

Essay - The Law of Food: Eight Questions Shaping America's Food Policy

Prof. Neil D. Hamilton,¹ November 11, 2002

Introduction: Considering the Issues Raised by a Food Law Perspective

For most American agricultural lawyers the impact of law on what foods are produced and how they are marketed has not been considered to be a significant component of the body of agricultural law. To the extent “food” related legal issues have been considered it has most often been as an indirect factor of agricultural production or seen as a distinct body of law on food safety. However America’s food and agricultural system continues to evolve and the role law plays in relation to shaping how our food system operates has become better defined. It is clear there exist a set of important issues relating specifically to “food law” - policy issues which reach well beyond traditional questions of food safety and labeling. Many of these issues relate to the role of information and questions about what can and can not be said about a food product or the method by which it was produced. Other issues relate to the performance of America’s food system and how well it serves the needs of our citizens in meeting their nutritional and health needs. The goal of this essay is to consider the concept of a broader body of “food law” and explain why it is important for the agricultural law community and the public to understand and consider these issues.

By using the lens of food law, the essay introduces eight basic questions at the heart of the current legal and policy debates over America food system. From the perspective of consumers the questions are fairly simple inquiries relating to the quality of food and how well our food satisfies their expectations. From the perspective of the lawyer or policy maker the questions present significant issues relating to the structure and operation of government and the appropriate role of law as it relates to our food system. For each of the eight topics there are a range of recent legal developments - lawsuits, legislative proposals, rule makings, or other recent actions - which evidence the significance of the issues and give some indication of the direction the possible legal and policy resolution may take.

The eight questions introduced in the essay, stated from a consumer’s perspective, are:

1. What’s in this? – GMO’s, Allergens, the First Amendment and Food Labeling
2. Are the carrots organic? – Organic Production, Eco-labels and Quality Food
3. Did you grow this? – Local Food, Country of Origin Labels and Direct Marketing
4. Have you eaten yet today? – Hunger, Food Access and Food Security
5. Do you want fries with that? – Nutrition, Kids, Fast Food, and the Obesity Epidemic
6. Do those pills really help? – Functional Foods and Dietary Supplements
7. What did they do to the meat? – Irradiation and Meat Safety
8. Smell it and see if it is OK? – USDA, the FDA, Food Safety, and Product Dating

1. Ellis and Nelle Levitt Distinguished Professor of Law and Director, Agricultural Law Center, Drake University, Des Moines, Iowa, USA. Essay prepared for the VII International Agricultural Law Congress, sponsored by the Union Mondiale Degli Agraristi Universitari (UMAU – the All World Union of Agricultural law Professors) in Pisa, Italy, November 2002.

Before discussing the questions it is important to reflect on why it is valuable for agricultural lawyers to consider a broader view of food law as a component of agricultural law. The reasons include:

- these significant and distinct legal issues will require lawyer's attention and skills and reflect legitimate client and societal issues;
- the issues involve fundamental public policy questions about the operation of government including the first amendment and protection of public health, consumers' ability to be informed about food and nutrition issues, and the opportunity for local institutions to shape food and nutrition policy;
- the traditional "agricultural law" community has not addressed these issues or if so has come to them from a production perspective rather than from a consumer or public policy view; conversely the "food safety" legal community focuses on how the issues affect the food industry rather than on the farmer or consumer impact;
- the businesses and institutions most directly involved in shaping the debate, such as food manufacturers and marketers can not be expected to articulate or defend the views and concerns of either farmers or consumers, if those views are counter to their economic self-interest;
- how these policy issues are resolved will have significant impacts at the farm level in the foods consumers expect from agriculture, the legal and marketing arrangements farmers encounter, and the challenges they face in expanding into food processing and marketing;
- how the legal system addresses and resolves these issues will influence society's perception of how well both the legal system and food system serve public needs; and
- the policy and economic outcomes on many of the topics are still uncertain because of the evolving social, scientific and legal attitudes in the U.S.

Taking a "food policy" approach to these legal issues is an outgrowth of using a food systems analysis to consider agriculture, one that considers farming and production as just one part of the much larger economic, social, and political system that includes all aspects of food.²

1. The First Amendment and Food Labels – What You Can Say, and What You Don't Want to Say -

The power of information and control over it, have become perhaps the most significant issues in the future of America's food system – and law. The role of information arises in many ways in relation to food. One of the most important questions in food labeling is what else can be said about a food product – legally – that goes beyond the minimum forms of information (weight, nutrition, manufacturer, etc.) required by law. Significant political debates exist in the U.S. related to efforts to provide additional, truthful information, to food labels - such as the country of origin or whether the food

² For a discussion of the concept of food policy and using a food system analysis to consider legal developments, see Hamilton, Putting a Face on Our Food: How State and Local Food Policies Can Promote the New Agriculture," 7 Drake Journal of Agricultural Law 2002.

was produced using genetically modified ingredients (known as GMOs). The topic of additional label claims – especially those designed to convey some form of meaningful information to consumers about how or where the food was produced is referred to generally as eco-labeling. Producers and marketers use the label information to try to influence consumer behavior, i.e. buy this product instead of that one – because it satisfies some additional value or concern the consumer might have. The first amendment of the U.S. constitution protects free speech and is considered a basic tenet of Americans’ civil rights. In recent years the first amendment and its relation to food labeling and marketing has come into a sharper focus in America’s legal system but with some rather unexpected twists. The following section considers five ways the first amendment and control over the use of information is shaping food policy in the U.S.

Commodity Promotion and Commercial Speech - One heavily litigated issue within food marketing is the constitutionality of various commodity check-off and promotion programs such as the beef and pork check-offs, which use small marketing fees levied against farmers to finance generic marketing and promotion programs.³ In recent years many of the commodity promotion programs have come under legal attack by opponents who either don’t agree with the message or believe they are ineffective. While some of the attacks on the programs may find their source in larger structural fights over the political future of livestock production, the U.S. Supreme Court has approached the issue through the context of the first amendment and limits on forced commercial speech. As a result the cases are serving as the testing ground for issues such as the “government speech” exception to the first amendment.

