spending power is invalid when it amounts to a "gun to the head" of the states); Ronald J. Kortosyzski, Jr., *Listening to the "Sounds of Sovereignty" But Missing the Beat: Does the New Federalism Really Matter?*, 32 IND. L. REV. 11, 16 (1998).

90. *Sebelius*, 132 S.Ct. at 2601 (noting that the Supreme Court has "long recognized that Congress may use [its spending power] to grant federal funds to the States, and may condition such a grant upon the States' 'taking certain actions that Congress could not require them to take'") (quoting College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686 (1999)).

91. Melissa D. Mortazavi, *Are Food Subsidies Making Our Kids Fat - Tensions Between the Healthy Hunger-Free Kids Act and the Farm Bill*, 68 WASH. & LEE L. REV. 1699, 1713-14 (2011) (stating that Congress incentivizes states to participate in the Healthy, Hunger Free Kids Act of 2010 by increasing the federal reimbursement rate for free lunches by six cents per meal to $2.74); ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., NATIONAL SCHOOL LUNCH PROGRAM, http://www.ers.usda.gov/topics/food-nutrition-assistance/child-nutrition-programs/national-school-lunch-program.aspx (last visited Jan. 25, 2014) (explaining that the National School Lunch Program provided meals to over 31 million public school students per day in 2012).

their provisions. Finally, they allow the federal government to levy fines against states that violate their requirements for deterrent effect.

1. Nutritional Standards

The Act, which was crafted with the input of nutritionists and dietitians in accordance with the 2010 Dietary Guidelines, explicitly states the types of food groups and quantities of those food groups that schools must make available at each meal in order to ensure healthy meals for schoolchildren.[92] For example, not only does the Act require participating schools to provide vegetables as a component of each school lunch, it also mandates that schools provide each of a number of various types of vegetables throughout the week.[93] Beyond that, the Act's standards ensure that students receive a wide variety of vitamins and minerals, necessary to promote a diversified and healthy diet.[94] In addition, the federal nutrition standards for public schools take into consideration that not all students and age cohorts have the same nutritional demands and requirements and thus vary the quantity required of particular food groups dependent upon the student's age and grade level.[95] This is consistent with the fundamental notion that all people, particularly within varying age groups, do not have uniform caloric intake and nutritional requirements.[96]

2. Training and Certification

Additionally, the Act requires a system of training and certification to ensure that food service personnel are familiar and compliant with the included nutritional standards.[97] First, the Act mandates annual training and certification of food service personnel in order to ensure program compliance and integrity as well as requiring a showing of competence in regard to the principles they learn in the training sessions.[98] The Department determines the standards of these training and certification

92. Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. 4088, 4088 (Jan. 26, 2012) (to be codified at 7 C.F.R pts. 210 and 220).

93. *Id.* at 4091.

94. *Id.* at 4094.

95. *Id.* at 4098.

96. R.A. McCance and E.M. Widdowson, *Food Requirements and Food Intakes*, 2 BRIT. MED. J. 311, 311 (1937).

97. Healthy, Hunger-Free Kids Act of 2010, Pub. L. No. 111-296 § 306, 124 Stat. 3183 (2010).

98. *Id.*

programs.[99] Further, the Act prescribes that each annual training session must contain training modules on nutrition, health and food safety standards and methodologies, and "any other appropriate topics, as determined by the Secretary."[100] The corresponding federal regulation also permits the use of training as a corrective action when a particular school violates the requisite standards.[101] Because nutritional researchers frequently uncover new and compelling data, these annual training sessions are essential in ensuring that the standards and procedures of the Act do not become obsolete or ineffective.[102] The final section allows discretion and flexibility on the part of the Department to tailor the training session to the individual needs of the locality, as nutritional issues requiring remedial attention may vary from state to state, and even city to city.[103]

3. Review Processes

While training and certification are critical to the effectiveness of public school food regulation, any rule is only as good as its enforcement mechanism. The federal government imposes a number of review and enforcement mechanisms to ensure public schools' compliance with its nutritional standards.[104] First, the federal government enlists state agencies to conduct administrative reviews, ensuring that they review each school for compliance at least once during every five year review cycle, but in no circumstances shall a school avoid review for longer than six consecutive years.[105] Much of the review process is concerned with ensuring that schools spend federal funds pursuant to the regulations and also to ensure that schools do not claim more funds than needed to operate the Program, in an attempt to defraud the federal government.[106]

