Externalities in Industrial Food Production: The Costs of Profit

Gabriela Steier
EXTERNALITIES IN INDUSTRIAL FOOD PRODUCTION: THE COSTS OF PROFIT

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The large food companies’ failure to internalize all the food production costs creates negative externalities and economic deficiencies in the food market. Government regulation to-date is insufficient to stop the externalization of costs. Poor eating habits of the general public promote such market failures and are controlled by misinformation, advertisements, and unhealthy foods. Regulatory laws, such as the Hazard Analysis Critical Control Point Act (HACCP), the Poultry Products Inspection Act (PPIA), and the Humane Methods of Slaughter Act were designed with so many legal loopholes, that these acts remain largely ineffective. The externalities of the food production industry affect the economy, the public’s health, the environment, but also the First Amendment Right of Free Speech. Veggie libel laws passed in thirteen states in the U.S. stifle the dissemination of the truth about the foods people eat. Consumer protection must be fueled from the inside out. Despite the public obsession with food and diet, most people are ignorant of where their food comes from. Until the public’s awareness and concern is increased to a point where citizens and lawyers will use tort law to force the food producers to internalize the food production costs, the market will continue to fail.

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I. INTRODUCTION

When Upton Sinclair's *The Jungle* illuminated the corruption of the meatpacking industry during the Roosevelt Administration over a century ago, people only began to realize that food has an economic, social, and ethical effect on society.1 In the twenty-first century, we continue to fail to acknowledge the power of food, and correspondingly, the effects of the food industry on our lives. Jonathan Safran Foer, author of the bestseller *Eating Animals*, an exposition in the tradition of *The Jungle* about the perversion of eating factory-farmed animals, said that “[w]e have waged war, or rather let a war be waged, against all of the animals we eat. This war is new and has a name: factory farming.”2 There was more than a century of insufficient public initiative between Sinclair’s and Foer’s bestsellers, which proved that people care about food but generally lack the insight to demand legislative changes to improve the conditions of where their food comes from, and thus remain helpless in the face of industrial food production.

The American public is increasingly suffering from poor health and nutrition because agricultural, environmental, corporate, and tax laws virtually force American farmers to adopt industrial food production practices. Large food corporations shift the "externalities" of cost from food corporations to the general populace, thereby increasing profits while eradicating healthy and ethical food choices for consumers. These laws and regulations hide the government’s support of unsustainable practices that create food that appears to cost less, but really shifts the costs of environmental pollution from producers to the general populace. The resulting ethical implications for socially responsible lawyers begin by tracing back where their food comes from, and demanding socially proactive legislation and personal pro-action to facilitate more sustainable food production for the American public. For example, Marian Burros from the *New York Times* argues that “[i]n a world in which people feel more and more distant from global forces that control their lives, they can do

something by, as the British put it, ‘voting with your trolley,’ their word for shopping cart. This statement makes the argument that simply shopping selectively makes a difference in the food industry.

Every time consumers buy organic produce from local farms, they essentially cast a vote for sustainable practices and against factory farming or genetically modified crops. Consumers simultaneously declare that they want a choice in their food selection and that they demand to know the source of their food, as well as economic, environmental and social costs beyond the sticker price. Consequently, professional opportunities for lawyers arise beyond the food lobby in Washington D.C. If more lawyers become aware of the hidden externalities and resulting damages from the food industry, they will be able to benefit from the professional opportunities that arise in tort law to force the large food corporations to internalize the production costs. Such legal forces, coupled with an active boycott of the products of unsustainable farming by consumers, are powerful tools to reduce the prevalence of damaging farming practices and introduce more sustainable practices quickly.

There are two approaches to force the large food corporations to internalize all of their production costs. The first is tort lawsuits against those corporations that externalize food production costs, which the public consequently bears as a whole. The second is that people can change the market from within by shifting the demand from “fast and cheap” food, which is in reality neither fast nor cheap, to organic alternatives. Consumers would thereby force large food corporations to adopt more sustainable practices for a market capable of gradually reversing market failures from negative externalities.

This paper will explore three examples to illustrate how and why the two approaches mentioned above can force an internalization of food production costs: (1) advertising and contamination of peanuts, (2) the Hazard Analysis Critical Control Point Act (HACCP), and (3) the veggie libel laws. To explain why the food production costs must be internalized, I will define and locate the negative externalities in the food industry and explain how government action is involved in the resulting market failures, and how legal remedies could improve the negative effects of those externalities. I will then analyze examples of government involvement and the need for legal remedies based on instances of food patenting and consumer management through advertisements, on the one hand, and past and present ineffective food inspection laws, on the other. In my analysis of veggie libel laws, I will explain how even some First Amendment guarantees are erased by the externalities in the food industry. Finally, I

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will expose a few of the driving forces of factory farming, and continue with the spiteful conditions which “food animals” are put through, and how humans are burdened by the resulting externalities. This paper will conclude with considerations of the true cost of so-called staple foods.

II. HOW AND WHY THE EXTERNALIZATION OF FAST FOOD PRODUCTION COSTS CAUSES MARKET FAILURES

A. Negative Externalities in the Food Industry

Externalities are market failures — “costs that are not borne by the actors in a particular transaction” — which distort the perception of risk. Externalities can be positive or negative. From an economist’s view, “negative externalities are costs that are infeasible to charge to not provide.” This means that the market cannot sustain the externalization of costs without eventually failing. “Ordinarily,” as Adam Smith explained, “selfishness leads markets to produce whatever people want.” In turn,

As every individual, therefore, endeavours [sic] as much as he can both to employ his capital in the support of domestick [sic] industry, and so to direct that industry that its produce may be of the greatest value; every individual necessarily labours [sick] to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. By preferring the support of domestick [sic] to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it. I have never known much good done by those who affected to trade for the publick [sic] good.


These principles are directly applicable to “voting with the cart,” where people make better food choices for themselves, and simultaneously reshape the market because they create a demand for sustainable agriculture and humane animal treatment. On the other hand, food corporations like Tyson, Smithfield, Perdue, and Cargill, are in the business of factory farming for their own profit, and externalize the cost because the general public lets them. With the understanding of simple economic principles, this reversed and dangerous relationship between supply and demand can be corrected.

Supra note 6.
what most consumers seem to look for is inexpensive food, which points to the success of factory farming and food advertisement campaigns. The focus of this paper is limited to selected aspects of such market failures in the food industry, where the economic principles of externalizing costs lead to the industrialization of food production. This food production, in turn, is geared to produce more of fewer foods to reduce the apparent cost to consumers and increase market availability of those foods. “[T]he pressures today’s farmers are under – [are] pressures to increase in size to obtain market share[s] and pressures to link with agribusiness to produce or market commodities. These are the forces leading toward an industrial agriculture.” By understanding these forces and their dangerous effects on society and the environment, people are empowered to make positive changes for more sustainable practices for the future.

B. The Government’s Effects on Market Failures

The government of the United States of America is directly involved in the vicious circle of negative externalities in food law. Although the government prefers the laissez-faire approach to a free market economy, it is a utopian ideal.10 The modern western food industry has proved to be such a failure because the costs of factory farming and industrial food production are externalized to the general public with far-reaching consequences for the future.

These governmental market failures generally fall into the six stages illustrated by Figure 1.11 For example, “air and water pollution created by many manufacturing operations are common examples of detrimental externalities . . . If a product generates detrimental externalities, and the government does nothing, the market will cause more of the product to be produced than is optimal.”12 This happened with the production of factory farms, as well as the animals and crops “produced” in those farms, which routinely increase in size and pollute the environment.

There are, however, several ways in which government regulation can reduce these detrimental externalities to consolidate the production and actual costs. First, the implementation of legislation to force the firms to internalize all of the production cost. Tort law is the most effective

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mechanism of such regulation. Second, the imposition of taxes as high as the externalities produced by the firms\textsuperscript{13} would make up for the externalized costs. Third, pollution controls or emission standards\textsuperscript{14} are environmentally sustainable. The logical result of such governmental action would be the inversion of the relationship between negative and positive externalities such that pollution could be reversed. The subsections on the HACCP and veggie libel laws in this article will explore how such government regulations affect the food industry and the public at large.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure1.png}
\caption{The vicious circle of market failures}
\end{figure}

Stage 1 - Free Market, is the period when there is no government intervention in an industry or market. . . Stage 2 - Market Failure are externalities, such as pollution. The existence and identification of market failure become the justification for government intervention into private enterprise that moves regulation from Stage 2 to Stage 3. . . The use of inadequate or incorrect regulation creates regulatory failure, or Stage 4. . . There are two reactions to regulatory failure. In the last two stages of the regulatory life cycle, either [the] government can respond by correcting the failure through regulatory reform (Stage 5), or, [the] government can extract itself from the market altogether by deregulation (Stage 6), . . . thus reverting back to Stage 1.\textsuperscript{15}

\begin{thebibliography}{9}
\bibitem{13} Id.
\bibitem{14} Laitos, supra note 13, at 142.
\bibitem{15} Laitos, supra note 13, at 7-9.
\end{thebibliography}
Government regulation is necessary because the fast food and industrial food corporations distort and disable “natural” self-regulating mechanisms in the food market. In their treatise, *Energy and Natural Resource Law in a Nutshell*, Laitos and Tomain explain that government regulation of the food industry is necessary to correct those economic malfunctions that result from competition imbalances. Such imbalances arise when the industry makes what the consumers want (allocative efficiency) by using the most efficient and sustainable practices, so that “the consumer’s economic pie . . . can be redistributed through legislation.” 16 In Part 2, I will analyze how such government regulations and market failures affected the food industry and public at large, by drawing from the examples of the HACCP and veggie libel laws. A subsequent exploration of possible legislative and legal remedies for the externalities resulting from industrialized food production and factory farming will follow. 17

