

RESNICK PROGRAM  
FOR FOOD LAW AND POLICY

---



UCLA | SCHOOL OF LAW

**UCLA-Harvard Food Law and Policy Conference | October 24, 2014**

*Transparency in the Global Food System: What Information and to What Ends?*

**Panel 2: Information to What End: The Role of the Consumer in Driving System Change**

# Food Workers, Food Whistles, & Food Muzzles

Jacob Gersen\*

## I. Introduction

There are three overarching problems in the modern law of food. The first is food safety. Given the massive complexity of the food system—both domestically and internationally—and the potential for both intentional and unintentional adulteration, ensuring the safety of the food system has long been a key task of food law. The second is food fraud—both a crime and a tort that encompasses a laundry list of conduct including passing off one food as another, misrepresenting volume, source, production methods, and so on. The third is nutrition. Over the years as the public and the government has grown increasingly aware of the link between food, nutrition, and health, ensuring that consumers have access to nutritious food products in the marketplace has been a major initiative of both public and private interests. These problems are related, of course, but they are not the same. Some food fraud produces safety concerns, but much does not. A food supply that is safe is not the same as a food supply that is healthy. And so on.

It should be relatively uncontroversial to note that underlying each of these issues is an information or transparency problem. It is difficult if not impossible for consumers to know about the actual conditions at a farm or manufacturing plant simply by inspecting the food they purchase. Food fraud exists only because of the asymmetric information problem between purchasers and sellers and the attendant difficulty of easily distinguishing the genuine article from imitations. The extensive rules about what must, may, and may not be disclosed on a food label are at least partially and arguably an attempt to provide consumers with the necessary information to make informed judgments about nutrition and health.

The demand for transparency in the food system is perhaps the loudest voice in the chorus of calls for legal reform in the food policy arena, but the notion of transparency connotes many different ideas. At base, it requires that consumers—or for that matter competitors or regulators or third party monitors—be able to identify a food product, origin, producer, production methods, distributors, distribution, seller, and so on, from *seed to sale*, *pasture to plate*, *boat to bowl*, or in somewhat less appetizing parlance, *cradle to grave*. Thus, consumers in this context have a double meaning: consumers do not merely purchase a good, they also actually consume or ingest it.

Within the transparency movement there is sometimes ambiguity or even conflict about why transparency ought to be embraced. Is transparency an end in and of itself because more information that is more clear is always better? Or is the value of transparency purely instrumental such that a transparent food system is more likely to produce a safe and healthy food system? Both these strands—transparency as ends vs. transparency as means—

---

\* Professor of Law, Harvard School. Affiliated Professor of Government. Director, the Food Law Lab at Petrie-Flom. I am grateful to Sophie Elsner and Mary Schnoor for excellent research assistance.

are clearly evident in the transparency movement. Yet, to the extent that at least a large part of the value of transparency is instrumental or a corrective for existing problems in the market, a bit more work to spell out the precise mechanisms by which transparency will or at least could compensate for those problems is needed. For the most part, in order for transparency to produce safer, healthier, or simply better food—no matter how better is defined—consumers would have to react to the newly revealed information for any change to occur.

Outside the food context, the Community-Right-to-Know Act requires that certain any toxic emissions be disclosed. The Act does not forbid the emissions or impose legal sanctions, but nevertheless, the law has been very successful at reducing toxic use and release of toxins on the TRI list. Apparently because of fear of bad publicity, the disclosure requirement alone generated a significant change in behavior even though most members of the public to whom toxic releases are disclosed are not in direct privity with the polluters. Within the food context, a significant literature has documented consumer reactions to label disclosure. For example, one study found that consumers discounting genetically modified foods by approximately 14% relative to a standard non- GM label. If so, consumer demand for alternate products in the market place should result either in price bifurcation or a shift to non-GM foods. Similarly, many of the Humane Society's recent efforts to reveal the treatment of animals in the food system rely on an implicit assumption that public outrage over the treatment will force either new laws or a change in consumer and therefore producer behavior.

## **II. Secondary Institutions In The Food System**

Transparency is typically accomplished by what we might call *primary actors or institutions*. When food law seeks transparency, it tends to require disclosures *by* the producer or seller or a food *to* the purchaser or consumer. This essay is concerned mainly with what I will call *secondary actors institutions* or actors in the food system, by which I mean simply actors involved in the food system in roles other than producer, seller, buyer or consumer. This includes (a) food workers, (b) non-worker whistleblowers, (c) accreditation organizations, (d) verification institutions, and (perhaps) media. Today I will focus mainly on the relationship between (a) and (b), between food workers and whistleblowers, and develop (c), (d) and (perhaps e) in a longer version of this essay.

### A. Food Workers

United States labor law creates many special classifications for workers, which come with a mix of special rights and special obligations. For example, pilots and crew of commercial aircrafts must meet certain eligibility requirements.<sup>1</sup> So too, commercial drivers and truck drivers.<sup>2</sup> Nuclear workers must meet extensive eligibility criteria.<sup>3</sup> Other examples abound and we rarely have much hesitation in imposing special obligations and protections on other classes of workers when they occupy positions in the economy that are particularly risky. Although the data are a bit hard to generalize from, we tend to utilize such classifications

---

<sup>1</sup> See 14 C.F.R. § 61.123; 121.436.

<sup>2</sup> See 49 C.F.R. § 383.1; 383.71.

<sup>3</sup> See 10 C.F.R. § 10.10-11

when the nature of the work entails particular risks to third parties or the public. Nuclear workers are an obvious case, but not all that different from commercial truck drivers. The work requires special skill and if that skill is lacking imposes special risks on the public at large. Closely related to the *special- special-special-risk* problem is a *special-access-to-information* problem. Poorly trained nuclear technicians impose a special risk on the public, but the nuclear technician also has special access to information about *other* risks imposed on the public and the law often wants to make use of (or compensate for) that unique access. .

There is no general legal classification of *food workers*, but whether they engaged in farming, ranching, production, distribution, or preparation—food workers actually occupy a similar structural location vis-à-vis the public and safety. In many instances, it is food workers who are on the food safety or food fraud front, so to speak. The failure to utilize special skills can contaminate the food system. And food workers will often have special access to information about food safety and food fraud. The idea of a category of food workers would cut across many traditional industry lines, but focusing on this aggregate category of actor (never mind imposing special rights and obligations) is a useful conceptual exercise in that it focuses our attention on the simple fact that it is line workers, be they in the fields, on the slaughterhouse floor, or in the kitchen that occupy this specialized node between producer and consumer. What I hope to do is explore what it would mean—both for good and bad—to utilize food workers more actively as a source of information about and enforcers of the food system and to raise a few recent legal developments in this domain.

## B. Food Whistles

Whistleblower protection laws generally preclude retaliating against an employee who reveals evidence that they believe in good faith reveals a lack of compliance with federal law. Some statutes also provide a reward if the information is accurate. Still others preclude retaliation for worker’s refusal to engage in illegal practices.

