REGENT UNIVERSITY LAW REVIEW

VOLUME 26 2013–2014 NUMBER 2

CONTENTS

REGENT UNIVERSITY LAW REVIEW

Volume 26 **2013–2014** **Number 2**

REGENT UNIVERSITY
SCHOOL OF LAW

UNIVERSITY OFFICERS

DANIEL C. "DANNY" SELLERS, JR., *Chairman of the Board of Trustees*

DR. M.G. "PAT" ROBERTSON, *Chancellor*

JEFFREY A. BRAUCH, *Dean; Professor*

B.A., University of Wisconsin at Madison; J.D., University of Chicago

DOUGLAS H. COOK, *Associate Dean for Academic Affairs and Student Services; Professor*

B.A., Miami University; J.D., The Ohio State University

JAMES E. MURPHY, *Associate Dean for Administration; Adjunct Professor*

B.A., University of Iowa; J.D., University of Oklahoma

JUDGE PATRICIA L. WEST, *Distinguished Professor and Associate Dean*

B.A., College of William and Mary, J.D., College of William and Mary, Marshall-Wythe School of Law

FACULTY

JOHN ASHCROFT, *Distinguished Professor of Law and Government*

A.B., Yale University; J.D., University of Chicago

JAMES M. BOLAND, *Director, Legal Research and Writing; Associate Professor*

B.A., Wheaton College; J.D., Regent University School of Law

ELEANOR W. BROWN, *Associate Professor*

B.A., University of Virginia; J.D., T.C. Williams School of Law, University of Richmond; LL.M., College of William and Mary, Marshall-Wythe School of Law

BRUCE N. CAMERON, *Reed Larson Professor of Labor Law*

B.A., Andrews University; J.D., Emory University School of Law

KENNETH K. CHING, *Assistant Professor*

B.A., University of Nevada at Reno; J.D., Duke University School of Law

JAMES A. DAVIDS, *Associate Professor*

B.A., Calvin College; J.D., Duke University School of Law; Ph.D., Regent University

ERIC A. DEGROFF, *Professor*

B.A., University of Kansas; M.P.A., University of Southern California; J.D., Regent University School of Law

JAMES J. DUANE, *Professor*

B.A., J.D., Harvard University

TESSA L. DYSART, *Assistant Professor*

B.A., Willamette University; J.D., Harvard Law School

THOMAS C. FOLSOM, *Professor*

B.S., U.S. Air Force Academy; J.D., Georgetown University Law Center

L.O. NATT GANTT II, *Director, Academic Success and Advising; Professor*

A.B., Duke University; J.D., Harvard Law School; M.Div., Gordon-Conwell Theological Seminary

LOUIS W. HENSLER III, *Professor*
B.A., Bob Jones University; J.D., University of Chicago

MICHAEL V. HERNANDEZ, *Professor*
B.A., J.D., University of Virginia

BRADLEY P. JACOB, *Associate Professor*
B.A., University of Delaware; J.D., University of Chicago

JANIS L. KIRKLAND, *Assistant Director, Legal Research and Writing; Instructor*
B.S., College of William and Mary; J.D., T.C. Williams School of Law, University of Richmond

LYNNE MARIE KOHM, *John Brown McCarty Professor of Family Law*
B.A., State University of New York at Albany; J.D., Syracuse University

BENJAMIN V. MADISON III, *Professor*
B.A., Randolph-Macon College; M.A., College of William and Mary; J.D., College of William and Mary, Marshall-Wythe School of Law

KATHLEEN A. MCKEE, *Director, Civil Practice Clinic; Associate Professor*
B.A., State University of New York at Albany; J.D., Columbus School of Law, Catholic University; LL.M., Georgetown University Law Center

C. SCOTT PRYOR, *Professor*
B.A., Dordt College; J.D., University of Wisconsin at Madison; M.A., Reformed Theological Seminary

MICHAEL P. SCHUTT, *Director, Institute for Christian Legal Studies; Associate Professor*
B.A., Stephen F. Austin State University; J.D., University of Texas

JAY ALAN SEKULOW, *Distinguished Professor of Law*
B.A., J.D., Mercer University; Ph.D., Regent University

JUDGE ROBERT M.M. SETO, *Professor Emeritus*
B.S., St. Louis University; J.D., St. Louis University School of Law; LL.M., The George Washington University School of Law

RANDY D. SINGER, *Attorney-in-Residence*
B.A., Houghton College; J.D., College of William and Mary, Marshall-Wythe School of Law

CRAIG A. STERN, *Professor*
B.A., Yale University; J.D., University of Virginia

KIMBERLY ROUSE VAN ESSENDELFT, *Instructor, Legal Research and Writing*
B.A., University of Virginia; J.D., College of William and Mary, Marshall-Wythe School of Law

DAVID M. WAGNER, *Professor*
B.A., M.A., Yale University; J.D., George Mason University School of Law

GLORIA A. WHITTICO, *Assistant Professor of Law; Associate Director, Academic Success Program*
A.B., College of William and Mary; J.D., University of Virginia

ADJUNCT FACULTY

RACHEL F. ALLEN
B.S., Liberty University; J.D., Regent University School of Law

GREGORY P. BERGETHON

B.S., University of Richmond; J.D., College of William and Mary, Marshall-Wythe School of Law

GARY A. BRYANT

B.A., Bob Jones University; J.D., Washington & Lee University

DARIUS K. DAVENPORT

B.A., Norfolk State University; J.D., University of Wisconsin

ERIN K. DEBOER

B.A., Hillsdale College; J.D., Regent University School of Law

THE HONORABLE ROBERT J. HUMPHREYS

B.A., Washington and Lee University; J.D., Widener University School of Law

DAVID C. JOHNSON

B.S., Montana State University; J.D., Regent University School of Law

THE HONORABLE DENHAM ARTHUR KELSEY

B.A., Old Dominion University; J.D., College of William and Mary, Marshall-Wythe School of Law

DAVID W. LANNETTI

B.S., U.S. Naval Academy; M.S. Management, Troy University; J.D., College of William and Mary, Marshall-Wythe School of Law

STEPHEN D. LENTZ

B.A., Bowling Green State University; J.D., College of William and Mary, Marshall-Wythe School of Law

JAMES A. METCALFE

B.A., U.S. Naval Academy; J.D., College of William and Mary, Marshall-Wythe School of Law

ANTHONY S. MULFORD

B.A., University of Nebraska; J.D., Regent University School of Law

THE HONORABLE H. THOMAS PADRICK, JR.

