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## A Continuing Plague: Faceless Transactions and the Coincident Rise of Food Adulteration and Legal Regulation of Quality

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### Recommended Citation

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# A CONTINUING PLAGUE: FACELESS TRANSACTIONS AND THE COINCIDENT RISE OF FOOD ADULTERATION AND LEGAL REGULATION OF QUALITY

BY DENIS W. STEARNS\*

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## INTRODUCTION: THE OUTBREAK OF OUTBREAKS

*"All this happened," she said softly, "because I asked my mother for a hamburger."*<sup>1</sup>

Beginning in the middle of November 1992, and through the end of February 1993, there were more than five hundred lab-confirmed *E. coli* O157:H7 infections and four related deaths, making it the largest reported outbreak in the history of the United States.<sup>2</sup> But the lab confirmations did not tell the whole story; hundreds more had been made sick, the majority of them children.<sup>3</sup> All were infected as a result of

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1. JEFF BENEDICT, POISONED: THE TRUE STORY OF THE DEADLY *E. COLI* OUTBREAK THAT CHANGED THE WAY AMERICANS EAT 199 (2011) (quoting Brianne Kiner and explaining how she became not only the most famous of the surviving victims of the Jack in the Box *E. coli* outbreak, but how her life was changed forever). The author of this Article worked as one of the lead defense attorneys on behalf of Foodmaker, Inc., the owner and operator of the Jack in the Box restaurant chain. *Id.* at 125–29.

2. Denis Stearns, *Preempting Food Safety: An Examination of USDA Rulemaking and Its E. coli O157:H7 Policy in Light of Estate of Kriefall ex rel. Kriefall v. Excel Corporation*, 1 J. FOOD L. & POL'Y 375, 389–90 (2005) (providing details of the outbreak, including its epidemiology and the resulting investigation).

3. *Id.* at 390 nn.71 & 73–74 and accompanying text.

eating a contaminated burger at a Jack in the Box restaurant. Reports of the outbreak dominated the news for months, spurring changes everywhere, from how consumers viewed the safety of ground beef to how the federal government regulated the manufacture and inspection of meat products.<sup>4</sup> The media focus on issues of food and food safety has only increased over time, making every outbreak that occurs widely reported news.<sup>5</sup> The recent reports of horse meat being found in a wide variety of food products<sup>6</sup> and the indictment of several corporate executives for selling *Salmonella*-contaminated peanuts are but two current examples of the media's continued focus on food and food safety.<sup>7</sup> But still the plague continues with no end in sight.

Today, there remains a number of ways to view the Jack in the Box outbreak. The most common view sees the outbreak as a watershed event that prompted the U.S. Department of Agriculture (USDA)—the once industry-favoring agency—into action to overhaul the regulation of meat, this time prioritizing public safety. But the overhaul ultimately failed to deliver the promised increase in meat safety. For example, in 2002, less than six years after the implementation of a new inspection system, the USDA announced a recall of eighteen million pounds of ground beef because it was contaminated with *E. coli* O157:H7.<sup>8</sup> Instead of improved

4. *Id.* at 390–97 (summarizing the changes spurred by the outbreak); *see also* MARION NESTLE, *SAFE FOOD: BACTERIA, BIOTECHNOLOGY, AND BIOTERRORISM* 73–85 (2003) (describing the outbreak and how it spurred a number of significant regulatory changes, including the requirement of “safe-handling” instructions on meat products).

5. During my fifteen years as a partner at Marler Clark, every time there was a foodborne illness outbreak the firm would quickly receive calls from media outlets seeking comments and interviews. Nearly from the beginning, we had a full-time employee whose job it was to handle media contacts.

6. *See, e.g.,* Alan Cowell, *A Hint of Horse Meat Has a Nation Squirring More Than Its Neighbors*, N.Y. TIMES, Feb. 26, 2013, at A8 (“For weeks, the land has been seized with a spreading, Europe-wide scandal over discoveries of equine DNA in processed meals sold under household brands packaged as exclusively bovine — spaghetti Bolognese, lasagna and burgers among them.”).

7. *See, e.g.,* Sabrina Tavernise, *Charges Filed in Peanut Salmonella Case*, N.Y. TIMES, Feb. 22, 2013, at B5 (reporting that “a 76-count indictment . . . charged Stewart Parnell, 58, the former owner of the Peanut Corporation of America . . . with criminal fraud and conspiracy, for his role in what they said was a scheme to ship peanut products known to be contaminated. . . .”). While at Marler Clark, I worked on a large number of the lawsuits arising from this particular outbreak.

8. OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF AGRIC., GREAT PLAINS REGION AUDIT REP. NO. 24601-2-KC, *FOOD SAFETY AND INSPECTION SERVICE OVERSIGHT OF PRODUCTION PROCESS AND RECALL AT CONAGRA PLANT*, at ii (2003), *available at* <http://www.usda.gov/oig/webdocs/24601-2-KC%20conagra%20091603.pdf> (finding that “neither ConAgra [meat company] nor FSIS [the Food and Safety Inspection Service] effectively fulfilled their responsibilities” under the new system). The extent to which there has been progress in improving food safety is, predictably, the subject of considerable dispute, mostly because most reported outbreaks vastly underrepresent the

safety, what was delivered was a further consolidation and industrialization of the meat industry, much like what followed the passage of the Federal Meat Inspection Act in 1906, which was notable for being as much prompted by a public outcry as it was for the speed with which industry and government turned the Act to interests having little to do with safety.<sup>9</sup>

Instead of using the Jack in the Box outbreak as an abject lesson in regulatory ineffectiveness or in how profit motives generally triumph over the interests of public health, what I call the “continuing plague” can be used as a starting point (as here) to raise a series of more fundamental questions: Why is regulation of quality presumed to be the sole effective response to the problem of food safety, creating a kind of regulatory imperative, with each large-scale outbreak giving rise to cries for stricter standards? Further, why does no one question the role of regulation in facilitating complexity, industrialization, and globalization of food production, all factors in making food less safe, not more? In contrast, should we not question whether there is instead something about the commercial exchange of food that dooms the regulation of food to relative ineffectiveness when it comes to safety? And, if so, would both the safety and sustainability of food benefit if parts of the marketplace were to be freed of regulation, allowing local control and long term relationships to enforce desired quality standards, all while giving rise to innovation that could be transformative of the food system as a whole? In short, if food was to be recognized as unique among products in both what it reveals about being and what community food can create, could we not then think about safety and quality in a much more effective way?

But to answer any of these questions, it must first be declared that food is not trivial. This declaration is a rebuttal to what the torts scholar, Fleming James, once asserted, that the “most extraordinary feature of the food cases . . . is how trivial they are.”<sup>10</sup> The irony of this assertion is that

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true extent of foodborne illness and are never linked to a particular source. See Denis W. Stearns, *On (Cr)edibility: Why Food in the United States May Never Be Safe*, 21 STAN. L. & POL’Y REV. 245, 248–50, 249 n.12 (2010) (explaining how the profitability of food depends in part on the ability to avoid investment in improved safety while causing significant amounts of foodborne illness that is never traced to its source).

9. See NESTLE, *supra* note 4, at 73–78 (describing how the public outcry prompted action and overcame industry resistance, but only momentarily); Stearns, *supra* note 2, at 388–89 nn.66–69 and accompanying text (discussing how “[r]eactionary [r]ulemaking,” like that which followed reaction to Upton Sinclair’s novel, *The Jungle*, has failed to achieve a coherent response to the threat of pathogens in meat).