Prior to the enactment of the Food Safety Modernization Act in 2011, there was no special whistleblower protection for workers in the food industry.<sup>4</sup> The Consumer Product Safety Improvement Act provides protections to employees of a “manufacturer, private labeler, distributor, or retailer” of consumer goods.<sup>5</sup> But implementing regulations clarify that for purposes of the CPSIA “consumer product” does not include:

Food (the term “food” means all “food,” as defined in 21 U.S.C. 321(f), including poultry and poultry products (as defined in 21 U.S.C. 453(e) and (f)), meat, meat food products (as defined in 21 U.S.C. 601(j)), and eggs and egg products (as defined in 21 U.S.C. 1033)).<sup>6</sup>

Thus, notwithstanding the general protections for workers, food and food workers constituted an exception.

---

<sup>4</sup> [stat. cite/ regulatory cite.]

<sup>5</sup> CPSIA § 40(a), 15 USC 2087.

<sup>6</sup> 29 CFR 1983.101(e)(2)(ix).

With relatively little political discussion or media attention, section 402 of the Food Safety Modernization Act,<sup>7</sup> enacted whistleblower protections for workers “engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food” who report activities they believe to be in violation of the FSMA. Like other whistleblower provisions, the basic idea is to enlist food workers as reporters, investigators, and advocates for compliance with federal law. Section 402 was said to close a so-called loophole, but loopholes aside, the question is how well is section 402 likely to function in the service of transparency in the food system.

How well is 402 likely to do in the service of food system transparency? A few tentative ideas are worth noting:

Incentives. Absent a bounty or reward of some sort, the Act merely allows the whistleblower to be restored to the prior status quo, either by requiring reinstatement or backpay or compensatory damages. Such remedies are intended to make the worker whole, but there are two potential problems with this approach. First, because enforcement is always imperfect, if the best an employee can do is to be returned to their prior status, the expected return on food whistleblowing is always negative. Second, even if enforcement were perfect such that affected workers were always restored to their prior post, that would simply make them indifferent between blowing the whistle and not. It removes the penalty for helping to enforce federal law, but it does not provide much in the way of incentive other than a pat on the back. Some protections are better than no protections, of course, but as a way of encouraging food whistleblowing, the statute seems relatively modest.

Scope. Section 402 applies to FDA regulated industries, which leaves outside of its coverage, concentrated animal feeding operations (CAFOs), slaughterhouses, and meatpacking facilities, which are regulated by the USDA. Given that poultry, swine, and beef constitute such a significant portion of the food supply, the exclusion of these segments of the food system is far from trivial.<sup>8</sup> The USDA, of course, regulates livestock and meat production while the FDA tends to regulate most—but not all—other aspects of the food system.

If anything, the stakes for whistleblowers in USDA regulated industries have increased dramatically in recent years and is likely to continue to do so. For example, the Food Safety Inspection Service (FSIS) is a part of the USDA employs just shy of 8,000 facility inspectors.<sup>9</sup> Over time, the USDA has migrated from a “sight, touch, smell” inspection method and towards use of Hazard Analysis Critical Control Point (HACCP) methods.<sup>10</sup> The basic idea is to rely on risk analysis as a way of targeting particular points in the production

---

7

<sup>8</sup> See Hard to Watch: How Ag-Gag Laws Demonstrate the Need for Federal Meat and Poultry Industry Whistleblower Protections, 65 Admin. L. Rev. 127 (2013).

9

<sup>10</sup> 65 Admin. L. Rev. at 133; \_\_C.F.R. 417; Eileen Starbranch Pape, Comment, A Flawed Inspection System: Improvements to Current USDA Inspection Practices Needed to Ensure Safer Beef Products, 48 Hous. L. Rev. 421 (2011).

process where risks of contamination are greatest. The HACCP program has both critics and advocates, but all seem to agree that the program will result in fewer onsite inspection efforts. FSIS is also phasing out approximately 770 USDA inspectors and per a recent rule will rely more on firms themselves for inspection.<sup>11</sup> When this trend dovetails with the Supreme Court's recent holding that FSIS preempts state inspection efforts,<sup>12</sup> the potential importance of workers on the ground in facilities only increases.

### C. Food Muzzles.

Precisely because the stakes of workers-as-whistleblowers have increased, a number of states have enacted so-called "Ag-Gag" laws. Conceptually, these measures are anti-whistleblower provisions that make it harder to obtain and ultimately disseminate information about the food production process.<sup>13</sup> These provisions vary in substance, but tend to criminalize certain forms of investigation and information revelation as they pertain to factory farming or ranching.<sup>14</sup>

Seven states have passed ag-gag laws, since 1991. They are: Idaho (2014), Iowa (2012), Kansas (1990), Missouri (2012), Montana (1991), North Dakota (1991) and Utah (2012).<sup>15</sup> Many more state legislatures have introduced ag-gag bills<sup>16</sup>, but they were not passed, either because they did not receive enough votes or were vetoed by the governor.

Some laws essentially impose more severe penalties for particular forms of trespass.<sup>17</sup> For example, laws in Kansas, North Dakota, and Montana prohibit entering without consent facilities in order to use video and audio recording devices.<sup>18</sup> The Kansas law prohibits entering an animal facility "to take pictures by photograph, video camera or by any other means."<sup>19</sup> The law also particularizes criminal sanctions for entering an animal facility in order to destroy or damage it. Others purport to restrict the reproduction or dissemination of video recordings obtained via trespass or fraudulently obtained entry.<sup>20</sup>

---

<sup>11</sup> See 79 Fed. Reg. 49566 (Aug. 21 2014).

<sup>12</sup> See *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965, 975 (2012).

<sup>13</sup>

<sup>14</sup> 65 Admin. L. Rev. at 141-42.

<sup>15</sup> See Jessica Pitts, *Ag-Gag" Legislation and Public Choice Theory: Maintaining A Diffuse Public by Limiting Information*, 40 AM. J. CRIM. L. 95, 97 (2012); ASPCA, *Ag-Gag Bills at the State Level*, 2014, <http://www.aspc.org/fight-cruelty/advocacy-center/ag-gag-whistleblower-suppression-legislation/ag-gag-bills-state-level>.

<sup>16</sup> The following states introduced but did not pass ag-gag laws: Arizona, Arkansas, California, Florida, Illinois, Kentucky, Minnesota, Nebraska, New Hampshire, New Mexico, New York, North Carolina, Pennsylvania, Tennessee, Vermont, and Wyoming. See ASPCA, *Ag-Gag Bills at the State Level*, 2014, <http://www.aspc.org/fight-cruelty/advocacy-center/ag-gag-whistleblower-suppression-legislation/ag-gag-bills-state-level>.

<sup>17</sup> See legislation in Kansas, North Dakota, and Montana.