B.A., Old Dominion University; Virginia State Bar Law Reader Program

STEPHEN P. PFEIFFER

B.A., Carroll College; J.D., Regent University School of Law

CATHERINE L. SIX

B.A., University of Richmond; J.D., Regent University School of Law

HUGO R. VALVERDE

B.S., College of William and Mary; M.E.M., Duke University; J.D., Regent University School of Law

DAVID D. VELLONEY

B.S., United States Military Academy; J.D., Yale Law School; LL.M., The Judge Advocate General's School, U.S. Army

SHAWN A. VOYLES

B.A., DePauw University; J.D., Regent University School of Law

LAW LIBRARY ADMINISTRATION

MARGARET CHRISTIANSEN, *Director of Law Library*
B.S., William Woods College; J.D., Regent University School of Law; M.S.I.S., Florida State University

ERIC L. WELSH, *Head of Research Services*
B.A., Westminster College; M.S., Drexel University; J.D., Regent University School of Law

WILLIAM E. MAGEE, *Assistant Research Services Librarian*
B.A., Old Dominion University; J.D., Regent University School of Law; M.L.S., Catholic University

MARIE SUMMERLIN HAMM, *Assistant Director for Collection Development; Adjunct Professor*
Dual B.S., Mount Olive College; J.D., Regent University School of Law; M.L.S., Syracuse University

LAW ADMISSIONS

BONNIE CREEF, *Director of Law School Admissions and Financial Aid*

JULIE ANJO, *Assistant Director of Law School Admissions and Financial Aid*

MARIE MARKHAM, *Assistant Director of Enrollment Management*

SARAH SCHULTE, *Assistant Director of Admissions & Recruitment*

LAW SCHOOL MARKETING AND COMMUNICATIONS

SEAN KIRNAN, *Director of Communications and Enrollment Marketing*

LAW SCHOOL CAREER AND ALUMNI SERVICES

DARIUS DAVENPORT, *Director of Career and Alumni Services*

KATHY STULL, *Assistant Director of Career and Alumni Services*

REGENT UNIVERSITY LAW REVIEW

ISSN 1056-3962. The *Regent University Law Review* is published at Regent University and is produced and edited by the students of the Regent University School of Law under the supervision of the faculty. The domestic subscription rate is $14.00 per issue. Third class postage paid at Virginia Beach, Virginia. POSTMASTER: Send address changes to Editor-in-Chief, Law Review, Regent University School of Law, Virginia Beach, VA 23464-9800. Absent receipt of notice to the contrary, subscriptions to the *Law Review* are renewed automatically each year. Claims for issues not received will be filled for published issues within one year before the receipt of the claim. Subscription claims for issues beyond this limitation period will not be honored.

Regent University Law Review accepts unsolicited manuscripts by email addressed to the Editor-in-Chief. Citations in submitted manuscripts should use footnotes and conform to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (19th ed. 2010).

Address all correspondence to Editor-in-Chief, Regent University Law Review, Regent University School of Law, 1000 Regent University Drive, RH 252C, Virginia Beach, VA 23464. Regent University Law Review's e-mail address is *lawreview@regent.edu*, and Law Review's website address is *http://www.regent.edu/lawreview*.

The seal of the Regent University Law Review symbolizes the Christian heritage of Regent University. The shield represents the shield of faith. The crown at the top of the crest declares the One we represent, our Sovereign King, Jesus Christ. The three crowns represent the Father, Son, and Holy Spirit. The flame and the lamp represent the lamp of learning and the fire of the Holy Spirit. Laced throughout the crest is a ribbon that signifies the unity Christians share. The mission of Regent University is embodied in the surrounding words "DUCTUS CHRISTIANUS AD MUNDUM MUTANDUM"— "Christian Leadership to Change the World."

REGENT UNIVERSITY LAW REVIEW

Volume 26 **2013–2014** **Number 2**

FOREWORD: FOOD LAW AND ITS PLACE AT THE LEGAL ACADEMY

*Michael T. Roberts**

The invitation extended by the *Regent University Law Review* Symposium on *Emerging Issues in Food Law* invited prospective attendees to the symposium to "learn about laws that affect you—and what you eat—every day."[1] Implicit in this invitation was the notion that if the measure of the importance of law is how it affects the lives of people on a daily basis, then food law is of paramount significance. To this end, the symposium presentations addressed a broad range of emerging issues, including food safety, the labeling of food products, the composition of food (biotechnology), and the effects of the modern diet (obesity and malnutrition) on consumers. The symposium also evaluated the legal tools that are used to govern the food system and deal with emerging issues, including government regulation, litigation, and private standards.

Although the symposium rightly focused on emerging issues, it should be recognized that food law is both old and new. From the beginning of recorded history, societies have sought to regulate the production, trade, and consumption of food. The modern food system has fundamentally transformed the production, composition, taste, availability, value, and appearance of food, the consequences of which raise novel health and societal issues of which "new" food law attempts to address. Historically and presently, food law is developed and applied specifically in response to problems and challenges that emerge in the food system (for example, food fraud, food safety outbreaks, allergy labeling, animal welfare, and obesity).

---

* Michael T. Roberts is the Executive Director of the Resnick Program for Food Law and Policy at UCLA School of Law.

[1] *Regent University Law Review Symposium*, REGENT L. SCH., http://www.regent.edu/acad/schlaw/student_life/studentorgs/lawreview/symposium.cfm (last visited Mar. 19, 2014).

In addition to dealing with problems in the food system, the development of food law also reflects societal values and perceptions of food. Notwithstanding the industrialization of food, the act of eating has never been, nor likely ever will be, a simple exercise of satisfying a basic physiological need. Culture has always mattered. Thus, the governance of food is shaped by cultural, political, and sociological norms articulated by consumers and communities, the force of which has intensified with growing interest in sustainability, nutrition, access to healthy food, localness, the right to certain information about food, the treatment of animals intended for food, farmland preservation, school lunch reform, urban agriculture, community gardens, social justice, farm worker rights, and food security. As evidenced by the symposium presentations, the cultural and commercial priorities of stakeholders in the food system are not always in sync, which gives rise to palatable tensions and divisive issues (for example, proposed mandatory labeling for genetically modified food, zoning rules for the production of backyard chickens, and proposed restrictions on sugar-added beverages, to name just a few) that make food law interesting.

The development of modern food law and its reframing of laws and norms requires food-law practitioners who are skilled and who understand the food systems. Lawyers who practice the traditional forms of food law—"food and drug law"[2] and "agricultural law"[3]—will better represent the interests of their stakeholder clients by understanding the issues raised by a constantly changing food system and the evolving norms and concerns in response to the changes. In addition to the "FDA" bar and agricultural law specialists, the food-law bar now is comprised of trial lawyers who engage in class action or other litigation involving food on issues not adequately addressed by regulation; government counsel

---

[2] The practice of food and drug law generally involves the representation of food enterprises engaged in the manufacturing, packaging, labeling, advertising, and distributing of food products. Many of the lawyers who focus on food and drug law are located in Washington, D.C., Chicago, and other large metropolitan areas. The practice of food law by these lawyers is mostly administrative law and is rich in its complexities.

[3] The practice of agricultural law really took hold in the 1970s and 1980s, which included a period of economic hardship for farms and rural communities. *See* Susan A. Schneider, *A Reconsideration of Agricultural Law: A Call for the Law of Food, Farming, and Sustainability*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 935, 941–42 (2010). Agricultural law focuses on the producer of food and the inputs that go into the production of food. Lawyers who practice in this area are a vastly different group than food-and-drug lawyers. Agricultural law practitioners typically practice in rural areas and represent the interests of agriculture enterprises, including "[f]inancing the [o]wnership of [a]gricultural [l]and," "[f]arm [l]eases," "[w]arehouses," "[o]perational [f]inancing," "[a]nimals," "[c]ommodity [f]utures [c]ontracts," "[a]gricultural [c]ooperatives," "[a]gricultural [e]mployment," "[s]oil and [w]ater [m]anagement," and "[f]armlands [p]reservation." *See Summary of Contents* to KEITH G. MEYER ET AL., AGRICULTURAL LAW: CASES AND MATERIALS, at xxv–xxvii (1985).

who are increasingly being involved in city planning and public health issues on zoning of food deserts, community gardening, and farmers' markets, food-access issues of food trucks, public-health issues concerning nutrition programs and obesity, and even food and beverage taxes designed to change public consumption habits; and public-interest lawyers who represent advocacy groups, state and local food policy councils, pro-bono activities, and NGOs who have an interest in setting food policy.

