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On (Cr)edibility: Why Food in the United States May Never be Safe

Denis Stearns

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Denis W. Stearns*

INTRODUCTION

"Sharing food with another human being is an intimate act that should not be indulged in lightly."[1]

In the ongoing political—not to mention, legal, historical, philosophical, and economic—arguments about the regulation of social and economic activity by government, one of the dominant theoretical controversies has been over the answer to this question: do regulations "interfere" with the marketplace by creating unnecessary inefficiencies and higher costs, or are regulations a necessary corrective for the inevitable "failures" of an unregulated (or "free") market?[2] While this controversy remains justifiably open in the context of the markets for many products and services, e.g., transportation and energy, the core thesis of this Article is that there is no rational—which is to say, cogent and fact-supported—justification for an argument in favor of a "free" market for food.

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* Denis Stearns is a founding partner of Marler Clark, LLP, PS, a Seattle-based law firm with a national practice devoted to the representation of persons injured by unsafe food and drink. He is also a principal in Outbreak, Inc., a non-profit company that promotes food safety through education, political advocacy, and pro bono consulting with the food industry.

1. M.F.K. FISHER, AN ALPHABET FOR GOURMETS 3 (Northpoint Press 1989) (1949).

2. *Compare* CASS SUNSTEIN, RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT 28-52 (2002) (taking a friendlier view of the need for regulation to achieve safety through a "cost-benefit state" that compensates for the faulty risk-perception of a supposedly irrational public), *with* KIP VISCUSI, FATAL TRADEOFFS: PUBLIC AND PRIVATE RESPONSIBILITIES FOR RISK 149-60 (1995) (arguing that much regulation is an overreaction to relatively low-probability risks that cannot be justified by a strict cost-benefit analysis). Elsewhere, Viscusi famously argued that smoking benefits the public because smokers pay more taxes and die before collecting their pensions. W. Kip Viscusi, *The Governmental Composition of the Insurance Costs of Smoking*, 42 J.L. & ECON. 575 (1999). For a general discussion of regulatory theory and the most often-cited justification for regulation, see STEPHEN BREYER, REGULATION AND ITS REFORM 15-34 (1982) (surveying the major economic rationales for regulatory programs and identifying the major types of regulation).

There are, of course, innumerable ways to define (or dispute) what constitutes a "free" market—thus, the use of the quotation marks at the outset is to signal that the meaning of the word is in play.[3] But for purposes of what follows, and without intending to take the term entirely out of play, I will (dropping the quotation marks) use free to describe a market that is self-regulated: a market where buyers and sellers are able to act however and whenever they choose, and to transact business on terms of their own choosing, solely based on self-interest. In sum, it is a market that, according to Adam Smith, is "led by an invisible hand,"[4] and which, aptly enough, he explained using the sale of food as an example, writing: "It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own self interest."[5]

The other term that needs explaining here is the "(cr)edibility" of this Article's title. As used, this is neither one term, nor two; and no fixed or parallel definitions are intended. What is intended is a multiple and free association of meanings in dialogue; a twinning, conjoining, and overlapping of concepts of edibility and credibility, either and both, intended to illustrate, in as many ways as possible, that edibility encompasses and exceeds, in meaning and practice, the narrower ideas of a trust in food safety—that state of believing that food is, in fact, safe to eat because eating it will not have any adverse health effects. Thus, as used, edibility includes the ideas of wholesomeness, nourishment, satisfaction, and even delight. Similarly, credibility, the spelling and meanings of which subsume edibility, invokes the ideas of honesty, generosity, good faith, and fair dealing; and it anticipates the basis of the bargain that is (or should be) at the heart of food exchange—I am receiving what I sought and for which I fully paid. Accordingly, and in sum, the term (cr)edibility is intended to reveal food exchange as an essentially (and unavoidably) intimate act that can never be fully commercialized. The exchange of food, whether by gift or sale, is founded and made possible by trust of the most extreme and significant kind. There are few things that make one more vulnerable than eating. Accordingly, (cr)edibility is the sine qua non of food exchange.

With these meanings in mind, I intend in this Article to interrogate the idea of food safety by opening the question of whether a rational economic actor in a free market for food can reasonably be expected to invest in improving the

3. The use of the quotation marks additionally calls attention to the word "free" as a subject (and location) of an ongoing, largely political dispute. *See, e.g.*, JAMES A. AUNE, SELLING THE FREE MARKET: THE RHETORIC OF ECONOMIC CORRECTNESS, at xiii (2002) (arguing that free market economics have had a destructive impact on the American character and community, and that "technical economic rhetoric has been allowed to trump the moral and cultural *meanings* of community, nature, work, and the market").

4. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 423 (Edwin Canaan ed., Univ. Chi. Press 1937) (1776).

5. *Id.* at 14.

safety of the food products he makes and sells. In opening this question, I will try to show just how naïve it is to expect any economic market—whether free or regulated—to create, on its own terms, enough safety to satisfy consumer expectation, which is to say, enough safety to be (cr)edible. I will additionally explain that it is precisely the lack of (cr)edibility in the market—i.e., the absence of reliable quality signals, the lack of traceability, the high degree of anonymity, and the destruction of trust—that creates the structural impediments and powerful disincentive for improving the edibility of food. I will then close by offering some thoughts on proposed core values that, if somehow made an essential or defining part of the market for food, would go far in making food in the United States, if not (cr)edible, at least much safer to eat.

I. THE IMPOSSIBILITY OF A FREE MARKET FOR SAFE FOOD

A free market for safe food in the United States is impossible because there are no set of circumstances under which a free market could exist in which the food bought and sold there could be safe, and reliably known as such at the time of purchase.

Take, for example, a recent outbreak of salmonella infections that was linked to the consumption of Veggie Booty snacks, a product described on its producer's website as follows:

> Veggie Booty will change the way you eat, while enjoying the finest snack on the planet. Veggie Booty puts you in the mindset to eat healthier and change your life, take it on a train, or in your car, on a walk, or on a boat, Veggie Booty will be your good friend. This is a life changing snack that will help you eat healthier.[6]

Over sixty persons living in twenty states were confirmed by the Centers for Disease Control and Prevention (CDC) to have been infected as a result of eating Veggie Booty contaminated with salmonella.[7] The source of the contamination proved to be parsley imported from China that, once finely ground, was used as an ingredient to make the Veggie Booty spice mix—that is, the spice coating applied to the puffed corn snack in order to make it "healthier." Of course, the person buying the Veggie Booty snacks had no way of knowing the danger lurking inside the bag. And that is the problem. Despite

6. *See* Robert's American Gourmet Website, http://web.archive.org/web/20080727004650/http:/www.robscape.com/files/prod-veggie-booty.php (last visited Apr. 18, 2010). It should be noted that, unless otherwise expressly stated, the foodborne illness outbreaks used as examples throughout this Article are ones in which the author's law firm represented persons alleging injury as an outbreak victim. As such, much of the specific information about the outbreak is based on the author's personal knowledge and experience.

7. Centers for Disease Control and Prevention, Salmonella Wandsworth Outbreak Investigation, June-July 2007 (July 11, 2007), http://www.cdc.gov/Salmonella/wandsworth.htm. Specifically, in its report on the ongoing investigation of the outbreak, the CDC noted that a "multistate case-control study demonstrated a strong association between illness and consumption of Veggie Booty."

the existing incentives and disincentives, both economic and regulatory, an unsafe food product was made, marketed, and eaten and then caused significant sickness and suffering, with infants and young children bearing the worst of it. All of this occurred because their parents had sought a "healthier" snack that, in the end, proved not healthful at all.

A. Food Safety as a Credence Attribute

There are innumerable reasons for purchasing any given food item, from its delightful smell, to the fact that it is on sale. But for all the reasons one might decide to purchase a given food item, no rational person will knowingly purchase something that he knew would make him sick, or even kill him. Unfortunately, however, the safety of a given food item is not readily discernable at the time of purchase. Consequently:

> For the most part, food safety is a credence attribute. Credence attributes are those that consumers cannot evaluate even when they use or consume the product. Consumers cannot usually determine before purchase, or even after consumption, whether a food was produced with the best or worst safety procedures, or whether a food poses a health risk.[8]

Food and its safety is thus to be distinguished from a search or experience good.[9] Whereas a search good allows for comparison-shopping because the searched-for attribute can be reliably detected, and an experience good can at least be reliably tested through use, the safety of a given food item can only be assumed, which is to say, trusted.[10] This is because, "with credence characteristics, the absence of consumer detection leads to the complete absence of revelation."[11] As a result, this most important of food attributes remains invisible.

There are some borderline cases, however. Bread or cheese that is moldy could be considered unsafe, and the attribute of moldiness is typically visible. There are also some pathogens that cause symptoms in an extremely short period of time, making food contaminated with these pathogens an experience

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8. Elise Golan et al., *Evidence from the Meat Industry, in* FOOD & CONSUMER ECON. DIV., U.S. DEP'T OF AGRIC., PUB. NO. 831, FOOD SAFETY INNOVATION IN THE UNITED STATES 1, 6 (2004) (citations omitted); *see also* Helen H. Jensen, *Food-System Risk Analysis and HACCP, in* NEW APPROACHES TO FOOD SAFETY ECONOMICS 63, 63 (A.G.J. Velthius et al. eds., 2003) ("Private markets often fail to provide adequate food safety because information costs are high, detection often very difficult, and the nature of contamination is complex. Underlying many of the food safety failures is the existence of externalities, or costs not borne by those whose actions create them.").

9. Esbon Sloth Andersen & Kristian Philipsen, *The Evolution of Credence Goods in Customer Markets: Exchanging "Pigs in Pokes"* (Jan. 10, 1998) (unpublished manuscript), *available at* http://www.business.aau.dk/evolution/esapapers/esa98/Credence.pdf.

10. *Id.* at 2.

11. John M. Crespi & Stephan Marette, *Some Economic Implications of Public Labeling*, 34 J. FOOD DISTRIBUTION RES. 83, 85 (2003).

good. And there are usually-detectable items like peanuts that are safe to most, but deadly to an allergic minority. But for the more common sources of foodborne illness, microbial pathogens, the incubation period is sufficiently long that, in most cases, more than one food item or exposure is implicated as a possible infection source. This means that, even after consuming a given food product and being made ill by it, the consumer has no reliable means of attributing the illness to the food. It is for this reason, mainly, that the vast majority of foodborne illness in the United States is, each year, attributable to unidentified food items.[12]

Because foodborne illness is only rarely attributed to an identified food source, the food industry is able to impose huge costs (or externalities) upon the public each year while reaping the cost-savings of not investing more in improved food safety. A USDA report describes the problem well:

> Because consumers cannot detect food safety, they may be unwilling to pay a premium for "safer" food. Consumers may worry about fraud and the possibility that some foods marketed as safer products are actually standard or even substandard. In fact, firms producing low-safety foods may have an incentive to market their products as high-safety; they could charge high-safety prices, and because of cost-cutting, have greater profits than high-safety producers. If this incentive were left unchecked, the market would be dominated by low-quality products with little or no product differentiation. In this case, consumers would be correct in assuming that all products were of low quality unless proved otherwise.[13]

And, in routinely making such an assumption, consumers recognize (and are forced to accept) that the credibility of safety claims is always doubtful. Similarly, consumers come to understand that the consequences of not being fully informed about a food product's most relevant qualities are that "they may consume an undesired characteristic or pay a price that does not reflect . . . the risk associated with the good in question."[14] Accordingly, because food cannot be trusted in its most essential sense, it is no longer (cr)edible.