<sup>18</sup> Kan. Stat. ann. Sec 47-1827; Mont. Code ann. 81-30-103; N.D. Cent. Code sec 12.1-21.1- 02(1). See 65 Admin. L. Revf. At 141-42 for a discussion.

<sup>19</sup> Kan. Stat. 47-1827(c)(4) .

<sup>20</sup>

To take one example, Iowa's "Agricultural Production Facility Fraud" provision<sup>21</sup> makes it a serious misdemeanor or aggravated misdemeanor to obtain access to an agricultural production facility by false pretenses, makes a false representation as part of an application or agreement to be employed at an agricultural production facility.<sup>22</sup> Utah's "Agricultural Operation Interference" provision makes it either a Class A or Class B misdemeanor for a person to:

(a) without consent from the owner of the agricultural operation, or the owner's agent, knowingly or intentionally records an image of, or sound from, the agricultural operation by leaving a recording device on the agricultural operation;

(b) obtains access to an agricultural operation under false pretenses;

(c)(i) applies for employment at an agricultural operation with the intent to record an image of, or sound from, the agricultural operation;

(ii) knows, at the time that the person accepts employment at the agricultural operation, that the owner of the agricultural operation prohibits the employee from recording an image of, or sound from, the agricultural operation; and

(iii) while employed at, and while present on, the agricultural operation, records an image of, or sound from, the agricultural operation; or

(d) without consent from the owner of the operation or the owner's agent, knowingly or intentionally records an image of, or sound from, an agricultural operation while the person is committing criminal trespass, as described in Section 76-6-206, on the agricultural operation.<sup>23</sup>

Of the seven laws that have been passed thus far, none has been struck down in court. Activist groups filed two lawsuits against the Idaho and Utah laws. In August, a federal judge refused to throw out the Utah lawsuit, filed by the Animal Legal Defense Fund (ALDF), People for the Ethical Treatment of Animals (PETA), and several individually named journalists and whistleblowers. Similarly, in September 2014, a federal judge ruled that the lawsuit against the Idaho law—filed by American Civil Liberties Union of Idaho, ALDF, PETA, and the Center for Food Safety—can move forward.

The demand for these laws stems, in part, from covert action by activists or journalists seeking to identify, document, and reveal the underlying conditions at agricultural facilities. As many of you know, the results of many of these efforts have been stark. Some investigations led to the largest beef recall in U.S. history. But notably, most of the activities that the anti-whistleblowing statutes target would not be protected under current federal law in any event. Section 402 of the Food Safety Modernization Act would not provide protection to most of the activities targeted by the ag-gag laws. Almost all

---

<sup>21</sup> Iowa code 717A.3A (Effective march 2, 2012).

<sup>22</sup> "if the person knows the statement to be false, and makes the statement with an intent to commit an act not authorized by the owner of the agricultural production facility, knowing that the act is not authorized."

<sup>23</sup> Utah Code ann. 76-6-112.

of the ag-gag laws cover agricultural production facilities, most of which are not regulated by the FDA, but rather are regulated by the USDA. Therefore, there is no direct or perhaps even indirect conflict between the federal food whistleblower law and the state anti-whistleblower laws. Some scholars have argued that the Food Safety Inspection Service could and should use its regulatory authority to implement whistleblower protection plans, but the statutory authority for such a measure is far from certain.

### Legal Challenges

Although the state laws have been challenged on a variety of grounds, the most common objection is that they run afoul of the First Amendment. Although the first amendment questions are both broad and deep, we can at least sketch the nature of the judicial analysis. First, are the activities covered by ag-gag laws—specifically video, audio and photos—speech? The plaintiffs challenging the Idaho and Utah statutes contend that photo, video and audio recordings are all speech, and thus within the scope of the First Amendment. Kevin C. Adam frames the key question of what is protected as speech as “whether the conduct—taking a photo or shooting a video—satisfies both prongs of a sufficient communicative effort.” Some proposed ag-gag laws come into conflict with the prior restraint doctrine, as the bills prohibit and punish the possession of the recordings, before any publication might occur.

Generally, viewpoint restrictions on speech are impermissible, whereas content-neutral speech is permissible (or at least “far more likely to receive favorable treatment by the courts”). The critics of state ag-gag laws argue that they focus on specific content and viewpoints of speech, but arguably the laws restrict speech based on the way the underlying information was obtained rather than the content or viewpoint.

There is an additional argument that the laws constitute an unconstitutional restriction on newsgathering or publication. As a general matter, courts have employed heightened scrutiny for restrictions on publication and lesser scrutiny for restrictions on newsgathering. Typically courts have deemed newsgathering activities less protected by First Amendment protections than publication.<sup>24</sup> The scope of First Amendment protections is less clear when the newsgathering methods are illegal, and when undercover citizen activists—rather than journalists—publish the results of undercover investigations.<sup>25</sup>

### D. Some other Analogies

---

<sup>24</sup> Lewis Bollard argues that ag-laws should be subject to heightened First Amendment scrutiny (“strict” and “intermediate”) because: “(1) they are not generally applicable laws; (2) their enforcement will single out, and disproportionately burden, those engaged in First Amendment activities; (3) they criminalize speech about affiliations and identity; (4) their enforcement will affect conduct “intimately related” to expression; and (5) they punish false statements without proof of harm.” Under the heightened scrutiny, Bollard argues, the ag-gag laws will fail a constitutional test. Lewis Bollard, *Ag-Gag: The Unconstitutionality of Laws Restricting Undercover Investigations on Farms*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10960, 10970 (2012).

<sup>25</sup> Jessalee Landfried, Note, *Bound & Gagged: Potential First Amendment Challenges to Ag-Gag Laws*, 23 DUKE ENVTL. L. & POL’Y F. 377 (2013).



To understand the impact of the anti-whistleblowing laws, it is worth pausing to consider how civil actions have addressed similar uses of deception in order to obtain consent to enter—particularly with regard to undercover media investigations. The undercover expose is an American tradition, but it actually has quite a lot in common with the review and critic industry in general and my argument today is that we have something to learn from the way the law deals with reviews and the way the law ought to think about whistleblowers, anti-whistleblowers, and transparency in the food system.<sup>26</sup>

Suppose a food critic lies about his identity, eats and pays for a meal at a prominent restaurant, and then writes a scathing review that causes business to plummet. Should the restaurant be able to sue for trespass? After all, the critic entered with consent of the establishment, fraudulently obtained.<sup>27</sup> In general, the answer is no. The restaurant cannot complain when it gets a bad review, even if the critic lied about his identity.

