

# Pay No Attention to That Man Behind the Curtain: Concealment, Revelation, and the Question of Food Safety

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## I. INTRODUCTION: PULLING BACK THE CURTAIN ON FOOD SAFETY

In the penultimate scene of the classic film *The Wizard of Oz*,<sup>1</sup> Dorothy and her fellow travelers—Scarecrow, Tin Man, and Cowardly Lion—have returned to the Emerald City, carrying with them a broom—proof that they achieved their mission of slaying the Wicked Witch of the West. Standing in the throne room of the palace, and having already presented the broom, the fearsome visage of the Wizard floats before them and tells them, “Go away and come back tomorrow.” Dorothy challenges the Wizard to keep his promise to send her home, to which the Wizard responds fiercely, “Do not arouse the wrath of the Great and Powerful Oz!” It is at this point that Dorothy’s dog, Toto, runs to one side and pulls back a curtain, revealing the subterfuge that manufactures the floating image of the Wizard, the thunderclaps, and his booming voice. Instead of being both the source and by-product of awesome magic, the Wizard is revealed to be merely the result of technological wizardry, a stunt performed for a public all too willing, indeed wanting, to believe in such magic.

Realizing that the reality of his mundane status has been revealed, the Wizard (should it be “Wizard” now?) shouts, “Pay no attention to that man behind the curtain!” Of course, the reality cannot now be unseen; once revealed, there is no further act of subterfuge or concealment

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1. THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939). The ultimate, or final, scene in the film is, of course, when Dorothy, following the direction of Glinda the Good Witch, clicks the heels of the ruby slippers together three times while repeating the famous phrase, “There’s no place like home,” thus transporting her from Oz back to Kansas.

that can fully undo (or erase) the revelation. And it is for this reason that both Dorothy and the Wizard are forced into a new kind of relationship, a rapprochement that requires an integration of a new reality, one that allows no room for the magical thinking of before.

The history of food safety in the United States has, since at least the second half of the nineteenth century, played out along lines remarkably similar to the scene from *The Wizard of Oz* just described. Despite knowledge that commerce in food is a profit-driven enterprise, the public has consistently put great faith in the wholesomeness and safety of the food being purchased.<sup>2</sup> To some extent, such faith is necessary, even if not always justified. In making the decision to put a bite of food in one's own mouth, or the mouth of a friend or family member, a form of faith or trust must accompany the act of eating. For who would knowingly eat food suspected to be unsafe? But that is precisely what millions of people do every year, with a great many of them falling ill as a result.<sup>3</sup> It is true that only a small minority of those made ill ever learn what particular food item was the cause and what particular manufacturer was responsible.<sup>4</sup> It is, however, no secret that food, in general, is a significant cause of illness each year, and is not as safe as it could be if made with greater care under more effective and transparent regulatory oversight.<sup>5</sup> And it is

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2. See Denis W. Stearns, *On (C)redibility: Why Food in the United States May Never Be Safe*, 21 STAN. L. & POL'Y REV. 245, 248–50, 249 n.12 (2010) [hereinafter Stearns, *On (C)redibility*] (explaining how the profitability of food depends in part on the ability to avoid investment in improved safety, causing significant amounts of foodborne illness that is never traced to its source).

3. 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 persons each year suffer a foodborne illness due to a major pathogen, a category that includes *E. coli* O157:H7).

4. Stearns, *On (C)redibility*, *supra* note 2, at 249 n.12 (citing two studies in support of assertion that a “vast majority of foodborne illness in the United States is, each year, attributable to unidentified food items”). See also Painter et al., *supra* note 3, at 407 (explaining results of the study confirmed 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”).

5. For example, a 2014 GAO report concluded that, despite the USDA Food Safety and Inspection Service (FSIS) launching an initiative in 2006 to reduce *Salmonella* in raw meat and poultry, a 2013 food safety progress report found “Salmonella infections in humans have not decreased, and the incidence of *Campylobacter* in humans increased by 13% in 2013 compared with previous years from 2006 through 2008 based on CDC’s long-term comparison.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-14-744, FOOD SAFETY: USDA NEEDS TO STRENGTHEN ITS APPROACH TO PROTECTING HUMAN HEALTH FROM PATHOGENS IN POULTRY PRODUCTS 2 (2014), available at <http://www.gao.gov/assets/670/666231.pdf>. See also Alvin Schupp et al., *Impacts of Selected, Media-Reported Beef Safety Problems on Consumer Beef Purchases*, 31 SW. ECON. REV. 13, 14 (2004) (“While the industry has made strides in reducing the incidence of [pathogen-related] safety problems, they have proven to be difficult to eliminate.”). When researchers such as the authors of the just-cited study, aligned and funded by the meat industry, note the difficulty of eliminating the risk of pathogens from meat, what is consistently not said is that this difficulty is wholly a consequence

precisely because food both could be safer, and is so often found to be unsafe, that the dynamic of concealment and revelation so inevitably leads to either denial or despair on the part of the public, with “consumers often feel[ing] powerless with reference to avoiding food safety problems.”<sup>6</sup>

Notwithstanding the repeated assertions of the United States Department of Agriculture (USDA) and food industry officials to the contrary, the food supply in the United States is not the safest in the world.<sup>7</sup> When faced with the ubiquity of unsafe food in the United States, the public has few choices beyond simply opting out of eating certain categories of food. For example, given the number of outbreaks linked to fresh sprouts, there is simply no way that I would ever eat sprouts again.<sup>8</sup> Moreover, we know that raw poultry is so commonly contaminated with *Salmonella* and *Campylobacter* that consumers are instructed to assume that all poultry purchased is contaminated, and then to handle and cook the meat accordingly.<sup>9</sup> But would the poultry industry accept a warning

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of not being able to eliminate the risk while keeping the prices the same. Interestingly, these same researchers go on to say that irradiation would be one means of eliminating the risk, but this process “has not been accepted by many consumers.” *Id.* But note that irradiation is a process that eliminates the contamination on meat that is placed there as a result of the slaughtering process. There is no need to eliminate contamination if the slaughtering process does not contaminate the meat in the first place.

6. Schupp et al., *supra* note 5, at 13.

7. See, e.g., THE PEW CHARITABLE TRUSTS & CTR. FOR SCI. IN THE PUB. INTEREST, MEAT AND POULTRY INSPECTION 2.0: HOW THE UNITED STATES CAN LEARN FROM THE PRACTICES AND INNOVATIONS IN OTHER COUNTRIES 20 (2014), available at [http://www.pewtrusts.org/~media/Assets/2014/10/Meat\\_and\\_Poultry\\_Inspection\\_ARTFINAL\\_v5.pdf?la=en](http://www.pewtrusts.org/~media/Assets/2014/10/Meat_and_Poultry_Inspection_ARTFINAL_v5.pdf?la=en) (concluding that “inspection methods developed in the early 1900s still form the backbone of meat inspection programs [in the United States]” and that such methods “are much less effective in protecting consumers from the modern-day hazards that commonly contaminate meat and poultry products”); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-794, FOOD SAFETY: SELECTED COUNTRIES’ SYSTEMS CAN OFFER INSIGHTS INTO ENSURING IMPORT SAFETY AND RESPONDING TO FOODBORNE ILLNESS 2 (2008), available at <http://www.gao.gov/assets/280/276340.pdf> (finding that food safety systems in the United States are lacking when compared to eight other countries, in large part because of how fragmented the federal food safety system is and how that fragmentation causes “inconsistent oversight, ineffective coordination, and inefficient use of resources”).

8. The primary federal website for food safety information advises that the elderly, children, pregnant women, and immune-compromised persons should not eat sprouts. See U.S. Dept. of Health & Human Servs., *Sprouts: What You Should Know*, FOODSAFETY.GOV, <http://www.foodsafety.gov/keep/types/fruits/sprouts.html> (last visited Mar. 12, 2015) (noting that “[s]ince 1996, there have been at least 30 reported outbreaks of foodborne illness associated with different types of raw and lightly cooked sprouts”).

9. See USDA FOOD SAFETY & INSPECTION SERV., FOOD SAFETY INFORMATION: CHICKEN FROM FARM TO TABLE (2014), available at [http://www.fsis.usda.gov/wps/wcm/connect/ad74bb8d-1dab-49c1-b05e-390a74ba7471/Chicken\\_from\\_Farm\\_to\\_Table.pdf?MOD=AJPERES](http://www.fsis.usda.gov/wps/wcm/connect/ad74bb8d-1dab-49c1-b05e-390a74ba7471/Chicken_from_Farm_to_Table.pdf?MOD=AJPERES) (noting that “[a]s on any perishable meat, fish or poultry, bacteria can be found on raw or undercooked chicken”). A study published in 2001, which was based on the testing of 825 samples of raw chicken

label beyond the currently benign one that states, “Some food products may contain bacteria that could cause illness if the product is mishandled or cooked improperly”?<sup>10</sup> Of course not. Because to provide the public with more specific information about the harmful bacteria invisibly present on meat and poultry would risk an act of revelation like that which dethroned the Wizard of Oz, revealing him to be a mere huckster, a former peddler of patent medicines that promised miraculous cures that could never be had. In short, the meat industry does “not want package labels to suggest that anything might be inherently wrong with their products.”<sup>11</sup>

The meat industry and the USDA are in many respects the same as the “Wizard,” putting on an act that it hopes convinces the public to believe that the industry wields mighty powers. It promises safety, and wants such promises to be credible, because without credibility its products will not be purchased and consumed. The strategy is less about the actual delivery of safety than it is about preserving the credibility of the promise of safety. For so long as the promise of safety is believed, the public will continue to purchase and eat meat. And that is why the fact of federal inspection is so important; without the seeming guarantee from

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purchased at grocery stores, found that over 70% of the chicken was positive for *Campylobacter*. See generally C. Zhoa et al., *Prevalence of Campylobacter spp., Escherichia coli, and Salmonella Serovars in Retail Chicken, Turkey, Pork, and Beef from the Greater Washington, D.C. Area*, 67 APPLIED ENVTL. MICROBIOLOGY 5431–36 (2001). In 1996, USDA established *Salmonella* performance standards with the goal of reducing, not eliminating, the prevalence of bacterial pathogens in meat and poultry. See FOOD SAFETY AND INSPECTION SERV., PROGRESS REPORT ON SALMONELLA AND CAMPYLOBACTER TESTING OF RAW MEAT AND POULTRY PRODUCTS, 1998–2012 (2012), available at <http://www.fsis.usda.gov/wps/wcm/connect/8d792eef-f44d-4ccb-8e25-ef5bdb4c1dc8/Progress-Report-Salmonella-Campylobacter-CY2012.pdf?MOD=AJPERES> (noting in almost impenetrable prose and difficult-to-decipher statistics that a majority of establishments (73.14% for chicken) had 50% or fewer positive test results than that set as the *Salmonella* performance standard goal).

10. 9 C.F.R. § 317.2 (1)(1)(i) (2015) (dictating that the quoted language appear on all meat that is destined for household consumers). The full text of the “Safe Handling Label” can be found on the USDA website here: [http://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/teach-others/download-materials/image-libraries/safe-handling-label-text/ct\\_index](http://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/teach-others/download-materials/image-libraries/safe-handling-label-text/ct_index). The exact language of the warning label was negotiated with the food industry, which had won a preliminary injunction that prevented the USDA from issuing an earlier version of the warning label as an “emergency” measure in response to the Jack in the Box outbreak. See *Tex. Food Indus. Assoc. v. USDA*, 842 F. Supp. 254, 260–61 (W.D. Tex. 1993) (finding that harm that the warning label rule threatened to impose on food industry outweighed any damage that the injunction might cause). See also MARION NESTLE, *SAFE FOOD: BACTERIA, BIOTECHNOLOGY, AND BIOTERRORISM* 76–80 (2003) (describing industry efforts to block warning labels in favor of continuing to use “consumer education” as primary means of preventing illness).

11. NESTLE, *supra* note 10, at 77. In response to industry complaints, the USDA made a number of concessions, including limiting the proposed rule to ground meat and poultry. *Id.* Despite these concessions, three industry groups still decided to sue. *Id.*

the USDA that meat is safe because it has been “[i]nspected and passed,” the public might pay greater attention to the fact that neither the USDA nor the meat industry claims that meat is free of pathogens as a result of it having been inspected. Indeed, in agreeing with the position taken by the USDA in resisting (along with industry) an attempt to require warning labels on meat, in 1974 the D.C. Circuit agreed that “Congress did not intend the [mark of inspection] to import a finding that meat and poultry products were free from salmonellae.”<sup>12</sup>

For that reason, among others, the metaphor of the “Wizard” is an apt one when applied to the meat industry: it hides behind the curtain of federal meat inspection, and uses the amplified voice of the USDA mark of inspection to assure the public that the meat it buys has been assuredly determined to be wholesome and safe for consumption. What else could be meant by the first sentence in the USDA-mandated Safe Handling Instructions: “This product was prepared from inspected and passed meat and/or poultry.”<sup>13</sup> Despite the second sentence that warns “products may contain bacteria,” and that illness could result “if the product is mishandled or cooked improperly,”<sup>14</sup> the phrase “inspected and passed” plainly implies a process that is supposed to ensure that the meat is free of pathogens. Indeed, observe what a main meat industry website proclaims

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12. *Am. Pub. Health Ass’n v. Butz*, 511 F.2d 331, 335 (D.C. Cir. 1974) (affirming grant of summary judgment against effort to require USDA to place warning labels on meat because inspection methods were insufficient against microorganisms like *Salmonella*). The warning sought by APHA at the time read as follows:

Caution: Improper handling and inadequate cooking of this product may be hazardous to your health. Despite careful government inspection, some disease-producing organisms may be present. Consult your local health department for information on the safe handling and preparation of this product.