Various policy failures, highlighted in this paper, “sometimes constitute perverse incentives, [that] promot[e] inefficient resource use or activities that damage the environment. . . . When government subsidies support pollution and wasteful resource use they are policy failures.” 18 See Figure 1 on page 9. In industrial food production, externalities are market failures. 19 The problem is that farmers are not fully reimbursed for the food they produce. 20 Staple foods in modern supermarkets are market commodities, such as soda, peanut butter, beef patties, and chicken fingers. In producing the raw materials for these commodities, farmers do not earn enough to invest in technologies for better farming practices. 21 Through commercials and low prices, the large food corporations that benefit from the turnover of the staple foods guarantee that these foods remain on our plates and fuel the downward spiral of hope for sustainable farming. 22

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17 For example, “[e]conomic regulation is imposed because of perceived flaws in the operation of competition in a particular market. . . . [and] market competition maximizes the size of the consumer’s economic pie; that pie can be redistributed through legislation.” 20 Ideally, a market’s negative externalities would be auto-corrected with equal bargaining powers, where representatives of the cost bearers, i.e. society at large who are suffering from pollution and health risks resulting from factory farming, would enter into agreements with the producers of those negative externalities to stop them. Farmers cannot compete with the large numbers and financial power of large food corporations and have no bargaining power. *Id.*
19 *Id.*
21 *Id.*
22 *Id.*
C. Poor Eating Habits and How They Promote Market Failures

The American public now lives in an apparent utopia of fresh international fruit where all produce is in season, year-round. The lean chicken breast so many people prefer to eat in order to forego red meat for health reasons and because they are sorry for inhumane cattle slaughtering is a pointless endeavor. Chicks are quickly raised to become supersized broilers, and slaughtered en-masse, just as cattle are kept in depressing conditions. It is no better for human health or animal welfare to prefer eating chicken over beef. People who prefer chicken over beef for these reasons still support factory farming, along with all the associated negative externalities — ranging from rampant disease to air and water pollution. Moreover, the pesticide-soaked broccoli people dip in hormone and chemical-injected cheese is spiked with pesticides and toxins that those people would think twice about before swallowing them in the form of a pill. Yet, most people remain ignorant of their responsibility to take action and improve the deteriorating condition of our planet.²

Jonathan Safran Foer describes the resulting trend of selective omnivorism and the hypocrisy of so-called conscious diets:

The choice-obsessed modern West is probably more accommodating to individuals who choose to eat differently than any culture has ever been, but ironically, the utterly unselective omnivore — ‘I’m easy; I’ll eat anything’ — can appear more socially sensitive than the individual who tries to eat in a way that is good for society. Food choices are determined by many factors, but reason (even consciousness) is not generally high on the list.²⁴

People pretend to care about what they ingest but they shy away from investigating the truth. Feces-infested steaks may kill children,²⁵ the local family restaurant’s shrimp special is filled with laxatives to alleviate and cover the symptoms of food poisoning, and the breakfast egg white omelet is a commodity that doomed thousands of chicks to cruel living conditions and brutal deaths. The law needs wake-up calls, which Foer calls “how-in-the-world-could-I-have-never-thought-of-that-before-and-why-on-earth-didn’t-someone-tell-me?” moments²⁶ (emphasis in original).

²³ Hamilton, supra note 8, at 629.
²⁴ Foer, supra note 2, at 32.
²⁶ Foer, supra note 2, at 6.
Documentaries such as *Food, Inc.* and *The Future of Food* or eye-opening movies with all-star casts such as *Fast Food Nation*, reveal too much unpleasant information to catch the public eye as easily as the latest McDonald’s or Burger King television commercials. Foer further explains that “our mouths [are] full of hurt.” He means that “[e]very consumer who buys without reading the labels and fails to recognize the euphemisms for animal cruelty, ecologically damaging resource mismanagement, and unhealthy ingredients is at fault.”

Each consumer takes the blame for this “diet of conscientious inconsistency” because most people choose to eat what allegedly tastes good without considering the externalized cost and prefer not to think about the consequences. Moreover, people let advertisements tell them what tastes good and then consumers eat an unnatural diet. Thereby, they emotionally externalize the cost of their food for their conscience, just like the industries do with the production costs of those foods. Telling oneself “forgiving stor[ies]” is an inexcusable form of ignorance for every person’s environmental impact. More importantly, “something having been done just about everywhere just about always is no kind of justification for doing it now.” It is not a myth that “[f]or every 1 kg of high-quality animal protein produced, livestock are fed about 6 kg of plant protein.” This translates into a ratio of 20-30 plant-based calories wasted to create one calorie of animal protein, depending on the type of meat. People must take responsibility for their energy-inefficient eating habits. Especially lawyers and law students, in particular, have the skills to look critically at the regulations and subsidies that promote the externalization of externalities in industrial food production.

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28 Id.
29 *Fast Food Nation* (Fox Searchlight Pictures & Tartan Films 2006) (motion picture).
30 Foer, supra note 2, at 6.
31 Id. at 9.
32 Id. at 8.
33 Foer makes a “case for eating dogs,” and explains that “[d]espite the fact that it’s perfectly legal in forty-four states, eating ‘man’s best friend’ is as taboo as a man eating his best friend. Even the most enthusiastic carnivores won’t eat dogs.” Foer, supra note 2, at 24. But this is just another ignorant excuse not to care and to externalize the cost. “George Orwell’s words (from *Animal Farm*) apply here: ‘All animals are equal, but some animals are more equal than others.’ The protective emphasis is not a law of nature; it comes from the stories we tell about nature.” Id. at 25. Yet, there is nothing natural about how we eat. “Eating animals has an invisible quality. Thinking about dogs, and their relationship to the animals we eat, is one way of looking askance and making something invisible visible.” Id. at 26.
34 Foer, supra note 2, at 26.
of the cost of our food. Together, people can make environmentally sustainable and ethically responsible choices and help improve food laws.

The foremost problem that society must overcome is the high demand for cheap and tasty food. People’s view of what is tasty is dictated by the sugar content, a habit that has been conditioned from advertisements and habit, but not natural taste buds. To make food cheaper and feed more people, the farmers evolved to food industrialists while food corporations took over nature.

The market is overflowing with food from factory farms. For example, “as of 2002, four companies produced 81 percent of cows, 73 percent of sheep, 57 percent of pigs and 50% of chickens – all factory farmed.”36 Consumers do not have a realistic choice to eat more sustainably because organic meat or produce from sustainable farms is not as widely marketed or as easily available as their factory-farmed and genetically manipulated counter-parts. Consequently, only government regulation and legal action can help reverse this process. However, government action will only occur if more people become aware of the problem. A paradigm shift would be necessary and must be advocated through campaigns. Farmers’ markets and organic produce should be marketed just as aggressively as fast food campaigns. Good examples of successful campaigns that brought about such paradigm shifts are the Anti-Smoking Campaigns, the “Got Milk” campaigns, and the new and “improved” food pyramid.

National campaigns, such as the Food Pyramid campaign, could help to erase and correct positive images of distorted and nutrient-deficient foods in consumers’ minds that were created by McDonald’s, Burger King, Coca-Cola, and even the government’s earlier food pyramids. The campaign should also re-introduce the idea that vegetarian and vegan food choices are plentiful, tasty, promote sustainable global energy management, help maintain healthy body weight, and protect “food animals,” While simultaneously decreasing every person’s environmental foot print. Instead of featuring coupons on food packaging for more unhealthy food, or putting toys in unhealthy breakfast “cereals” to get children “hooked,” attractive, quick, and easy recipes for healthy meals without meat, dairy, or refined sugar should be featured on packages, brochures, and television. Children must see fewer cartoons with soda-sipping characters, and more

of Bugs Bunny munching on carrots, or Popeye enjoying spinach. In sum, a sustainable farming and healthy food campaign could change consumers’ eating patterns and reduce pollution, diseases, and corruption. It would be a start in correcting the market failures in the same way the market was destroyed and help to correct the market failures from the consumer’s side through education of the public.

