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THE FOOD AND DRUG ADMINISTRATION AND THE ECONOMIC ADULTERATION OF FOODS

WESLEY E. FORTE†

PART I: THE HISTORY OF OUR ECONOMIC ADULTERATION LAW

The economic adulteration of foods is an ancient cheat and scholars have found references to it in the laws of Moses and the early literature of China, Greece and Rome.¹ The reported economic adulterations of foods increased unmistakably in the 1800's and early 1900's² and it was in this period of public indignation resulting from reports of milk diluted with water, coffee diluted with chicory and other roasted vegetable products, maple syrup diluted with cane sugar or glucose, and spices diluted with ground wheat and corn that Congress first passed prophylactic legislation preventing the debasement of foods.³ This legislation was part of the 1906 Food and Drugs Act.⁴ The provisions of the 1906 Act dealing with economic adulteration were

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1. See Hart, *A History of the Adulteration of Food Before 1906*, 7 FOOD DRUG COSM. L.J. 5 (1952); see also Kleinfeld, *Legislative History of the Federal Food Drug and Cosmetic Act*, 1 FOOD DRUG COSM. L.Q. 532 n.1 (1946); Kushen, *The Significance of Section 402 (b)*, 10 FOOD DRUG COSM. L.J. 829 (1955).

2. The increase was probably due to both the industrialization and urbanization of the Western World (with the greater impersonality of commercial relations) and the development of analytical chemistry (which made it possible to discover debased foods). See ANDERSON, *THE HEALTH OF A NATION* 69 (1958); Hart, *supra* note 1, at 13-22; see also Anderson, *Pioneer Statute: The Pure Food and Drugs Act of 1906*, 13 J. PUB. L. 189 (1964).

3. See *Ibid.*; Hart, *Food Adulteration in the Early Twentieth Century*, 7 FOOD DRUG COSM. L.J. 485 (1952). The statute which preceded the 1906 Food and Drugs Act was concerned only with the importation of adulterated food, drugs or liquor. See ch. 839, § 2, 26 Stat. 415 (1890). Both before and after passage of the 1906 Act and its superseding statute, the Federal Food, Drug, & Cosmetic Act of 1938, Congress passed legislation to prevent the sale of specific adulterated foods within federal jurisdiction. Some of these laws prohibited the sale of specific adulterated foods, see *e.g.*, Tea Importation Act, 29 Stat. 604 (1897), as amended, 21 U.S.C. §§ 41-50 (1958); Filled Milk Act, 42 Stat. 1486 (1923), 21 U.S.C. §§ 61-64 (1958); Meat Inspection Act, 34 Stat. 1260 (1907), as amended, 21 U.S.C. §§ 71-91 (1958); Butter Standard Act, 42 Stat. 1500 (1923), 21 U.S.C. § 321 (a) (1958); Import Milk Act, 44 Stat. 1101 (1927), as amended, 21 U.S.C. §§ 141-49 (1958), while other laws imposed taxes upon the sale of such foods or similar foods. See *e.g.*, Oleomargarine Tax Act, INT. REV. CODE OF 1954, §§ 4591-97; Adulterated and Process or Renovated Butter Act, INT. REV. CODE OF 1954, §§ 4811-26; Filled Cheese Act, INT. REV. CODE OF 1954, §§ 4831-46. However, the 1906 Food and Drugs Act was the first legislation banning adulterated foods in general from interstate commerce and its superseding statute, the Federal Food, Drug, & Cosmetic Act of 1938 (which contains adulteration provisions similar to the 1906 Act), is still our basic adulteration law.

4. Federal Food & Drugs Act of 1906, ch. 3915, § 7, 34 Stat. 768, repealed, 52 Stat. 1059 (1938).

strengthened in the superseding statute, the Federal Food, Drug, and Cosmetic Act of 1938.⁵ Section 402 (b) of the Federal Food, Drug, and Cosmetic Act covers economic adulteration and this section provides that a food is adulterated:

(b) (1) If any valuable constituent has been in whole or in part omitted or abstracted therefrom; or (2) if any substance has been substituted wholly or in part therefor; or (3) if damage or inferiority has been concealed in any manner; or (4) if any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is.⁶

Additionally, section 402 (d) of the act bars economic adulteration through the use of nonnutritive substances in confectionery.⁷ The Food and Drug Administration, acting under the supervision of the Secretary of Health, Education and Welfare, has the responsibility of enforcing the provisions of the Federal Food, Drug, and Cosmetic Act prohibiting economic adulteration.⁸

In 1914, Congress empowered the Federal Trade Commission to stop "unfair methods of competition in commerce."⁹ These provisions were also strengthened in 1938 when Congress in the Wheeler Lea Act gave the Federal Trade Commission the additional power to stop

5. Section 402 (b) of the Federal Food, Drug, & Cosmetic Act, 52 Stat. 1046 (1938), 21 U.S.C. § 342(b) (1958), enacted the economic adulteration provisions of the 1906 Act in slightly broader language and abolished certain provisions in the 1906 Act which had been used as defenses by the manufacturers of fabricated foods. See text accompanying notes 48-52 *infra*.

6. See statute cited note 5 *supra*.

7. 52 Stat. 1046 (1938) as amended, 21 U.S.C. § 342 (d) (1958), provides generally that confectionery is adulterated if it contains any nonnutritive substance except flavoring, coloring, and other minor ingredients. This section supersedes a section of the 1906 Act which classified confectionary containing talc and other such substances as adulterated. See Act of June 30, 1906, ch. 3915, § 7, 34 Stat. 768, repealed, 52 Stat. 1059 (1938). The candy industry has objected to § 402(d) of the Federal Food, Drug, & Cosmetic Act of 1938 and its predecessor statute as unnecessary in view of the provisions in these acts which prohibit economic adulteration of foods in general. A bill to repeal § 402(d) has twice passed the House of Representatives but has never been acted upon by the Senate. See ANNUAL REPORT OF NATIONAL CONFECTIONERS ASSOCIATION 5 (1964-1965). The most current versions of the bill were H.R. 7042, 89th Cong., 1st Sess. (1965) and S. 1839, 89th Cong., 1st Sess. (1965) and the bill died after being favorably reported to the Senate Labor and Public Welfare Committee by a special subcommittee.

8. The administration of the Federal Food, Drug, & Cosmetic Act of 1938 was originally the responsibility of the Department of Agriculture until its transfer first to the Federal Security Administrator and finally to the Secretary of Health, Education, and Welfare. See 1 CCH FOOD, DRUG, & COSMETIC L. REP. 4108.

9. 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(a) (6) (1964).

"unfair or deceptive acts or practices in commerce."¹⁰ Economic adulteration of foods is an "unfair method of competition" and an "unfair or deceptive act or practice" and therefore the FDA and the FTC have concurrent jurisdiction over this practice.¹¹ However, with a few notable exceptions which have been largely of historical interest,¹² the FTC has deferred to the FDA in the handling of this matter and economic adulteration is therefore regarded as an FDA problem.¹³ Violations of the economic adulteration sections of the Federal Food, Drug, and Cosmetic Act can result in either criminal penalties¹⁴ or seizure of

10. 52 Stat. 111 (1938), 15 U.S.C. § 45(a) (6) (1964).

11. FDA's jurisdiction is based on § 402(b) of the Federal Food, Drug, & Cosmetic Act, 52 Stat. 1046 (1938), 21 U.S.C. § 342(b) (1958). "Economic adulteration" is food and drug law terminology. The FTC does not purport to handle economic adulteration cases, or even to have jurisdiction over this practice as such. However, under § 5 of the Federal Trade Commission Act, 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45 (a) (6) (1964), the FTC has the power to prevent "unfair methods of competition" and "unfair or deceptive acts and practices," and, under that authority, the FTC has acted to prevent the sale of debased foods which deceive the public and divert trade from honest competitors. See *Fresh Grown Preserve Corp. v. FTC*, 125 F.2d 917 (2d Cir. 1942), in which the FTC alleged that it was unfair competition to label as "preserves" a food not containing at least 45% fruit; see also *FTC v. Morrissey*, 47 F.2d 101 (7th Cir. 1931); *FTC v. Good-Grape Co.*, 45 F.2d 70 (6th Cir. 1930) ("Good-Grape" soft drink with no natural grape flavor); *cf. FTC v. American Snuff Co.*, 38 F.2d 547 (3d Cir. 1930); *Royal Baking Powder Co. v. FTC* 281 Fed. 744 (2d Cir. 1922), in which the FTC alleged that respondents' packages were associated with products composed of certain ingredients and that it was deceptive for respondents to use the same style packages after basic changes had been made in the composition of these products. Some of the FTC's cases are virtually indistinguishable from the economic adulteration cases brought by the FDA and predecessor agencies. Compare, e.g., *FTC v. Morrissey supra*, and *FTC v. Good-Grape Co., supra*, with *United States v. 88 Cases of Bireley's Orange Beverage*, 187 F.2d 967 (3d Cir.), *cert. denied*, 342 U.S. 861 (1951) and *United States v. 24 $\frac{1}{2}$ Gallons of Smack*, (E.D. Wis. 1926), a 1906 Act case reported unofficially in *White & Gates, Decisions of Courts in Cases under the Federal Food and Drugs Act 1181* (1934) (hereinafter cited as *White & Gates*). Some of the FTC's trade practice rules also help to prevent economic adulteration of foods. See, e.g., *Preserve Manufacturing Industry Rules*, 16 C.F.R. 114.1 (1960); *Tomato Paste Manufacturing Industry Rules*, 16 C.F.R. 133.1-.3 (1960); *Tuna Industry Rules*, 16 C.F.R. 146.1-.2 (1960).

12. See FTC cases cited note 11 *supra*.

13. The FTC and the FDA have a Working Agreement defining their areas of primary responsibility. The Working Agreement is set forth at 3 TRADE REG. REP. ¶ 9850 (1954), and it provides that, unless the agencies otherwise agree, the FTC will exercise sole jurisdiction over all advertising of foods, drugs, devices, and cosmetics and the FDA will exercise sole jurisdiction over all labeling of these products. FTC's cases against the debasement of foods have been on the theory that this appearance (especially their labeling) has permitted them to be "passed off" on the unsuspecting public as foods of more expensive composition. Accordingly, the FTC probably regards economic adulteration of foods primarily as a deceptive labeling problem and, in the Working Agreement, the FTC ceded the responsibility of regulating the deceptive labeling of foods to the FDA.

14. Violation of the economic adulteration sections of the Federal Food, Drug, & Cosmetic Act can result in imprisonment for not more than one year or a fine of not more than \$1,000 or both for the first offense, 52 Stat. 1043 (1938), 21 U.S.C. § 333(a) (1958), and imprisonment for not more than three years, or a fine of not more

the offending food¹⁵ but the statutory provisions in the act are general, vague, complex, and abstruse. There are no regulations clarifying the economic adulteration sections of the act and the courts have been understandably reluctant to impose criminal sanctions on individuals who cannot determine in advance whether their conduct may later be held illegal.¹⁶ The patent need for either a better understanding of our present statute or a revised improved statute makes a review of the prohibitions against economic adulteration both timely and appropriate.

Economic adulteration is of a different gender than most other adulterations of food. Other adulterated foods are generally poisonous, deleterious, filthy, decomposed, or contaminated.¹⁷ Foods which are

than \$10,000 or both, if the violation was committed with intent to defraud or mislead or if the offender had a previous conviction, 21 U.S.C. § 333(b) (1958).

Criminal penalties may be imposed under the Federal Food, Drug, & Cosmetic Act even if the defendant has committed no wrongful act and lacks any knowledge of wrong-doing. All that is required is that the defendant stand in a reasonable relationship to the wrong. See *United States v. Dotterweich*, 320 U.S. 277 (1943); *United States v. Parfait Powder Puff Co., Inc.*, 163 F.2d 1008 (7th Cir. 1947), *cert. denied*, 332 U.S. 851 (1948).

15. The Government can proceed against adulterated or misbranded foods having the requisite connection with interstate commerce by libel and such foods may be condemned and destroyed or required to be brought into compliance with the act. 52 Stat. 1044 (1938), as amended, 21 U.S.C. § 334 (1958). The seizure remedy is more severe in adulteration cases than in misbranding cases for two reasons. First and most important, the Government can make multiple seizures of allegedly adulterated food immediately without court action whereas multiple seizures of allegedly misbranded food are not usually permitted until after the Government has secured an initial judgment that the foods are misbranded. Second, if the Government succeeds in a condemnation action against misbranded food, the claimant generally can recover the seized goods and revise the labeling or otherwise bring the foods into compliance with the act. However, if the Government succeeds in a condemnation action against adulterated food, the same opportunity will probably not exist. Because labeling will not usually cure an adulteration, adulterated foods must generally be reprocessed or destroyed if the Government is successful. See *United States v. 716 Cases of Del Comida Brand Tomatoes*, 179 F.2d 174 (10th Cir. 1950), holding that watered tomatoes cannot be released for truthful labeling. There is one possible exception. Some foods which are economically adulterated may comply with the law if they are re-labelled as "imitations." Compare *United States v. 30 Cases of Leader Brand Strawberry Fruit Spread*, 93 F.Supp. 764 (S.D. Iowa 1950) with *62 Cases of Jam v. United States*, 340 U.S. 593 (1951).

16. See, *e.g.*, *United States v. Fabro, Inc.*, 206 F. Supp. 523 (M.D. Ga. 1962); see also *Van Liew v. United States*, 321 F.2d 664 (5th Cir. 1963).

17. Adulterated foods are generally those which are either deleterious or have been manufactured with potentially deleterious ingredients or under potentially dangerous conditions. This includes foods containing added poisonous substances, unsafe food additives, color additives, or pesticide chemicals, filthy, putrid, or decomposed substances, as well as foods which are packed under unsanitary conditions or are the products of diseased animals. See 52 Stat. 1046 (1938), as amended, 21 U.S.C. § 342 (1958). Some adulterated foods may be fit for human consumption, *e.g.*, foods bearing unsafe additives or packed under unsanitary conditions or foods containing some decomposed material, see *Salamonie Packing Co. v. United States*, 165 F.2d 205 (8th Cir.), *cert. denied*, 333 U.S. 863 (1948); *United States v. 935 Cases of Tomato Puree*, 65

economically adulterated have none of these "dangerous" characteristics. On the contrary, economically adulterated foods may be and frequently are healthful and nutritious. The problem is primarily one of economic cheat with only incidental dangers to health.¹⁸

Economic adulteration is the sole economic cheat classified as an adulteration under the Federal Food, Drug, and Cosmetic Act. The other economic cheats are classified as misbrandings,¹⁹ which may result in less serious consequences. The primary difference under the present statute is that the Food and Drug Administration can make multiple seizures of adulterated food immediately whereas multiple seizures of

F. Supp. 503 (N.D. Ohio 1946), but such foods are, in general, potentially deleterious. The classification of such foods as adulterated (whether or not they are individually harmful) probably raises the general standards of safety in the food industry.

Economically adulterated foods generally have neither the deleterious characteristics nor the deleterious potentialities of the other adulterated foods. Perhaps the adulteration offense most similar to economic adulteration is found in § 402(a) (3). Section 402(a) (3) classifies as adulterated those foods which are "otherwise unfit for food" and this has been interpreted as including foods which people would not eat as well as foods which they could not eat. See *United States v. 24 Cases of Herring Roe*, 87 F. Supp. 826 (D. Me. 1949) (herring roe having a tough, rubbery consistency); *cf. United States v. 298 Cases of Asparagus*, 88 F. Supp. 450 (D. Ore. 1949) (asparagus allegedly too woody and fibrous). If this liberal interpretation prevails, § 402 (a) (3) cases may raise the same problem as the economic adulteration cases; the problem of determining when the food varies so far from the norm that the public is defrauded. *Cf. Steffy, Otherwise Unfit For Food — A New Concept in Food Adulteration*, 4 *Food Drug Cosm. L.J.* 552, 560-62 (1949) in which the author takes the position that articles otherwise unfit for food are those which offend aesthetic tastes, citing uncontested FDA seizures of foods having abnormal and offensive odors, colors, and flavors.

18. See, *e.g.*, *United States v. 5 Cases of Figlia Mia Brand Vegetable Oils*, 179 F.2d 519 (2d Cir.), *cert. denied*, 339 U.S. 963 (1950) (involving diluted salad oils); *United States v. 716 Cases of Del Comida Brand Tomatoes*, 179 F.2d 174 (10th Cir. 1950) (involving diluted canned tomatoes); *United States v. 30 Cases of Leader Brand Strawberry Fruit Spread*, 93 F. Supp. 764 (S.D. Iowa 1950) (involving diluted jam); *United States v. 254 Cases of Baby Brand Tomato Sauce*, 63 F. Supp. 916 (E.D. Ark. 1945) (involving diluted tomato sauce). All of the foods involved in these cases were healthful and nutritious although not as healthful and nutritious as the superior foods they simulated. *Cf. Van Liew v. United States*, 321 F.2d 664 (5th Cir. 1963) in which the Government conceded that defendant's orange drink was just as good and just as palatable and had just as many vitamins as freshly squeezed orange juice. However, the confusion caused by economic adulteration may result in dangers to health in some situations. *Cf. The 1950 Annual Report of the Food and Drug Administration*, Kleinfeld & Dunn, *Federal Food, Drug, and Cosmetic Act 1953-57* at 564, 569 (1957). [The five volumes under this title for 1938-49, 1949-50, 1951-52, 1953-57, and 1958-60 are hereinafter cited as 1, 2, 3, 4, or 5 Kleinfeld, respectively. The first four volumes of the book were written Kleinfeld and Dunn and the fifth volume was written by Kleinfeld and Kaplan.] in which the FDA suggested that many mothers were being deceived into serving orangeade instead of orange juice, thus impairing the health of small children.

19. These offenses generally are false or misleading labeling, sale under the name of another food, sale of an imitation food not prominently marked as such, deceptive packaging, failure to state certain mandatory information prominently on the label, and failure to conform to the standards of identity, quality, or fill of container. See 52 Stat. 1047 (1938), as amended, 21 U.S.C. § 343 (1958).

misbranded food are not permitted (except under special circumstances) until the Government has secured a judgment that the food is misbranded.²⁰ This classification of economic adulteration as a more serious offense than the other economic cheats does not have any discernable basis in logic.²¹ Economically adulterated foods are generally foods of inferior composition which may be confused with foods of superior composition and economic adulteration is prohibited because of the possibility that the inferior food may be passed off for the superior food at some point in the distribution system.²² The offense is therefore similar to the offering of a food for sale under another name, or the selling of an imitation food without labeling it "imitation," or the selling of a standardized food which does not meet governmental standards. Yet all of these other "passing-off" type offenses are classified as misbrandings rather than adulterations.²³ The more drastic classification of economic adulteration probably reflects the public indignation aroused by reports of economic adulteration at the time the 1906 Act was passed as well as the revulsion most of us still feel at the thought of any tampering with the composition of our foods.

The 1906 Food and Drugs Act provided that a food is adulterated:

First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

Second. If any substance has been substituted wholly or in part for the article.

20. Generally, the FDA can only make one seizure of a misbranded food until it has secured a judgment in its favor. See 52 Stat. 1044 (1938), 21 U.S.C. § 334(a) (1958). However, if the Secretary has probable cause to believe that the misbranded article is dangerous to health, or that its labeling is fraudulent or that it would be in a material respect misleading to the injury or damage of the purchaser or consumer, multiple seizures may be made immediately. See *Ibid.*

The claimant has no right to a hearing on the facts which are the basis for seizures and the Secretary's findings of facts are not subject to judicial review even if they are arbitrary and capricious. See *Ewing v. Mytinger and Casselberry*, 339 U.S. 594 (1950).

21. If logic were the test, the offenses could appropriately have been divided into more or less serious categories, depending upon whether the offense resulted in a danger to health or merely an economic violation. Alternatively, the offenses could also have been appropriately divided into more or less serious categories depending on whether the offense related to the composition of the food itself or merely to its label or container or the information printed thereon. The classification of offenses in the present statute is not supported by either rationale.

22. Foods may be economically adulterated although there is no immediate danger of passing-off. Truthful labeling is, in general, therefore no defense to an economic adulteration charge. See *United States v. 36 Drums of Pop'n Oil*, 164 F.2d 250 (5th Cir. 1947); *United States v. Two Bags of Poppy Seeds*, 147 F.2d 123 (6th Cir. 1945).

23. See 52 Stat. 1047 (1938), as amended, 21 U.S.C. § 343 (1958).

Third. If any valuable constituent of the article has been wholly or in part abstracted.

Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.²⁴

The generality of language in this definition of adulteration was such that, standing alone and interpreted literally, it could have seriously impeded improvements in the composition of fabricated foods.²⁵ This result was avoided under the 1906 Act by two provisos. The provisos stated that a food which contained no added poisonous or deleterious ingredients was not adulterated if it was either (i) a mixture or compound sold under its own distinctive name, or (ii) a compound, imitation, or blend plainly labeled as such.²⁶ All fabricated foods could therefore be excluded from the economic adulteration prohibitions of the 1906 Act simply by labeling the foods in conformity with the provisos.²⁷ The provisos thus provided the honest manufacturer with the opportunity to continue the development and sale of new and improved foods and the dishonest manufacturer with the opportunity to palm off inferior foods on the public under more or less distinctive names.

Upon the passage of the 1906 Act, the Government began a vigorous attack upon economic adulteration in both criminal and civil cases. Convictions were secured in numerous criminal²⁸ and civil²⁹ cases. Inter-

24. Act of June 30, 1906, ch. 3915, § 7, 34 Stat. 768, repealed, 52 Stat. 1059 (1938).

25. The broadest and most restrictive section of the 1906 Act prohibited substituting any substance in whole or in part for the food. Since most improvements in fabricated foods are made by substituting one ingredient for another, this provision (without the provisos) could have imposed serious limitations on the food industry. Other provisions could have raised similar if less serious problems. The section of the 1906 Act prohibiting abstracting of valuable constituents of foods could have prevented the development of dietary foods. The section of the 1906 Act prohibiting coloring a food to conceal inferiority could have impeded the expanding use of artificial colorings. (Consider, for example, whether artificial coloring in oleomargarine or orange soda merely makes those foods more visually attractive or conceals their inferiority.) However, the most serious problems were those raised by the prohibition against substitution of ingredients under the 1906 Act, and this problem was solved by the provisos which provided fabricated foods were not adulterated if they were sold under distinctive names or as compounds, imitations or blends.

26. See statute cited note 24 *supra*, at § 8.

27. Fabricated foods are foods which are made by combining two or more ingredients. Cf. 52 Stat. 1047 (1938), 21 U.S.C. § 343 (i) (2) (1958).