*Id.* at 333. In refusing to require the USDA to use the warning, the court quoted from the USDA’s letter to the court in which the agency had stated its then position, to which the court added on a memorable conclusion, as follows:

As the Department said in its letter of August 18, 1971 “the American consumer knows that raw meat and poultry are not sterile and, if handled improperly, perhaps could cause illness.” In other words, American housewives and cooks normally are not ignorant or stupid and their methods of preparing and cooking of food do not ordinarily result in [S]almonellosis.

*Id.* Although the court did not itself rule on whether the USDA could declare *Salmonella* to be a declarant under the FMIA, the USDA would subsequently act as if that was what had occurred, doing so as a means of justifying its inaction in combatting *Salmonella*.

13. 9 C.F.R. § 317.2(1)(2) (2015). The safe handling instructions “shall accompany every meat or meat product . . . destined for household consumers, hotels, restaurants, or similar institutions and shall appear on the label.” 9 C.F.R. § 317.2(1)(1)(i) (2015). Identical instructions are required for poultry products. 9 C.F.R. § 381.125 (2015).

14. 9 C.F.R. § 317.2(1)(2) (2015).

with regard to the role of the Food Safety and Inspection Service (FSIS) and meat inspection:

The Food Safety and Inspection Service (FSIS) of the United States Department of Agriculture (USDA) is responsible for ensuring that meat, poultry and egg products are safe, wholesome, and accurately labeled. FSIS enforces the Federal Meat Inspection Act, the Poultry Products Inspection Act, and the Egg Products Inspection Act, which require the federal inspection of meat and poultry products prepared for distribution in commerce for use as human food.<sup>15</sup>

Despite a 1998 transformation in federal meat inspection intended to give “industry, not [g]overnment, the primary responsibility for ensuring the safety of meat and poultry products,”<sup>16</sup> industry has continued to advance the narrative that it is federal regulation and inspection that is the guarantor of safety, as shown by the mark of inspection. As such, the public continues to be invited to believe in the USDA as “great and powerful,” just like the Wizard of Oz.

To examine the role of the federal government in the regulation of meat safety, and the way the meat industry uses the fact of regulation to perpetuate the credibility of its products and its safety promises, this Article argues that what matters most to both the government and industry is consumer confidence in safety, and not safety itself. Without sufficient consumer confidence in the safety of meat, both sales and the government’s credibility suffer. As a result, the interests of industry and government align in protecting the credibility of the regulatory system as a whole, even where that alignment of interests is at the expense of public health. Moreover, because the narrative of a “great and powerful” regulatory system is, in the end, reassuring to a public that needs and wants reassurance, it is only when facts of sufficiently disturbing power are revealed that the status quo is challenged and systemic change becomes

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15. Am. Meat Inst., *Inspection: Labeling*, MEATSAFETY.ORG, <http://www.meatsafety.org/ht/d/sp/i/26846/pid/26846> (last visited Feb. 14, 2015). The Meatsafety.org website is sponsored by the American Meat Institute (AMI). *Id.* The AMI is now known as the North American Meat Institute (NAMI) as a result of a merger with the North American Meat Association in 2015. *Id.* The description of the AMI’s history on the NAMI website states that “[t]he American Meat Institute (AMI) was founded in Chicago, IL in 1906 just after the passage of the Federal Meat Inspection Act, one of the first U.S. laws to set federal food processing standards. . . . In 2006, AMI celebrated its 100 year anniversary as a leading trade association for the meat and poultry industry.” *History*, N. AM. MEAT INST., <http://www.meatinstitute.org/ht/d/sp/i/232/pid/232> (last visited Feb. 14, 2015).

16. Estate of Kriefall *ex rel.* Kriefall v. Excel Corp., 665 N.W.2d 417, 430 (2003) (quoting USDA Office of Inspector Gen., FOOD SAFETY AND INSPECTION SERVICE IMPLEMENTATION OF THE HAZARD ANALYSIS AND CRITICAL CONTROL POINT SYSTEM, Rep. No. 24001-3-At, at 1 (2000)).

inevitable. To resist or avoid this change, it becomes necessary to suppress doubt about safety as a means of maintaining consumer confidence, and to keep concealed facts that would otherwise give rise to such doubts. Such suppression and concealment also leads—and has, in fact, led—to industry efforts to deter those who might seek to call attention to food safety risks or shocking production practices.

In looking at the dynamics of concealment and revelation, and the effects on food safety, Part II of this Article looks at the origins of federal food regulations in revelations of production practices that so disgusted the public that industry embraced the need for regulation to restore consumer confidence and thus protect sales. In Part III, this Article looks at another form of revelation, this one involving claims made about potential food safety risks, claims that call into question the safety of a particular product, causing sales to fall. Lacking any regulatory response, this time industry went to court, filing product disparagement lawsuits. Part IV of this Article explores a recent product disparagement lawsuit in more detail, a lawsuit in which a meat processor alleged that its product—lean finely textured beef—was disparaged by being called “pink slime,” causing huge financial losses when sales of the product plummeted. Finally, this Article concludes by arguing that visibility and transparency are prerequisites to increased food safety; even if the public would rather not know the details about how meat is produced, it is only if the curtain is pulled back, and reality revealed, that sustained progress toward a real increase in food safety can finally be achieved.

## II. THE WILLFUL SUSPENSION OF DISBELIEF: THE GOVERNMENT REGULATION OF CONSUMER CONFIDENCE, INSTEAD OF FOOD SAFETY

*“The history of food safety legislation and rulemaking in the United States is largely one of reaction.”*<sup>17</sup>

Looking at the history of federal food laws, beginning in 1906 when the first such laws were enacted,<sup>18</sup> it is apparent that the real goal of the laws was not to ensure safe and wholesome food. Instead, the goal

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17. 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. 375, 388 (2005) [hereinafter Stearns, *Preempting Food Safety*] (providing details of the outbreak, including its epidemiology and the resulting investigation).

18. The Pure Food and Drug Act, Pub. L. No. 59-384, 34 Stat. 768 (1906) and Meat Inspection Act, Pub. L. No. 106-274, 34 Stat. 1260 (1907).

was to restore consumer confidence.<sup>19</sup> After the publication of *The Jungle*<sup>20</sup>—a novel portraying unsanitary practices in the United States’ meatpacking industry—the sale of meat plummeted, prompting the industry to seek out government regulation as a means of showing the public that the safety of meat could be trusted.<sup>21</sup> With passage of the Federal Meat Inspection Act (FMIA), meat was subject to continuous federal inspection, certified by a federal mark of inspection placed on all meat products sold in interstate commerce stating “USDA Inspected and [P]assed.”<sup>22</sup> And even better, in the view of the still powerful meat industry, Congress was ultimately convinced to let the cost of inspection be borne by taxpayers, a cost shifting that resulted in “considerable bitterness” among several of the senators who had sought passage of the Act.<sup>23</sup>

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19. Roger Roots, *A Muckraker’s Aftermath: The Jungle of Meatpacking Regulation After a Century*, 27 WM. MITCHELL L. REV. 2413, 2414 (2001) (“About the only aspect of federal meat inspection laws that all critics agree with is that federal meat quality laws were originally intended to counteract the hysteria created by *The Jungle*.”). See also Stearns, *Preempting Food Safety*, *supra* note 17, at 375–76 & nn.66–67 (discussing publication of *The Jungle* as a kind of “tipping point” for enactment of federal food regulation, and citing multiple authorities making the same or similar point).

20. UPTON SINCLAIR, *THE JUNGLE* (1906).

21. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 461 (2d ed. 1985). Accord Roots, *supra* note 19, at 2419 (citing FRIEDMAN and writing about how loss of sales so damaged “the pocketbooks of meat-packing companies that many of them actually *sought out* government regulation” (emphasis in original)); C.C. Regier, *The Struggle for Federal Food and Drugs Legislation*, 1 LAW & CONTEMP. PROBS. 3, 13 (1933) (“[Packers] began to realize that government inspection was the only thing that could save their business[es], for that alone could restore the confidence of the public[.]”). But see Dennis R. Johnson, *The History of the 1906 Pure Food and Drugs Act and the Meat Inspection Act*, 37 FOOD DRUG COSMETIC L.J. 5, 9 (1982) (noting that the release of a report commissioned by President Roosevelt—the Neill–Reynolds Report—did as much to hurt meat sales (“cut in half”) and increase industry support for passage of the Act); Arlene Finger Kantor, *Upton Sinclair and the Pure Food and Drugs Act of 1906: “I Aimed at the Public’s Heart and By Accident I Hit It in the Stomach”*, 66 AM. J. PUB. HEALTH 1202, 1202–05 (1976) (noting that public reaction to the Neill–Reynolds report helped assure passage of the laws).

22. For the statutory provision governing the mark of inspection, see 21 U.S.C. § 606 (declaring that “inspectors shall mark, stamp, tag, or label as ‘Inspected and passed’ all such products found to be not adulterated; and said inspectors shall label, mark, stamp, or tag as ‘Inspected and condemned’ all such products found adulterated”).

23. Regier, *supra* note 21, at 15. During the Senate debate, one senator memorably declared, “The most loathsome and slimy criminal that curses the earth is the one that adulterates food.” *Id.* He further declared:

Honesty and decency stand stupified [sic] before the effrontery of the demands of these criminals—that the people pay the cost of the inspection. What is their proposition? That the people shall pay to have them stop their filthy and dangerous practices; that the people shall pay to compel them to obey the law; that the people shall pay to stop them from defrauding and robbing the public; that the people shall pay to prevent them from destroying life and spreading disease; that the people shall pay to stop them from poisoning and murdering the innocent and helpless! A proposition more monstrous never came from the polluted lips of crime.



Certainly, the stated goal of the FMIA was to prohibit the sale of “adulterated” or “misbranded” food.<sup>24</sup> But such a prohibition was in many respects beside the point. It was the continued sale of meat that was to be protected, the regulation and inspection being a necessary grease to keep the wheels of commerce spinning. That sales of certain products were from time to time prevented is undoubtedly true.<sup>25</sup> Just as true is that industry often challenged some of the regulatory restrictions imposed, often with success.<sup>26</sup> Nonetheless, if you had gone at any point to a segment of industry and offered an exemption from the law, or offered to remove inspectors from facilities, it is incredibly unlikely that any company would have ever accepted the offer. To do so would have been to commit economic suicide, giving market share to competitors whose products still carried the mark of inspection. And even if, from time to time, a meat processor might be shut or sanctioned, such an enforcement action served the larger narrative of systemic effectiveness, depicting the sanctioned processor as an aberration—a bad actor evidencing that all other processors played by the rules—and that the public was justified in believing that all other meat products were safe to buy and eat.

Consequently, in the decades that followed passage of the FMIA, all that industry needed was to keep regulation light enough to not be cost prohibitive—which is to say, profit eroding—while at the same time keeping the fact of regulation in the public eye to assure that the meat being purchased was safe and wholesome. And as to the members of the

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*Id.* (quoting 40 CONG. REC. 9470–72 (1906)).

24. 21 U.S.C. § 610(c) (1978) (“No person, firm, or corporation shall . . . sell, transport, offer for sale or transportation, or receive for transportation, in commerce, (1) any such articles which (A) are capable of use as human food and (B) are adulterated or misbranded[.]”). This provision also bars the sale, transport, or offer for sale or transport “any articles required to be inspected under this subchapter unless they have been so inspected and passed.” 21 U.S.C. § 610(c)(2) (1978).

25. *See, e.g.*, *Brougham v. Blanton Mfg. Co.*, 249 U.S. 495, 501 (1919) (reversing the grant of an injunction and upholding the USDA’s authority under FMIA to prevent the sale of oleomargarine using the trade name “Creamo” on the grounds that use of the trade name was misleading and thus constituted “misbranding”).