Although the widely neglected paradox that world hunger has increased even though food has become cheaper\textsuperscript{40} is gaining popularity in the news, death from eating instead of hunger is a fairly new concept. America and most of the industrialized world has experienced the fast food movement to be cheaper, quickly edible, and entertaining, while developing countries rely on a much more plant-based diet. Overall health in the industrialized world has been steadily declining since the advent of fast food. Figure 2 shows the leading causes of death as cited in the largest current study linking nutrition and disease, \textit{The China Study}\textsuperscript{41} by Dr. T. Colin Campbell and Thomas M. Campbell II. Notably, each of these leading diseases is accelerated by unhealthy diets, including the consumption of animal protein, saturated fats, and simple carbohydrates such as sugar. Dr. Campell concluded that a plant-based diet could reverse many of these diseases. Voting with their supermarket shopping carts could help people to improve their lives on multiple levels, even prolonging their lives.

<table>
<thead>
<tr>
<th>Cause of Death</th>
<th>Deaths</th>
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<tbody>
<tr>
<td>Diseases of the Heart</td>
<td>710,760</td>
</tr>
<tr>
<td>Cancer (Malignant Neoplasms)</td>
<td>553,091</td>
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<tr>
<td>Medical Care</td>
<td>225,400</td>
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<tr>
<td>Stroke (Cerebrovascular Diseases)</td>
<td>167,661</td>
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<tr>
<td>Chronic Lower Respiratory Diseases</td>
<td>122,009</td>
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<tr>
<td>Accidents</td>
<td>97,900</td>
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<tr>
<td>Diabetes Mellitus</td>
<td>69,301</td>
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<td>Influenza and Pneumonia</td>
<td>65,313</td>
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<tr>
<td>Alzheimer’s Disease</td>
<td>49,558</td>
</tr>
</tbody>
</table>

\textit{Figure 2: Leading causes of death}\textsuperscript{42}

Dr. Mark Hyman,\textsuperscript{43} physician and author of \textit{Ultrametabolism}, \textit{Ultraprevention}, and Dr. Dean Ornish,\textsuperscript{44} also published numerous articles


and books about the healing properties of food. All these doctors and scientists agree that typical American staple foods make the general population sick. In buying those unhealthy staple foods, we let the large food corporations do the thinking for us while we bear the costs of such an unhealthy nutrient-deficient diet. There are numerous legal and governmental obstructions within the food production system that promote externalization of the food production costs on the levels of legislation, public health and individual rights.

III. FOOD INSPECTION AND LIBEL LAWS

A. Advertising and Contamination: The Example of Peanuts

As the food industry evolved and the market grew, expanding food corporations had to create innovative advertising campaigns to induce consumers to buy their products, instead of those of their competitors. The natural human reflex of salivating upon seeing an appetizing piece of food quickly led to distortion as the basis of aggressive advertising campaigns. Food became intellectual property and the laws permitted trademarks of food products like Underwood Deviled Ham. This was the stand of marketing taking over natural food preferences in people’s nutritional selection.

The landmark decision in food trademark litigation is the Mr. Peanut case, an appeal from the decision of the Patent Office Trademark Trial and Appeal Board dismissing Planters Nut & Chocolate Company’s claim to the registration of a design mark in the form of an animated peanut, which many American came to know as Mr. Peanut. Other trademarks on eye-catching packages feature cartoons and commercials...

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44 Dr. Dean Ornish is a cardiologist, founder and president of the non-profit Preventive Medicine Research Institute in Sausalito, California, and Clinical Professor of Medicine at the University of California, San Francisco. Preventive Medicine Research Institute, Dr. Dean Ornish, http://www.pmri.org/dean_ornish.html (last visited Apr. 3, 2011).
45 Ivan Petrovich Pavlov received the Nobel Prize in Medicine in 1904. In his winning experiment, he rang a bell every time he gave his subject, a dog, a piece of food. Upon seeing the food, the dog began to salivate and drool. After a few trials, the dog began to drool only upon hearing the ringing bell, even when there was no food. This process is called classical conditioning and also works in humans. See generally http://nobelprize.org/educational/medicine/pavlov/ (last visited Feb. 19, 2011).
jingles endorsing certain foods are advertisements that shape and permit control over people’s appetite. As a result, classical conditioning, or Pavlov syndrome, is created when a certain song is linked to the image of a food, such as an advertising jingle. Naturally, when a person sees the food packaging, he or she is sub-consciously reminded of the jingle and associates the food with a positive experience, so that he or she is inclined to buy it. Classical conditioning is especially effective in children. Some examples of successful marketing are Tony the Tiger for Kellogg’s, the Keebler Elves, Ronald McDonald, and the “pure clover honey” packaged in a honey bear shaped plastic bottle. People do not eat granola, they eat “Kellogg’s” – the trademark has become the food.

Advertising is everywhere and has blurred the line between food and entertainment. For example, Honey Nut Cheerios feature an interactive website analogizing the Honey Bee Defender to Indiana Jones. On the bottom right corner of the website, a friendly reminder reads “Hey kids, this is Advertising.” Children most likely ignore the warnings. Such warnings of advertising do not prevent classic conditioning from happening; the ads control their food choices. With the market limited by foods that became staples, not according to their high-nutrient density, but because of the expansion of large food corporations, and advertising that distorts our appetite, people lost the ability to make ethical choices about what they want to eat.

As Mr. Peanut taught the general public, peanuts are good at cocktail parties, in hotel lobbies, and as bar treats, and are best when roasted and salted. However, this is what marketing says, not nature. Few people eat plain peanuts; most prefer them in the form of peanut butter, which is a food defined by law. In reality, peanuts are highly nutritious legumes, like peas, chickpeas, and lentils, and yet, over the past century, the public’s consumption of them resulted more from cartoons than from

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48 Supra note 46.
49 His full name is Doctor Henry Walton "Indiana" Jones, Jr., Ph.D. He is a fictional, heroic archaeologist, and the main character of the Indiana Jones movies, which were created by the prestigious movie makers Steven Spielberg and George Lucas.
51 See 21 C.F.R. § 164.150.
52 As one of The World’s Healthiest Foods, [peanuts are a very good source of monounsaturated fats . . . good sources of vitamin E, niacin, folate, protein and manganese. In addition, peanuts provide resveratrol, the phenolic antioxidant also found in red grapes and red wine . . . are far richer in antioxidants than apples, carrots or beets. Research conducted by a team of University of Florida scientists, published in the journal Food Chemistry, shows that peanuts contain high concentrations of antioxidant polyphenols, primarily a compound called p-coumaric acid, and that roasting can increase peanuts’ p-coumaric acid levels, boosting their overall antioxidant content by as much as 22%.

nature. Moreover, Skippy and Jiff peanut butters are sold for unrealistically low prices because the true production costs of peanut butter are externalized. Instead of spreading information about nutritious benefits, people either see Mr. Peanut cartoons, and are indirectly entertained by food, or they see headlines about dangerous salmonella-infected peanut recalls, and are appalled - but they do not see the nutritious value in food anymore because such common sense has been fogged by the large food corporations’ advertisements and distortions of natural foods. Both extremes are proof of market failures in the peanut industry and show that society bears the externalized costs of the products they choose to eat.

B. Food Inspection Laws: The Example of the Hazard Analysis Critical Control Point Act (HACCP)

The salmonella contamination of peanuts in 2009 made national news and scared many Americans. Few people seemed to look past the

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53 The American Journal of Nutrition published an article about the following benefits of nut consumption:

Epidemiologic and clinical trial evidence has demonstrated consistent benefits of nut and peanut consumption on coronary heart disease (CHD) risk and associated risk factors. The epidemiologic studies have reported various endpoints, including fatal CHD, total CHD death, total CHD, and nonfatal myocardial infarct. A pooled analysis of 4 U.S. epidemiologic studies showed that subjects in the highest intake group for nut consumption had an ~35% reduced risk of CHD incidence . . . The LDL cholesterol-lowering response of nut and peanut studies is greater than expected on the basis of blood cholesterol-lowering equations that are derived from changes in the fatty acid profile of the diet. Thus, in addition to a favorable fatty acid profile, nuts and peanuts contain other bioactive compounds that explain their multiple cardiovascular benefits. Other macronutrients include plant protein and fiber; micronutrients including potassium, calcium, magnesium, and tocopherols; and phytochemicals such as phytosterols, phenolic compounds, resveratrol, and arginine. Nuts and peanuts are food sources that are a composite of numerous cardioprotective nutrients and if routinely incorporated in a healthy diet, population risk of CHD would therefore be expected to decrease markedly.


54 On January 30, 2009, CNN reported that [m]ore than 500 cases of salmonella in 43 states and Canada have been linked to products (peanut butter and peanut paste made from ground, roasted peanuts) from the Peanut Corporation of America's Blakely, Georgia, plant since September. At least eight people are believed to have died from the outbreak.