This lack of (cr)edibility is the primary reason that there can be no such thing as a free market that produces consistently safe food; instead, a free market for food will always be defined by a near-perfect asymmetry of information. Such a market allows only producers and sellers the opportunity to be fully informed, and so to act freely in a way that allows them an advantage over uninformed buyers. For when it comes to the safety of the food being considered for purchase, producers and sellers know the relative care (or lack

12. *See* Paul Frenzen, *Deaths Due to Unknown Agents*, 10 EMERGING INFECTIOUS DISEASES 1536, 1536 (2004) ("Reported outbreaks probably account for only a small proportion of deaths from unknown foodborne agents because most foodborne outbreaks are never recognized or reported."); Paul Mead et al., *Food-Related Illness and Death in the United States*, 5 EMERGING INFECTIOUS DISEASES 607, 614 (1999) (reporting that unknown agents account for 81% of foodborne illnesses and hospitalizations, and 64% of deaths).

13. Golan et al., *supra* note 8, at 6 (citation omitted).

14. Crespi & Marrette, *supra* note 11, at 84.

of it) that went into production, but the buyer must purchase the product based solely on trust—which is to say, based on the presumed credibility of the food's claim to being safe and wholesome.

The inability of consumers to reliably detect the relative safety of food products competing for their purchase ends up preventing all but a weak and nonspecific demand—which is really more like a hope—for safer food products. And so the demand is ineffective, and does not, in any sense that Adam Smith would recognize, prompt producers and sellers to provide, with "regard to their own self interest," the dinner we expect. This is what is meant when economists talk of "market failure," where the "individual pursuit of self-interest found in the market makes society worse off—that is, the market outcome is inefficient."[15] A notable problem with this utterly sanguine description is that, in the market for food, the "inefficient" outcome is injury and death.

B. Competing on Price (and Volume) Versus Safety: A Case Study

In early November of 2008, employees of the CDC noticed a surge in the number of salmonella infections with an unusual pulsed-field gel electrophoresis pattern, prompting a multistate epidemiological investigation.[16] The initial results of the investigation found a strong connection between infection with this unusual strain and the consumption of specific brands of prepackaged peanut butter crackers.[17] Further investigation by the Minnesota Department of Health and Agriculture traced the source of infections in that state to King Nut brand peanut butter, which had been manufactured by the Peanut Corporation of America (PCA) at a single facility in Blakely, Georgia.[18] By January 28, 2009, 529 persons from forty-three states had been confirmed as victims of this salmonella outbreak, with at least 116 people hospitalized, and eight people having died as a result of their infections.[19]

One of the outbreak victims who died was Shirley Almer, an elderly woman of Finnish descent filled with "spunk, fortitude, and determination," who had successfully battled cancer, but then died as a result of eating salmonella-contaminated peanut butter.[20] This is how her son, Jeffrey Almer,

15. PAUL KRUGMAN & ROBIN WELLS, MACROECONOMICS 15 (2nd ed. 2009)

16. Ctr. for Disease Control & Prevention, *Multistate Outbreak of Salmonella Infections Associated with Peanut Butter and Peanut Butter-Containing Products—United States, 2008-2009*, 58 MORBIDITY & MORTALITY WKLY. REP. 1 (Early Release 2009), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm58e0129a1.htm.

17. *Id.*

18. *Id.*; *see also* Ctr. for Disease Control & Prevention, Timeline of Infections: Multistate Outbreak of Salmonella Infections Associated with Peanut Butter and Peanut Butter-Containing Products—United States, 2008-2009 (Jan. 20, 2009), *available at* http://www.cdc.gov/salmonella/typhimurium/salmonellaOutbreak_timeline.pdf.

19. Ctr. for Disease Control & Prevention, *supra* note 16, at 1.

20. *Salmonella Contamination: Hearing before the Oversight and Investigations*

described his mother's ordeal, and how it has affected the family:

> It was just after the New Year that my sister Ginger was informed by the Minnesota Department of Health about [my mother's] positive test for *Salmonella*. A week or so earlier she had unknowingly consumed *Salmonella*-laced peanut butter while in her immune compromised state of health. Cancer couldn't claim her but peanut butter did.
>
> Now that we understood the cause of her death our grief was replaced by anger as we struggled to accept this very preventable tragedy. Our family feels cheated. My mom should be with us today. My mother, Shirley, was a proud mother, a proud businesswoman, and a proud American. She fought hard for the things she believed in. She always liked to fly the US flag along with the Finnish flag, which was her heritage. If it was one of her kids who passed away from *Salmonella*-tainted food, or one of the many other contaminants present in our food supply these days, there is no doubt that she would be as outraged as I am today. She would be doing the same thing her family is doing in her memory right now: telling her story in order to effect change.
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> Her death and the deaths of seven others could have been so easily prevented if it were not for the greed and avarice of the Peanut Corporation Of America (PCA). PCA appears to be more concerned with squeezing every dollar possible at the expense of sanitary conditions and sound food manufacturing processes. Every company should have a moral and ethical compass when producing the nation's food supply. In this absence, we need a cohesive proactive regulatory system to serve as our safety net; too often it is reactive, if at all.
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> PCA now has the blood of eight victims on their hands, along with the shattered health of a known 600 others. Their legacy is now that of a company that did what it could get away with until their shoddy practices led to one of the nation's largest recalls.[21]

In the case of the PCA salmonella outbreak, one can easily see the dynamics of "market failure" at work, and how the "moral and ethical compass" that consumers presume to be at work in the market for food is, in fact, entirely absent. And so, faced with infrequent and ineffective inspections (which are, under the current regulatory regime, the key prescriptive intended to incentivize safety), PCA was free to do whatever it wanted in its pursuit of its self-interest, which is to say, higher profits. Such things included:

> The conditions at the plant, more circa 1955 than 2009, would have been enough to cause alarm in an industry where sanitation can be a matter of life and death, food experts said . . . .
>
> . . . .
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> . . . But its yellow-brick walls hid the array of poor work conditions and safety flaws, said employees, who lost their jobs when the plant closed on Jan. 16.
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> Many of the hourly workers earned only minimum wage and had gone

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Subcomm. of the H. Comm. on Energy and Commerce, 111th Cong. 1 (2009) (statement of Jeffrey Almer), *available at* http://energycommerce.house.gov/Press_111/20090211/testimony_almer.pdf. By way of full disclosure, my law firm represents dozens of victims of the PCA Salmonella outbreak, including the families of three people who died. My firm does not, however, represent the Almer family.

21. *Id.* at 2.

> years without a raise. Frederic McClendon, 31, a shift supervisor, reached $12 an hour last year but still could not afford health insurance for his two boys, who live in a weather-beaten trailer. "If you pay your workers, you get the best out of them," Mr. McClendon said. "If you don't, you don't."
>
> Using temporary workers also saved money, said Mr. Hardrick, the assistant manager, "but there was a lot of retraining going on."[22]

But should any of this be a surprise to anyone? What was the incentive to invest in modernizing the plant, in employee training, and in vigorous internal oversight? There was none, except for the slight risk that the shocking problems would somehow come to light. And the problems did not. For years.

In the ironic words of Representative Henry Waxman, a Democrat from California—words that were apparently not intended to be ironic—he asserts that the company's internal records showed that it "was more concerned with its bottom line than the safety of its customers."[23] Whether feigned or not, this statement of shock is telling in what it reveals about the failure of effective food safety regulation. If it is accepted by policymakers as axiomatic that a for-profit food company can be expected to put the interests of public safety first, and do so without condition or compensation, regardless of circumstance, then it is clearly time to question the seriousness of legislative efforts at creating an effective regulatory regime for food. This is especially so, when, as here, the food-product implicated in a widespread outbreak of illnesses is a commodity ingredient that is incorporated, *sub rosa*, in hundreds of products sold under hundreds of different brand names and labels.[24] Indeed, one need only look at the roster of recalled products to realize that the contaminated peanuts sold by PCA would only implicate the company if a sufficiently large number of people were injured or killed to prompt an investigation and regulatory attention.[25]

And that is exactly what eventually happened—enough injury, illness, and death was caused to finally force the government—here, the Food and Drug Administration (FDA)—into action. It certainly was not the FDA that discovered the food safety violations, nor did it do anything to prevent the

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22. Michael Moss, *Peanut Case Shows Holes in Safety Net*, N.Y. TIMES, Feb. 9, 2009, at A1.

23. Lyndsey Layton, *Peanut Executive Takes the Fifth*, WASH. POST, Feb. 12, 2009.

24. As of October 28, 2009, according to the FDA, there were 3918 individual entries with regard to products subject to recall because they were manufactured with peanuts supplied by PCA. *See* FDA, Peanut Butter and Other Peanut Containing Products Recall List (Oct. 28, 2009), http://www.accessdata.fda.gov/scripts/peanutbutterrecall/index.cfm.

25. Abbie Boudreau & Scott Bronstein, *Poor Oversight Fueled Salmonella Outbreak, Critics Say*, CNN, Feb. 5, 2009, http://www.cnn.com/2009/HEALTH/02/05/peanut.recall/index.html?iref=mpstoryview. According to the final CDC update on April 29, 2009, there were nine deaths and 714 lab-confirmed salmonella infections, spread across forty-six states and attributed to PCA peanuts. Centers for Disease Control and Prevention, Investigation Update: Outbreak of Salmonella Typhimurium Infections 2008-2009 (Apr. 29, 2009), http://www.cdc.gov/salmonella/typhimurium/update.html.

outbreak from happening.[26] Thus, if anything, this outbreak is not really an example of a market failure per se. Despite the existence of regulations intended to prevent the "inefficient" or "non-optimal outcomes" of a free market for food, PCA remained a commercial enterprise at its most free—which is to say, free of agency oversight or inspection, free of economic restraint imposed by buyers of its ingredients, and free of accountability to the hundreds of thousands of ill and injured consumers who did not have their infections lab-confirmed or ever attributed to its products.[27] Furthermore, PCA had enjoyed this freedom in the market for years. Thus, here, the free market had worked as its proponents intend; it created profits based solely on self-interest. What it did not create is safety.