To meet the challenges of this expansive food-law discipline, law schools are increasingly paying attention to food-law curriculum development and law and policy analysis. Recent examples of this effort include the Resnick Program for Food Law and Policy at UCLA School of Law and a Food Law and Policy Clinic and Food Law Lab at Harvard Law School. Food law and policy courses are now offered in law schools across the country.[4] Even traditional law courses, including health law, environmental law, international law, public policy law, and intellectual law courses include components of food law and policy. The *Regent University Law Review* Symposium has played an important role in this educational movement on food law by recognizing the growing saliency of food law and by focusing attention on how law governs food from the field to the table. The challenge for the legal academy is to continue to develop food law, which, as evidenced by this symposium, the academy is well suited to accomplish.

---

[4] The 2014 annual conference for the Association for American Law Schools featured a panel session titled "*Innovations in Teaching Food Law and Policy: Definitions, Fellowships, Clinics, and Local Food Initiatives.*" Schedule-at-a-Glance, Ass'n of Am. Law Sch. Annual Meeting (Jan. 2–5, 2014), http://aals.org/am2014/Glance.pdf.

DEFINING *NATURAL* FOODS: THE SEARCH FOR A *NATURAL* LAW

Nicole E. Negowetti[*]

INTRODUCTION

The term *natural* has escaped an enforceable definition by the Food and Drug Administration ("FDA") despite repeated requests from food industry groups[1] and food manufacturers[2] and various failed attempts over the past decade.[3] Retail sales demonstrate the claim's influence on consumers. In the United States, consumers have spent more than $40 billion on food labeled *natural* over the past year, and 51% of Americans search for *all natural* products when shopping.[4] Consumers, however, are confused by the term's meaning, and "only 47% view the claim as trustworthy."[5] As both consumers and businesses demand an enforceable, accountable, and uniform standard for the terms *natural* and *all natural*,[6] courts, legislatures, and retailers are attempting to create their own standards in the absence of action by the FDA.[7] Recent court decisions have referred the issue of *natural's* meaning to the FDA, but in January 2014, the FDA refused to act upon these requests.[8] This Article evaluates the recent attempts to establish a standard in the

---

* Assistant Professor of Law, Valparaiso University Law School.

1 "In 2006, the Sugar Association petitioned the FDA to 'establish specific rules and regulations governing the definition of "natural" before a "natural" claim can be made on food and beverages regulated by the FDA.'" Nicole E. Negowetti, *A National "Natural" Standard for Food Labeling*, 65 ME. L. REV. 581, 586 (2013) (quoting Citizen Petition from Andrew C. Briscoe III, President & CEO, Sugar Ass'n, to FDA, Re: Definition of the Term "Natural" for Making Claims on Foods and Beverages Regulated by the Food and Drug Administration 1 (Feb. 28, 2006), *available at* http://www.cspinet.org/new/pdf/sugar_fda_petition.pdf).

2 In 2007, "the Sara Lee Corporation petitioned for the FDA to collaborate with the USDA's Food Safety and Inspection Service (FSIS) to create a uniform policy for the use of the term 'natural.'" *Id.* (citing Citizen Petition from Robert G. Reinhard, Dir. Food Safety/Regulatory, Sara Lee Corp., to FDA, Requesting the Food and Drug Administration to Develop Requirements for the Use of the Term "Natural" Consistent with USDA's Food Safety and Inspection Service 1–2 (Apr. 9, 2007), *available at* http://www.fda.gov/ohrms/dockets/dockets/07p0147/07p-0147-cp00001-02-vol1.pdf).

3 *See id.* at 584–86, 589–91 for a discussion of regulatory attempts by the FTC, FDA, and USDA to define the term *natural*.

4 Mike Esterl, *The Natural Evolution of Food Labels*, WALL ST. J., Nov. 6, 2013, at B1.

5 *Id.*

6 *See* Negowetti, *supra* note 1, at 583.

7 *Id.* at 593.

8 *See infra* Part I.A.2.

absence of government regulation and concludes that the *natural* claim is more likely to be abandoned by food manufacturers than it is to be defined in a uniform and enforceable manner.

The Federal Food, Drug, and Cosmetic Act ("FDCA") of 1938 grants the FDA the power to "promulgate food definitions and standards of food quality."[9] The FDCA also empowers the FDA to (a) protect the public health by ensuring that "foods are safe, wholesome, sanitary, and properly labeled";[10] (b) promulgate regulations pursuant to this authority; and (c) enforce its regulations through administrative proceedings.[11] The FDCA deems a food as "misbranded" if its labeling "is false or misleading in any particular."[12] There is no private right of action under the statute.[13]

Although the FDA has acknowledged that defining the term *natural* could prevent consumer confusion and ambiguity, the agency nevertheless has declined to adopt a formal definition.[14] In 1991, it adopted an "informal policy," which states that *natural* means merely that "nothing artificial or synthetic (including colors regardless of source) is included in, or has been added to, the product that would not normally be expected to be there."[15] The policy carries only the weight of an advisory opinion, and it does not establish a legal requirement.[16] In 1993, when it initiated rulemaking for the Nutrition and Labeling Education Act ("NLEA"),[17] the FDA invited comments on a potential rule

---

[9] Fellner v. Tri-Union Seafoods, 539 F.3d 237, 251 (3d Cir. 2008) (citing 21 U.S.C. § 341 (2006)).

[10] § 393(b)(2)(A).

[11] *See* Food and Drugs, 21 C.F.R. §§ 7.1, 10.25, 10.40, 10.50 (2013).

[12] 21 U.S.C. § 343(a) (2012).

[13] Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 806–07, 810 (1986).

[14] Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. 2302, 2407 (Jan. 6, 1993) (to be codified at 21 C.F.R. pts. 5, 101) [hereinafter 1993 Food Labeling Reg.]; Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definitions of Terms, 56 Fed. Reg. 60,421, 60,466 (proposed Nov. 27, 1991) (to be codified at 21 C.F.R. pts. 5, 101, 105) [hereinafter 1991 Proposed Food Labeling Reg.].

[15] 1991 Proposed Food Labeling Reg., *supra* note 14, at 60,466.

[16] 21 C.F.R. § 10.85(d), (e), (j) (2013). The FDA has implemented only one regulation concerning the use of the term *natural*, distinguishing natural flavoring from artificial flavoring for the "labeling of spices, flavorings, colorings and chemical preservatives." § 101.22.