On March 23, 2009, the U.S. Food and Drug Administration asked Irvington, N.J.-based Westco Fruit and Nut Co., Inc. (Westco/Westcott) to voluntarily recall all of its products containing peanuts from PCA because of the contamination threat. Westco/Westcott refused. On April 8,
frightening idea that their peanut butter and jelly sandwiches might sicken their children. Food safety recalls originate from food safety scandals, which, in turn, are due to industrialized food production malfunctions. The lack of biodiversity due to uniform seeds leads to diminished microbial resistance of the crops. Consequently, the large collection points and centralized processing plants of peanuts, and most other common staple foods, expose large quantities of food to contamination, which is then transported nationwide, or even internationally. The resulting industrialization of peanut production externalizes costs, as illustrated by the 2009 peanut contamination scare. Some of those costs, for example, are production plant hygiene, or food quality inspections, where contaminations should be discovered, before the foods leave the plants to be shipped nation-wide. Neil D. Fortin, Director and Professor at the Institute for Food Laws and Regulation at the Michigan State University, explained that “society subsidizes the food industry's practices by paying the cost of... foodborne illnesses. Thus, the food industry has a perverse economic incentive to continue risky food handling practices relative to Hepatitis A and Listeria monocytogenes.”55 News coverage of “recent large disease outbreaks of Salmonella serotype Enteritidis from eggs and poultry, Escherichia coli O157:H7 from hamburger and apple cider, and Listeria monocytogenes from hot dogs and lunchmeat, have demonstrated the population's vulnerability to foodborne illness.”56 Waiting for such outbreaks to take lives, drive up the health care costs, and cause general panic is not an effective way of managing this problem. Foodborne diseases and deaths are entirely preventable and often falsely attributed to cardiac or pulmonary arrests.57 As The China Study showed, a plant-based diet can help to prevent many diseases, but better food inspection standards are needed to keep foods safe. Professor Fortin argues that “[t]he current food safety regulatory system - propelled in fits and stops, reacting to crises and coffins - would no longer so depend on fits of public outrage to drive improvements.”58 If the public were better educated about the sources and production of inexpensive food, consumerism might change. Thus, providing people with the information to make educated food choices and


55 Fortin, supra note 1, at 577.
56 Id. at 565 (internal footnotes omitted).
57 See generally Gail A. Eisnitz, Slaughterhouse: The Shocking Story of Greed, Neglect, and Inhumane Treatment Inside the U.S. Meat Industry (2007); see also Campell, supra note 43.
58 Fortin, supra note 1, at 590.
use tort law to resist the externalization of food production costs could reverse many of its negative results.

One mechanism to force internalization of food production costs lies in stricter food safety measures. After all, food safety enables the large food production companies to market their products, while lack of food safety, as the following example of vomitoxin demonstrates, can stifle the demand for and thereby reduce the production of unsustainable, unhealthy, and unsafe food. To produce inexpensive food, some costs must be cut. However, those costs are taken from quality controls or sustainable practices. The resulting dilemma is thus where to shift the costs to. Professor Fortin explains this dilemma surrounding the food inspection and safety legislation, where “[i]t is to be expected, then, that the food industry would be more resistant to the expense of implementing risk controls for Hepatitis A and Listeria monocytogenes, with their long incubation periods, than for Staphylococcus aureus or Clostridium perfringens, with their short latency or incubation periods.”

He continues to explain that “although not quantified, the food industry’s resistance to controlling the risk of a pathogen is related to the delay time from ingestion to onset of illness. This correlation more specifically relates to the likelihood of a business paying for the consequential injuries from a foodborne pathogen risk.”

Consequently, when consumers get sick from foodborne illness, they bear the cost that the producers should bear in producing safer food. It follows that, if they were widely aware of the symptoms from foodborne illness, consumers would be more likely to sue in tort and thereby providing incentives for production facilities to raise food safety standards, enforce stricter controls, and internalize the costs to keep food safe. The lack of food safety measures further illustrates the market failures due to negative externalities in the food industry.

The first of many failures was the first modern U.S. farm bill, the Agricultural Adjustment Act of 1933. Black's Law Dictionary defines this Act as a “federal statute that paid farmers not to produce crops in an effort to raise crop prices.”

Thirty years later, the Poultry Products Inspection Act (PPIA), another failure, was passed in 1968 and can still be found in 21 U.S.C.A. Chapter 10. Its primary purpose is “to ensure that all poultry

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59 Id. at 576-577 (internal citations omitted).
60 Id.
63 (c) The term “poultry” means any domesticated bird, whether live or dead. (f) The term “poultry product” means any poultry carcass, or part thereof; or any product which is made wholly or in part from any poultry carcass or part thereof, excepting products which contain poultry ingredients only in a relatively small proportion or historically have not been considered by consumers as products of the poultry food industry, and which are exempted by the Secretary from definition as a poultry product under such conditions as the Secretary may prescribe to

and poultry products are wholesome, not adulterated, properly labeled, and properly packaged.” Notably, poultry is defined in this act, but wholesomeness is not and remains a very fluid concept. The PPIA set out to avoid everything that it finally endorsed, i.e., the destruction of a market for wholesome poultry, sustainable practices, and safe food. Schumann, Schneid, and Fagel, authors of Food Safety Law, explained that, “[i]n essence, the Act granted the USDA jurisdiction over all poultry.” Even rabbits are defined as “poultry” under this Act, so rabbits, along with chickens and turkeys, do not fall under the Humane Methods of Slaughter Act. The law is trumped by corporate interests and the food industry manipulates loopholes to externalize more costs and make more profit.

Since the 1930s, however, the farming “industry” - an oxymoron - has been increasingly pressured by the globalization of markets and modern technologies. Gail A. Eisnitz, Albert Schweizer Medalist and author of the award-winning documentation Slaughterhouse, remarked that “[t]he implications of changing demographics are clear - fewer farms, larger operations, and concentrated land ownership. If these trends continue society may face important legal challenges accompanying the trends.”

The changes that the large food corporations introduced into the food market correspond to the spread of unsustainable farming practices. The food industry, thereby, is forced to keep up with the speed of modern technology, increases in population, and globalization. The HACCP, for example, set out to create a new solution to an old problem.

The HACCP is the newest Act intended to insure food safety but it has been met with resistance by the food industry. Professor Fortin calls it “a prevention-based food safety system.” One possible explanation for the resistance to establishing this system in the market is that prevention of contamination is more expensive than remedies, which are not borne by the producers, but by the consumers. The reason, according to Professor Fortin, is that “the market is inefficient at rewarding those who improve food safety. Conversely, the market perversely rewards firms that cut back on

 assure that the poultry ingredients in such products are not adulterated and that such products are not represented as poultry products.
67 Id.
68 Id.
69 Id.
70 Id. at 631-32.
71 Fortin, supra note 1, at 578.
7 Id.
some food safety measures, because firms that cut these preventative costs may externalize the burden of those food safety risks to the public."\textsuperscript{72} Schumann and his colleagues noted that the purpose of the HACCP is “to provide safer and better working conditions for individual employees, to improve the products provided through the slaughtering process, and to produce other benefits for the producers, processors, and consumers.”\textsuperscript{73} But there are many problems with this new solution. The government is standing in its own way of stopping market failures from happening due to negative externalities in the food industry.

First, the HACCP is not effective in doing what it set out to do for large food corporations because it does not force the corporations to internalize enough of the production costs by forcing heightened food safety measures to reduce foodborne illness. Professor Fortin pointed out that “[w]hen market controls are inefficient and ineffective at producing the level of safety desired by consumers, the common approach has been to require firms to meet regulatory requirements for design or process standards.”\textsuperscript{74} Most likely, the enforcement of the regulatory requirements is flawed and the HACCP has not been properly implemented. Thus, although the HACCP is a well thought-through idea, the government is preventing a complete execution of its goals.

One group of impediments to a more effective execution of the HACCP are land ownership laws. Keith D. Haroldson described how “[e]ach state flatly prohibits corporate ownership of agricultural land, yet each prohibition is qualified by a list of exceptions.”\textsuperscript{75} He continues to explain that “[s]ome of the exceptions are so extensive that, in reality, the prohibition has a very limited effect.”\textsuperscript{76} Finally, he notes that “in Iowa, Kansas, Minnesota, Missouri, Nebraska, and South Dakota, a corporation may be excepted from the agricultural land ownership prohibition if it is a

\textsuperscript{72} Id.
\textsuperscript{73} Schumann, supra note 65, at 79.
\textsuperscript{74} Fortin, supra note 1, at 566 (in reference to 21 U.S.C.A. § 350g).
\textsuperscript{75} Id.
\textsuperscript{76} Keith D. Haroldson, Two Issues in Corporate Agriculture: Anticorporate Farming Statutes and Production Contracts, 41 Drake L. Rev. 393, 403 (1992)(internal footnotes omitted).
\textsuperscript{70} Id.
‘family farm corporation.”

It follows that well-intentioned statutes like the HACCP and the Anti-Corporate Farming Statutes carve out too many exceptions and are therefore ineffective. Without better execution of the HACCP, the Act will fail. Better execution, for example, could be achieved through consistent enforcement of penalties for HACCP violations, for which the Attorney General of each state may bring an action. Haroldson noted that “[o]nly Oklahoma allows a private citizen to bring an action. Under the enforcement scheme provided by these statutes, the corporation has an affirmative duty to report its own abuses.” (emphasis added) It is unlikely, however, that slaughterhouses would report their own abuses, at least not in full. Gail A. Eisinitz calls the HACCP “A Trojan Horse for Deregulation.”

Logically, then, those well-intended statutes like the HACCP, PPJA, the Anti-Corporate Farming Statutes, and the Humane Methods of Slaughter Act were designed to be ineffective in their alleged purposes, and to deregulate the industry, rather than to regulate it. Such deregulation is an indirect support of the externalization of food production costs. It follows that the mentioned statutes largely favor those they should regulate but fail to do so – and the whole market is pierced with failures from negative externalities.