28. See, e.g., *Union Dairy Co. v. United States*, 250 Fed. 231 (7th Cir. 1918) (milk diluted by water); *Frank v. United States*, 192 Fed. 864 (6th Cir. 1911) (pepper diluted by corn); *United States v. Frank*, 189 Fed. 195 (S.D. Ohio 1911) (lemon extract diluted by alcohol and water); *United States v. South Hero Creamery Ass'n, White & Gates* 1142 (D. Vt. 1925) (butter with less than 80 per cent milk-fat); *United States v. Atlantic Macaroni Co., White & Gates* 793 (E.D.N.Y. 1917) (macaroni dyed yellow to conceal inferiority); *United States v. German American Specialty Co., White & Gates* 459 (S.D.N.Y. 1913) (eggs diluted by skim milk); *United States v. Libby*,

perspersed among the Government's many victories in economic adulteration cases were a considerable number of defeats. Some of these defeats resulted from problems inherent in all litigation (e.g., faulty pleadings³⁰ and adverse findings of fact)³¹ but other defeats resulted from problems which were unique to economic adulteration law. These problems included difficulties in proving the standard against which the allegedly perspersed among the Government's many victories in economic adulteration

McNeill & Libby, White & Gates 442 (E.D. Va.), *aff'd*, 210 Fed. 148 (4th Cir. 1913) (condensed skimmed milk diluted by sugar).

29. See, e.g., United States v. 60 Barrels of Wine, 225 Fed. 846 (W.D. Mo. 1915) (claret wine diluted by pomace wine); William Henning & Co., v. United States, 193 Fed. 52 (5th Cir. 1912) (catsup diluted by pumpkin); United States v. 100 Barrels of Vinegar, 188 Fed. 471 (D. Minn. 1911) (cider vinegar diluted by distilled vinegar); United States v. 420 Sacks of Flour, 180 Fed. 518 (E.D. La. 1910) (flour bleached to conceal inferiority), *But see*, Lexington Mill & Elevator Co. v. United States, 202 Fed. 615 (8th Cir. 1913), *aff'd*, 232 U.S. 399 (1914).

30. The generality of the statute invited vague pleadings but the courts insisted that the defendant be informed with sufficient particularity or certainty of the charge against him to enable him to prepare his defense. See, e.g., United States v. Krumm, 269 Fed. 848 (E.D. Pa. 1921); United States v. St. Louis Coffee & Spice Mills, 189 Fed. 191 (E.D. Mo. 1909); United States v. 154 Cases of Tomatoes, White & Gates 967 (W.D. Pa. 1920).

31. See United States v. Lexington Mill & Elevator Co., 232 U.S. 399 (1914) (*affirming* a court of appeals' decision which reversed a verdict because there was no substantial evidence that the bleaching of flour concealed inferiority); Hall-Baker Grain Co. v. United States, 198 Fed. 614 (8th Cir. 1912) (holding that there was no evidence to support a verdict that No. 2 wheat had been adulterated by inferior wheat); United States v. 3998 Cases of Canned Tomatoes, White & Gates 1213 (D. Del. 1923) (jury failed to find that excess water had been added to canned tomatoes); United States v. 200 Sacks of Wheat Middlings, White & Gates 1189 (E.D. Mich. 1926) (the court, sitting without a jury, failed to find that the grinding of wheat middlings into powder concealed their inferiority); United States v. 4½ Cases of Creme De Menthe, White & Gates 1191 (E.D. Mo. 1926) (jury failed to find that caffeine had been substituted in part for creme de menthe flavor non-alcoholic cocktail); United States v. South Peacham Creamery Co., White & Gates 1147 (D. Vt. 1925) and United States v. Barnet Creamery Ass'n, White & Gates 1149 (D. Vt. 1925) (juries failed to find butter deficient in butterfat); United States v. 37 One Pound Packages of Colors, White & Gates 1165 (E.D. Pa. 1925) (jury failed to find that food colors had been diluted by paste); United States v. Marmarelli, White & Gates 1122 (S.D.N.Y. 1924) (jury failed to find that defendants had diluted olive oil with cottonseed oil); United States v. Potter, White & Gates 409 (E.D. N.C. 1912) (jury failed to find that excess water was used in canning oysters); United States v. Heide, White & Gates 325 (S.D.N.Y. 1911) (jury failed to find that 5% glucose reduced the quality of almond paste); United States v. St. Louis Coffee & Spice Mills, 189 Fed. 191 (E.D. Mo. 1909) (directed verdict for the defendant because there was no evidence that vanilla extract and vanilla flavor were the same foods).

32. The Government did not have the authority to fix standards of identity having the effect of law under the 1906 Food and Drugs Act. See Crawford, *Ten Years of Food Standardization*, 3 FOOD DRUG COSM. L.Q. 243, 244-45 (1948). It was therefore necessary to prove in each case both the composition of the adulterated food and the ordinary or standard composition of the food alleged to be economically adulterated. Even when regulations had been promulgated by the Department of Agriculture defining the ordinary composition of foods, they were usually not given any weight. See e.g. United States v. Swift & Co., White & Gates 1146 (D. Ore. 1925) (no standard of butterfat for butter); United States v. St. Louis Coffee & Spice Mills, 189 Fed.

provisos.

Litigation under the distinctive name proviso tended to produce bizarre results. Manufacturers frequently adopted names which were more descriptive than distinctive for foods of inferior composition which were then passed off as familiar superior foods on the unsuspecting public. A classic example was a product which looked like, tasted like, and was used for the same purpose as jam but which contained little fruit and was labeled "Bred Spred." Economic adulteration charges against this product were dismissed because the court held that "Bred Spred" was a distinctive name.³³ In like decisions, an imitation grape juice

191 (E.D. Mo. 1909) (no standard for vanilla flavor). *But see*, United States v. Frank, 189 Fed. 195 (S.D. Ohio 1911) (accepting USDA standards for lemon extract). Difficulties in determining the standard against which the adulterated food was to be judged confounded the courts and resulted in judgments against the Government in some cases. See United States v. Swift & Co., *supra*; United States v. St. Louis Coffee & Spice Mills, *supra*; and United States v. Rinchini, White & Gates 318 (D. Ariz. 1911) (no standard of butterfat for ice cream); W. B. Wood Mfg. Co. v. United States, 286 Fed. 84 (7th Cir. 1923) (no standard for salt in food colors); United States v. 30 Cases of Grenadine Syrup, 199 Fed. 932 (D. Mass. 1912) (no standard requiring pomegranate juice in grenadine syrup). See 1933 REPORT OF THE FOOD AND DRUG ADMINISTRATION p. 14, which is reprinted in DUNBAR, FEDERAL FOOD, DRUG & COSMETIC LAW, ADMINISTRATION REPORTS 1907-49, 800 (1951) However, the Government was "fairly successful" in proving the composition of foods in judicial proceedings although it objected to the expense and complexity of that procedure. See 1931 REPORT OF THE FOOD AND DRUG ADMINISTRATION pp. 5-6, which is reprinted in DUNBAR, *supra* at 742-43.

33. "Bred Spred" was the subject of three reported seizure actions, all of which ended unhappily for the Government. In the first case (which ended in an informal and ambiguous opinion by the district court), the judge apparently concluded that a food which was not labeled with the distinctive name of another food was exempt from the economic adulteration laws under the distinctive name proviso. United States v. 49½ Cases of Bred Spred, White & Gates 1204 (E.D. Mich. 1927); see Markel, "The Law on Imitation Food," 5 FOOD DRUG COSM. L.J. 145, 154 (1950). The second case was dismissed because it involved the same issues as the first Bred Spred case and the first case therefore operated as a collateral estoppel against the Government. United States v. 15 Cases of Bred Spred, 35 F.2d 183 (7th Cir. 1929). In the third case, the circuit court held that there was no proof that Bred Spred was economically adulterated because of concealed damage or inferiority. The court reasoned that the ingredients in Bred Spred were not of low quality and that the only allegation was that Bred Spred contained less fruit than ordinary jam. United States v. Ten Cases of Bred Spred, 49 F.2d 87 (8th Cir. 1931). The comparison of Bred Spred with ordinary jam was inappropriate, according to the court, because there was no proof that Bred Spred was being palmed off on the public as jam. A misbranding charge grounded on the theory that Bred Spred was an imitation jam (not labeled as such) was defeated because the Government had, incredibly, failed to make the exhibit-jars of Bred Spred and the exhibit-jars of jam part of the record on appeal. The Circuit Court was therefore unable to compare Bred Spred against jam to determine the imitation issue.

The Bred Spred cases provided much of the stimulus for the strengthening of the economic adulteration laws of the 1906 Act in the later Federal Food, Drug, & Cosmetic Act. See 62 Cases of Jam v. United States, 340 U.S. 593 (1951) and United States v. 30 Cases of Leader Brand Strawberry Fruit Spread, 93 F.Supp. 764 (S.D. Iowa 1950), in which the courts alluded the effect of the Bred Spred case on Congress. See also Kleinfeld, "Legislative History of the Federal Food, Drug and Cosmetic Act," 1 FOOD DRUG COSM. L. Q. 532, 548, 559 (1946), summarizing some of the testimony concerning

labeled "Grape Smack" was absolved under the distinctive name proviso,³⁴ as was a product which consisted of calcium acid phosphate and corn starch and was labeled with the initials of its more expensive ingredient, "C.A.P."³⁵ One court even decided that "Macaroons" was a distinctive name thereby exculpating the defendant-producer (and presumably all other producers of macaroons) from the federal economic adulteration laws.³⁶ Other decisions were more rational, holding, for example, that "Mapleine"³⁷ and "Maple Flavo"³⁸ were not distinctive names for imitation maple flavors. "Grant's Hygienic Crackers" was correctly held to be a distinctive name,³⁹ "Fruit Puddine" and "Cream Vanilla" were both held to be distinctive names in a more dubious decision,⁴⁰ and one misguided judge submitted the question whether "Milk Chocolate" was a distinctive name to the jury, which ultimately exonerated a defendant who was accused of adulterating his milk chocolate with wheat starch.⁴¹

Equally absurd results occurred when the courts considered the proviso absolving from economic adulteration charges all products which were compounds, imitations, or blends and were plainly labeled as such⁴² One court held that an imitation cherry juice labeled "Fruit Wild Cherry Compound" was not adulterated because it was labeled "compound,"⁴³

Bred Spred during the hearings on the bills which later became the Federal Food, Drug, & Cosmetic Act.

The irony is that the Government might have won the third Bred Spred case under the 1906 Act thereby ending the fraud perpetrated on the public by that product, if the Government had proved that Bred Spred was being passed off as jam or made the jars of Bred Spred and jars of jam part of the appellate record so that the court could decide whether or not Bred Spred was an imitation.

34. United States v. 24 $\frac{3}{8}$ Gallons of Smack, White & Gates 1181 (E.D. Wis. 1926).

35. United States v. 100 Barrels of Calcium Acid Phosphate, White & Gates 58 (N.D. Cal. 1909).

36. See *F. E. Washburn & Co. v. United States*, 224 Fed. 395 (1st Cir. 1915), *reversing* a judgment of adulteration on this and other grounds, but *affirming* a judgment of misbranding.

37. United States v. 300 Cases of Mapleine, White & Gates 39 (N.D. Ill. 1909).

38. United States v. S. Gumpert, White & Gates 182 (S.D.N.Y. 1910).

39. United States v. Hygienic Health Food Co., White & Gates 259 (N.D. Cal. 1911).

40. "Fruit Puddine" was held to be a distinctive name for a pudding without fruit on the theory that the name had acquired a secondary meaning. "Cream Vanilla," a flavor of Fruit Puddine that contained vanillin rather than vanilla, presented more difficult problems. The Government suggested that Cream Vanilla implied that the pudding was flavored with the best vanilla (cream of the vanilla) but the claimant persuaded the court that Cream Vanilla was an arbitrary designation. Fruit Puddine was, however, held to be misbranded because it was falsely labelled "Fruit Flavored." United States v. 150 Cases of Fruit Puddine, 211 Fed. 360 (D. Mass. 1914).

41. United States v. Auerbach & Sons, White & Gates 357 (S.D.N.Y. 1912).

42. Act of June 30, 1906, ch. 3915, § 8, 34 Stat. 768, *repealed*, 52 Stat. 1059 (1938).

43. Weeks v. United States, 224 Fed. 64 (2d Cir. 1915), *aff'd on other grounds*, 245 U.S. 618 (1918).

while another court held that a product called "Compound Ess Grape" was adulterated (despite the word "compound") because it consisted only of imitation grape essence.⁴⁴ A product labeled "Compound White Pepper" was held economically adulterated because corn had been intermixed with the pepper, although the court indicated that if the product had been labeled "White Pepper Compound," the economic adulteration charges would have been dismissed.⁴⁵ There was a marked difference of opinion concerning whether the ingredients of compounds had to be listed on the labels of these products,⁴⁶ and, while the economic adulteration sections of the 1906 Act may have been theoretically workable,⁴⁷

44. *United States v. Schider*, 246 U.S. 519 (1918).

45. *Frank v. United States*, 192 Fed. 864 (6th Cir. 1911). The Court reasoned that the ordinary purchaser would believe that White Pepper Compound was white pepper plus another ingredient but that the ordinary purchaser would believe that Compound White Pepper was white pepper with added strength.

46. There was no provision in the 1906 Food and Drugs Act expressly requiring the labeling of ingredients of compounds. However, the Department of Agriculture's regulations required a clear statement of the principal or essential ingredients of such foods and at least one economic adulteration case supported this type of requirement. See Rules and Regulations for the Enforcement of the Federal Food and Drugs Act (Ninth Revision) § 20(a) (1927) reprinted at I DUNN'S FOOD AND DRUG LAWS 14 (1927), (hereinafter cited as DUNN); *William Henning & Co. v. United States*, 193 Fed. 52 (5th Cir. 1912). *Contra* *United States v. Weeks, White & Gates* 519 (S.D.N.Y. 1913), *rev'd on other grounds*, 224 Fed. 64 (2d Cir. 1915), *aff'd*, 245 U.S. 618 (1918); *United States v. One Carload of Corno Horse and Mule Feed*, 188 Fed. 453 (M.D. Ala. 1911); *cf.* *United States v. Goodman, White & Gates* 484 (E.D.N.Y. 1913).

47. The Government's principal problems with economic adulteration cases under the 1906 Act were the problems of proving the standard composition of the food which was allegedly adulterated and the problems raised by the two provisos. Proof of the standard composition of a food is merely a question of fact and probably no more difficult than many other questions of fact decided in connection with ordinary negligence or patent cases. In general, the Government was not losing many cases on the "standard" problem, see note 32 *supra*, and it is likely that if the Government continued to prepare its cases carefully and the appellate courts reviewed the record fairly, proof of the standard would not have been a major problem.

The problems raised by the provisos could have been resolved through a different interpretation of their language. The distinctive name proviso exempted mixtures or compounds sold under their own distinctive name "and not an imitation of or offered for sale under the distinctive name of another article." It could therefore be argued that a food which was an imitation was not exempted by the distinctive name proviso and, indeed, some courts so held, although others held *contra*. See *United States v. Five Cases of Champagne*, 205 Fed. 817 (N.D.N.Y. 1913); see also *Hudson Mfg. Co. v. United States*, 192 Fed. 920 (5th Cir. 1912); *cf.* *United States v. 9 Cases of Sparkling White Seal*, *White & Gates* 1023 (E.D. Pa. 1921), *aff'd*, 285 Fed. 737 (3d Cir. 1923). *Contra* *United States v. 24 $\frac{1}{2}$ Gallons of Smack*, *White & Gates* 1181 (E.D. Wis. 1926). See also Markel, *The Law on Imitation Food*, 5 FOOD DRUG COSM. L.J. 145, 154-64 (1950). The Department of Agriculture regulation interpreting that proviso also stated that foods sold under distinctive names could not be imitations of other articles. See Rules and Regulations for the Enforcement of the Federal Food and Drugs Act § 19(b) (1927) (reprinted in DUNN 13).

The second proviso exempted compounds, imitations, and blends, if the word "compound," "imitation," or "blend" was stated plainly on the label. The Department of Agriculture regulations interpreting this proviso stated that an imitation food must be labeled "imitation" and that compounds and blends must be labeled "compounds"

in general it was impossible to predict the results of any litigation in which one of the provisos was raised as a defense to an economic adulteration charge. The conflicting decisions, their apparent absurdity, and the certainty that the public was still being defrauded through some of these products brought a demand for legislative reform, and it was in this context that in 1938 the Federal Food, Drug, and Cosmetic Act was enacted.

The Federal Food, Drug, and Cosmetic Act struck directly at the defenses which manufacturers had raised in economic adulteration cases. First, the new statute permitted the Government after notice and hearing to define the composition of each food in regulations called "standards of identity."⁴⁸ After a food was defined by the Government in a standard of identity the producers of that food either had to comply with the standard, or label and sell their products as imitations.⁴⁹

and "blends." See Rules and Regulations for the Enforcement of the Federal Food and Drugs Act § 20 (1927) (reprinted at DUNN 14). Had the courts decided that many of the products challenged by the Government were imitations and could only be sold as such rather than as compounds and blends, this proviso also would have offered no refuge for those defrauding the public. Cf. *United States v. Schider*, 246 U.S. 519 (1918).

The remaining problems under the 1906 Act would be little different from the problems which the Government has now under the Federal Food, Drug, & Cosmetic Act. However, the provisos might under these revised interpretations offer desirable counterparts to the present all inclusive language of § 402(b).

48. Under § 401 of the act, when such action will promote honesty and fair dealing in the interest of consumers, the Secretary can fix a reasonable definition and standard of identity for a food. See 52 Stat. 1046 (1938), as amended, 21 U.S.C. § 341 (1958). Standards of identity have been promulgated for the following foods: Cacao Products (chocolate, cocoa, etc.), 21 C.F.R. 14 (1955); Cereal Flours, 21 C.F.R. 15 (1955); Macaroni and Noodle Products, 21 C.F.R. 16 (1955); Bakery Products (Bread & Rolls), 21 C.F.R. 17 (1955); Milk and Cream, 21 C.F.R. 18 (1955); Cheeses and Related Foods, 21 C.F.R. 19 (1959); Frozen Desserts (Ice Cream and Related Products), 21 C.F.R. 20 (1965); Food Flavorings (Vanilla Extract and Similar Products), 21 C.F.R. 22 (1963); Dressings for Foods (Mayonnaise, French and Salad Dressing), 21 C.F.R. 25 (1955); Canned Fruits and Fruit Juices, 21 C.F.R. 27 (1955); Fruit Butters, Jellies, and Related Products, 21 C.F.R. 29 (1955); Shellfish (Shrimp and Oysters), 21 C.F.R. 36 (1955); Canned Tuna Fish, 21 C.F.R. 37 (1958); Eggs and Egg Products, 21 C.F.R. 42 (1955); Oleomargarine and Margarine, 21 C.F.R. 45 (1955); Canned Vegetables, 21 C.F.R. 51 (1955); and Tomato Products, 21 C.F.R. 53 (1955).

Foods which comply with standards of identity may still be economically adulterated. FDA's regulations specifically provide for concurrent applicability of the general provisions of the act and the standards of identity for particular foods and one of the examples in the regulations involves economic adulteration: "A provision in such regulations [standards of identity] for the use of coloring or flavoring does not authorize such use under circumstances or in a manner whereby damage or inferiority is concealed or whereby the food is made to appear better or of greater value than it is." 21 C.F.R. 10.1(c) (Supp. 1962). Even foods which are labeled "imitation" can probably violate our economic adulteration laws, see Austern, *Ordinary English But Not Ordinary Jam*, 6 FOOD DRUG COSM. L.J. 909, 913 (1951), although there do not seem to be any reported cases involving such a situation.

49. The classic United States Supreme Court case involving standards of identity is *Federal Security Adm'r v. Quaker Oats Co.*, 318 U.S. 218 (1943). The Quaker Oats Co. had manufactured and sold for ten years a cereal consisting of farina plus vitamin D.

Second, the new statute required all non-standardized foods which were fabricated from two or more ingredients to state each such ingredient on the label.⁵⁰ Finally, and most important, the new statute enacted the economic adulteration provisions of the 1906 Act in slightly broader language,⁵¹ repealing at the same time the two provisos which had exon-

The Administrator (who then had the responsibility of administering the Federal Food, Drug, and Cosmetic Act) promulgated standards of identity for two farina products — ordinary farina with no vitamins added called "farina," and "enriched farina" with added vitamins B, D, and other ingredients. Since the Quaker Oats product did not comply with either of these standards, it could not be sold as either "farina" or "enriched farina." The company appealed, arguing that the standards were arbitrary and unreasonable. However, the United States Supreme Court (6-3) upheld the standards. In a later case, 62 Cases of Jam v. United States, 340 U.S. 593 (1951), the Government had promulgated a standard of identity for jam requiring 45% fruit in that product while the claimant was manufacturing a product labeled "Imitation Jam" which contained only 25% fruit. The Government seized the claimant's product, asserting that it was in violation of the standard of identity and the United States Supreme Court (7-2) held that the product did not violate the standard of identity because it did not purport to be "jam," it purported to be and was "imitation jam." After these two Supreme Court cases, it was generally recognized that when standards of identity for a food have been promulgated, the food must either conform to these standards or, perhaps, be labelled "imitation," or it cannot be sold.

While violations of the standards of identity could be considered a form of economic adulteration, *cf.* Willis, *Preventing Economic Adulteration of Food*, 1 FOOD DRUG COSM. L.Q. 20 (1946), it would seem that the better view is *contra*. "Farina with Vitamin D Added" may be barred from sale as such because it violates standards of identity, *cf.* Federal Security Adm'r v. Quaker Oats Co., *supra*; see also Libby, McNeill & Libby v. United States, 148 F.2d 71 (2d Cir. 1945) (condemning a product labeled tomato catsup with preservative because it did not conform to the standard for tomato catsup), but only under the most liberal definitions can such a product be considered as adulterated or debased food. *Cf.* United States v. Cudahy Packing Co., 4 Kleinfeld 138 (D.Neb. 1955). But see ANDERSON, THE HEALTH OF A NATION 69 (1958), stating that Dr. Harvey W. Wiley's view was that adulteration was any purposeful change in the composition of a food whether or not it resulted in debasement. The real importance of standards of identity is that they avoid recourse to the economic adulteration prohibitions in most instances involving foods for which standards have been established. Proof of noncompliance with the standard of identity constitutes a misbranding and the FDA often secures a judgment on that basis without trying the more complex issues of economic adulteration.