10. See George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 465, 503 (1985). This same point is made in Fleming James’s article, which was based on the presentation that Priest describes. See Fleming James, Jr., *General Products—Should*

it was made in defense of the rule of strict liability, a rule that would not have existed but for its evolution in food cases.<sup>11</sup> Indeed, the first-adopted version of section 402A of the *Restatement (Second) of Torts* applied solely to the sale of food products, holding such sellers strictly liable because:

by marketing his food for consumption, [the seller] has undertaken and assumed a *special responsibility* toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of a product so vitally important to human existence and welfare as food, that reputable sellers *will stand behind their goods*; that public policy demands that the burden of accidental injuries caused by products *vital to the life and health of the community* be placed upon those who market them . . . ; and that the consumer of food is entitled to the maximum of protection at the hands of some one [*sic*], and the people to afford it are those who market the food.<sup>12</sup>

Thus for a moment, the importance of food to both life and the law seemed by legal scholars to have been admitted, as was the importance of requiring the makers and sellers of food to “stand behind their goods.” But in a span of three years, the American Law Institute, led by William Prosser, extended by analogy the rule specific to food to that of all products.<sup>13</sup> Thus was food deemed trivial, displaced by products not of

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*Manufacturers Be Liable without Negligence?*, 24 TENN. L. REV. 923, 926 (1957) (“Surely a greater danger lurks in a defective automobile wheel than in a pebble in a can of beans. And in reading a great many food cases one is struck with the essential triviality of most of them.”). Of course, to be fair, both James and Priest are speaking more of food cases than food. But the broader intent is nonetheless clear: food, in general, is not likely to ever make for an interesting case or a worthy subject of the legal scholarship.

11. George L. Priest, *Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2301, 2308 (1989) (noting how the leading tort scholars of the time, including Fleming James, successfully pushed for the adoption of strict liability, in the form of section 402A, to be included in the *Restatement (Second) of Torts*, a rule initially intended to solely apply to “food for human consumption”).

12. RESTATEMENT (SECOND) OF TORTS 33–34 (Tentative Draft No. 6, 1961) (emphasis added). The Council submitted the draft to the Members for discussion and possible adoption at the thirty-eighth annual meeting, which occurred on May 17–20, 1961. *Id.* at i. William L. Prosser was the Reporter for this draft, and Justice Roger Traynor and Fleming James were principle advisors to the Council, of which there were over fifty members, including Judge Billings Learned Hand. *Id.* at iii–iv.

13. RESTATEMENT (SECOND) OF TORTS, at (v), 1–2 (Tentative Draft No. 10, 1964) (proposing section 402A for adoption); see also Priest, *supra* note 11, at 2308 (describing how James and others, including William Prosser, Page Keeton, Justice Roger Traynor, and other scholars, “coordinated their advocacy [for a broader rule of strict liability] within the American Law Institute with a series of publications defending

the domestic (read: female) sphere, products like the defective combination power tool that injured William Greenman and led to the widespread adoption of section 402A.<sup>14</sup>

Notwithstanding this displacement, a central assertion of this Article is that food is *sui generis*, of its own kind, and unique in both its nature and in what it can tell us about life and the law. Food is unique not only because of the intrinsic qualities that set food apart from anything else to which food can be compared; it is unique for the start of an ontology that food suggests. It is also unique for the interrelatedness of being that only food best reveals and defines. Food reminds us that, as living beings, we were born into a vulnerability of hunger and dependence. To survive, which is to say, to continue being, we require nourishment—to eat and drink. And to eat and drink, and thus survive, we must be fed. Food is a biological imperative; without food, no one survives—a fact not often noted by legal scholars.<sup>15</sup>

Food not only supports life, however; it also injures and kills when not produced with sufficient care. Now, twenty years after the Jack in the Box *E. coli* outbreak reminded the world that food and its safety cannot be taken for granted, I will here argue that the legal regulation of food quality is not the only answer—not even a primary one. Where food is made locally and sold directly, as in a farmers' market, or where growers supply consumers on an ongoing basis, the obligations and controls created by face-to-face exchanges can be enough to maintain the expected level of food quality and safety. And even when that expected level of quality or safety is sometimes not provided (as is inevitable), the parties to these transactions will work out any needed solution, likely without recourse to any available legal remedy, because the relationships and community are as highly valued as the food being provided. We thus must reject the idea that regulation is needed at all levels of food production to keep the public safe. To allow artisanship and local production of food to expand and further transformative innovation, the pervasive regulation of food at all levels needs to be modified in favor of the potential "regulatory" power of the face-to-face transaction because

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the approach"). This final draft was adopted on May 25, 1963, and promulgated almost a year later on May 22, 1964. RESTATEMENT (SECOND) OF TORTS § 402A, 347–58 (1965).

14. *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1963) (holding that a manufacturer could be held liable based upon proof that the plaintiff was injured "as a result of a defect in design and manufacture . . . that made the [product] unsafe for its intended use").

15. The eminent products liability scholar, David Owen, is one of the few who have noted the centrality of food as deriving from its necessity for survival, a quality that no other product has in the same manner or extent. See David Owen, *Manufacturing Defects*, 53 S.C. L. REV. 851, 884 (2002) ("Both king and pauper live by food and drink, just as both may die by food or drink gone bad. And this essential fact of human life is as true today as it was a thousand years ago.").

only then will we have an opportunity to bring the plague closer to an end.

# I. FOOD AS BOTH A PLACE OF ORIGIN AND DEPARTURE: TOWARDS A CRITICAL FOOD THEORY

To explain why food is *sui generis*, which is to say so fundamentally different that it demands a category of its own, I must first sketch the map of an ontology “of a sort.”<sup>16</sup> I start from the “genetic facts” of my existence (how I find myself in the world) and the “apparent history” of my being.<sup>17</sup> Without a need for a strategic skepticism, I accept that I exist. Instead of my asking the most cliché metaphysical question of all—“why is there anything at all, rather than nothing?”<sup>18</sup>—I suffice myself with exploration of the world that I find myself within, that my existence allows to open before me, and that which, as a result of my exploration, I can find reassuringly beyond dispute.<sup>19</sup> The world is not just what I experience; it is *where* I experience it; and there, in the

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16. I borrow the phrase “of a sort” from Thomas Flynn, *Foucault's Mapping of History*, in *THE CAMBRIDGE COMPANION TO FOUCAULT* 29, 29 (Gary Gutting ed., 2005) (“All of Foucault’s major works are histories of a sort, which is enough to make him a historian of a sort.”). My own modes of exploration have been influenced by the approaches that Foucault took during his multiple explorations, approaches usually called archaeology, genealogy, and problematization. See *id.* at 30–39 (describing each of Foucault’s successive and complementary approaches).

17. I borrow the two phrases in quotation marks from Maurice Merleau-Ponty. The following is the passage from which I borrowed the phrases:

That a child perceives before he thinks, that he begins by putting his dreams in the things, his thoughts in others, forming with them, as it were, one block of common life wherein the perspectives of each are not yet distinguished—these *genetic facts* cannot be simply ignored by philosophy in the name of the exigencies of the intrinsic analysis. Thought cannot ignore its *apparent history*, if it is not to install itself beneath the whole of our experience, in a pre-empirical order where it no longer merits its name; it [thought] must put to itself the problem of the genesis of its own meaning.

MAURICE MERLEAU-PONTY, *THE VISIBLE AND THE INVISIBLE* 12–13 (Alphonso Lingis trans., 1968) (emphasis added).