II. THE INEFFECTIVENESS OF CONSUMER DEMAND FOR FOOD SAFETY

Because a generalized demand (or hope) for safer food is usually applicable to an entire industry or product category, like meat, there is little economic incentive for individual companies within an industry to manufacture food that is safer than required by government regulations. Such regulations therefore tend to act as a ceiling rather than a floor, and effectively suppress most intra-industry competition in the realm of food safety. In economic terms, the regulations thus act as a negative incentive that prompts manufacturers to invest only what is necessary to avoid non-compliance (or getting caught), but nothing more. And if you add to this a low probability of getting caught, what results is an incentive to make food less safe, not more. The question then arises: why is this, and how might it be changed?

A. The Inability to Profit from Safety

Numerous studies have shown that consumers are willing to pay more for safer food.[28] The problem, however, is how to make safety visible as a product

26. Boudreau & Bronstein, *supra* note 25 ("Food safety experts said the underlying cause of the problem, however, is that the century-old system of regulation is broken. In this case, the experts said, the federal government failed to oversee the safety of products coming out of the Blakely plant and was slow to identify it as the source of the *salmonella*.").

27. For, as the CDC pointed out in its preliminary report on the PCA salmonella outbreak, "only an estimated 3% of *Salmonella* infections are laboratory confirmed and reported to surveillance systems." Ctr. for Disease Control & Prevention, *supra* note 16, at 3 (citing Andrew C. Voetsch et al., *FoodNet Estimate of the Burden of Illness Caused by Nontyphoidal Salmonella Infections in the United States*, 38 CLINICAL INFECTIOUS DISEASES 127, 127-34 (Supp. 3 2004)). Based on this figure, one can reasonably assume that more than 25,000 persons were injured as part of the PCA outbreak.

28. *See, e.g.*, Doris Hicks et al., *Consumer Awareness and Willingness to Pay for High Pressure Processing of Ready-to-Eat Foods*, 8 J. FOOD SCI. EDUC. 32, 32-38 (2009) (documenting a willingness to pay more per food item, especially when technology is explained); Seung-Youll Shin et al., *Consumer Willingness to Pay for Safer Food Products*, 13 J. FOOD SAFETY 51, 51-59 (1992) (finding that for each meal that may be contaminated,

attribute such that the seller can charge more, thus gaining a reasonable return on the investment in improved safety. As one paper published in conjunction with a 1995 USDA-sponsored food safety conference has well-explained:

> Safety is an attribute of food products associated with reduced risk or chance of foodborne illness. If consumers can ascertain the level of safety or risk associated with a food prior to its purchase and understand the true risks to health, then they could choose among products to obtain the preferred level of food safety. In doing so, consumers could express their willingness to pay for varying levels of safety. . . . Producers have little incentive to provide greater levels of food safety, since consumers will not pay for an attribute that they cannot verify.[29]

Therefore, despite the demand for safety, and the willingness to pay for it, the market for food has proven systematically incapable of responding to the demand.

Unlike cars, for example, that persist as consistent brands and model lines, and are subject to an array of independent reviews and testing, a given food product generally cannot develop a particularized reputation *for* safety that persists over time. In contrast, categories of food can easily develop a bad reputation for a perceived *lack of* safety. One notable example is ground beef, which has a lengthy history of causing substantial amounts of illness and death. At the same time, the problem of meat safety has proven to be largely intractable. This is, in large part, due to the fact that the U.S. system of ground beef production, which is highly regulated, is too big and complicated to be adequately controlled from farm to table. Moreover, the economic incentives that might otherwise be expected to reward higher quality and increased care-taking work in the opposite direction. As one food economist rightly points out:

> Incentive problems occur because it is difficult for packers to reward farmers for care taking, and farmers have no incentive to take additional care in production or transport to reduce the likelihood of problems at the packer level. Nor do packers that sell products to intermediaries that co-mingle beef from multiple sources have market incentives to adopt technologies that reduce pathogens in the plant source.[30]

This is not to say, however, that these problems cannot be both addressed and fixed.

Take, for example, the very different approach taken by the large food retailer Marks & Spencer, which is based in the U.K. In general, food retailers in the U.K. have been at the forefront in developing private label brands that signal a high degree of responsibility being taken by the retailer over the

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study participants would pay fifty-five cents to eliminate salmonella risk).

29. Helen Jensen & Laurian Unnevehr, *The Economics of Regulation and Information Related to Foodborne Microbial Pathogens*, *in* FOOD & CONSUMER ECON. DIV., U.S. DEP'T OF AGRIC., PUB. NO. 1532, TRACKING FOODBORNE PATHOGENS FROM FARM TO TABLE: DATA NEEDS TO EVALUATE CONTROL OPTIONS 125, 126 (1995), *available at* http://ageconsearch.umn.edu/bitstream/33549/1/mp951532.pdf.

30. Jensen, *supra* note 8, at 69.

manufacturing process.[31] This development was triggered, in part, by passage of the 1990 Food Safety Act, which legislatively assigned primary responsibility to retailers for the safety of the food sold, and forced retailers to focus on upstream supply chains, and to demand stringent quality assurance and product-traceability schemes.[32]

One result of the "asymmetric liability hazard" that this law imposes on retailers is the documented trend "in the British beef industry to source beef through partnership agreements and groups of farmers."[33] Marks & Spencer appears to have gone further by restricting its procurement of ground beef from a single family-owned slaughter and processing facility that sources all raw materials from pre-approved Scottish producers. Interestingly, Marks & Spencer even goes so far as to conduct regular taste tests of the ground beef to provide feedback to individual farmers. "This system promotes learning throughout the supply chain and is mutually beneficial, since it improves both the farm-level performance and product quality."[34] And, even better, at least from the point of view of the consumer, the result is safer, higher quality meat that Marks & Spencer can credibly market, for example, with the following advertising text:

> PLAN A: DOING THE RIGHT THING
> We don't sell poor quality meat.
> It comes at too high a price.
>
> How can you be sure our meat is of high quality? For starters, all our fresh meat comes from known and trusted farms and we only use prime cuts, even in our burgers. We've also been recognised with a RSPCA Good Business Award for animal welfare. So, for the sake of a few pence, what would you rather serve your family?[35]

This advertisement is about as good an example of (cr)edibility as can be found. And it is no mere coincidence that the credibility of the claim successfully justifies a higher price, one that the public in the U.K is plainly happy to pay. Indeed, according to recent research, private label products, like those sold by Marks & Spencer, have captured an increasing share of the

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31. Robert King & Luciano Venturini, *Demand for Quality Drives Changes in Food Supply Chains*, *in* FOOD & CONSUMER ECON. DIV., U.S. DEP'T OF AGRIC., PUB. NO. 794, NEW DIRECTIONS IN GLOBAL FOOD MARKETS 18, 22-23 (2005), *available at* http://www.ers.usda.gov/Publications/AIB794.

32. *Id.* at 23; *see also* Rupert Loader & Jill E. Hobbs, *Strategic Responses to Food Safety Legislation*, 24 FOOD POL'Y. 685, 687 (1999) (characterizing the 1990 Food Safety Act as "probably the most important piece of food safety legislation in terms of its impact on firms' strategic responses," and noting that the Act was "intended to induce all those involved in the food supply chain to improve their food handling practices").

33. Jutta Rosen, *Marketing Safe Food Through Labeling*, 34 J. FOOD DISTRIBUTION RES. 77, 79 (2003).

34. *Id.*

35. I saw this advertisement, and was immensely struck by it, while in London the week of June 8, 2009, attending the 2009 Conference on the Law of Food and Drink, at the British Institute of International and Comparative Law. A copy of the advertisement is on file with author.

market, representing as much as thirty percent of the value sold in Britain.[36] In this example, safety is profitable, which is how the market for food must work if it is to produce consistently safe food.

B. The Absence of Reliable Quality Indicators

In examining the failure of the food market to provide the desired levels of safety, it is plain that the absence of reliable quality signals is one of the chief impediments to improving the system. The producers and sellers of food simply have no incentive to invest in improving their products if there is no predictable return on the investment, and therefore the public is forced to purchase and consume food that satisfies minimal quality standards—as low as the market will bear. Thus, foodborne illness—so long as it does not result in death—comes to be accepted as a risk that one is forced to accept if one expects to eat. Put another way, the "stomach flu" comes to be accepted as a fact of life, a burden to be borne, and a necessary price to pay as a consumer.[37]

None of this is to suggest, however, that food companies have no desire to make credible claims about food quality and safety, and to profit from such claims. To the contrary: I have not once met a food industry professional who did not express a desire for their company to have a better reputation for the quality and safety of their products. Similarly, I have heard dozens of such professionals complain that the reputation of their company had been sullied by the bad acts of others in the same industry, simultaneously damaging the credibility of all. This "credibility crisis" (my term) thus comes to affect the food industry as a whole. The former commissioner of the FDA, David Kessler, has stated that "[t]he food industry alone cannot recoup its credibility. The public is simply not going to believe any assessment of risk that comes from a source with much to lose by exposing dangers. No purveyor of a product can be objective about the risks posed by its own products."[38]

That is why the public understandably trusts the government more than private industry when it comes to issues related to food safety, even when such trust is far from fully justified. Still, in a contest over whom to trust, the government's appearance of objectivity gives it the edge.

Despite high levels of consumer distrust, food companies can still come to develop a reputation for higher quality over time, and thus brand names can come to serve as proxies for the more specific attribute of safety.[39] "In consumers' minds the brand names identify the main attributes of the product

36. Rosen, *supra* note 33, at 79.

37. How often have you heard someone say that they suffered "a touch of stomach flu"? This pretty much invariably means that the person suffered a foodborne illness.

38. Crespi & Marette, *supra* note 11, at 85 ("[T]here is no reason that the signaling characteristics will emerge spontaneously from a market equilibrium" (quoting David Kessler, *Europe Needs a Stronger Food Safety Regulator*, TIME, July 5, 1999, at 30-31)).

39. Golan et al., *supra* note 8, at 6.

and are a guarantee of consistent or minimum quality. Brands are preferred by consumers to unbranded products because they reduce the uncertainties concerning product performance, quality, and value associated with food purchases."[40]

Of course, the positive association that builds between the brand name and the product as a result of its "consistent or minimum quality" will be, of necessity, based on qualities that are perceptible, which safety is not. That is why quality assurance programs primarily "attempt to homogenize products and control the product process to *limit* the risk of a future food-safety incidence."[41] So a McDonald's Big Mac might taste the same no matter where in the world that you purchase it, but there is no guarantee that it will be always safe to eat.