Two other well-known cases provide useful counterpoints. In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*,<sup>28</sup> an undercover reporter lied on an employment application to obtain a job as a deli-counter worker and gather audio and video recordings for an expose. When the supermarket store sued, the court held that there could be liability, but awarded next to nothing in damages. There had been a trespass, said the court, but the court awarded total damages of \$2.00. In *Desnick v. ABC*,<sup>29</sup> an undercover investigative reporter pretended to be a customer at an eye surgery clinic. After the expose, the clinic sued for trespass, arguing that it did not and would not have consented to entry to its clinic by an under-cover reporter. The court, per Judge Posner, concluded that the clinic could not sue for trespass. There are various ways of understanding these and similar cases, but the courts seem to understand the importance of the expose to the public, notwithstanding the harm caused to the objects of an expose. If, for the sake of argument, we take *Food Lion* and *Desnick* to be good predictors of what courts would typically do when faced with a claim for trespass deriving from a condition of fraudulently obtained consent to enter, then many “investigators” of conditions in the food system would not be held liable for trespass, even though consent to enter was fraudulently obtained.

If that is right, then enactment of ag-gag laws, criminalizing the underlying activity may have two effects. On the one hand, of course, it may deter potential whistleblowers because of the criminal sanction. On the other, it may change the way courts analyze *civil* cases for trespass. The cases would not be negligence *per se* cases, but given the statutory crime, it seems possible, if not likely, that courts in those jurisdictions would be more willing to find trespass and award more substantial damages. That said, if the underlying tendency to preclude recovery in expose cases is really about a recognition that the fraudulently obtained consent is in the service of the public—in the service of information

---

<sup>26</sup> My discussion of under-cover investigators and critics relies heavily on my former c-teacher Saul Levmore’s thinking in this area. See Saul Levmore, *A Theory of Deception and then of Common Law Categories*, 85 Texas L. Rev. 1359 (2007).

<sup>27</sup> One might be tempted to say that the restaurant is open to all comers, but suppose there is a prominent sign saying no critics allowed.

<sup>28</sup> 194 F.3d 505 (4th Cir. 1999).

<sup>29</sup> 44 F.3d 1345 (7th Cir. 1995).

revelation about bad apples—then perhaps judges will be all the less likely to award damages for these same underlying acts. Time will tell. But it is precisely in this space of overlap between criminal, civil, and whistleblower protections that part of the battle for transparency in the food system will be fought. Not so much between producers and consumers, but between secondary actors like food workers and food whistleblowers.

## **Industry Use of the “Compelled Speech” Claim to Avoid Conveying Information to Consumers and a Way around that Dubious Argument through “Government Speech”**

Stephen D. Sugarman

During World War II a group of children (on instruction from their parents who were Jehovah’s Witnesses) refused (on religious grounds) to recite the Pledge of Allegiance at school, and their dispute with public school officials reached the U.S. Supreme Court. In its *Barnette* decision, the Court sided with the children on the ground that the Free Speech clause of the First Amendment (not the Free Exercise of Religion clause) protects the right to remain silent as well as the right to speak, and that to make children swear their allegiance to the flag was compelling them to speak in a way that they had a right to refuse. So the “compelled speech” doctrine was born.

Notice that this case involved political speech, and that captive children (who were compelled to attend school) were meant to be coerced into saying something that they were in turn meant to embrace as their own ideological belief (through repetition, through joining in making the Pledge along with others, and through general school teachings about the immorality of lying).

This “compelled speech” doctrine has now been asserted in cases as far-fetched as a challenge to New York City’s “menu labeling law” in which the businesses opposing the requirement that they post calorie information next to prices in their stores argued that they had the constitutional Free Speech right to remain silent and not disclose how many calories were in the meals on offer. Were this doctrine widely embraced in such settings, it has the potential to seriously blunt public health efforts to require business to be transparent about various aspects of the food they sell.

In fact, the objectors in the NYC menu labeling case lost. But other, in my view, equally preposterous claims have actually succeeded as conservative federal judges who are hostile to the regulation of business have embraced the First Amendment as a shield for industry.

I will give a few examples of these sorts of cases in the food context (although this “compelled speech” claim is now being advanced by industry against all sorts of regulations), noting where business has so far won. I will offer my critique of these decisions. I will end with a proposed way for government to get around this First Amendment problem if courts cannot be convinced to stop mis-applying the doctrine.

Before focusing on the “compelled speech” claims, however, I want to offer a few words about “commercial speech” in general. Before 1976, American free speech law did not apply to commercial speech. Like several other sorts of speech, this type was held by the U.S. Supreme

Court to be outside First Amendment protection. That year, however, thanks to Ralph Nader and his team at Public Citizen, in the *Virginia State Board of Pharmacy* case, the Court changed course (unwisely in my view) and concluded that pharmacies have a constitutional right to advertise the prices of the medicines they sell, an action which had been made illegal in Virginia. Later, the Court extended this reasoning to give lawyers the right to advertise, to give liquor stores the right to advertise, and so on. (Nader, one can appreciate, wanted consumers to be able to easily learn about lower prices.)

These cases are really about competition law, in which one part of the business community is complaining that its competitors had conspired with government to control the market. In my view, the remedy of the complaining parties should have been sought through the Sherman Act or other anti-trust laws. And if, because of the *Parker* case, the current reach of those laws did not protect the complaining businesses since government or quasi-governmental actors were involved in restricting competition, the appropriate solution was to convince Congress to change the law. Instead, the Supreme Court stepped in, and, inappropriately in my view, used the First Amendment to deal with these business disputes.

Later on, in the *Central Hudson* case, the Court concluded that free speech rights in the commercial speech arena are not as strong as in the political or artistic speech arenas, which means that government justifications for restricting commercial speech are supposedly more easily defended. Yet several members of the current Court want to eliminate this distinction, and furthermore the difference in the level of judicial scrutiny may be more theoretical than real as the Court and lower federal courts these days are striking down regulations under this reduced scrutiny standard by applying the constitutional tests in ways that make commercial speech, in practice, virtually as protected as core free speech.

The central justification the Court has given for applying the free speech clause to commercial speech – a la Nader -- has been the right of consumers to receive truthful information (like price, but not only price) about the products and services that providers seek to convey via advertising.

With this justification in mind, I find it highly ironic that the Court and lower courts are now using the “compelled speech” concept (drawing on *Barnette*) to keep consumers from getting information that many of them clearly want to have (and which regulators have tried to assure that they can obtain).

Let us turn then to some of the food law cases in which the compelled speech argument has been put forward by industry. The Court initially got off to the wrong start, in my view, in the way it approached government-created generic food marketing programs (which have existed for some time for products like beef, mushrooms, berries, and the like). These sorts of products tended to be sold in bulk and on an unbranded basis. This meant that the growers/producers of these sorts of foods like, say, broccoli, were unlikely to pay for any advertising of their products

on their own because of “free rider” problems – other broccoli growers would benefit from such ads without paying for them. But this left these generic product providers at a commercial disadvantage as compared with packaged-food providers who regularly engage in brand advertising. To help contend with this well-understood “market failure,” the federal government facilitated the creation of a number of cooperative organizations that would advertise, say, berries in ways that would (as a general matter) benefit all berry providers, and then appropriately charge all berry growers or distributors for their share of the cost of the marketing campaign.