However, a significant portion of the review process is also focused on ensuring that participating schools adhere to the nutritional standards

99. *Id.*
100. *Id.*
101. 7 C.F.R. § 210.18 (2012).
102. CAROLE DAVIS & ETTA SALTOS, U.S. DEP'T OF AGRIC., *Dietary Recommendations and How They Have Changed Over Time in* AMERICA'S EATING HABITS: CHANGES AND CONSEQUENCES 33-50 (1999) (describing how prevailing notions of what constitutes prudent nutrition have evolved over time as new nutritional research becomes available).
103. Healthy, Hunger-Free Kids Act of 2010, Pub. L. No. 111-296 § 306, 124 Stat. 3183, 3243 (2010).
104. 7 C.F.R. § 210.18 (2012).
105. *Id.*
106. *Id.*

promulgated by these regulations.[107] For example, the Act instructs the reviewing agency to "[c]onduct a weighted nutrient analysis of the meals . . . to determine whether the meals offered meet the calorie, sodium, and saturated fat requirements" stated previously in the regulations.[108] In addition, the reviewing agency is responsible for reviewing "nutrition labeling or manufacturer specifications for products or ingredients used to prepare school meals to verify they contain zero grams . . . of trans fat per serving."[109] As such, the Act charges the reviewing agency with ensuring schools' compliance with a strict set of criteria in order to make an assessment as to whether or not each school abides satisfactorily by the terms of the regulations.[110]

4. Penalties

However, it is not enough simply to charge an agency with the responsibility of identifying violations; the proposed act must impose a system of penalties in order to deter prisons from violating of the regulations.[111] According to the current system of regulations for public schools, a school that has violated any provision of the Program is not immediately penalized for its transgression, but rather then becomes subject to a follow-up review.[112] During the interim between the violation and the follow-up review the regulations provide the school with an opportunity to rectify its violation.[113] However, if upon follow-up review the school has still not cured the issue, a number of remedial procedures are possible.[114] These remedial procedures include requiring the school food authority to resolve the problems complete with documentation of the corrective action taken, the taking of corrective fiscal actions, and the withholding of payments under the program.[115]

Further, and perhaps most persuasively to the participating schools, the Act imposes a system of fines to be assessed to the school upon a determination that the school either failed to correct a severe mismanagement of the program, disregarded a program requirement of

107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. Cass R. Sunstein, David Schkade & Daniel Kahneman, *Do People Want Optimal Deterrence?*, 29 J. LEGAL STUD. 237, 237 (2000).
112. 7 C.F.R. § 210.18 (2012).
113. *Id.*
114. *Id.*
115. *Id.*

which the school food authority or school had been informed, or failed to correct repeated violations of program requirements.[116] Arguably more importantly, the Act also prescribes the amount of the fines that reviewing agencies can accord to the states, capping the fine at a maximum of ten percent of the funds made available to the state under the program.[117]

C. *Comparing Public Schools to Prisons*

Upon first glance, one might reasonably reject the notion that these two institutions with such seemingly diametrically opposed goals, public schools and prisons, could be so related so as to justify the implementation of similar regulatory schemes. However when one considers the facts more closely, that they are both largely state funded and operated, they both demand highly controlled and supervised environments, and they both subject their primarily involuntary inhabitants to rigid routines, the comparison seems far less attenuated.[118] Beyond this, due to the high operating costs of both establishments and their substantial impact on the general welfare, governments have limited viable alternatives to both schools and prisons.[119] In fact, the need for pervasive regulation in the prison food system exceeds that of the public school system since, unlike schoolchildren, inmates do not have the option of providing their own food. As such, one may fairly conclude that Congress can and should expect a similar regulatory scheme that is effective to control food quality in our public schools to serve as an archetype that may be applied with efficacy to the prison setting.

D. *Necessary Alterations for the Prison Context*

Of course, Congress cannot simply apply the preexisting regulatory scheme in public schools to the prison context identically. This section identifies and analyzes the necessary alterations that Congress would have to make to the public school food paradigm in order to ensure effectiveness in the prison food system. Further, this section examines the monetary

116. Healthy, Hunger-Free Kids Act of 2010, Pub. L. No. 111-296 § 303, 124 Stat. 3183 (2010).

117. *Id.*

118. Wayne K. Hoy, *Organizational Socialization: The Student Teacher and Pupil Control Ideology*, 61 J. EDUC. RES. 153, 153-54 (1967).