[17] Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (codified at 21 U.S.C. § 343 (2012)). The NLEA amended the FDCA for nearly all food products within the FDA's jurisdiction to regulate health claims on food packaging, standardize nutrient content claims, and require that more detailed nutritional information be included on product labels. *See The Impact of the Nutrition Labeling and Education Act of 1990 on the Food Industry*, 47 ADMIN. L. REV. 605, 606 (1995).

that would define *natural*.[18] The FDA questioned whether it should "establish a definition for 'natural' so that the term would have a common understanding among consumers" or whether it should completely prohibit *natural* claims "on the basis that they are false and misleading."[19] Although the agency acknowledged that defining the term *natural* could reduce ambiguity and prevent misleading claims, the FDA ultimately decided that resource limitations and other priorities prohibited it from undertaking rulemaking to establish a definition for *natural*.[20]

Although consumer interest in *natural* foods continued to grow over the following decade, the FDA again declined to address the *natural* issue. In July 2008, when answering the question of whether high fructose corn syrup ("HFCS") is *natural*, the FDA explained that it would not "restrict the use of the term 'natural' except on products that contain added color, synthetic substances and flavors."[21] It thus concluded that whether HFCS could be considered *natural* would depend on the manner in which the corn syrup was made, and products containing HFCS could carry a *natural* label when synthetic fixing agents were not in contact with the product during manufacturing.[22] In doing so, the FDA continued to adhere to its position that its "longstanding policy on the use of the term 'natural' is that 'natural' means that nothing artificial (including artificial flavors) or synthetic (including all color additives regardless of source) has been . . . added to a food that would not normally be expected to be in the food."[23] The FDA also stated that it would make determinations on a case-by-case basis, as opposed to adopting a consistent, uniform policy:

> Consistent with our policy on the use of the term "natural," we have stated in the past that the determination on whether an ingredient

---

[18] 1993 Food Labeling Reg., *supra* note 14, at 2397.

[19] *Id.* at 2407.

[20] *Id.*

[21] Letter from Geraldine A. June, Supervisor Prod. Evaluation & Labeling Team, FDA, to Audrae Erickson, President, Corn Refiners Ass'n (Jul. 3, 2008), *available at* http://www.corn.org/wp-content/uploads/2008/07/FDAdecision7-7-08.pdf. Just three months earlier, in April 2008, the FDA's position was that HFCS was *not* natural. In fact, in response to an article on Foodnavigator-usa.com regarding whether HFCS could be considered a *natural* ingredient, the FDA stated that "the use of synthetic fixing agents in the enzyme preparation, which is then used to produce HFCS, would not be consistent with our policy on the use of the term 'natural.' Consequently, we . . . would object to the use of the term 'natural' on a product containing HFCS." *Id.*; *see also* Lorraine Heller, *FDA Comments on HFCS Spark Industry Opposition*, FOOD NAVIGATOR-USA.COM (Apr. 3, 2008), http://www.foodnavigator-usa.com/Regulation/FDA-comments-on-HFCS-spark-industry-opposition.

[22] Letter from Geraldine A. June, *supra* note 21.

[23] *Id.*

> would qualify for use of the term "natural" is done on a case-by-case basis. Further, ingredients with the same common or usual name may be formulated in different ways, where a food containing the ingredient formulated one way may qualify for the use of [the] term "natural" and another food containing the ingredient with the same common or usual name, which has been formulated in a different way may not be eligible for the use of the term "natural."[24]

In 2012, the FDA updated its website to reflect its rationale for not providing a clear definition of *natural* on food labels; according to the FDA:

> From a food science perspective, it is difficult to define a food product that is "natural" because the food has probably been processed and is no longer the product of the earth. That said, the FDA has not developed a definition for use of the term natural or its derivatives. However, the agency has not objected to the use of the term if the food does not contain added color, artificial flavors, or synthetic substances.[25]

The FDA's position regarding *natural* is merely an informal policy that has the weight of an advisory opinion.[26] The policy does not impose a legal requirement nor does it have the force of law.[27] This lack of an enforceable *natural* standard has created legal issues regarding consumer expectations and the ubiquitous use of the term on a wide variety of food products. Although food labeling and misbranding issues are properly within the FDA's province, the issue of what constitutes *natural* is now before the courts.

Part I of this Article discusses the recent decisions in the *natural* lawsuits. Part II evaluates the efforts of Congress and state legislatures to define *natural*. Part III then discusses whether the food industry or retailers will establish a *natural* standard. Part IV analyzes the issue of whether consumers should be required to investigate what a food producer's *natural* claim means, and the Article closes by offering a conclusion regarding the future of *natural* claims on food labels.

I. FOOD FIGHTS IN THE FOOD COURTS

As the FDA has continued to refrain from providing sufficient guidance to food manufacturers as to what constitutes *natural*, lawsuits have flooded the courts. At least one hundred lawsuits have been filed in

---

[24] *Id.*

[25] Negowetti, *supra* note 1, at 588 (quoting *About FDA, What Is the Meaning of 'Natural' on the Label of Food?*, FDA, http://www.fda.gov/AboutFDA/Transparency/Basics/ucm214868.htm (last updated Apr. 4, 2012)).

[26] 21 C.F.R. § 10.85(d), (e), (j) (2013).

[27] *See* Holk v. Snapple Beverage Corp., 575 F.3d 329, 342 (3d Cir. 2009).

the past two years challenging *natural* claims on food,[28] particularly in the Northern District of California, now referred to as the "Food Court."[29] Plaintiffs have alleged violations of state statutes on false advertising, unfair trade practices, consumer protection, fraud, and breach of warranty.[30] Most of the *natural* lawsuits filed in California allege that the *natural* claims on various products constitute violations of the Unfair Competition Law ("UCL"),[31] predicated on violations of the False Advertising Law ("FAL")[32] or the Consumer Legal Remedies Act ("CLRA").[33] The UCL, FAL, and CLRA are California consumer protection statutes which prohibit deceptive practices and misleading advertising.[34] Claims made under these statutes "are governed by the 'reasonable consumer' test" which focuses on whether "members of the public are likely to be deceived."[35] More specifically, the inquiry under the reasonable consumer standard is whether "a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled."[36] "A 'reasonable consumer' is an 'ordinary consumer acting reasonably under the circumstances,' who 'is not versed in the art of inspecting and judging a

---

[28] Esterl, *supra* note 4.

[29] Anthony J. Anscombe & Mary Beth Buckley, *Jury Still Out on the 'Food Court': An Examination of Food Law Class Actions and the Popularity of the Northern District of California*, BLOOMBERG LAW, http://about.bloomberglaw.com/practitioner-contributions/jury-still-out-on-the-food-court/ (last visited Mar. 19, 2014); *see also* AM. TORT REFORM FOUND., STATE CONSUMER PROTECTION LAWS UNHINGED 18 (2013), *available at* http://atra.org/sites/default/files/documents/CPA%20White%20Paper.pdf.

[30] *See, e.g.*, Class Action Complaint at 1–2, Janney v. Gen. Mills, 944 F. Supp. 2d 806 (N.D. Cal. 2013) (No. 4:12-cv-03919-PJH) (alleging violations of California's Unfair Competition Law, False Advertising Law, and unjust enrichment); Class Action Complaint at 2, Briseño v. ConAgra Foods, Inc., No. CV11-05379MMM (AGBx), 2011 WL 7939790 (C.D. Cal. June 28, 2011) (alleging breach of express warranty along with claims under California's false advertising law, California's unfair competition law, and California's Consumer Legal Remedies Act); Class Action Complaint at 1–2, 16–17, Lockwood v. ConAgra Foods, Inc., 597 F. Supp. 2d 1028 (N.D. Cal. 2009) (No. 3:08-CV-04151-CRB) (seeking injunctive relief and restitution on behalf of a class of California consumers for unlawful and deceptive business acts and practices and false advertising).