18. MARTIN HEIDEGGER, *AN INTRODUCTION TO METAPHYSICS* 1 (Ralph Manheim trans., 1959).

19. Or, that is, *sufficiently* beyond dispute to not want to waste my time (and yours) by attempting to dispute my existence, or explaining in greater detail by what means I do not dispute my existence. In this, I am reminded of a thought from Ralph Waldo Emerson, who was also impatient with skepticism: “I can reason down or deny everything, except this perpetual Belly: feed he must and will, and I cannot make him respectable.” RALPH WALDO EMERSON, *Montaigne, or the Skeptic*, in *REPRESENTATIVE MEN* 100 (The Belknap Press 1996) (1850). Cf. RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 163–96 (1990) (adopting a pragmatic position on the question of existence, which he answers in a meandering way that seems mostly interested in getting beyond the need to even ask the question).

world with me, are others, some known and others not. But like me, they find themselves in the world as well, just as I find them in the world. And, like me, to continue our exploration, we must eat and drink.

*A. Food, Ontology, and the Face-to-Face*

Food simultaneously reveals and constitutes a fundamental structure of being in the world. This structure is not transcendental in a metaphysical sense. Rather, this structure, this rough ordering, is *before* me in three other important senses—the directional (that which is in front of me), temporal (that which has already happened), and existential (that which has existed before I did). In other words, I “apprehend myself only as ‘already born’ and ‘still living’ . . . as pre-personal horizons. . . .”<sup>20</sup> For this—and many other—reasons, as Maurice Merleau-Ponty aptly observed, “[e]verything is both manufactured and natural in man, as it were, in the sense that there is not a word, not a form of behavior which does not owe something to purely biological being—and which at the same time does not elude the simplicity of animal life . . . .”<sup>21</sup> I am *somebody* living in the world, an indisputably biological being, but somehow more than that too. But either way, I need to eat.

This need to eat, this being hungry for food that is my imperative biological inclination toward the world, a kind of natal bond that connects to the matter of my origin—a birth, and not a metaphoric one. This birth is what “high altitude” (systematizing) philosophies pretend to forget.<sup>22</sup> As a result, these philosophies also forget that food constitutes

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20. M. MERLEAU-PONTY, *PHENOMENOLOGY OF PERCEPTION* 216 (Colin Smith trans., 1962). Although I am biased, given the influence that Merleau-Ponty has had on my own thought, I remain struck that his work is not mentioned in any of the books on “modern” or “postmodern” jurisprudence that I reviewed while doing my research. *See, e.g.,* HANS BERTENS, *THE IDEA OF THE POSTMODERN: A HISTORY* 249–84 (1995) (no mention in either the bibliography or index); COSTAS DOUZINAS & RONNIE WARRINGTON, *POSTMODERN JURISPRUDENCE: THE LAW OF THE TEXT AND THE TEXTS OF LAW* 280–303 (1991) (no mention in either the bibliography or index); STEPHEN M. FELDMAN, *AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM* 131 (2000) (mentioning “Merleau-Ponty” in a list of other “continental thinkers” who “the crits” cite in footnotes, thus showing themselves to be “eclectic”); DOUGLAS E. LITOWITZ, *POSTMODERN PHILOSOPHY AND LAW* 221–30 (1997) (no mention in the index); CORNELIUS F. MURPHY, JR., *MODERN LEGAL PHILOSOPHY: THE TENSION BETWEEN EXPERIENTIAL AND ABSTRACT THOUGHT* 233–41 (1978) (no mention in the index). For the one exception, and it is a significant one—even though it does not really “do” legal theory, see GEORGE LAKOFF & MARK JOHNSON, *PHILOSOPHY IN THE FLESH*, at xi (1999) (acknowledging in the introduction that “[a]ny book with the words ‘philosophy’ and ‘flesh’ in the title must express its obvious debt to Maurice Merleau-Ponty”).

21. MERLEAU-PONTY, *supra* note 20, at 189.

22. MERLEAU-PONTY, *supra* note 17, at 77 (“For a philosophy that is installed in pure vision, in the aerial view of the panorama, there can be no encounter with another:



and continues to mediate an original relationship to the material of the world from which, and into which, I was born. Without knowing, the world waits like the room into which you wake in the morning; it is always there before you, in both the temporal and locational sense.

But before I awake to find the world before me and become conscious to the possibility of exploration, I must wait too—and be fed. And who is this person who will feed me? Perhaps a mother, but not necessarily so.<sup>23</sup> Whoever it was who fed me, though, that person sustained me long enough for me not only to awaken to the world before me, but to then involve myself in it in a way that I could grow and recognize—touch by touch, glance by glance—the world around me, developing in an organic and incremental way “outside of myself, in the world, among the others, and [come to apprehend that] constantly this experience *feeds* my reflection.”<sup>24</sup> In the same style in which “the body is our anchorage in a world,”<sup>25</sup> so is food my invitation to meet others and to form a community with them. The person who first fed me, who was the world to me in that first face-to-face, provided the means for me to

for the look dominates; it can dominate only things, and if it falls upon men it transforms them into puppets which move only by springs.”).

23. This one who fed me at first is neither mother, nor father, and is without gender to me at that moment. Because my ontology of a sort begins with being *already* born, there is no need for an idealized pre-history—an ontotheology based on an “origin beyond origins.” See LUCE IRIGARAY, *How to Conceive (of) a Girl*, in *SPECULUM OF THE OTHER WOMAN* 160, 164 (Gillian C. Gill trans., Cornell Univ. Press 1985) (1974) (criticizing “this philosophical construct [because it] reduces the potential for generation, growth, change, and expansion for all beings. Everyone, in effect, is pulled up by the roots, deprived of the ‘body’s’ first resources, of the endless possibilities of being in space”). The face-to-face as conceived, revealed in the first acts of being fed, is both without gender and precedes gender. There is, as a result, no foundation offered here for a claim of heteronormativity; and, in fact, food and the face-to-face can be used as a means to critique heteronormative assumptions about gender and identity, allowing food to be the basis of another critical form of theory.

24. MERLEAU-PONTY, *supra* note 17, at 49 (emphasis added).

25. *Id.* at 144. In his last essay completed before his death, Merleau-Ponty made this same point in a way that is simultaneously clearer and more beautiful, especially in its depiction of others in the world:

[W]henever I try to understand myself, the whole fabric of the perceptible world comes too, and with it come the others who are caught in it. . . . For they are not fictions with which I might people my desert—offspring of my spirit and forever unactualized possibilities—but my twins or the flesh of my flesh. Certainly, I do not live their life; they are definitively absent from me and I from them. But that distance becomes a strange proximity as soon as one comes back home to the perceptible world, since the perceptible is precisely that which can haunt more than one body without budging from its place.

MAURICE MERLEAU-PONTY, *SIGNS* 15 (Richard C. McCleary trans., Northwestern Univ. Press 1964) (1960). And it is within that “strange proximity” that the struggles of the face-to-face and the faceless play out, giving rise to both commerce and law.

know that world not as mine alone, but as an extension of family, home, and community, discovered and created in equal measure at once.

Like a mountain so prominent that one could never get to a point distant enough to *not* see it, one is never beyond food and the fixed point of reference that it provides. No matter how seemingly distant (or forgotten), food is never lost as a point of reference and, thus, as a source of order and meaning. The prominence of food, its irreducibility, and the impossibility of its displacement, is not a matter of size as the metaphor of the mountain may seem to suggest. Instead, it is the *difference* of food (but definitely *not* the *différance*<sup>26</sup> of food) that maintains its prominence, its utter visibility, and, thus, its suitability as a point of reference. Food is (or makes itself) a category all its own, placing food beyond anything but superficial comparison or analogy.<sup>27</sup> The difference of food cannot be suppressed enough to make analogy meaningful. The gap opened by the unfinished phrase “food is like \_\_\_\_\_” demands that the blank remain empty.