26. *See, e.g.*, *St. Louis Indep. Packing Co. v. Houston*, 215 Fed. 553, 560 (8th Cir. 1914) (holding that FMIA did not give the USDA authority to withhold the mark of inspection from sausage where cereal was in excess of two percent where the name of the product was not false or deceptive, and the products were not unsafe, unwholesome, or unfit for human food). Until the major transformations in meat inspection that started in the wake of the 1993 Jack in the Box *E. coli* O157:H7 outbreak, court challenges were not much needed because of the industry’s success in ensuring that regulations were largely aligned with industry interests. *See Stearns, Preempting Food Safety, supra* note 17, at 378–79 & nn.17–18 (describing how a “fundamental shift in how [the agency] operated” occurred after the outbreak, when USDA “demonstrated a renewed ability to put public interests ahead of traditional deference to Meat Industry concerns” and was an example of the agency no longer subject to its previous “capture”).

public, they were happy to suspend disbelief, so long as challenging or otherwise disquieting facts to the contrary were sufficiently kept from attention.

Keeping the safety risks of meat from public attention is not that difficult for two main reasons. First, what primarily makes meat unsafe is invisible—that is, bacterial pathogens like *E. coli*, *Salmonella*, and *Campylobacter*.<sup>27</sup> But, as the court that rejected an attempt to require warning labels on meat explained in defense of the USDA: “[W]e are mindful that salmonellae can be detected only by microscopic examination. No one contends that Congress meant that inspections should include such examinations.”<sup>28</sup> In other words, the USDA was not required to inspect for that not visible to the eye, and the public need not be warned about a safety risk that it could not see either. The second reason that safety risks of meat do not attract attention (in the absence of a revelatory event) is because death and illness also remain largely invisible. Only a “small proportion of deaths” are linked to reported outbreaks, and unknown agents cause at least 81% of illnesses and hospitalizations.<sup>29</sup> As such, even those sickened or killed by unsafe meat might never know.

Bad facts do not stay hidden forever, though. And if you look at each time that food laws were overhauled, you will always find some kind of catastrophe that preceded the overhaul. These preceding catastrophes quickly made the suspension of disbelief impossible by coalescing the attention of the public and focusing that attention on the need for decisive change. With regard to meat, the catastrophe occurred in 1993 with the Jack in the Box *E. coli* O157:H7 outbreak.<sup>30</sup> The facts of this tragic outbreak, in which hundreds of children fell seriously ill and four died, has been recounted at length before, making a full recitation of the

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27. Painter et al., *supra* note 3, at 409 (finding that of 4,589 outbreaks, 18% of bacterial illnesses were attributable to poultry, and 13% were attributable to beef).

28. *Am. Pub. Health Ass'n v. Butz*, 511 F.2d 331, 335 (D.C. Cir. 1974) (affirming summary judgment in favor of USDA in suit alleging violation of Wholesome Meat and Poultry Products Acts).

29. See Paul Frenzen, *Deaths Due to Unknown Agents*, 10 EMERGING INFECTIOUS DISEASES 1536, 1536 (2004) (“[M]ost 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).

30. See generally JEFF BENEDICT, *POISONED: THE TRUE STORY OF THE DEADLY E. COLI OUTBREAK THAT CHANGED THE WAY AMERICANS EAT* (2011) (providing a book-length account of the outbreak, the litigation arising from it, and the toll that *E. coli* O157:H7 bacteria took on those sickened and killed as a result of contaminated meat). 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, and this work is recounted in Benedict’s book. See, e.g., *id.* at 125–29.

details unnecessary here.<sup>31</sup> Suffice it to say that one primary effect of this outbreak was to make a transformation of meat safety regulation and inspection possible in the United States, at last overcoming the resistance of both the USDA and the meat industry.<sup>32</sup>

In the face of widespread criticism that the manner of meat inspection had not kept up with either science or reality,<sup>33</sup> the USDA did an

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31. See Stearns, *Preempting Food Safety*, *supra* note 17, at 389–90 & nn.70–76 (setting forth details of the outbreak, including the epidemiological investigation, and the nature and extent of the illnesses that comprised the outbreak).

32. *Id.* at 391 & n.77 (“The fact that the Jack in the Box outbreak resulted in relatively prompt and significant changes to the federal food safety regulations . . . is widely acknowledged.”). See also NESTLE, *supra* note 10, at 62–85 (describing the twenty years of consistent and often successful efforts to block regulations that might adversely affect the meat industry’s commercial interests, the denial of responsibility for outbreaks of foodborne illness, and the invocation of science as a means to prevent unwanted oversight). This kind of regulatory transformation is not unique to the meat industry. For example, long-sought changes to the Pure Food and Drug Act of 1906, until “headlines the nation over broke the news of a mounting death toll” of over one-hundred children killed by a liquid form of the sulfa drug “Elixir Sulfanilamide” made with Diethylene glycol, a poisonous substance that the company had tested for appearance, fragrance, and flavor, but had not tested for safety. James Harvey Young, *The Government and the Consumer: Evolution of Food and Drug Laws, The 1938 Food, Drug, and Cosmetic Act*, 13 J. PUB. L. 197, 203 (1964). See also Paul M. Wax, M.D., *Elixirs, Diluents, and the Passage of the 1938 Federal Food, Drug and Cosmetic Act*, 122.6 ANN. INTERNAL MED. 456, 456–61 (1995) (detailing the Elixir Sulfanilamide disaster of 1937 and how FDCA changed FDA from a policing agency primarily concerned with confiscation of adulterated drugs to a regulatory agency overseeing the evaluation and approval of new drugs). The FDA’s powers regarding the approval of drugs were increased again in 1962 with the passage of the Kefauver–Harris Amendments, which authorized the FDA to require drug companies to conduct and submit tests determining safety and efficacy, to pre-clear human trials, drug advertising, and labeling, and increased regulatory power over manufacturing. See Jeremy Greene & Scott Podolsky, *Reform, Regulation, and Pharmaceuticals—The Kefauver–Harris Amendments at 50*, 367 N. ENGL. J. MED. 1481, 1481–83 (2012) (describing how the amendments, among other things, gave FDA authority to require proof of efficacy, and not just safety, in the approval of drugs).

33. A report issued in 1994, in the wake of the Jack in the Box *E. coli* outbreak, concluded that “FSIS’s meat and poultry inspection system does not efficiently and effectively use its resources to protect the public from the most serious health risks associated with meat and poultry-microbial contamination.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-94-110, FOOD SAFETY: RISK-BASED INSPECTIONS AND MICROBIAL MONITORING NEEDED FOR MEAT AND POULTRY 2 (1994), available at <http://www.gao.gov/assets/220/219682.pdf>. The report then went on to observe and explain:

The system—originally designed around the turn of the century to protect against health threats from diseased animals—is hampered by inflexible legal requirements and relies on outdated, labor-intensive inspection methods. Under current law, federal inspectors must examine each carcass slaughtered—nearly 7 billion birds and livestock annually—and visit each of the approximately 5,900 processing plants at least once during each operating shift. During these inspections, FSIS inspectors rely on their senses (smell, touch, and feel) to make judgments about disease conditions, contamination, and sanitation. However, these inspections, which consumed about two-thirds of FSIS’s 10,750 staff year budget in fiscal year 1993, cannot detect microbial contamination.

*Id.* It makes sense, though, that the inspection methods designed in response to revelations in *The Jungle* focused more on the disgusting than dangerous. *Id.* at 3 (“The Jungle raised a public outcry

about-face in its position on whether bacterial pathogens could be regulated as “adulterants” within the meaning of the FMIA.<sup>34</sup> Suddenly, instead of siding with the meat industry in its position that the consumer was responsible for making meat safe to eat by cooking and handling it properly, the USDA decided to recognize the special danger of *E. coli* O157:H7 and declared it a per se adulterant under the FMIA, and thus began testing for bacteria in meat processing plants.<sup>35</sup> More importantly, though, the USDA began to speak out about pathogens—an invisible contaminant. Gone was the “poke-and-sniff,” organoleptic approach to inspection, which relied on sight and smell as the primary means of assuring that only meat of a sufficient quality and safety made it into the food supply.<sup>36</sup> For the first time, the real safety risks—the invisible safety risks that posed the real threat to the public health—would be given attention.

When accused two decades earlier of misbranding for its placement of the mark of inspection on meat contaminated with *Salmonella*, the USDA resisted the effort to directly warn the public with product labels, arguing that the public already understood the risk.<sup>37</sup> Thus, as a matter of regulation, the agency fought to remain silent about the dangers such pathogens posed to the public and the agency’s lack of action in preventing the sale of contaminated meat. It was only when the Jack in the Box

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about contagious animal diseases, unsanitary conditions, deceptive practices, and lax government inspection at meat packing plants.”).

34. The announcement was first made by Michael Taylor at a speech on September 24, 1994 to the American Meat Institute (AMI), where he stated:

To clarify an important legal point, we consider raw ground beef that is contaminated with *E. coli* O157:H7 to be adulterated within the meaning of the [FMIA]. We are prepared to use the Act’s enforcement tools, as necessary, to exclude adulterated product from commerce. Finally, we plan to conduct targeted sampling and testing of raw ground beef at plants and in the marketplace for possible contamination.

Michael Taylor, Speech to AMI (Sept. 24, 1994) (copy of speech in author’s possession).

35. *Tex. Food Indus. Ass’n v. Espy*, 870 F. Supp. 143, 149 (W.D. Tex. 1994) (upholding both the declaration of *E. coli* O157:H7 as an adulterant and the proposed testing program, explaining that, “unlike other pathogens, it is not ‘proper’ cooking but ‘thorough’ cooking that is necessary to protect consumers from *E. coli*. . . . Therefore, *E. coli* is a substance that renders ‘injurious to health’ what many Americans believe to be properly cooked ground beef”).

36. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 33, at 3.

37. *Am. Pub. Health Ass’n v. Butz*, 511 F.2d 331, 333 (D.C. Cir. 1974) (quoting USDA letter stating “the American consumer knows that raw meat and poultry are not sterile and, if handled improperly, perhaps could cause illness”). The USDA also argued that a “consumer education program”—a kind of indirect warning—was more than sufficient to meet its obligations under the FMIA. *Id.* (“[A] soundly designed consumer education program is the best manner in which to approach the entire problem of food-borne disease.”). A dissenting judge found it to be a “debatable proposition” whether consumers are aware of the risks, noting that the “record contains facts supporting appellants’ assertion that people are not generally aware of the danger of salmonellae, much less the safeguards required to avoid salmonellosis.” *Id.* at 336 (Robinson, III, J., dissenting).

outbreak revealed the inadequacies of both the USDA and the industry that the public responded with outraged demands for change and a regulatory response was made politically possible.

In the end, though, that regulatory response had but a single purpose: to make people stop talking about unsafe meat and go back to purchasing and consuming meat in great quantities. Neither the agency nor the meat industry was focused on a goal of eliminating the risks of pathogens in meat; instead, the goal (perhaps unstated) was to reinforce the view that a regulatory response—and seemingly stricter enforcement—had the ability to make meat as safe as the public expected. But this was more subterfuge than anything else, as the USDA’s much-touted overhaul of meat inspection

ultimately failed to deliver the promised increase in meat safety. . . . Instead of improved 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>38</sup>

Thus, notwithstanding the supposedly game-changing revelations of the Jack in the Box outbreak, consolidation quickly allowed industry to reassert its dominance on issues of inspection and enforcement, leading, among other things, to the USDA allowing large plants to be exempt from FSIS testing.<sup>39</sup> This exemption was one of the factors identified in 2002 as causing the second biggest ground beef recall in history—over 18 million pounds—when forty-six people in sixteen states fell ill with *E. coli* O157:H7 infections, resulting in one death.<sup>40</sup> A report by the USDA’s inspector general found that “meat inspectors and the company largely ignored evidence of *E. coli* O157:H7 contamination that began cropping up . . . more than a year before the recall and illness out-

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38. Denis Stearns, *A Continuing Plague: Faceless Transactions and the Coincident Rise of Food Adulteration and Legal Regulation of Quality*, 2014 WIS. L. REV. 421, 423 (2014) [hereinafter Stearns, *A Continuing Plague*] (questioning, among other things, why the legal regulation of quality is “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”).

39. Robert Roos, *FSIS, ConAgra Share Blame for Massive 2002 Beef Recall*, U. MINN. CTR. FOR INFECTIOUS DISEASE RES. & POL’Y (Oct. 3, 2003), <http://www.cidrap.umn.edu/news-perspective/2003/10/fsis-conagra-share-blame-massive-2002-beef-recall> (noting that in a policy that was discontinued in September 2002, large meat plants “did their own pathogen testing under HACCP plans exempt from FSIS testing”).