50. See 52 Stat. 1047 (1938), 21 U.S.C. § 343(i)(2) (1958). The ingredients had to be stated with sufficient prominence and conspicuousness and in such terms as would be likely to be read and understood by the ordinary individual under customary conditions of purchase and use. 52 Stat. 1047 (1938), 21 U.S.C. § 343(f) (1958). FDA's regulations prohibited the listing of ingredients in misleading order and required the proportion of an ingredient to be disclosed when the proportion became material in the light of representations concerning the ingredient. 21 C.F.R. § 1.10(d)(1) and (2) (1955). The sum of these statutes and regulations gave the intelligent consumer fairly complete information concerning the composition of the food, and this information has probably acted as an indirect deterrent to economic adulteration.

51. Section 402(b) of the Federal Food, Drug, & Cosmetic Act is broader than the economic adulteration provisions of the 1906 Act in the following areas:

(a) Section 402(b)(1) provides a food is adulterated if a valuable constituent has been *omitted* or *abstracted*. Omitting a valuable constituent was not included under the 1906 Act.

(b) Section 402(b)(3) provides a food is adulterated if damage or inferiority has been concealed *in any manner*. The 1906 Act covered concealment of damage or in-

erated from the economic adulteration laws all fabricated foods which were either labelled with distinctive names or as compounds, imitations, or blends.⁵² The repeal of these provisos left the language of the 1906 Act in slightly broadened form standing by itself. This statute, which is so broad that it cannot be taken literally and so ambiguous that it can hardly be interpreted intelligently, became Section 402 (b) of the Federal Food, Drug, and Cosmetic Law and is our present law. The statute does not define the standards used to determine economic adulterations and this has been one of the many complex problems faced by the courts in economic adulteration cases.

PART II: THE STANDARDS USED TO DETERMINE ECONOMIC ADULTERATION

A. Introduction

Section 402 (b) of the Federal Food, Drug, and Cosmetic Act begins by stating, "A food shall be deemed to be adulterated" and then defines in individual subsections the conditions which may result in the economic adulteration of a food.⁵³ Sections 402 (b) (1) and (2) provide that a food is adulterated if any valuable constituent of the food is removed or omitted, or if any substance is substituted in whole or in part therefore.⁵⁴ Sections 402 (b) (3) and (4) provide that a food is adulterated if damage or inferiority is concealed in the food, or if any substance has been packed with the food to increase its bulk or weight, reduce its quality or strength or make it appear better or of greater value than

feriority by mixing, coloring, powdering, coating, or staining the food; and

(c) Section 402(b)(4) provides a food is adulterated if any substance has been added, mixed, or packed with it to *increase its bulk or weight*, reduce its quality or strength, or *make it appear greater or of better value than it is*. The 1906 Act covered mixing or packing a substance with the food to reduce or lower or injuriously affect its quality or strength. See 52 Stat. 1046 (1938), 21 U.S.C. 342(b) (1958) and Federal Food & Drugs Act of 1906, ch. 3915, § 7, 34 Stat. 768, repealed, 52 Stat. 1059 (1938).

Only § 402(b)(2) was not changed significantly from the language of the 1906 Act. This section provided a food is adulterated if any substance has been substituted in whole or in part for the food, and it was the broadest section in the 1906 Act.

52. The effect of repealing the provisos was dramatically illustrated in *United States v. 651 Cases of Chil-Zert*, 114 F. Supp. 430 (N.D.N.Y. 1953). Claimant in that case manufactured and sold a product which resembled ice cream but was composed of soy fat and soy protein rather than milk fat and milk protein. The product was seized because it was not labeled imitation ice cream and the claimant defended on the ground that its labeling was truthful. The court granted the Government's motion for summary judgment, stating, "The Court is impressed that claimant's argument proceeds as if the distinctive name provision of the 1906 Act is still in force, and claimant seeks to use the fanciful name of Chil-Zert with informative labeling to escape the provisions of the present statute. (The distinctive name provision was eliminated in the 1938 Act)." *Id.* at 433.

53. 52 Stat. 1046 (1938), 21 U.S.C. § 342(b) (1958).

54. 52 Stat. 1046 (1938), 21 U.S.C. § 342 (b)(1) and (2) (1958).

it is.⁵⁵ "Food" is defined in the act as "(1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article."⁵⁶ This general definition is satisfactory for most purposes but it offers little help in the interpretation of section 402 (b).

The word "food" in section 402 (b) can be given either of two different interpretations. One interpretation is that "food" means a familiar recognizable food; the other interpretation is that "food" means the allegedly adulterated food itself.⁵⁷ For example, assume a product called "Bred Spred" is made in semblance of jam but with only one-half the fruit content of jam.⁵⁸ If the court defined "food" as the familiar recognizable food, Bred Spred would be an economically adulterated jam. However, if the court defined "food" as the allegedly adulterated product, Bred Spred would be an economically adulterated food when compared to jam. Both interpretations seem equally acceptable so long as the only standard against which Bred Spred can be judged is that of the familiar recognizable food, "jam."⁵⁹ However, if Bred Spred may

55. 52 Stat. 1046 (1938), 21 U.S.C. § 342 (b) (3) and (4) (1958).

56. 52 Stat. 1041 (1938), 21 U.S.C. § 321 (f) (1958).

57. In *United States v. 88 Cases of Bireley's Orange Beverage*, 187 F.2d 967 (3d Cir.), *cert. denied*, 342 U.S. 861 (1951), the claimant argued that under § 402(b), the court either had to conclude that the seized product was a familiar recognizable food which was adulterated or a new and original food which was unadulterated. The claimant reasoned that § 402(b) (4) said a food was adulterated if any substance was "mixed or packed therewith" etc., and that the prohibition must mean that a basic and identifiable article of food had been adulterated through the introduction of some additive. The court rejected that argument citing prior cases in which "food" had been interpreted as the allegedly adulterated product rather than as a familiar recognizable food. The court concluded that § 402(b) (4) applied "...whether a recognized food is altered or sundry ingredients are combined or compounded to make what is essentially a new article of manufacture." *Id.* at 970. There was thus a recognition in the court's opinion that food could either mean the "familiar recognizable food" or the "allegedly adulterated food." Cf. Kushen, *The Significance of Section 402(b)*, 10 FOOD DRUG COSM. L.J. 829, 843 (1955).

58. "Bred Spred" is generally considered the classic example of economic adulteration although the product was exonerated in the three reported cases under the 1906 Act. See text accompanying note 33 *supra*. *United States v. 30 Cases of Leader Brand Strawberry Fruit Spread*, 93 F. Supp. 764 (S.D. Iowa 1950), involved a product similar to Bred Spred called "Leader Brand Strawberry Fruit Spread" and the product was held economically adulterated under the Federal Food, Drug, and Cosmetic Act. While the court's opinion is somewhat unclear, it seemed to be grounded on the theory that the product was an adulterated jam.

59. Defining food as the familiar recognizable food is the easiest and most grammatically precise interpretation of § 402(b). Using this interpretation, the statute would be neither familiar nor recognizable. See 52 Stat. 1041 (1938), 21 U.S.C. § 321 (f) has been removed from the familiar recognizable food, or any substance has been substituted for the familiar recognizable food, or if damage or inferiority has been concealed in the familiar recognizable food, or any substance has been added to the familiar recognizable food to increase its bulk or reduce its quantity or strength, or make it appear better than it is.

Defining "food" as the allegedly adulterated food provides a less graceful inter-

be economically adulterated by comparison with some standard other than jam, "food" in section 402 (b) cannot be interpreted consistently as the familiar recognizable food.⁶⁰ "Food" must then mean the allegedly adulterated product itself in at least some cases⁶¹ and the courts can look beyond the standard of the familiar recognizable food in these cases in determining economic adulteration. This is the important issue — whether the ambit of consumer protection is limited to confusion with a familiar recognizable food. The issue is completely obscured if the standard of the familiar recognizable food is read into the statute through the word "food."

B. *The Proper Interpretation of Bireley's: Economic Adulteration Standards Must Be Reasonably Definite and Precise*

*United States v. 88 Cases of Bireley's Orange Beverage*⁶² is considered the leading economic adulteration case both on the interpretation of the word "food" in section 402 (b) and on the standards which are to be applied in determining whether a food is adulterated under that section. The *Bireley's* case involved an orange beverage which consisted

pretation of the statute. Using this interpretation, the statute would provide that an allegedly adulterated food is adulterated if a valuable constituent has been removed from the allegedly adulterated food, or any substance has been substituted for the allegedly adulterated food, or if damage or inferiority has been concealed in the allegedly adulterated food, or any substance has been added to the allegedly adulterated food to increase its bulk, or reduce its quality or strength, or make it appear better or of greater value than it is, when the allegedly adulterated food is compared with any proper standard.

The basic difference between the two interpretations is that in the former the standard of the familiar recognizable food is read into the statute whereas in the latter the courts must look outside the statute to find the standards used to determine adulteration.

60. The only reason to interpret food as the familiar recognizable food is to provide a standard for determining economic adulteration. The reason for such an interpretation therefore disappears if a standard other than the standard of the familiar recognizable food is applicable in economic adulteration cases.

61. Both the word "food" in § 402(b) and the definition of food in § 201(f) are inherently broader than familiar recognizable foods. The word and definition include all foods, whether familiar or new, and all ingredients of such foods, many of which would be neither familiar nor recognizable. See 52 Stat. 1041 (1938), 21 U.S.C. § 321(f) (1958). Additionally, the interpretation of food as the allegedly adulterated product rather than the familiar recognizable food is more consistent with the other adulteration prohibitions in § 402(a) and (c). These sections provide a food is adulterated if it bears poisonous substances, unsafe food or color additives or if it consists of filthy or putrid substances or is prepared, packed, or held under insanitary conditions or is the product of a diseased animal. 52 Stat. 1046 (1938), as amended, 21 U.S.C. § 342(a) and (c) (1958). Congress clearly intended that these basic prohibitions against dangerous foods were to apply to all allegedly adulterated foods whether or not they were familiar recognizable foods. It seems likely that the word "food" was intended to have the same broad meaning throughout § 402.

62. 187 F.2d 967 (3d Cir.) cert. denied, 342 U.S. 861 (1951). The *Bireley's* case was reviewed at 100 U. P. A. L. REV. 139-41 (1951).

of 6% orange juice, 2% lemon juice, 87% water, and small quantities of other harmless substances, including artificial coloring. The Government's theory was that the jury could examine the beverage and decide the percentage of orange juice which the beverage appeared to contain. If that percentage exceeded 6%, the government argued the beverage was adulterated because it appeared better than it was.⁶³ The Government therefore wanted to judge Bireley's Orange Beverage by its own appearance rather than by comparison with a familiar recognizable food.⁶⁴

The claimant argued the precise opposite. The claimant's position was that food in section 402 (b) meant a familiar recognizable food and that this was the only standard which could be used in economic adulteration cases.⁶⁵ The Government prevailed in the lower court but the Third Circuit Court of Appeals reversed.⁶⁶ The opinion of the Court of Appeals is notable in several respects. The court first held that the interpretation of food in section 402 (b) depends upon the facts of each individual case. In a prior case, the court noted that food had been interpreted as the allegedly adulterated food itself and the court reasoned that this could not be considered an improper or surprising conclusion in relation to the facts involved. Conversely, the court reasoned that food might also mean a recognized food rather than the allegedly adulterated product if different facts were presented.⁶⁷

The court had more difficulty determining the standard to be applied in *Bireley's* case. The standard urged by the Government, the per cent of orange juice which appeared to be in the allegedly adulterated beverage, was considered by the court to be vague, speculative and whimsical.⁶⁸ The court therefore accepted the claimant's argument that Bireley's Orange Beverage should be compared against a defined, familiar and superior food. The only relevant food was undiluted orange juice and the court remanded the case to the lower court for

63. The trial court's charge to the jury is reported at 2 Kleinfeld 128-37. The trial court charged the jury at the request of the Government, "It is for you to decide, upon all of the evidence, first: whether the yellow coal-tar dyes make the article look like a product composed entirely or in large part of a fresh orange juice." *Id.* at 134. The portion of the charge permitting the jury to conclude the product was adulterated if it appeared to be in large part orange juice was reversible error. See Nelson, *What Standard For the Non-standardized Food? — The Bireley's Case*, 8 FOOD DRUG COSM. L.J. 425, 435 (1953).

64. The claimant contended that if the Government were right and the jury could speculate whether the product was in large part orange juice, the statute was unconstitutionally vague. The court never reached that issue because it rejected the Government's interpretation. Nelson, *supra* note 63 at 434.

65. See note 57 *supra*.

66. *United States v. 88 Cases of Bireley's Orange Beverage*, 187 F.2d 967 (3d Cir.), *cert. denied*, 342 U.S. 861 (1951).

67. *Id.* at 970-71.

68. *Id.* at 972.

a trial on the issue of whether Bireley's Orange Beverage would be confused with undiluted orange juice by the ordinary consumer. The court stated, "The difficulty with this entire approach [the approach urged by the Government] is that the 'adulterated' food is made to serve as its own only standard. . . . Without a finding that a marketable inferior product is likely to be confused with a specified superior counterpart, we think there can be no appearing 'better than it is' within the scope of disapproval of a section patently concerned only with confusion."⁶⁹

This dicta must be viewed in the context of the facts of the *Bireley's* case. In *Bireley's* the court was faced with a choice between two standards. One (the percent of orange juice which appeared to be in the drink) was speculative while the other (undiluted orange juice) was concrete. Under these circumstances the court quite correctly chose the concrete standard.

Despite the contrary assumption by one court,⁷⁰ *Bireley's* does not necessarily exclude from economic adulteration law a standard which is both derived from the allegedly adulterated food and is also definite and concrete. No such standard was before the court in *Bireley's* and the court's dicta cannot be considered as binding on that issue.⁷¹ To determine whether that type of standard is permissible, it is necessary to consider the nature of economic adulteration.

The essence of economic adulteration is sale of a food which appears to be superior to its actual composition.⁷² The deceptive appear-

69. *Ibid.*

70. See *United States v. Fabro, Inc.*, 206 F. Supp. 523, 526 (M.D. Ga. 1962) which is reviewed in more detail in text accompanying notes 141-44 *infra*.

71. The material allegations of the Government's libel in the *Bireley's* decision were that the beverage appeared to be composed entirely or in large part of fresh orange juice. See *United States v. 88 Cases of Bireley Orange Beverage*, 2 Kleinfeld 128, 130 (D.N.J. 1949), *reversed*, 187 F.2d 967 (3d Cir.), *cert. denied*, 342 U.S. 861 (1951). When the court decided that adulteration could not result from the beverage appearing to be composed in large part of orange juice, the only issue remaining was whether the beverage appeared to be composed entirely of orange juice and the court ordered a trial on that issue.

72. No food can be adulterated except by comparison with some standard. See *United States v. 88 Cases of Bireley's Orange Beverage*, 187 F.2d 967 (3d Cir.), *cert. denied*, 342 U.S. 861 (1951); *United States v. Goodman, White & Gates* 484 (E.D.N.Y. 1913). In general, a standard becomes relevant to an economic adulteration charge because the allegedly adulterated food by its appearance expressly or impliedly represents that it complies with the standard. *Cf. United States v. Nesbitt Fruit Products, Inc.*, 96 F.2d 972 (5th Cir. 1938). The one exception involves situations in which natural foods, sold as such, have been diluted. Courts then hold that the dilution constitutes economic adulteration not because the food fails to equal the standard set by its appearance; but simply because, contrary to the expectations of purchasers and consumers, the food has been diluted. See text accompanying notes 129-36 *infra*.

ance of the food is analogous to a misrepresentation⁷³ or a fraudulent concealment of material facts in a sales transaction.⁷⁴ However, the remedy chosen by Congress to correct economic adulteration was, in general, not limited to a disclosure of the actual facts through labeling.⁷⁵ On the contrary, with the possible exception of labels prominently identifying the food as an imitation, truthful labeling is at most only one of many considerations in determining whether a food is economically adulterated.⁷⁶

Truthful labeling was rejected as a complete defense to economic adulteration charges for two reasons: first, because many purchasers purchase food by its general appearance without reading the detailed information on the label,⁷⁷ and, second, because truthful labeling could

73. The misrepresentation analogy is most obvious in cases involving false ingredient statements. However, implied misrepresentations are probably present when a food appears to be a familiar recognizable food or appears to be equal to its former composition, or appears to be a natural undiluted food, and the contrary is true.

74. A fraudulent concealment of material facts probably occurs when a seller, by altering the composition of a recognized food or by intentionally creating a new food in the appearance of a recognized food, conceals the inferiority of his product. *Cf.* RESTATEMENT, TORTS, § 550 (1938); PROSSER, TORTS 532-33 (2d ed. 1955). Similarly a fraudulent concealment of material facts probably occurs if a seller debases his own familiar proprietary and conceals the inferiority by offering it in its former container and with its former name and label. *Cf. ibid.*; *Royal Baking Powder Co. v. FTC*, 281 Fed. 744 (2d Cir. 1922). There is more than nondisclosure in such situations; there is affirmative action designed to prevent the purchaser from discovering the inferiority of the new products. It is as if the seller false stated, "Here is the familiar recognizable food" or "Here is my familiar proprietary food."

75. *United States v. 36 Drums of Pop'N Oil*, 164 F.2d 250 (5th Cir. 1947); *United States v. Two Bags of Poppy Seeds*, 147 F.2d 123 (6th Cir. 1945); see also *United States v. 716 Cases of Del Comida Brand Tomatoes*, 179 F.2d 174 (10th Cir. 1950); *cf. Federal Security Adm'r v. Quaker Oats Co.*, 318 U.S. 218 (1943); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); Willis, *Preventing Economic Adulteration of Food*, 1 FOOD DRUG COSM. L.Q. 20, 25 (1946): "It is clear from the cases that where a food product is inherently deceptive so that it may tend to mislead or confuse the ultimate consumer, label statements may not be relied upon to correct its deceptive character."

76. See *ibid.* Labeling may be a defense to an economic adulteration charge if it is adequate and effective notice that the food is an imitation or a different generic product. While it is difficult to cite precedent for this proposition other than the analogous 62 Cases of Jam *v. United States*, 340 U.S. 108 (1951) (which involved § 403(g) rather than § 402(b) of the act), it is apparent that a number of foods are now sold under such labeling without challenge by the Government and have been for some time. Consider, for example, soft drinks with artificial sweeteners, non-dairy coffee lighteners, and vegetable whipping bases. All of these foods would be economically adulterated except for labeling which distinguishes them as different generic products from their more traditional counterparts and the Government, by permitting their widespread sale, has in fact accepted such labeling as sufficient. If the labeling does not identify the food as a different generic product, the labeling is only one consideration in deciding whether the food is adulterated.

77. *Cf.* "Experience had shown that truthful labeling of a product was no protection to the bulk of the consuming public; if a product gave the appearance of being a certain food, the public assumed that it contained only those ingredients which were commonly associated with that food and the label was never consulted." *United States v.*

be separated from the food at some later point in the distribution system and the adulterated food then passed off on unsuspecting purchasers.⁷⁸ The burden was therefore placed upon sellers to refrain from creating and selling foods which have a deceptive appearance.⁷⁹

The classic economic adulteration cases involve the issue of whether the food appears to the ordinary purchaser and consumer to be a superior food.⁸⁰ Such cases rest upon a comparison of the appearance of the

306 Cases of Sandford Tomato Catsup With Preservative, 55 F. Supp. 725, 726 (E.D.N.Y. 1944), *aff'd*, 148 F.2d 71 (2d Cir. 1945).

78. *Cf.* United States v. 36 Drums of Pop'N Oil, 164 F.2d 250 (5th Cir. 1947), in which the court noted that the popped corn with oil on it was not accompanied by any ingredient statement. As H. Thomas Austern has stated, "Except on camping trips, food is seldom served in the original container. Very often it is so happily prepared that one hasn't the vaguest notion of the identity of what he is eating.

It is this apprehension which leads to the idea of things being inherently deceptive: the assumption that a manufacturer who departs from a prescribed composition in an identity standard may have in mind creating an opportunity for a restaurateur, the proprietor of a boarding house, or the operator of a logging camp to pass off the different product on his unsuspecting patrons or employees. Even if he isn't, he is hanged by the possibility. The producer of the food may be acting honestly and labeling forthrightly, but he is restricted because of the venality of others." Austern, *Section 403(g) Revisited*, 6 FOOD DRUG COSM. L.J. 181, 187-88 (1951). However, the courts have not generally held that the possibility of passing off by restaurants to their customers is enough. See text accompanying notes 223-26 *infra*.

79. This type of restriction is not unique or unconstitutional. United States v. Carolene Products Co., 304 U.S. 144 (1938), involved a compound of condensed skimmed milk and coconut oil which was banned from interstate commerce under the Filled Milk Act. The district court sustained a demurrer and the United States Supreme Court reversed, holding that the statute was constitutional and that it was for the legislature to determine whether the public would be adequately protected by a prohibition of false labels or whether it was necessary to go further and prohibit entirely the sale of substitute food-products which were inferior to and indistinguishable from, natural milk. See also *Hebe Co. v. Shaw*, 248 U.S. 297 (1919) (opinion by Holmes, J. upholding the constitutionality of an Ohio statute prohibiting the sale of condensed skimmed milk from which cream was removed); *Powell v. Pennsylvania*, 127 U.S. 678 (1888) (upholding a Pennsylvania statute prohibiting the sale of substitutes for butter made from animal fats). All of these cases involved wholesome foods which were prohibited despite truthful labeling.

Perhaps the most difficult constitutional case was *Carolene Products Co. v. United States*, 323 U.S. 18 (1944), in which the seller sold a product consisting of skimmed milk plus cottonseed or coconut oil and added vitamins. The product was as nutritious as milk; was honestly labeled, and was sold in its natural color which was indistinguishable from milk. The defendant argued that (1) the legislative history of the Filled Milk Act indicated it was directed at foods which were nutritionally inferior to milk and that therefore his product was outside the act; and (2) the Filled Milk Act was directed at foods which were artificially prepared to simulate milk and that he had not altered the natural appearance of his food. The Court held that in the Filled Milk Act Congress was concerned with confusion, and defendant's product must be banned because, whatever its nutritional qualities might be, it would be confused with milk. The Court also held that the Filled Milk Act was directed at all mixtures which simulate milk whether or not they were conscious and purposeful simulations.