To buttress the credibility of the implicit safety claim made by a brand name, a food company is likely to rely on some sort of third-party audit or verification mechanism that is intended to suggest that the quality of the product (or process) has been certified to be safe, and done so in an apparently objective manner.[42] The Nobel Prize-winning economist, Joseph Stiglitz, argues that the need for certification arises from an "information problem," and he gives as an example the call for food safety by the meat packing industry in the wake of bad publicity created by publication of Upton Sinclair's novel, *The Jungle*. As Stiglitz explains, "[t]he meatpackers wanted certification that their products were produced in a safe and humane manner. They also knew that the only credible source of such certification was the government—if the meatpackers paid the certifiers directly, there would be a conflict of interest."[43]

And a conflict of interest there indeed would have been. But that has not stopped the recent increase in the use of private, for-profit certification companies to create an imprimatur of safety.

Of course, as has been revealed time and time again, private, for-hire certifications are not consistently reliable in assuring product safety.[44] Indeed,

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40. *Id.* (quoting JOHN CONNOR & WILLIAM SCHIEK, FOOD PROCESSING: AN INDUSTRIAL POWERHOUSE IN TRANSITION 348 (1997)).

41. Rosen, *supra* note 33, at 78 (emphasis added).

42. *Id.* at 77 ("[F]irms that wish to credibly communicate the safety of their products must rely on third-party accreditation or government enforcement.").

43. Joseph Stiglitz, *Government Failure vs. Market Failure: Principles of Regulation*, *in* GOVERNMENT MARKETS: TOWARD A NEW THEORY OF REGULATION 7, 10 (Edward J. Balleisen & David A. Moss ed. 2009).

44. *See* Michael Moss & Andrew Martin, *Food Problems Elude Private Inspectors*, N.Y. TIMES, Mar. 6, 2009, at A1 ("An examination of the largest food poisoning outbreaks in recent years—in products as varied as spinach, pet food, and a children's snack, Veggie Booty—show that auditors failed to detect problems at plants whose contaminated products later sickened consumers."); *see also* Gardiner Harris, *House Panel Questions Industry on Food Safety*, N.Y. TIMES, Mar. 20, 2009, at A18 (detailing how Nestle sent an auditor to the PCA plant and subsequently decided not to purchase peanuts from the company based on the findings, whereas an auditor hired by "Kellogg Company and dozens of other food manufacturers . . . to assure the safety of the peanut ingredients in hundreds of cookie and

in outbreak after outbreak over the years, discovery during the litigation process reveals the existence of some sort of third-party audits being used, but plainly to no real safety effect. This strongly supports the notion that in the United States such audits are mainly marketing tools, done because consumers generally have come to expect this "extra" safety step. Like the "Good Housekeeping Seal of Approval," the fact of a third-party audit reassures without making any credible guarantee.

But even in the absence of certification, as a consumer makes repeat purchases of a given company's food product—say, Peter Pan peanut butter—the impression that the product is safe is repeatedly reinforced by the perception that it has not made anyone in the family sick. Understandably, this perception persists only until proven false by news of an outbreak or recall that is linked to the product and, perhaps, an illness that occurred in the family that had not previously been attributed to eating the peanut butter. And so, suddenly, the product that had been perceived to be reliably safe, and was deemed (cr)edible as a result, is proven to have been unsafe all along.

Our experience in dealing with thousands of potential claims arising from the Peter Pan peanut butter outbreak revealed that, to most people wanting to assert a claim, it was irrelevant whether microbiological testing of their leftover peanut butter found salmonella. Nor did they think it mattered that a diarrheal illness they had suffered months before could have countless other causes. For most potential claimants that contacted our office, the fact of some publicized illnesses having been attributed by the CDC—a credible source to most consumers—to a brand of peanut butter found in their home was, by itself, proof that the product had been unsafe, and the cause of their illness. In reality, whether the peanut butter had been contaminated could, in most cases, not be proven because most of the hundreds of jars that were tested did not reveal the presence of bacteria.[45] Further, the fact of illness having occurred at some point in time adjacent to eating the peanut butter might be circumstantial evidence, but it was not enough to support a viable legal claim for compensation. Instead, what was required in most cases was proof-of-purchase, along with a stool culture that evidenced a salmonella infection, preferably serotype Tennessee—that which was associated with the outbreak in question.[46] Consequently, only a

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cracker products" gave the plant a "superior" rating).

45. There is no shortage of explanations for this. For example, one would not expect peanut butter to be uniformly contaminated like a liquid might be. Furthermore, the sample obtained might simply have missed finding the salmonella that was in fact present. Finally, even if one assumes that a person was in fact infected as a result of eating contaminated peanut butter, proof of such contamination is just as likely have disappeared into the victim's stomach. Thus, in the absence of a positive stool culture, or at least well-documented symptoms that were consistent with a salmonella infection, a large portion of foodborne illness claims that might otherwise have been attributable to the peanut butter failed for lack of sufficient proof. This is borne out by the fact that our firm began with over 5000 potential claimants, whom we eventually filtered down to a little over 1000.

46. *See* Ctr. for Disease Control & Prevention, *Multistate Outbreak of Salmonella*

minority of persons infected as a result of eating contaminated peanut butter were able to obtain some form of compensation, leaving them with only one other option: buying a different brand of peanut butter in the future.[47]

So, like the purchasers of contaminated Veggie Booty snacks, the hundreds injured and killed by the contaminated peanut butter had no way, in the current market for food, to select a safer product—even though we know that a safer product was available, i.e., one that was not at the time contaminated with salmonella. This is both why and how the market failed the victims of this huge outbreak; it was impossible to avoid the risk of being poisoned because all quality claims being made at the time appeared exactly the same. And even after the fact of injury, the majority of people injured in this outbreak would never be compensated for their damages. This is the real market for food in the United States, lacking (cr)edibility and accountability.

C. The U.S. and EU Approach to Labeling Compared

Where consumers can distinguish credible claims from non-credible claims about food quality (including, but not limited to, safety), credibility in the marketplace can be, and is, rewarded by increased market share and higher profits. But in a market defined by equally credible (or non-credible) claims, the consumer is forced into being a passive participant, and buying decisions are more and more left to chance. Think of the recent outbreaks attributed (after the fact of purchase) to frozen ground beef patties.[48] The purchasers of the patties that proved to be contaminated could have based the purchase decision on any number of factors, *except* the actual safety of the product (as defined by whether it contained E. coli O157:H7). Whether it was because the box of frozen patties was on sale, or because the purchaser liked the colorful appearance of the label, every box of patties available for purchase was stamped with a label that stated, "USDA inspected and passed," as required by

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Serotype Tennessee Infections Associated with Peanut Butter—United States, 2006-2007, 56 MORBIDITY & MORTALITY WKLY. REP. 521, 521-24 (2007).

47. This is not to say that ConAgra, the maker of the contaminated peanut butter, did not pay a significant price as a result of the outbreak. Over 326 million pounds of peanut butter was recalled, at an estimated cost to ConAgra of $1 billion. *See* Kim S. Nash, *Beyond Peter Pan: How ConAgra's Pot Pie Recall Bakes in Hard Lessons for Supply Chain Management*, CIO, Oct. 22, 2007, http://www.cio.com/article/148054. Of course, prior to the outbreak, the perceived risk of these costs, and the cost of lost sales and market share were not enough incentive to prompt ConAgra to make the necessary investments to avoid the outbreak in the first place.

48. Recent outbreaks linked to frozen patties contaminated with E. coli O157:H7 involved products made by Cargill (on behalf of WalMart). *See* Kenneth Li, *Cargill Recalls Patties on E. Coli Scare*, REUTERS, Oct. 7, 2007, *available at* http://www.reuters.com/article/businessNews/idUSN0726594120071007. These products were also made by Topps Meat Company, which is now bankrupt. *See Topps Closes 6 Days After Huge Recall*, USA TODAY, Oct. 5, 2007, *available at* http://www.usatoday.com/money/industries/food/2007-10-05-topps-meat-recall_N.htm.

the Federal Meat Inspection Act (FMIA).[49] The U.S. government thus appeared to vouchsafe the uniform quality and safety of all products so labeled, even though this was not in fact true. Indeed, in what appears to have been a recent moment of relatively clearheaded pragmatism, the USDA has announced, "[t]he mark of inspection is a reflection of a finding by FSIS personnel that the [meat] establishment has followed validated procedures in its HACCP plan, not that the pathogen has been eliminated or reduced to undetectable levels."[50]

In other words, just the fact that the USDA has marked a meat product as officially "inspected and passed" does not mean that it is actually pathogen-free, and thus safe. So now even the USDA has conceded that its claims about meat are not fully credible.

Compare this to the numerous government-approved certifications of food products in the European Union, e.g., poultry, which earns the right to bear the *Label Rouge*.[51] The label started in the early sixties when French chicken farmers banded together in cooperatives to protect traditional methods of raising chickens on small farms "against a new wave of industrial chicken production techniques."[52] For an organization ("quality group") to be entitled to use the coveted *Label Rouge*, the poultry farmers who comprise the quality group must request the seal from a joint commission of the French Agriculture and Commerce Ministries, the *Commission Nationale des Labels et Certifications* (CNLC).[53] To do so,

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49. The Federal Meat Inspection Act, passed in 1907, mandated USDA inspection of meat processing plants that conducted business across state lines. Pub. L. No. 59-242, 34 Stat. 1260 (1907) (codified as amended at 21 U.S.C. §§ 601-695 (2006)). The Pure Food and Drugs Act, enacted in 1906, also gave the government broad jurisdiction over food in interstate commerce. Pub. L. No. 59-384, 34 Stat. 768 (1906) (repealed 1938).

50. Food & Safety Inspection Serv., U.S. Dep't of Agric., FSIS Notice 05-09, Measures to Address E. coli O157:H7 at Establishments that Receive, Grind, or Otherwise Process Raw Beef Products (Jan. 7, 2009), http://www.marlerblog.com/uploads/ file/05-09.pdf.

51. *See* ANNE FANATICO & HOLLY BORN, APPROPRIATE TECH. TRANSFER FOR RURAL AREAS, *LABEL-ROUGE*: PASTURE-BASED POULTRY PRODUCTION IN FRANCE (2002), *available at* http://attra.ncat.org/attra-pub/PDF/labelrouge.pdf; *see also,* J. Bureau & E. Valceschini, *European Food-Labeling Policy: Successes and Limitations*, 34 J. FOOD DISTRIBUTION RES. 70, 70-76 (2003) (surveying the numerous similarities between U.S. and EU law regarding mandatory labeling regulations, and the major policy differences regarding voluntary labeling, particularly as it relates to the importance of labels accurately identifying the geographical origins of food products); Frances D'Emilio, *Food Cops: Italy's Palates Guard*, SEATTLE TIMES, July 27, 2008, at A17 (describing the intense efforts of Italian food-inspectors to prevent the sale of counterfeit foods improperly bearing EU designations).