Health Claims as Protected Speech - A second legal challenge to restrictions on food labeling is that from food manufacturers who are challenging the FDA’s ability to limit their efforts to “communicate” useful information to consumers about possible health benefits of products and the standards FDA requires before such claims can be made.⁴ The first amendment claims are an outgrowth of the 1994 law removing most federal

³ The U. S. Supreme Court has decided two recent cases challenging the constitutionality of mandatory commodity promotion programs. In Glickman v. Wileman Brothers & Elliot, Inc., 521 US 457, 117 S Ct. 2130, 138 L.Ed2d 585 (1997) the Court decided a promotion program which operated as part of the marketing order for stone fruit did not violate the first amendment. Four years later in United States Department of Agriculture v. United Foods, Inc., 533 US 504, 121 S. Ct. 2334, 150 LEd2d 438 (2001), the Court held the mushroom promotion program to be unconstitutional as a form of forced commercial speech. Now the action has moved to the federal district courts where challenges have been filed to the beef and pork promotion programs. In June 2002, the U.S. District Court in South Dakota ruled the beef-check off program is unconstitutional. See Livestock Marketing Association v. USDA, 2002 DSD 18 (June 21, 2002), and see Rod Smith, “Beef checkoff found unconstitutional,” Feedstuffs, July 1, 2002, p. 1. The government has appealed the decision to the 8th Circuit Court of Appeals and the district court judge has stayed his order requiring the collection of check-off fees be suspended, until the appeal is heard.

⁴ See, e.g. “First Amendment Issue Raised on Conventional Food Labeling,” 4 Food Safety Reporter # 27, July 3, 2002, p. 429, concerning the 57 page brief filed by the Grocery Manufacturers of America, and “National Food Processors Association Files Comments on Labeling Revisions,” 4 Food Safety Reporter #30, July 24, 2002, p. 468, concerning the comment filed by the NFPA. Both filings came in response to the Food and Drug Administration’s “Request for Comment on First Amendment Issues” filed in May, see 67 Federal Register 34942, May 16, 2002.

restrictions on the sale of dietary supplements.⁵ The food industry, which is regulated, believes the government's more stringent limitations on the ability to provide useful information to consumers about possible health benefits of eating certain foods unfairly limits free speech. The food industry has been developing this argument for years and recent personnel changes in the FDA under the new Administration created a political context to add it to the FDA's docket. While there may be free speech issues involved, the real public policy relates to how much authority FDA has to protect consumers from the proliferation of "helpful" label claims that may or may not reflect substantial health or nutritional benefits.⁶

Labeling Foods for the Presence of GMO's - The third prong of the first amendment food labeling debate relates to consumer group desires to require certain additional information – such as the use of genetically modified ingredients (GMOs) – be listed on the food label. As to the issue of mandatory labeling of foods produced from GMO ingredients, the FDA has answered and resolved the GMO labeling issue for once and for all – the U.S. will not require such labels except in limited cases where there is evidence of evidence of allergen concerns.⁷ However the free speech issue is implicated by continuing efforts to mandate such labels, as in the state ballot initiative on GMO labeling that failed in Oregon in November 2002.⁸ Assuming the law had passed food manufactures would have undoubtedly challenged it on first amendment grounds as well as on other claims, such as federal preemption and interference with interstate commerce. This challenge would have been similar to the successful fight waged by the food industry to defeat Vermont's 1994 attempt to require the labeling of milk produced with bovine growth hormone.⁹ That case was resolved against the state when the court ruled the state could not force marketers to provide such information even though true, because the federal law allowing for the use of bovine growth hormones did not require that fact to be disclosed. The court reached its conclusion, in part because it believed consumers concerned about health issues could purchase BST free milk from producers who voluntarily labeled their products as not containing the additive. But the assumption that

⁵ See the Dietary Supplement Health and Education Act of 1994 (DSHEA), Pub. L. No. 103-417, 108 Stat. 4325 (codified at 21 U.S.C. §301). For a discussion of the FDA's current efforts to implement the act and live under its restrictions, see Joseph Levitt, "Regulation of Dietary Supplements: FDA's Strategic Plan," 57 Food and Drug Law Journal 1 (2202).

⁶ For a discussion of the food industry efforts to force the FDA to remove limitations on the ability of food marketers to make health related label claims, see "First Amendment Discussion Opens Door to Labeling Revisions," 4 Food Safety Reporter # 21, May 22, 2002, p. 357.

⁷ See e.g., action taken by the Food and Drug Administration rejecting petition to require mandatory labeling of foods produced with genetically modified ingredients. 66 Fed. Reg. 4706, Jan. 18, 2001. For a comprehensive discussion of American law and policy as relates to the use of biotechnology, see N. Hamilton, Legal Issues Shaping Society's Acceptance of Biotechnology and Genetically Modified Organisms, 6 Drake Journal of Agricultural Law 81 (Spring 2001).

⁸ For a discussion of the contents of the proposed Oregon law and its potential impact on the food industry, see Patricia Callahan, "Oregon May Require Labels on Genetic Food," Wall St. Journal, Sept. 30, 2002, p. B1. The food industry is waging a multi-million dollar campaign to defeat the initiative and the U.S. government has taken the unprecedented step of warning the state of Oregon it believes such a law would interfere with the operation of the national food system. See article U.S.A. Today, Oct. 9, 2002 concerning a letter from the acting FDA commissioner to the Governor of Oregon. The Oregon proposal can be found at the web site of the group Oregon Concerned Citizens for Safe Food, www.labelgefoods.org

⁹ International Dairy Foods Association v. Amestoy, 92 F. 3d 67 (2nd Cir. 1996).

producers who choose to employ alternative production techniques will be able to communicate this fact on food labels is very much in doubt. The best example concerns efforts to provide consumers truthful information about whether foods have produced from GMO ingredients. The ability of a food marketer to label a product in this manner will be directly influenced by the FDA's "voluntary guidance" relating to such labels.¹⁰ While the guidance provides the basis for making such claims, the effect of the actual provisions makes it next to impossible for food marketers to do so – short of complying with existing standards for organic food labeling – a separate and more costly and cumbersome system. One issue in the background of this debate is the idea of the "consumer right to know" but this concept has no basis in American law. In reality the real thrust of most food industry resistance to efforts to require additional labeling, is the food industry's campaign to preserve the "right not to tell" which food manufacturers and marketers currently enjoy.