Failure to report violations under the HACCP, for example, can only be prevented by sending more government employees out to perform the controls. Self-regulation and self-control proved fruitless in the past. Such increased control visits by government officials cost the government money, which seems to be unavailable. But it is available, because the money that is now spent on remedies for food contamination would eventually be redirected to contamination prevention. In the long run, food inspection practices would be improved and money saved, thereby making the negative externalities positive.

Moreover, according to Professor Fortin, “an important and powerful improvement in the food safety system would be a better feedback loop to the food business — one that makes up for the market’s failure to communicate food safety and risk.” The market would no longer “perversely rewar[d] firms that cut back on some food safety measures, because firms that cut these preventative costs may externalize the burden of those food safety risks to the public.” Thus, by preventing negative externalities from being a problem, the cost for the remedies would provide the money for the prevention. As Professor Fortin wrote,
“[i]t's much easier to keep all the needles out of the barn than to find the needle in the haystack.”\textsuperscript{83} Consequently, he noted correctly that the “[r]ecent outbreaks provide dramatic examples of the economics of failed prevention. For example, $12.5$ million worth of apple juice was recalled following contamination of the product with \textit{E. coli}, and the firm — Odwalla, Inc. — paid a $1.5$ million federal fine.”\textsuperscript{84} A smaller sum would have been needed for prevention, but the defective feedback loops and externality-indulging laws intensify the vicious circle of food market failures.

\textit{C. Veggie Libel Laws: The Interrelation of the United States Department of Agriculture (USDA), the Food Disparagement Statutes, and the First Amendment Right to Free Speech}

Showing the truth to society is supposed to be an absolute right — freedom of speech. The question is whether, in modern America, talking about food is a form of defamation of the large food corporations. Should the answer even lean toward “yes,” then it is clear that the large food corporations have too much control over what we eat and that they are hiding how unhealthy and unsustainable their products are. It follows directly that preventing free discussion about their products is another externalized cost, the constitutional right of free speech, i.e., of freely discussing food safety. It also shows that the large food corporations have something to hide and should arouse suspicion, rather than apathy. To avoid abolishing any rights, the government should step in. On the surface, the USDA is doing just that in the food industry. But on behalf of whom? Both consumers and producers are citizens under the USDA’s protection.

Kerri Machado emphasized that “[t]he USDA is responsible for two major tasks that are incompatible. The agency must both promote and police American agriculture.”\textsuperscript{85} Consolidation of these two tasks went wrong multiple times in the past. For example, “former Presidents Reagan and Bush cut the federal public health budget, and then subsequently appointed USDA officials whose primary interests were the deregulation of the meatpacking industry.”\textsuperscript{86} Machado continues with another example, where “President Clinton’s Secretary of Agriculture, Mike Espy, retained

\begin{itemize}
  \item \textsuperscript{83} Id. at 567-68.
  \item \textsuperscript{84} Id.
  \item \textsuperscript{85} Machado, \textit{supra} note 27, at 825-28 (internal footnotes omitted).
  \item \textsuperscript{86} Id. It is also notable that Reagan’s first Secretary of Agriculture, John Block, was involved in the pork industry. Reagan’s second appointee for the Secretary of Agriculture, Richard Lyng, was president of the American Meat Institute (formerly known as the American Meatpacker’s Association). His nominee for the USDA’s Food Marketing and Inspection Service was William McMillan, vice president of the National Cattlemen’s Association. These political appointments made the USDA no different than the agencies that it was meant to police.
\end{itemize}
Dr. Cross as the head of the USDA's meat inspection program . . . The reason was that Don Tyson of Tyson Foods was not only a friend of Clinton, but also gifted $220,000 to Clinton's Arkansas race.\(^8\)\(^7\)

Information later revealed that “Espy was instrumental in stopping a proposed salmonella prevention policy that would have slowed line speeds and also required trimming of (as opposed to washing) contaminated flesh. Espy then proposed regulations that would reduce the USDA inspectors within the plants.”\(^8\)\(^8\)

The foregoing examples prove that policing and promoting agriculture are clashing interests that can hardly be reconciled within one governmental institution.

While the USDA was designed to protect producers, whose foremost priority is to make profit, the government should place equal or greater emphasis on protecting consumers, i.e., citizens. When the government both supports the large food corporations and CAFOs — even if it does not publicize this — while also supporting organic and sustainable practices, such as certifying USDA organic foods for conscious consumers, the line is blurred.

One mechanism blurring the line is the “veggie libel laws,”\(^9\)\(^8\) or “food disparagement statutes,” which are defined as statute[s] designed to protect food producers from and provide remedies for pecuniary harm resulting from false and malicious reports of food contamination. A typical statute applies to false and disparaging public statements implying or claiming that a perishable food product is unsafe for human consumption. It typically applies when the speaker or writer knows that the statements are false because the claim or implication has no basis in reliable scientific inquiry, facts, or data.\(^9\)\(^0\)

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\(^8\)\(^7\) Id.

\(^8\)\(^8\) Id.


\(^9\)\(^0\) Black's Law Dictionary (9th ed. 2009) agricultural-disparagement law.
Such laws became best known after Robert Kenner, director of the
documentary Food, Inc.,91 and Oprah Winfrey,92 famous American talk
show hostess and philanthropist, spent millions on defending their
consumer rights to talk freely about food, which started on television. “On
March 22, 1996, CNBC’s America’s Talking aired a segment on Mad Cow
Disease which featured a debate between Dr. Gary Weber and Howard
Lyman. The CNBC program attracted the attention of staffers on The
Oprah Winfrey Show to Weber and Lyman as prospective guests for the
“Dangerous Foods” program.”93 The allegedly controversial statement
that triggered a veggie libel suit occurred “[i]n response to Lyman’s
assertion that Bovine Spongiform Encephalopathy, more commonly known
as ‘mad cow’ disease, ‘could make AIDS look like the common cold,’
[when] Ms. Winfrey exclaimed, ‘It has just stopped me cold from eating
another burger.’”94 This statement led to a landmark lawsuit in the domain
of agricultural disparagement or veggie libel law.

On June 5, 1997, 14 months after the “Dangerous Food”
segment aired, the FDA published the final rules on a
ruminant-to-ruminant feed ban. On April 16, 1996, The
Oprah Winfrey Show broadcast a program entitled
“Dangerous Food” which included a segment on BSE.
Plaintiffs [the Texas Beef Group] contend that the April

91 A New York Times article described the movie as follows:
“Food, Inc.,” an informative, often infuriating activist documentary about the big
business of feeding or, more to the political point, force-feeding, Americans all the
junk that multinational corporate money can buy . . . Divided into chapters dedicated to
points along the commercial food chain — from farm to fork, to borrow a loaded
agribusiness phrase — the movie is nothing if not ambitious. “There are no seasons in
the American supermarket,” the unidentified voice intones in the opening scene, as the
camera sweeps the aisles of one such brightly lighted, heavily stocked if nutritionally
impoverished emporium. From there the director Robert Kenner jumps all over the
food map, from industrial feedlots where millions of cruelly crammed cattle mill about
in their own waste until slaughter, to the chains where millions of consumers gobble
down industrially produced meat and an occasional serving of E. coli bacteria . . . The
voice in the opening belongs to the ethical epicurean and locavore champion Michael
Pollan, author of “In Defense of Food” and “The Omnivore’s Dilemma,” as well as a
contributing writer to The New York Times Magazine . . . As Mr. Kenner marshals his
prodigious evidence, including bushels of statistics, a veritable village of talking heads
and too many dopey graphics, he makes the case that there’s something horribly wrong
with a system in which a bag of chips cost less than a bag of carrots.
Manohla Dargis, Meet Your New Farmer: Hungry Corporate Giant, New York Times, June 12,
2009.
92 Oprah Winfrey is a highly successful American talk show hostess. Her talks how carries her
name and she has won multiple awards for her show. She is one of the most popular and
influential celebrities. See oprah.com (last visited Apr. 10, 2011).
93 Id.
94 Texas Beef Group v. Winfrey, 11 F. Supp. 2d 858, 861 (N.D. Tex. 1998) aff’d, 201 F.3d 680
(5th Cir. 2000).
16, 1996, broadcast of The Oprah Winfrey Show caused beef markets to “immediately” crash and that they were damaged thereby.95

The United States District Court, N.D. Texas, Amarillo Division, “consider[ed] this case ‘against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open’.”96 The trial, however, did not come to a satisfactory ruling, because the federal district court found that the plaintiff, Texas Beef, had no standing.97 Thus, the issue of the constitutionality of the statute was never reached.98

Instead, the costly trial was a warning to avoid speaking badly about unhealthy food, because it could result in expensive litigation.99 In fact, as Collins and McMasters pointed out in their article, Upton Sinclair would most likely be sued under the veggie libel laws if he published, in today’s modern America, his shocking and eye-opening book about the Chicago meat packing industry.100

Texas Beef Group v. Winfrey, nonetheless, is one of the few veggie libel law precedents and Oprah raised significant awareness about the Right of Free Speech restriction springing from veggie libel laws. In fact, the veggie libel laws that were passed in the thirteen U.S. states101 have little to do with the Restatement of Torts definition of defamation102 or the common law product disparagement causes of action.103 According to the Coalition

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95 Id.
96 Id. at 680 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).
97 In sum, [t]he Texas Beef court granted the defendants' motion for summary judgment as to the agricultural-product disparagement claim. The court found that the claim could not be sustained for two reasons: first, cattle were not a “perishable” agricultural product within the meaning of the statute;103 second, assuming arguendo that the cattle were perishable, the plaintiffs failed to present evidence that the defendants knew that the statements about cattle were false.104 In fact, the court noted that some of the plaintiffs' evidence suggested that at least part of what Lyman said had a factual basis in the practice of cattle raising.105 In short, the court did not address whether Texas' statute was constitutional; instead it disposed of the claim by finding that the plaintiffs lacked standing.