52. G. W. Stevenson & Holly Born, *The "Red Label" Poultry System in France*, *in* REMAKING THE NORTH AMERICAN FOOD SYSTEM: STRATEGIES FOR SUSTAINABILITY 144, 145 (C. Clare Hinrichs & Thomas A. Lyson eds., 2009).

53. Randall E. Westgren, *Delivering Food Safety, Food Quality, and Sustainable Production Practices: The* Label Rouge *Poultry System in France*, 81 AM. J. AGRIC. ECON. 1107, 1108 (1999) ("The CNLC is a joint commission of the agriculture and commerce ministries. The quality group is typically a group of agricultural producers but may include representatives of hatcheries, abattoirs, and/or feed mills.").

> [q]uality groups must present a formal document called a *cahier des charges*, an elaborate business plan that gives full details of the poultry supply chain (called a *filière*) from the genetic selection and rearing of chicks, through product and processing practices, and to delivery of product to retail stores. The *cahier des charges* designates a series of quality control tests organized around principles of Hazard Analysis Critical Control Points (HACCP). A minimum of sixty-five tests along the supply chain is required of quality groups seeking the [*Label Rouge*]. The *cahier des charges* also names a third-party certifying organization from the private sector that will be paid by the quality group to oversee its performance with regards to food quality and safety.[54]

And the resulting differences are remarkable.

"All of the *filières* produce a high-quality product that meets the minimal product and process standards set by the CNLC."[55] For example, *Label Rouge* poultry live mostly outdoors for a minimum of eighty-one days, twice as long as their industrial-raised counterparts; and they grow to five pounds in twelve weeks, while fast-growing broilers reach five pounds in half the time.[56] Most importantly though, *Label Rouge* chickens are subject to regular taste testing as a condition of certification, and the taste must be "vividly distinguishable" from industrial poultry.[57] Also, supermarket shelf-life for *Label Rouge* chickens cannot exceed nine days.[58]

"Consumer support for *Label Rouge* poultry is based on understandings about taste, safety, type and scale of farming, and locality."[59] More importantly, these understandings are firmly founded on the credibility of the *Label Rouge*, and of the (cr)edibility of the poultry so labeled. It is for this reason, among others, that one out of every three whole birds sold in France carry the *Label Rouge*, even though the birds cost twice as much.[60] In the mid-1970s to 2000, the sale of *Label Rouge* chicken went from less than ten million

54. Stevenson & Born, *supra* note 52, at 146-47; *accord* FANATICO & BORN, *supra* note 51, at 3 ("Independent third-party certifying organizations ensure that standards are being followed."); Westgren, *supra* note 53, at 1108 (noting that there "is no direct translation to English of *filière*," and that the English terms "supply chain" or "network" are "pale, bloodless terms that do not capture the degree of interrelatedness and jointness of strategic and operational issues that exist inside this kind of alliance").

55. Westgren, *supra* note 53, at 1109 (detailing many requirements of the minimum standards).

56. FANATICO & BORN, *supra* note 51, at 4; Stevenson & Born, *supra* note 52, at 147; Westgren, *supra* note 53, at 1109.

57. FANATICO & BORN, *supra* note 51, at 2; *see also* Westgren, *supra* note 53, at 1107; Stevenson & Born, *supra* note 52, at 147 ("certifying organizations regularly perform taste tests on Label Rouge poultry using both expert and consumer panels").

58. Stevenson & Born, *supra* note 52, at 147.

59. *Id.* (citation omitted); *see also* King & Venturini, *supra* note 31, at 21 (noting that the "significant" market share of *Label Rouge* chickens is due in large part to recognition by consumers of their "taste, appearance, safety and wholesomeness, and the environmentally friendly practices used in producing them").

60. FANATICO & BORN, *supra* note 51, at 2.

to more than 130 million.[61] This significant increase in market share was driven in large part by the perception and actuality of *Label Rouge* chickens being safer to handle and consume.[62] Notably, the incidence of salmonella in *Label Rouge* chickens is less than three percent.[63] In contrast, the salmonella incidence rate in France for industrial flocks is seventy percent.[64] Meanwhile, in the United States the percentage of broiler chickens that tested positive for a single strain of salmonella experienced a four-fold increase between 2000 and 2005, according to USDA-collected data.[65] Even worse, in an independent study done by the organization that publishes Consumer Reports, it was found that so-called "premium brand" chickens were more likely to harbor salmonella.[66] Among all brands, eighty-three percent of those analyzed tested positive for either salmonella or campylobacter.[67]

Given these statistics, it does not take a stretch of the imagination to think that, if offered poultry of the same quality as that bearing the *Label Rouge* in France, consumers in the United States would buy it. But in the United States there is no poultry widely available for purchase that has anything close to the (cr)edibility of *Label Rouge* poultry in France. And that is the problem. Consumers in the United States pay more for a "premium product" that is not in fact safer; nor does it offer a "vividly distinguishable" taste. In short, the U.S. market has failed where the EU market has not, and there is much to be learned from that.

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61. Stevenson & Born, *supra* note 52, at 146.

62. *Id.* at 148 (noting that, although "[i]n the earlier years of the label, consumers purchased Label Rouge poultry primarily for Sunday and holiday meals" because of superior taste and quality, in later years, increasing fears of foodborne illness prompted consumers to purchase only Label Rouge poultry).

63. FANATICO & BORN, *supra* note 51, at 8; Westgren, *supra* note 53, at 1109 ("*Salmonella* is rare in Label Rouge products."); *cf.* Henrik Wegener et al., *Salmonella Control Programs in Denmark*, 7 EMERGING INFECTIOUS DISEASES 774, 774-75 (2003) (describing how salmonella was eliminated from chickens in Denmark through public-private partnership that made possible the designation, at retail, that broiler chickens were salmonella-free).

64. Stevenson & Born, *supra* note 52, at 147 (citing Westrgen, *supra* note 53, at 1109).

65. Sean F. Altekruse et al., Salmonella *Enteritidis in Broiler Chickens, United States, 2000-2005*, 12 EMERGING INFECTIOUS DISEASES 1848, 1848 (2006). The study that analyzed this USDA data notes, however, that it "preceded a new FSIS policy to control *Salmonella*." Somewhat depressingly, under this new policy, the baseline "performance standard" is having twenty percent of tested broiler chickens test positive for salmonella (twelve positive samples out of fifty-one), when testing one-carcass per day over a fifty-one day period. *See* USDA Food Safety & Inspection Service, Salmonella *Verification Testing Program: Monthly Reports for Establishments by Performance Category, available at* http://www.fsis.usda.gov/Science/Salmonella_Verification_Testing_Program/index.asp. For plants that do not meet this not-exactly-stringent standard, their "punishment" will be to have the test results published online. *Id.*

66. *Dirty Birds*, CONSUMER REPS., Jan. 2007, http://www.consumerreports.org/cro/food/food-safety/chicken-safety/chicken-safety-1-07/overview/0107_chick_ov.htm.

67. *Id.*

III. HOW REGULATIONS CAN STIFLE COMPETITION ON THE BASIS OF SAFETY

The failure of the market for food to deliver an optimal level of safety is not simply the result of lax enforcement or regulations that are not strict enough—as so many have argued.[68] In fact, there is no real basis for believing that stricter rules or enforcement will, by themselves, be enough to create an efficient market for safe food. Indeed, the existence of regulations can be just as much a problem as no regulations at all where such regulations have the effect of limiting competition on the basis of quality and safety and forestalling investment and innovation.[69]

Rather than worrying about a competitor doing more to improve the relative safety of a product-category—e.g., bagged fresh produce—regulations can impose a predictable cost and minimal quality level that companies can easily meet and need not exceed. Thus, even if, for example, certain spinach growers had invested far more than others before the 2006 Dole spinach outbreak occurred, the outbreak would still have hurt the market as a whole.[70] The same thing also occurred in 2003 when the price of boxed green onions dropped in one week from $18.30 to $7.23 per box in reaction to the widespread outbreak of hepatitis A infections linked to contaminated green onions used at a Mexican restaurant in Pennsylvania.[71] As a result, from a

68. *See, e.g., How Do You Fix Our Ailing Food Safety System?: Hearing Before the Subcomm. on Health of the H. Comm. on Energy and Commerce*, 110th Cong. 1 (2009) (statement of Caroline Smith DeWaal, Director of Food Safety, Center for Science in the Public Interest) (decrying "long-standing deficiencies that are causing a crisis in consumer confidence"); *The Salmonella Outbreak: The Role of Industry in Protecting the Nation's Food Supply: Hearing Before the Subcomm. on Oversight and Investigation of the H. Comm. on Energy and Commerce*, 110th Cong. (2009) (statement of A. D. David Mackay, CEO, Kellogg Company) (addressing Kellogg's role in the PCA Peanuts Salmonella outbreak, and arguing that the "recent outbreak illustrated that the U.S. food safety system must be strengthened"); *see also* Ben Feller, *White House: Stricter Food Safety Rules Coming*, ASSOCIATED PRESS, Feb. 1, 2009 (noting promises of "stricter oversight" and a "stricter regulatory structure" in response to PCA salmonella outbreak).

69. This is not exactly a new phenomenon either. The Pure Food and Drug Act of 1906, and its sister provision, the Federal Meat Inspection Act, are both as notable for handing national food companies a competitive advantage over local and regional companies, as they are for preventing state health departments from imposing tougher safety regulations than those proposed on the federal level. *See* CLAYTON A. COPPIN & JACK HIGH, THE POLITICS OF PURITY: HARVEY WASHINGTON WILEY AND THE ORIGINS OF FEDERAL FOOD POLICY 6 (4th ed. 2002) ("Buried in the disputes over federal regulation is a conflict between local and national food companies. In various ways, federal regulations conferred competitive advantage on national firms.").

70. Linda Calvin, *Outbreak Linked to Spinach Forces Reassessment of Food Safety Practices*, 5 AMBER WAVES 24, 29 ("With the fall 2006 outbreak, all spinach growers suffered from decreased consumer demand for their product, even though only one grower's spinach was contaminated.").

71. LINDA CALVIN ET AL., U.S. DEP'T OF AGRIC., VGS-305-01, THE ECONOMICS OF FOOD SAFETY: THE CASE OF GREEN ONIONS AND HEPATITIS A OUTBREAK (2004), *available at* http://www.ers.usda.gov/publications/vgs/nov04/VGS30501/ VGS30501.pdf.

strictly economic perspective, those who avoided investing in improved quality came out ahead of those who had made the investment in safety.