In due course, some involuntary members of these organizations started branding their products and sought to advertise separately, which of course they could do. But they also wanted to get out from paying towards the generic ad campaign (whether or not they would continue to benefit from such generic ads were they to continue being paid for by others).

Once again, in my view, this is a commercial dispute that should have been dealt with, if at all, by legislative changes in the relevant cooperative marketing program. But instead, at least at the outset, in the *United Foods* case involving mushroom handlers, the Court jumped in with the First Amendment. I find this dangerous and wrong-headed in two respects. For one, the Court equated paying for speech (advertising) via the mandatory assessment with speech itself, and two, it then freed the complaining parties from the compulsory regime on “compelled speech” grounds. The implication here is that it would be unconstitutional for government to tax gasoline and use the revenues to promote taking public transportation. I find that bizarre.

Fortunately, later on, in the *Livestock Marketing Association* case, the Court seems to have backed off this line of analysis. That dispute concerned a largely identical, cooperative advertising organization that promoted the sale of beef. Noting that the government was centrally involved in the program, the Court this time termed the relevant ads “government speech” and hence simply outside the reach of the First Amendment. That seems correct. I will return to this distinction shortly.

Turning now away from government-imposed fees or taxes to required disclosures, consider first the Vermont milk case. A synthetic growth hormone (rBST) was developed that was used to treat many dairy herds. The FDA had investigated rBST and concluded that the milk from cows that were so treated was no different from traditional milk. Nevertheless, many consumers in Vermont did not want to drink rBST-related milk, and surveys showed that lots of people wanted to know whether milk was rBST-related or not. In response, the Vermont legislature passed a law, in effect, requiring that milk retailers post a notice in that section of the grocery store disclosing which of the cartons contained milk from rBST treated cows.

The First Circuit (albeit in a panel divided 2-1), in the *International Dairy Foods Association* case, deemed that, in light of the FDA finding, consumer interest in information here was a “mere curiosity” and struck down the Vermont law on “compelled speech” grounds. But

to many consumers this was more than just being curious about what they would be drinking. They simply did not want to drink milk connected to this synthetic hormone, just as many consumers don't want to consume foods with GMOs in them. And absent disclosure, they would not know how to make their milk selection. Some consumers were being extra-cautious about imagined, but not yet discovered, health risks; others had economic or ideological objections to this sort of scientific tinkering with the world of ranching and farming and wished to show their disapproval through their purchasing decisions. But the Court decided that the retailers (and the milk suppliers) had a constitutional right to keep these customers in the dark.

In my view, regardless of what the mainstream scientific findings are, if these voters can get the appropriate legislative or executive body to pass a law or adopt a regulation that will give them information they want about the content of food they will eat, then I say that disclosure requirement surely should be upheld. If, on policy grounds, requiring this disclosure seems silly, unduly costly, or potentially misleading, it seems to me that the industry's relief should be sought in the political process and not the courts.

Although not a food case, a similarly alarming decision was recently handed down with respect to a San Francisco cell phone ordinance that would have required mobile phone retailers to post next to the phones on display the amount of radiation they emit. While the majority scientific view has been that this radiation is not dangerous, it turns out that a) phones emit very different amounts, b) the FCC has imposed a maximum limit, just to be safe I suppose, and c) many people, including some scientists have a different view and believe that this radiation is either clearly dangerous or at least potentially dangerous so that buying a low radiation phone is a wise idea (as is never holding it up to one's ear). The federal district court in SF struck this law down. Like the Vermont law, the San Francisco ordinance, although it related to a *matter* that was controversial, only asked for simple *facts*. I would have thought that the original justification for including commercial speech within the First Amendment – providing information to consumers – would have more appropriately applied here than the “compelled speech” doctrine.

Fortunately, two other food cases have gone the other way, but it should be clear that those involved what both the Second Circuit and the DC Circuit saw to be the mere required disclosure of uncontroversial facts. When restaurants attacked the New York City menu labeling law, they argued that the U.S. Supreme Court's decision in the *Zauderer* case (involving personal injury lawyer advertising about legal fees) implied that disclosures could be compelled from providers of commercial goods and services *only* when the disclosure was designed to prevent deception. The same position was repeated in the more recent attack by beef importers on the required disclosure of the country of origin of their products. Both courts upheld the relevant disclosures (in the *New York State Restaurant Association* and *American Meat Institute* cases). The beef case was decided en banc by 11 D.C. Circuit judges (with the vote 9-2). The majority clearly held that preventing deception is not the only basis on which government can compel disclosures from business. Quoting from *Zauderer* the majority restated “Because the

extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." By contrast the opinion argues that the government interest requiring county-of-origin disclosure is "substantial."

What was rather tricky about the case is that the beef importers had already taken the U.S. before the WTO claiming that this "buy American" strategy was an illegal trade barrier and won. Hence, the government now had to justify the disclosure on other grounds. The opinion points to: "the context and long history of country-of-origin disclosures to enable consumers to choose American-made products; the demonstrated consumer interest in extending country-of-origin labeling to food products; and the individual health concerns and market impacts that can arise in the event of a food-borne illness outbreak." The first two points seem to be: people want to buy-American and should be able to, regardless of what the government might be promoting. The third seems to be grasping at the idea that tracing the source of tainted meat could be harder were the meat imported and so there some sort of safety reason to buy-American. To me, this comes down to "some consumers want to know the source of their meat and they got Congress to require it" and that is enough to uphold the law (although the real politics of this law, of course, reflects the political power of the domestic meat industry).

Given the current state of commercial speech law, I think this way of looking at the constitution is fine, although I note that the opinion later goes out of its way to emphasize that the information to be provided here – where the meat came from – was "purely factual and uncontroversial."

So long as it is enough that the information itself is factual and uncontroversial, then it seems to me that this decision is decidedly at odds with the Vermont milk decision and the San Francisco cell phone decision. As already noted, in both of those cases, the laws required giving consumers purely factual information that many wanted to know. The relevance of that information was highly controversial, but that is a different matter. I should concede, however, that Judge Kavanaugh (another of the conservative DC Circuit judges) in his concurring opinion in the DC country-of-origin case made clear that in his view "consumer interest" alone was an insufficient reason for government to compel disclosures. Yet, surely the justifications for the Vermont and San Francisco disclosures were as strong as the country-of-origin disclosure requirement. Kavanaugh seems to retreat to the very longstanding nature of country-of-origin requirements for other products as a special justification for the required meat labels.

It is difficult to know what to make of the "factual and uncontroversial" test. Thinking of the Vermont milk case the fact that the hormone has or has not been used with the relevant cows is just a fact, and seemingly not in question. What is troubling is that by making a stink about this matter, industry might somehow have a chance of blocking the disclosures. This is sadly

reminiscent of the position taken by the tobacco industry for decades that smoking cigarettes is not dangerous.