Country-of-Origin Labels - The same dynamic concerning the desire of consumers for specific information about their food – and the resistance of food marketers who do not want to share the information - is being played out in other disputes. For example, as part of the 2002 farm bill Congress required the USDA to develop guidelines for the "country-of-origin" labeling (COOL).¹¹ Under the terms of the law, the USDA had to develop a preliminary voluntary program by September 30, 2002, and is to develop a permanent mandatory program to replace it within 2 years. The meat processing and marketing industry lead by the American Meat Institute, for a variety of political and economic reasons, have long opposed efforts to require COOL, arguing it will be too difficult and expensive to implement and is unjustified on either free-trade or health and safety grounds.¹² As the same time the idea has gained increasing support among livestock farmers – who feel their products are superior in safety and quality to imported meat – and from consumers who for various reasons either desire to purchase American raised meat or at least be given an informed choice. Both farmers and consumers believe information concerning the source of the meat is a material fact that consumers should know while marketers and processors disagree.¹³ The USDA released the terms of the voluntary COOL program in early October 2002, and meat industry immediately attacked the plan, claiming it would cost over \$1.5 billion to comply.¹⁴

Presence of Food Allergens - One food labeling and information issue which arises above mere consumer satisfaction or curiosity concerns the presence of food allergens and

¹⁰ See FDA Draft Guidance for Industry, "Voluntary Labeling Indicating Whether Foods Have or Have Not Been Developing Using Bioengineering," January 21, 2001, available at www.cfsan.fda.gov/~lrd/biotechm.html#label.

¹¹ See section 10816 of the 2002 farm bill, officially known as the Farm Security and Rural Investment Act of 2002, 107th Congress 2nd Session, Report 107-424, conference report to accompany H.R. 2646.

¹² See e.g., "USDA Urged to Use Light Hand in Crafting Country-of-Origin Program," 4 Food Safety Reporter #33, August 14, 2002, p. 503.

¹³ USDA issued its guidance for implementing the COOL program on October 8, 2002. See USDA News Release, # 0430.02. the actual regulations were published at 67 Fed. Reg. 63367, October 11, 2002.

¹⁴ See American Meat Institute, press release, Oct. 9, 2002, in which AMI President, J. Patrick Boyle called the COOL proposal the "Most costly, cumbersome and complex labeling program in history." at www.meatami.com.

whether food labels adequately and accurately reveal the true contents and ingredients of the food. For the small but perhaps increasing portion of the population who suffer from food allergies, the availability and accuracy of this information is critical. For that relative small but not insignificant group of people suffering severe food allergies – this information can be a life or death issue. The class of ingredients that most commonly trigger food allergies is relatively small – most notably milk, nuts, and wheat gluten. One policy issue in the U.S. relating to food allergies is how stringent the food labeling laws are relating to the mandatory disclosure of possible allergens as ingredients in a food product. In recent months this issue has come into sharper focus because of concerns there is no common method or terminology used by food marketers to describe or name the allergens.¹⁵ So for example, a person allergic to dairy products, may not just need to look for the words dairy on the label, but must also know the same proteins might be described with other terms such as whey, or casein. The relatively straight forward policy issue is shouldn't the FDA develop a commonly agreed set of terms and descriptors for food allergens and require the use of these names by marketers rather than placing the burden of lexicography on the shopper? Assuming for the moment that food labels include understandable information, there are still problems in how diligent food manufacturers are in actually disclosing or labeling for the presence of ingredients. The issue of potential liability for failing to disclose the presence of known allergens is one of the areas in which the courts continue to play a role in defining the duties required of food marketers.

2. Are the carrots organic? – Organic Production, Eco-labels and Quality Food

In recent years the nature of America's food system has changed as food producers and marketers have responded to a changing set of demands and expectations from consumers. One of the most notable – and promising trends – in America's food system is the increasing demand for higher quality foods – foods that meet consumer desires other than just price or nutrition. Perhaps the best example of this changing demand is the success of the organic food sector.¹⁶ Demand for organic foods has grown by over 20% a year for the last 10 years and now involves a market of over \$12 billion annually. The growth in the organic food sector has been largely the result of the efforts of the thousands of organic farmers who have taken the time and effort to produce foods that can be organically certified and the processors and marketers serving consumers. A significant portion of the organic food consumed in the U.S. is sold directly from farmers to consumers, such as at farmers markets, but the largest amount is sold through traditional food marketing outlets. These include a whole new class of grocery stores, such as Whole Foods Market and Wild Oats, to serve natural and organic food customers.

The production and marketing of organic foods has developed in the U.S. under a mixture of private certification programs and state organic laws. But in October 2002

¹⁵ See Greg Winter, "Calls for Increasing Clarity on Food Labels," New York Times, July 2, 2002, and "Use-Friendly Food Labels," New York Times Editorial, July 6, 2002.

¹⁶ Evidence of the continuing progress of the organic food industry to move the issue into mainstream American culture can be seen in the recent multi-page article in a major U.S. news magazine, see Geoffrey Cowley, "Certified Organic," Newsweek, September 30, 2002, p. 50.

this will change when the long awaited and much debated federal organic rules – and the national organic label – go into effect.¹⁷ The basis for the federal organic program was provided in the 1990 farm bill¹⁸ and it has taken the USDA and the administrative process 12 years to develop a national system for certifying and labeling organic foods. This period saw great controversy – such as when USDA proposed in the first organic rule to allow use of sewage sludge as fertilizer and genetically modified seeds. Over 300,000 citizens commented on the proposed rules – most voicing strong opposition – and USDA went back to the drawing board. The new rules, proposed and refined over the last five years by the National Organic Standards Board, are considered to be much better and more in keeping with the philosophy and values that drives the organic food system. However, the topic of organic food is not free from controversy with issues concerning the relation between the new federal rules and the ability of producers and marketers to label foods to a different or “higher” standard of production.