Nonetheless, like the model of an atom, with its nucleus of seeming stability and the whirring blur of electrons that invisibly circle, food is on the verge. Food is a contingency among contingencies that sustains being in a way that allows me, once I am able, to sustain being of my own, to enter into interactions of my own, and to construct family and community to further sustain me. This is the fecundity of food and the face-to-face of food, and how and why its inherent interactivity breeds community.

Anyone who has watched loved ones pour into a house, from all directions, and make a meal together and settle around a table together to eat and converse will understand that food connects and binds (*ligare*),<sup>28</sup> and it reconnects, pulling and putting us back together, repairing bonds, binding again (*re-ligare*).<sup>29</sup> Food is thus also a religion of a sort, in all

26. See JACQUES DERRIDA, *Différance*, in MARGINS OF PHILOSOPHY 1, 3–27 (Alan Bass trans., Univ. Chicago Press 1982) (1972).

27. I do not use the term “category” in any essentialist sense. I mean “category” more in the sense of an abidingly strong family resemblance which legitimates a definitive sorting and cataloguing. Keep in mind that I am talking about things, not words *for* things. Thus, my borrowing of Wittgenstein’s term, “family resemblance” is being put to a different use. Cf. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 32<sup>c</sup> (G.E.M. Anscombe trans., The MacMillan Co., 3d ed. 1968) (1953) (“[T]he various resemblances between members of a family: build, features, colour of eyes, gait, temperament, etc. etc. overlap and criss-cross in the same way.—And I shall say: ‘games’ form a family.”).

28. *Ligare* translates as “[t]o fasten, bind (with something specified or implied).” 1 OXFORD LATIN DICTIONARY 1133 (P.G.W. Glare ed., 2d ed. 2012).

29. *Re* translates as “restoration.” *Id.* at 1738. Take, for example, the ritual of celebrating a birthday, which can bring together in restorative fashion a network of family and friends. See Theodore C. Humphrey, *A Family Celebrates a Birthday*, in “WE

aspects of the word, while also providing the central means and symbolism for sacred rites of religious movements.<sup>30</sup> Food calls me to community, to recognize the shared condition and contingencies that find me “thrown” into being with others, all of us seeking food and meaning in a world unconcerned with our continued existence. Food is, in this sense, both a mystery and a problem, to borrow from Gabriel Marcel.<sup>31</sup>

What, though, of food no longer of or about community, food that has become a product of commerce and that is viewed as a problem only? In this view, food is no longer a part of lived life, but apart from lived life, waiting instead someplace else, in the market, where you must

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GATHER TOGETHER” FOOD AND FESTIVAL IN AMERICAN LIFE 19, 25 (Theodore C. Humphrey & Lin T. Humphrey eds., Utah State Univ. Press 1991) (1988) (“[P]eople who celebrate birthdays . . . create and manipulate powerful symbolic systems from their traditions, especially within the customs that center on foods in this festive context. They establish and maintain *communitas*, the idea and the reality of community, not as a permanent and unchanging entity, but as a source of individual and group identity and power.”). Of course, no one should think I am suggesting food occasions are only restorative encounters. For an extended and remarkably insightful phenomenological analysis of the meanings and implications of “the table,” see SARA AHMED, QUEER PHENOMENOLOGY: ORIENTATIONS, OBJECTS, OTHERS 81 (2006) (“The table in its very function as a kinship object might enable forms of gathering that direct us in specific ways or make some things possible and others not. Gatherings, in other words, are not neutral but directive. . . . If families and other social groups gather ‘around’ tables, what does this gathering do? What directions do we take when we gather in this way, by gathering ‘around’ the table?”).

30. The most obvious example is the Christian sacrament of the Eucharist that is understood as the eating of God. See, e.g., ANGEL F. MENDEZ-MONTOYA, THE THEOLOGY OF FOOD: EATING AND THE EUCHARIST 78 (2009) (“[T]he Eucharist becomes the main item on this theological menu, since this partaking of God-as-food is a Christian-Catholic paradigm of being nourished.”). Other examples exist, including the *samskāras* of Hinduism, which includes the *Annaprāśana* (literally, feeding food) ritual in which a child who is typically six months old—“[a]s the quantity of the mother’s milk declines [and] the infant’s body demands greater amounts and different types of food”—is first introduced to solid food, after which offerings are made to the goddesses of energy and speech. See Jyotsna M. Kalavar, *Hindu Samskāras: Milestones of Child Development*, in RITUALS AND PATTERNS IN CHILDREN’S LIVES 41, 48 (Kathy Merlock Jackson ed., 2005); see also Valerie J. Hoffman, *Eating and Fasting for God in Sufi Tradition*, 63 J. AM. ACAD. RELIGION 465 (1995) (discussing and providing many examples of how eating and drinking can be sacred acts, and the key religious value of hospitality and of feeding the poor).

31. See GABRIEL MARCEL, BEING AND HAVING: AN EXISTENTIAL DIARY 100 (Katherine Farrer trans., Harper Torchbooks 1965) (1949) (“A problem is something met with which bars my passage. It is before me in its entirety. A mystery, on the other hand, is something in which I find myself caught up, and whose essence is therefore not before me in its entirety. It is as though in this province the distinction between *in me* and *before me* loses its meaning.”). For Marcel, ontology is ultimately—and necessarily—mysterious, refusing all attempts to reduce it to the status of the problematic. I find his setting of the problem opposite mystery to be an amazingly useful means of seeing the world. And this opposition certainly echoes what I mean in setting the face-to-face opposite facelessness.

go and buy it before bringing it home. And this is where and how the law rose to eminence, to govern the exchange of food among strangers, claiming to solve a problem.

*B. Food, Facelessness, and Commerce*

Unless I am somehow self-sustaining or am a part of a community that is, I must depart the home to enter into commerce, that is, to transact a kind of business. Although one might say that there is a kind of business within a home, it is a transaction defined by reciprocity, trust, and the complete lack of ongoing accounting. At home, a ledger is not balanced at the end of the day; no profit or loss is determined. Similarly, in ancient times, the “[p]ublic sale of food products between strangers, as we think of it today, was not prevalent . . . . Rather, food commonly was shared within extended family units and tightly knit communities as the result of their division of communal labor.”<sup>32</sup> Consequently, food exchange was defined by the face-to-face and its noneconomic nature, with even barter reinforcing interrelationship.<sup>33</sup> And what is shared is not strictly accounted for either.

The services rendered by one person are not treated as individual units . . . . Each individual provides services for those who need them even if a recipient is unlikely ever to be able to match them. Without specific arrangements being made to this end there will often be a merry-go-round of help: you help me, I help another, and his son helps you.<sup>34</sup>

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32. Jesse D. Lyons, *Coordinated Food Systems and Accountability Mechanisms for Food Safety: A Law and Economics Approach*, 53 FOOD & DRUG L.J. 729, 737 (1998). And for those inclined to think that such a phenomenon is nothing more than a cultural relic of the distant past, it should be noted that “[l]ess than one hundred years ago most rural households in the United States sustained themselves by farming. While some agricultural products were sold for money on the open market, others were produced solely for household consumption or for bartering with neighbors.” THOMAS LYSON, CIVIC AGRICULTURE: RECONNECTING FARM, FOOD, AND COMMUNITY 8 (2004).

33. F. Leslie Hart, *A History of Adulteration of Food Before 1906*, 7 FOOD DRUG COSM. L.J. 5, 5 (1952) (Prior to the rise of commerce, “[t]rade existed for the most part through barter.”).