80. See cases cited note 88 *infra*. These cases are called classic economic adulteration because they are similar to the "Bred Spred" case and the other adulteration

allegedly adulterated food with the appearance of a food which is both familiar and recognizable to the ordinary purchaser and consumer.⁸¹ If the labeling of the allegedly adulterated food suggests that it is a familiar recognizable food, the case is easier. In such cases, the possibility of passing-off is immediate rather than remote and the courts will have little difficulty in declaring the food adulterated by comparison with the standard of the familiar recognizable food.⁸²

Other economic adulteration cases have involved a comparison of the allegedly adulterated food with a standard set by the allegedly adulterated food itself. Usually such cases have involved ingredient statements which suggest the food is better than it is—e.g. a label stating that the food contains 25% olive oil when in fact it contains almost no olive oil⁸³—but there is also reason to believe that, under certain circumstances, an allegedly adulterated food may be judged by a standard it has set through secondary meeting⁸⁴ or through its natural composition.⁸⁵

cases which were in large part responsible for the passage of the economic adulteration sections of the Federal Food, Drug, and Cosmetic Act.

81. See note 72 *supra*.

82. Most of the cases have involved labeling which falsely suggested that the product complied with a standard of identity rather than economic adulteration cases involving familiar recognizable foods. See *United States v. 30 Cases of Leader Brand Strawberry Fruit Spread*, 93 F. Supp. 764 (S.D. Iowa 1950); *cf. United States v. 306 Cases of Sandford Tomato Catsup with Preservative*, 55 F. Supp. 725 (E.D.N.Y. 1944), *aff'd*, 148 F.2d 71 (2d Cir. 1945), holding that claimant's designation "Tomato Catsup With Preservative," was not an arbitrary or fanciful name but a designation which suggested what the food really was—tomato catsup; *United States v. 20 Cases of Buitoni 20% Protein Spaghetti*, 130 F. Supp. 715 (D. Del. 1954), *aff'd*, 228 F.2d 912 (3d Cir. 1956) (per curiam); *United States v. Omar Inc.*, 91 F. Supp. 121 (D. Neb. 1950), holding that the distinction between "vitamin rich farina" and "enriched farina" is a very thin line to draw if the consumer is to receive any protection from standards of identity. Logic and one Supreme Court case suggest the courts will reach the same results in economic adulteration cases. See *United States v. Schider*, 246 U.S. 519, 521-22 (1918), holding, "The obvious and undisputed purpose and effect of the label was to declare the bottled article a compound essence of grade. . . . Within the statute's general terms the article must be deemed adulterated since some other substance had been substituted wholly for the one indicated by the label. . . ."

83. See *United States v. 40 Cases of Pinocchio Brand Oil*, 289 F.2d 343 (2d Cir.), *cert. denied*, 368 U.S. 831 (1961), and cases cited note 138 *infra*.

84. *Cf. United States v. 70½ Dozen Bottles of 666*, 1 Kleinfeld 89 (M.D. Ga. 1944); *Royal Baking Powder Co. v. FTC*, 281 Fed. 744 (2d Cir. 1922).

United States v. 70½ Dozen Bottles of 666, *supra*, involved a drug called "666" which had been known and sold to the public for many years as a drug containing iron and quinine. The manufacturer eliminated the iron and quinine and sold the drug under the same name and in the same style packages to the public. The drug was held misbranded.

Similarly, in *Royal Baking Powder Co. v. FTC*, *supra*, the respondent had manufactured and sold a baking powder with cream of tartar called "Dr. Price's Cream Baking Powder" for many years. When the cost of the cream of tartar increased, respondent changed the composition of its product from a cream of tartar powder to a phosphate powder, selling the new product under the same name and in the same style package and the FTC brought an action under § 5 of the FTC Act. The FTC ordered respondent to cease and desist selling a phosphate baking powder under the name of

The ingredient cases alone are numerous enough to make it clear that, contrary to the dicta in *Bireley's*, allegedly adulterated foods can set their own standards and may be judged by these standards in economic adulteration cases.⁸⁶ *Bireley's* must therefore be read as merely requiring that the standards applied in economic adulteration cases be reasonably definite and precise.⁸⁷

Both standards set by the allegedly adulterated food itself and standards set by a familiar recognizable food are reviewed below.

C. *The Standards Used To Determine Economic Adulteration And The Evidence Required to Prove Each Standard.*

1. The Familiar Recognizable Food:

The familiar recognizable food is the standard which has been applied most frequently in economic adulteration cases.⁸⁸ The standard

"Dr. Price's" or "Price's" unless the word "Cream" was omitted and the word "Phosphate" was incorporated in the label. Respondent was also ordered to cease and desist using any label simulating or resembling in coloration, design or general appearance the labels formerly used on its cream of tartar powder. The court affirmed the FTC's order holding that "...petitioner in the use of its labels and otherwise,.... did deceive the public, into buying a phosphate baking powder believing it was Dr. Price's Baking Powder which had been well known for 60 years as a cream of tartar powder, concealing and obscuring the fact that it was a radically different powder." *Id.* at 753.

In both cases the fraud related to the composition of the product and the Government might have succeeded had it brought economic adulteration charges.

85. See cases cited note 130 *infra*.

86. See cases cited notes 137-38 *infra*.

87. One court has rejected an ingredient statement as the standard in an economic adulteration case, basing its decision on *Bireley's*. *United States v. Fabro*, 206 F. Supp. 523 (M.D. Ga. 1962). However, the weight of authority is to the contrary. See *United States v. 40 Cases of Pinocchio Brand Oil*, 289 F.2d 343 (2d Cir.), *cert. denied*, 368 U.S. 831 (1961); *United States v. Food Products Labs., Inc.*, 6 Kleinfeld 123 (W.D. Mo. 1963). Cf. Nelson, *What Standards For the Nonstandardized Food? — The Bireley's Case*, 8 FOOD DRUG COSM. L.J. 425, 438 (1953); *Developments in the Law—The Federal Food Drug and Cosmetic Act*, 67 HARV. L. REV. 632, 648 (1954): "[I]nsofar as the decision [*Bireley*] immunizes from adulteration charges a certain product which, though deceptive in appearance, could not be confused with an identified superior, it would seem to deny the consumer the full protection the act intended."

88. Cases involving alleged economic adulteration by comparison of the food with a familiar recognizable food are almost infinite in number and numerous cases are collected in this footnote. With few exceptions, however, the decisions in these cases rest upon simple findings of fact or points of law having little relevance to economic adulteration charges. Many of the 1906 Act cases, for example, turn upon the interpretation of the provisos relating to distinctive names and compounds (which were abolished in the 1938 Act) and many of the later cases were actually decided on misbranding charges rather than the economic adulteration charges. The principal value of the list is therefore to enable members of the profession to find cases involving particular foods easily and quickly. The cases are: *United States v. Schider*, 246 U.S. 519 (1918) (grape essence); *Van Liew v. United States*, 321 F.2d 664 (5th Cir. 1963) (orange juice); *United States v. Treffinger*, 224 F.2d 855 (2d Cir. 1955) (horseradish); *United States v. 716 Cases of Del Comida Brand Tomatoes*, 179 F.2d 174 (10th Cir. 1950) (canned tomatoes); *United States v. 36 Drums of Pop'n Oil*, 164 F.2d 250 (5th Cir. 1947) (popped corn flavoring); *United States v. Two Bags of Poppy Seeds*, 147

consists of a single superior food which is both known ("familiar") to retail purchasers and identifiable ("recognizable") by them.⁸⁹ The

F.2d 123 (6th Cir. 1945) (poppy seeds); United States v. 800 Sacks Barley Mixed Oats, 64 F.2d 678 (5th Cir. 1933) (oats); United States v. Centralia Dairy Co., 60 F.2d 141 (W.D. Wash. 1932) (butter); W.B. Wood Mfg. Co. v. United States, 286 Fed. 84 (7th Cir. 1923) (food colors); F.B. Washburn v. United States, 224 Fed. 395 (1st Cir. 1915) (macaroons); Libby, McNeill & Libby v. United States, 210 Fed. 148 (4th Cir. 1913) (condensed skimmed milk); Lexington Mill & Elevator Co. v. United States, 202 Fed. 615 (8th Cir. 1913), *aff'd*, 232 U.S. 399 (1914) (flour); Hall-Baker Grain Co. v. United States, 198 Fed. 614 (8th Cir. 1912) (No. 2 wheat); William Henning & Co. v. United States, 193 Fed. 52 (5th Cir. 1912) (tomato catsup); United States v. W. F. Morgan, 155 F. Supp. 40 (E.D. Va. 1957) and 155 F. Supp. 847 (E.D. Va. 1957) (canned oysters); United States v. Cudahy Packing Co., 4 Kleinfield 138 (D. Neb. 1955) (oleomargarine); United States v. 149 Cans of Black Eyed Peas, 4 Kleinfield 27 (D. Colo. 1953) (canned peas); United States v. 70 Gross Bottles of Quenchies, 3 Kleinfield 141 (S.D. Ohio 1952) (soft drink base); United States v. Midfield Packers, 3 Kleinfield 157 (W.D. Wash. 1947) (frozen fruit); United States v. Beck, 2 Kleinfield 197 (S.D. Iowa 1948) (salad dressing); United States v. 55 Cases of Popped Corn, 62 F. Supp. 843 (D. Idaho 1943) (popped corn); United States v. South Peacham Creamery Co., White & Gates 1266 (D. Vt. 1931) (butter); United States v. Morehouse, White & Gates 1210 (N.D. Cal. 1928) (mustard seed); United States v. 4½ Cases of Creme De Menthe, White & Gates 1191 (E.D. Mo. 1926) (creme de menthe); United States v. 200 Sacks of Wheat Middlings, White & Gates 1189 (E.D. Mich. 1926) (powdered wheat middlings); United States v. 24¾ Gallons of Smack, White & Gates 1181 (E.D. Wis. 1926) (grape juice); United States v. 37 One-Pound Packages of Colors, White & Gates 1165 (E.D. Pa. 1925) (food colors); United States v. Marmarelli, White & Gates 1122 (S.D.N.Y. 1924) (olive oil); United States v. Krumm, 269 Fed. 848 (E.D. Pa. 1921) (macaroni); United States v. Alban, White & Gates 1014 (S.D.N.Y. 1921) (olive oil); United States v. 100 Cases of Canned Red Kidney Beans, White & Gates 982 (W.D. Ky. 1920) (kidney beans); United States v. 6 Barrels of Ground Pepper, White & Gates 817 (S.D.N.Y. 1917) (pepper); United States v. Shucart, White & Gates 693 (E.D. Mo. 1915) (cider); United States v. 60 Barrels of Wine, 225 Fed. 846 (W.D. Mo. 1915) (claret wine); United States v. 6 Cases of Honey, White & Gates 543 (E.D. Pa. 1913) (honey); United States v. Goodman, White & Gates 484 (E.D.N.Y. 1913) (nonalcoholic cordial); United States v. German American Specialty Co., White & Gates 459 (S.D.N.Y. 1913) (eggs); United States v. Huyler's, White & Gates 455 (Police Ct. D.C. 1913) (maple sugar); United States v. Dunham Mfg. Co., White & Gates 440 (E.D.N.Y. 1913) (shredded coconut); United States v. 30 Cases of Grenadine Syrup, 199 Fed. 932 (D. Mass. 1912) (grenadine syrup); United States v. Auerbach & Sons, White & Gates 357 (S.D.N.Y. 1912) (milk chocolate); United States v. 75 Boxes of Alleged Pepper, 198 Fed. 934 (D. N.J. 1912) (pepper); United States v. 100 Barrels of Vinegar, 188 Fed. 471 (D. Minn. 1911) (vinegar); United States v. Heide, White & Gates 325 (S.D.N.Y. 1911) (almond paste); United States v. Rinchini, White & Gates 318 (D. Ariz. 1911) (ice cream); United States v. 100 Barrels of Calcium Acid Phosphate, White & Gates 58 (N.D. Cal. 1909) (calcium and phosphate).

89. The leading economic adulteration case, *United States v. 88 Cases of Bireley's Orange Beverage*, 187 F.2d 967 (2d Cir.), *cert. denied*, 342 U.S. 861 (1951), refers to the standard as a "defined and familiar food." The food certainly must be familiar to purchasers (or else there can be no deception), but the use of the word "defined" is somewhat misleading. The test is not whether the food is defined in standards of identity or by the trade; the test is whether the food is recognized by the ordinary purchaser or consumer as a food containing certain ingredients (or a certain proportion of ingredients) which the allegedly adulterated product does not have. Thus there may be no complete definition of the food anywhere. *Cf. United States v. 4½ Cases of Creme De Menthe, White & Gates 1191 (E.D. Mo. 1926)* in which the only issue was whether creme de menthe was recognized as containing caffeine. It seems more precise therefore to refer to the standard as the "familiar recognizable food."

food must not only be identifiable under ordinary conditions of purchase and use; it must also be identifiable generally in its composition.⁹⁰ The composition of the familiar recognizable food is defined according to the common understanding of retail purchasers and consumers.⁹¹

The familiar recognizable food is a generic food. It may be either a standardized or unstandardized food, a natural or fabricated food.⁹² The standard is usually applied without comment or discussion by the courts and consequently there is little understanding of the standard. It seems likely that the common understanding of retail purchasers and consumers is not a monolithic standard but that, on the contrary, a food which purports to be a familiar recognizable food may arouse diverse and conflicting expectations among substantial numbers of retail purchasers and consumers. If this is so, a food which appears to be a familiar recognizable food but which falls short of the expectations of almost all purchasers ought to be considered economically adulterated even if there is a diversity of opinion concerning the usual composition of the food. This was apparently the situation in *United States v. 36 Drums of Pop'N Oil*.⁹³ In the *Pop'N Oil* case, the Government seized drums of artificially-colored mineral oil intended for use as popped corn seasoning. The court held the mineral oil was economically adulterated because it was inferior to all of the oils (cottonseed, coconut and soya-bean) which had previously been applied to popped corn.⁹⁴

90. *United States v. 88 Cases of Bireley's Orange Beverage*, *supra* note 89; *United States v. Midfield Packers*, 3 Kleinfeld 157 (W.D. Wash. 1952); *United States v. 70 Gross Bottles of Quenchies*, 3 Kleinfeld 141 (S.D. Ohio 1952); *United States v. 55 Cases of Popped Corn*, 62 F. Supp. 843 (D. Idaho 1943); *United States v. 30 Cases of Grenadine Syrup*, 199 Fed. 932 (D. Mass. 1912). *Cf.* *United States v. Swift & Co.*, White & Gates 1146 (D. Ore. 1925); *United States v. Krumm*, 269 Fed. 848 (E.D. Pa. 1921); *United States v. 154 Cases of Tomatoes*, White & Gates 967 (W.D. Pa. 1920); *United States v. Rinchini*, White & Gates 318 (D. Ariz. 1911), are examples of cases in which the Government was defeated because it failed to plead or prove the composition of a familiar recognizable food which differed from the composition of the allegedly adulterated product.

91. See *United States v. 4½ Cases of Creme De Menthe*, White & Gates 1191 (E.D. Mo. 1926); *United States v. F. B. Washburn & Co.*, White & Gates 434 (D. Mass. 1913), *rev'd on other grounds*, 224 Fed. 395 (1st Cir. 1915); *United States v. Auerbach & Sons*, White & Gates 357 (S.D.N.Y. 1912); *United States v. 30 Cases of Grenadine Syrup*, 199 Fed. 932 (D. Mass. 1912); *United States v. 75 Boxes of Alleged Pepper*, 198 Fed. 934 (D. N.J. 1912); *United States v. Bettman-Johnson Co.*, White & Gates 299 (S.D. Ohio 1911); *cf. Libby, McNeill & Libby v. United States*, 210 Fed. 148 (4th Cir. 1913).

92. See cases cited note 88 *supra*.

93. 164 F.2d 250 (5th Cir. 1947).

94. In *United States v. 55 Cases of Popped Corn*, 62 F. Supp. 843 (D. Idaho 1943) the Government had seized popped corn flavored with mineral oil because of economic adulteration and the court had dismissed the seizure because there was no established formula for the preparation of popped corn. The *Pop'N Oil* case, *supra* note 93, only four years later, then held that variances in the formula were irrelevant since all of the oils used had more food value than mineral oil. The different results

More subtle questions arise when the food complies with the expectations of some of the purchasers and consumers concerning familiar recognizable foods but falls short of the expectations of others. In theory it would seem that a manufacturer who has created a food with an appearance which may deceive any substantial number of purchasers and consumers should not be able to defend an economic adulteration charge by showing that other purchasers and consumers are not deceived.⁹⁵ However, the application of this principle to economic adulteration cases would yield startling results. Foods which complied with the expectations of most purchasers and consumers could be outlawed or required to be labeled imitation and, quite apart from the economic consequences to manufacturers, more confusion than enlightenment would probably result from such a situation.⁹⁶ Therefore, it is likely that the

in the two cases probably rest upon different evaluations of mineral oil by the two courts. In the *Popped Corn* case, the court did not know whether mineral oil had been used before but knew of no reason why mineral oil should not be used. In the *Popp'N Oil* case, the court recognized mineral oil as new and inferior to all other oils formerly used for flavoring popped corn. Therefore, regardless of whether mineral oil was deleterious, its use on popped corn was deceptive to purchasers and consumers and the court correctly found economic adulteration.

95. Certainly if the same manufacturer deceived a substantial number of purchasers and consumers by a false or misleading advertisement of the composition of the food, he could be subject to a cease and desist order issued by the Federal Trade Commission. See 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(a)(6) (1964); Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439, 457-62 (1964). The fact that other customers were satisfied or not deceived would be no defense to the cease and desist proceeding if the advertisement had the capacity to deceive. Cf. *Erickson v. FTC*, 272 F.2d 318 (7th Cir. 1959), cert. denied, 362 U.S. 940 (1960); *Independent Directory Corp. v. FTC*, 188 F.2d 468 (2d Cir. 1951). It can be argued that the manufacturer should also be liable under economic adulteration law if instead of publishing a deceptive advertisement, he creates an inferior food having an appearance which will deceive a substantial number of purchasers.

The distinction probably lies in the two statutes. The FTC Act is very flexible and the FTC can fashion orders to individual cases so that the deception is ended and the manufacturer is able to continue to sell his products. The Federal Food, Drug, & Cosmetic Act gives no comparable power to the FDA and therefore if the food is considered economically adulterated, it must be either labeled imitation or removed from sale.

96. The economic adulteration sections of the Federal Food, Drug, & Cosmetic Act are constructed on the premise that there is only one genuine version of each familiar recognizable food. These sections therefore require the seller to either label any other version as an imitation or refrain from selling it. Cf. *United States v. 62 Cases of Jam*, 340 U.S. 593 (1951).

When it becomes apparent that there are several versions of the familiar recognizable food, all of which vary in quality and all of which are regarded as genuine by some members of the public, the law becomes totally inadequate. In such circumstances, the courts must either force the manufacturers to label as imitation a food which some purchasers and consumers regard as genuine, or, the courts must simply not apply the economic adulteration laws to the various versions of the food and leave the purchaser to protect himself by reading the ingredient statement. The courts have usually handled such situations by holding that the standard is too indefinite to hold any of the versions of the food economically adulterated. See cases cited note 97 *infra*. The purchasers are thus left to rely upon labeling although the judicial consensus seems to be

courts will hold that where a difference of opinion exists concerning the composition of the familiar recognized food, the allegedly adulterated food is not adulterated so long as a substantial number of ordinary purchasers and consumers consider it within the definition of the familiar recognizable food.⁹⁷ Protection of purchasers and consumers with higher expectations will be limited to the misbranding sections of the act, although this may require that they read ingredient statements until the Government promulgates standards of identity defining the food.⁹⁸ The standards of identity end the controversy concerning the proper composition of the food, so far as the misbranding sections of the act are concerned.⁹⁹ The effect of standards of identity upon economic adulteration cases is, however, more dubious and this and other evidentiary problems are reviewed below.

that labeling is inadequate protection for purchasers. Cf. *Federal Security Adm'r v. Quaker Oats Co.*, 318 U.S. 218 (1943); *United States v. 306 Cases of Sandford Tomato Catsup With Preservative*, 55 F. Supp. 725 (E.D.N.Y. 1944), *aff'd*, 148 F.2d 71 (2d Cir. 1945). However, in at least one analogous situation, a federal agency tried the "imitation" labeling route and this was found equally inadequate. See *Armour & Co. v. Freeman*, 304 F.2d 404 (D.C. Cir.), *cert denied*, 370 U.S. 920 (1962) in which it was regarded as deceptive to label ham with added water as imitation ham.

97. Probably the two most recent relevant authorities are *United States v. 70 Gross Bottles of Quenchies*, 3 Kleinfeld 141 (S.D. Ohio 1952) and *United States v. 55 Cases of Popped Corn*, 62 F. Supp. 843 (D. Idaho 1943). In the former case there was apparently a difference of opinion whether soft drink bases should be sweetened with sugar or saccharin while in the latter case there was a difference of opinion whether popped corn should be flavored with butter, vegetable oils or mineral oils. In both cases the court concluded the products were not adulterated. However, the same approach is inherent in those cases which define the familiar recognizable food according to the *common* understanding of purchasers and consumers, cf. authorities cited note 91 *supra*, since it can be argued, there is no *common* understanding when substantial groups of purchasers and consumers dissent.

98. Establishing a standard of identity is probably the best approach when differences of opinion exist concerning the proper composition of the food. The procedure for establishing a standard of identity is set forth in § 701 of the act and, briefly, it consists of a proposal for a standard initiated by the Secretary of Health, Education, and Welfare or by any interested person, publication of the proposal and an opportunity to file written objections and request a public hearing, a public hearing at which evidence may be presented, and publication of a final order subject to court review. 52 Stat. 1055 (1938), as amended, 21 U.S.C. § 371(e)-(f) (1953). While this procedure is time-consuming, it provides an opportunity for all interested persons to voice their opinion concerning the proper composition of the food, and provides the basis for establishing a reasonable standard of identity which will "promote honesty and fair dealing in the interest of consumers." See 52 Stat. 1046 (1938), as amended, 21 U.S.C. § 341 (1958). The public hearing and the publicity concerning the controversy over the proper composition of the food may also make a small contribution to the education of some purchasers and consumers. Cf. *The Second Citizens Advisory Committee Report on the Food and Drug Administration*, 17 FOOD DRUG COSM. L.J. 587, 597-99 (1962), wherein the committee stressed the need for education rather than just prosecution. Ultimately, if it were decided that there was more than one legitimate version of the familiar recognizable food, the standard of identity could provide for optional ingredients, thus preserving the sellers' rights to sell both versions of the food.

99. 52 Stat. 1047 (1938), as amended, 21 U.S.C. § 343(g)(1) (1958).

(a) *Standards of Identity*

Under section 401 of the act, the Secretary is authorized to promulgate reasonable definitions and standards of identity and quality for all foods.¹⁰⁰ This provision was inserted in the Federal Food, Drug, and Cosmetic Act because of the Government's difficulties in proving the composition of the familiar recognizable food in cases under the 1906 Act.¹⁰¹ However, Congress did not provide in the Federal Food, Drug, and Cosmetic Act that a food which failed to comply with a standard of identity or quality was economically adulterated; instead Congress provided that such a food was misbranded.¹⁰² This left open the question of the effect of a standard of identity in an economic adulteration case.