119. CTR. ON EDUC. POLICY, WHY WE STILL NEED PUBLIC SCHOOLS - PUBLIC EDUCATION FOR THE COMMON GOOD 7-13 (2007), *available at* http://www.cep-dc.org/displayDocument.cfm?DocumentID=291 (follow "Full Report" hyperlink); Richard Harding, *Private Prisons*, 28 CRIME & JUST. 265, 340-41 (2001).

feasibility of implementing such a regulatory scheme and of making the necessary alterations to tailor them to the prison context. In doing so, this section mirrors section IV.B in focusing on nutritional standards, training and certification, review processes, and penalties.

1. Nutritional Standards

Congress could not directly translate the nutritional standards of the Act and the Program to the prison context due to the obvious distinction between the variation in nutritional requirements between children and adults, and an amended version of these standards would certainly have its place in the prison system. If the Act recognizes the necessity to accommodate differences in standards among age groups in the public school setting, which only vary from five to eighteen, it only follows that prison food regulations would need to make the same, and perhaps even more regimented, distinctions in a system feeds inhabitants comprising a far wider gap in age.[120] While making the necessary adjustments to the current public school regulation in this regard to make it viable for prison inmates would incur some cost through hiring registered dietitians to tailor food group requirements to various adult age cohorts, the cost would be negligible when compared to the health benefits generated.[121] Further, it is possible that much of these costs could be offset by a reduction in prison health care costs, as the inverse correlation between good nutrition and health care costs is well documented, particularly in regard to reducing the average length of stay of patients.[122]

2. Training and Certification

The implementation of a training and certification program similar to the Act would be essential to the success of the program in a prison setting. Taking into consideration the fact that Congress has yet to place federal standards in the prison food system despite the obvious and empirical need for them, it would be far too easy for them to effectuate a system of standards and guidelines and then neglect it for years at a time, allowing

120. *See generally* A. Stewart Truswell, *Adults Young and Old*, 291 BRIT. MED. J. 466 (1985) (standing for the general proposition that nutritional requirements for adults change as they age).

121. D.C. Hemingway, *Good Nutrition Lowers Health Care Costs*, 7 J. ORTHOMOLECULAR MED. 67, 68 (1992) (stating that patients showing signs of nutritional deficiency have ninety-eight percent longer average lengths of stay in hospitals than those patients displaying no such signs).

122. *Id.*

the provisions therein to become obsolete. Certainly, one might expect that the propensity for this to happen in a prison context would be substantially greater than in a school setting since schoolchildren have the benefit of the political lobbying power of their parents to ensure that their interests are represented.[123] Inmates generally do not have the benefit of the same political protection; in fact, powerful interest groups routinely lobby for interests diametrically opposed to those of the incarcerated.[124] Consequently, this proposed act would require stricter training and certification standards than those currently in place in public schools. Otherwise, the risk of ignoring advances in nutritional science and the general degradation of food service officials' knowledge base would be far too great.[125]

3. Review Processes

While the review process is certainly an essential element of any regulatory scheme, the prison food system would require no substantial departures from the preexisting public school regulatory system in regard to review in order to be effective. A schedule requiring review at least once during every five year period allows for enough deterrence in oversight without imposing the significant costs that would accompany more frequent review.[126] It is important that review must occur *at least* once per five year review cycle, allowing for the possibility of more frequent review.

One may argue that such an infrequent review process coupled with prior notice of an impending review increases the possibility that a prison may engage in detection avoidance and conceal its violations during the

123. *See, e.g.*, Andrea Eger, *Tulsa-area Parent Group Lobbying for Graduation Requirement Changes; Good Students Could be Denied Diplomas*, TULSA WORLD, Mar. 2, 2012, http://www.tulsaworld.com/news/education/tulsa-area-parent-group-lobbying-for-graduation-requirement-changes-good/article_c1e7b7d9-4a40-50f1-935a-255e720aa66d.html; Steve Stoler, *Parents Lobby for Downtown Dallas School Zone*, WFAA, Sept. 11, 2012, http://www.wfaa.com/news/education /Parents-lobby-for-downtown-Dallas-school-zone-169384946.html.