A concern voiced by many within the organic food movement is the rules will facilitate growth of an industrialized organic food system. The fear is such a development would entail many of the issues of scale, mono-cultures and mass marketing techniques the organic system was designed to avoid – and which plague farmers trying to exist in the conventional farming system.¹⁹ In addition, the USDA will not acknowledge that organic production has any relation to health, safety or environmental protection, even though that is clearly the belief of most consumers and producers. Instead USDA – which must be mindful of its traditional constituency of farmers using conventional chemical based techniques - considers organic to be simply an alternative production and marketing system. This tension between the market “reality” where consumers buy organic food on the premise it is healthier, and USDA’s more limited view of the purpose of organic production means there will continue to be tension and conflicts over how the federal organic rules are implemented. In addition, because the “organic” label is now an issue of public law there are concerns politicians can change the meaning of “organic” simply by amending the law.²⁰ As a result of these concerns many of the original proponents of organic food are now moving on to other forms of marketing and labeling they believe more fully capture the values their farming methods reflect and that consumers expect.²¹

¹⁷ See 7 Code of Federal Regulations (CFR) Part 205. To learn more about the USDA and the National Organic Program (NOP) visit the USDA Agricultural marketing Service web site at <http://www.ams.usda.gov/nop>.

¹⁸ See the Organic Foods Production Act of 1990 (OFPA), codified at 7 U.S.C. 6501-6522 (2002).

¹⁹ See Michael Pollan, “The Organic-industrial Complex: How organic became a marketing niche and a multibillion-dollar industry,” *New York Times Sunday Magazine*, May 13, 2001.

²⁰ See e.g., “Assurances on Organic Program Fail to Quell Producer Anxiety,” *4 Food Safety Reporter #25*, June 19, 2002, p. 407, about the concerns organic poultry growers had over efforts by several members of Congress to get USDA to allow a Georgia poultry company to label chickens as organic even though they had been fed non-organic feed.

²¹ The possible impact the new organic rules might have on small organic farmers, forcing some to drop their certification, was the subject of a guest editorial by Samuel Fromartz, “Small Organic Farmers Pull Up Stakes,” *New York Times*, October 14, 2002, p. A21.

As noted above, there are a broad array of additional traits or factors that might be of value or interest to consumers, including such things as animal welfare concerns, and the use of certain production practices, such as chemical free or no growth hormones. The ability of food producers and marketers to label their products to reflect these other traits or values, is known as eco-labeling. Clearly, organic food production is a form of eco-label, one in which the content of the label is defined by the rules and practices required in order to obtain certification. But for most forms of eco-labels no public regulation or law restricts what can be said or sets the process to earn the right to use the label. Instead eco-labels represent a private form of labeling and as such there are a number of legitimate policy issues which might arise, including the potential for consumer fraud, the ownership and control of the labels, and the mechanism or protocols used to measure compliance and eligibility for their use.²² In recent years more attention have been given to the topic of eco-labels, both their marketing potential and questions of whether the government needs to develop regulations to control their use. For now the labels are the domain of private organizations, such as environmental groups and increasingly, the third party certifiers, who determine compliance with the labels.

3. Did you grow this? – Local Food and Direct Marketing

One of the most significant trends underway in America's food system relates to the growing demand for "locally grown" food and the increased interest in forms of direct farmer to consumer marketing, such as farmers markets.²³ In September 2002, USDA released a study showing the number of farmers' markets in the US has grown over 79% since 1994, with 3,137 markets now in existence. The study indicates 67,000 American farmers utilize farmers' markets and sales have grown to over \$1 billion, still a small share of the \$200 plus billion food market in the U.S.²⁴ The growth in demand for local food is tied to a number of concerns many consumers have about either the safety or quality of their food and their desire to "put a face" on their food by purchasing foods about which they have more information or confidence.²⁵ At the same time there is an increasing desire by many farmers to raise and market foods in ways to gain higher incomes and more satisfaction. The production of food crops as opposed to grains and commodities is one way this is possible. Because of the benefits from expanding direct marketing – for both consumers and producers – public officials at the national, state and local level are looking for ways to encourage this portion of the food system. Supporting the creation and use of farmers' markets is one of the most direct and visible

²² The role of eco-labels in food marketing will be the subject of an international conference to be held at Tufts University in Boston, Massachusetts in November, 2002. for more information about the conference visit <http://nutrition.tufts.edu/conted/ecolabels>.

²³ Evidence of how the public has become increasingly aware of the importance of quality food is reflected in the increased coverage of food related stories in the popular press. See for example the collection of articles "Love Your Food," in the Utne Reader, May-June 2002, including Jay Walljasper, "The Joy of Eating," at p. 48.

²⁴ See, Timothy Egan, "Growers and Shoppers Crowd Farmers' Markets," New York Times, September 29, 2002, p. 18.

²⁵ For a discussion of many of the forces driving the development of the local food movement, see Hamilton, note 1, *supra*.

opportunities.²⁶ But other efforts to create demand for locally grown food – such as purchases by local schools or state institutions are also part of this development.

In order to promote new marketing opportunities for locally grown food, states need to create a policy context in which to address these opportunities, and in order to ask questions that may not be asked in traditional commodity based systems – such as does the state make any effort to use locally raised food. Creating and supporting state or local food policy councils, is one way to create the larger context for developing a comprehensive “food policy” for a state or region. Five states – Connecticut, Iowa, North Carolina, Oklahoma and Utah - have formed official state food policy councils, and a number of others are considering this opportunity.²⁷ The 2002 farm bill authorizes USDA to provide community food security grants to create food policy councils. In addition to doubling annual funding to \$5 million, the law says grants can be awarded to:

Encourage long-term planning activities, and multi-system, interagency approaches with multistakeholder collaborations, that build the long-term capacity of communities to address the food and agricultural problems of the communities such as food policy councils and food planning associations.²⁸

Another step many states have taken is to create an identity for foods grown in the state so that consumers – if motivated – can find and consume foods produced and marketed by local farmers. Almost every state in the nation has developed some form of state based identity marketing effort, typically involving promoting use of a common name and marketing logo.