98 Id.
100 Id.
101 See note 90.
102 Restatement (Second) of Torts § 559 (1977).
103 Collins, supra note 99.
for Free Speech, “[i]n its place, many of them punish protected expression, establish a lower standard for civil liability, allow for punitive damages and attorney’s fees for plaintiffs alone, and lend themselves to abusive litigation practices.” These veggie libel laws are legislative products of the externalized costs of unsustainable food production practices. Professor Fortin noted that “firms will invest less in reducing risks if they are unlikely to pay for the consequences of those risks.” However, each citizen has the power to provide the much-needed incentives to internalize the food production cost. As Robert Kenner said, “consumers have a lot of power. We get to vote three times a day when we go food shopping. So go vote for fair food!” It is each consumer’s own fault when he does not take his rights to speak up seriously. Warnings are on the news and the veggie libel laws must not stifle people’s right to know where their food comes from.

Often referred to as the “catalyst for veggie libel laws,” the Alar apple scare is another example of how the veggie libel laws

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104 Id.
105 Fortin, supra note 1, at 577 (internal footnotes omitted).
107 Jones, supra note 98, at 825.
108 Jones also notes that

[i]t is probably a human carcinogen. In the aftermath of the public’s response to the publicity about Alar, the manufacturer of the chemical, Uniroyal Chemical Company, halted sales and requested cancellation of its registration for use on food crops. By that time, the EPA and Congress had already taken steps to halt sales of the chemical. The Alar incident also prompted Congress to order the National Academy of Sciences to study risks to children posed by pesticide residues in food. The Academy established the National Research Council (the “NRC”) to carry out this task. The NRC’s final report on the subject, *Pesticides in the Diets of Infants and Children*, generally found that children were probably not being protected under then-current regulations. Ultimately, the report spawned the enactment of the Food Quality Protection Act of 1996. That law has begun a new round in the pesticide debate.

Jones, supra note 98, at 830-31 (2001) (internal footnotes omitted).
109 The American Council on Science and Health wrote:

[O]n February 26, 1989, an environmental health canard was made public, hyperbolically. The principal result was mass hysteria over Alar, a chemical product that was not otherwise noteworthy except for its usefulness to apple growers and apple consumers. This unfounded yet widespread public-health fright tops the list of such frights in the latter half of the twentieth century. . . . In 1989, costuming oneself as an apple on Halloween would have befitted the times. That was the year in which something of a kangaroo court pronounced Alar, a powder used to prevent the pre-harvest rotting of apples, "the most potent cancer-causing agent in our food supply." It was the year in which the Natural Res-sources Defense Council, the TV newsmagazine 60 Minutes, then-talk-show host Phil Donahue, and film star Meryl Streep made "Alar" an almost dirty household word.

Kenneth Smith, Jack Raso, M.S., R.D., *An Unhappy Anniversary: The Alar ‘Scare’ Ten Years*
restrict constitutional rights. The Alar food scandal is often referred to as the “catalyst for veggie-libel laws.” The three main points of criticism of the veggie libel laws, or food disparagement laws, are as follows.

First, standing has been defined too broadly, so that producers can sue under the agricultural product disparagement statutes, turning the plaintiff-defendant relationship upside down. For example, although Winfrey could have sued for a restriction of free speech to discuss and warn about dangerous foods, Texas Beef sued her instead. The problem with this goes beyond the monetary award of damages and deep into the core of food consumption mentality. If promoters of unsustainable food production practices can sue to avoid the truth about their externalization of costs from being publicized, the government is indirectly protecting these externalization-of-costs practices and thereby contributing to the failure of the food market.

Second, according to Jones, the agricultural food disparagement statutes “actually vary from a level of intent reflective of the accepted defamation standard of malice, to the lowest level of intent or negligence, to no standard of intent.” This means that the reversed relationship between plaintiff and defendant is possible through statutory crafting of a lowered intent, i.e., a lower threshold for blaming the defendant. The above example shows that in Winfrey’s case, the burden of proof was shifted to the defendant, instead of the plaintiff, which goes hand in hand with the third point. As Jones notes, “[i]n such litigation, the defendant is required to proffer evidence in the form of scientific studies or research, and reasonable or reliable ones at that.” This means that a strong plaintiff from the pool of possible plaintiffs of food companies who externalize the production cost may interpret data favorable to their claim. Under the veggie libel laws, these companies may distort or hide data and, as they have done, make friends of organic and sustainable practices sound like unreasonable radicals with unfounded claims against food that allegedly tastes good. Jones concludes that, “what is only possibly true may be legally false. Indeed, unless a statement can be supported by reasonable scientific evidence (whatever that is), it is presumed false.” As a direct result of the inversion of the plaintiff-defendant relationship and falsity definition, the bearer of litigation costs and damages is not who it logically should be. Instead, the agricultural product disparagement laws allow the


110 Jones, supra note 98, at 825.
111 Id. at 836.
112 Id. at 838 (internal footnotes omitted).
113 Id. at 838-39.
114 Id.
115 Id. at 840.
large food production companies to externalize their litigation costs under the veggie libel laws.

Therefore, the fourth point of criticism points to the damage provisions of the agricultural product disparagement laws. Jones explained “that some of the statutes unconstitutionally allow for punitive damages without a showing of actual malice . . . To the extent that the statutes provide injunctive relief and may be classified as a ‘prior restraint’ on free speech, they may also be unconstitutional.” However, Bederman argues that “to sustain a claim of product disparagement, a plaintiff must show the intentional publication of an unprivileged false statement that disparages plaintiff’s property and causes special damages.” Thus, these laws are set up to make it nearly impossible for the defendant to win.

The unfortunate consequence is further illustrated by Bederman. Agricultural disparagement statutes violate both the First Amendment of the United States Constitution and many state constitutions by making actionable the very speech protected by these documents. Underpinning the protection of free speech is Justice Holmes classic “marketplace of ideas” statement. “ Freedoms of expression require ‘breathing space’ ” to have fair competition of ideas within a free and open society. Occasionally, the need to protect the competition of ideas will require the courts to “protect some falsehood in order to protect speech that matters.”

Overall, in addition to being unconstitutional, the “[a]gricultural product disparagement statutes have created a new right - the right to produce a consumer good without public discourse about its safety.” The results are statutory protections of externalizing food production costs, and to hiding the negative externalities from the general public. As a lawyer, one must be aware of the distortion of values inherent in the veggie libel laws. As a person who eats, one must search for the hidden truth. As a citizen, one must realize that the current system cries for changes from the inside out, i.e., each person’s investment in a tort law suit, rather than active changes for the benefit of the consumers by forcing the large food corporations to internalize the costs.

The dairy, meat, fast food, and similar lobbies succeeded in concealing the problem and twisting the laws in their favor. All this seems unconstitutional and against the citizens’ best interest. Foer pointed out that “[f]ew know the details about the contemporary meat and seafood industries, but most know the gist – at least that something isn’t right. The

116 Jones, supra note 98, at 841 (internal footnotes omitted).
118 Bederman, supra note 117, at 149-50 (internal footnotes omitted).
119 Jones, supra note 98, at 845 (internal footnotes omitted).
details are important, but they probably won’t, on their own, persuade most people to change. Something else is needed.” Then, Foer suggests that shame, in the sense used by Franz Kafka, an important nineteenth century philosopher, is the missing link.

Beyond [the] literal forgetting of animals by eating them, animal bodies were, for Kafka, burdened with the forgetting of all those parts of ourselves we want to forget. If we wish to disavow a part of our nature, we call it our ‘animal nature.’ . . . We can recognize parts of ourselves in fish – spines, nociceptors (pain receptors), endorphins (that relieve pain), all of the familiar pain responses – but then deny that these animal similarities matter, and thus equally deny important parts of our humanity. What we forget about animals we begin to forget about ourselves.