In United States v. 30 Cases of Leader Brand Strawberry Fruit

100. 52 Stat. 1046 (1938), as amended, 21 U.S.C. § 341 (1958).

101. On June 12, 1933, Senator Copeland introduced a bill which would have completely revised the 1906 Food and Drugs Act; the revision, in amended form, was ultimately enacted on June 25, 1938. See DUNN, FEDERAL FOOD, DRUG, AND COSMETIC ACT 24-30 (1938). The authority to promulgate standards of identity for foods was part of the original bill providing for the revision of the 1906 Act. See S. 1944, 73d Cong., 1st Sess. § 11 (1933). The early Senate Reports of the bills providing for the proposed revision of the 1906 Food and Drugs Act made it clear that the standards of identity were intended to apply in economic adulteration cases. See S. REP. No. 493, 73d Cong., 2d Sess. § 7 (1934); S. REP. No. 361, 74th Cong., 1st Sess. § 302 (1935); S. REP. No. 646, 74th Cong., 1st Sess. § 302 (1935). (These reports are reprinted in DUNN, *supra* at 110-32, 237-66, and 477-90 respectively.) For example, S. REP. No. 646 stated: "Paragraph (g) overcomes a serious deficiency of the present law which makes no provision for definitions and standards of identity for food, with the exception of one enacted by Congress defining butter. The absence of such authority has seriously handicapped effective enforcement. The provisions of the law, as well as those of this bill, dealing with so-called 'economic adulteration' that is, the cheapening of foods either through lessening the quantities of valuable constituents or through the substitution of cheaper constituents, require definitions and standards whereby the article can be judged. For example, under the law and under the bill, a food is defined as adulterated if any substance has been mixed or packed with it so as to reduce its quality or strength, or if any substance has been substituted wholly or in part therefor. These provisions in themselves imply the existence of definitions and standards of identity, since no one can tell when an article is adulterated under them without first determining definitely what constitutes the unadulterated product." DUNN, *supra* at 480.

However, later legislative reports concerning the proposed revision of the 1906 Food and Drugs Act did not contain the same type of language, see H.R. Rep. No. 2755, 74th Cong., 2d Sess. (1935) (DUNN, *supra* at 550-65); S. Rep. No. 91, 75th Cong., 1st Sess. (1937) (DUNN, *supra* at 675-81); S. Rep. No. 152, 75th Cong., 1st Sess. (1937) (DUNN, *supra* at 686-92); and H.R. Rep. No. 2139, 75th Cong., 3d Sess. (1938) (DUNN, *supra* at 815-33), although H.R. Rep. No. 152, for example, did note the Government's difficulties in dealing with cheapened jams and that the standards of identity would prevent this debasement in the future. (DUNN, *supra* at 819).

It seems plain therefore that Congress originally intended the standards of identity to apply in economic adulteration cases but it is not clear whether Congress later retreated from that position, intending the misbranding remedy alone to govern.

102. Foods which fail to conform to a standard of identity are misbranded (unless labeled imitation); foods which fail to conform to a standard of quality are misbranded unless labeled that they fall below the standard. 52 Stat. 1047 (1938), as amended, 21 U.S.C. § 343(g) (h) (1958).

Spread,¹⁰³ the Government seized claimant's "fruit spread" because it was economically adulterated and because it violated the standards of identity for jam. The evidence showed that claimant's product was being passed off as jam and that ordinary purchasers would consider it as jam but that claimant's product contained approximately 10% fruit rather than the approximate 40% fruit required by the jam standards. The court concluded that the product was both economically adulterated and misbranded because it was represented to be and purported to be jam but failed to conform to the standards of identity for jam.

In *United States v. 716 Cases of Del Comida Brand Tomatoes*,¹⁰⁴ the Government seized canned tomatoes because they were economically adulterated and because they failed to conform to the standard of quality for canned tomatoes. Both charges were based upon the fact that the tomatoes had been diluted with water. The trial court held that the canned tomatoes were misbranded but not economically adulterated. The Circuit Court reversed, holding that the tomatoes were economically adulterated since the Act was intended to provide protection against the substitution of less expensive ingredients, in whole or in part, for the more expensive ingredients of familiar recognizable foods.¹⁰⁵ The standard of quality was accepted as proof of the proper composition of canned tomatoes.

In neither the *Leader Brand Strawberry Fruit Spread* case nor the *Del Comida Tomatoes* case did the courts discuss the effect of a standard of identity or quality on an economic adulteration case. In these cases involving obvious and deliberate frauds, the courts simply accepted the standard as proof of the familiar recognizable food. The claimants apparently did not contest either the admissibility of the standard or the weight given to it.

A later case, *United States v. Cudahy Packing Company*,¹⁰⁶ involved a contest of both questions. In the *Cudahy* case, the Government brought criminal charges against a corporation for shipping oleomargarine which failed to contain the 80% fat required by the standards of identity. The deficiency in the fat content of defendant's oleomargarine was slight and inadvertent and the court concluded that the oleomargarine was misbranded but not economically adulterated. The court reasoned that economic adulteration consists of skimping upon expensive ingredients and enlarging cheaper ingredients, and that this

103. 93 F. Supp. 764 (S.D. Iowa 1950).

104. 179 F.2d 174 (10th Cir. 1950).

105. *Ibid.*

106. 4 Kleinfeld 138 (D. Neb. 1955).

offense had not been proved in the *Cudahy* case because there was no evidence of the relative cost of the ingredients involved.¹⁰⁷ The Government's contention that standards of identity can be used to support an economic adulteration charge was rejected. The court held that since the adulteration sections of the act do not refer to the standards of identity as canons or tests, the standards are irrelevant to adulteration cases.¹⁰⁸

It is difficult to accept either the position that standards of identity are conclusive upon, or irrelevant to, an economic adulteration case. Since Congress provided for misbranding penalties for failure to comply with the standards, it seems unlikely that the same offense was intended to be an adulteration.¹⁰⁹ However, proof of the ordinary or usual composition of a food is usually admitted in economic adulteration cases and a standard of identity seems at least as good evidence of that composition as the custom of the trade.¹¹⁰ The proper approach is probably to accept the standard as evidence and let the courts determine according to the facts of each individual case whether additional evidence of consumer expectations is required. If the facts indicate that the deficiency

107. In the *Cudahy* case, *supra* note 106, the defendant had apparently increased the percentage of whole milk and decreased the percentage of cottonseed oil in the oleomargarine. No evidence was introduced concerning the relative cost of these ingredients, and, unlike the *Del Comida* case, *supra* note 104, involving watered tomatoes, the court could not take judicial notice of the cost differential.

108. The court said "Another obstacle to conviction under Count I arises because it assumes that resort may be had in support of a charge under Title 21 U.S.C.A., Section 342(b)(2) to 21 CFR Section 45.0(a) [the standard of identity for oleomargarine].... Unlike the section of the statute defining misbranding, (Title 21 U.S.C.A., Section 343(g)) the section within which Count I was framed does not refer to such regulatory definition or standard as a canon or test of adulteration," *supra* note 106 at 147. The court cited *Bruce's Juices, Inc. v. United States*, 194 F.2d 935 (5th Cir. 1952) in support of this reasoning. In *Bruce's Juices* cans of blended pineapple and grapefruit juice were seized because the juices were decomposed. The claimant argued that the condemnation was improper because no standards of identity had been promulgated for the product and the court correctly concluded standards of identity were irrelevant to the adulteration charge. The court in *Cudahy* thus traveled far afield to find support for its reasoning.

109. If Congress intended to make the failure to conform to the standards an adulteration, it would have been easy enough to do so expressly. Instead, and in contrast to the previously adopted laws and regulations of a number of states, Congress chose the misbranding route. See Callaway, *Current Problems in Formulating Food Standards*, 2 FOOD DRUG COSM. L.Q. 124, 128 (1947). Violations of the Butter Act, 42 Stat. 1500 (1923), as amended, 15 U.S.C. § 321(a) (1958), which requires 80 per cent milk fat in butter have always been considered economic adulterations. See *e.g.*, *United States v. Centralia Dairy Co.*, 60 F.2d 141 (W.D. Wash. 1932); *United States v. South Hero Creamery Ass'n, White & Gates* 1142 (D. Vt. 1925). However, the Butter Act was enacted in 1923 (before Congress enacted the Federal Food, Drug & Cosmetic Act providing for misbranding penalties for failure to conform to a standard of identity) and hence is only analogous precedent for the argument that the failure to conform to a standard of identity is an economic adulteration.

110. See text accompanying notes 114-117 *infra*. The standard of identity would seem better evidence than the custom of the trade since there is less deviation from it.

from the standard involves a major or important ingredient, the courts may well decide that purchasers would expect the omitted or reduced ingredient in the food.¹¹¹ Conversely, if the facts show that the deficiency from the standard of identity is minor both nutritionally and financially, the courts may decide that more evidence is required to infer that purchasers expected to receive the omitted or reduced ingredient in the food.¹¹² This type of analysis would reconcile the apparently conflicting decisions in the *Leader Brand*, *Del Comida*, and *Cudahy* cases.¹¹³

(b) Custom of the Trade

In cases involving unstandardized foods, proof of the ordinary or usual composition of a food is made through the testimony of competing food processors or chemical analyses of their products rather than proof of a standard identity.¹¹⁴ The evidence secured from the proces-

111. This is simply an issue of fact for the trial court. If, for example, the standards require 40% fruit in jam and the allegedly adulterated food only contains 10% fruit, the deficiency is sufficient so that consumer expectations have probably been violated. Cf. *United States v. 30 Cases of Leader Brand Strawberry Fruit Spread*, 93 F. Supp. 764 (S.D. Iowa 1950); Markel, *Federal Food Standards*, 1 FOOD DRUG COSM. L.Q. 28, 42 (1946) in which the author suggests that the nature of the deficiency of the food when compared to the standard will determine whether it is economically adulterated.

112. In the *Cudahy* case, *supra* note 106, defendant's margarine contained at least 73% fat and averaged 79.8% fat as compared with an 80% standard. The deficiency was apparently filled largely with nonfat dried milk. Neither substantial economic or nutritional inferiority was therefore shown.

113. In the *Del Comida*, *supra* note 104, and *Leader Brand Strawberry Fruit Spread*, *supra* note 103, cases, both elements were present: (1) substantial nutritional inferiority of the adulterated food as compared with the familiar recognizable food and (2) substantial economic inferiority of the adulterated food as compared with the familiar recognizable food. Both of the same elements were missing in the *Cudahy* case.

114. In cases involving unstandardized foods fabricated from two or more ingredients or natural foods packed or preserved with another ingredient, the Government usually proves the composition of the familiar recognizable food in part at least by evidence of the custom of the trade. See, e.g., *United States v. 36 Drums of Pop'N Oil*, 164 F.2d 250 (5th Cir. 1947) (custom of the trade was to use butter or vegetable oils rather than mineral oil to flavor popped corn); *United States v. Two Bags of Poppy Seeds*, 147 F.2d 123 (6th Cir. 1945) (custom of the trade was to use Dutch and Turkish rather than British India poppy seeds to decorate baked goods); *United States v. 149 Cases of Black Eyed Peas*, 4 Kleinfeld 27 (D. Colo. 1953) (custom of trade was to use less water than claimant in canned peas); *United States v. 154 Cases of Tomatoes*, White & Gates 967 (W.D. Pa. 1920) (libel dismissed because Government failed to allege that custom of the trade was to exclude tomato pulp from canned tomatoes); *United States v. 60 Barrels of Wine*, 225 Fed. 846 (W.D. Mo. 1915) (custom of trade was to make claret wine from the entire grape rather than the grape residue remaining after extraction of the juice); *United States v. Golden & Co.*, White & Gates 1033 (Police Ct. D.C. 1922) (custom of the trade was to use less water than claimant in canned oysters); *United States v. Krumm*, 269 Fed. 848 (E.D. Pa. 1921) (libel dismissed, in part, because Government failed to allege that custom of the trade was to manufacture macaroni solely from semolina rather than flour); cf.

sors or chemical analyses indicates the custom of the trade and is relevant to, but not determinative of, the composition of the familiar recognizable food. As one court said, "The standard set by the statute is not what is customarily done by manufacturers but what is properly done by them. . . ."¹¹⁵ The custom of the trade is probably most apt to be rejected when the evidence indicates that manufacturers are diluting foods to secure competitive advantage, rather than when evidence indicates that the variation in ingredients has resulted from competing manufacturers' attempts to make the food more nutritious or acceptable to retail purchasers and consumers.¹¹⁶ In general, however, the custom of the trade has been given great weight in economic adulteration cases

United States v. 30 Cases of Grenadine Syrup, 199 Fed. 932 (D. Mass. 1912); United States v. Bettman-Johnson Co., White & Gates 299 (S.D. Ohio 1911). But see W.B. Wood Mfg. Co. v. United States, 292 Fed. 133 (8th Cir. 1923) in which the court would not permit evidence of the custom of the trade.

Cases involving unstandardized natural foods not packed or preserved with another ingredient are handled a little differently. The composition of unstandardized natural foods is apt to be a matter of common knowledge and, when foreign ingredients are introduced in the food, it is usually unnecessary to prove the composition of the natural food. For example, olive oil is generally recognized as an oil extracted from olives and when cottonseed oil is found in a container of olive oil, the debasement is clear. See United States v. Germack, White & Gates 1178 (S.D.N.Y. 1925); United States v. Marmarelli, White & Gates 1122 (S.D.N.Y. 1924); United States v. Alban, White & Gates 1014 (S.D.N.Y. 1921); United States v. Monahos, White & Gates 935 (S.D.N.Y. 1919); United States v. Paraskevopolus, White & Gates 925 (S.D.N.Y. 1919). Similar situations occur when horseradish is adulterated with parsnip, see United States v. Treffinger, 224 F.2d 855 (2d Cir. 1955), or, eggs are adulterated with skimmed milk, see United States v. German American Specialty Co., White & Gates 459 (S.D.N.Y. 1913). In some situations, however, the composition of the natural food is not obvious and in such cases the custom of the trade becomes relevant. See United States v. 75 Boxes of Alleged Pepper, 198 Fed. 934 (D.N.J. 1912), in which the dispute was whether the familiar recognizable food "pepper" properly consisted of black pepper or long pepper.

Additionally, unstandardized natural foods are sometimes adulterated by increasing the cheaper ingredients which occur naturally in the food and decreasing the more valuable natural ingredients. If such foods fall below the consumers' expectations, they could be considered adulterated under the standard of the familiar recognizable food and evidence of the usual quantitative composition of such foods as sold by the trade would be relevant if the Government applied the standard of the familiar recognizable food to such cases. As a practical matter, however, the standard of the familiar recognizable food is not applied to such cases. Another more stringent standard based upon the natural composition of these foods is applied and this standard makes the dilution of the food illegal per se. See text accompanying notes 129-36 *infra*.

115. W.B. Wood Mfg. Co. v. United States, 292 Fed. 133, 134 (8th Cir. 1923). See also United States v. 4½ Cases of Creme De Menthe, White & Gates 1191, 1197 (E.D. Mo. 1926): "It is not a question of what Tom, Dick or Harry put in there, because Tom, Dick, or Harry may be violating the law themselves, but the question is, whether it is a standard formula and whether this conforms to it."

116. See United States v. W.B. Wood Mfg. Co., White & Gates 1002 (E.D. Mo. 1921), *aff'd*, 292 Fed 133 (8th Cir. 1923) in which the Government charged that a red food color was being diluted by salt. The defendant wanted to prove that it was customary to dilute food colors with salt and the court excluded this testimony, reasoning that the standard was not what was customarily done by manufacturers but what was properly done by them.

and the Government has usually found it necessary to prove that foods are outside ordinary trade standards to secure judgments in economic adulteration cases involving the standard of the familiar recognizable food.¹¹⁷

(c) *Opinion Surveys and Expert Testimony*

Since the composition of the familiar recognizable food depends upon the common understanding of retail purchasers and consumers, opinion surveys and expert testimony concerning purchasers' and consumers' expectations are often used in economic adulteration cases.¹¹⁸

The Government has relied upon opinion surveys in economic adulteration cases since at least 1911. In *United States v. One Carload of Corno Horse and Mule Feed*,¹¹⁹ the Government introduced evidence of an opinion survey intended to prove that "oat feed" was generally interpreted as ground oats rather than oat by products. The court decided that the survey deserved little weight because it purported to show evidence of the opinion of the general public rather than of the ordinary purchasers of the product.¹²⁰ Since the product in question, mule feed, had a rather specialized and limited market, the court's conclusion was probably correct.

A more fundamental objection was raised to the Government's opinion survey in *United States v. 88 Cases of Bireley's Orange Beverage*.¹²¹ The claimant objected to the Government's survey as hearsay and the court concluded that the survey was admissible since it was offered to prove the reactions of the persons surveyed rather than the

117. The Food and Drug Administration in its 1933 report to the Department of Agriculture summarized the situation as follows: "To prove that a product sold within the jurisdiction of the Food and Drugs Act and that fails to comply with the advisory standard is adulterated or misbranded, it is necessary for the Department to present to the court and jury convincing evidence that the advisory standard does represent the actual composition of the product expected by the consumer and recognized by the majority of the trade." DUNBAR, FEDERAL FOOD DRUG AND COSMETIC LAW REPORTS 1907-1949, 800 (1951). The Government can now promulgate legally binding standards of identity, but in cases involving unstandardized foods, the same type of evidence seems required today as was required in 1933.

118. *United States v. 88 Cases of Bireley's Orange Beverage*, 187 F.2d 967 (3d Cir.), *cert. denied*, 342 U.S. 861 (1951); *United States v. 70 Gross Bottles of Quenchies*, 3 Kleinfeld 141 (S.D. Ohio 1952); *United States v. One Carload of Corno Horse and Mule Feed*, 188 Fed. 453 (M.D. Ala. 1911). Analogous situations involving such evidence include *United States v. 174 Cases of Delson Thin Mints*, 195 F. Supp. 326 (D.N.J. 1961), *aff'd*, 302 F.2d 724 (3d Cir. 1962) (misleading packaging); *United States v. 254 Cases of Baby Brand Tomato Sauce*, 63 F. Supp. 916 (E.D. Ark. 1945) (false and misleading labeling); and *Rhodes Pharmacal Co. v. FTC*, 208 F.2d 382 (7th Cir. 1953), *rev'd on other grounds*, 348 U.S. 940 (1955) (F.T.C. deceptive advertising case).

119. 188 Fed. 453 (M.D. Ala. 1911).

120. *Id.* at 462.

121. 187 F.2d 967 (3d Cir.), *cert. denied*, 342 U.S. 861 (1951).

truth of their opinions.¹²² The survey was of the opinion of householders and the public generally but the court did not indicate that this affected the weight given to the survey, probably because Bireley's Orange Beverage was a food which appealed to householders and the public in general.¹²³

Opinion surveys, if properly conducted, may be invaluable in cases involving basic adulteration questions (e.g., whether the flavoring ingredient in popped corn is mineral oil, oleomargarine or butter), but in more complex cases involving, for example, the percentages of ingredients in a food, a survey of ordinary purchasers and consumers is likely to produce no intelligible results.¹²⁴ In such cases, it would seem more fruitful to introduce expert testimony concerning the understanding of purchasers and consumers concerning the composition of a food.¹²⁵ Among the many experts who may shed light on this subject are nutritionists and dieticians; food brokers, wholesalers and retailers; restaurant proprietors and chefs; food processors and representatives of trade associations of food processors, and housewives.¹²⁶ These wit-

122. *Id.* at 974.

123. In comparing the *Corno* case, *supra* note 119, and the *Bireley's* case, *supra* note 121, it should be remembered that the public in general is a potential purchaser and consumer of orange beverages while the public in general is not, to the same degree, a potential purchaser of mule feed.

124. For example in *United States v. 36 Drums of Pop'N Oil*, 164 F.2d 250 (5th Cir. 1947) in which the issue was whether mineral oil was a proper flavoring for popped corn, consumer surveys would probably have been helpful but in *United States v. Cudahy Packing Co.*, 4 Kleinfeld 138 (D. Neb. 1955) in which the issue was whether oleomargarine should contain 79% or 80% fat, the survey would probably have produced no intelligible results.

125. One commentator has summarized the identity factors of a food as follows:

The identity factors of any food are (1) composition, and (2) resulting organoleptically determinable physical characteristics. These, in turn, are subdivided into—

- | | |
|--|--|
| (1) Composition | (a) Qualitative |
| | (b) Quantitative |
| (2) Resulting organoleptically determinable physical characteristics | (a) Taste |
| | (b) Color |
| | (c) Odor |
| | (d) Texture or consistency, ranging from liquid to solid |

See Markel, *The Law On Imitation Food*, 5 FOOD DRUG COSM. L.J. 145, 166 (1950). The expert can compare the qualitative and quantitative composition of the familiar recognizable food and the allegedly adulterated product and describe the differences in the organoleptically determinable physical characteristics of the two foods which result from the differences in their composition. This type of testimony will better enable the jury to understand the issues of the case and their importance. See *United States v. 4½ Cases of Creme de Menthe, White & Gates* 1191 (E.D. Mo. 1926) for this type of approach.

126. In *United States v. 254 Cases of Baby Brand Tomato Sauce*, 63 F. Supp. 916 (E.D. Ark. 1945), a misbranding case in which the principal issue was the proper

nesses may be cross-examined and asked their opinion concerning statements of the composition of the food found in common reference books such as recipe books, dictionaries, and encyclopedias.¹²⁷ From the expert testimony, the fact-finder may be able to construct the standard of the familiar recognizable food. The resulting standard will reflect the consensus of informed opinion rather than an understanding that is common to retail purchasers and consumers and hence will be highly artificial. However, it is a workable and fair standard and probably the best possible in the absence of a standard of identity.¹²⁸

2. The Natural Composition of the Natural Food:

The natural foods, when sold as such, are subject to a standard which may be more stringent than the standard of the familiar recognizable food.¹²⁹ This standard is based upon the natural composition of the particular lot of food involved and it prevents the deliberate dilution of that lot to the level of the general average of that food.¹³⁰

composition of tomato sauce, the witnesses included chemists employed by FDA and competitors, a plant manager employed by a competitor, a buyer and sales manager of a food wholesaler, a housewife, a chef, a restaurant manager, a partner of the defendant canning company, the owner of a competing cannery, and two food brokers. *Cf.* The nutritionists' testimony concerning the proper composition of farina in *Federal Security Adm'r v. Quaker Oats Co.*, 318 U.S. 218 (1943) (appeal from a standard of identity). In addition to experts on food in general, witnesses may testify who are authorities on the particular food involved in the suit. Perhaps the best examples of this type of testimony were the wine experts who testified concerning the proper composition of claret wine in *United States v. 60 Barrels of Wine*, 225 Fed. 846 (W.D. Mo. 1915), basing their testimony upon the taste and smell of claimant's product.