34. ALAN WATSON, *The Prehistory of Contracts*, in LEGAL ORIGINS AND LEGAL CHANGE 233, 234 (1991). I strongly recommend the reading of this short essay, which packs more beauty and insight into five pages than I have found in articles of much greater length, my own included. Watson’s description of “a fairly isolated, small community which is closely knit” comes closest to evoking in an essay with a legal topic what I believe that Martin Buber meant by his notion of “true community.” *Id.* Buber writes,

But as Alan Watson points out, "the situation changes with the use of money."<sup>35</sup>

Although there are certainly exceptions—for example, giving a child an "allowance" in exchange for doing chores around the home—what I here define as commerce is the exchange of money for goods or services that occurs outside the home. This outside is an economic realm characterized by exclusive and competing interests and, most importantly—by way of its definition—a strict and ongoing accounting that has an "important social consequence."<sup>36</sup> One such consequence is the opening of a gulf separating merchants from the community, making

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True community does not come into being because people have feelings for each other (though that is required too), but rather on two accounts: all of them have to stand in a living, reciprocal relationship to a single living center, and they have to stand in a living, reciprocal relationship to one another.

MARTIN BUBER, *I AND THOU* 94 (Walter Kaufmann trans., 1970). Cf. SALLIE TISDALE, *THE BEST THING I EVER TASTED: THE SECRET OF FOOD* 94–95 (2000) ("Families have long been sprawling and evolving things, with both adults and children coming and going and returning, with shelter built and food raised by all, wages earned by none or many as the opportunity arose, household chores (including those involving food) divided among every member . . .").

35. WATSON, *supra* note 34, at 235 (using the example of Roman law where "money is the touchstone which determines which contract is involved," and where, for example, a "sale ceases to be a contract and becomes the legally ineffective arrangement of barter (*permutio*) if the price is not to be in coined money"). Cf. FERNAND BRAUDEL, *THE WHEELS OF COMMERCE* 59 (Siân Reynolds trans., 1982) ("[M]oney still played its part in destroying old values and relationships. The peasant who was paid a wage, duly noted in his employer's account book, even if he received so much of his pain in kind that he practically never had two coins to rub together at the end of the year, had grown accustomed to *reckoning* in money terms.").

36. WATSON, *supra* note 34, at 237 ("No matter how honorable and generous [the merchant] is, he requires—and must do if he is himself to purchase supplies—instant payment for his goods, each purchase from him involving the completion of an obligation."). It is also in this sense that I use "accounting" to signify a bookkeeping orientation that the idea of reckoning becomes as transactions turn increasingly faceless and move outside the boundaries of home and village. Cf. Karl N. Llewellyn, *On Warranty of Quality, and Society: II*, 37 COLUM. L. REV. 341, 402 (1937) ("Accounting drives toward making deals mean deals, to keep books straight."). In this regard, it is interesting to note that the merchants who originally took up residence in the town's center were, over time, banished to the areas beyond the walls of the town. See MAGUELONNE TOUSSAINT-SAMAT, *A HISTORY OF FOOD* 447–48 (Anthea Bell trans., 1992) (noting that sometimes the merchants would be invited back in only to be banished again). For his part, Braudel accepts that money is a key driver of changed relationship, but he focuses more on towns and cities as the "turning-points," with their rise "born of the oldest and most revolutionary division of labour: between work in the fields on the one hand and activities described as urban on the other." 1 FERNAND BRAUDEL, *THE STRUCTURES OF EVERYDAY LIFE* 479 (Siân Reynolds trans., 1979). I agree that this division is indisputably important; however, more important is Braudel's related point about how "extremely important [is the] fact that even the humblest town-dweller must of necessity obtain his food-supply through the market: the town in other words *generalizes* the market into a widespread phenomenon." *Id.* at 481.

merchants and their customers into strangers and turning the transactions into faceless ones.<sup>37</sup>

### *C. On Faceless Transactions: How Food Came to Be a Product*

Going to an ATM or making purchases online are contemporary examples of faceless transactions.<sup>38</sup> With regard to food, the best example would be the purchase of a canned good from a national grocery store chain. The transaction becomes especially faceless if you complete your purchase at the self-scanner checkout. But the form of this transaction belies the nature of what is purchased—which is still food, albeit an industrialized and banal form of it. One reason that food and food cases could have been deemed “trivial” as a subject of legal study is because the view of food at the time was restricted to thinking of food as something in a can or a bottle on a store shelf—that is, as a product. Because food as a product seemed both simple and boring, there was no reason for a second and more careful look.

Had there been a second look, someone might have noticed that an industrialized process for its making and distribution had not stripped food entirely of its uniqueness as a product. Looking closely, one can

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37. Karl Llewellyn makes this point beautifully in his introduction to the chapter on warranty in his 1930 casebook on sales law, writing that:

The law of seller's obligation as to quality (“warranty”) presents the sweep of sales law in perhaps its most dramatic form. The picture begins in terms of a community whose trade is only one step removed from barter—your black horse, two stools, a jackknife and thirty-four bushels of corn for my roan, an ox and two dozen eggs. Two vital presuppositions reign: first, that the goods in question are there to be seen; second, either that everybody knows everybody's goods, individually, in a face-to-face, closed, stable group; or that trade with strangers in a shop is an arm's length proposition, with wits matched against skill.

KARL LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* 204 (E.M. Morgan ed., 1930). See also Cornelius W. Gillam, *Products Liability in a Nutshell*, 37 OR. L. REV. 119, 130 (1957–58) (“[U]nder modern conditions the consumer typically deals with retailers, mere conduits through whom goods manufactured more or less anonymously by parties remote in time and place are passed along to unknown users.”); Leslie Green, *Positivism and the Inseparability of Law and Morals*, 83 N.Y.U. L. REV. 1035, 1043–57 (2008) (“[I]f we are to have large, mobile, and anonymous societies, it is better to that we have the forms of guidance that law makes available. Whether those are in any morally superior societies is another question entirely.”). Aristotle and Rousseau certainly doubted it, favouring small, face-to-face societies that made law less necessary and made direct governance more possible.

38. Cf. Daniel K. Wiig, *U.C.C. Article 2 Warranties and Internet-Based Transactions: Do the Article 2 Warranties Sufficiently Protect Internet-Based Transactions with Unprofessional Internet Merchants?*, 12 FORDHAM J. CORP. & FIN. L. 717, 718 (2007) (using the term “faceless transaction” to mean a “distance sale . . . between two people set apart,” as in when persons buy things from a catalog or online).

discern a trace of a maker, and of its making, in any food product, along with a hint of the face-to-face that introduced us to food itself. Of course, all of this is difficult to see (or recall) once food becomes a fungible commercial object. But that is what commerce does; it erases the maker of things, asking us to believe in the idea of a product that appears out of nowhere, connected to no one in particular. In seeing a can of beans on a store shelf, few will think of someone standing at a stove, stirring a pot while beans cook. Nonetheless, the trace of this all remains there with the can, which is why phrases like “handmade” and “home-cooked” have the power to convince us that a quality we want might be within that can, a quality worthy of a taste.

The trace of the face-to-face that connects the food to a maker also promises—or appears to promise—that the food was made with care sufficient to provide me with something to eat that will sustain me, not kill me. But, as with anything given to me by a stranger, my acceptance of the food must always be a matter of trust. Some stranger who I invite inside my home could turn out to be a danger to me. The same is true for food. And in some ways, it is worse. I have no choice but to rely on food to sustain me, and no choice but to rely on the food’s maker. Unlike any other product, only food vouches for itself, regardless of maker or manner of making, playing on the preexisting invitation that only food possesses. It is thus not by accident that so much of the modern marketing of food continues to rely on putting a face on the label in the form of an imaginary maker, like an image of Betty Crocker smiling from the box of cake mix.<sup>39</sup>

One tort scholar who has done an impressive job questioning the relationship of products and product makers is Anita Bernstein.<sup>40</sup> Where I especially agree with her is in her focus on “the power and autonomy of the product in society,” and in her description of a product as a “community-created matrix.”<sup>41</sup> I also agree that, historically, the need “to acquire money to pay for subsistence” represented a key point of transformation, and that products “do not exist outside of commerce.”<sup>42</sup>

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39. See TISDALE, *supra* note 34, at 115 (making a similar point and noting how “Betty Crocker was an instant success” for General Mills, the food company that invented her).