124. Harvey Silvergate & Kyle Smeallie, *Freedom Watch: Jailhouse Bloc*, THE PHOENIX, Dec. 9, 2008, http://thephoenix.com/Boston/News/73092-Freedom-watch-Jailhouse-bloc/?page=3#TOPCONTENT (explaining that the Corrections Corporation of America, the country's largest private prison provider, spent more than $2.7 million in the period between 2006 and September of 2008 lobbying for stricter laws in order to keep their prisons occupied).

125. *See supra* p. 19.

126. *See supra* pp. 21-22.

review period.[127] However, this ignores the inherent cost associated with detection avoidance.[128] From a prison's perspective "there is little difference between a dollar of sanction . . . and a dollar spent avoiding that sanction."[129] Consequently, it would be financially illogical for prisons to expend significant resources to avoid detection despite the fact that review occurs fairly infrequently. As such, the proposed prison regulatory scheme could adopt the review processes currently in use for the public school system with no significant substantive change, contributing further to the cost-effectiveness of implementation.

4. Penalties

A significant divergence from the public school model in regard to penalties would be in order for this regulatory scheme to work effectively in a prison context.[130] The maximum fine of ten percent of all funding received for violations currently imposed by the Act, while certainly a tremendous amount of money when dealing with a program of this magnitude, may be inadequate to effectively deter prisons from violating the provisions of such regulations.[131] This is due to the idea that if fines are not set at a sufficiently high level, a rationally thinking, profit motivated entity, even a state government, may be willing to continue its current prison food scheme, even under the threat of sanction, because of the uncertainty that a reviewing agency will actually discover its violations and the vast sums of money that it could save by continuing to cut corners.[132]

This notion mirrors the fundamental yet poignant law and economics idea that "a particular damage measure provides a particular degree of incentive to perform, and in general, it is evident that the higher is the

127. 7 C.F.R. § 210.18 (2012).

128. Chris Williams Sanchricho, *Detection Avoidance*, 81 N.Y.U. L. REV. 1331, 1361 (2006).

129. *Id.*

130. Mortazavi, *supra* note 91, at 1732 (noting that there is even evidence that the current enforcement mechanisms in the public school context are ineffective, suggesting that penalties in the prison context may need to substantially increased in order to ensure efficacy).

131. Donald C. Klawiter, *After the Deluge: The Powerful Effect of Substantial Criminal Fines, Imprisonment, and Other Penalties in the Age of International Cartel Enforcement*, 69 GEO. WASH. L. R. 745, 757 (2001) (noting that "it appears certain" that blockbuster fines in the area of antitrust violations are substantially more effective than the previous, more limited fines).

132. Max Minzner, *Why Agencies Punish*, 53 WM. & MARY L. REV. 853, 880 (2012) (concluding that the probability of detection and the harm from the violation should lie at the center of an agency's calculation of penalties).

damage measure, the greater incentive to perform."[133] In effect, the amount of money that a state could save through continuing to cut corners coupled with an accounting for the uncertainty of enforcement may lead to a scenario where the perceived savings through non-compliance exceeds the highest currently available monetary penalty.[134] Accordingly, the penalties currently utilized for federal programs involving public school food would likely be insufficient to serve the purpose of deterrence in a prison setting. The implementation of a severe fine for infractions may also have the added benefit of encouraging self-reporting, mitigating some enforcement costs and contributing to the overall cost-effectiveness of the program.[135] This makes more severe fines a preferable alternative to more frequent review. Prescribing an exact figure of what a sufficient penalty should look like without complete information and data would prove to be a nearly impossible task. However, the proposed act should set the optimal fine at some figure beyond the total cost that a state can save through non-compliance, adjusting for the chance of enforcement, a function of the total resources devoted to enforcing the scheme.[136]

As such, while the Act and the Program serve as a foundation for the implementation of a regulatory scheme for food in the prison context, legislators would have to impose some significant modifications in order to ensure an effective regulatory scheme in the prison context. First, the differences in physiology and nutritional requirements between children and adults demand more finely tailored nutritional standards. Second, more frequent training and certification sessions will ensure that nutritional standards do not become quickly outdated. Finally, a proper prison food regulatory scheme would require harsher monetary penalties in order to ensure compliance. While these modifications would incur some cost, the overall regulatory scheme would be cost-effective, particularly when one considers potential savings in regard to health care costs for inmates.