The growing popularity of locally grown food is not merely the product of public efforts to open new markets for farmers. Demand for locally grown food is being generated by consumers who appreciate freshness and quality, and who value the direct personal relations with local producers. Another important force helping increase appreciation for local foods are the nation’s chefs, who depend on quality ingredients for their success. In recent years there has been a distinct trend in culinary education and practice to promote and feature locally grown foods. Many of the most famous and influential chefs in the U.S. such as Alice Waters, the owner of Chez Panisse in Berkeley, California, are known for their use of and commitment to local and seasonal produce. This support for local agriculture is one of the key tenets of the Chefs Collaborative, an organization involving many of America’s influential culinary leaders, and in many ways local foods are helping set the standard for quality in American cuisine.²⁹ Another organization devoted to the relation of food and culture is the Slow Food movement,

²⁶ For an analysis of the operation of farmers’ markets in the U.S. and the role that the rules and regulations play in their success, see N. Hamilton, *Farmers’ Markets: Rules, Regulations, and Opportunities*, June 2002, available at www.NationalAgLawCenter.org.

²⁷ For a discussion of the operation of state food policy councils, see Hamilton, note 1 supra.

²⁸ Section 4125 of the Farm Security and Rural Investment Act of 2002 amending 7USC §2034.

²⁹ For an example of the increasing role of knowledge about farmers and their production methods in American cooking, see the profile about Virginia farmer, Joel Salatin, a leading proponent of pasture raised poultry and direct marketing in a recent leading culinary magazine, see Michael Pollan, “Sustaining vision,” *Gourmet*, September 2002, p. 80.

which began in Italy in 1986 and has now spread throughout the land. Slow Food was born out of concern for how fast food culture was helping eradicate traditional forms of local artisan foods and altering the role food and its appreciation play in society.³⁰

The fast food industry is not unaware of the trends in consumer food buying patterns, and the possibility exists fast food companies may develop markets for healthier products and use their marketing power to promote important changes in how animals are produced. For example, McDonalds is the largest purchaser of eggs in the U.S. and in 2001 the company sent a letter to its suppliers instructing them to adopt several new production methods based on animal welfare concerns, including providing layers with more cage space.³¹ The company has also recently made a major investment in a new and growing chain called Chipolte Mexican Grill, which uses high quality ingredients, including Niman Ranch free ranch pork which is certified by the Animal Welfare Institute as being humanely raised, outside on family farms in Iowa and the Midwest.³²

4. Have you eaten yet today? - Hunger and Food Access

There is perhaps no more emotional and troubling issue facing society and agriculture than the question of hunger. While it is difficult to believe that a nation as prosperous as the United States could have a significant hunger problem, recent studies indicate hunger and food insecurity continue to exist.³³ The sad truth is that even with the over \$35 billion the nation spends each year, when combined with significant private relief efforts, close to 10% of the households in the nation, about 10 million, still experience food insecurity.³⁴ USDA studies indicate that over 30 million people are food insecure, meaning they have difficulty accessing adequate food supplies on a regular basis. The food stamp program and other hunger relief efforts continue to be the single largest component of the nation's spending on agriculture. Developing effective initiatives and programs to respond to hunger and address the underlying causes of it continues to be a challenge to both the public and private sectors.³⁵ Addressing hunger and food assistance is an issue somewhat like the development of federal farm programs - while the impacts of problems are experienced by individuals at a local level, the public resources and

³⁰ For a discussion of Slow Food movement, see, Alexander Stille, "Slow Food's Pleasure Principles," The Nation, August 27, 2001. For more information about the organization visit the web site at www.slowfood.com.

³¹ See Marc Kaufman, "McDonald's Tells Farmers to Treat Chickens Better," Washington Post, August 23, 2000, p. A1. See also a recent story concerning a poultry grower who has developed a new market for free range poultry, based on how the birds are raised, see, Alex Markels, "A Marketing Cry: Don't Fence Them In," New York Times, September 1, 2002.

³² For a discussion of the company and its growth potential, see Julie Dunn, "Free-Range Burritos; Is This McDonald's?" New York Times, September 29, 2002, p. 6.

³³ See, Mark Nord, Kyle Jemison, and Gary Bickel, Measuring Food Security in the United States: Prevalence of Food Insecurity and Hunger, by State, 1996-1998, USDA/ERS, Food Assistance and Nutrition Report Number 2, Sept. 1999.

³⁴ See Nord, et al, supra. The USDA defines the term "food insecurity" as meaning "limited or uncertain availability of nutritionally adequate and safe foods or limited or uncertain ability to acquire acceptable foods in a socially acceptable ways."

³⁵ See, Janet Poppendieck, Sweet Charity: Emergency Food and the End of Entitlement, Viking 1998, for a thorough and candid analysis of America's hunger problem and the challenges facing the public.

responsibility for addressing them has been primarily assigned to the federal government. The development and funding for food stamps, the WIC program, school meals³⁶, elderly meals, donation of surplus commodities and similar programs have all been done at the federal level. The dominant role given to federal efforts is a reflection of the issue as a national priority, the magnitude of the expenditures needed, and the need for or value of uniformity in response.