40. See, e.g., Anita Bernstein, *How Can a Product Be Liable?*, 45 DUKE L.J. 1, 6–8, 12 (1995) (arguing that products possess symbolic powers amounting to a kind of life force, and that such powers create interactions that necessarily give rise to products liability, which, in the view of Bernstein, means a product-being-liable).

41. *Id.* at 82.

42. *Id.* at 23, 61 (“Just as one of the defining elements of a product is a commercial context, the maker is defined in part as the entity that charges, and receives payment, for the delivery of its product.”). See also TISDALE, *supra* note 34, at 95 (“Human history is one of working together. Formally separated economic spheres is a . . . product of capitalism, an industrial idea, one of the most modern ideas of all.”).

Where I disagree, though, is that products are solely a result of the “industrial revolution,” as if there was no such thing as a product in the “modern” sense prior to this turning point in history.<sup>43</sup> Certainly, the most commonly accepted *legal* view of products takes industrialization as its starting point,<sup>44</sup> but that is also where the legal view loses sight of

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Tisdale persuasively argues that one consequence of a civilization model based on the need to obtain wages to buy food is the separation of family members. She writes: “What is most peculiarly modern is the isolation and solitude of the homemaker, the separation of partners for most of their working hours, the separation of children from their parents, and the separation of adults from the results of their labor.” *Id.*

43. Bernstein, *supra* note 40, at 20 (“Before creating products liability, however, industrialization created products—manufactured objects—whose properties could be traced not only to a producer or seller, but to some technology. These are the objects that may be blamed for injury in a modern products liability action.”). It is worth noting here—although I must for now put off delving further into this—that the “industrial revolution” did not uniquely change the relationship between the individual and the work of making things. Since the “ancient world” there has been an ongoing debate about the value and status of *poesis*—making—and *praxis*—doing. Craftsmanship was deemed to be the employment of techniques that existed independent of, and prior to, those who employed the techniques:

[T]he craftsman’s activity and the nature of his work were matters of little or no account, simply to be taken for granted as part of the natural scene. There was nothing deserving of question; the craftsman followed his trade as a bee gathered honey or a spider span its web, and that was that.

ALISON BURFORD, CRAFTSMEN IN GREEK AND ROMAN SOCIETY 185 (1972) (discussing both the views of philosophers of the time, like Plato and Aristotle, and the views of the general public). Hannah Arendt, to whom Bernstein several times refers (although not with regard to this exact point), elevated Aristotle’s concept of *praxis* to champion a philosophy of “action,” which is for Arendt a term of art referring to that which “goes on directly between men without the intermediary of things or matter.” HANNAH ARENDT, THE HUMAN CONDITION 7 (2d ed. 1998). Arendt’s conception of bodily necessities, like eating (the realm of labor), work (the economic activity necessary to support bodily necessities), and the hidden domain of the household, could not be more different than what I speak of in terms of the face-to-face, of commerce and faceless transactions, and of the home and community—mostly because work and labor are, for Arendt, that from which to escape anonymity and make a full appearance as an individual in the public realm. *Id.* at 46. What Arendt decries in modern society is not so much an individual’s alienation from the fruits of her labor, but how, as consumers driven by the needs of bodily necessity we are turned into a “society of laborers . . . [where] all members consider what they do primarily as a way to sustain their own lives and those of their families.” *Id.* For Arendt, the only way to claim the freedom needed to “escape” the confines of the household and move into the realm of action is to be free of the *need* to labor. *Id.* at 47. Of course, for the ancient Greeks that Arendt appears to so venerate, freedom from the need to labor came at the “price” of a “violent injustice . . . forcing one part of humanity into the darkness of pain and necessity.” *Id.* at 119. See generally Roy T. Tsao, *Arendt against Athens, Rereading the Human Condition*, 30 POL. THEORY 98 (2002) (criticizing Arendt for her “apparently unstinting praise of the classical polis—withstanding the institutions of slavery and oppression that sustained it”).

44. Bernstein, *supra* note 40, at 21.



the rise of commerce as something more fundamentally important to understanding what a product is and our relationship to it.

Using dialectical materialism as a primary tool, Bernstein conceives of products as autonomous objects (of perception) that, despite autonomy, still manage to interact. Explaining this conception, she writes:

A person perceives the world around her and interprets that world to herself. In a post-industrial setting, material objects or products make up a large share of the world perceived. Members of a culture create, share, and interpret symbolic properties attributed to product. Because of their dynamic function, products participate in social life. [Products] shape identities and communicate messages to observers.<sup>45</sup>

Although in many ways descriptively accurate, such a conception is starkly (and unnecessarily) Cartesian, positing a world littered with objects that remain only to be bought and sold, a world in which the only way to traverse the gap between subject and object is by acquisition.<sup>46</sup> Moreover, that which invites acquisition—and thus meaningful relationship—is for Bernstein the power of symbolism, a power that gives objects the ability to lure us into some sort of relationship.<sup>47</sup> To put it bluntly, we are consigned to a world that is an immense shopping mall full of objects that are “shiny” with symbolism, luring us into interaction. In a world such as this, there is of course no question that “products liability is fundamentally a commercial and transactional concept.”<sup>48</sup> But so what?

Hermeneutical pursuits like those of Bernstein inevitably lose track of the fact that, unlike other products, food is always and necessarily *of* its making, and never wholly apart from maker or making. Even if we

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45. *Id.* at 8 (footnotes omitted). Bernstein relies, in part, on a book: DR. MIHALY CSIKSZENTMIHALYI, *THE EVOLVING SELF: A PSYCHOLOGY FOR THE THIRD MILLENNIUM* (1993). Dr. Csikszentmihalyi is best known for his studies of happiness and creativity, and his best-selling book, *FLOW: THE PSYCHOLOGY OF OPTIMAL EXPERIENCE* (1990). He is much influenced by the work of Hannah Arendt, and it shows.

46. I offer no further critique here (even though there is a critique to be made) about Bernstein's employment of Marx or Hegel as the foundation of much of her analysis. I will say, though, that the use to which Bernstein puts Hegel and Marx in support of her analysis reminds me more of Sartre in his later writings on Marxist existentialism. See, e.g., JEAN-PAUL SARTRE, *CRITIQUE OF DIALECTICAL REASON: THEORY OF PRACTICAL ENSEMBLES* 79 (A. Sheridan-Smith trans., 2004) (“[T]he crucial discovery of dialectical investigation is that man is mediated by things to the same extent that things are ‘mediated’ by man.”).

47. Bernstein, *supra* note 40, at 39.

48. *Id.* at 55.

assume that all other products can become “alienated” from their makers, whether by an “industrial revolution” or the invention of “mass-production,” food alone defies such alienation. Food disrupts the categorical opposition of the deontological and the teleological by being both act and object, verb and noun, being defined by its nature and its end. In this, food and eating, which are an inseparable pair, reveal the paralleled intertwining of the face-to-face—being human and human being. The hand that reached out to feed me in my vulnerability, whether that first time or a last time, is simultaneously sustaining (an act) and sustenance (a thing), thus verb and noun together. This is yet another intertwining that manages to call into question the differentiation of objects and subjects and to erase the difference enough to maintain a real world still to live in. In contrast, a view of the world that sees subjects and object only requires a kind of symbolic power—like that which Bernstein describes—to reanimate the objects around us, bringing them “back to life.” But that trick of symbolism is needed only if you find yourself on the wrong side of a dialectical divide, looking for a way back to a world in which life is being lived.