Nonetheless, in the aftermath of such outbreaks, those who had made no investment in safety were faced with the imminent need to do so, whether driven by market conditions—e.g., contract demands of customers—or regulatory requirement. To fend off the possibility that the needed investment would be too expensive, in the wake of the Dole spinach outbreak, the fresh produce industry actively sought regulation at first, hoping to control it. Then, when no quick action occurred on the regulatory front (in part because of predictable bickering about the best approaches), the United Fresh Produce Association and other industry representatives took advantage of the delay and preempted mandatory regulation by drafting the National Leafy Greens Marketing Agreement (LGMA).[72]

The LGMA proposed putting in place a set of minimum requirements (or "metrics") that all market participants would agree to meet to sell their produce.[73] It is notable that the minimum requirements were far less stringent than what one major market participant, Fresh Express, already had in place. For example, the minimum requirement for the "buffer" area between leafy green fields and feedlots was significantly smaller.[74] Despite these relatively minimal standards, growers still complained of "lost acreage due to the buffer zone requirements and animal activity concerns."[75] Such complaints confirm, interestingly enough, that it was market-driven demand that pushed growers to plant to the edges, despite the risks. Thus, it was the market itself that created the conditions that made the Dole spinach outbreak, and its numerous predecessors, not only possible, but inevitable.

But by setting the safety standards lower, and ceding the more stringent requirements to the then market-leader, Fresh Express, the LGMA had the effect of leveling the playing field for the rest of the market, and so ensuring that all would bear similar costs in meeting improved, but still lower, safety requirements. While a good public-relations maneuver, this was, in fact, a

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72. *See* Calvin, *supra* note 70, at 29-30 ("The California Leafy Green Products Handler Marketing Agreement was approved in March 2007, under the supervision of the California Department of Food and Agriculture. By April 1, 2007, the beginning of the first year of the agreement, 71 handlers representing more than 99 percent of all California leafy green production signed the agreement."). The Agreement has continued to be a work in progress, however, and has gone through several drafts and expansions in the number of signatories. *See generally* National Leafy Greens Marketing Agreement Homepage, http://www.nlgma.org (last visited Jan. 23, 2010).

73. *See generally* Matthew Kohnke, *Reeling in a Rogue Industry: Lethal E. Coli in California's Leafy Green Produce and the Regulatory Response*, 12 DRAKE J. AGRIC. L. 493 (2007) (arguing that the safety standards put into place by industry are both too lax and not enforceable).

74. SHERMAIN D. HARDESTY & YOKO KUSUNOSE, UNIV. OF CAL. SMALL FARM PROGRAM, GROWERS' COMPLIANCE COSTS FOR THE LEAFY GREENS MARKETING AGREEMENT AND OTHER FOOD SAFETY PROGRAMS 4 n.5 (2009).

75. *Id.* at 4 n.6.

strongly anticompetitive move that created a set of largely voluntary safety requirements that were less stringent than what would have likely resulted if market participants had been forced to compete in an open market on the basis of improved safety and innovation. This can easily be seen if one looks at the requirements that were in the process of being imposed by major buyers of fresh produce, using their own economic leverage as a means of requiring a safer product.[76] These contractually imposed standards were more stringent than the LGMA best practices, and soon came to be known as "supermetrics."[77]

Concerned about the possibility of an "arms race" (read: competition) that might develop between produce buyers seeking to impose ever more stringent standards, the industry has now renewed its efforts to have the USDA develop (with industry input, of course) a set of regulations that would apply to all market participants. The industry calls this an effort to guarantee that "all parties—growers, packers, handlers, manufacturers and end-users—are at the table."[78] In other words, if the voluntary marketing agreement will not suffice to maintain the lowest—which is to say, the cheapest—safety standards, the leafy greens industry will attempt to do so by regulatory fiat, hoping that its influence with the USDA will work to its benefit.

A similar attempt by an industry to use legislation to forestall higher safety standards occurred in the aftermath of the PCA salmonella outbreak. In this instance, the peanut industry in Georgia immediately sought to "tighten" regulation of this economically important agricultural commodity. Thus, according to one news story at the time:

> A sweeping new food safety measure proposed in the wake of the salmonella outbreak easily passed its first key legislative hurdle Wednesday as Georgia lawmakers sought to reassure antsy residents.
>
> The Senate Agriculture Committee unanimously approved a plan that would require food makers to alert state inspectors within twenty-four hours if a plant's internal tests show its products are contaminated.[79]

Despite the positive coverage, the real intent of the peanut industry was to use these regulations to protect itself. Since the PCA salmonella outbreak, the sales of jars of peanut butter have dropped by close to twenty-five percent.[80]

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76. *Id.* at 4 ("In Spring of 2007, the Food Safety Leadership Council (FSLC), a consortium of large produce buyers including Disney, Walmart, McDonald's, Darden (as the world's largest company-owned and operated restaurant company . . .) and Publix, launched its Food Safety Initiative and began designing its own set of on-farm produce safety standards.").

77. *Id.*

78. Press Release, Western Growers, Fresh Produce Industry Associations Petition USDA for a National Leafy Greens Marketing Agreement (June 8, 2009), *available at* http://www.nlgma.org/fresh-produce-industry-associations-peti.php. The current version of the Draft Act is available at http://www.nlgma.org/documents/New_LGMA_Proposed_Text.pdf.

79. *Ga. Panel OKs Stricter Food Safety Rules*, ASSOCIATED PRESS, Feb. 12, 2009, *available at* http://www.msnbc.msn.com/id/29160598.

80. Andrew Martin & Liz Robbins, *Fallout Widens as Buyers Shun Peanut Butter*,

Overall, this coordinated suppression of higher quality standards is one which the Nobel Prize-winning economist George Akerlof predicted in his seminal article "The Market for Lemons," in which he states, "there is incentive for sellers to market poor quality merchandise, since the returns for good quality accrue mainly to the entire group . . . rather than to the individual seller."[81]

In other words, if everyone in an industry pays to the same extent when unsafe or poor quality goods are sold, a greater profit can be made by competing on price rather than quality, so long as the consumer cannot tell the difference. Such is the case with food products, and thus it remains the public that pays the highest price in suffering millions of foodborne illnesses, thousands of hospitalizations, and hundreds of deaths each year.[82]

IV. RESTORING THE (CR)EDIBILITY OF FOOD IN THE UNITED STATES

As already noted, a primary justification for regulation is "market failure." What I think is odd about this justification, however, at least when applied to food, is the presupposition that the free market might have somehow succeeded—i.e., that the term "failure" is being used to mean a kind of falling-short-of otherwise expected success. But if one accepts, as I argue one must, that there is no possibility of an efficient free market for food, there is necessarily no possibility of such a market succeeding or failing. Consequently, the very idea of a "market failure" makes no sense; it is like saying that my dog (whose name is Doyler, by the way) has failed at being a cat. This requires us then to be more precise in talking about what it is that the market for food has failed at doing. Or put another way, what is it exactly that we would call market success?

The obvious answer is to provide reasonably safe food—or, at least, safer food. But is this something that a regulatory scheme, no matter how strictly enforced, can accomplish? Probably not—and the continuing failure of USDA meat inspection is proof enough.[83] If a regulatory scheme based on the around-

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N.Y. TIMES, Feb. 7, 2009, at A1 ("The drop-off [in sales] is so striking that brands like Jif are taking the unusual step of buying ads to tell shoppers that their products are not affected [by the product-recall], and giving them a coupon to make sure they do not learn to live without [peanut butter].").

81. George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. OF ECON. 488, 488 (1970).

82. Mead et al., *supra* note 12, at 607 ("In the United States, foodborne diseases have been estimated to cause 6 million to 81 million illnesses and up 9,000 deaths each year.").

83. For example, during the last three years, a significant spike nationwide in E. coli O157:H7 cases linked to meat products has caused a corresponding spike in the numbers of victims contacting my law firm to ask us to represent them in seeking compensation from the responsible companies. As such, the firm's client list acts as a kind of lagging indicator of U.S. food safety. Whereas in 2005 and 2006 we saw more E. coli O157:H7 cases attributable to contaminated produce, the next two years saw a resurgence of cases involving meat. *See*

the-clock inspection of production, in which no meat can be sold in the United States unless "inspected and passed" by the USDA,[84] is incapable of creating an acceptable level of safety, then there must be a better approach.

Accordingly, I agree that regulation is not the answer to so-called market failure—but I do so for different reasons than those asserted by one economist when he stated that:

> It is increasingly recognized by policy makers and the public that the existence of market failure does not mean that government regulations can necessarily improve upon the unregulated market, especially when one considers the positive role that market mechanisms such as liability and product quality reputation play in the provision of safe products, including foods.[85]

In my view, "market failure" does not ipso facto justify (and presuppose) regulation as a needed fix for such failure. There is thus no reason to accept the either-or of a regulatory versus a free market approach. Nor is there reason to ignore the fact that the market for food, *as currently regulated*, is in many ways as bad as an unregulated market, notwithstanding "market mechanisms such as liability and product quality reputations" that are supposed to play a "positive role" but barely do at all. And that is the real problem here. When it comes to looking for safety in the market for food, consumers are not able to act in their own self-interest in seeking *and finding* safer food. Instead, consumers are left to choose between avoiding an entire product category—for example, meat, or variously being in denial, rolling the dice, or just hoping for the best.

Perhaps then, what is needed by way of a better approach is regulation that creates a market for food that is free in a meaningful sense, especially for those who are dependent on such a market for sustenance—which is to say, everyone. If we were to create such a regulatory scheme, one that restored (cr)edibility to food, and improved food safety as a result, what would the core values of such a scheme need to be? Here are four suggestions.

1. Increase visibility; decrease irresponsibility

Like restaurant inspections, the inspectors inside any food production facility function primarily as the eyes, ears, and noses of consumers—as

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also U.S. GENERAL ACCOUNTING OFFICE, GAO-02-902, BETTER USDA OVERSIGHT AND ENFORCEMENT OF SAFETY RULES NEEDED TO REDUCE RISK OF FOODBORNE ILLNESSES 4 (2002), *available at* http://www.gao.gov/new.items/d02902.pdf (providing an in-depth discussion of the failure of meat inspection in the United States; among the many GAO findings was that "FSIS is not ensuring that all plants' HACCP plans meet regulatory requirements and, as a result, consumers may be unnecessarily exposed to unsafe foods").