127. See *United States v. 254 Cases of Baby Brand Tomato Sauce*, 63 F. Supp. 916 (E.D. Ark. 1945) for this type of cross-examination. In at least one older case, *United States v. 30 Cases of Grenadine Syrup*, 199 Fed. 932 (D. Mass. 1912), dictionaries seem to have been used directly as evidence of the proper composition of the food, but this practice may raise hearsay problems. *Cf.* McCORMICK, *EVIDENCE* 620-21 (1954).

128. The definition of the familiar recognizable food could be derived from three different sources—the Government, the trade, or the purchasers and consumers of the food. When the Government has failed to promulgate standards, either the custom of the trade or the expectations of purchasers and consumers must govern. Since the trade in general could be deliberately debasing food for economic advantage, the expectations of purchaser and consumers, difficult as they may be to define, seem the best possible test.

129. The standard of the familiar recognizable food reflects the common understanding of purchasers and consumers. See cases cited in note 91 *supra*. Where there is a difference in expectations among purchasers, the food is probably not adulterated unless it falls outside the expectations of all substantial groups of purchasers. See text accompanying notes 95-97 *supra*. It thus follows that if water were added to milk, the milk would probably not be adulterated under the familiar recognizable food standard unless it contained considerably more water than all substantial groups of purchasers and consumers would ordinarily anticipate. This is in contrast to the standard described in text accompanying notes 129-36 *infra* which makes the addition of any water to milk illegal.

130. *United States v. 154 Sacks of Oats*, 283 Fed. 985 (W.D. Va. 1922), *modified*, 294 Fed. 340 (W.D. Va. 1923); *United States v. Heimann, White & Gates* 840 (E.D. Ill. 1917) are the cases which best illustrate this rule. However, support can also be derived for this rule from *Union Dairy Co. v. United States*, 250 Fed. 231 (7th Cir.

Assume, for example, that Farmer X's cows consistently produce milk with more than the average percent of butterfat. If Farmer X abstracts the "extra" butterfat, reducing his milk to the general average of milk sold, he may be held guilty of economic adulteration.¹³¹ Or, assume that Farmer X's fields consistently produce oats with less weeds, dust and chaff than the general average of oats sold. If Farmer X adds additional weeds, dust and chaff to his oats, reducing his oats to the level generally sold, he may be held guilty of economic adulteration.¹³² Even more surprising, Farmer X's milk and oats which have been made exactly equivalent to the general average of the food in the market may be seized because they are economically adulterated.¹³³

This reasoning which seems paradoxical on its face takes on more logic when viewed in the light of the history and purposes of the act. Both the 1906 Act and the Federal Food, Drug, and Cosmetic Act of 1938 were intended to prevent tampering with and debasement of foods.¹³⁴ There is no social good to be achieved from the purposeful debasement of superior natural foods to the level of the general average.¹³⁵ Indeed, if every producer of superior foods reduced his foods to average, then either the Government would have to seize all below-average foods or the average would be constantly falling and the con-

1918); *United States v. Tetz, White & Gates* 917 (W.D. Wash. 1919); *United States v. Taylor, White & Gates* 839 (S.D. Ill. 1917); and *United States v. Griebler, White & Gates* 29 (E.D. Ill. 1908). In these cases the courts treated the addition of water to milk as illegal per se. Cf. *United States v. Six Barrels of Ground Pepper, White & Gates* 817 (S.D.N.Y. 1917) in which the claimant had intermixed pepper shells with pepper. Although the claimant's product still met the United States Department of Agriculture's chemical standards for pepper, the deliberate dilution of the product with pepper shells was illegal.

131. Cf. *United States v. Heimann, White & Gates* 840, 841 (E.D. Ill. 1917) in which the court said: "The evidence shows that not all cows are uniform in the amount of butterfat which their milk contains—whatever it does contain, that the shipper should ship the whole milk without any abstraction of any part of it."

132. See *United States v. 154 Sacks of Oats*, 283 Fed. 985 (W.D. Va. 1922), *modified*, 294 Fed. 340, W.D. Va. 1923), in which claimant deliberately added weed seeds, chaff and dust to his oats until the product just met the standard for oats provided by the Grain Standards Act.

133. In both *United States v. Six Barrels of Ground Pepper, White & Gates* 817 (S.D.N.Y. 1917) (pepper adulterated by pepper shells); and *United States v. 154 Sacks of Oats*, *supra* note 132, the condemned products met the minimum standards for such foods established by the Government. Cf. *United States v. 3998 Cases of Canned Tomatoes, White & Gates* 1213 (D. Del. 1928).

134. See text Part I *supra*.

135. More tampering is permitted in foods which are fabricated from a combination of ingredients and sold under distinctive names because the manufacturer may be producing and selling a new and desirable food. See *United States v. 88 Cases of Bireley's Orange Beverage*, 187 F.2d 967 (3d Cir.), *cert. denied*, 342 U.S. 861 (1951); *United States v. 70 Gross Bottles of Quenchies*, 3 Kleinfeld 141 (S.D. Ohio 1952). Society has no comparable interest in permitting the sale of a natural food, as such, which has been reduced to the average prevailing in the market.

sumer constantly receiving less quality in his foods.¹³⁶ The Government therefore applies standards based on the natural composition of each lot of the food, thus making deliberate debasement illegal per se and giving the greatest possible protection to purchasers and consumers.

3. Statements on the Label:

Some foods set their own standard through representations made on their labels. For example, a food called "Pinocchio Oil" which is labeled "25 per cent pure olive oil" or a food which is labeled "Figlia Mia Brand, a Blend Consisting of 90% Vegetable Oils, Choice Cottonseed, Corn and Peanut Oils, Plus 10% Pure Olive Oil," may be judged by these statements in economic adulteration cases.¹³⁷ The use of the label as a standard in economic adulteration cases is well-supported by precedent at least so far as ingredient statements are concerned.¹³⁸ One recent decision has, however, rejected that approach entirely, relying upon the dictum in *Bireley's* that a food cannot set its own standard.¹³⁹ Another recent decision took precisely the opposite approach.¹⁴⁰ It accepted the label as the standard for the food and looked beyond the ingredient statement to the "selling copy" for the standard. Both decisions deserve detailed review.

In *United States v. Fabro, Inc.*,¹⁴¹ the Government brought a criminal action for economic adulteration and the defendant filed a motion to dismiss. The Government's action was based on section 402 (b) (1) of the act and the Government charged that defendant's pet food was adulterated because it was labeled "Guaranteed Analysis Crude Protein . . . (Min.) . . . 11.00%" while the protein content was actually less. The court dismissed the action stating, "The only standard shown by the information or by the statute upon which it is based is that the dog food showed upon its label that it contained 11% protein when

136. There is also a possibility that producers permitted to reduce superior natural foods to average might reduce these foods below average on occasion.

137. See *United States v. 40 Cases of Pinocchio Brand Oil*, 289 F.2d 343 (2d Cir.), *cert. denied*, 368 U.S. 831 (1961); *United States v. 5 Cases of Figlia Mia Brand*, 179 F.2d 519 (2d Cir.), *cert. denied*, 339 U.S. 963 (1950).

138. See cases cited in note 137 *supra* and *United States v. Antonio Corrao Corp.*, 185 F.2d 372 (2d Cir. 1950); *Barnes v. United States*, 142 F.2d 648 (9th Cir. 1944); *United States v. Fabro, Inc.*, 206 F. Supp. 523 (M.D. Ga. 1962); *United States v. Germack, White & Gates* 1178 (S.D.N.Y. 1925); *United States v. One Carload of Corno Horse & Mule Feed*, 188 Fed. 453 (M.D. Ala. 1911). See also *United States v. Food Products Labs., Inc.*, 6 Kleinfeld 123 (W.D. Mo. 1963); *United States v. Beck*, 2 Kleinfeld 197 (S.D. Iowa 1949).

139. See *United States v. Fabro, Inc.*, 206 F. Supp. 523 (M.D. Ga. 1962).

140. See *United States v. Food Products Labs., Inc.*, 6 Kleinfeld 123 (W.D. Mo. 1963).

141. 206 F. Supp. 523 (M.D. Ga. 1962).

in fact it contained less. Thus, it attempts to make the product serve as its own standard, and this the said product cannot be made to do."¹⁴²

In support of this reasoning, the court cited *Bireley's*. *Bireley's*, however, involved a situation in which the Government attempted to make the appearance of the product serve as the standard and the court rightly rejected this approach as "speculative" or even "whimsical."¹⁴³ The label in *Fabro* set a definite and specific standard and, it is submitted, the court in *Fabro* erred when it failed to follow cases prior to and after *Bireley's* which have accepted such a standard in economic adulteration cases.¹⁴⁴

Approximately a year and a half after the *Fabro* decision, another district court decided an economic adulteration case based on a label statement. This case, *United States v. Food Products Labs., Inc.*,¹⁴⁵ was also a criminal action and the Government brought economic adulteration charges because the defendants shipped in interstate commerce certain vitamin D enrichment wafers which were labeled as "stable" and having a "long shelf life" when in fact the wafers were unstable and had a short shelf life. The court ignored the *Bireley's* decision and looked to the label of the food for the standard against which the food could be judged. The defendants argued that the words "stable" and "long shelf life" were not used in the absolute sense; that they were relative words which should not form the basis of a criminal charge. The court rejected that argument, stating, "We cannot accept defendants' argument that the offenses here charged could be committed only if words of absolute meaning were used. In cases involving relative words there are, of course, areas within the center of the spectrum that may involve difficulty but the tests of particular products here involved reveal conditions that rise above or fall below any high or low water marks that could be said to be encompassed within any doubtful area toward the center of the concept of relativity."¹⁴⁶ The defendants were found guilty.

Thus, in contrast to *Fabro*, which would not accept an absolute statement on the label as the standard in an economic adulteration case, the *Food Products* case held that even relative statements on the label could be used as the standard.¹⁴⁷ The *Fabro* court cited *Bireley's* while

142. *Id.* at 526.

143. *United States v. 80 Cases of Bireley's Orange Beverage*, 187 F.2d 967 (3d Cir.), *cert. denied*, 342 U.S. 861 (1951).

144. See cases cited notes 137-38 *supra*.

145. 6 Kleinfeld 123 (W.D. Mo. 1963).

146. *Id.* at 124.

147. The distinction between absolute and relative statements is perhaps more often described as the distinction between facts and puffery. Merchants have tradi-

the *Food Products* court ignored it. Yet *Bireley's* was concerned with the fatal vagueness of the standard, a problem which was more present in *Food Products* than in *Fabro*.¹⁴⁸ It could be argued that the apparent orange juice content of a beverage is no more vague a standard than the words "stable" and "long shelf life."¹⁴⁹ If this is so, both cases were wrong; *Fabro* because it failed to recognize that label statements could provide the standard and *Food Products* because it failed to recognize that the standard provided by the label must be definite and precise. Such an interpretation would return the law to its approximate state prior to these cases.¹⁵⁰

Part III: *The Individual Subsections of Section 402 (b)*

A. *Introduction.*

After the proper standard has been identified, there must be a comparison of the allegedly adulterated food with the standard and a determination whether the differences constitute economic adulteration. Not all deviations from the standard are prohibited. For the Government to prevail, it must prove both a proper standard and a deviation from that standard which falls within one of the individual

tionally been given wide latitude in expressing their opinions or evaluations of the intangible qualities of their products although the FTC has decreased that latitude somewhat in more recent years. See Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439, 469-70 (1964). The *Food Products* decision suggests that if the puffery on the label relates to the composition of the food and is too extravagant, liability may be imposed under economic adulteration law.

148. *Fabro*, *supra* note 139, raised for the first time the question whether *Bireley's* really barred all standards derived from the food itself from economic adulteration law, and, contrary to the opinion of the author of this article, answered the question in the affirmative. Both the question and the answer were unnecessary in *Fabro* since the court had other more substantial grounds (which it also relied upon) for finding for the defendant. See text accompanying notes 161-64 *infra*.

149. In *Bireley's*, *supra* note 143, the court refused to let the jury speculate whether the apparent orange juice content of the beverage was more than 6%. Presumably the jury had both beverages—*Bireley's* and natural orange juice—as exhibits. In *Food Products*, *supra* note 140, the court sitting without a jury, decided that vitamin enrichment wafers labeled "stable" and "long shelf life" were adulterated and misbranded because they could not retain the vitamins "over any significant period of time." *Id.* at 125. Both questions seem vague. Assume, however, that the court's conclusion that the vitamin enrichment wafers were misbranded was correct, would it necessarily follow that they were economically adulterated? It could be argued that when it comes to puffery at least, the courts ought to regard this as the exclusive province of the misbranding section of the Federal Food, Drug, and Cosmetics Act, reserving economic adulteration penalties for factual misrepresentations concerning the composition of the food. There is no indication that the defendant raised this argument in the *Food Products* case.

150. Before *Fabro*, *supra* note 139, and *Food Products*, *supra* note 140, there were no reported cases in which a court had ever refused to apply a definite standard derived from the food in an economic adulteration case or in which a court had ever applied puffery as the standard in an economic adulteration case.

subsections of section 402 (b). The problems encountered under each subsection are described below.

B. "(b) (1) *If Any Valuable Constituent Has Been In Whole Or In Part Omitted Or Abstracted Therefrom*":

Section 402 (b) (1) provides a food is adulterated if any valuable constituent is in whole or in part omitted or abstracted therefrom.¹⁵¹ The key word in this subsection is "valuable," for it describes those constituents which cannot be omitted or removed from the food without adulteration. Every constituent of a food presumably has some value but Congress apparently intended to distinguish between constituents of greater and lesser value by the use of the word, "valuable." The distinction could be based upon the cost of the constituent ("financial value"); the amount of calories or energy provided by the constituent ("food value"), or the total nutritive contribution made by the constituent ("nutritive value").¹⁵² Different results will be reached in economic adulteration cases, depending upon which value is adopted.

Assume, for example, a quart of milk is labeled "Enriched with 1500 Units of Vitamin A" and the Vitamin A is in part omitted. If the label sets the standard for the food, it can be argued that, so far as section 402 (b) (1) is concerned, (a) there is no economic adulteration because "valuable" means "financial value" and Vitamin A is relatively inexpensive, or, (b) there is no economic adulteration because "valuable" means "food value" and Vitamin A supplies no calories or energy, or, (c) there is economic adulteration because "valuable" means "nutritive value" and Vitamin A is an important element in nutrition. Valuable is thus inherently ambiguous in this context and the statute contains no definition of this highly ambiguous word.¹⁵³

The ambiguity implicit in "valuable" has not been clarified by court decisions. The predecessor 1906 statute prohibited merely the

151. 52 Stat. 1046 (1938), 21 U.S.C. § 342(b)(1) (1958).

152. These definitions do not appear as such in economic adulteration cases. However, a comparison of FDA's economic adulteration cases and its trade correspondence illustrates that these values are considered by both FDA and the courts. Compare, for example, *United States v. Two Bags of Poppy Seeds*, 147 F.2d 123 (6th Cir. 1945) where the holding of economic adulteration was based solely on financial value with *United States v. 36 Drums of Pop'N Oil*, 164 F.2d 250 (5th Cir. 1947) where the holding of economic adulteration was based primarily on food value, although the product was also economically inferior. See also FDA Trade Correspondence 311, August 20, 1940 (1 Kleinfeld 691), and 8A, April 4, 1946 (1 Kleinfeld 752) for examples of FDA's concern about food values. Cf. *United States v. Newton Tea & Spice Co.*, 275 Fed. 394 (S.D. Ohio 1920), *aff'd*, 288 Fed. 475 (6th Cir. 1923) a misbranding case in which the court was concerned with the food and nutritive values of a product labeled as a substitute for eggs.

153. Cf. *United States v. Fabro, Inc.*, 206 F. Supp. 523 (M.D. Ga. 1962).

abstracting of a valuable constituent.¹⁵⁴ This seemed to imply a removal of an ingredient from a pre-existing food rather than a failure to put a usual ingredient into a food¹⁵⁵ and this is probably the reason why there were so few cases involving adulteration under this subsection of the 1906 Act. The 1906 Act cases relating to this subsection seemed to involve primarily economic cheapening of foods accompanied occasionally by a reduction in food or nutritive value as well.¹⁵⁶

The Federal Food, Drug, and Cosmetic Act of 1938 prohibited the omission as well as the abstraction of valuable constituents and there has been a slight increase in litigation under the act. In general, however, the courts have avoided any attempt to define or interpret "valuable," although holdings of economic adulteration usually occur in cases involving pecuniary and nutritive frauds on the public.¹⁵⁷ One of the few cases involving food value was *United States v. 70 Gross Bottles of Quenchie's*.¹⁵⁸ In the *Quenchie's* case, the Government seized a base for soft drinks which had been sweetened by saccharin instead of sugar. The Government contended that the beverage base was economically adulterated because saccharin contributed no calories or energy and had no food value. One of the Government's witnesses testified that she gave her children soft drinks for energy and that when

154. Act of June 30, 1906, ch. 3915, 34 Stat. 768, § 7, *repealed*, 52 Stat. 1059 (1938).

155. *Cf.* *United States v. One Carload of Corno Horse and Mule Feed*, 188 Fed. 453, 456-57 (M.D. Ala. 1911): "There is no charge or proof of removal of any part of the contents of the package as originally put up." But see *United States v. Golden & Co., White & Gates 1033* (Police Ct. D.C. 1922) (involving canned oysters with excess water in which the court apparently considered it sufficient if the valuable constituent (oysters) was in part omitted rather than removed.)

156. See *United States v. Schider*, 246 U.S. 519 (1918); *United States v. Hall-Baker Grain Co., White & Gates 291* (W.D. Mo. 1911), *rev'd*, because there was insufficient evidence, 198 Fed. 614 (8th Cir. 1912) (inferior wheat allegedly packed with No. 2 wheat, reducing its quality); *United States v. Rinchini, White & Gates 318* (D. Ariz. 1911) (ice cream allegedly deficient in butterfat); *United States v. One Carload of Corno Horse & Mule Feed*, *supra* note 155 (oat byproducts allegedly reduced quality of feed when substituted for ground oats); *United States v. Heimann, White & Gates 840* (E.D. Ill. 1917) (butterfat allegedly abstracted from milk, reducing its quality); and *United States v. Golden*, *supra* note 155 (excess water allegedly put in canned oysters reducing their quality).

157. See *United States v. 5 Cases of Figlia Mia Brand*, 179 F.2d 519 (2d Cir.), *cert. denied*, 339 U.S. 963 (1950) (olive oil omitted from blend of oils); *Barnes v. United States*, 142 F.2d 648 (9th Cir. 1944) (vitamin deficiency in vitamin tablets); *United States v. Fabro, Inc.*, 206 F. Supp. 523 (M.D. Ga. 1962) (protein omitted from dog food); *United States v. 70 Gross Bottles of Quenchie's*, 3 Kleinfeld 141 (S.D. Ohio 1952) (sugar allegedly omitted from soft drink base); *United States v. Midfield Packers*, 3 Kleinfeld 157 (W.D. Wash. 1952) (fruit in part allegedly omitted from frozen fruit); *United States v. Antonio Corrao Corp.*, 2 Kleinfeld 206 (E.D.N.Y.), *rev'd*, 185 F.2d 372 (2d Cir. 1950) (olive oil allegedly omitted from blend of oils); *United States v. 55 Cases of Popped Corn*, 62 F. Supp. 843 (D. Idaho 1943) (butter and vegetable oils allegedly omitted from popped corn).

158. 3 Kleinfeld 141 (S.D. Ohio 1952).

a soft drink was labeled "sweetened," she expected it to contain sugar.¹⁵⁹ Claimant's position was that many purchasers wanted a beverage base without sugar. The court issued a judgment for claimant, noting that the very absence of calories and food value made the food valuable to some purchasers.¹⁶⁰

The most recent reported case under section 402 (b) (1) is *United States v. Fabro, Inc.*¹⁶¹ In that case, the defendant shipped a dog and cat food in interstate commerce. The pet food was labeled with a guaranteed analysis stating the minimum percentages of protein and fat therein. In fact, the pet food did not contain the minimum protein and fat stated in the guaranteed analysis and the Government brought criminal charges against the defendant under section 402 (b) (1). The court dismissed the charges on two grounds: first, because the statute is too vague and indefinite to be sanctioned as a penal statute and second, because the product cannot serve as its own standard.¹⁶²

The court's reasoning concerning the vagueness of section 402 (b) (1) was based on the difficulties involved in determining the meaning of "valuable constituent." The court noted, "The statute furnishes no definition of what constitutes a 'valuable constituent,' nor can a satisfactory definition be found in the words themselves. The word 'valuable' is a relative term susceptible of many interpretations and of no definite or absolute meaning."¹⁶³ The latest decision under section 402 (b) (1) therefore holds that section 402 (b) (1) is too vague to be enforced in criminal actions and, with this precedent, it is likely that the Government will have increased difficulties in cases under this section in the future.¹⁶⁴

159. *Id.* at 143.

160. *Ibid.* "Saccharin is allegedly non-nutritious. Unlike sugar it does not build calories. It merely sweetens. But this very characteristic is a quality that is much desired and sought by many who fear that their waist line may unduly expand with the use of sugar."

161. 206 F. Supp. 523 (M.D. Ga. 1962).

162. The court also dismissed the case because under its interpretation of *Bireley's* the product could not set its own standard. But see text accompanying notes 141-44 *supra* for a review of the fallacies of that theory.

163. *Supra* note 161 at 526.

164. The Government had not been particularly successful in either civil or criminal cases prior to *Fabro*, *supra* note 161. Of the seven cases under § 402(b)(1) listed in note 157 *supra*, the Government won two and lost five. The Government is now in a situation in which its indifferent prior record under § 402(b)(1) is coupled with a patently recognizable and recognized ambiguity in the statute. Since the Government could not convince the *Fabro* court that protein was a valuable constituent of dog food, other courts will probably be hesitant to declare any constituent as "valuable."