Certainly, there is meaning to be found in the “concept of *homo faber*” and taking careful note of a connection between human intentionality and the manufacture of a product; however, food is never truly “let loose, severed from its maker.”<sup>49</sup> What “departure from the maker” that occurs with food is of distance only; it is a departure, not a divorce; and the departing carries with it a trace of the maker—literally, a *souvenir*.<sup>50</sup> Moreover, the making of food, like any product requiring craftsmanship of a closely personal kind, is necessarily a craftsmanship that “must reckon with the infallible judgment of reality, where one’s failures or shortcomings cannot be interpreted away.”<sup>51</sup> This is what is meant when we say that “the proof of the pudding is in the eating.”<sup>52</sup> Taste demonstrates the reversibility that makes perception and understanding two sides of the same exploration of being in the world. To feel a spoon on your tongue, a bit of tea-soaked madeleine left there

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49. *Id.* at 14.

50. *Id.*

51. Matthew T. Crawford, *Shop Class as Soulcraft*, NEW ATLANTIS, Summer 2006, at 7, 9. Crawford provides a sophisticatedly concrete examination of the connection between value and meaning of work, both with regard to the individual and as to society. In his spirited and nuanced defense of the importance of working with one’s hand, Crawford notes that “[s]killed manual labor entails a systematic encounter with the material world, precisely the kind of encounter that gives rise to natural science.” *Id.* at 12. Not coincidentally, this same “systematic encounter with the material world” is what makes one an accomplished food maker, able to give advice like that of my grandmother, who said about making pies, “the dough is ready when it tells your fingers it is ready.”

52. CAMBRIDGE IDIOMS DICTIONARY 327 (2d ed. 2006).

to dissolve into flavor and sensation, then into thought and memory. A taste—noun and verb combined.

Unlike all other products, even when food originates in a factory far away and is made by a complete stranger (or even a robot), and even when food is subject to a series of faceless transactions, once the food arrives in my hand, a unique relationship comes into being—or at least the trace of it. Even food mindlessly eaten—potato chips from a bag purchased from a vending machine—harkens, in the act of eating, to the first food given to us, thus resituating us in a living and lived web of relationships that defies full reduction to economic terms. Getting in a car to drive, using a power tool, climbing a ladder—these are all acts fundamentally different than putting a potato chip in my mouth, chewing, and swallowing. All of these acts may, by way of analogy, involve a degree of trust or reliance, but only eating depends upon trust and reliance inherent in the necessity of eating and the vulnerability and reciprocity found from the beginning as something given to and by my being. As Merleau-Ponty puts it, “[o]ur own body is in the world as the heart is in the organism: it keeps the visible spectacle constantly alive, it breathes life into it and sustains it inwardly, and with it forms a system.”<sup>53</sup> But it is food that is needed to keep the spectacle alive—that is, unless the food is adulterated with a pathogen, in which case the spectacle may come to an end in death.

#### *D. Food Adulteration as a Kind of Inevitable Betrayal*

“The adulteration of foods is as old as commerce itself.”<sup>54</sup> As already indicated, it was only when the people moved outside of the self-supporting community, beyond home and village to towns, that day-to-day life must then be sustained by the purchase of food from a

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53. MERLEAU-PONTY, *supra* note 20, at 203.

54. Hart, *supra* note 33, at 5. Prosser made this same point in *The Assault upon the Citadel*, observing that “[e]ven in the ancient days of the courts of custom, manor and baron, leet and talsey and pie-powder, there were innumerable local regulations governing weight and measure and quality.” William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1103 (1960) (citing specific laws as far back as 1266). See also George M. Burditt, *The History of Food Law*, 50 FOOD & DRUG L.J. (SPECIAL ISSUE) 197, 197 (1995) (noting that Cato and other prominent Romans reported or made warnings about the quality of food and wine, including the adulteration of bread with chalk); James F. Bush, “By Hercules! The More Common the Wine, the More Wholesome!” *Science and the Adulteration of Food and Other Natural Products in Ancient Rome*, 57 FOOD & DRUG L.J. 573, 576 (2002) (describing the adulteration of food in ancient Rome, for example, the substitution of inferior local products for more expensive imported ones and the mixing of spoiled product with fresh).

relative stranger, with money the means of exchange. This fact should come as no surprise.

Food adulteration is essentially a phenomenon of urban life, and its historical origins cannot be traced back earlier than the city states of the Classical world. As soon as there emerged a consuming public, distinct and separated from the producers of food, opportunities for organized commercial fraud arose: cheaper and nutritionally inferior substitutes might be used to replace the proper constituents of a food, essential ingredients might be removed, or foreign substances added to impart fictitious flavour, appearance or strength.<sup>55</sup>

To repurpose a phrase from Emmanuel Levinas, food is thus “delivered over to the anonymous field of economic life.”<sup>56</sup>

Once food is so delivered, adulteration is inevitable. Not only do the incentives become increasingly economic (all of which argue in favor of adulteration as the most profitable strategy),<sup>57</sup> but the likelihood of a seller suffering negative consequences from selling adulterated food is exceedingly low. As a result, the sale of adulterated food is profitable—and highly so—because adulterants are by definition invisible, and the act of adulteration is invisible too.<sup>58</sup> It is as if the seller of adulterated food has inherited the ring of Gyges, a ring with magic to make a wearer invisible.<sup>59</sup> As Glaucon argues to Socrates in Plato’s *Republic*, “[i]f you could imagine anyone obtaining this power of becoming invisible, and never doing any wrong . . . , he would be thought by the lookers-on to be a most wretched idiot . . . .”<sup>60</sup> Those are the rules of the game when it

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55. JOHN BURNETT, *PLENTY AND WANT: A SOCIAL HISTORY OF DIET IN ENGLAND FROM 1815 TO THE PRESENT DAY* 99 (Scolar Press rev. ed. 1979) (1966) (describing the diet of the town worker as having been comparable to the agricultural worker of the time during the first half of the nineteenth century and increasingly prosperous during the second half); *id.* at 74–98 (describing the “food of the rich” and concluding “[i]n nothing was the contrast between wealth and poverty more obvious than in food”).

56. EMMANUEL LEVINAS, *TOTALITY AND INFINITY* 176 (Alphonso Lingis trans., 1988).

57. *Cf.* Stearns, *supra* note 8, at 275 (arguing that consumers will never be able to purchase food of a reliable quality and level of safety unless producing safer and higher quality food is predictably and consistently more profitable than producing food that is less safe and of a lower quality).

58. BURNETT, *supra* note 55, at 115 (“[W]hy did the public allow themselves to be cheated and poisoned in this way? The answer is, of course, the majority did not know.”).

59. PLATO, *THE REPUBLIC OF PLATO* 37–38 (Benjamin Jowett trans., The Colonial Press 1901).

60. *Id.* at 38.

comes to adulteration and commerce. Faceless, which is to say invisible, sellers are free to prioritize profit without a risk of accountability. The seller is “a being *no longer participating* . . . , a being conformable to the fate of Gyges who sees those who look at him without seeing him, and who knows that he is not seen.”<sup>61</sup> Consequently, commerce creates a double invisibility: not only is the seller invisible to the buyer, but the most pertinent qualities of the food are invisible too.<sup>62</sup> The seller is free to play “a double game, a presence to the others and an absence, speaking to ‘others’ and evading speech . . . the possibility of accepting the rules of the game, but cheating.”<sup>63</sup> Put another way—and this is a thesis of a sort—commerce as such becomes a primary cause of adulteration. Furthermore, the continuing plague of illness comes to be accepted as the unavoidable cost of having a seemingly bountiful food supply, with legal regulation presented to the public as the necessary (but not sufficient) means of making food just safe enough.<sup>64</sup> But safe enough is not the same as safe, as the continuing plague so plainly proves.