[31] CAL. BUS. & PROF. CODE § 17200 (Westlaw through 2013 Reg. Sess.); *see, e.g.*, *Lockwood*, 597 F. Supp. 2d at 1029.

[32] § 17500 (Westlaw through 2013 Reg. Sess.); *see, e.g.*, Ries v. Arizona Beverages USA, 287 F.R.D. 523, 527 (N.D. Cal. 2012).

[33] CAL. CIV. CODE § 1750 (Westlaw through 2013 Reg. Sess.); *see, e.g.*, Miller v. Ghirardelli Chocolate Co., 912 F. Supp. 2d. 861, 863 (N.D. Cal. 2012).

[34] *See* § 1770 (Westlaw through 2013 Reg. Sess.); CAL. BUS. & PROF. CODE §§ 17200, 17500.

[35] Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir. 2008) (quoting Freeman v. Time, Inc., 68 F.3d 285, 289 (9th Cir. 1995)).

[36] Lavie v. Procter & Gamble Co., 105 Cal. App. 4th 496, 508 (2003).

product, [or] in the process of its preparation or manufacture.'"[37] Because plaintiffs have alleged that they were misled by defendants' *natural* claims on unnatural products, satisfying the "reasonable consumer" test requires that they offer an objective standard for *natural* that was not met by the food producer.[38] Thus, courts will engage in an analysis of what constitutes *natural* to a reasonable consumer.[39] Before discussing how the courts have evaluated the meaning of *natural*, this Article will first analyze whether the inquiry is a proper one for the courts, or whether defining *natural* is within the FDA's area of expertise.

A. Preemption and Primary Jurisdiction

Recently, several courts have announced decisions that reveal a lack of consensus on whose role—courts or FDA—it is to address the issue of what *natural* means to consumers. Federal courts have consistently ruled "that the FDA, pursuant to the FDCA and NLEA, [does] not preempt claims brought under state consumer protection laws that utilized labels emphasizing that the food contained 'all natural' ingredients."[40] For example, in denying Defendant Campbell Soup's Motion to Dismiss, the court in *Barnes v. Campbell Soup Company* reasoned that "because the FDA deferred taking regulatory action by providing a mere general and unrestrictive policy on the term 'natural,' the FDA provided no actual federal requirements regarding the term 'natural' for the Court to endow with preemptive effect."[41] Therefore, until the FDA issues an enforceable requirement regarding the term

---

[37] Viggiano v. Hansen Natural Corp., 944 F. Supp. 2d 877, 885 (C.D. Cal. 2013) (alteration in original) (quoting Colgan v. Leatherman Tool Grp., Inc., 135 Cal. App. 4th 663, 682 (2006)).

[38] *See Williams*, 552 F.3d at 938.

[39] *Id.* at 939–40.

[40] Barnes v. Campbell Soup Co., No. C12-05185 JSW, 2013 WL 5530017, at *7 (N.D. Cal. July 25, 2013); *see also* Holk v. Snapple Beverage Corp., 575 F.3d 329, 341–42 (3d Cir. 2009) (holding that the plaintiff's claims brought under state law were not preempted); Astiana v. Ben & Jerry's Homemade, Inc., Nos. C10-4387 PJH & C10-4937 PJH, 2011 WL 2111796, at *7–8 (N.D. Cal. May 26, 2011) (denying defendant's motion to dismiss because plaintiff's claims were not preempted by the FDCA); Lockwood v. ConAgra Foods, Inc., 597 F. Supp. 2d 1028, 1031–32 (N.D. Cal. 2009) (finding defendant's argument that plaintiff's claims were preempted non-persuasive); Hitt v. Arizona Beverage Co., No. 08CV809 WQH (POR), 2009 WL 449190, at *5 (S.D. Cal. Feb. 4, 2009) (concluding that plaintiff's claims were not preempted by federal law).

[41] *Barnes*, 2013 WL 5530017, at *7; *see Hitt*, 2009 WL 449190, at *3 (noting that "'deliberate agency inaction—an agency decision not to regulate an issue—will not alone preempt state law'") (quoting Fellner v. Tri-Union Seafoods, 539 F.3d 237, 247 (3d Cir. 2008)).

natural, the court will not "intrude upon the FDA's authority" and preempt plaintiffs' claims.[42]

In addition to raising preemption claims, which have been consistently unsuccessful, defendants in these *natural* lawsuits have routinely sought dismissal of the cases also on primary jurisdiction grounds.[43] The doctrine applies "whenever enforcement of [a] claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body."[44] It serves to maintain uniformity and consistency, uphold the integrity of a regulatory scheme, and establish a "workable relationship between the courts and administrative agencies."[45] Although "[n]o fixed formula exists for applying the doctrine of primary jurisdiction,"[46] courts will generally weigh four factors in deciding whether it applies: "(1) a need to resolve an issue (2) that has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration."[47] If the doctrine applies, a court will "refer" the issue to the appropriate agency, allowing the parties reasonable opportunity to seek an administrative ruling.[48]

In 2010, although Defendant Snapple's Motion to Dismiss was denied, the company succeeded in arguing the applicability of the primary jurisdiction doctrine in *Coyle v. Hornell Brewing Company*.[49] The New Jersey District Court certified to the FDA for administrative determination the question of whether HFCS is a *natural* ingredient.[50]

---

[42] *Barnes*, 2013 WL 5530017, at *7. However, where the USDA and Food Safety and Inspection Service ("FSIS"), pursuant to the Federal Meat Inspection Act ("FMIA") and the Poultry Products Inspection Act ("PPIA"), pre-approved Campbell's Natural Chicken Tortilla soup label, the court held that state claims with respect to this soup must be preempted. *Id.* at *5. Because the pre-approval process for labels includes a determination of whether the label appears "false or misleading," the Defendant's Natural Chicken Tortilla soup labels indicating that the soup contains "100% Natural" ingredients, despite its inclusion of GMO corn, "cannot be construed, as a matter of law, as false or misleading." *Id.*

[43] *See, e.g.*, *Holk*, 575 F.3d at 333; *Barnes*, 2013 WL 5530017, at *8; *Lockwood*, 597 F. Supp. 2d at 1030.

[44] United States v. W. Pac. R.R. Co., 352 U.S. 59, 63–64 (1956).

[45] MCI Telecomms. Corp. v. Teleconcepts, Inc., 71 F.3d 1086, 1105 (3d Cir. 1995).

[46] *W. Pac. R.R.*, 352 U.S. at 64.

[47] Janney v. Gen. Mills, 944 F. Supp. 2d 806, 811 (N.D. Cal. 2013) (citing Clark v. Time Warner Cable, 523 F.3d 1110, 1114–15 (9th Cir. 2008)).

[48] Reiter v. Cooper, 507 U.S. 258, 268 & n.3 (1993).

[49] Coyle v. Hornell Brewing Co., No. 08-02797 (JBS), 2010 WL 2539386, at *1, 3–4 (D.N.J. June 15, 2010).

[50] *Id.* at *4–5.