40. *Id.* (“A report by the [USDA’s] inspector general blames both federal meat inspectors and ConAgra Beef Co. for errors that led to a multistate outbreak.”).

break[.]”<sup>41</sup> According to the report, “FSIS inspectors at ConAgra did not perform their own tests and did not review other tests that were available to them.”<sup>42</sup>

Both regulatory agencies and the food industry respond to food safety crises with similar rhetoric touting the ability of quality regulations and inspection regimes to guarantee food safety. Consequently, the public is asked to trust that the system will do its job such that there is no reason for continuing doubts or fears. Echoing FDR’s admonishment to a public caught in the grip of the Great Depression, the message sent is that “the only thing we have to fear is fear itself.”<sup>43</sup> In this way, the public is encouraged to return the daily focus to things other than particular fears of food safety. But with this returned focus, the problems of food safety are not really solved; they are simply hidden again, behind a closed curtain, until the next exposé comes along to remind the public yet again that the “great and powerful” agency is rarely, if ever, effective as the public would like to believe.<sup>44</sup> Meanwhile, so many people continue to fall ill and die year after year because of unsafe food, in what I have previously called “a continuing plague.”<sup>45</sup> This plague, though, manages to remain a kind of background noise, hidden enough from view to avoid being a cause of public outrage and a threat to continued food sales—that is, unless people speak up.

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41. *Id.*; see also Greg Winter, *Beef Processor’s Parent No Stranger to Troubles*, N.Y. TIMES (July 20, 2002), <http://www.nytimes.com/2002/07/20/us/beef-processor-s-parent-no-stranger-to-troubles.html> (noting that ConAgra was “hardly at the extreme of the industry. In fact, it is well regarded as something of a leader in food safety by public health advocates, who argue that the real danger lies in the shortcomings of federal regulation.”). The complete Inspector General’s Report, FOOD SAFETY AND INSPECTION SERVICE OVERSIGHT OF PRODUCTION PROCESS AND RECALL AT CONAGRA PLANT (ESTABLISHMENT 969), can be found at <http://www.usda.gov/oig/webdocs/24601-2-KC%20conagra%20091603.pdf> [hereinafter INSPECTOR GEN. REPORT].

42. INSPECTOR GEN. REPORT, *supra* note 41, at iii.

43. Franklin D. Roosevelt, President, Inaugural Address (Mar. 4, 1933), in THE PUBLIC PAPERS OF FRANKLIN D. ROOSEVELT, VOLUME TWO: THE YEAR OF CRISIS, 1933, at 11–16 (Samuel I. Rosenman ed., 1938).

44. See, e.g., Wil S. Hylton, *A Bug in the System: Why Last Night’s Chicken Made You Sick*, NEW YORKER, Feb. 2, 2015, at 30, 32 (“The regulatory function at the F.S.I.S. can seem like a distant afterthought at the U.S.D.A., whose primary purpose is to advance the interests of American agriculture.”).

45. Stearns, *A Continuing Plague*, *supra* note 38, at 422 (observing that “media focus on issues of food and food safety has only increased over time . . . . But still the plague continues with no end in sight”).

### III. THE ORIGINS OF ANTI-DISCOURSE: HOW THE FOOD INDUSTRY SEEKS TO SILENCE CRITICAL SPEECH AND DISCLOSURE

For an industry built on marketing, where products seek to outshout each other for a claim on public attention, and thus market share, there is no shortage of irony in the fact that the food industry has been preeminent in seeking to silence those who attempt to contradict the carefully crafted message of food safety. The effort to silence, by way of passing food-specific libel laws, first began with what is known as the “Alar scare.”<sup>46</sup> And, as with all stories, there are many, many sides. As depicted by those seeking to present a morality tale about the stoking of unfounded paranoia and the horrors of overzealous regulators, namely the food industry, the Alar scare presents the story of how apple farmers were harmed by the public concern about a pesticide—evidence of why laws are needed to protect food producers from allegedly libelous statements that can cause sales to plummet.<sup>47</sup> As one commentator explains:

The so-called Alar scare occurred more than seven years ago, but it is still very much in the news—mainly because food and chemical industry trade groups have made it their rallying cry as they lobby for “agricultural-disparagement” laws meant to blunt criticism of their products. The Alar affair also has become a favorite media symbol for a false alarm. Reporters and pundits repeatedly refer to it as a prime example of Chicken Little environmentalism and government regulation run amok.<sup>48</sup>

But for critics of product disparagement statutes, efforts to penalize (and even criminalize) critical speech about food safety evidences a food industry that will do anything to protect consumer confidence in the safety

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46. See generally Margot Fell, Note, *Agricultural Disparagement Statutes: Tainted Beef, Tainted Speech, and Tainted Law*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 981, 986–87 (1999) (briefly summarizing the fallout, litigation-related and otherwise, from the public reaction to news that Alar could cause cancer in children, including the fact that “[m]any veggie libel laws were passed”). See also David J. Bederman et al., *Of Banana Bills and Veggie Hate Crimes: The Constitutionality of Agricultural Disparagement Statutes*, 34 HARV. J. ON LEGIS. 135, 137 (1997) (noting disparagement statutes emerged as a response to Alar incident); Howard F. Lyman, *Free Speech, Animal Law, and Food Activism*, 5 ANIMAL L. i, ii–iii (1999) (pointing out that the passage of food disparagement laws in thirteen states by 1996 “were a result of the Alar scare,” while also coinciding at that time with the unfolding mad cow epidemic).

47. Eileen Gay Jones, *Forbidden Fruit: Talking About Pesticides and Food Safety in the Era of Agricultural Product Disparagement Laws*, 66 BROOK. L. REV. 823, 832 (2001) (“Finding that state law would not protect them from the fallout from food scares, farmers rallied for a change that would be more beneficial to their interests.”).

48. Elliot Negin, *The Alar “Scare” Was For Real; and So Is That “Veggie Hate-Crime Movement”*, COLUM. JOURNALISM REV., Sept.–Oct. 1996, available at <http://www.pbs.org/tradesecrets/docs/alarscarenegin.html>.

of food, even at the price of suppressing factual information and opinion. For these critics, the story of the “Alar scare” is Exhibit A.

With the benefit of hindsight, it becomes easy to see how the revelation of Alar on apples was the source of controversy. It is also easy to see the beginning of a pattern (one that was to repeat in the two decades that followed), which goes as follows. First, there is a link provided by scientific research between a health risk and a food product. Second, there is an increase in regulatory attention to the risk, often accompanied by some public statement admitting that the agency is looking further into the matter but taking no immediate action, usually because of industry pressure. Third, there is an increase in media attention, culminating in the publication of a news story that gains widespread attention. Fourth, as a result of the attention that was prompted by the news story, public concern grows and coalesces, leading to a fall in sales of the food product. Finally, as a result of the fall in sales, the industry segment that was harmed fights back, usually on multiple fronts, using not only a public relations strategy, but also seeking regulatory intervention of some kind, and sometimes filing a lawsuit. And it was in precisely this way that the Alar scare played out.

In ruling on a motion to dismiss and a motion to remand, the United States District Court for the Eastern District of Washington set the factual stage for the Alar lawsuit in a way that follows the pattern just described:

On February 26, 1989 the CBS television program “60 Minutes” aired a segment highly critical of daminozide, more commonly known by its tradename as Alar. Alar was commonly used in the apple industry as a growth regulator. By maintaining the fruit on the tree longer, cosmetic appearance is improved, fruit disorders are reduced, size is increased and storage life is enhanced. Various public interest groups, among them the Natural Resources Defense Council [NRDC], expressed concern over research which indicated that Alar chemically degrades into unsymmetrical dimethylhydrazine [UDMH], a carcinogen. Alar cannot be washed off the fruit, nor will peeling remove it. The substance remains in the flesh of the apple regardless of processing procedures.

The risk falls hardest on children who are the largest consumers of apple products. Based on these findings, the maxim “an apple a day keeps the doctor away” lost its appeal in the eyes of NRDC. “60 Minutes” investigated a report published by NRDC and centered a broadcast around those concerns narrated by Ed Bradley. The credibility of the report was bolstered by an interview with the acting director of the Environmental Protection Agency, Dr. Moore. While minimizing the severity of risk, Dr. Moore confirmed that Alar was



indeed a health hazard and noted that under today's rigorous certification standards, the chemical would not be approved for use.<sup>49</sup>

The litigation arising from the so-called Alar scare was filed as a class action, with eleven Washington State apple growers acting as representatives for approximately 4,700 growers.<sup>50</sup> Those who sued sought compensation for the economic injury alleged to have been caused by the airing of the program. As summarized by the Ninth Circuit: "Following the '60 Minutes' broadcast, consumer demand for apples and apple products decreased dramatically. The apple growers and others dependent upon apple production lost millions of dollars. Many of the growers lost their homes and livelihoods."<sup>51</sup>

After the initial effort to get the motions dismissed failed, discovery on the question of the falsity of the broadcast proceeded, followed by CBS's motion for summary judgment on this same question.<sup>52</sup> The district court granted summary judgment, emphasizing that "the issue of the carcinogenic effect of pesticides in the food supply is speech that clearly matters."<sup>53</sup> The court further held:

Even if CBS' statements are false, they were about an issue that mattered, cannot be proven as false and therefore must be protected. To hold as plaintiffs request would have required CBS to take the EPA report and perform a highly technical scientific study before issuing a public broadcast about that report. A news reporting service is not a scientific testing lab and these services should be able to rely on a scientific government report when they are relaying the report's results. The duty plaintiffs propose would so chill debate that the freedom of speech would be at risk.<sup>54</sup>

In affirming dismissal, the Ninth Circuit made brief work of the plaintiffs' arguments, noting first the applicable legal standard:

To establish a claim of product disparagement, also known as trade libel, a plaintiff must allege that the defendant published a knowing-

49. *Auvil v. CBS "60 Minutes"*, 800 F. Supp. 928, 930 (E.D. Wash. 1992) (denying motions to dismiss and remand of CBS "60 Minutes," while granting summary judgment dismissal of non-diverse CBS affiliate stations) (footnote omitted).

50. *Auvil v. CBS "60 Minutes"*, 67 F.3d 816, 819 (9th Cir. 1995).

51. *Id.*; see also *Auvil*, 800 F. Supp. at 930-31 ("[P]ublic reaction to the broadcast was dramatic and swift. Both sales and prices fell sharply, not only locally, but world-wide. . . . [G]rowers and others dependent upon apple production sustained tremendous losses amounting to perhaps as much as \$75 million dollars.").

52. *Auvil*, 800 F.3d at 819; *Auvil*, 836 F. Supp. at 741-42 ("CBS claims that it is entitled to summary judgment because the plaintiffs cannot prove that CBS' statements were false.").

53. *Auvil*, 836 F. Supp. at 743.

54. *Id.*

ly false statement harmful to the interests of another and intended such publication to harm the plaintiff's pecuniary interests. Accordingly, for a product disparagement claim to be actionable, the plaintiff must prove, *inter alia*, the falsity of the disparaging statements.<sup>55</sup>

Applying these standards, the court rejected all arguments that the statements made in the broadcast were false. For example, the court disagreed that the lack of human studies was enough to create issues of fact for trial given the existence of "[a]nimal laboratory tests [that] are a legitimate means for assessing cancer risks to humans."<sup>56</sup> The court also refused to recognize as valid a defamation theory based on the possibility that "a jury could find that the broadcast contained a provably false *message*, viewing the broadcast segment in its entirety."<sup>57</sup> According to the court, "No Washington court has held that the analysis of falsity proceeds from an implied, disparaging message. It is the statements themselves that are of primary concern in the analysis."<sup>58</sup> Of particular note, the court emphasized that "using irony and innuendo" was not enough because defamatory meaning may not be imputed to true statements."<sup>59</sup>

Summing up its ruling, the Ninth Circuit sounds a cautionary note that, in retrospect, is what spurred subsequent industry efforts to statutorily enact a lower burden of proof for product disparagement. Specifically, the court warned:

[I]f we were to accept the growers' argument, plaintiffs bringing suit based on disparaging speech would escape summary judgment merely by arguing, as the growers have, that a jury should be allowed to determine both the overall message of a broadcast and whether that overall message is false. Because a broadcast could be interpreted in numerous, nuanced ways, a great deal of uncertainty would arise as to the message conveyed by the broadcast. Such uncertainty would make it difficult for broadcasters to predict whether their work would subject them to tort liability. Furthermore, such uncertainty raises the spectre of a chilling effect on speech.<sup>60</sup>

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55. *Auvil*, 67 F.3d at 820 (citation omitted) (citing RESTATEMENT (SECOND) OF TORTS §§ 623A, 651(1)(c)).

56. *Id.* at 821.

57. *Id.* at 822 (emphasis in original).

58. *Id.*

59. *Id.* (quoting *Lee v. Columbian, Inc.*, 826 P.2d 217, 219 (1991)).