C. "(b) (2) If Any Substance Has Been Substituted Wholly Or In Part Therefor":

Section 402 (b) (2) is the broadest section of our economic adulteration statute. This section provides that a food is adulterated if any substance has been substituted wholly or in part therefor.¹⁶⁵ An almost identical provision was contained in the 1906 Food and Drugs Act.¹⁶⁶

The statute makes no distinction as to whether the substance substituted is better or worse than the original ingredient.¹⁶⁷ Substitution of an ingredient is per se sufficient to adulterate a food under the literal language of the statute.¹⁶⁸ Most improvements in fabricated foods involve a change in the identity or proportion of the ingredients commonly used in these foods. There is thus a substitution of one substance for another which is literally prohibited by section 402 (b) (2).

Because of the sweeping nature of section 402 (b) (2), it has been relied upon by the Food and Drug Administration in multiplicity of cases.¹⁶⁹ Many of these cases have involved obvious economic frauds and there can be little quarrel with the results of the cases although the basic objections to the statute itself remain. The statute was obviously designed to permit purchasers to purchase recognized foods with confidence that they will receive the food they desire.¹⁷⁰ The

165. 52 Stat. 1046 (1938), 21 U.S.C. § 342 (b) (2) (1958).

166. See Act of June 30, 1906, ch. 3915, 34 Stat. 768, § 7, repealed, 52 Stat. 1059 (1938).

167. See CCH FOOD DRUG COSM. L. REP. ¶ 50,087.

168. *Ibid.*

169. See, e.g., *United States v. Schider*, 246 U.S. 519 (1918); *Van Liew v. United States*, 321 F.2d 664 (5th Cir. 1963); *United States v. Treffinger*, 224 F.2d 855 (2d Cir. 1955); *United States v. 716 Cases of Del Comida Brand Tomatoes*, 179 F.2d 174 (10th Cir. 1950); *United States v. 36 Drums of Pop'N Oil*, 164 F.2d 250 (5th Cir. 1947); *Libby, McNeill & Libby v. United States*, 210 Fed. 143 (4th Cir. 1913); *Hall-Baker Grain Co. v. United States*, 198 Fed. 614 (8th Cir. 1912); *United States v. Cudahy Packing Co.*, 4 Kleinfeld 138 (D. Neb. 1955); *United States v. 149 Cases of Black Eyed Peas*, 4 Kleinfeld 27 (D. Colo. 1953); *United States v. 70 Gross Bottles of Quenchies*, 3 Kleinfeld 141 (S.D. Ohio 1952); *United States v. Beck*, 2 Kleinfeld 197 (S.D. Iowa 1946); *United States v. 254 Cases of Baby Brand Tomato Sauce*, 63 F. Supp. 916 (E.D. Ark. 1945); *United States v. 55 Cases of Popped Corn*, 62 F. Supp. 843 (D. Idaho 1943).

170. *Cf. United States v. Paraskevopolus, White & Gates* 925, 926 (S.D.N.Y. 1919); *United States v. Shucart, White & Gates* 693, 694 (E.D. Mo. 1915); *United States v. 58 Sacks of Corn Meal, White & Gates* 322, 323 (D. S.C. 1911) (misbranding) ("As a matter of law I charge you that a man when he purchases an article, has a right to buy whatever he pays his money for; it may be a pure fancy on his part, and it may be the veriest whim on his part, but if he stipulates in the contract that he is to buy certain specified articles, or an article prepared in a certain specified way, and that is the contract and the agreement, and he pays for it, then he is entitled to have it, although the result may be that he chooses to buy an inferior article at a higher price...")

theory of the statute is analogous to the FTC decisions which hold that the consumer is prejudiced, if upon giving an order for one thing he is supplied with something else, even if his choice is dictated by caprice, fashion or ignorance.¹⁷¹ Analogous situations under FTC law are resolved by truthful labeling and it might be argued analogously that truthful labeling should be accepted as a defense under section 402 (b) (2), even if the labeling is not a defense under the other adulteration sections of the statute.

The applicability of a truthful labeling defense to a economic adulteration charge under section 402 (b) (2) was presented squarely in *United States v. 716 Cases of Del Comida Brand Tomatoes*.¹⁷² The Food and Drug Administration seized the claimant's tomatoes because water had been added to them. Although economic adulteration charges might have been alleged under other sections of the statute, the Government relied upon section 402 (b) (2), contending that a product containing water was substituted wholly or in part for the canned tomatoes. The trial court held that the tomatoes were misbranded but not adulterated and provided in its decree that the tomatoes be released to the claimant for the purpose of truthful labeling. The Circuit Court reversed, holding that the tomatoes were economically adulterated and could not be sold in interstate commerce even if they were truthfully labeled.¹⁷³ While the facts in the case were certainly unfavorable to the claimant, the case stands as a precedent for rejecting truthful labeling as a defense to a section 402 (b) (2) charge, with apparently only one district court opinion, which is not generally reported, to the contrary.¹⁷⁴

171. See, *e.g.*, *FTC v. Algoma Lumber Co.*, 291 U.S. 67 (1934).

172. 179 F.2d 174 (10th Cir. 1950).

173. *Ibid.*

174. See *United States v. 70 Gross Bottles of Quenchies*, 3 Kleinfeld 141 (S.D. Ohio 1952). The court said, "Thus, the generally recognized rule that no illegal substitution occurs where a replacement is made, in whole or in part, with another substance not injurious or deleterious to health, provided the name of the substance substituted appears on the label, governs in these proceedings. And we are not confusing adulteration with misbranding. *United States v. 36 Drums of Pop'N Oil, supra.*" *Id.* at 144.

The *Pop'N Oil* case, 164 F.2d 250 (5th Cir. 1947), involved artificially colored mineral oil which had been prepared as a flavoring for popped corn. The Government alleged adulteration under § 402(b)(2), (3), and (4) and the Circuit Court only considered the latter two subsections. No reason is cited by the Circuit Court for not considering the § 402(b)(2) claim and the District Court opinion is unreported. However, the Circuit Court states that the District Court dismissed the libel because truthful labeling was, in the absence of a standard of identity, sufficient to comply with the act. The court in the *Quenchies* case, may have assumed that the failure of the Circuit Court to reverse the dismissal of the § 402(b)(2) was an implied holding that labeling was a defense to this section of the statute. Alternatively, the court in *Quenchies*

A more recent attempt to limit the all-inclusive language of section 402 (b) (2) was made by the Fifth Circuit Court of Appeals in *Van Liew v. United States*.¹⁷⁵ Defendants were convicted of conspiring to sell and selling an economically adulterated orange drink in interstate commerce. The Government's theory was apparently that the orange drink would be confused with orange juice. The court reversed the conviction on a number of grounds, one of which was a unique interpretation of section 402 (b) (2).¹⁷⁶ The court reasoned that section 402 (b) (2) must be construed in conjunction with section 402 (b) (1). The substitution which is prohibited according to the court is the substitution of an ingredient for a valuable constituent of the food.

The validity of this interpretation seems dubious.¹⁷⁷ Under the court's interpretation, there would have to be an omission or abstraction which violated section 402 (b) (1) before there could be a substitution which violated section 402 (b) (2).¹⁷⁸ Section 402 (b) (2) would thus add nothing to section 402 (b) (1) and the *Van Liew* case makes sense only if Congress intended to prohibit the same offense twice.¹⁷⁹

If, as seems likely, the *Van Liew* case is not the law, the limitations, if any, on section 402 (b) (2) are not found in the statute itself. A possible solution is to look to the purpose of the statute. Congress was clearly trying to prevent fraud and confusion in section 402 (b) (2)

may only have been citing the *Pop'N Oil* case for the proposition that adulteration should not be confused with misbranding.

175. 321 F.2d 664 (5th Cir. 1963).

176. The court stated, "For there to be a crime under (2), there must be the substitution of any substance for some valuable constituent of the food. Unless there is a valuable constituent plus a substitution of any substance for it, there is simply no crime." *Id.* at 670.

177. The 1906 Act provided: "That for the purposes of this Act an article shall be deemed to be adulterated:....

First....

Second. If any substance has been substituted wholly or in part for the article.

Third. If any valuable constituent of the article has been wholly or in part abstracted...."

There is thus no possible construction of the 1906 Act whereby it can be logically concluded that the substance had to be substituted for a "valuable constituent." The economic adulteration provisions of the Federal Food, Drug, and Cosmetic Act were intended to be broader than the corresponding provisions of the 1906 Act. It is therefore inconsistent with the history and purpose of the Federal Food, Drug, and Cosmetic Act to conclude that the revised statute was intended to limit § 402(b)(2) to the substitution of substances for a valuable constituent. None of the prior cases have so limited it. See, e.g. cases cited in note 169 *supra*.

178. Before a substance can be substituted for a valuable constituent, the valuable constituent must be omitted or abstracted. The omission or abstraction of valuable constituents is prohibited by § 402(b)(1). See 52 Stat. 1046 (1938), 21 U.S.C. § 342(b)(1) (1958).

179. *Ibid.*

and when the substitution results in either economic fraud or a nutritionally deficient food, the courts will probably find economic adulteration.¹⁸⁰ The substantiality of the deception and the producer's intent are probably also relevant.¹⁸¹ Labeling, while not a defense to a section 402 (b) (2) charge, may be an indication of the producer's intent since those who intend fraud do not usually publish the changes they have made in foods. Consideration of these factors would reconcile most of the cases which have been decided under section 402 (b) (2).¹⁸² Although the same type of interpretation was rejected in the *Filled Milk Act* case, it was rejected in very different circumstances.¹⁸³ Even if

180. See *e.g.*, *United States v. 40 Cases of Pinocchio Brand Oil*, 289 F.2d 343 (2d Cir.), *cert. denied*, 368 U.S. 831 (1961) (cheaper oils substituted for olive oil); *United States v. 716 Cases of Del Comida Brand Tomatoes* 179 F.2d 174 (10th Cir. 1950) (water substituted for tomatoes); *United States v. 149 Cases of Black Eyed Peas*, 4 Kleinfeld 27 (D. Colo. 1953) (brine substituted for peas); *United States v. Beck*, 2 Kleinfeld 197 (S.D. Iowa 1948) (mineral oil and other substances substituted for butter and cream), all of which were decided in favor of the Government.

181. *Compare* *United States v. 716 Cases of Del Comida Brand Tomatoes*, 179 F.2d 174 (10th Cir. 1950) and *United States v. 30 Cases of Leader Brand Strawberry Fruit Spread*, 93 F. Supp. 764 (S.D. Iowa 1950) with *United States v. Cudahy Packing Co.*, 4 Kleinfeld 138 (D. Neb. 1955). In the former two cases the violation was substantial and deliberate while in the latter the alleged adulteration was minor and inadvertent. Economic adulteration was held in the *Del Comida* case and the *Leader Brand* case but not in the *Cudahy* case.

182. *Compare* the cases cited in note 180 *supra* with the following cases in which the claimant (or defendant) prevailed: *United States v. Cudahy Packing Co.*, 4 Kleinfeld 138 (D. Neb. 1955) (minor and inadvertent shortage of fat in oleomargarine); *United States v. 70 Gross Bottles of Quenchies*, 3 Kleinfeld 141 (S.D. Ohio 1952); *United States v. 55 Cases of Popped Corn*, 62 F. Supp. 843 (D. Idaho 1943).

In general, when the Government has prevailed under § 402(b)(2), it has been in factual situations where there was economic and nutritional fraud, where the deception was substantial and deliberate, and where there was no labeling indicating the substitution. Conversely, the claimant (or defendant) has usually prevailed when it was selling a useful and accurately labeled food with changed ingredients, see *Quenchies, supra*, when the substitution was an unintentional error, see *Cudahy, supra*, or when the court saw no reason why the substitution should not be made. See *Popped Corn, supra*.

183. The Filled Milk Act specifically prohibits interstate sale of any milk containing fats or oil other than milk fat or which has been made in imitation or semblance of milk. 42 Stat. 1486 (1923), 21 U.S.C. §§ 61-63 (1958). The statute is therefore much more specific than the economic adulteration statute. Additionally, the United States Supreme Court cases have involved foods which were made in imitation of milk but which were much less costly. See *Carolene Products Co. v. United States*, 323 U.S. 18 (1944) and *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). It is one thing for the Supreme Court to prohibit the sale of a food consisting of skimmed milk and coconut oil which is in semblance of milk, or a food which consists of milk and cottonseed or coconut oil which is in semblance of milk, when there is a specific statute and the food offers an obvious opportunity for economic fraud. Quite a different case is presented if, for example, the courts are operating under a general statute such as § 402(b)(2) and the food involved consists of the ordinary ingredients plus an added ingredient which is more expensive and improves the nutritive qualities of the food. There may be a substitution of one substance for another but the courts are likely to approach the substitution much more sympathetically. *Cf. United States v. Cudahy Packing Co.*, 4 Kleinfeld 138 (D. Neb. 1955) and *United States v. 70 Gross*

this interpretation were adopted, the uncertainty which pervades the statute would, however, remain. Uncertainty seems highly inappropriate since criminal liability can be imposed for violations committed without criminal intent under the Federal Food, Drug, and Cosmetic Act.¹⁸⁴

D. "(b) (3) *If Damage Or Inferiority Has Been Concealed In Any Manner*":

Of the four subsections of section 403 (b) only subsection 403 (b) (3) is passably well drafted. This subsection provides that a food is adulterated if damage or inferiority has been concealed in any manner.¹⁸⁵ The corresponding subsection in the 1906 Food and Drugs Act provided that a food was adulterated if it was mixed, colored, powdered, coated or stained in a manner whereby damage or inferiority was concealed.¹⁸⁶

The statute therefore requires proof that the food, when compared to a proper standard, has either been damaged or is inferior and that the damage or inferiority has been concealed. Damage and inferiority are two different concepts. Damage means that the food has deteriorated or been injured or suffered a loss of strength or quality.¹⁸⁷ Inferiority means that the food was originally of low grade or quality.¹⁸⁸ Inferiority is present if the appearance, texture, composition, digestibility, or nutritive qualities of the food are of low grade and quality.¹⁸⁹ Foods may also be economically inferior, depending upon the values of the market place.¹⁹⁰ Concealment of the damage or inferiority is also essential. It is not illegal under this subsection to sell a damaged or inferior food so long as the damage or inferiority is apparent.

Most of the cases brought by the Government under the 1906 Food and Drugs Act involved foods which had been artificially colored to look like superior foods. These cases included cases involving artificially colored vanillin which simulated vanilla extract,¹⁹¹ arti-

Bottles of Quenchies, 3 Kleinfeld 141 (S.D. Ohio 1952) for less favorable situations in which the courts decided in favor of the manufacturer.

184. See *Van Liew v. United States*, 321 F.2d 664 (5th Cir. 1963).

185. 52 Stat. 1046 (1938), 21 U.S.C. § 342(b) (3) (1958).

186. Act of June 30, 1906, ch. 3915, § 7, 34 Stat. 768, repealed, 52 Stat. 1059 (1938).

187. *United States v. Ten Cases of Bred Spred*, 49 F.2d 87 (8th Cir. 1931).

188. *Ibid.*

189. See *United States v. 200 Sacks of Wheat Middlings, White & Gates* 1189 (E.D. Mich. 1926).

190. See *United States v. Atlantic Macaroni Co., White & Gates* 793, 804 (E.D.N.Y. 1917); see also *United States v. Two Bags of Poppy Seeds*, 147 F.2d 123 (6th Cir. 1945) and *United States v. 36 Drums of Pop'N Oil*, 164 F.2d 250 (5th Cir. 1947).

191. *United States v. Hudson Mfg. Co., White & Gates* 462 (N.D. Ill. 1913).

ficially colored lemon oil and alcohol which simulated lemon flavor,¹⁹² artificially colored derivative of wild cherry bark which simulated cherry juice,¹⁹³ and artificially colored macaroni which simulated macaroni composed of superior wheat.¹⁹⁴ One classic series of cases involved flour which had been bleached white. In the *Lexington Mills* case¹⁹⁵ which ultimately went to the Supreme Court, the jury returned a verdict of adulteration and the Circuit Court reversed the verdict because the color of the flour was at best an uncertain index of quality and because the color of the bleached flour was distinct from the color of the nonbleached superior flour. The United States Supreme Court affirmed the Circuit Court without deciding the economic adulteration issue since the case was to be retried to a jury.¹⁹⁶

Probably the most well known case arising under this subdivision of the 1906 Food and Drug Act was *United States v. Nesbitt Fruit Products, Inc.*¹⁹⁷ The claimant sold a syrup consisting of orange juice, orange peel flavoring, sugar, and acid in interstate commerce. The Government alleged that the inferiority of this product had been concealed because it resembled orange juice. The evidence showed that the color of the syrup itself was far deeper than orange juice and that the syrup could not possibly be mistaken for orange juice. When an orange juice drink was prepared, the syrup was diluted by water and the diluted beverage simulated the color and taste of orange juice. However, the evidence showed that the dilution was made in the presence of the consumer, and it was obvious to the consumer that the orange drink was not orange juice. The Circuit Court therefore held that the inferiority, if any, of the claimant's product had not been concealed.

The Government occasionally tried concealed inferiority cases under the 1906 Act involving concealment of inferiority by means other than artificial coloring. These cases included alleged concealment of inferior

192. *United States v. Edward Western Tea & Spice Co.*, White & Gates 69 (E.D. Mo. 1909).

193. See *Weeks v. United States*, 224 Fed. 64 (2d Cir. 1915), *aff'd on other grounds*, 245 U.S. 618 (1918). The Government was unsuccessful in the *Weeks* case because the food was labeled "compound."

194. *United States v. Atlantic Macaroni Co.*, White & Gates 793 (E.D.N.Y. 1917). The macaroni had been colored yellow to simulate the appearance of macaroni made from semolina flour prepared from durum wheat but was actually prepared from flour made from inferior wheat.

195. See *United States v. 625 Sacks of Flour*, White & Gates 129 (W.D. Mo. 1910), *rev'd, sub. nom. Lexington Mill & Elevator Co. v. United States*, 202 Fed. 615 (8th Cir. 1913), *aff'd*, 232 U.S. 399 (1914).

196. *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399 (1914).

197. *United States v. Nesbitt Fruit Products, Inc.*, 96 F.2d 972 (5th Cir. 1938).

wheat by mixing it with superior wheat,¹⁹⁸ alleged concealment of wild oats, weed seeds and chaff by mixing them with cultivated oats,¹⁹⁹ and alleged concealment of wheat by-products by powdering them.²⁰⁰ However, the Government had very little success in such cases and, in general, the Government's victories in reported cases under this subsection of the 1906 Act almost universally involved artificially colored foods.

Although the Food, Drug, and Cosmetic Act of 1938 substantially broadened this subsection, most of the Governments' cases have continued to involve artificially colored products. The two classic cases under this section of the Federal Food, Drug, and Cosmetic Act are *United States v. Two Bags of Poppy Seeds*²⁰¹ and *United States v. 36 Drums of Pop'N Oil*.²⁰² In the *Poppy Seed* case the seeds had been artificially colored to resemble more expensive seeds. In the *Pop'N Oil* case, mineral oil had been artificially colored to resemble butter or vegetable oils. In both cases the Government alleged that the coloring concealed the inferiority of the foods and in both cases, although the products were truthfully labeled, the Government was successful. In the *Poppy Seed* case it was proved that despite the artificial coloring, the inferiority would be obvious to the dealers who purchased the poppy seeds although consumers would be deceived by artificial coloring. In the *Pop'N Oil* case, the dealers who purchased the oil recognized that it was not butter or vegetable oil but consumers of the popped corn would have been deceived by the use of the oil in place of butter or vegetable oils. In both cases, the courts held that inferiority was concealed if consumers would be defrauded. In neither the *Poppy Seed* nor *Pop'N Oil* case was the product deceiving anyone at the time of its seizure. Instead, both courts rested their decision on the ground that the artificially colored product would deceive consumers in the future.

Despite the fact that most judgments of economic adulteration under this subsection have involved artificially colored products, the prohibition is broader than this. The Food and Drug Administration's Trade Correspondence suggests that if a chemical preservative conceals the age of a product or if an imitation flavoring conceals the inferior taste of a product, the foods may be adulterated, although FDA has brought

198. *United States v. Hall-Baker Grain Co.*, White & Gates 291 (W.D. Mo. 1911), *rev'd*, 198 Fed. 614 (8th Cir. 1912).

199. *United States v. 154 Sacks of Oats*, 283 Fed. 985 (W.D. Va. 1922), *modified*, 294 Fed. 340 (W.D. Va. 1923).

200. *United States v. 200 Sacks of Wheat Middlings*, White & Gates 1189 (E.D. Mich. 1926).

201. *United States v. Two Bags of Poppy Seeds*, 147 F.2d 123 (6th Cir. 1945).

202. *United States v. 36 Drums of Pop'N Oil*, 164 F.2d 250 (5th Cir. 1947).

no such cases yet.²⁰³ Similarly, inferior foods which are artificially prepared to have the texture or consistency or even odor of superior foods may be held to violate this subsection.²⁰⁴ The outer limits of subsection 402 (b) (3) are still to be discovered but, in contrast to the two preceding subsections of the statute, subsection 402 (b) (3) seems at least to be a relatively straight forward, well-drafted prohibition against economic and nutritional fraud.²⁰⁵

E. "(b) (4) *If Any Substance Has Been Added Thereto Or Mixed Or Packed Therewith So As To Increase Its Bulk Or Weight, Or Reduce Its Quality Or Strength, Or Make It Appear Better Or Of Greater Value Than It Is*":

Section 402 (b) (4) provides that a food is adulterated if any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength; or make it appear greater or of better value than it is.²⁰⁶ The corresponding section in the 1906 Act prohibited the mixing or packing of a substance which reduced the quality and strength of a food but did not prohibit the addition of substances which increased the bulk or weight of a food, or made the food appear greater or of better value than it is.²⁰⁷ This subsection was therefore both lengthened and broadened in the passage of the Federal Food, Drug, and Cosmetic Act.

Under the 1906 Act, the Government had to prove both that a substance was mixed or packed with the food and that the added substance reduced, lowered, or injuriously affected the quality and strength of the food. The latter element was sometimes supplied by inference. For example, in the early case of *United States v. Griebl*²⁰⁸ involving watered milk, the court charged the jury, "It is sufficient if you believe he delivered the milk for shipment, or shipped it, and that there was water in it, and that the water was mixed therewith so as to reduce or lower or injuriously affect its quality or strength; and as to that question you know as much as any witness. It is not a matter for an expert. It is a matter of everyday knowledge as to whether water

203. FDA TRADE CORRESPONDENCE 49, February 12, 1940 (1 Kleinfeld 589). See also FDA TRADE CORRESPONDENCE 213, March 21, 1940 (1 Kleinfeld 652).

204. FDA TRADE CORRESPONDENCE 233, April 11, 1940 (1 Kleinfeld 660); see also FDA TRADE CORRESPONDENCE 340, September 17, 1940 (1 Kleinfeld 703).