It follows that the physical and mental diseases in the meat which humans ingest are transferred. If people do not apply the ethical rights that they so strongly defend to domesticated animals, they will eventually give up their own. Veggie libel laws have already weakened the right of Free Speech. A person’s choice of what to eat is a choice which is almost eliminated by the market supply through commercials. Demand is controlled by commercials and governmental brainwashing through the dairy and meat industry lobbies. As the “Got Milk” campaign showed, even physicians are taught that milk is part of a healthy diet, whereas scientific evidence established that milk is harmful for adults. It is every person’s responsibility to look beyond the labels of packaged foods, to make healthy food taste good, and to resist the temptations in food advertisements that distort our sense of what good food is. After all, humans eat for nutrition, not entertainment. In turn, the entertainment of tasty food is directly linked to conscientious food selection and in order to make educated choices, people must not let veggie libel laws or other unsustainable practices cloud their supply of information.

Manohla Dargis, writing in the New York Times, summarized Michael Pollan’s idea of building slaughterhouses with glass walls, so people can watch what happens within. Watching “food animals” being slaughtered and separated into filets may help the general public to question their food-choices and to change their eating habits. From a legal standpoint, there are no reasons not to ask and not to look. It is every

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120 Foer, supra note 2, at 35.
121 Id. at 37.
122 See generally, Joseph Keon, Whitewash (2010).
citizen’s First Amendment Right, regardless of what veggie libel laws may dictate. Dargis pointed out that “much in everyday life, as Mr. Pollan notes, remains strategically out of view, including how our food winds its slow way to the dinner table. If we could see the living animal and not just the supermarket package, see the labor and the waste, we might change how and what we eat.” Along with the freedom of speech, press and the moral responsibility to ask questions about what we ingest, “looking” for the sources of our food seems natural – and yet the law has not sufficiently addressed this right and people are blinded with policies, laws, and regulations that take their voices away, leaving them buying or eating without a chance to look behind the metaphorical food package curtains.

Americans are obsessed with what they eat. This is true insofar as calorie-counting, carbohydrate-free diets and diet-help groups penetrate fashion magazines, supermarket shelves, even frozen dinners and restaurant menus. However, most dieters are ignorant to the truth behind the origin of their food. Hamilton noted that “[i]n 1988, the Board on Agriculture of the National Research Council published a report which documented our agricultural illiteracy . . . [and] notes that ‘most Americans kn[e]w very little about agriculture, its social and economic significance in the United States, and particularly, its links to human health and environmental quality.’” This is a lack in the proper education. Instead of reading the South Beach Diet, the Cabbage Soup Diet, the Atkins Diet, and the Zone Diets, the general public must be educated on the proper food groups, what adequate servings are and to preserve nutrients in food, among many other crucial aspects.

If society were better informed and more skilled at eating consciously, not only would the American public be less susceptible to unhealthy food campaigns and advertisements, but the most fundamental democratic principles would be maintained, rather than quashed by veggie libel laws or subsidized by falsified infomercials. As Hamilton pointed out, “in 1980 the USDA conducted a major study on the structure of agriculture called A Time to Choose, but the change in administrations made talking

124 Hamilton, supra note 8, at 619 (internal footnotes omitted).
about the structure of agriculture politically incorrect."\textsuperscript{129} Recent bestsellers like \textit{Skinny Bitch}\textsuperscript{130} by Rory Freedman and Kim Barnouin, \textit{The Kind Diet}\textsuperscript{131} by Hollywood Actress Alicia Silverstone, or any of the vegan cook and lifestyle books by Kathy Freston show that there has been discussion about the merits of a vegan diet, but, unfortunately, as Foer correctly wrote in \textit{Eating Animals}, the omnivore appears more "politically correct" than vegetarians, vegans, or flexitarians,\textsuperscript{132} like Robert Kenner, director of the Film \textit{Food, Inc.} This distorted perception, along with the idea that everything with high fructose corn syrup allegedly tastes better, is an unnatural product of advertisements, misdirected government subsidies and indoctrinated falsehoods. More lawyers need to take the problem seriously, more celebrities like Oprah Winfrey\textsuperscript{133} should raise awareness, and vegan role models with active voices, such as Brad Pitt, Natalie Portman and Ginnifer Goodwin should lead the way to healthier and more sustainable food choices.\textsuperscript{134}

The emergence of uncountable vegan and vegetarian cook books, magazines and websites,\textsuperscript{135} as well as press and media coverage, prove that food law is a matter of public concern. Food law should be a topic for open discussions, in the manner of politics and sports. As Foer noted when he drew attention to the taboos of talking about food, legislature is empowered to respond to how to treat this delicate topic.\textsuperscript{136} Any matter of public concern could potentially raise constitutional issues. Veggie libel laws should not be permitted to establish taboos in discussing matters of public concern, food safety. Jones wonders "[h]ow many members of the public

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\item \textsuperscript{129} Hamilton, \textit{supra} note 8, at 625.
\item \textsuperscript{130} Rory Freedman & Kim Barnouin, \textit{Skinny Bitch} (2005); see also \url{http://www.skinnybitch.net/}
\item \textsuperscript{131} Alicia Silverstone & Neal D. Barnard, \textit{The Kind Diet: A Simple Guide to Feeling Great, Losing Weight, and Saving the Planet} (2011); see also \url{http://www.thekinddietbook.com/uof/thekinddietbook/pb}
\item \textsuperscript{132} A “flexitarian” is a flexible vegetarian, one who eats a mostly plant-based diet and occasionally included eggs, dairy, or other animal products.
\item \textsuperscript{133} On February 1, 2011, Oprah Winfrey interviewed Kathy Freston on her show and introduced the one-week vegan challenge, along with 378 members of her staff. The resonance among academics was impressive and the show’s website features tips, benefits, support and advice on how to take the vegan challenge. Michael Pollan’s video provides directions for food choices. See \url{http://www.oprah.com/showinfo/Oprah-and-378-Staffers-Go-Vegan-The-One-Week-Challenge}. An alternative vegan shopping list is available at \url{http://static.oprah.com/images/packages/vegan-starter-kit/vegan-shopping-list.pdf}
\item \textsuperscript{134} For a list of celebrity vegans visit \url{http://en.wikipedia.org/wiki/List_of_vegans}
\item \textsuperscript{135} See e.g., \textit{Vegan Action}, \url{http://www.vegan.org/}
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would freely refer to lawyers as thugs and thieves who cheat and steal? But the ABA has not lobbied for protectionist legislation.\textsuperscript{137} Neither should the thirteen states that enacted the veggie libel laws be allowed to “regulate the marketplace of ideas in that gray area between science and the public good. The underlying approach of these statutes is to regulate speech by encouraging certain kinds of exchanges and punishing others.”\textsuperscript{138} In sum, classic conditioning and marketing of mass-produced foods changed the character of desirable foods by stimulating an appetite for unhealthy choices. Advertisements, misguided campaigns, and unconstitutional laws aggravate the burden on society at large, a burden solely caused by the greed of the fast and processed food industries.

IV. FACTORY FARMING

A. An Obsession with Food Contrasted with an Ignorance of Food Origins

In the introduction to his bestseller, \textit{Animal Factory}, David Kirby observed that “[m]any Americans have no idea where their food comes from, and many have no desire to find out.”\textsuperscript{139} He found “[t]he willful ignorance of our food’s provenance . . . curious, given our Discovery Channel-like fascination with the way in which everything else in our modern world is made.”\textsuperscript{140} This is a shame, because all people are affected by factory farming and Kirby unveiled these ugly farming practices in his book. By raising awareness and supporting sustainable alternatives to mass-produced and factory-farmed food, people are empowered to create hope for a better future.

The American market is flooded with poultry and livestock products, ranging from breakfast patties to school lunches, and even solidified animal fats in chapsticks. The kings of the food production and processing conglomerates that control the market are Archer Daniels Midland, Tyson, Perdue, Cargill, Smithfield, and Land O’Lakes, followed by Kraft, Nestlé, General Mills, PepsiCo, and Dole. These large companies and their followers “create[e] a favorable business climate for themselves.”\textsuperscript{141} The lack of controls and regulations of pollution practices and the negative externalities resulting from insatiable and greedy business conduct, facilitate the corporations’ rise to power and fuel their prevalence in the current market. Factory farming is one of the main contributors to

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\textsuperscript{137} Jones, supra note 98, at 847.
\textsuperscript{138} Bederman, supra note 117, at 136.
\textsuperscript{139} David Kirby, \textit{Animal Factory} xi (2010).
\textsuperscript{140} Id.
\textsuperscript{141} Id. at xiv.
their success and a key supplier of the corporate food industry. The mass production inherent in the term “factory” clashes with the naïve idea of idyllic “farms,” and the oxymoron extends from the corn feed to chicken’s genetic material - and finally also to the slaughter practices of those chickens. Foer explained that “[m]ore than any set of practices, factory farming is a mind-set: reduce production costs to the absolute minimum and systematically ignore or ‘externalize’ such costs as environmental degradation, human disease, and animal suffering.” He continues, saying that “[f]actory farming considers nature an obstacle to be overcome.” Costs are, then, externalized and laws are pierced with loopholes for temporary profit spikes. However, eating fast food, such as hamburgers, leaves irreconcilable environmental damage.