60. *Id.* In a footnote, the *Auvil* court considerably expanded on its concerns with the plaintiffs' proffered approach to basing claims of defamation on the overall message of a broadcast. The court writes:

The plaintiffs plainly felt entitled to this lower burden of proof, one that would allow them to point to disparaging “innuendo and irony” and the falsity of what is alleged to be the “overall message” in seeking damages for product disparagement.<sup>61</sup> The apple growers were aggrieved by the public response, which was thought to be an overreaction against the carcinogenic properties of a pesticide that had long been in use and was allowed by the EPA.<sup>62</sup> And it was this sense of grievance that inspired an increased push in favor of enacting agricultural disparagement statutes that would allow claims of defamation to rest not only on what was falsely said, but also on what was falsely implied.<sup>63</sup>

Thirteen states (not including Washington State) currently have disparagement statutes, although not all are the same.<sup>64</sup> Colorado is the only state to have criminalized disparagement.<sup>65</sup> Of the twelve states with

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There is an additional problem with the growers’ arguments: their approach allows disparagement plaintiffs to construct an overall message that lends itself easily to proof of falsity. The instant case provides a cogent example. Rather than proving the falsity of statements made during “‘A’ is for Apple” by challenging the studies upon which factual assertions made during the broadcast were based, the growers request that we analyze the message that the studies conclusively show that apples cause cancer in humans. Accordingly, the growers offered evidence that the studies are not conclusive, that there are no studies tracing the specific link between ingestion of daminozide and incidence of cancer in humans. It is considerably easier to prove the falsity of an assertion that studies are conclusive, rather than to prove the falsity of the studies themselves.

*Id.* at 822 n.11.

61. *Id.* at 822.

62. Negin, *supra* note 48, at 13 (stating that although there was “indeed an overreaction to the 60 Minutes report, as viewers confused a long-term cumulative threat with imminent danger” the EPA’s review of scientific data confirmed the long-term dangers posed by Alar, leading to the Agency’s decision to ban the use of the pesticide because “long-term exposure to Alar poses unacceptable risks to public health”).

63. Rita Marie Cain, *Food, Inglorious Food: Food Safety, Food Libel, and Free Speech*, 49 AM. BUS. L.J. 275, 289 (2012) (noting that “[t]he standard in these ‘implied’ falsity statutes seemingly would allow an argument like the Alar plaintiffs’ to proceed to a jury” and “also could cover speech that does not specifically criticize the safety of a plaintiff’s product, but could be interpreted as such by hearers”).

64. *Id.* at 275 (noting that the risk of being sued for criticizing the food industry “stems from special legislation in thirteen U.S. states that protects agriculture and food production interests from criticism”). For a chart that helpfully summarizes the provisions of food disparagement statutes, see Appendix B, *id.* at 323. See also Jones, *supra* note 47, at 823–24 (“Thirteen states have actually passed a bill, making a new cause of action for publicizing false information about food safety or quality.”); David J. Bederman, *Limitations on Commercial Speech: The Evolution of Agricultural Disparagement Statutes*, 10 DEPAUL BUS. L.J. 191, 195 (1998) (“The stated legislative purpose of the disparagement statutes is virtually identical in all thirteen states. The language used reflects a general concern on the part of each legislature to protect the agricultural and aquacultural economy of its state.”).

65. COLO. REV. STAT. § 35-31-101 (1994) (making it unlawful to “knowingly . . . make any materially false statement . . . for the purpose of in any manner restraining trade, any fruits, vegetables, grain, meats, or other articles or products ordinarily grown, raised, produced, or used in any

civil disparagement laws, eleven limit potential liability to disparagement (or libel) of “perishable” products.<sup>66</sup> In addition, the allegedly false statements must usually be about the food product being in some way unsafe.<sup>67</sup> But regardless of the variations between the state laws, all stand as a means for food producers to both exact compensation for economic injury caused by disparagement and deter such criticism from being made at all. Such deterrence acts as a proactive silencing of dissent, dissent that might foment doubt about the notion that food is as safe as the public expects or assumes.

The apple growers did not have the benefit of statutory protections when they had been unsuccessful in their effort to win compensation for the economic injury caused by the *60 Minutes* broadcast about the cancer risks associated with Alar.<sup>68</sup> In contrast, when the next notable food disparagement lawsuit was filed, *Texas Beef Group v. Winfrey*, the complaint alleged violations of the Texas False Disparagement of Food Products Act (Texas Food Disparagement Act).<sup>69</sup> The lawsuit was high-profile due to the fact that Oprah Winfrey was among the three defendants.<sup>70</sup> In addition to alleging violation of the Texas Food Disparagement

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manner or to any extent as food for human beings or for domestic animal”). *But see* Cain, *supra* note 63, at 276 n.7 (“As a criminal law, the Colorado law differs in numerous respects from the other twelve state laws. It targets restraints on trade and does not seem to be motivated to protect agribusiness from criticism, as the other states’ statements of legislative purposes reveal.”).

66. Cain, *supra* note 63, at 287 nn.74–76 (citing examples of various statutory definitions of “perishable”). North Dakota is the only state with a disparagement law that applies to “any agricultural producer or agricultural product.” N.D. CENT. CODE § 32-44-02 (2008). North Dakota is also the only state to omit the requirement that false statements must implicate or reference food safety. N.D. CENT. CODE § 32-44-01 to -04 (2008). *See also* Cain, *supra* note 63, at 288 (arguing that North Dakota’s law seems to permit plaintiffs to sue based on “statements about food production techniques, such as use of pesticides on crops or antibiotics and hormones in animals[.] . . . [or] presumably . . . from allegedly false statements about animal welfare”).

67. *See* Fell, *supra* note 46, at 984 (noting that the intention of the food disparagement laws is to ensure that food producers “have a means of protecting themselves against false or misleading reports about the safety of the food they produce”). *See also* Cain, *supra* note 63, at 287 (“In most states, the alleged falsity must be about the lack of safety of a food product.”); Megan W. Semple, *Veggie-Libel Meets Free Speech: A Constitutional Analysis of Agricultural Disparagement Laws*, 15 VA. ENVTL. L.J. 403, 413 (1996).

68. *Auvil v. CBS “60 Minutes”*, 67 F.3d 816, 820 (9th Cir. 1995) (applying Washington State common law, which had adopted RESTATEMENT (SECOND) OF TORTS § 623A, to determine the validity of the asserted product disparagement claim). Although bills were introduced in Washington in both the House and Senate in 1992, neither was given a vote. *See* S.B. 6352, 52d Leg., Reg. Sess. (Wash. 1992); H.B. 2858, 52d Leg., Reg. Sess. (Wash. 1992).

69. Fell, *supra* note 46, at 982 n.5 (citing and quoting text of the Texas Food Disparagement Act).

70. *See* *Tex. Beef Grp. v. Winfrey*, 11 F. Supp. 2d 858 (N.D. Tex. 1998). The two other defendants were Harpo Production, Inc., Oprah’s production company, and Howard Lyman, “a former cattle-rancher-turned-vegetarian who [was] Executive Director of the Humane Society’s Eating With

Act, the lawsuit also asserted claims for common law business disparagement, common law defamation, negligence, and negligence per se.<sup>71</sup> As with the Alar scare incident, this lawsuit was prompted by the broadcast of a show discussing potential dangers linked to food. In this case, it was Oprah Winfrey's discussion of "Mad Cow Disease," relating it in part to feeding practices then common in the beef industry.<sup>72</sup>

Reportedly, "Paul Engler, owner of one of the largest cattle-feeding operations in the country, was so incensed by the program that he [decided to sue]."<sup>73</sup> The plaintiffs alleged that the "Dangerous Foods" episode had cost them millions of dollars "as a direct result of the anti-beef sentiment of the broadcast," causing an "Oprah crash" to occur right after the program aired.<sup>74</sup>

Like claims asserted by the apple growers, the disparagement and defamation claims the cattle industry asserted did not lead to the desired award of damages.<sup>75</sup> After the defense verdict on the sole claim that had gone to the jury was announced (business disparagement), Oprah predictably took to the courthouse steps to make a public statement, exclaiming, "Free speech not only lives. It rocks!"<sup>76</sup> She was also quoted as saying:

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Conscience campaign." *Id.* at 861. *See also* Lyman, *supra* note 46, at i-ii (describing his journey going from being a rancher to activist). For a balanced description of the claims, defenses, trial, and court rulings, see Marvin L. Hayenga, *Texas Cattle Feeders v. Oprah Winfrey: The First Major Test of the Veggie Libel Law*, CHOICES, 2nd Quarter 1998, at 13-20.

71. *Tex. Beef Grp.*, 11 F. Supp. 2d at 860. For a more detailed discussion of claims, which also quotes further from the Amended Complaint, see Fell, *supra* note 46, at 1011.

72. Lyman, *supra* note 46, at iii-iv n.2 (providing a first-hand account by a guest of the show and one of the defendants). The segment was called "Dangerous Foods" and it aired on April 16, 1996. Fell, *supra* note 46, at 981 ("Ms. Winfrey and her guests discussed the possibility of mad cow disease developing in the United States." (citing Amended Complaint, § III, No. Civ. A.2:96-CV-208-J)).

73. Fell, *supra* note 46, at 981.

74. *Id.* at 1010. In its decision on appeal, the Fifth Circuit noted that the depression in prices "continued for approximately eleven weeks" and "reverberated" in other cattle markets as well. *Tex. Beef Grp. v. Winfrey*, 201 F.3d 680, 684 (5th Cir. 2000). *But see* Schupp et al., *supra* note 5, at 28 ("While the Texas cattlemen may have feared that the statements made by Oprah regarding beef consumption caused beef cattle prices to decline, the results of this survey indicated only a minor proportion of consumers used her statements as an excuse for reducing beef consumption.").

75. *Tex. Beef Grp.*, 11 F. Supp. 2d at 864 (granting defendants' motion for judgment as a matter of law made at close of the plaintiffs' case on statutory disparagement, defamation, and negligence claims). After presenting a defense to the business disparagement claim, the sole claim that the court did not dismiss, the jury returned a verdict in favor of all defendants, finding no liability for disparagement of cattle. *Id.*; *see also* Fell, *supra* note 46, at 1014-17 (discussing the trial court's rulings).

76. Fell, *supra* note 46, at 1016-17 (quoting *Jury Decides in Favor of TV Star Winfrey in Suit by Cattlemen*, WALL ST. J., Feb. 27, 1998, at B19).

I will continue to use my voice. I believed from the beginning that (the lawsuit) was an attempt to muzzle my voice, and I come from a people who have struggled and died in order to have a voice in this country. And I refused to be muzzled. . . . (The lawsuit) will not change the way I operate. It has made me even more fervent in my desire and intention to bring information and enlightenment and encourage people in ways that I see fit.<sup>77</sup>

Predictably, the plaintiffs saw the verdict differently, admitting to being disappointed but nonetheless claiming, “[W]e do believe that we made one very strong point . . . that U.S. beef is safe.”<sup>78</sup> But the point that Engler and the other plaintiffs from the Texas cattle industry ultimately failed to make, even on appeal, is that Oprah and her guest, Howard Lyman (an animal rights activist),<sup>79</sup> made false statements. Even a publication friendly to the interests of cattle ranchers observed, commenting on the trial verdict and likely appeal, “[T]he ability to speak freely about concerns or issues regarding the safety of our food supply is very important, and many would be reluctant to see that freedom abridged because of such concerns.”<sup>80</sup> As the Fifth Circuit later explained in affirming the judgment as a matter of law on the statutory-based claims:

There is little doubt that Howard Lyman and the Winfrey show employees melodramatized the “Mad Cow Disease” scare and discussion of the question “Can it happen here?” Perhaps most important, from the audience’s viewpoint, was not the give-and-take between the glib Lyman and the dry Drs. Weber and Hueston, but Ms. Winfrey’s exclamation that she was “stopped cold from eating another burger.” When Ms. Winfrey speaks, America listens. But her statement is neither actionable nor claimed to be so. Instead, two false statements by Lyman and misleading editing are relied upon to carry the cattlemen’s difficult burden. Like the district court, we hold they have not sustained their burden of articulating a genuine issue of material fact concerning liability under the Act.<sup>81</sup>

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77. *Oprah: “Free Speech Rocks”: Texas Cattlemen Lose Defamation Suit*, CNN (Feb. 26, 1998), <http://www.cnn.com/US/9802/26/oprah.verdict/>.

78. *Id.*

79. Lyman, *supra* note 46, at i–ii (describing his personal journey from being “a fourth generation farmer-rancher-feedlot owner” to being a meat safety lobbyist and activist who ended up working as a director of the Humane Society of the United States’ Eating with Conscience campaign).

80. Hayenga, *supra* note 70, at 20.

81. *Tex. Beef Grp. v. Winfrey*, 201 F.3d 680, 688 (5th Cir. 2000).