84. The Federal Meat Inspection Act requires, among other things, that "all meat food products prepared for commerce" be subject to inspection "at all times, by day or night," and that no meat can be sold unless "inspectors shall mark, stamp, tag, or label as 'inspected and passed' all such products found to be not adulterated." 21 U.S.C. § 606 (2006).

85. John M. Antle, *Benefits and Costs of Food Safety Regulation*, 24 FOOD POL'Y 605, 606 (1999).

surrogates for the public at large that make an otherwise hidden (or mostly hidden) production process visible. And so, as with restaurant inspections, we accept as true that food producers would, if not inspected, "shirk in their efforts to maintain good hygiene, and customers would generally have little idea that their [food] may have been prepared without meeting appropriate health standards."[86] Compared to restaurant inspections, however, the level of visibility in the market for food as a whole is quite low. Indeed, as was pointed out repeatedly in the wake of the PCA salmonella outbreak, and both the Banquet Pot Pie and Peter Pan Peanut Butter salmonella outbreaks, the deplorably decrepit and dirty conditions at the food production facilities were only revealed as a result of the outbreak having spurred an investigation.[87] The resulting visibility created by these inspections was predictably damaging to the reputations of these companies, and the value of their brands. It is thus ironic that, in seeking to restore its reputation, ConAgra invites the public to make a kind of virtual inspection of its peanut butter plant as "evidence" that the products made there are (cr)edible.[88]

One predictably proffered solution to this problem is the call to hire more inspectors. But what if we instead mandated the installation of video cameras throughout every food plant and streamed the video online for anyone to watch, twenty-four hours a day. Recall the huge public uproar, and swift policy changes, that followed the release of video of "downer" cattle being abused at a

86. Ginger She Jin & Phillip Leslie, *The Case in Support of Restaurant Hygiene Grade Cards*, 20 CHOICES 97, 97 (2005) (arguing that the key goal of posting inspection results in the form of grade cards is to provide consumers information about restaurant hygiene, thereby increasing the economic incentive for hygienic behavior).

87. For example, when the FDA investigated the facility in Sylvester, Georgia where ConAgra manufactured its peanut butter, after the plant had already been sanitized and substantially repaired, it found, among other things, that "effective measures are not being taken to exclude pests from the processing areas and protect against the contamination of food on the premises by pests; [and] failure to store cleaned and sanitized portable equipment in a location and manner which protects food-contact surfaces from contamination . . . ." FOOD & DRUG ADMIN., FEI NO. 1038538, ESTABLISHMENT INSPECTION REPORT, CONAGRA FOODS (2007), *available at* http://www.fda.gov/downloads/AboutFDA/CentersOffices/ ORA/UCM133012.pdf. Similarly, when the USDA inspected the plant where ConAgra manufactured pot pies they found enough violations to justify threatening to close the plant. Notice of Intended Enforcement from U.S. Dep't of Agric. to ConAgra Foods (Oct. 23, 2007) (on file with author).

88. Peter Pan Safety & Quality, http://www.peterpanpb.com/safety-quality.jsp (last visited Jan. 23, 2010). The invitation appears on a ConAgra website, along with the following statement:

> We've opened the doors to our plant in Sylvester, Georgia, to give you a behind-the-scenes tour of our operation—from start to delicious finish. From keeping our peanuts safe in a room with coded locks to quality-control inspections and rigorous taste tests, Peter Pan ® wants you to know we are committed to giving all of our families the safest and most wholesome peanut butter we possibly can.

Id. One wonders whether ConAgra would be willing to put a live video-feed on its website instead, a much more credible bit of evidence.

California meat plant.[89] To obtain the video, the Humane Society had to sneak someone inside the plant to secretly record the offending conduct. With video cameras always in place no such secrecy would be necessary. And with the food producers knowing that the public was always watching, one can only expect that most of the shocking conditions that are found after the fact of an outbreak would be less likely to occur in the first place. Also, food production inspectors could then conduct inspections more like restaurant inspectors: making surprise inspections that are a complete, multi-day audit of the entire operation. This would be similar to what the FSIS does now, after the fact, in response to an outbreak or other significant public health threat.[90] In this way, inspections are likely to be more effective and probably cost less over time. And the government might restore its own credibility.

2. Increase accountability; decrease externalities

As has already been argued above, the inability of consumers to reliably detect quality attributes, especially safety, is one of the chief impediments to a well-functioning market for food. While I can reliably locate a bag of Dole brand baby spinach, I have no way to reliably locate spinach that is free of deadly pathogens. In fact, there is no way of knowing how and where the spinach commingled in the bag was grown and processed, or whether the water used to irrigate or wash it was tested for pathogens. Thus when Ruby Trautz stood in her local grocery store deciding what bag of spinach to buy, she did not know that her life depended on the choice she made.[91] She also did not know that, even though the bag carried the Dole brand, Dole neither grew the spinach, nor sourced or processed it.

In the litigation that resulted from the Dole spinach outbreak, there was significant delay attributable to the difficulties of determining which companies would—or could—be held to account for the injuries and deaths caused by this contaminated product. Under the prevailing product liability laws, no one

89. Andrew Martin, *Largest Recall of Ground Beef Is Ordered*, N.Y. TIMES, Feb. 18, 2008 ("A California meat company on Sunday issued the largest beef recall in history, 143 million pounds, some of which was used in school lunch programs, Department of Agriculture officials announced. The recall by the Westland/Hallmark Meat Company, based in Chino, Calif., comes after a widening animal-abuse scandal that started after the Humane Society of the United States distributed an undercover video on Jan. 30 that showed workers kicking sick cows and using forklifts to force them to walk.").

90. *See* FOOD SAFETY & INSPECTION SERV., U.S. DEP'T OF AGRIC., FSIS DIRECTIVE 5100.1 REV. 2, ENFORCEMENT, INVESTIGATIONS, AND ANALYSIS OFFICER COMPREHENSIVE FOOD SAFETY ASSESSMENT METHODOLOGY (2008), *available at* http://www.fsis.usda.gov/OPPDE/rdad/FSISDirectives/5100.1Rev2.pdf.

91. Elizabeth Weise & Julie Schmit, *Spinach Recall: 5 Faces. 5 Agonizing Deaths. 1 Year Later*, USA TODAY, Sept. 24, 2007 (discussing Ruby and four others who died as a result of eating contaminated spinach). My law firm represented the families of Ms. Trautz, as well as June Dunning and Betty Howard. The views expressed here and throughout are solely my own. I do not in any way here speak on behalf of these families.

participant in the chain of distribution for a product is primarily accountable for its safety, leaving all such participants free to point the finger at another.[92] In fact, the only market participant who is guaranteed accountable is the consumer, who will necessarily pay the price if the food she eats is contaminated or otherwise unsafe. The proverbial "buck" for food safety in the United States right now stops primarily with the consumer. It is only when the consumer is able to determine the source of her food poisoning and hold someone else legally liable for her damages that the person responsible for causing the food to be unsafe is held accountable. But the vast majority of foodborne illness in the United States is not linked to any identified food item,[93] and thus its manufacturer pays no price for the illness at all. The public pays the price instead through, for example, the $6.9 billion in medical costs, productivity losses, and the costs of premature death each year attributable to just five pathogens.[94]

Given the lack of accountability in the market, where companies responsible for causing foodborne illness not only do not pay, but in fact profit from failing to prevent such illnesses, it seems clear that increasing the likelihood of accountability can only increase the amount of safety. This is the approach taken, in part, by the U.K, which has assigned responsibility for food safety, and thus accountability for its lack, primarily to retailers.[95] In contrast,

92. In actuality, it is the insurance companies—who have the right to hire defense counsel and control the defense of the case—that eagerly attribute fault to another's insurer. The further distorting effects of insurance will, however, need to be a topic for another day.

93. *See, e.g.*, Michael Batz et al., *Attributing Illness to Food*, 11 EMERGING INFECTIOUS DISEASES 993, 995 (2005) ("Reported outbreaks represent only a small proportion of those that occur, and the degree of underreporting may vary geographically and temporally"); Paul D. Frenzen, *Deaths Due to Unknown Foodborne Agents*, 10 EMERGING INFECTIOUS DISEASES 1536, 1536 (2004) ("Reported outbreaks probably account for only a small proportion of deaths from unknown foodborne agents because most foodborne outbreaks are never recognized or reported."); Mead et al., *supra* note 12, at 607 (finding that the vast majority of the 76 million illnesses, 325,000 hospitalizations, and 5,000 deaths that occur annually are never attributed to a specific source).

94. Stephen R. Crutchfield & Tanya Roberts, *Food Safety Efforts Accelerate in the 1990's*, 23 FOOD REV. 44, 44-49 (2000). This figure excludes "costs such as: (1) pain, suffering, and lost leisure time of the victim and her/his family, (2) lost business and costs and liabilities of lawsuits affecting agriculture and the food industry, (3) the value of self-protective behaviors undertaken by industry and consumers, and (4) resources spent by Federal, State, and local governments to investigate the source and epidemiology of the outbreak." JEAN C. BUZBY ET AL., U.S. DEP'T OF AGRIC., REP. NO. 741, BACTERIAL FOODBORNE DISEASE: MEDICAL COSTS AND PRODUCTIVITY LOSSES 72 (1996). But when a willingness-to-pay analysis is applied to the seventy-six million acute foodborne illnesses that occur each year, the estimated societal costs "total[] $1.4 trillion, compared to the last ERS estimate of $6.9 billion for five pathogens causing food-borne illness." Tanya Roberts, *WTP Estimates of the Societal Costs of U.S. Food-borne Illness*, 89 AM. J. OF AGRIC. ECON. 1183, 1187 (2007).

95. Loader & Hobbs, *supra* note 32, at 687-88 (explaining that the incentive to comply with U.K. food safety legislation derives from the fact that a food retailer can be held liable for selling food contaminated as a result of the acts of upstream suppliers, unless the retailer

in the United States, product liability law generally protects retailers from the imposition of strict liability, meaning that retailers are liable only for their own negligent acts.[96] As a result, there are different levels of accountability along the chain of distribution, a fact that incentivizes market participants to look the other way, or simply pass along a safety problem, because the risk of liability is deemed too small to outweigh the economic benefit. But by making all market participants equally accountable, especially retailers, the incentive to improve food safety increases accordingly. In this way, increasing accountability works to decrease externalities, improving food safety as a result.

3. Increase reliability; decrease fraud

The United States should also follow the lead of the EU, something that the USDA has done in small ways in enacting semi-meaningful restrictions around what can be labeled as "organic" and by creating new quality categories for food.[97] While some might criticize this as trying to create a multi-tiered market in food, where those who can afford to pay more can purchase higher quality goods, such criticism is mostly undercut by the research indicating quality and safety levels would likely rise in the market as a whole with such an approach.[98] More importantly, it makes possible a reallocation of the current burden of foodborne illness away from those who currently suffer the most—the young, elderly, and immune-compromised.[99] Healthy, adult consumers who

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can show "due diligence"—i.e. that the retailer took all necessary precautions to detect or prevent the contamination).