205. If, for example, diluted jam is made to appear to have the consistency of ordinary jam, it would seem to violate § 402(b)(4). Cf. *United States v. 30 Cases of Leader Brand Strawberry Fruit Spread*, 93 F. Supp. 764 (S.D. Iowa 1950); FDA TRADE CORRESPONDENCE 185, March 15, 1940 (1 Kleinfeld 641).

206. 52 Stat. 1046 (1938), 21 U.S.C. § 342(b)(4).

207. Act of June 30, 1906, ch. 3915, § 7, 34 Stat. 768, repealed, 52 Stat. 1059 (1938).

208. *White & Gates* 29 (E.D. Ill. 1908).

in the milk would reduce or lower its strength. Everybody knows that it does. So if you believe from the evidence that there was water in the milk you will convict the defendant.²⁰⁹ Similarly in cases in which alcohol was added to lemon oil,²¹⁰ pepper shells were added to pepper,²¹¹ and cottonseed oil was added to olive oil,²¹² the courts did not seem to require direct evidence indicating that the quality and strength of the food was reduced.

Other cases under the 1906 Act were more complex and evidence was apparently required to prove that the quality and strength of the food was reduced. For example, when nitrates were added to flour, the Government proved that the flour did not improve with age as ordinary flour would have.²¹³ Since the effect of nitrates upon flour was not common knowledge, such evidence was probably necessary to prove a violation of the statute.

Under the Federal Food, Drug, and Cosmetic Act three separate offenses are prohibited by section 402 (b) (4). These offenses are mixing or packing a substance with the food, which (i) increases its bulk or weight; (ii) reduces its quality or strength; or (iii) makes it appear better or of greater value than it is.²¹⁴ The last prohibition is the broadest of the subsections and, as one would anticipate, the Food and Drug Administration has concentrated almost exclusively in its enforcement upon it.

FDA's early victories under section 402 (b) (4) involved poppy seeds which had been artificially colored to stimulate more expensive poppy seeds²¹⁵ and mineral oil which had been artificially colored to simulate butter or vegetable oils.²¹⁶ Since the artificially colored foods appeared to retail purchasers and consumers to be more expensive foods, the courts concluded that they were made to appear better or of greater value than they were.

In the leading *Bireley's* case,²¹⁷ the Government alleged that claim-

209. *Id.* at 30.

210. See *United States v. Edward Westen Tea & Spice Co.*, White & Gates 69 (E.D. Mo. 1909).

211. See *United States v. Six Barrels of Ground Pepper*, White & Gates 817 (S.D.N.Y. 1917).

212. See *United States v. Alban*, White & Gates 1014 (S.D.N.Y. 1921); *United States v. Monahos*, White & Gates 935 (S.D.N.Y. 1919).

213. *United States v. 625 Sacks of Flour*, White & Gates 129 (W.D. Mo. 1910), *rev'd on other grounds, sub. nom. Lexington Mill & Elevator Co. v. United States*, 202 Fed. 615 (8th Cir. 1913), *aff'd*, 232 U.S. 399 (1914).

214. See *Van Liew v. United States*, 321 F.2d 664 (5th Cir. 1963).

215. *United States v. Two Bags of Poppy Seeds*, 147 F.2d 123 (6th Cir. 1945).

216. *United States v. 36 Drums of Pop'N Oil*, 164 F.2d 250 (5th Cir. 1947).

217. *United States v. 88 Cases of Bireley's Orange Beverage*, 187 F.2d 967 (3d Cir.), *cert. denied*, 342 U.S. 861 (1951).

ant's orange beverage appeared to be better than it was because it appeared to be composed entirely or in large part of orange juice while it only contained 6% orange juice. The trial court had charged the jury that the product was adulterated if any part of the public including the ignorant, the unthinking, the credulous and those who do not stop to analyze in making a purchase would be misled.²¹⁸ The Circuit Court reversed, holding, "The correct standard was the reaction of the ordinary consumer, under such circumstances as attended retail distribution of this product. When a statute leaves such a matter as this without specification the normal inference is that the legislature contemplated the reaction of the ordinary person who is neither savant nor dolt, who lacks special competency with reference to the matter at hand but has and exercises a normal measure of the layman's common sense and judgment."²¹⁹

Despite the holding of the *Bireley's* case, the questions to whom the food must appear better than it is, and how it is to be determined whether the food appears better than it is, seem far from settled. In *Bireley's*, the Government tried for a broad FTC-type standard and was defeated.²²⁰ In future cases, the attempts to lower the intelligence level will probably be more subtle. The *Bireley's* case does not bar the Government from proving by market research that particular foods appeal to children and the less educated and less sophisticated portion of the population and this type of evidence will probably present a much closer question. This evidence would certainly fall within the *Bireley's* rule that "all circumstances of retail acquisition and consumption are relevant."²²¹ The closest authority in point, however, seems to be a mis-

218. *Ibid.*

219. *Id.* at 971.

220. FDA's extreme position in *Bireley's* was apparently derived from *Aronberg v. FTC*, 132 F.2d 165, 167 (7th Cir. 1942). See *Developments in the Law — The Federal Food Drug and Cosmetic Act*, 67 HARV. L. REV. 632, 648 at n. 118 (1954).

The charge of the trial court is also very similar to the standard applied in *Charles of the Ritz Distribs. Corp. v. FTC*, 143 F.2d 676, 679 (2d Cir. 1944). Cf. Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439, 457-62 (1964) for a review of the standard usually applied in FTC advertising cases. Under the Federal Food, Drug, and Cosmetic Act, the courts have usually applied an ordinary purchaser standard. See Nelson, *What Standard For The Nonstandardized Food?* The *Bireley's* Case, 8 FOOD DRUG COSM. L.J. 425, 433 (1953); see also Forte, *The Food and Drug Administration, The Federal Trade Commission and the Deceptive Packaging of Foods*, 40 N.Y.U.L. REV. 860, 869 (1965). This may be because the ordinary purchaser standard is implied under § 403(f) of the act. 52 Stat. 1047 (1938), 21 U.S.C. § 343(f) (1958). Cf. *United States v. 88 Cases of Bireley's Orange Beverage*, 187 F.2d 967 (3d Cir.), *cert. denied*, 342 U.S. 861 (1951) relying upon § 403(f) as authority for the ordinary purchaser standard.

221. *United States v. 88 Cases of Bireley's Orange Beverage*, *supra* note 217. See Forte, *The Food and Drug Administration, The Federal Trade Commission and*

leading packaging case and the court there rejected the Government's argument that "the question is whether the package is so filled as to mislead an average five-year-old child who might expect the box to be filled to overflowing," accepting instead an ordinary person standard.²²²

One of the interesting questions raised by *Bireley's* is whether proof that restaurant patrons will be deceived by the food is sufficient to cause the food to be considered as economically adulterated. If so, the packaging and labeling of the food would be irrelevant since they would not ordinarily be seen by restaurant customers. The *Bireley's* court held that the packaging and labeling were relevant in the absence of proof that some considerable part of the retail trade acquired the food without the packaging.²²³ The court cited in support of the holding the Circuit Court's opinion in *United States v. 62 Cases of Jam*²²⁴ in which the Circuit Court held that imitation jam violated section 403 (g) because it was served to restaurant customers as the standardized food jam without disclosure that it was an imitation. The Circuit Court's opinion in the *Jam* case was later reversed by the United States Supreme Court which held that the prominent disclosure of the word "imitation" on the label was sufficient to warrant a judgment for the claimant.²²⁵ The United States Supreme Court has thus indirectly strengthened the agreement for consideration of packaging and labeling in section 402 (b) (4) cases. The realities of the marketplace also strengthen the argument. If the possibility of a restaurant passing-off an imitation for a superior food were all that were required for economic adulteration, many common and useful foods such as oleomargarine, vegetable whipping bases, and powdered milk, and all imitation and substandard foods could be considered economically adulterated. It seems likely therefore that the courts will continue to regard packaging and labeling as one consideration in determining whether foods appear better than they are ex-

the Deceptive Packaging of Foods, 40 N.Y.U.L. Rev. 860, 870 (1965) for the author's views on the limitations of market research in defining the ordinary purchaser.

222. *United States v. 116 Boxes of Arden's Assorted Candy Drops*, 80 F. Supp. 911 (D. Mass. 1948). Apparently the FDA believes the same type of rule will apply in economic adulteration cases. See testimony of George Larrick, then Commissioner of the Food and Drug Administration, before a *Special Subcommittee of the Committee on Labor and Public Welfare of United States Senate* on S. 1839 and H.R. 7042, 89th Cong. 1st Sess., p. 10 (1965).

223. See *United States v. 88 Cases of Bireley's Orange Beverage*, *supra* note 217; *United States v. 306 Cases of Sandford Tomato Catsup with Preservative*, 55 F. Supp. 725 (E.D.N.Y. 1944), *aff'd, sub nom. Libby, McNeill & Libby v. United States*, 148 F.2d 71 (2d Cir. 1945) (in which the court noted in passing the problems raised by restaurant consumption of a food which simulated a standardized food).

224. 183 F.2d 1014 (10th Cir. 1950), *rev'd*, 340 U.S. 593 (1951).

225. *62 Cases of Jam v. United States*, 340 U.S. 593 (1951).

cept when the evidence indicates either that there is a considerable amount of palming-off of the food in restaurants or the food is actually designed for palming off in restaurants and other situations.²²⁶

Probably the most difficult question concerning to whom the food must appear "better than it is" was presented in *United States v. Antonio Corrao Corp.*²²⁷ In the *Corrao* case the defendants sold in interstate commerce a blend of oils marked 80% peanut oil and 20% olive oil. The Government seized the blend of oils as economically adulterated, alleging that it contained little olive oil and had been made to appear better than it was by the addition of artificial flavoring which simulated the flavor of olive oil and squalene which simulated the chemical properties of olive oil. The interesting legal question arose because of the presence of the squalene.

Squalene is an odorless colorless substance which cannot be detected by the consumer. However, squalene is a natural component of olive oil and the Government therefore tests for squalene content when it attempts to determine whether olive oil has been omitted or removed from a food. To frustrate the Government's tests, the defendants added squalene artificially to the blend of oils. The district court concluded that the blend of oils actually contained the 20% olive oil stated on the label but that the blend of oils was adulterated under section 402 (b) (4) because the added squalene made the blend appear better than it was to the Government officials who tested it—i.e., the blend appeared to contain more than 20% olive oil to the Government's officers.²²⁸

On appeal, the Circuit Court reversed, holding that since the natural squalene content of olive oil varies and there was no indication of the amount of squalene added, it could not be said that the added squalene was sufficient to deceive the Government's officers. The Circuit Court therefore never reached the question of whether a food is economically adulterated if it is made to appear "better than it is" to the Government, but not to ordinary purchasers and consumers.²²⁹

226. Cf. note 76 *supra*. The artificially colored mineral oil in the *Pop'N Oil* case and the artificially colored poppy seeds in the *Poppy Seed* case were foods which were actually designed for "palming-off" and the courts therefore disregarded the labeling of these foods. See *United States v. 36 Drums of Pop'N Oil*, 164 F.2d 250 (5th Cir. 1947) and *United States v. Two Bags of Poppy Seeds*, 147 F.2d 123 (6th Cir. 1945).

227. 185 F.2d 372 (2d Cir. 1950).

228. The district court's opinion is reported at 2 Kleinfeld 206 (E.D.N.Y. 1950).

229. The Circuit Court said, "It is suggested, however, that indirect deception, in violation of the statute, occurred if the added squalene, on an ordinary squalene test, led the officers to believe that the blend contained a larger percentage of olive oil than it did contain, even if the actual percentage was 20%, i.e., the percentage represented to the consumer. It may be urged that such a construction of the statute is

This type of case can be approached as an agency situation. It could be reasoned that the ordinary purchasers and consumers have, through their legislators, appointed Government officials as their agents to make certain that the foods sold to them comply with the law. The fraud, if any, in the *Corrao* situation was on the governmental agents rather than on the ordinary purchaser-principal. Since the purchaser-principal received exactly what was specified, the fraud would seem immaterial, and since the Federal Food, Drug, and Cosmetic Act was intended to protect purchaser-principals rather than governmental agents, there would be no adulteration.

Because section 402 (b) (4) was changed so significantly from its predecessor section of the 1906 Act, there are probably even more unresolved questions concerning this subsection than exist concerning the other subsections of the act. The *Bireley's* and *Corrao* cases illustrate the interesting and complex questions which can arise concerning to whom the food must appear better than it is. Other questions will probably arise concerning how the food can appear better than it is. *Bireley's* says flavor can be considered, so "appear" does not seem to be limited to visual impressions of the food.²³⁰ The Food and Drug Administration's Trade Correspondence suggests if water is added to poultry,²³¹ if silver nitrate is added to fish,²³² if artificial coloring is added to baked goods,²³³ and if artificial flavor is added to food,²³⁴ these foods may appear better than they are. The Government therefore views this portion of the statute as applying to many varied situations.

There has been very little reported litigation in connection with that portion of subsection (b) (4) which prohibits packing a substance with food to increase its bulk or weight. In *United States v. 30 Cases of Leader Brand Strawberry Fruit Spread*,²³⁵ the court held that adding water, sugar and corn syrup to a purported jam violated this section of the statute and in other cases the Government has contended that

untenable because, unless there is less olive oil than that stated on the label, the consumer, who knows nothing of the squalene content, cannot be disadvantaged economically since he receives what he thinks he is buying. But we need not decide whether the suggested construction of the statute is correct..." *United States v. Antonio Corrao Corp.*, 185 F.2d 372, 376 (2d Cir. 1950).

230. See *United States v. 88 Cases of Bireley's Orange Beverage*, 187 F.2d 967, 971 (3d Cir.), cert. denied, 342 U.S. 861 (1951).

231. FDA TRADE CORRESPONDENCE 154, March 7, 1940 (1 Kleinfeld 629).

232. FDA TRADE CORRESPONDENCE 213, March 21, 1940 (1 Kleinfeld 652).

233. FDA TRADE CORRESPONDENCE 218, March 21, 1940 (1 Kleinfeld 654).

234. FDA TRADE CORRESPONDENCE 233, April 11, 1940 (1 Kleinfeld 660).

235. 93 F. Supp. 764 (S.D. Iowa 1950).

adding excess water to canned oysters²³⁶ and adding water and sugar to orange juice is a violation,²³⁷ but the first case was lost on the facts and the second through faulty pleading. FDA's Trade Correspondence also suggests that soaking poultry in water is a violation of this portion of the statute.²³⁸ Most violations of this prohibition and the prohibition against adding substances which reduce the quality and strength of a food are also violations of that portion of the subsection which prohibits packing a substance with the food which makes it appear better or of greater value than it is, and this probably explains the scarcity of reported cases under the first two portions of subsection 402 (b) (4).

Part IV: Conclusion

Congress in the 1906 Food and Drugs Act enacted our first comprehensive legislation prohibiting the economic adulteration of foods. The Government secured judgments in both criminal and civil cases under the 1906 Act and, in general, the act was sufficient to eliminate blatant economic cheats.²³⁹ However, the more subtle economic cheats remained,²⁴⁰ and the Government under the 1906 Act was unable to prevent the sale of economically debased foods which were sold as compounds or blends or labeled with distinctive names.

The Federal Food, Drug, and Cosmetic Act was designed to eliminate the loopholes in the 1906 Act. Although the Federal Food, Drugs, and Cosmetic Act was actually enacted in 1938, the roots of the statute lie in the early 1930's.²⁴¹ As in another noted depression era stat-

236. See *United States v. W.F. Morgan*, 155 F. Supp. 847 (E.D. Va. 1957).

237. *Van Liew v. United States*, 321 F.2d 664 (5th Cir. 1963).

238. FDA TRADE CORRESPONDENCE 154, March 7, 1940 (1 Kleinfeld 629).

239. The passage of the 1906 Food and Drugs Act had an almost immediate effect upon economic adulteration. As early as 1917 the Bureau of Chemistry noted in its report to the Department of Agriculture: "The best evidence that many of the abuses formerly occurring in the food industry have ceased, is to be found in the fact that the violations of the Food and Drugs Act observed today are hardly comparable with those obtained during the first few years of the past decade. Most of the staple food products now found in violation are either of a higher grade than formerly, or are products of the clever adulterator, that is of those who have more or less anticipated the ordinary means of detection by so manipulating their products so that not infrequently the adulteration can be detected only by the most detailed and painstaking chemical analysis coupled with factory inspection." 1917 Report of the Bureau of Chemistry 14, DUNBAR, FEDERAL FOOD DRUG & COSMETIC LAW—ADMINISTRATIVE REPORTS 1907-1949, 368 (1951). In 1926, the Bureau reported, "The enactment and the enforcement of the Federal and State food legislation has restored the confidence of the public in the purity and wholesomeness of the food supply of the Nation." *Id.* at 635.

240. See 1931 Report of the Food and Drug Administration 5, DUNBAR, FEDERAL FOOD DRUG & COSMETIC LAW — ADMINISTRATIVE REPORTS 1907-1949, 743 (1951) and note 239 *supra*.

241. The proposed revision of the 1906 Food and Drugs Act was introduced on June 12, 1933, and enacted on June 25, 1938. See DUNN, FEDERAL FOOD DRUG AND

ute, the Robinson-Patman Act,²⁴² drastic action rather than precision of language was the foremost consideration of proponents of the law.²⁴³

The Federal Food, Drug, and Cosmetic Act's economic adulteration provisions suffer from two significant defects. First is the failure to describe precisely the standards against which the allegedly adulterated food is to be judged.²⁴⁴ Second is the failure to describe precisely the types of deficiencies from the standard which constitute economic adulteration.²⁴⁵ The combination of these two deficiencies have confounded the courts which have issued diverse and conflicting opinions.²⁴⁶ While the trend seems to be to refuse to apply economic adulteration sanctions at all, except in the clearest of cases,²⁴⁷ in at least one recent case economic adulteration sanctions were applied under very dubious

COSMETIC ACT 29-30, 1015 (1938). Although the public was apparently complacent in 1926, by 1930 there was evidence of renewed public interest in the measures taken by the Government to insure wholesome, pure, and honest food. See Annual Reports of Food and Drug Administration for 1926, at 19, and 1930, at 2 reprinted at DUNBAR, *supra* note 239 at 635 and 714. Consumers' groups thought the new law was not tough enough and urged Roosevelt to veto it. See Young, *The Government and the Consumer: Evolution of Food and Drug Laws — The 1938 Food, Drug and Cosmetic Act*, 13 J. PUB. LAW 197, 203 (1964).

242. 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1958).

243. Both the FDA and the muckrakers sought a revision of the 1906 Food and Drugs Act. The muckrakers were represented in large part by an organization called Consumers Research and this organization's suggestions were considered even by FDA as "too extreme to be practicable." Young, *supra* note 241 at 200.

244. These standards appear to be (1) a familiar recognizable food, (2) the natural composition of a natural food, (3) label statements and (4) possibly the standards set by secondary meaning of a food. See Text Part II *supra* and note 84 *supra*. However, these standards are not set forth in the statute or any regulations and, if the author's interpretation of "food" in § 402(b) and the *Bireley's* case, is correct, other standards could also be used provided they were reasonably definite and precise. See Part II *supra*.

245. See Text Part III *supra*. This is the most vital defect in the current law law.

246. Compare *United States v. Fabro, Inc.*, 206 F. Supp. 523 (M.D. Ga. 1962) (holding that the label cannot set the standard in an economic adulteration case) with *United States v. Food Products Labs., Inc.*, 6 Kleinfeld 123 (W.D. Mo. 1963) (holding the contrary). Or compare *United States v. 716 Cases of Del Comida Brand Tomatoes*, 179 F.2d 174 (10th Cir. 1950) (holding proper labeling is not a defense to an economic adulteration charge under § 402(b)(2)) with *United States v. 70 Gross Bottles of Quenchies*, 3 Kleinfeld 141, 144 (S.D. Ohio 1952) (which cites the "generally recognized rule that labeling is such a defense.") Or, compare *United States v. 716 Cases of Del Comida Brand Tomatoes, supra*, and *United States v. 30 Cases of Leader Brand Strawberry Fruit Spread*, 93 F. Supp. 764 (S.D. Iowa 1950) (which seem to accept standards of quality and identity as conclusive proof of the standard in economic adulteration cases) with *United States v. Cudahy Packing Co.*, 4 Kleinfeld 138 (D. Neb. 1955) (holding that such standards are totally irrelevant).

247. See *Van Liew v. United States*, 321 F.2d 664 (5th Cir. 1963); *United States v. Fabro, Inc.*, 206 F. Supp. 523 (M.D. Ga. 1962); *United States v. Cudahy Packing Co.*, 4 Kleinfeld 138 (D. Neb. 1955); *United States v. Midfield Packers*, 3 Kleinfeld 157 (W.D. Wash. 1952); *United States v. 70 Gross Bottles of Quenchies*, 3 Kleinfeld 141 (S.D. Ohio 1952); *cf. United States v. 88 Cases of Bireley's Orange Beverage*, 187 F.2d 967 (3d Cir.), *cert. denied*, 342 U.S. 861 (1951).

circumstances.²⁴⁸ Economic adulteration law therefore resembles a type of national lottery in which the odds are that the defendant will go free although he may not if he happens to draw the wrong judge.

When criminal liability can be imposed without intent, it would seem that the legislature, the governmental agency which administers the law, and the courts have a responsibility to issue precise and definite guidelines which will permit persons to predict in advance the consequences of their conduct. Yet all of these have abdicated this responsibility in relation to our economic adulteration laws and chaos has resulted. There is a patent and immediate need for a revised economic adulteration statute. In the interim, the Food and Drug Administration should by interpretative regulations define and explain what constitutes a violation of the present act.²⁴⁹

248. See *United States v. Food Products Labs., Inc.*, 6 Kleinfeld 123 (W.D. Mo. 1963) wherein relative (or puffery) statements furnished the standard against which the food was judged.

249. In another context, Judge Friendly has advanced the thesis that the success of the administrative process is dependent upon the development of more definite standards. See Friendly, *The Federal Administrative Agencies: The Need For Better Definition of Standards*, 75 HARV. L. REV. 863 (1962). Judge Friendly suggests that precise standards are necessary to require like treatment under like circumstances; to permit security of business transactions; to make the standards for administrative action known and therefore amenable to change; to maintain the independence of administrative agencies from improper lobbying and political influences; and to inform and educate the staff of the administrative agency. *Id.* at 878-82. Therefore, even if the Federal Food, Drug, & Cosmetic Act only provided for civil penalties, the vagueness of the present statute, unclarified by interpretative regulations, would still be highly undesirable.