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133. STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 305 (2004).

134. *Id.* at 306.

135. Klawiter, *supra* note 131, at 762 (noting that when criminal fines are high enough in the context of antitrust violations, companies are eager to self report if this means a reduced penalty).

136. *See generally* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON.169 (1968) (making the case that actual penalties should be set at a level substantially beyond the amount of harm done through noncompliance. If set appropriately, the same level of deterrence could still be achieved in this way, while saving a substantial amount of social resources through reduced enforcement expenditures).

V. OBSTACLES TO IMPLEMENTATION AND POSSIBLE SOLUTIONS

It seems clear that the implementation of nationwide, federal standards for prison food is not only a feasible goal, but may even be socially and economically beneficial in many ways. However, several obstacles stand in the way of imposing a food based federal regulatory scheme in state prisons. This section reviews these obstacles and suggests ways in which each might be ameliorated. First, widespread disenfranchisement of felons leaves politicians with little incentive to concern themselves with inmates' needs and desires. Second, the popularization of "tough on crime" policies gives non-felon political constituents little motivation to pressure their legislators into passing laws intended to benefit the incarcerated. Finally, deep-seated notions of federalism dictate that state governments, not Congress, should be responsible for prison related policies.

A. *Felon Disenfranchisement and Socioeconomic Trends in Voting Patterns*

It is a cornerstone of any democracy that the right to vote of *all* citizens is essential.[137] Alexis de Tocqueville echoed this sentiment when he wrote that "[w]hen a nation begins to modify the elective qualification, it may easily be foreseen sooner or later, that qualification will be entirely abolished."[138] Despite this, the U.S. Supreme Court has upheld the right of states to disenfranchise felons, contending that, "the exclusion of felons from the vote has an affirmative sanction in the Fourteenth Amendment."[139] Consequently, state legislatures have rescinded the right to vote of nearly six million Americans nationwide.[140] While some states have no restrictions or limited restrictions on felons' right to vote, other states have particularly onerous policies.[141] For example, in Florida, over 10% of the

137. Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (stating that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live").

138. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 71 (Henry Reeve trans., vol. I, 1898).

139. Richardson v. Ramirez, 418 U.S. 24, 54 (1974) (upholding the constitutionality of the disenfranchisement of felons).

140. CHRISTOPHER UGGEN, SARAH SHANNON & JEFF MANZA, THE SENTENCING PROJECT, STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010 1 (2012), *available at* http://sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf.

141. *Id.* at 6.

adult voting age population lacks the ability to cast a vote at the ballot box due to its stringent disenfranchisement laws.[142]

Beyond felon disenfranchisement, those individuals that are likely to vote to protect inmates' interests, namely their family members, are those individuals that traditionally are underrepresented in the political process; a byproduct of inherent racial and socioeconomic disparities in the prison population. For example, African Americans represent only approximately 12% of the United States population, but 40% of the total prison population; a product of incarceration at a rate of 5.6 times that of their white counterparts.[143] Hispanics, as well, are incarcerated at a rate of 1.8 times that of whites.[144] Additionally, data show that enfranchised African Americans and Hispanics generally vote at a substantially lower rate than do whites.[145]

As a consequence of felon disenfranchisement and socioeconomic trends in the voting patterns of those voters likely to sympathize with the interests of inmates, legislators have very little self-interest in passing laws concerned with the improving prison conditions.[146] As "legislative elections are devices . . . for translating . . . citizen desires into legislative action," where the electoral system bars a particular class of individuals from participating in the election process, it is clear that legislative responsiveness to that class will be diminished.[147] Felon disenfranchisement thus poses perhaps the most significant barrier to the implementation of a federal regulatory scheme devoted to the standardization of prison food.

In order to overcome this hurdle, interest groups such as the American Civil Liberties Union must mobilize to advocate more ardently for prisoners' political rights. Further, these interest groups must zealously support the movement toward felon re-enfranchisement. The political resources of powerful interest groups coupled with the general citizenry's support of reinstating an inmate's right to vote after her release from

142. *Id.*

143. Brett E. Garland, Cassia Spohn & Eric J. Wodahl, *Racial Disproportionality in the American Prison Population: Using the Blumstein Method to Address the Critical Race and Justice Issue of the 21st Century*, 5 JUST. POL'Y J. 2, 4 (2008).