In so holding, the court avoided the need to make a ruling on the proper scope of the Texas Food Disparagement Act, relying on the insufficiency of the evidence to affirm dismissal of the claim.<sup>82</sup>

Because the cattle industry failed to prove disparagement under either the Texas Act or the common law, no new food disparagement laws have been enacted. That does not mean food industry efforts to create laws against critical speech and disclosure have ceased. Instead, the focus has changed. Specifically, the agriculture industry has begun to push for passage of anti-whistleblower laws, also called “ag-gag” laws.<sup>83</sup> This push has been in response to a spate of incidents in which videos of alarming, often unlawful practices are surreptitiously taped and then released to the media.<sup>84</sup> For example, when the videos of workers at a poultry farm revealed vicious cruelty to chickens, the resulting public uproar prompted McDonalds and Target to announce that they were no longer buying eggs from one of the country’s largest egg producers, Sparboe Farms.<sup>85</sup> The FDA then followed up by issuing the producer a company-wide warning letter that “cit[ed] ‘serious’ and ‘significant violations’ at five different locations” and “at least 13 violations of the recently enacted federal egg rule meant to prevent dangerous salmonella outbreaks.”<sup>86</sup>

Largely in response to these undercover investigations, many done by persons who sought to be hired so that the videotapes could be made, three states have passed laws that limit (or attempt to limit) the ability to conduct such investigations. Specifically, Iowa, Utah, and Idaho have passed ag-gag laws.<sup>87</sup> The crux of the Iowa law makes it a crime to apply for employment at a facility “with an intent to commit an act not authorized by the owner of the agriculture production facility, knowing that the

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82. *Id.* at 689; *but see id.* at 690 (“I have become convinced that the district court’s interpretation of the Act was wrong.”) (Jones, E., concurring).

83. See Larissa Wilson, *Ag-Gag Laws: A Shift in the Wrong Direction for Animal Welfare on Farms*, 44 GOLDEN GATE U. L. REV. 311, 311–12 (2014).

84. *Id.* at 316 (“Undercover investigations have caused damage to the animal agriculture industry, leading to food recalls and revocation of contracts between meat suppliers and purchasers.”) (citing examples); *see also* Larissa U. Liebmann, *Fraud and First Amendment Protections of False Speech: How United States v. Alvarez Impacts Constitutional Challenges to Ag-Gag Laws*, 31 PACE ENVTL. L. REV. 566, 567–68 (2014) (“These investigations have revealed major violations of food safety and humane farming practices, and have prompted action by both the [USDA] and by companies that purchase products from the facilities investigated.”).

85. See Cynthia Galli et al., *McDonald’s, Target Dump Egg Supplier After Investigation*, ABC NEWS (Nov. 18, 2011), <http://abcnews.go.com/Blotter/mcdonalds-dumps-mcmuffin-egg-factory-health-concerns/story?id=14976054>.

86. *Id.*

87. IOWA CODE § 717A.3A(1)(b) (2013); UTAH CODE § 76-6-112(2)(c) (2013); IDAHO CODE § 18-7042(1)(c)-(d) (2014). *See also* Liebmann, *supra* note 84, at 568–70 (discussing and comparing the Iowa and Utah laws); Wilson, *supra* note 83, at 316–17 (discussing passage of Idaho law).

act is not authorized.”<sup>88</sup> The Utah law is more specific because it applies to the acts of obtaining employment to record images or sound if it is known that the facility owner prohibits such conduct.<sup>89</sup> Along these same lines, the Idaho law prohibits someone from obtaining employment “by force, threat, or misrepresentation with the intent to cause economic or other injury,”<sup>90</sup> while also prohibiting anyone from entering without consent to make audio or video recordings.<sup>91</sup> Although no other states have yet passed similar laws, a number of states are actively considering such laws.<sup>92</sup>

The irony of ag-gag (or anti-whistleblower) laws is that they are premised on a kind of privacy right for the food producer. Despite the fact of federal inspection, either ongoing in the case of USDA, or the right of inspection in the case of FDA, agribusiness claims for itself the right to bar the public from seeing what occurs inside its facility, even though the public is expected to *eat* the food that is made there. In short, the food industry wants the public to eat the food made behind the curtain, but never see the food being made. And thus any act of revelation—of pulling the curtain aside—is an invasion to be criminalized in the view of the food industry.

Similar to disparagement statutes that attempt to silence critical discourse about food safety concerns, ag-gag laws seek to suppress the distribution of information that might otherwise inform decisions about whether to purchase a given product. When videos of something that actually took place are released to the media, it is the apparent truth that is revealed, and nothing else, which is what gives the revelation such potential impact. On the other hand, even if a photograph unquestionably reveals that which was photographed, the lack of context can leave a viewer at a loss in understanding the significance of what is viewed.<sup>93</sup>

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88. IOWA CODE ANN. § 717A.3A(1)(b) (2013).

89. UTAH CODE § 76-6-112(2)(c) (2013).

90. IDAHO CODE § 18-7042(1)(d) (2014).

91. IDAHO CODE § 18-7042(1)(c)–(d) (2014).

92. See Wilson, *supra* note 83, at 318 & n.49 (“[S]everal new ag-gag bills in other states are being considered.”); Liebmann, *supra* note 84, at 570 (“In 2013, Ag-Gag bills were proposed in eleven other states.”).

93. For example, a recent article discussing undercover video that is alleged to have revealed inhumane practices at a chicken farm that had been “certified humane” notes that “experts debated exactly what was wrong with the hens shown in the video. Is the forlorn-looking, nearly bald hen a victim of feather pecking, a behavioral tic acquired by chickens in close quarters? Or is the hen simply molting?” Stephanie Strom & Sabrina Tavernise, *Animal Rights Group’s Video of Hens Raises Questions, but Not Just for Farms*, N.Y. TIMES (Jan. 8, 2015), [http://www.nytimes.com/2015/01/09/business/direct-action-everywhere-video-of-laying-hens-raises-concerns.html?\\_r=0](http://www.nytimes.com/2015/01/09/business/direct-action-everywhere-video-of-laying-hens-raises-concerns.html?_r=0).



Either way, when people, experts or otherwise, speak of fears about food, questioning the practices or the intentions of food producers and regulators alike, they are calling into question a central premise of the food supply in the United States, a premise that both food producers and regulators do not want called into question—trust. Except for food that I grow myself, and prepare myself, I am forced to trust that the food I eat was prepared under conditions that are acceptably safe, and preferably neither disgusting nor morally questionable. But the simple fact is that much food in the United States is not as safe as it could be and not prepared under conditions that the public imagines. There is, as a result, a significant disconnect between the reality of food production in the United States and what the public both wants and believes. But here, the public's want is the mother of its belief, filling the disconnect with magical thinking that government and industry can exploit to maintain public confidence. So long as the levels of safety can be maintained at acceptable levels—low enough to avoid stoking fear, but not high enough to threaten profits—the public will continue to trust the safety of the U.S. food supply. That is, however, until the next disturbing revelation comes along. The story of lean finely textured beef is a perfect case in point because it is an ingredient that managed to remain “hidden” in ground beef products for twenty years until being given the revelatory name of “pink slime,” creating a public backlash that quickly threatened trust in the product and its sales.

#### IV. AN AGENCY COMPLICIT IN PUBLIC DECEPTIONS: HOW “PINK SLIME” CAME TO BE ADDED TO GROUND BEEF

Two things must be said at the outset. First, and at the risk of appearing defensive, let it be known that the “proper” (or, according to its defenders, nonpejorative) name for what ultimately came to be called “pink slime” is “lean finely textured beef” (LFTB).<sup>94</sup> “LFTB is a beef product developed by Beef Products, Inc. (BPI), in 1991 to provide more domestic lean beef.”<sup>95</sup> It is made from “fat trimmings that otherwise have

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94. The name “pink slime” was coined by Gerald Zirnstein, then a USDA-FSIS employee, and subsequently a defendant in BPI’s lawsuit. USDA/ERS, *Consumer Concern About LFTB and Its Effect on Ground Beef Prices*, DROVERS CATTLE NETWORK (Aug. 16, 2012, 4:12 PM), <http://www.cattlenetwork.com/cattle-news/Consumer-concern-about-LFTB-and-its-effects-on-ground-beef-prices-166453526.html>. He additionally “comment[ed] that 70 percent of the ground beef sold in supermarkets contained LFTB.” *Id.*

95. JOEL L. GREENE, CONG. RESEARCH SERV., R42473, *LEAN FINELY TEXTURED BEEF: THE “PINK SLIME” CONTROVERSY 2* (2012), available at <https://www.fas.org/sgp/crs/misc/R42473.pdf>. Cargill is the manufacturer of a similar product called finely texturized beef or FTB. USDA/ERS, *supra* note 94. See also J. Ross Pruitt & David P. Anderson, *Assessing the Impact of LFTB in the*

less value [than other parts of the carcass] and typically sell at a discount to a rendering plant.”<sup>96</sup> To make LFTB, the trimmings are heated just-to-melting and sent through a centrifuge that separates what meat remains from the fat.<sup>97</sup> According to information on the BPI website, the result is a product that is “typically 94% to 97% lean and is a key ingredient to making low fat ground beef or any other food in which lean finely textured beef is an essential ingredient.”<sup>98</sup> Not touted on the website is the fact that “[d]uring the production process, BPI treats the LFTB with food-grade ammonia gas; the gas mixes with the water in the meat and creates ammonium hydroxide, which in turn raises the pH level in the LFTB and kills pathogens.”<sup>99</sup>

Second, and at the risk of sounding like a broken record, the facts require it be said at the outset that the “pink slime” controversy (as the Congressional Research Service, among others, have called it) was triggered by a broadcast news report. Specifically:

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*Beef Cattle Industry*, CHOICES MAG. ONLINE, <http://www.choicesmagazine.org/choices-magazine/theme-articles/pink-slimemarketing-uncertainty-and-risk-in-the-24-hour-news-cycle/assessing-the-impact-of-lftb-in-the-beef-cattle-industry> (last visited Feb. 17, 2015) (noting various kinds of LFTB have been used since “early 1980’s,” but the version subject to controversy since 2001).

96. USDA/ERS, *supra* note 94. On average, this fatty trim makes up approximately five to ten percent of the total weight of a carcass, and its sale for use in making LFTB “adds value to the carcass by utilizing a few more pounds of beef that would otherwise be used in rendering.” *Id.* When the market for LFTB declined as a result of the “pink slime” controversy, it was estimated that an additional 900 million pounds of extra fat trimmings would be available for sale, presumably, again, for rendering. *Id.* See also Pruitt & Anderson, *supra* note 95 (observing that, unless the fat trimmings were used in making LFTB, the fat trimmings “would have been rendered down or . . . been incorporated into lower value products”).

97. GREENE, *supra* note 95, at 2. See also Y. He & J.G. Sebranek, *Functional Protein Components in Lean Finely Textured Tissue from Beef and Pork*, 61 J. FOOD SCI. 1155, 1155 (1996) (describing that lean finely textured tissue, which includes LFTB, “is derived from beef and pork . . . by unique low-temperature separation process”).

98. *BPI Lean Finely Textured Beef—Why It’s Good*, BEEF PRODUCTS, INC., [http://www.beefproducts.com/why\\_its\\_good.php](http://www.beefproducts.com/why_its_good.php) (last visited Mar. 23, 2015).

99. GREENE, *supra* note 95, at 2 (citing multiple sources). Kit Foshee, a former BPI employee, and one of the defendants that BPI would later sue for product disparagement and defamation, claimed in emails to the USDA that BPI submitted false test results to the USDA to obtain approval for the ammonia-injected product, and that the process did not achieve the pathogen reduction claimed. Foshee also claimed that pH levels were not raised to the levels needed, or those used in tests, because of the effect on taste and smell of the LFTB. Consequently, according to Foshee, LFTB was not as safe as BPI claimed. See also Michael Moss, *Safety of Beef Processing Method Is Questioned*, N.Y. TIMES (Dec. 31, 2009), <http://www.nytimes.com/2009/12/31/us/31meat.html> (noting in 2009 article that BPI “acknowledged lowering the alkalinity, and the U.S.D.A. said it had determined that ‘at least some of B.P.I.’s product was no longer receiving the full lethality treatment”).

Although LFTB had received negative press in previous years, the issue re-emerged dramatically on March 7, 2012, when ABC News broadcast a report about the use of LFTB in retail beef products. The report referred to LFTB as “pink slime,” and described LFTB as “beef trimmings that were once used only in dog food and cooking oil, but now [are] sprayed with ammonia to make them safe to eat.”<sup>100</sup>

Subsequent media coverage seemed only to increase public outrage and renewed attention to USDA e-mails the *New York Times* had published in 2009—e-mails that had revealed agency insiders were concerned about the quality of this meat product and the safety of the processes used to make it.<sup>101</sup> Yet, interestingly, while the *New York Times* article directly questioned the safety of LFTB and the validity of the research studies that BPI submitted to the USDA to get its production process approved,<sup>102</sup> BPI never accused the article’s author of product disparagement.