It should be no surprise given the continuing presence of hunger that a number of states have undertaken additional state and local efforts to address hunger concerns. The state initiatives typically relate to improving the coordination of public anti-hunger programs and improving the performance of the programs that exist – in terms of their coverage and operation.³⁷ In recent years a number of states have enacted legislation to undertake a focused study of hunger issues in the state. The initiatives most typically referred to as hunger commissions or task forces provide detailed sets of tasks and priorities expected for the body. For example, in Oregon, creation of the Commission was accompanied by enactment of a detailed state policy on hunger.³⁸

5. Do you want fries with that? – Nutrition, Kids, Fast Food, and the Obesity Epidemic

While hunger continues to be a issue for some people in the U.S. one of the great ironies is an equally significant issue – one that promises to create a perhaps even greater public health crisis – is the over nutrition or fattening of America. More Americans are becoming fatter and fatter with each passing year and as a result we are creating new public health concerns. The over-abundance of food, the prevalence of a junk food diet heavy with fried foods, fats, sweetened drinks, and super sized portions, and the lack of exercise, all contribute to this growing epidemic of obesity. With the increased incidence of over weight – now close to 65 percent of the population and obesity – now estimated to exceed 30 percent of Americans, there are associated health concerns related to the increased incidence of diabetes, heart attack, stroke and other related nutrition related illnesses.³⁹ The role of fast food culture and how it has changed America, not just what we eat, but also how food is grown and processed, how it is marketed, as well employment and transportation patterns, were the subject of a recent best selling book which helped raise the nation's awareness of the issue.⁴⁰

Questions of how to actually confront the effects of these dietary changes present difficult issues of public policy and law. The foods being consumed are legal and the

³⁶ For a fascinating historical review of one component of federal feeding programs, see Antonia Demas, Hot Lunch: A History of the School Lunch Program, Food Studies Institute Inc. (2000).

³⁷ The most comprehensive and valuable inventory of these state efforts is an annual report prepared by the Food Research and Action Center (FRAC) and America's Second Harvest. See, State Government Responses to The Food Assistance Gap 2000, Third Annual Report and 50 State Survey, December 2000.

³⁸ In 1991 Oregon enacted legislation, the Oregon Hunger Relief Act of 1991, see Oregon State Code, Sections 458.530 et seq. Examples of state anti-hunger commissions and the legislative language used to initiate them can be found for Maine, New Jersey, Oregon, and Texas.

³⁹ See, Henry Fountain, "Living Large: Our Just (Burp) Desserts," New York Times, October 13, 2002, p. 6, on the recent Center's for Disease Control and Prevention study showing 65% of Americans overweight.

⁴⁰ Eric Schlosser, Fast Food Nation: the dark side of the all-American meal, Houghton Mifflin 2001.

marketing practices employed are well accepted, further, the economic power of fast food companies such as McDonald's is legendary. In the summer of 2002 a great deal of public attention was given to a lawsuit filed against McDonald's and several other fast food marketers by an obese plaintiff who alleged the companies were responsible for his weight gain and related health concerns.⁴¹ The lawsuit was filed by an attorney experienced with the tobacco litigation that over the course of the last twenty years has transformed America's relation with smoking. Much of the media attention about the lawsuit raised the question of whether lawyers were now preparing for a tobacco like war against fast food –and whether this raises similar questions as to personal responsibility. Most legal observers doubt the merits of the case, but few believed the tobacco litigation would succeed. The fast food industry is not taking the challenge lightly, and has mobilized a multi-million dollar campaign based on personal choice and protecting consumer freedom to eat what you choose without interference from the “food police.”⁴²

While class action lawsuits may not change America's eating habits, public health officials and nutritionists raise valid concerns about the health impacts of fast food based diets. A recent book details the role public policy will need to play if America is to address these issues. In Food Politics, Dr. Marion Nestle provides a critical examination of – in the words of the subtitle “How the food industry influences nutrition and health.”⁴³ Prof. Nestle chairs the Department of Nutrition and Food Studies at New York University and has served on several nutrition and science advisory committees for the government, including advisor on the first Surgeon General's Report on Nutrition and Health released in 1988. Her detailed and comprehensive account of how the food industry influences government nutrition policy, while unleashing its marketing genius on America, especially our youth, is a powerful, sometimes disturbing story. It explains what has happened in the grocery aisles and at school lunch counters – which may explain why the sugar and sweetener industry has threatened her with legal action.⁴⁴

One of the major issues in the debate over nutrition policy in the U.S. concerns the role of schools in shaping both what children eat and what they know about diet and health. In recent years an increasing number of parents and public health officials have raised concerns about the growing role of fast food within the nation's school lunch program. A related and equally serious issue concerns the availability of soda and other sweetened drinks at vending machines on school property. The consumption of milk and other healthier alternatives has continued to decline while consumption of sweetened beverages, such as soda pop and colas has risen dramatically.⁴⁵ The opportunity to

⁴¹ The filing of the lawsuit triggered extensive coverage in the media, see e.g. Jonathan Turley, “Lawyers drooling over big fat awards,” Baltimore Sun, August 1, 2002; Jennifer Heldt Powell, “Fast-food suit gets heat; Experts say lawsuit will be hard to win, as well as to justify,” Boston Herald, July 29, 2002; and Jonah Goldberg, “The anti-Big Mac attack,” National Review, July 15, 2002.

⁴² To see how the food fight is being waged visit the web site of Consumer Freedom, an organization helping lead the fight against the attack on fast food, www.consumerfreedom.com.

⁴³ Food Politics, University of California Press 2002.

⁴⁴ For information about the book and the industry response to it, visit www.foodpolitics.com.

⁴⁵ Even in school districts where concerted efforts have been made to provide healthier foods, kids still choose fast food alternatives, see, Patricia Leigh Brown, “Health Food Fails test at School in Berkeley,” New York Times, October 13, 2002, p. 14, discussing the difficulty in getting students to eat the healthier

increase sales to children has been heightened by the marketing agreements beverage makers are entering with school districts. In exchange for the rights as exclusive vendors on school premises, sellers make sizeable payments – sometimes hundreds of thousands of dollars to school districts. School officials justify the agreements by noting the kids are going to drink pop anyway and the payments help make up for short falls in public funds and provide additional opportunities for students, such as band uniforms and books. The agreements, referred to as ‘pouring rights’ contracts, have triggered sharp debates in some cities. In 2002 the Los Angeles school district voted to remove some vending machines from school property.⁴⁶ This action followed an intense debate in the California legislature to limit sale of these products, referred to as “competitive” foods.