Just a few months later in September 2010, the FDA refused to provide the requested guidance.[51] Again, the FDA referenced more pressing concerns and limited resources and stated it would take years to properly formulate a definition of *natural* through its normal process including public participation.[52] In the response letter, the FDA remarked that "[c]onsumers currently receive some protection in the absence of a definition of 'natural' because the Federal Food, Drug, and Cosmetic Act and FDA's implementing regulations require that all ingredients used in a food be declared on the food's label."[53] Since the FDA's refusal to intervene in *Coyle* and respond to the issue of whether HFCS is a *natural* ingredient, most district courts have ruled that the primary jurisdiction doctrine does not apply to lawsuits alleging misleading use of the *natural* claim.[54]

1. Issue within the Courts' Competence

The majority of district courts recently deciding whether to grant defendants' motions to dismiss on primary jurisdiction grounds have concluded either that primary jurisdiction is inappropriate in these *natural* lawsuits or that referral to the FDA would be futile even if the doctrine was applicable.[55] For example, in *Brazil v. Dole Food Company*, the Northern District of California rejected the defendant's argument that the court should either dismiss or stay the case under the doctrine of primary jurisdiction.[56] Plaintiff alleged that he purchased Dole's misbranded food products, such as Dole Mixed Fruit in 100% Fruit Juice and Dole Blueberries, which claimed to be "'All Natural' despite containing artificial or unnatural ingredients, flavorings, coloring, and/or chemical preservatives."[57] The court concluded that "this case does not

---

[51] Negowetti, *supra* note 1, at 588 (citing Letter from Michael M. Landa, Acting Dir., Ctr. for Food Safety & Applied Nutrition, FDA, to Judge Jerome B. Simandle, U.S. Dist. Court, Dist. N.J. (Sept. 16, 2010), *available at* http://www.kashifalse advertisingclassaction.com/Documents/KKA0002/KKA_KashiComplaint_131105.pdf).

[52] *Id.*

[53] *Id.* (quoting Letter from Michael M. Landa, Acting Dir., Ctr. for Food Safety & Applied Nutrition, FDA, to Judge Jerome B. Simandle, U.S. Dist. Court, Dist. N.J. (Sept. 16, 2010), *available at* http://www.kashifalseadvertisingclassaction.com/Documents/KKA0002/KKA_KashiComplaint_131105.pdf).

[54] *See infra* I.A.1; *see also* Janney v. Gen. Mills, 944 F. Supp. 2d 806, 811–15 (N.D. Cal. 2013).

[55] *Compare Janney*, 944 F. Supp. 2d at 814–15 (holding that referral of the matter to the FDA is futile), *and* Brazil v. Dole Food Co., 935 F. Supp. 2d. 947, 959–60 (N.D. Cal. 2013) (declining to apply the doctrine of primary jurisdiction to the case), *with* Barnes v. Campbell Soup Co., No. C12-05185 JSW, 2013 WL 5530017, at *8–9 (N.D. Cal. July 25, 2013) (referring the case to the FDA and ordering a six-month stay).

[56] *Brazil*, 935 F. Supp. 2d at 959–60.

[57] *Id.* at 950–51.

raise a 'particularly complicated issue that Congress has committed to a regulatory agency.'"[58] The court opined that the case is "'far less about science than it is about whether a label is misleading'"[59] and it went on to comment that "'every day courts decide whether conduct is misleading,' and the 'reasonable-consumer determination and other issues involved in Plaintiff's lawsuit are within the expertise of the courts to resolve.'"[60] Finding that the case did not "require[ ] resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency," the court declined to stay the case based on primary jurisdiction.[61] Quoting the Ninth Circuit, the court reasoned that "the doctrine of primary jurisdiction does *not* require that all claims within an agency's purview be decided by the agency. Nor is it intended to secure expert advice for the courts from regulatory agencies every time a court is presented with an issue conceivably within the agency's ambit."[62]

Similarly, in *In re Frito-Lay North America, Inc. All Natural Litigation*, the Eastern District of New York reasoned that "the primary jurisdiction doctrine does not apply when 'the issue at stake is legal in nature and lies within the traditional realm of judicial competence.'"[63] In this consolidated multi-district class action against Frito-Lay North America Inc., plaintiffs alleged that Tostitos, SunChips, and Fritos Bean Dip products are deceptively labeled and marketed as "All Natural" when, in fact, the products contained unnatural genetically modified organisms ("GMOs").[64] The court adopted reasoning similar to that in *Brazil* and explained that the issue regarding whether a reasonable consumer would find the label misleading is one in which "courts are

---

[58] *Id.* at 960 (quoting Brown v. MCI Worldcom Network Servs., Inc., 277 F.3d. 1166, 1172 (9th Cir. 2002)).

[59] *Id.* (quoting Jones v. ConAgra Foods, Inc., 912 F. Supp. 2d. 889, 898 (N.D. Cal. 2012)).

[60] *Id.* (quoting *Jones*, 912 F. Supp. 2d. at 899); *see also* Chacanaca v. Quaker Oats Co., 752 F. Supp. 2d 1111, 1124 (N.D. Cal. 2010) (stating that "plaintiffs advance a relatively straightforward claim: they assert that defendant has violated FDA regulations and marketed a product that could mislead a reasonable consumer[,] . . . [and that] this is a question courts are well-equipped to handle" (internal quotation marks omitted)).

[61] *Brazil*, 935 F. Supp. 2d at 960 (alteration in original) (quoting *Brown*, 277 F.3d. at 1172).

[62] *Id.* (internal quotation marks omitted) (quoting *Brown*, 277 F.3d at 1172).

[63] *In re* Frito-Lay N. Am., Inc. All Natural Litig., No. 12-MD-2413 (RRM) (RLM), 2013 WL 4647512, at *8 (E.D.N.Y. Aug. 29, 2013) (quoting Goya Foods, Inc. v. Tropicana Prods., Inc., 846 F.2d 848, 851 (2d Cir. 1988)).

[64] *Id.* at *1.

eminently well suited, even well versed."[65] The court also noted that a formal definition of *natural* by the FDA "would not dispose of plaintiffs' state law claims."[66] Furthermore, the court noted:

> There is no telling, if it even chose to respond with any directive to the Court's referral, how the FDA would define the term, and whether its definition would shed any further light on whether a reasonable consumer is deceived by the 'All Natural' food label when it contains bioengineered ingredients.[67]

In In re *ConAgra Foods, Incorporated*,[68] the court was not persuaded by ConAgra's argument that a stay of the case pursuant to the primary jurisdiction doctrine would be "highly probative," if not "determinative" of its liability.[69] The court reasoned:

> First, the FDA would have to act, something it has declined to do in the past. Second, the court would have to assess whether the FDA's action was such that it preempted all state regulation of the subject; this would necessitate that the court consider whether any regulation adopted by the FDA conflicted with the law of the various states in which plaintiffs reside. Third, ConAgra does not concede that an FDA regulation precluding the use of a "100% Natural" label on GMO foods would establish that it is liable to plaintiffs. As a result, the impact any potential FDA action might have on future litigation of this case is speculative at best.[70]

Therefore, due to the "uncertain prospect that the FDA will act, . . . the fact that the impact of any regulatory action on this litigation is speculative, [and] the specter of a lengthy delay that could prejudice plaintiffs," the court denied ConAgra's application for an order staying the action.[71]

The FDA's repeated reluctance to establish an enforceable *natural* requirement was critical to other courts' holdings regarding the

---

[65] *Id.* at *8. "[E]very day courts decide whether conduct is misleading." *Id.* (alteration in original) (quoting Lockwood v. ConAgra Foods, Inc., 597 F. Supp. 2d 1028, 1035 (N.D. Cal. 2009)).