B. Steps Toward Possible Legal Solutions

Tort law is a viable approach to attack factory farming and to create new solutions. As lawsuits against the gun industry proved, “tort litigation is free from agency or legislative capture and the tort system is still able to create public policy. This is because the tort system is not influenced by the meatpacking lobbyists or the massive power of the meatpacking industry.” Aaron Gross, Ph.D., Executive Vice President, and Founder of Farm Forward, explains how important the role of lawyers is in shaping food laws:

Factory Farming has been made possible by a variety of legal structures that have provided protection to big agribusiness and denied animals legal standing. Virtually every general animal protection law across the nation exempts the abuse of farmed animals so long as the abuse is ‘standard practice,’ resulting in a situation where agribusiness can do almost anything to animals. Thus practices that none of us would condone, like condemning animals to live in cages so small they literally cannot turn around or extend their limbs, are ubiquitous in agriculture. Ubiquitous, that is, until new laws are passed - as is beginning to happen - that might well change the legal landscape for animals. Lawyers, of course, don’t make laws, but the enormous relevance of the law to the plight of farmed animals means that there are few groups in

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142 Foer, supra note 2, at 34.
143 Id.
144 Machado, supra note 27, at 831-32 (internal footnotes omitted).
America as able to make a difference in the lives of the billions of animals raised for food in the U.S. as lawyers.\textsuperscript{145}

In order to attack the problem, however, its origin must be made clear. Over approximately the past thirty years, corporations acquired family farms, and often forced or blackmailed the owners to change the farms’ character from rustic, old-fashioned, agricultural ideals, to high-production, unnatural, environmentally toxic and immoral mass production facilities, which are often called CAFOs (concentrated animal feeding operations) – a euphemism for the brutality that is actually going on there. Anti-corporate farming statutes, in turn, seemingly attempt to limit the corporate control of farming in the U.S., but the vast number of loopholes and exceptions make the laws nearly meaningless. While the advantages of the corporate form of agriculture are clear, the devastating conditions cannot be overstated. Gail A. Eisnitz, provided a glimpse behind the iron curtains of Factory Farms and CAFOs, which reveal images that would not only stop Oprah Winfrey from eating meat,\textsuperscript{146} but also everyone who knows how meat is mass-produced.

But this is just the tip of the iceberg that constitutes the Factory Farming problem. “[L]ivestock production accounts for 70 percent of all agricultural land and 30 percent of the land surface of the planet . . . About 20 percent of the world’s pastures and rangelands, with 73 percent of rangelands in dry areas, have been degraded to some extent, mostly through

\textsuperscript{145} Aaron S. Gross, E-mail to author (Jan 13, 2011) (copy on file with author).

\textsuperscript{146} For example:

About 285 million hens are raised for eggs in the U.S., and most spend their lives in battery cages, stacked tier upon tier in huge warehouses. Millions of day-old male chicks are killed (usually in a high-speed grinder called a “macerator”) every year because they are worthless to the egg industry. To prevent stress-induced behaviors caused by severe crowding, such as pecking cage-mates to death, hens are kept in semi-darkness, and the ends of their beaks are cut off with a hot blade—no painkillers are administered during this painful process. The wire mesh of the cages rubs off their feathers, chafes their skin, and causes their feet to become crippled. Farmers induce greater egg production through “forced molting”—shocking hens’ bodies into another egg-laying cycle by starving them for days and keeping them in the dark. Broken bones are also common among these birds, who “suffer significant osteoporosis,” according to the International Veterinary Information Service. A study published in Poultry Science explained that “high production hens’ structural bone is mobilized throughout the laying period in order to contribute to the formation of eggshell.” Although chickens can live for more than a decade, hens raised for their eggs are exhausted, and their egg production begins to wane when they are about 2 years old. When this happens, they are slaughtered. More than 100 million “spent” hens are killed in slaughterhouses every year.

overgrazing, compaction and erosion created by livestock action.\footnote{Steinfeld, supra note 20, at xxi.} Not only do factory farms mass produce living, suffering beings, but they also strip the animals of their dignity, make humans who consume the meat and dairy from CAFO condemned animals sick, and cause major damage to our planet.\footnote{The livestock sector is a major player, responsible for 18 percent of greenhouse gas emissions measured in CO2 equivalent. This is a higher share than transport. . . . Livestock are responsible for much larger shares of some gases with far higher potential to warm the atmosphere. The sector emits 37 percent of anthropogenic methane (with 23 times the global warming potential (GWP) of CO2) most of that from enteric fermentation by ruminants. It emits 65 percent of anthropogenic nitrous oxide (with 296 times the GWP of CO2), the great majority from manure. Livestock are also responsible for almost two-thirds (64 percent) of anthropogenic ammonia emissions, which contribute significantly to acid rain and acidification of ecosystems. Bernard T. Nolan, Barbara C. Ruddy, Kerrie J. Hitt, & Dennis R. Helsel, A National Look at Nitrate Contamination of Ground Water, National Water-Quality Assessment (NAWQA) Program (1988), http://water.usgs.gov/nawqa/nutrients/pubs/wcp_v39_no12/ (last visited Apr. 2, 2011).}

V. CONCLUSION: THE TRUE COST OF OUR STAPLE FOODS

There are many ways in which food production can be made safer and more sustainable. Mass production of food and factory farming promote contamination of large amounts of food that cause dangerous epidemics for consumers around the nation and abroad. Although some monitoring mechanisms are in place, the controls are delayed and feedback loops from consumers to government regulators are often interrupted. The externalized costs offset government funds that should be invested to regulate mass food production and avoid the escalation of epidemics and violations of safety measures. Government funds need to be redirected to correct the derailed food industry, rather than support ingenious loopholes to make more profit at the cost of the whole world. The prevention-based HACCP is failing and the USDA does not police the food industry sufficiently. Exceptions in the laws are abused and the resulting reversal of values penetrates morals, legislation, and public health. People suspect that factory farmed meat, for example, is unsafe, and that it is unconscionable to mistreat suffering animals for commodities and staple foods. Animals were attributed the status as “staples” by large advertisement campaigns that facilitated the rise to food industry superpower companies. People also disregard the unconstitutional veggie libel laws and fail to demand their implied constitutional right to know where their food comes from. They let large food companies and the conflicted USDA do the thinking for them.

The externalization of food production costs is omnipresent and the dangerous consequences are escalating. Not only do diets full of animal
products cause nationally amplified death rates, but world hunger is increasing while food prices decrease. The most readily available method to remedy these alarming negative externalities of the food industry in the currently failing market is via tort law suits, and forced changes in the food supply through consumer-driven demand for sustainable food. Corporate agriculture and factory farming will then suffer economic losses and internalize the costs to maintain profit margins. Thus, if consumers collaborate and use the tools available to them, torts and buying power, they may be able to reverse the effects of the negative externalities from the food industry as it is to-date. The needs for stricter food safety measures and healthier eating education are obvious, but the drive to promote those must be secured by the general public via tort law suits against those who shift the burden to the general public, i.e., the large food corporations.

Figure 3 is a visual illustration of selected externalized food production costs that are excluded from general food sticker prices but borne by society at large. Food sticker prices should encompass all the externalities (shown in boxes). In order to reverse the market failures, more externalities must be internalized by the food producers and reflected by sticker prices, rather than being left uncontrolled in the forms of pollution, foodborne illness, animal cruelty, and deprivation of rights.

Opposing arguments may be that cheaper food will feed the hungry world, and the slaughtering of animals is inevitable because they were “meant to be food” for humans, but those myths are unfounded and misguided. Anna Lappé, a national expert on food politics and sustainability, said it clearly when she stated that “[t]he inevitability myth is powerful; if we buy it, opposition seems futile.” She continues to explain that arguments based on such myths about “how industrial agriculture, especially when it has been adopted in the developing world, often has worsened hunger, not alleviated it. Small-scale farmers in developing countries may be cash poor, but many have been resource rich: growing healthy foods for themselves and their local economies.” The true cost of American so-called Staple foods extends far beyond the sticker price. Although the food industrialists externalize the production costs, those costs do not disappear – every person inhales the polluted air, drinks the contaminated water, eats the feces and bacteria-infected meat, supports animal cruelty, and deprives him or herself of fundamental rights by buying processed and factory-farmed food.


151 Id.
Figure 3: Factors influencing food sticker price

Sticker prices are isolated from externalities, but must be internalized in the food production costs.

As Aaron Gross correctly noted, lawyers and fellow-citizens are empowered to shape the laws around food production costs and force an internalization of the costs to reduce the negative externalities of the food industry.\(^{152}\) People can thereby help to reverse the negative effects of and censure the food industry that ferociously took over the world without concern for the consequences.

Every time people buy mass-produced fast food, they harm their minds, as well as their bodies, and the planet. Every time people buy organic foods from sustainable practices, they create a new piece of hope for the world they live in. The choice is up to each person to dig deeper and demand to know the truth about where his or her food comes from. When people see that the system derails, they can turn to torts to try to make public policy. There are few reasons not to condemn factory farming and to demand higher food safety standards. Since the markets are failing, people must help themselves. Raising awareness, carefully selecting which foods to buy, taking advantage of the right to sue those who shift the burden of the food production business on the general public provide viable solutions from the inside out.

\(^{152}\) Gross, supra note 145.