6. Do those pills really help? – Functional Foods and Dietary Supplements

In the 1990s the U.S. Congress enacted a law, the Dietary Supplement Health and Education Act of 1994, which had the effect of essentially removing the sale of dietary supplements from direct federal regulation.⁴⁷ Unlike foods or drugs, dietary supplements, many of them based on herbal remedies, can be sold with little government oversight as to testing, labeling, or verification of claims made for the products. As a result, the supplement industry has boomed in the U.S. becoming a multi-billion dollar industry. Many public officials have raised concerns about the possible consequences of this proliferation of products making health based claims, which are largely unverified, but many consumers are avid purchasers of the new products. For some officials the policy issues raised are ones of consumer fraud and the question of whether or not the products actually provide any health or nutritional benefit, worth the cost. The axiom here is the market rules and let the buyer beware. But for other officials, the increased sales of dietary supplements and consumers’ reliance on them to address health matters raise legitimate public health concerns. This is especially true when the supplements include herbs that have physical effects, such as ephedra, which has been shown to cause heart related problems.⁴⁸ Evidence of adverse public health impacts is one basis upon which the FDA can in fact take action against health supplements. Another public health concern relates to the possible impact using the products may have on the efficacy of other medications being taken.

In recent years a whole new category of food related production and marketing has developed relating to health and diet supplements, referred to as functional foods. The idea is that the food provides more than just basic nutrition, but instead also provides

food promoted by the school district. Colleges dining services which have experimented with healthier eating alternatives have had similar difficulty changing students’ eating habits. See, Elizabeth F. Farrell, ‘Students won’t Give Up their French Fries,’ Chronicle of Higher Education, July 12, 2002, p. A35.

⁴⁶ See the report, Challenging The Soda Companies: The Los Angeles Unified School District Soda Ban, by the Center for Food and Justice, Urban and Environmental Policy Institute, Occidental College, September 2002, available at http://departments.oxy.edu/uepi/cfj/cfj_LA_sodaban.htm

⁴⁷ Pub. L. No. 103-417, 108 Stat. 4325 (codified at 21 U.S.C. §301).

⁴⁸ The FDA is taking legal action against a major dietary supplement companies, Metabolife, in relation to its marketing of ephedra-based products and its failure to provide the agency with complaints the company had received about adverse reactions to the product. See, “FDA Targets Metabolife; Gets Serious about Adverse Event Reports,” 4 Food Safety Reporter #34, August 21, 2002, p. 515.

some additional health related benefits. This blurring of the line between what products are foods and what products are drugs, or have health related impacts, will continue to present U.S. lawmakers with new and challenging issues.

7. What did they do to the meat? – Irradiation and Meat Safety

In recent years the most significant food safety issue in the U.S. has been the incidence of various forms of pathogens in the meat supply. Whether it is Listeria in poultry, E. coli in beef, or Salmonella contamination, protecting the meat supply from harm represents a great challenge to federal officials, meat processors, distributors and marketers. Trying to find the proper and most effective balance between federal and state inspection, inspections by the companies involved, and safe handling by others in food chain continues to be the subject of an often fractious debate. In the 1990s the U.S. made a significant shift in the structure of the meat inspection system by adopting the HACCP (Hazard Analysis and Critical Control Points) approach. Under this system the front line of physical inspections shifted to employees of the meat industry and made the role of federal inspectors one of reviewing the records keep by industry.⁴⁹ Several recent incidents of serious meat contamination, including the recall of over 19 million pounds of beef produced at a ConAgra plant in Colorado, indicate that real challenges continue to exist in protecting meat safety regardless of who is responsible for inspections.⁵⁰

In the search for increased assurance of meat safety - an elusive goal given its perishable nature and the many ways its safety can be compromised – one process being promoted is irradiation. Debate over meat irradiation has been going on for almost two decades. From a legal standpoint, the FDA and USDA have approved the process for use on meat as well as a variety of other foods. But the actual use of irradiation remains controversial both to some consumers who have safety concerns about the process and to marketers who believe irradiation affects the quality. The controversy over public acceptance of meat irradiation is reflected in the federal rules for its use, which require the products be labeled as having been irradiated as well as carry the radura emblem to alert consumers.⁵¹ Meat processors and some public health officials believe the requirement the meat be labeled as irradiated causes anxiety on the part of shoppers who see it as a warning not a promise of safety. Whatever the reasons the market acceptance of irradiated meat products has been limited, as little of the American meat supply is

⁴⁹ The wisdom and effect of shifting from federal inspectors to relying on industry employees is still being debated in the U.S., with at least one recent government investigation raising questions about the wisdom of the change. See e.g., John Heilprin, “GAO audit finds risk in meat,” Des Moines Register, September 21, 2002, p. 1A.

⁵⁰ In the summer of 2002 a major E. coli contamination of beef occurred at a plant in Colorado, which ultimately led to over 19 million pounds of meat being recalled. The episode raised special concerns because of the lengthy delays, over 3 months, between when the problem was first noticed and the recall was finally implemented. See, e.g. H. Josef Hebert, “Delayed beef recalls criticized,” Des Moines Register, July 27, 2002, 1A. The incidence of major recalls of meat and poultry due to possible contamination has become a regular occurrence in the U.S. On October 13, 2002, Wampler foods announced one of the largest recalls in history, covering 27.4 million pounds of poultry over a five-month period at one plant in Pennsylvania, due to concerns of contamination with the bacteria Listeria monocytogenes. See “Poultry Recall Expanded After Bacteria Is Found at Plant,” New York Times, October 14, 2002, p. A12.

⁵¹ The FDA’s rules on irradiating meat are at 21 CFR Part 179, adopted Dec. 3, 1997, 62 Fed. Reg. 64107.

irradiated, with most of what is being sold to populations with special needs such as those with suppressed immune systems.