144. *Id.*

145. THOM FILE, U.S. DEP'T OF COMMERCE, THE DIVERSIFYING ELECTORATE — VOTING RATES BY RACE AND HISPANIC ORIGIN IN 2012 (AND OTHER RECENT ELECTIONS) 3 (2013), *available at* http://www.census.gov/prod/2013pubs/p20-568.pdf.

146. Debra Parks, *Ballot Boxes Behind Bars: Toward the Repeal of Prisoner Disenfranchisement Laws*, 13 TEMP. POL. & CIV. RTS. L. REV. 71, 100 (2003) (noting that "[p]risoners are no politician's constituents").

147. Lyn Ragsdale, *Responsiveness and Legislative Elections: Toward a Comparative Study*, 8 LEGIS. STUD. Q. 339, 341 (1983).

incarceration could make substantial inroads toward improving felon participation in the political process.[148] Increased public awareness of prison food conditions may also engender increased political sympathy from enfranchised Americans, forcing legislators to take action in regard to prison food conditions. Finally, increased awareness on the part of Democratic Party politicians that "felon disenfranchisement erodes the Democratic voting base" may encourage those politicians to unite to support the repudiation of felon disenfranchisement laws, thus increasing the likelihood that the proposed federal prison food regulations may reach fruition.[149]

B. *"Tough on Crime" Political Landscape*

The public and political disposition toward harsh penalties for those who violate the law, often referred to as the "tough on crime" movement, also poses a significant threat to the imposition of the proposed federal prison food regulatory scheme.[150] The war on drugs, coupled with the politicization of crime, has resulted in a political landscape in which constituents extol the virtues of acute penalties on lawbreakers.[151] As a result, American law enforcement policies have produced a retributive system that incarcerates its citizens at a rate five to eight times that of most other industrialized nations.[152] Consequently, it may pose exceedingly difficult to engender enough public support for a federal food regulatory scheme to make the implementation of such a scheme feasible.

Falling crime rates since the inception of the war on crime have led many to the reasonable conclusion that the war on crime caused this decline.[153] However, some have suggested that this may be a simple case

148. Shawn Macomber, *Re-enfranchising Felons*, AM. SPECTATOR, Mar. 2, 2005, http://spectator.org/archives /2005/03/02/re-enfranchising-felons (noting that a July 2002 Harris poll found that 80% of Americans believe that all ex-felons who have completed their sentences should be allowed to vote and that 60% of Americans believe that felons finished with their sentence but on probation or parole likewise should have the right to vote).

149. Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 780 (2002) (explaining that "African Americans are overwhelmingly Democratic Party voters" and thus felon disenfranchisement disproportionately affects Democratic politicians, as opposed to Republican politicians).

150. *See generally,* K.L. Mclff, *Getting Smart as Well as Tough on Crime*, 11 UTAH B. J. 41 (1998).

151. Marc Mauer, *Why are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9, 13 (1999).

152. *Id.* at 9.

153. *Id.*

of correlation and not causation.[154] For example, one staple of the war on crime is the increase of mandatory sentences.[155] One legal scholar determined that these mandatory sentences have produced "severe, unevenly imposed sentences that have little effect on crime" instead of the deterrent effect that legislators intended.[156] Similarly, more affordable and higher quality cocaine, heroin, and marijuana is available today than was available prior to the war on drugs.[157] Increased public awareness of these findings, that "tough on crime" policies may not produce the effects that voters believe, may cause constituents to renounce their strict beliefs about proper punishment for lawbreakers. Then, inducing voters to support a regulatory scheme concerned with the rights and interests of inmates would prove far less challenging.

C. *Federalism and the States' Police Powers*

Federalism, the traditional division of powers between state and federal governments in America, also stands as a potential roadblock to the implementation of a federal prison food regulatory scheme.[158] While the dichotomy between states' power and federal power is often debated "the Founders undeniably left [police powers] reposed in the States and denied the central Government [the regulation of] the suppression of violent crime and vindication of its victims."[159] Consequently, the Supreme Court has seemed to have made an emphatic statement that states should maintain dominion over general concerns over the health, safety, morals, and general welfare of their citizens. As prison conditions would undeniably fall within the purview of police powers, one is left reconsidering the constitutionality of a federal prison food regulatory scheme.