More importantly, what if government wants food sellers to provide information that does not meet the “factual and uncontroversial” test. Suppose the words that the law asks the retailer to provide are better understood as recommendations for healthy living. For example, suppose the message is “smoking cigarettes is bad for you, because if you smoke you will very likely become very ill.” Or suppose the message is “children should eat more fresh fruits and vegetables and less sweet things like sugar-sweetened sodas.”

In my view, as a condition of operating the businesses, government should be able to require businesses to carry such messages in their stores and/or on their product packages (assuming the requirements are properly adopted). But I think that for these sorts of messages, it should be clear that they are coming from the government – in the way that the tobacco warnings are traditionally said to come from the U.S. Surgeon General.

If the disclosure makes clear that the speech is coming from government, then consumers have no basis for concluding that the message is coming from the retailer or product maker. They are only the messengers. By doing that, the speech is no longer *Barnette*-like compelled speech but rather it becomes “government speech” and that takes it outside the First Amendment (as the Court made clear in the *Livestock Marketing Association* case mentioned earlier).

After all the government clearly has the right to convey information and opinions that industry doesn’t like consumers hearing and seeing. Government could send voters messages through the mail or electronic media; it could put up billboards or signs on city property. So, too, in my view, it should be able to require sellers to convey that government speech as a condition of being able to do business in the jurisdiction – limited only by the “takings” clause.

Here are some examples that I think are just fine: “The city water department assures you that our water is cheap, safe, and tasty. You need not buy bottled water.” “The state department of health urges you to feed your kids in a healthy way. Buy lots of fruits and veggies and save sugary products like sodas for special occasions.” These could be signs that government agencies require supermarkets to post in their stores, near the relevant products. Courts should not interfere, using the First Amendment of all things, to protect business from such regulation. I thought we abandoned that sort of judicial interference with the legislative and regulatory process in the 1930s.



# Greener, Fairer Foods: Consumer Demand and Eco/Fairness-Labels

Stephanie Tai\*

## I. Introduction

Food eco-labels have been proliferating at a rapid pace, with over 200 labels as of January 2013.<sup>1</sup> These labels have been driven by consumer demand for sustainable food products,<sup>2</sup> as well as producer recognition of this growing consumer demand,<sup>3</sup> and have been seen as a promising nongovernmental way for incorporating sustainability into food production.<sup>4</sup> At the same time, critics have questioned the effectiveness of such private mechanisms in shaping actual sustainable food production,<sup>5</sup> as well as the effectiveness of these labels in conveying information about the actual production processes behind eco-labeled foods.<sup>6</sup> This paper summarizes some of these debates regarding eco-labels as a private mechanism for achieving goals of fairness and sustainability, and presents challenges that this regime must tackle as consumers grow more sophisticated in their demands.

## II. Consumer Concerns

The term “eco-label” generally refers to labels used to identify certain products as preferable based on environmental impact assessments of those products as compared to others in the same category.<sup>7</sup> This paper, however, will refer to eco/fairness-labels to address a broader set of consumer interests, including fairness, “naturalness,” and “humaneness.”<sup>8</sup>

In April 2014, Consumer Reports commissioned a phone survey of a nationally representative sample of 1,004 adult US residents in order to better understand “what consumers know about food labeling, and the standards consumers want for food labeling.”<sup>9</sup> Among other things, the survey identified a number of consumer demands:

---

\* Associate Professor of Law, University of Wisconsin Law School.

<sup>1</sup> See Sustainable Food News, Will Glut of Food Eco-labels Imperil Consumer Confidence? (Jan. 11, 2013), available at [https://www.sustainablefoodnews.com/printstory.php?news\\_id=18242](https://www.sustainablefoodnews.com/printstory.php?news_id=18242).

<sup>2</sup> See, e.g., Teshager W. Dagne, *Place-Based Intellectual Property Strategies For Traditional And Local Agricultural Products: Acting Locally To Participate Globally In A Rights-Based Approach*, 17 *DRAKE J. AGRIC. L.* 565, 593 (Fall 2012); Jill J. McCluskey & Maria L. Loureiro, *Consumer Preferences and Willingness to Pay for Labeling: A Discussion of Empirical Studies*, 34(3) *J. FOOD DISTRIBUTION RESEARCH* 95, 95 (Nov. 2003).

<sup>3</sup> See, e.g., McCluskey & Loureiro, *supra* note 2, at 95.

<sup>4</sup> See, e.g., Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 *CAP. U. L. REV.* 21, 136-39 (2001); J.A. Caswell & D.I. Padberg, *Towards a More Comprehensive Theory for Food Labels*, 74 *AM. J. AGRIC. ECON.* 460 (1992).

<sup>5</sup> See, e.g., Megan S. Houston, Note, *Ecolabel Programs And Green Consumerism: Preserving A Hybrid Approach To Environmental Regulation*, 7 *BROOK. J. CORP. FIN. & COM. L.* 225 (Fall 2012); Jessica E. Fliegelman, Note, *The Next Generation of Greenwash: Diminishing Consumer Confusion Through a National Eco-Labeling Program*, 37 *FORDHAM URB. L.J.* 1001 (2010); Greg Northen, Comment, *Greenwashing the Organic Label: Abusive Green Marketing in an Increasingly Eco-Friendly Marketplace*, 7 *J. FOOD L. & POL'Y* 101 (2011).

<sup>6</sup> See, e.g., Martijn W. Scheltema, *Assessing Effectiveness of International Private Regulation in the CSR Arena*, 13 *RICH. J. GLOBAL L. & BUS.* 263 (Spring 2014).

<sup>7</sup> See McCluskey & Loureiro, *supra* note 2, at 95.

<sup>8</sup> See Consumer Reports National Research Center, Survey Research Report 2 (2014), available at <http://www.greenerchoices.org/pdf/ConsumerReportsFoodLabelingSurveyJune2014.pdf>.

<sup>9</sup> *Id.* at 2.