[66] *Id.* (quoting *Lockwood*, 597 F. Supp. 2d at 1035).

[67] *Id.*

[68] No. CV 11–05379–MMM (AGRx), 2013 WL 4259467 (C.D. Cal. Aug. 12, 2013). On August 6, 2013, in light of the *Cox v. Gruma* order referring to the FDA the question of whether food products containing bioengineered ingredients may be labeled "100% Natural," ConAgra filed an *ex parte* application for an order staying its action under the primary jurisdiction doctrine. *Id.* at *1–2. Plaintiffs alleged that ConAgra Foods deceptively and misleadingly marketed its Wesson brand cooking oils as "100% Natural," when in fact Wesson Oils are made from GMOs. Class Action Complaint at 2, Briseño v. ConAgra Foods, Inc., No. CV11-05379MMM (AGBx), 2011 WL 7939790 (C.D. Cal. June 28, 2011).

[69] In re *ConAgra Foods, Inc.*, 2013 WL 4259467, at *4.

[70] *Id.*

[71] *Id.* at *5.

inapplicability of the primary jurisdiction doctrine. The court in *Krzykwa v. Campbell Soup Company* noted that "the FDA has repeatedly declined to adopt formal rule-making that would define the word 'natural.'"[72] The court found persuasive those courts that have refused to dismiss lawsuits involving *natural* claims because the FDA simply does not regulate those claims.[73] Similarly, in *Bohac v. General Mills, Incorporated*, the court reasoned:

> Given the amount of attention that the FDA has apparently directed towards the issue before the Court, "there is no such risk of undercutting the FDA's judgment and authority by virtue of making independent determinations on issues upon which there are no FDA rules or regulations (or even informal policy statements)."[74]

Similarly, in a class action against J.M. Smucker Co. alleging that Crisco Oils' claims of *natural* are deceptively labeled because they are made from GMOs and are heavily processed, the Northern District of California declined to apply the primary jurisdiction doctrine.[75] "[V]arious parties have repeatedly asked the FDA to rule on 'natural' labeling, and the FDA has declined to do so because of its limited resources and preference to focus on other priorities. . . . [R]eferring the matter to the FDA would do little more than protract matters."[76]

In *Janney v. General Mills*, although the judge found that the primary jurisdiction "factors favor the resolution of this issue by the FDA," he refused to dismiss or stay the action on primary jurisdiction grounds because "any referral to the FDA would likely prove futile."[77] The court determined that the issue of what constitutes *natural* implicates the FDA's regulatory authority, expertise, and uniformity in administration.[78] However, the FDA's repeated refusal "to promulgate

---

[72] Krzykwa v. Campbell Soup Co., 946 F. Supp. 2d 1370, 1374–75 (S.D. Fla. 2013). The plaintiffs allege that Campbell's 100% Natural Soups are falsely labeled as "All Natural" because they contain genetically modified corn. *Id.* at 1371.

[73] *Id.* at 1374–75.

[74] Bohac v. Gen. Mills, Inc., No. 12-CV-05280-WHO, 2013 WL 5587924, at *3 (N.D. Cal. Oct. 10, 2013) (quoting Brazil v. Dole Food Co., 935 F. Supp. 2d 947, 959–60 (N.D. Cal. 2013)); *see also* Rojas v. Gen. Mills, Inc., No. 12-CV-05099-WHO, 2013 WL 5568389, at *6 (N.D. Cal. Oct. 9, 2013) (holding that the plaintiff's "'claims do not necessarily implicate primary jurisdiction, and the FDA has shown virtually no interest in regulating' the term 'natural'" (quoting Chavez v. Nestle USA, Inc., 511 F. App'x 606, 607 (9th Cir. 2013))).

[75] Parker v. J.M. Smucker Co., No. C 13-0690 SC, 2013 WL 4516156, at *1, *7 (N.D. Cal. Aug. 23, 2013).

[76] *Id.* at *7.

[77] Janney v. Gen. Mills, 944 F. Supp. 2d 806, 814–15 (N.D. Cal. 2013). A consumer class alleges that General Mills' Nature Valley brand food products' *natural* labels are deceptive because the products contain high fructose corn syrup and other processed sweeteners. *Id.* at 809.

[78] *Id.* at 814.

regulations governing the use of 'natural' . . . has signaled a relative lack of interest in devoting its limited resources to what it evidently considers a minor issue, or in establishing some 'uniformity in administration' with regard to the use of 'natural' in food labels."[79] Therefore, the court concluded that there was little reason to provide the FDA with another opportunity to address the *natural* issue.[80]

2. Referring the *Natural* Question to the FDA

The FDA's repeated reluctance to establish a definition or enforceable standard for the term has recently been challenged by several judges who have decided that the primary jurisdiction doctrine does apply to these *natural* lawsuits. Although the majority of judges in the Northern District of California have ruled against the applicability of primary jurisdiction, two judges in the same District reached the opposite result.[81] The order in *Cox v. Gruma Corporation* presented the issue of GMOs and labeling of *natural* foods to the FDA for the first time.[82] In *Cox*, the plaintiff alleged that the labels on Gruma Corporation's tortilla products are false and misleading because while they indicate that the products are *natural*, they contain corn grown from bioengineered seeds.[83] The court granted Gruma's motion to dismiss based on primary jurisdiction grounds.[84] It recognized that "[t]he FDA has regulatory authority over food labeling," the FDCA "establishes a uniform federal scheme of food regulation to ensure that food is labeled in a manner that does not mislead consumers," and food labeling "requires the FDA's expertise and uniformity in administration."[85] The

---

[79] *Id.* at 814–15.

[80] *Id.*

[81] For cases where judges have declined to apply the primary jurisdiction doctrine, see, for example, *id.* at 809, 818 (Hamilton, J.); Brazil v. Dole Food Co., 935 F. Supp. 2d 947, 950, 959 (N.D. Cal. 2013) (Koh, J.); Chacanaca v. Quaker Oats Co., 752 F. Supp. 2d 1111, 1114, 1124 (N.D. Cal. 2010) (Seeborg, J.); Lockwood v. ConAgra Foods, Inc., 597 F. Supp. 2d 1028, 1029–30 (N.D. Cal. 2009) (Breyer, J.). *But see, e.g.*, Barnes v. Campbell Soup Co., No. C12-05185 JSW, 2013 WL 5530017, at *1, *9 (N.D. Cal. July 25, 2013) (White, J.) (dismissing the plaintiffs' claims on the grounds of primary jurisdiction); Cox v. Gruma Corp., No. 12-CV-6502 YGR, 2013 WL 3828800, at *1–2 (N.D. Cal. July 11, 2013) (Rogers, J.) (granting the defendant's motion to dismiss on the basis of primary jurisdiction).

[82] *Cox*, 2013 WL 3828800, at *2; *see also* Elaine Watson, *FDA 'Respectfully Declines' Judges' Plea for It to Determine if GMOs Belong in All-Natural Products*, FOOD NAVIGATOR-USA.COM (Jan. 8, 2014), http://www.foodnavigator-usa.com/Regulation/FDA-respectfully-declines-judges-plea-for-it-to-determine-if-GMOs-belong-in-all-natural-products.