But such concerns over bad publicity never managed to stand in the way of the meat industry’s desire to continue selling a profitable product. Moreover, even though the *New York Times* article prompted both a focus on the use of LFTB and some measure of public reaction, the loss of market share was not dramatic at first. Fast food chains, including McDonald’s, Burger King, and Taco Bell, were the first to stop using the product.<sup>103</sup> And the companies appeared careful not to blame the product itself, or admit that consumer concerns were the reason for no longer using LFTB, stating, for example, “[T]he decision to remove BPI products from McDonald’s system was not related to any particular event but rather to align our global beef raw material standards.”<sup>104</sup>

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100. GREENE, *supra* note 95, at 5 (alteration in original).

101. *Id.* (stating how “in an internal email, which became public as part of a *New York Times* Freedom of Information Act (FOIA) request, one of the USDA employees had called LFTB ‘pink slime,’ and characterized as ‘fraudulent labeling’ the labeling of ground beef blended with LFTB as ‘ground beef’”). Although many of the emails are subject to a protective order, those that can be obtained from USDA by FOIA requests are not. For the *New York Times* article in question, see Moss, *supra* note 99.

102. Moss, *supra* note 99 (reporting that *E. coli* and *Salmonella* had on many occasions been found in BPI meat sold in the school lunch program, prompting the USDA to revoke its exemption against testing for pathogens—an exemption that had been based on the asserted efficacy of BPI’s ammonia kill-step process).

103. GREENE, *supra* note 95, at 5–6.

104. *Id.* at 6 (quoting Helena Bottemiller, *Fast Food Companies Abandon Ammoniated Beef*, FOOD SAFETY NEWS (Jan. 6, 2012), <http://www.foodsafetynews.com/2012/01/fast-food-companies-abandon-ammoniated-beef/>) (internal quotation marks omitted) (noting that Burger King issued a “similar statement”).

What seemed to change the tenor of public reaction from one of concern to fear and outrage was the renewed focus on the use of ammonia as a “kill-step” in the manufacture of LFTB. The use of ammonia is necessary because LFTB is made of materials—trimmings—more likely to contain *E. coli* and *Salmonella*, “which are more prevalent in fatty trimmings than in higher grades of beef.”<sup>105</sup> According to the report prepared by the Congressional Research Service:

Two days before the ABC News report, *The Daily*, an online news publication, reported that USDA was buying 7 million pounds of LFTB for the school lunch program. The report also referenced a video from celebrity chef Jamie Oliver’s *Food Revolution* television show from April 2011 that shows beef trimmings, characterized as inedible, being mixed with what appears to be household cleaning ammonia to simulate the process for making LFTB.<sup>106</sup>

In response to the growing concern about the safety of LFTB (because of the need for ammonia as a processing step), combined with the previous decisions of fast food chains to stop using it, the USDA decided that it would “give school districts the option to buy ground beef without LFTB.”<sup>107</sup> The fallout from this decision was swift.<sup>108</sup> Major grocery store chains quickly announced that they would no longer sell ground beef that contained LFTB.<sup>109</sup> The makers of LFTB then decided to reduce production, market prices for beef declined, and companies decided to begin voluntarily labeling ground beef containing LFTB.<sup>110</sup> “In statements released to the press, the grocery stores that stopped carrying ground beef with LFTB stated that it was safe, but that their customers were demanding that it not be used in ground beef.”<sup>111</sup>

With demand for LFTB disappearing amid concerns about the safety of the product, and the fact that most consumers seemed to think that it

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105. Moss, *supra* note 99 (noting that according to a study funded by BPI, “the trimmings ‘typically include[] most of the material from the outer surfaces of the carcass’ and contain ‘larger microbiological populations’”).

106. GREENE, *supra* note 95, at 5. BPI had developed the process that used anhydrous ammonia as intervention to reduce the presence of *E. coli* O157:H7 to undetectable levels, as required by USDA regulations. The process was also shown to be effective on *Salmonella*. *Id.* at 2. The extent of the effectiveness of the intervention was, however, a subject of dispute within the USDA, a dispute that prompted some of the criticisms of the product’s safety—criticisms that BPI would later allege to be defamatory.

107. GREENE, *supra* note 95, at 6.

108. USDA/ERS, *supra* note 95, at 6 (“Demand for LFTB recently declined following media reports portraying it as a seemingly unappealing additive to ground beef products.”).

109. GREENE, *supra* note 96, at 7 (citing multiple sources).

110. *Id.* at 6.

111. *Id.* at 7.

in fact looked like “pink slime” and was, as a result, disgusting, BPI decided to sue. In doing so, BPI and its attorneys went to great length in the complaint to depict the public’s reaction as solely the result of a “disinformation campaign against BPI and LFTB.”<sup>112</sup> As alleged by BPI, the public reaction was solely based on the “disinformation campaign” because

Defendants’ disinformation campaign had its intended effect—consumers reacted negatively to LFTB and demanded that grocery stores stop selling ground beef made with “pink slime.” This reaction was not based on accurate information about LFTB but on disinformation spread by Defendants. Defendants led consumers to believe that LFTB was not beef, was not safe or healthy, and was approved by the USDA only because BPI had engaged in improper conduct.<sup>113</sup>

These were allegations of product disparagement taken to a whole new level. BPI was accusing ABC of not just getting their facts wrong, but of an intentional and successful attempt to deceive the public.<sup>114</sup>

#### V. THE “PINK SLIME” LAWSUIT: TRYING TO ACCUSE THE MEDIA OF BEING THAT MAN BEHIND THE CURTAIN

BPI commenced its lawsuits against ABC and several other defendants on September 13, 2012, by filing a complaint that was 257 pages long, thus giving a whole new meaning to the phrase “a short and plain statement”—which is all the South Dakota Rules of Civil Procedure require of a complaint.<sup>115</sup> The page count does not include the caption or the five-page-long table of contents, appendices 1–7 (measuring about one inch tall), and exhibits 1–107 (measuring five inches tall). The summary provided in the “Nature of the Action” section is a relatively concise ten pages, starting as follows:

This action is brought by BPI to recover from defamation, product and food disparagement, tortious interference with business relationships, and other wrongs committed by Defendants. Defendants knowingly and intentionally published nearly 200 false and disparaging statements regarding BPI and lean finely textured beef (“LFTB”). Defendants engaged in a month-long vicious, concerted disinformation campaign against BPI companies that produced a

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112. Complaint and Jury Demand at 3, *Beef Prods., Inc. v. Am. Broad. Cos., Inc.*, No. Civ. 12-292 (S.D. Cir. Ct. Sept. 13, 2012) [hereinafter BPI Complaint].

113. *Id.* at 39.

114. See *infra* Part V.

115. S.D. CODIFIED LAWS § 15-6-8(a)(1) (2015).

safe, nutritious beef that has lowered the cost of lean ground beef sold to consumers for 20 years.<sup>116</sup>

Claims were asserted against a former employee, Kit Foshee, who claims now to be a whistleblower, and the two former USDA employees who were critical of the agency's approval of LFTB, Gerald Zirnstein and Carl Custer. Zirnstein coined the term "pink slime" in a 2002 e-mail to USDA colleagues.<sup>117</sup> Zirnstein also stated in his e-mail: "I do not consider the stuff to be ground beef, and I consider allowing it in ground beef to be a form of fraudulent labeling."<sup>118</sup> BPI also sued American Broadcasting Companies, Inc. (ABC), ABC News, Inc., and three on-air news reporters.<sup>119</sup> According to a BPI attorney, "ABC defamed its products by simply calling the beef additive 'pink slime.' . . . BPI blames ABC for causing consumers to believe the product 'is some type of unhealthy and repulsive liquid product that is not even meat.'"<sup>120</sup>

In reading the complaint, one cannot avoid recognizing the high dudgeon that permeates its every word. Owners of BPI, Eldon and Regina Roth, are depicted as an "American success story"<sup>121</sup> who, through "30 years of hard work," were able to grow a "small, family-owned group of companies . . . into a very successful enterprise" with annual revenues in 2012 of "over \$650 million and profits of over \$115 million."<sup>122</sup> In contrast, the defendants were practically un-American in the zeal with which they had sought to tear down this success story, such that "the Roth family's life work, BPI's future, and the future of BPI's employees were turned upside down."<sup>123</sup> According to the complaint, on March 7, 2012:

ABC News, one of the most powerful news outlets in the world, began a disinformation campaign against BPI and LFTB. The month-long campaign, in which all Defendants participated, manufactured

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116. BPI Complaint, *supra* note 112, at 1.

117. Moss, *supra* note 99. Moss won a Pulitzer Prize for explanatory reporting based on this and other articles addressing "contaminated hamburger and other food safety issues that, in print and online, spotlighted defects in federal regulation and led to improved practices." *The 2010 Pulitzer Prize Winners*, PULITZER PRIZES, <http://www.pulitzer.org/citation/2010-Explanatory-Reporting> (last visited Mar. 24, 2015).

118. Moss, *supra* note 99.

119. See Bill Tomson, *ABC Sued for "Pink Slime" Defamation*, WALL ST. J. (Sept. 13, 2012, 4:51 PM), <http://www.wsj.com/articles/SB10000872396390444709004577649552576092254>.

120. *Id.*

121. BPI Complaint, *supra* note 112, at 2.

122. *Id.* at 2.

123. *Id.* at 3. *But see* Moss, *supra* note 99 ("Headstrong and self-assured, Eldon N. Roth had the good fortune to be in the right place at the right time. Mr. Roth spent the 1990s looking to give Beef Products a competitive edge by turning fatty slaughterhouse trimmings into usable lean beef.").

a baseless consumer backlash against BPI and LFTB. Through a series of factual misstatements, repeated continuously during the campaign, Defendants knowingly misled the public into believing that LFTB was not beef at all, but rather an unhealthy “pink slime” “hidden” in ground beef as part of an “economic fraud” masterminded by BPI.<sup>124</sup>

Based on its numerous and detailed allegations, BPI asserted twenty-seven claims.<sup>125</sup> The first eighteen claims are based on allegedly false statements, including statements that LFTB was “pink slime,” that it was not beef, that it was a “filler” or “substitute,” and that LFTB was made from beef trimmings “once used only for dog food.”<sup>126</sup> The next six claims are based on alleged false implications.<sup>127</sup> Claim twenty-six is for the alleged violation of South Dakota’s Agricultural Food Products Disparagement Act, while the last claim is for tortious interference with business relationships.<sup>128</sup>

Although there is neither time nor space here to address the allegations in BPI’s complaint in detail, reading all that was alleged would leave anyone with the impression that the owners of BPI are on a vendetta of sorts, inspired by what they perceived to be a vendetta first directed at BPI. The resulting blood feud is remarkable in a myriad of ways, particularly for the ferocity with which the views of the media are expressed. Not only were ABC and its reporters accused of making statements that were outright lies with the malicious intent to advance a “disinformation campaign,” but they were also accused of “publish[ing] and broadcast[ing] a blacklist of grocery store chains that sold ‘pink slime’ to their customers.”<sup>129</sup> And that was not all:

The ABC Defendants used the blacklist to create a so-called “grass-roots movement” against grocery store chains that sold ground beef with LFTB, and they actively encouraged consumers to join the campaign. Their efforts worked. No grocery store chains wanted to be on the blacklist. Nearly every major grocery store chain in the country that had been purchasing ground beef that included LFTB stopped doing so, even though none of them had complaints about quality or safety of LFTB. After years of selling ground beef with LFTB, each of the grocery store chains dropped LFTB because of

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124. BPI Complaint, *supra* note 112, at 3.

125. *Id.* at 138–256.

126. *Id.* at 8. The specific pleadings that set forth these first eighteen claims can be found at pages 138–215, with Counts I–IX being for defamation, and X–VIII being product disparagement.

127. *Id.* at 8–9; *see also id.* at 216–45.

128. *Id.* at 9; *see also id.* at 245–56.

129. *Id.* at 6.

the consumer backlash created by the Defendants' disinformation campaign. The chains could not risk being on the blacklist and losing consumers who were making decisions based on Defendants' false information about LFTB.<sup>130</sup>

What is perhaps most astounding about these allegations is how little credit consumers are given for having intelligence or free will. Even though it may be more litigation strategy than a reflection of what the owners of BPI or their attorneys really believe, the world depicted by BPI's complaint and subsequent pleadings is one that is populated by consumers so easily misinformed that one wonders how any member of the public ever makes a decision on his own. Indeed, the assumption appears to be that no one looking at a photograph of LFTB would ever on his own think, "Wow, that looks like pink slime." Or that no consumer learning of the name "pink slime" would ever on his own think, "I don't want to eat ground beef with ammonia-soaked meat in it."