- 2/3 of those surveyed were checking to see if their food is locally produced; 59% of those surveyed were checking to see if their food is “natural”<sup>10</sup>
- a “vast majority” of those surveyed “prioritize[d] supporting local farmers, protecting the environment from chemicals, fair conditions for workers, reducing exposure to pesticides, good living conditions for animals, and reducing antibiotic use in food.”<sup>11</sup>
- 79% of those surveyed would pay more for fruits and vegetables produced by workers under fair wage and working conditions; 34% would pay 50 cents or more per pound.<sup>12</sup>
- Around 2/3 of those surveyed feel that the “natural” label on processed foods currently means no pesticides were used, no artificial ingredients were used, no artificial materials were used during processing, and no GMOs were used; around 85% of those surveyed think the label *should* mean no pesticides were used, no artificial ingredients were used, no artificial materials were used during processing, and no GMOs were used.<sup>13</sup>
- With respect to the organic labels on processed foods, around two thirds of those surveyed believed this label means no toxic pesticides, no artificial materials were used during processing, no artificial ingredients were used, and no GMOs were used; even more believed that the organic label *should* mean no toxic pesticides were used (91%), no artificial materials were used during processing (91%), no artificial ingredients were used (89%), and no GMOs were used (88%).<sup>14</sup>
- Around half of those surveyed believed that eggs, dairy, and meat claimed to be “humanely raised” means that the animals were raised without cages, and 75% of those surveyed think that such claims *should* mean that the animals were raised without cages.<sup>15</sup>
- 92% of those surveyed want their food labels to reflect country of origin, and 82% want their food labels to reflect state or origin.<sup>16</sup>
- 83% of those surveyed want meat routinely raised with antibiotic to be labeled as “raised with antibiotics.”<sup>17</sup>
- 92% of those surveyed think that before genetically engineered food should be labeled as such before it can be sold, and also meet government safety standards.<sup>18</sup>
- In terms of shopping for food, 66% of those surveyed looked at whether their food was locally produced, 59% looked at whether their food is natural, 40% at non-GMO claims, 36% at animal welfare claims, 39% at antibiotic-free claims, and 31% at “fair trade” claims.<sup>19</sup>

---

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 6.

<sup>13</sup> *Id.* at 8.

<sup>14</sup> *Id.* at 8.

<sup>15</sup> *Id.* at 2.

<sup>16</sup> *Id.* at 3.

<sup>17</sup> *Id.* at 3.

<sup>18</sup> *Id.* at 12.

<sup>19</sup> *Id.* at 4.

Beyond the concerns listed above, studies of those who identify as committed to sustainable food suggest an additional array of values, including availability of knowledge regarding the food systems; participatoriness of the food system; “sacredness” of the food system for “honoring and nurturing” cultural and spiritual well-being; healthfulness of the food system; and expressiveness food system for cultural contexts.<sup>20</sup>

Some of these values may already be changing the food production system. For example, in response to consumer concerns regarding animal welfare, Nestle recently committed to “committed to working closely with our supply chain partners, farmers, governments and other stakeholders to support the long-term economic, environmental and social viability of the animal farming systems which supply Nestlé worldwide.”<sup>21</sup> In terms of concrete actions, it stated

We will support and implement actions to promote animal health and welfare, and eliminate practices which contravene the “Five Freedoms,” and tackle the root causes of those practices. In particular, we will initially focus upon:

- For cattle: dehorning; tail docking; disbudding and castration without anesthetic and analgesia; veal crates; permanent tethering
- For pigs: gestation crates; tail docking; surgical castration
- For poultry and eggs: cage systems, particularly barren battery cages; fast-growing practices
- For animal production systems in general: our first focus is the responsible use of antibiotics, in line with [the World Organization for Animal Health’s] guidance, and the phasing out of the use of growth promoters.<sup>22</sup>

The Consumer Report survey’s identification of deviations between what consumers think particular labels mean and what they want those labels to mean suggests, however, that consumer expectation and demand do not exactly align, despite the presence of various labeling schemes.

### III. The Governance of Eco/Fairness-Labels

Eco/fairness-labels work by using particular sets of criteria to label products as sustainable or fair.<sup>23</sup> These sets of criteria, however, as well as the processes by which products are evaluated, are frequently nontransparent.<sup>24</sup> However, a few generalizations can be made. As one observer describes it:

Depending on the governance model for any particular label, the body responsible for controlling use of the label can draft, adopt, or implement the standards that must be met. The standards for award of the ecolabel are normally referred to as “criteria.” Frequently, the criteria are used to award points, and a minimum

---

<sup>20</sup> See Stephanie Tai, *The Rise of U.S. Food Sustainability Litigation*, 85 S. CAL. L. REV. 1069, 1079-80 (2012) (citing Jack Kloppenburg, Jr. et al., *Tasting Food, Tasting Sustainability: Defining the Attributes of an Alternative Food System with Competent, Ordinary People*, 59 HUM. ORG. 177 (2000)).

<sup>21</sup> Nestle, Appendix to The Nestlé Supplier Code: Nestlé Commitment on Farm Animal Welfare 1 (July 2014), available at [http://www.nestle.com/asset-library/documents/creating%20shared%20value/rural\\_development/nestle-commitment-farm-animal-welfare.pdf](http://www.nestle.com/asset-library/documents/creating%20shared%20value/rural_development/nestle-commitment-farm-animal-welfare.pdf).

<sup>22</sup> *Id.* at 2.

<sup>23</sup> Jeffrey Belson, *Ecolabels: Ownership, Use, and the Public Interest*, 102 TRADEMARK REP. 1254, 1258 (2012).

<sup>24</sup> *Id.*

number of points must be scored before a product can be awarded the right to use the ecolabel.<sup>25</sup>

The evaluation of the environmental impact of particular products, in turn, is often based on principles of Life-Cycle Analysis (LCA), which is a “cradle-to-grave” approach of evaluating the environmental impacts of a particular product.<sup>26</sup> The International Organization for Standardization (ISO), however, provides standards for three types of ecolabeling schemes that involve an LCA approach, with Types I, II, and III designating different levels of LCA application.<sup>27</sup>

“Ownership” of an eco/fairness-label can also vary. Some labels (such as the EPA ENERGY STAR) are government owned,<sup>28</sup> while others are privately owned by an entity labeling its own products (such as the Home Depot “Eco Options” label),<sup>29</sup> and even others are owned by a third-party labeler of other products (such as Fair Trade).

Likewise, the process and standards by which an eco/fairness label is “awarded” can vary significantly. For example, some labeling schemes award labels for any product that meets a fixed standard, while others evaluate particular products relative to other products in a category, and even others operate under different tiered systems of awards.<sup>30</sup>

The process of standard setting, however, is not only varied but also less transparent than for public processes.<sup>31</sup> However, suggested best practices for standard-setting include providing consumers with access to those standards, developing those standards in an open, transparent, and stakeholder-involved process, and integrating the standard-setting process with public standards.<sup>32</sup>

Finally, the regime by which such standards are enforced is also complicated. Typically with third-party labeling organizations, the enforcement mechanism for a label “award” in the United States is conducted through a combination of contract law, with labeling organizations entering into a contract with producers upon award of a label,<sup>33</sup> and more complicated claims regarding the relationships of certification marks under federal law and subject marks under U.S. trademark laws.<sup>34</sup>

#### IV. Future Directions

---

<sup>25</sup> *Id.* (internal citations omitted).

<sup>26</sup> *Id.* at 1260.

<sup>27</sup> *Id.* at 1261.

<sup>28</sup> *Id.* at 1264.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1265.

<sup>31</sup> *Id.* at 1258.

<sup>32</sup> See Linda Breggin, *Interviews with Private Governance Experts*, 44 ENVTL. L. REP. NEWS & ANALYSIS 10102, 10104 (2014).