One approach to increase the use of irradiation that is being promoted by some meat processors who believe irradiation is the best and only way to “insure” meat safety is to change the name of the process. The new term favored by proponents of the process is “cool pasteurization” a name they believe is accurate and not subject to the same negative consume connotations. But as you might expect, consumer and health advocates who oppose increased use of irradiation also oppose the name change. They argue it is inaccurate because it does not involve pasteurization and that it is misleading in that fails to reveal a fact many consumers believe is important to know. One irony in the debate over use of irradiation is that some retailers who have aggressively promoted and labeled meat as being irradiated have experienced increased sales.⁵²

8. Smell it and see if it is OK? – USDA, the FDA, Food Safety, and Product Dating

The most basic legal issue relating to U.S. food policy concerns food safety and the determination of which foods are subject to some form of inspection or regulatory compliance before they can be sold and which agency is responsible. The content and allocation of food inspection responsibility is the subject of volumes of federal law and regulations, with the main issue being how the duties are allocated between the Food and Drug Administration, the United States Department of Agriculture, and other state and federal agencies. The actual manner in which responsibility is divided depends on the specific food item involved, the production or processing practice and even the manner in which it is marketed. While the current system has evolved over time, the result is a virtual hodgepodge of rules and programs, involving a multitude of agencies.⁵³ The regulatory system is in some ways overly complex with duplicative jurisdiction and in other ways incomplete with certain foods or issues falling outside regulatory purview. As a result some members of Congress, led by Senator Durbin from Illinois, have long argued for a consolidation and clarification of America’s food safety system. The primary goal has been to consolidate all of the food safety and inspection processing into one agency created for the purpose. Bills to achieve this goal have been introduced in Congress for many years but the resistance of the food industry and the agencies now carrying out these functions have meant the proposals have not advanced.

One example of an important food policy issue, which bridges issues of labeling and food safety concerns the required labeling for “sell by dates” on various foods. Consumers typically look for this information in order to determine whether a product is still fresh or whether it is so old that safety may be impacted. However, from a regulatory standpoint, the requirements for providing such labels and standardizing the dating methods used are minimal. As a result a joint advisory panel commissioned by the USDA and the FDA is studying the possibility of proposing federal standards concerning

⁵² See, “Surprise: Labeling of Irradiated Food Boosts Expected Sales,” 4 Food Safety Reporter #22, May 29, 2002, p. 369, relating the experience of the Wegman’s grocery store chain in new York.

⁵³ See, e.g., Philip Brasher, “Food security remains a ‘patchwork,’” Des Moines Register, September 8, 2002, p. 1A.

the date labeling of food products.⁵⁴ As might be expected, food manufacturers are concerned about possible regulations, especially if they have to cut the shelf life and thus marketability of perishable items such as processed ready-to-eat meat products.

One effect of the September 11, 2001, terrorist attacks on the U.S. was to trigger a more comprehensive discussion of how the nation's security might be improved. The issue of food safety and the need to improve food security efforts to protect the food supply from harm – either intentional or not – achieved a higher profile in the public debate. As a result, proposals to create a new Department of Homeland Security included suggestions to unify the food safety system under one agency by combining functions of the FDA and the USDA. However, the passage of time and continued resistance by the food industry has made any significant progress on these proposals doubtful.⁵⁵ Given the size of America's food system, the economic power of the companies invested in it, and the inertia associated with changing any system of bureaucracy and law, efforts to make major reforms in the U.S. food safety regulatory structure are unlikely to succeed.

Conclusion: The Search for Food Security and Food Satisfaction

This essay has tried to provide a contemporary discussion of some of the most significant legal and policy issues shaping the U.S. food system. The goal has not been to provide answers or predictions but instead to review the issues in debate and the values at stake in the discussions. It is clear there are significant social and economic forces driving changes in how food is produced, marketed and consumed in America. The legal and regulatory system is being called on to play a central role both in providing the foundation for many of the changes – and to resolve contests over which policy direction will be pursued. How well the legal system performs will help determine if the food system is able to satisfy the public's hunger – for nutrition and fulfillment. Each person brings his or her own values to the table and to appraising the appropriate role of law.

For me, the goal of the legal system as relates to the food system can not be limited to just questions of food safety and food security but must also include food satisfaction - helping give America's consumers the foods they want. These goals include providing the information consumers feel they need about how and where food was raised – and who raised it. The law must protect the public interest by promoting food safety, but promoting food safety must be viewed in a multi-dimensional fashion. Claims of promoting food safety should not be used to standardize or industrialize our food system at the expense of local foods or local farmers. The role of the law should not be to protect the status quo of whatever foods, diets, or economic interests now dominate the food system. Law should not be used to elevate a doctrinal view of “good science” as a way to prescribe the only correct way to produce, process or market food. Nor

⁵⁴ See Philip Brasher, “federal panel looks to crate new standards for food dating,” Des Moines Register, July 1, 2002, p. 1A.

⁵⁵ see e.g., Robert Pear, “Food Industry's Resistance Stalls Bill to Protect Food: Lobbyists Call Anti-terror Measure Intrusive,” New York Times, April 16, 2002, p. 1A, see also, the article by Philip Brasher, “Meat, grain Ids hailed for safety, but producers feat lawsuits,” Des Moines Register, September 22, 2002, p. 1A, concerning efforts to provide for traceability of meat and food products to the farm level, and the concerns producer groups have about such information being used to shift food safety liability to them.

should law be used to diminish the role of quality and diversity in providing consumers with options as to the foods they buy and enjoy. Instead, the role of law should be to protect consumer autonomy by providing the information people desire and the food choices they demand. The law should assist farmers and food producers by making it possible to produce and market a diverse array of foods, and respond to the myriad of consumer desires. Ultimately the role of law must be to promote opportunity in our food system, opportunities for farmers to produce and market new foods, for consumers to experience quality foods and to find satisfaction and nourishment in their diets. If the law does this it will satisfy the role the public expects of it.