96. For example, Washington's Product Liability Act provides that "a product seller . . . is liable to the claimant only if the claimant's harm was proximately caused by: (a) The negligence of such product seller; or (b) Breach of an express warranty made by such product seller; or (c) The intentional misrepresentation of facts about the product by such product seller or the intentional concealment of information about the product by such product seller." WASH. REV. CODE § 7.72.040 (1981 & Supp. 1991). Under Washington's Act, imposition of strict liability is, in most cases, restricted to product manufacturers. WASH. REV. CODE § 7.72.030 (1981).

97. Jean-Christophe Bureau & Egizio Valceschini, *European Food-Labeling Policy: Successes and Limitations*, 34 J. OF FOOD DISTRIBUTION RES. 70, 70-76 (describing how EU regulations protect the meaningfulness and reliability of denominations like "organic" while also emphasizing things like traceability).

98. Joshua S. Graff Zivin, *Ensuring a Safe Food Supply: The Importance of Heterogeneity*, 4 J. OF AGRIC. & FOOD INDUS. ORG. 1 (2006); *cf.* Stevenson & Born, *supra* note 52, at 149 (noting how the government policies underlying Label Rouge seek to support "differentiating food products through quality certification and marketing," unlike U.S. policies that tend toward only the support of "production of undifferentiated bulk agricultural commodities").

99. Zivin, *supra* note 98. The benefit of having a certified higher-quality product might not only be restricted to those of higher incomes if one imagines, like with *Label Rouge* chickens in France, that its purchase becomes not just about safety, but about the enjoyment of its other preferred qualities like taste. One can thus imagine that the purchase

wish to voluntarily assume certain risks related to food by, for example, eating industrially produced ground beef that is cooked to rare, should be allowed to do so. But that does not mean that others—especially those who are vulnerable—should be forced to choose between not eating ground beef and sterilizing it first.

The only way out of this dilemma is to increase reliability in the market through the creation of strict standards that can be certified in a way that is credible. This requires us to recognize that the government's role is crucial because only it can "protect the integrity and legitimacy of the [certification]."[100] In this way we will allow manufacturers to profit from the sale of safer food while preventing competitors from profiting from the fraudulent sale of unsafe food as safe. Like the chicken producers who earn the right to use the *Label Rouge* and can thus charge a premium for the product, and retailers in Norway who are able to label broiler chickens "salmonella free," in a market where safety and quality are profitable, there will be no shortage of producers willing to make the necessary investments. And that, most certainly, is how an efficient free market for food should actually work.

4. Increase traceability; decrease anonymity

Finally, there is the important issue of traceability—or, in the case of the United States, the stunning lack of it. And this despite the fact that it has been shown that,

> although [traceability] does not directly act on food safety, it can do so indirectly. This is because traceability makes it possible to identify the source of food safety problems with some chance of success, reducing anonymity. Hence, traceability may mitigate suboptimal results due to asymmetric information amongst buyers and suppliers by allowing for the use of explicit and implicit incentives along food supply chains.[101]

Put in simpler terms, traceability increases the likelihood of identifying the source of a given foodborne illness, and this in turn increases the effectiveness of its removal from the market. Such identification also increases the likelihood that the entity most responsible for causing the food to become contaminated and cause illness will be held accountable to the persons so injured. "In fact, traceability can strengthen liability incentives by providing useful information in accessing *ex post* legal responsibility by those involved in the food

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of the chicken would be reserved for special occasions, or for recipes that truly benefit from the other higher qualities.

100. Stevenson & Born, *supra* note 52, at 149.

101. Moisés de Andrade Resende Filho, *Information Asymmetry and Traceability Incentives for Food Safety*, Anais do XXXVI Encontro Nacional de Economia [Proceedings of the 36th Brazilian Economics Meeting], ANPEC—Associação Nacional dos Centros de Pósgraduação em Economia, at 3 (2008), *available at* http://www.anpec.org.br/encontro2008/artigos/200807111109520-.pdf.

production chain."[102]

In a market where suppliers can safely assume that the risk of being held accountable for selling unsafe ingredients is small, and the profit potential of taking the risk of being caught is high, then no one but the completely naïve or disingenuous should be surprised when consumers are injured as a result. And, to me, that is the real lesson of the emails that were revealed to have been sent by the president and CEO of Peanut Corporation of America, including the one where he directed that contaminated product be shipped—"turn them loose"—and where he wrote in a June 2008 e-mail, "I go thru [sic] this about once a week. I will hold my breath . . . again." Well, apparently Mr. Parnell never had to hold his breath very long, since for years he breathed easy about not being caught—that is until his product managed to sicken and kill enough people to make it impossible not to trace the problem back to him, his indefensibly awful operation, and oft-contaminated ingredients.

In cases that have involved a branded product, the manufacturer is more easily identified. One example of this is the 2006 Dole spinach outbreak—even though, as previously pointed out, Dole did not in fact manufacture the product in question. Large numbers of consumers recalled eating Dole brand bagged spinach and even had leftover spinach in their refrigerators that could be tested. But even with a quickly proven link to a branded product, an effective traceback all the way to the grower historically has been a rare event. One reason for this is the absence of any statute or regulation, state or federal, imposing detailed record keeping requirements related to distribution. Such requirements are imposed by the Perishable Agricultural Commodities Act (PACA) regulations.[103] But the primary purpose of these record-keeping regulations is to ensure that growers receive proper payments for the produce shipped.[104]

In response to the growing number of outbreaks linked to the contamination of produce, the FDA developed guidelines to improve traceability in 1998. One stated reason for the need for effective traceback was described as follows:

> Despite the best of efforts by food industry operators, food may never be completely free of microbial hazards. However, an effective traceback system, even if only some items carry identification, can give investigators clues that may lead to a specific region, packing facility, even field, rather than an entire commodity group. Narrowing the potential scope of an outbreak could lessen the economic burden on those industry operators not responsible for the

102. *Id.* at 2-3 (citations omitted).

103. 7 C.F.R. pt. 46 (2009).

104. ELISE GOLAN ET AL., U.S. DEP'T OF AGRIC., REP. NO. 830, TRACEABILITY IN THE U.S. FOOD SUPPLY: ECONOMIC THEORY AND INDUSTRY STUDIES 12 (2004).

problem.[105]

But despite the importance ascribed by the FDA to effective traceback records, the guidelines remained wholly voluntary and largely ineffective. Indeed, the 2006 Dole spinach outbreak is notable for being one of the very first investigated outbreaks in which a specific grower was ultimately identified.[106]

Only when the market for food has sufficient traceability built in, to ensure a greater likelihood of foodborne illness being attributed to particular food items, will the economics of food production begin to tilt in favor of increased food safety. What must ultimately be accepted, then, is that the deficiencies that plague the market for food are systemic in nature, and not the result of sporadic mistakes or the occasional rogue operator held up as the exception that proves the rule of overall good conduct on the part of food manufacturers.[107] It is the market for food itself that has failed consumers by depriving them of power and choice. But the market has also failed those producers who would invest in safety and innovation if they were able to reliably appropriate the benefits of their investments. Increased traceability helps solve this.

CONCLUSION

Despite an understandable desire to cling to the oft-repeated notion that the United States enjoys the safest food supply in the world, the fact remains that foodborne illness causes injury, disability, and death on a wholly unjustifiable scale in this country. It is unjustifiable because it is possible to manufacture all food with sufficient care to make it nearly always safe to eat. In fact, "the cost of poor quality exceeds the cost of developing processes which produce high-

105. FOOD & DRUG ADMIN., CTR. FOR FOOD SAFETY & APPLIED NUTRITION, GUIDE TO MINIMIZE MICROBIAL FOOD SAFETY HAZARDS FOR FRESH FRUITS AND VEGETABLES 38 (1998), *available at* http://vm.cfsan.fda.gov/~dms/prodguid.html.

106. *See* CAL. FOOD EMERGENCY RESPONSE TEAM, INVESTIGATION OF AN ESCHERICHIA COLI O157:H7 OUTBREAK ASSOCIATED WITH DOLE PRE-PACKAGED SPINACH (2007). The California Food Emergency Response Team (CalFERT) was comprised of members from the FDA and the California Department of Health Services. Its success in tracing the contamination source to a particular field may have been a harbinger of future successes, in large part attributable to greater efforts being expended by public health officials, like the CalFERT team. For example, the investigation into the 2006 Taco John's E. coli O157:H7 outbreak was also able to trace the contaminated lettuce back to a particular field. *See* CAL. FOOD EMERGENCY RESPONSE TEAM, INVESTIGATION OF THE TACO JOHN'S ESCHERICHIA COLI O157:H7 OUTBREAK ASSOCIATED WITH ICEBERG LETTUCE (2008). In both of these cases, it was environmental testing of irrigation water and swab-testing of cattle that ultimately provided the link when E. coli O157:H7 was found and then subjected to genetic testing that showed a match to bacterial isolates obtained by confirmed outbreak cases.

107. *See generally* David A. Hennessy et al., *Systemic Failure in the Provision of Safe Food*, 28 FOOD POL'Y 77 (2003) (arguing that for any analysis and policy prescription to be effective in addressing food safety issues, a systems analysis approach is required).

quality products."[108]

But to produce consistently safe, high-quality food without increasing the cost of food to a point where it would be too expensive for large numbers of people to purchase is plainly a key challenge to any systemic improvement in food safety in the United States. Indeed, much food is already too expensive for large numbers of people, and this is food that is relatively unhealthy, and often unsafe. Accordingly, if we look honestly at the market for food, and ask whether and how regulation can work to make food safe, we must accept that food safety will forever remain something to be improved, but not achieved, unless we can figure out how to get all market participants to invest in safety in a way that is profitable for all involved.

To do this, we must make the market work in favor of safety, instead of against it. We must make the cost of producing safe food reliably profitable while making the production of unsafe food predictably, and demonstrably, more expensive. Consumers must be able to reliably identify safer food in the market by being able to distinguish credible claims from non-credible ones. Finally, those who produce and sell unsafe food and injure consumers as a result, must be held quickly and consistently accountable. Without these reforms, food in the United States will never be safe enough.

108. Tanya Roberts, *Economics of Private Strategies to Control Foodborne Pathogens*, 20 CHOICES 117, 118 (2005) (quoting Michael A. Mazzocco, *HACCP as a Business Management Tool*, 78 AM. J. OF AGRIC. ECON. 770, 770 (1996)).