<sup>33</sup> See, e.g., Martijn W. Scheltema, *Assessing Effectiveness Of International Private Regulation In The CSR Arena*, 13 RICH. J. GLOBAL L. & BUS. 263, 327 (2014); Elliot B. Staffina, *Trade Barrier Or Trade Boon? A Critical Evaluation Of Environmental Labeling And Its Role In The “Greening” Of World Trade*, 21 COLUM. J. ENVTL. L. 205, 226 (1996).

<sup>34</sup> See, e.g., *Dr. Hauschka Skin Care, Inc. v. Demeter Association, Inc.*, Complaint, No. 3:12-cv-30022-KPN, (D. Mass. 2012).

The rise of consumer interest, the proliferation and diversity of ecolabels, and the overall complexity of the food system mean that developments in this area will respond to several critical concerns. This section outlines some of these concerns and discusses potential directions for responses. **[NOTE FROM STEPH: I am sorry, I haven't filled in with footnotes much of this; I can fill in later.]**

### **A. Inconsistency and Credibility**

Observers have highlighted the consumer confusion created by created by the proliferation of eco/fairness labels.<sup>35</sup> As a 2010 World Resources Institute report on ecolabels described, “Marketplace confusion has grown and continues to grow due to competing claims on what makes a product ‘green’, especially when there are two or more competing schemes for the same sector or product.”<sup>36</sup>

What will this mean as eco/fairness-labels move forward? A number of dynamics could possibly arise. First, third party eco/fairness-monitors appear to be arising, to provide more comprehensive reports and evaluations of various eco/fairness-labels. Such third-party reports and evaluations attempt to provide uniform grounds for assessing various eco/fairness-labels along various metrics, including their standards, as well as their effectiveness and processes. Such third-party reports and evaluations, however, may be susceptible to the same weaknesses as the proliferation of eco/fairness-labels, because conflicting third-party reports and evaluations can also lead to confusion among consumers.

Second, more universally established private standard-setting bodies such as the ISO could also provide some uniformity and credibility to the various labeling schemes, despite their proliferation. This is already beginning to happen, with the ISO’s in terms of its standards for various eco-labeling schemes using LCA-based approaches, as well as the ISO’s continual development of ISO 22000, the ISO standard on food safety management systems, as well as ISO/TS 22003, which outlines requirements for certification bodies and ISO 22000, which sets generic requirements for bodies carrying out food safety audits.

Third, increasing calls for government intervention to create additional uniformity may also come into play. Similar interventions have occurred in the past, with various degrees of cooperation by labeling bodies. The U.S. National Organic Program provides one such example, where organic labels occurred on both private and state-based levels until concerns of uniformity and credibility spurred the development of national governmental programs.

Finally, various labeling bodies may work together to establish agreed-upon best practices between them, in order to address credibility concerns raised by consumers. Soft mechanisms such as ecolabeling conferences such as those held through the Global Ecolabeling Network,<sup>37</sup> can lead to further exchange of best practices between various eco/fairness-labeling bodies.

---

<sup>35</sup> See, e.g., World Resources Institute, *Global Ecolabel Monitor: Towards Transparency* (2010), available at [http://www.wri.org/sites/default/files/pdf/2010\\_global\\_ecolabel\\_monitor.pdf](http://www.wri.org/sites/default/files/pdf/2010_global_ecolabel_monitor.pdf); Helen Nilsson, Burcu Tunçer, Åke Thidell, *The Use Of Eco-Labeling Like Initiatives On Food Products To Promote Quality Assurance—Is There Enough Credibility?*, 12 J. CLEANER PRODUCTION 517–526 (June 2004).

<sup>36</sup> World Resources Institute, *supra* note 35, at 3.

<sup>37</sup> <http://www.globalecolabelling.net/> (“The Global Ecolabelling Network (GEN) is a non-profit association of third-party, environmental performance recognition, certification and labelling organizations founded in 1994 to improve, promote, and develop the “ecolabelling” of products and services.”).

## B. Public Participation and Structured Processes

Similarly, the rise of consumer interest in eco/fairness labels may bring about more sophisticated demands from the buying public. That is, those with stronger interests in sustainable food production have also emphasized the values of participation, structure, and transparency.<sup>38</sup> These broader, more procedural interests that extend beyond the production methods of products could lead to the development of more complex regimes for the governance of eco/fairness labels.

That is, as labeling organizations encounter greater demands for participation, it is possible that this may cause the organizations to move towards the greater stakeholder participation in standard-setting suggested by some commentators.<sup>39</sup> The structures for such increased stakeholder participation, however, remains to be seen. **[examples, ranging from study groups/surveys, open conferences, to more formal methods.]**

Moreover, as labeling organizations encounter greater demands for transparency for their decisionmaking processes, they may need to respond by becoming more open with these processes. In turn, the very process of establishing open processes can lead to the availability of more information regarding the processes, allowing observers and environmental groups to use soft mechanisms such as the Global Ecolabeling Network to create greater harmonization, or at least provide stronger assessments of best practices.

## C. Responsiveness to Developing Scientific Understandings

Finally, the food production sector is both rapidly evolving and facing developments in scientific, economic, and social science information about the externalities related to food production.<sup>40</sup> To the extent that these developments contravene the premises upon which different eco/fairness labels are based, they may call into question the legitimacy or at least soundness of the eco/fairness label.

Such dynamics, in turn, may create pressures on eco/fairness labeling organizations to develop response networks in order to protect the branding of their labels, should either changes arise that affect their branding, or changes in information arise that contradict the values of the brand. **[examples]**

These dynamics, in turn, may also lead to the development of greater information-sharing networks between labeling bodies should developments arise that affect multiple brands in similar ways. **[examples]**

---

<sup>38</sup> See, e.g., Tai, *supra* note 20.

<sup>39</sup> See, e.g., Belson, *supra* note 23, at 1258.

<sup>40</sup> See, e.g., Ching-Fu Lin, *Global Food Safety: Exploring Key Elements For An International Regulatory Strategy*, 51 VA. J. INT'L L. 637, 691 (Spring 2011) ("For instance, considering both the rapid development of food technology and the scientific uncertainty in numerous food safety areas, a step-by-step incremental approach can better cater to evolving scientific evidence and better locate the most cost-effective solutions in the international governance of food safety."); cf. Juanjuan Sun, *The Evolving Appreciation of Food Safety*, 7 EUR. FOOD & FEED L. REV. 84 (2012).

## **V. Conclusion**

Eco/fairness labels present both promises and challenges for shaping our food systems. On one hand, they provide the potential for softer informational processes to influence food sourcing and production practices in a sustainable, fairer manner. On the other hand, as the dynamics develop between consumers, different labels, and government institutions, we are likely to see additional developments arise in order to address the tensions outlined above—which makes this an especially exciting area for observers to watch.