#### CONCLUSION OF A SORT: THE FAILURE OF A REGULATORY IMPERATIVE

During the last decade, the majority of foodborne illness outbreaks attributable to a particular food commodity have involved fresh produce—a total of 46 percent of all illnesses.<sup>65</sup> Leafy green vegetables like spinach and lettuce were the second most frequent cause of hospitalizations and the fifth most frequent cause of death.<sup>66</sup> None of these illnesses or deaths were attributable to produce grown by the

61. LEVINAS, *supra* note 56, at 90.

62. Stearns, *supra* note 8, at 248–50 (explaining how food safety, as a credence attribute, is something that invariably cannot be detected by consumers at the time of its purchase and that even the consumption of food will not reliably indicate whether the food was contaminated and thus the source of illness).

63. LEVINAS, *supra* note 56, at 173.

64. Tony Weis, *The Accelerating Biophysical Contradictions of Industrial Capitalist Agriculture*, 3 J. AGRARIAN CHANGE 315, 317–18 (2010) (“[D]eceptive efficiency of industrial capitalist agriculture and its manifestation in cheap bountiful food have long overshadowed the instability and inequalities of the system.”), available at <http://onlinelibrary.wiley.com.ezproxy.library.wisc.edu/doi/10.1111/j.1471-0366.2010.00273.x/abstract;jsessionid=EA7A1109EC029ED6F4E4E7FD400528CD.f03t04>.

65. See John A. Painter et al., *Attribution of Foodborne Illnesses, Hospitalizations, and Death to Food Commodities by Using Outbreak Data, United States, 1998–2008*, 19 EMERGING INFECT. DIS. 407, 409–10 (2013) (estimating that over nine million people each year suffer a foodborne illness due to a major pathogen, a category that includes *E. coli* O157:H7). The study also confirms how and why outbreaks are so important to understanding the extent of foodborne illness because “linking an illness to a particular food is rarely possible except during an outbreak.” *Id.* at 407.

66. *Id.* at 410.

victim, the victim's family, or purchased at a farmers' market.<sup>67</sup> Instead, virtually every illness and death was attributable to bagged salad greens linked to large-scale processing.<sup>68</sup> Since the 2006 *E. coli* outbreak linked to contaminated Dole spinach, it is as if there was one produce-related outbreak after another, involving tomatoes, sprouts, cantaloupes, and peppers.<sup>69</sup> Meanwhile, the law continues its own regulatory enterprise, reacting to the rise of public outrage with yet another regulatory response, most recently the Food Safety Modernization Act (FSMA).<sup>70</sup>

Confronted with the problem of adulterated food in the marketplace, the response is always legal, premised upon a kind of regulatory imperative that assumes the effectiveness of inspection and testing as the enforcement mechanism. The FSMA is but the latest example of this reflexive approach, one that both industry and food-safety advocates have succeeded in expanding to all levels of agriculture and food production.<sup>71</sup> Again we can see that large-scale food producers are adept at turning food safety regulations to their advantage, successfully demanding that both the regulators and the public accept the notion that safety is safety, and the regulations should be enforced across the spectrum of food production and sale, from the small to the large and from the local to the global.<sup>72</sup> But this demand has also been echoed by those who claim to speak on behalf of the public and its safety, asserting that "[f]ood safety should be a baseline requirement for all food products, not something to be used to gain advantage in the market-place."<sup>73</sup> Safety is safety after all, they say, and rules must be uniformly enforced to be

67. See Diana Stuart & Michelle R. Worosz, *Risk, Anti-reflexivity, and Ethical Neutralization in Industrial Food Processing*, 29 AGRIC. HUM. VALUES 287, 293 (2012).

68. See Stuart & Worosz, *supra* note 67, at 293 (discussing the role of centralized processing in the rise of foodborne illness outbreaks linked to bagged produce). See also Stearns, *supra* note 8, at 263–66 (discussing how, in the wake of the Dole spinach outbreak, industry trade associations first sought to avoid increased regulatory oversight but then lobbied for regulations that would not impose any competitive cost disadvantages as between supposedly competing market participants).

69. *Reports of Selected Salmonella Outbreak Investigations*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/salmonella/outbreaks.html> (last updated Jan. 14, 2014).

70. See FDA Food Safety Modernization Act, Pub. L. No. 111-353, 124 Stat. 3885 (2011).

71. *Id.* See also FOOD & DRUG ADMIN., FSMA FACTS: BACKGROUND ON THE FDA FOOD SAFETY MODERNIZATION ACT (2011), available at <http://www.fda.gov/downloads/Food/GuidanceRegulation/UCM263773.pdf> (demonstrating the FSMA's broad scope).

72. FOOD & DRUG ADMIN., *supra* note 71.

73. Rita Marie Cain, *Salads, Safety and Speech under the National Leafy Greens Marketing Agreement*, 67 FOOD & DRUG L.J. 311, 327, 327 n.148 (2012) (quoting comments of Consumers Union on proposed USDA National Marketing Agreement for leafy greens).

effective in guaranteeing all consumers safe food. But not only does such an approach drive the costs of regulatory compliance to small-scale producers with borderline profitability and few, if any, capital resources; it assumes that all marketplaces require the same level and kind of regulation, ignoring that when a producer literally stands behind a product, face-to-face with a consumer, there is an effective enforcement mechanism already in effect. Why, then, not protect and expand this mechanism instead of by regulation putting it at risk of again disappearing?

The regulation of food quality has always been sold as imperative, a set of rules and enforcement mechanisms necessary to make food safe and to protect the otherwise vulnerable consuming public. This imperative was and is advanced by those with established interests in maintaining the continued primacy of regulation based on inspection and testing—that is, those who make the law (and thus can claim to be protecting the public), those who enforce the regulations (and thus earn money doing so), and those who use and financially benefit from the regulations (and thus drive up the costs of upstart competitors).<sup>74</sup> But if we honestly question the necessity of this regulatory enterprise, it is well-nigh impossible to avoid the conclusion that regulations should apply only where consumers are not in a position to protect themselves. For example, instead of spending hundreds of millions of dollars per year on federal meat inspection, why not remove the USDA mark of inspection from all meat and educate the public that meat produced in massive plants is a very risky product indeed?<sup>75</sup> The same kind of education could be done with regard to bagged produce processed on a large-scale and distributed nationwide. But right now, the regulatory imperative stops this education from happening because the government says the food is safe.

The current regulatory regime legitimates and facilitates the now globalized commerce in food. Doing so increases—not decreases—the risk of adulteration because it creates greater invisibility in the system and thus more opportunity to profitably adulterate without detection. Thus, that the law continues to fail in achieving its mission is proven simply by looking at the continuing plague of foodborne illness, a plague first made apparent during the 1993 Jack in the Box *E. coli* outbreak. The law provides its stamp of approval but never really does its job of making the food it regulates consistently safe to buy and eat. Meanwhile, the push for safety adds unnecessary costs to local food production with

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74. FOOD & DRUG ADMIN., *supra* note 71.

75. By one count, there were 428 outbreaks linked to ground beef from 1998 to 2007, involving nearly 10,000 documented illnesses. Stuart & Worosz, *supra* note 67, at 291.

no commensurate increase in safety or quality. And so the plague continues.



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