In the world that BPI's complaint depicts, it is the power of the name alone—"pink slime"—that prompts consumers to decide to stop buying ground beef that contains LFTB. Moreover, this power is created *ex nihilo*—from nothing—by the act and intent of malicious naming. Note how BPI explains it:

When Defendants called LFTB "pink slime," consumers understood that Defendants were indicating that LFTB was a noxious, repulsive, and filthy fluid. There is not a more offensive way of describing a consumable product than to call it "pink slime." By repeatedly referring to LFTB as "pink slime," Defendants conveyed that LFTB was not beef, but instead was an unsafe and unhealthy substance that was included in ground beef.<sup>131</sup>

That the name "pink slime" has a pejorative slant to it is pretty much undeniable, as one court ruling on the issue from an evidentiary perspective ruled.<sup>132</sup> As this court explained, "The word slime is synonymous with ooze, sludge, muck, mud, or mire. The word implies repulsion. Certainly, the word slime does a disservice to the jurors in impart-

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130. *Id.* at 6–7. BPI predictably echoed its allegations in opposing the Motion to Dismiss that ABC filed, stating, for example: "In one month, Defendants manufactured a consumer backlash against BPI and LFTB that nearly destroyed the enterprise that BPI's owners, the Roth family, had spent a lifetime building." Plaintiffs' Opposition to ABC Defendants' Motion to Dismiss All Claims of Plaintiff Beef Products, Inc. at 1, *Beef Prods., Inc. v. Am. Broad. Cos., Inc.*, No. Civ. 12-292 (S.D. Cir. Ct. Aug. 9, 2013).

131. BPI Complaint, *supra* note 112, at 58.

132. *See* *Am. Home Assurance Co. v. Greater Omaha Packing Co.*, No. 8:11CV270, 2014 U.S. Dist. LEXIS 62880 (D. Neb. May 2, 2014) (granting a motion in limine and ordering meat in question be referred to as "lean finely textured beef").



ing—not an accurate understanding of the beef product—but a predisposed misunderstanding that the meat was unsavory or repulsive.”<sup>133</sup> Even assuming for the sake of argument that describing LFTB as “slime” implies a certain sense of repulsion, at least in the speaker, BPI reveals a serious failure of imagination in asserting that “[t]here is not a more offensive way of describing a consumable product than to call it ‘slime’.”<sup>134</sup> To the contrary, it seems to me that calling LFTB “pink snot” or “pink vomit” packs a much greater offensive punch than the mere use of “pink slime.”<sup>135</sup> And while it makes sense that a trial court wants to avoid prejudice at a trial by prohibiting the use of the term “pink slime” in front of jurors, much more should be required to prohibit citizens from using the term as part of reasonable discourse about food safety.

BPI has no more right to stop its critics from calling a product that definitely appears to be both pink and slimy “pink slime” than critics would have the right to insist that BPI abandon the name “lean finely textured beef.” Nor would BPI appear to have a strong basis for complaining that the use of the term “pink slime” unambiguously implied that LFTB was unsafe to eat. People are known to eat a lot of slimy things that many would deem repulsive and refuse to eat. For example, I do not particularly like to eat mangoes because the texture is slimy. On the other hand, I love to eat escargot, which many find repulsive. I also love cooked oatmeal, which my best friend detests because he thinks the texture is slimy. The sliminess of these foods does not imply a lack of safety, however. Nonetheless, when the court in the BPI lawsuit ruled on the motion to dismiss that ABC and other defendants filed, it concluded that “the use of the term ‘pink slime’ with a food product can be reasonably interpreted as implying that that food product . . . is not fit to eat, which are objective facts which can be proven.”<sup>136</sup> The court thus held that BPI’s product disparagement claims under South Dakota’s food product disparagement statute would not be dismissed at the pleading stage of the litigation, leaving open that the defendants could later move

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133. *Id.* at \*2.

134. BPI Complaint, *supra* note 112, at 58.

135. Indeed, the other name Custer and Zirnstein gave to LFTB seems in many ways more mocking and disgusting—calling it “soylent pink.” See “*Pink Slime: Combo of Connective Tissue, Scraps Hidden in Your Kids’ Lunch*,” FOX NEWS (Mar. 8, 2012), <http://www.foxnews.com/health/2012/03/08/pink-slime-combo-connective-tissue-scraps-hidden-in-your-kids-lunch/> (quoting Carl Custer as saying: “We originally called it soylent pink”). Of course, only fans of old science fiction movies and those over fifty are likely to understand the reference to the 1973 movie *Soylent Green*, named after the rations (made with an extremely disgusting ingredient) that were fed to people in a polluted and overpopulated world. SOYLENT GREEN (Metro-Goldwyn-Mayer 1973).

136. Beef Prods., Inc. v. Am. Broad. Cos., Inc., No. Civ. 12292, 2014 WL 1245307, at \*12 (S.D. Cir. Ct. Mar. 27, 2014).

for summary judgments.<sup>137</sup> The court also held that the disparagement statute preempted the common law disparagement claims, meaning that five of the counts pleaded would be dismissed.<sup>138</sup> Consequently, in the months since the court's ruling, discovery by all parties has gotten underway.

How the "pink slime" case will ultimately resolve cannot be predicted with any accuracy. Once discovery is completed, ABC and the other defendants will certainly move for summary judgment dismissal of all claims. But in light of the trial court's ruling favorable to BPI on the motions to dismiss, it is difficult to imagine the case not going to a jury. Regardless of the jury verdict, though, or the results of subsequent appeals, there is no question that BPI has sent a clear signal that the meat industry will spend what it takes to fight allegedly defamatory attacks. Less clear is what lessons, if any, the USDA may have learned from the criticism once again pointed in its direction. As one who has watched the agency criticized repeatedly for favoring industry concerns over public health, I am not optimistic that this is an agency that can ever put the public first. Consequently, unless the public pays closer attention, resists the inclination toward magical thinking, and demands more of industry and regulators alike, the food we eat will be as the industry chooses to make, and the agencies allow it to be made—out of sight, but also out of mind.

#### VI. CONCLUSION: VISIBILITY AND TRANSPARENCY AS PREREQUISITES TO FOOD SAFETY AND POSSIBLY PREVENTATIVE OF PUBLIC OUTRAGE

*"But you can always pick it up, and if you're alone in the kitchen,  
who is going to see?"<sup>139</sup>*

When Julia Child made her famous quip about the purported upside to there being a lack of witnesses to a kitchen mishap, she was pointing to a key truth about our relationship with food: a significant majority of

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137. *Id.* at \*2 ("[T]he court is not treating the Defendants' respective 12(b)(5) motions as summary judgment motions."). The court also refused to dismiss the defamation and tortious interference with business relationship claims. *Id.* at \*25, \*29

138. *Id.* at \*6 ("Based upon the court's determination that SDCL Chapter 20-10A preempts common law disparagement claims when an agricultural food product such as LFTB is allegedly stated to be unsafe for consumption, the court dismisses Counts 10, 14, 15, 16 and 24.").

139. Laura Jacobs, *Our Lady of the Kitchen*, VANITY FAIR (Aug. 2009), <http://www.vanityfair.com/culture/2009/08/julia-child200908> (quoting Julia Child on the famous incident, which occurred during an episode of *The French Chef* television show, when a potato pancake that she was attempting to flip fell on the counter instead of landing back in the pan where it was intended).

all that we consume was prepared without our having seen its preparation. It is for this reason, among many, that eating requires a kind of fundamental trust. The play of visibility and invisibility, concealment and revelation, deception and disclosure, are what sit at the core of modern food production and what define the dynamics of food commerce. Publication of *The Jungle* revealed a plethora of disgusting meatpacking practices; that revelation predictably gave rise to widespread disgust that undermined the public trust in the safety and wholesomeness of meat and, as a result, quickly hurt sales. Faced with the loss of profits, and no effective means to restore consumer confidence, the meat industry did an about-face and supported federal inspection of meat, so long as the taxpayers picked up the tab.

It has been oft noted that rising public outrage over food safety is what creates a necessary precondition for regulatory change. But no one has noted the role that revelation has played, and how the power of visibility is what the industry fears most, as evidenced by the continued efforts to pass and enforce laws against calling a product's safety into question or revealing unsafe or inhumane food production practices. The food industry understands that its credibility and consumer confidence are always inextricably intertwined, plummeting together when ugly practices or unsafe conditions are exposed. By suing the persons who labeled lean finely textured beef as "pink slime," BPI has attempted to remove that label from the lexicon and silence conversation about the presence of that which has the power to disgust, but also the power to make ground beef cheaper. The fact that sales of LFTB are on the rise again offers proof of the public's inclination to forget,<sup>140</sup> and its preference for the kind of magical thinking that keeps the wheels of food commerce smoothly spinning, so long as the number of deaths and illnesses linked to food are kept low enough to avoid drawing too much attention to the man behind the curtain.

I did not intend this Article to be a full evaluation of the validity of the First Amendment issues that surround and inform the debate of food disparagement laws and food libel litigation. I have instead tried to show how the food industry and regulators historically have worked in tandem to suppress public discussion about the risks posed by food, and that such suppression is key to maintaining a level of consumer confidence sufficient for continued profitable sales. In the end, it is the credibility of the

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140. Joyce Russell, "*Pink Slime*" Is Making a Comeback. Do You Have a Beef with That?, NPR BLOG (Feb. 16, 2015, 4:06 PM), <http://www.npr.org/blogs/thesalt/2014/06/17/322911060/pink-slime-is-making-a-comeback-do-you-have-a-beef-with-that> (noting that "higher beef prices are leading to increased demand for the product").

food marketplace and the food sold there that must be protected against fears, founded and unfounded.

Just as the Federal Reserve works to prevent bank runs by bolstering confidence in the soundness of the money supply, so too do the USDA and FDA repeat mantra-like the message about how reliably safe all food is in the United States. Take, for example, a statement posted on the USDA blog by the Secretary of Agriculture, Tom Vilsack, which reads in part as follows:

Often during the holiday season, we take time to reconnect with family and friends over a meal. We're able to do so because hard-working folks in rural America deliver the most abundant and affordable food supply on earth.

It's also the safest food supply—an achievement made possible by a wide range of skilled, dedicated people.

It all starts with our growers and processors, who are always asking how they can produce a safer product. They have the support of USDA staff at more than 6,000 plants around the country and at U.S. ports of entry. These experts inspect a wide range of food products before they're sent to the grocery store.<sup>141</sup>

That such a statement is, at least in part, propaganda should go without saying. But making such statements is also plainly part of the Secretary of Agriculture's job description, as the head of a department charged not only with food safety, but also food marketing responsibilities.

In carrying out its food safety responsibilities, through issuing regulation, inspecting food plants, and making enforcement decisions, the USDA has always been complicit in erecting and maintaining the curtain that keeps the public from seeing how food is in fact made, a sight that most of the public would rather not see anyway.<sup>142</sup> When the photo of lean finely textured beef began to circulate on the internet, with the descriptive "pink slime" attached, the collective reaction was one of disgust—and predictably so. And when the public learned that this meat product was doused in ammonia or citric acid as a means of reducing the risk of pathogenic contamination, it is easy to understand that few people were instantly reassured. To the contrary, who would not reasonably ask:

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141. Tom Vilsack, *Secretary's Column: Ensuring a Safe Food Supply for Americans*, USDA BLOG (Dec. 7, 2012, 1:57 PM), <http://blogs.usda.gov/2012/12/07/secretarys-column-ensuring-a-safe-food-supply-for-americans/>.

142. Pruitt & Anderson, *supra* note 95 (questioning whether increased transparency and knowledge about food production practices would, in fact, "reduce the 'yuck' factor, . . . [and] eventually lead to consumer acceptance").

If this meat is of a sufficiently high quality such that I can eat it with confidence, why must it be doused with liquid bactericide first?

Yet, regardless of the answer to this question, it would seem relatively noncontroversial to assert that the public has a right to know what is in the food that it eats. And if I find the very thought of eating ground beef with LFTB in it repulsive (and I do), then I should be able to successfully avoid eating such ground beef. On the other hand, if you are a consumer that prizes lower cost, and can find a way to not think about the LFTB (or are not in any way bothered by it), then I see no reason why you should be kept from buying ground beef made with LFTB. Either way, though, the role of the government should be to increase transparency, not decrease it.<sup>143</sup> As even commentators friendly to the meat industry have noted, “[W]ithout sufficient transparency, a product can be rebranded into something seemingly sinister.”<sup>144</sup> Moreover, when it comes to supporting critical discourse, the agency should be a participant, not a key suppresser. Ultimately, when the details of food production are allowed to remain invisible, the backlash that accompanies revelation is both inevitable and predictable. Being instructed to “ignore that man behind the curtain” is not the solution. Instead, the curtain must come down, and the reality should be seen.

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143. Stearns, *On (C)redibility*, *supra* note 2, at 267–69 (arguing that increasing the visibility of food production is a key means of decreasing unsafe practices, and providing examples of how regulatory inspections conducted by the USDA and FDA have failed to create sufficient incentives, unlike restaurant inspections that have increased safety).

144. Pruitt & Anderson, *supra* note 95.