However, the Court's statement in *Morrison* has proven less absolute than it may otherwise appear, leaving open the door for federal regulation of state penitentiaries. For example, the Religious Land Use and Institutionalized Persons Act (the Act) requires that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in

154. *Id.*
155. *Id.* at 11.
156. *Id.*
157. *Id.*
158. Mitchell F. Crusto, *The Supreme Court's New Federalism: An Anti-Rights Agenda*, 16 GA. ST. U. L. REV. 517, 522 (2000) (defining federalism as "our system of government, formed by a compact between and among the federal government and the state governments, wherein the states have surrendered their individual sovereignty to a central authority but retain limited residuary powers of government").
159. U.S. v. Morrison, 529 U.S. 598, 599 (2000).

or confined to an institution," including those housed in state penitentiaries.[160] Despite the fact that this federal law clearly infringes on the states' police powers to control the conditions of their own prisons, the Court upheld the constitutionality of the Act in *Cutter v. Wilkinson*.[161] Consequently, while federalism and the reservation of police powers to the states might appear at first glance to provide a substantial obstacle to a federal prison food regulatory scheme, the Court has been inconsistent in its holdings and the potential for such a scheme remains viable.

Felon disenfranchisement and socioeconomic trends in voting patterns, the recent increase of "tough on crime" legislation, and basic ideas of federalism all pose substantial threats to the feasibility of implementing the proposed regulatory scheme. These obstacles are not insurmountable, however. A number of solutions to these problems are available and their adoption will pave the way for the federal regulation of state prison food.

VI. CONCLUSION

The prison food system is an anomaly in modern political America, as it lacks many of the stringent regulations that have become ordinary in virtually every facet of our lives. Section II surveyed how this under-regulation has resulted in significant health related issues for inmates, as both individual states and large corporate food contractors, such as Aramark, routinely take advantage of the lack of accountability in prison food provision for their own financial benefit. These health-related issues range from simply providing inadequate amounts of food to providing meals that lack the same nutritional standards that are provided in other public settings, such as public schools. The issue is amplified in the prison context based on the lack of alternatives that inmates have to rely on in the face of insufficient provisions.

Section III then analyzed the adequacy of litigation as a remedial tool for inmates the current to inmates to cure any perceived injustices they may have endured pertaining to improper food service. Taking into consideration the lengthy litigation process, the fact that many inmates must proceed *pro se* due to their indigent status and a general underlying perception that inmate claims are frivolous, it is clear that relying on litigation as the sole corrective mechanism is a virtual assurance of the perpetuation of these unjust food practices. Additionally, Congress adopted the Prison Litigation Reform Act in 1996, which provided further

160. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1(a) (2000).

161. *See generally*, Cutter v. Wilkinson, 544 U.S. 709 (2005).

barriers to inmates seeking to utilize the court system. Finally, Eighth Amendment jurisprudence serves as a substantive barrier to the hopeful inmate litigant even if she navigates the aforementioned procedural difficulties.

Since many states evidently will not take the initiative to solve the issue independently and the litigation system alone is insufficient to solve the problem, it is obvious that pervasive and stringent federal standards are needed. Section IV proposed a federal regulatory scheme to standardize prison food using preexisting federal regulations for public school food as a paradigm. Some substantive and administrative alterations would have to be incorporated to adjust for the change in demographic and setting, such as more narrowly tailored, age-specific nutrition plans and increased penalties for noncompliance. However, the general framework could remain intact. Further, section IV explored the notion that such a policy may actually be economically beneficial for states based on an expected reduction in inmate health care costs.

Section V then analyzed a number of practical barriers to the implementation of a federal prison food regulatory scheme in state prisons. Felon disenfranchisement and socioeconomic trends in voting patterns ensure that inmates' interests fall through the cracks of political discourse. The recent proliferation of "tough on crime" legislation dissuades the citizenry from championing the rights of inmates. Finally, traditional notions of federalism may leave regulation of state prisons to the sole authority of individual state governments. Section V then proposed a number of solutions to each of these potential obstacles.

In conclusion, it seems an unfortunate political reality that the only realistic solution to these problems is strict, interventionist legislation. Otherwise, the pleas of this class of individuals with "no political constituency" will continue to fall on deaf ears.[162]

162. Esteemed legal scholar Erwin Chemerisnky has been quoted as saying that inmates, "get no protection from the political process. They have no political constituency." Robertson, *supra* note 61, at 203.