[83] *Cox*, 2013 WL 3828800, at *1; Class Action First Amended Complaint at 1–2, *Cox*, 2013 WL 3828800, ECF No. 33.

[84] *Cox*, 2013 WL 3828800, at *2.

[85] *Id.* at *1.

court agreed with the plaintiff's position that there is "a gaping hole in the current regulatory landscape for 'natural' claims and GMOs."[86] Although the FDA has not addressed the question of whether foods containing GMO or bioengineered ingredients may be labeled *natural*, or whether those ingredients would be considered "artificial or synthetic," the court concluded that the FDA is charged with resolving the issue.[87] It thus referred to the FDA "the question of whether and under what circumstances food products containing ingredients produced using bioengineered seed may or may not be labeled 'Natural' or 'All Natural' or '100% Natural.'"[88] Otherwise, the court reasoned, it "would risk 'usurp[ing] the FDA's interpretive authority[,]' and 'undermining, through private litigation, the FDA's considered judgments.'"[89] To provide the FDA an opportunity to address the question, the court stayed the proceedings for six months.[90]

Following the *Cox* court's lead, two other judges also stayed *natural* labeling cases to refer the issue to the FDA of whether food products containing GMOs can be labeled *natural*. One week after the *Cox* decision, a judge in the District of Colorado stayed a case in which plaintiffs alleged that Nature Valley Granola Bars are mistakenly or misleadingly labeled as "100% Natural," when in fact they are not *natural* because the Granola Bars contain GMOs.[91] The court found the primary jurisdiction doctrine appropriate because "[t]he issues of fact in this matter are not within the conventional experience of judges, they require the exercise of administrative discretion, and they require uniformity and consistency in the regulation of the business entrusted to the particular agency."[92]

The inconsistency in federal courts' decisions regarding primary jurisdiction, and thus the proper venue to determine the meaning of *natural*, is further highlighted by two lawsuits against Campbell Soups. In *Barnes v. Campbell Soup Company*,[93] a case that is nearly identical to

---

[86] *Id.* at *2 (citing Opposition to Defendant's Motion to Dismiss First Amended Class Action Complaint at 12, *Cox*, 2013 WL 3828800, ECF No. 47).

[87] *Id.*

[88] *Id.*

[89] *Id.* (alteration in original) (quoting Pom Wonderful, LLC v. Coca-Cola Co., 679 F.3d 1170, 1176, 1178 (9th Cir. 2012)).

[90] *Id.*

[91] Van Atta v. Gen. Mills, Inc., No. 12-cv-02815-MSK-MJW, at *1 (D. Colo. July 18, 2013) (Watanabe, Mag. J.), ECF No. 51.

[92] *Id.* at *7.

[93] The plaintiffs asserted that Campbell's 100% Natural Soups are falsely labeled as "100% Natural" when they contain genetically modified corn. Barnes v. Campbell Soup Co., No. C 12-05185 JSW, 2013 WL 5530017, at *1 (N.D. Cal. July 25, 2013).

Krzykwa v. Campbell Soup Company,[94] discussed above, the district court reached the opposite conclusion regarding the applicability of the primary jurisdiction doctrine.[95] Although it acknowledged that the FDA has refused to directly regulate the term or impose a requirement upon companies to disclose GMOs as "unnatural" ingredients, the court nevertheless held that it was proper to defer to the FDA's regulatory authority.[96] The court explained that the FDA's inaction on the issue of whether food products labeled *natural* can contain GMOs "does not remove the presumption that Congress squarely empowered that authority to the FDA pursuant to the FDCA and NLEA. Under these circumstances, deference to the FDA's regulatory authority continues to remain the appropriate course."[97] As in *Cox*, the court reasoned that failing to refer the issue to the FDA would risk challenging the FDA's authority and undercutting its judgments.[98] Therefore, "out of respect for the FDA's authority," the court granted the defendant's motion to dismiss, referred the matter to the FDA for an administrative determination, and stayed the action for six months.[99]

In response to these courts' referral of the GMO issue to the FDA, the Center for Food Safety ("CFS")[100] submitted a letter to FDA Commissioner Margaret Hamburg urging the "FDA to decline defining the term 'natural' for use on food labels in an *ad hoc*, fact-specific, and haphazard manner, per individual court request, lacking public process and general applicability."[101] As the CFS argued,[102] to define *natural*, the FDA should engage in rulemaking pursuant to the Administrative Procedure Act ("APA").[103] This process "requires that the agency provide notice of proposed rulemaking and an opportunity for the public to

---

[94] Krzykwa v. Campbell Soup Co., 946 F. Supp. 2d 1370, 1371, 1374–75 (S.D. Fla. 2013) (holding that the primary jurisdiction doctrine does not apply regarding the "all natural" labeling of food products containing genetically modified ingredients).

[95] *Barnes*, 2013 WL 5530017, at *8.

[96] *Id.* at *9.

[97] *Id.* (citing Pom Wonderful, LLC v. Coca-Cola Co., 679 F.3d 1170, 1178 (9th Cir. 2012)).

[98] *Id.*

[99] *Id.*

[100] The "Center for Food Safety (CFS) is a nonprofit public interest organization whose mission centers on protecting and furthering the public's right to know how their food is produced, through accurate labeling and other means." Letter from Andrew Kimbrell, Exec. Dir., & Bill Freese, Sci. Policy Analyst, Ctr. for Food Safety, to Margaret A. Hamburg, Comm'r, FDA 1 (Nov. 4, 2013), http://www.centerforfoodsafety.org/files/2013-11-1-letter-to-fda-re-natural-final_85868.pdf.

[101] *Id.*

[102] *Id.*

[103] 5 U.S.C. § 553 (2012).

comment."[104] Such a process is lengthy and would require considerable agency resources.[105] The FDA's recent correspondence with the courts indicates its agreement with this argument.

3. The FDA's Response

While the rise in food labeling litigation and consumer confusion over *all-natural* claims could pressure the FDA to revisit its *natural* policy in the near future, on January 6, 2014, the FDA responded to the courts and again declined the opportunity to address the issue.[106] In a letter from Leslie Kux, the FDA's Assistant Commissioner for Policy, the FDA cited several reasons for its refusal to define *natural*.[107] First, it noted that amending its *natural* policy would likely involve "a public process, such as issuing a regulation or formal guidance," rather than an *ad hoc* decision made "in the context of litigation between private parties."[108] Acknowledging the complexity of the issue and the competing interests of various stakeholders, Ms. Kux stated that "it would be prudent and consistent with FDA's commitment to the principles of openness and transparency to engage the public on this issue."[109] The letter also noted that defining *natural* would require coordination and cooperation with the USDA and other agencies.[110] Reconsidering its *natural* policy would entail a consideration of scientific evidence, consumer preferences and beliefs, food production and processing methods, and First Amendment issues.[111] Finally, the FDA again noted its lack of resources and identified other priorities, such as regulations implementing the Food Safety Modernization Act of 2011 and nutrition labeling regulations.[112]

---

[104] Kimbrell & Freese, *supra* note 100.

[105] For example, it took the FDA more than six years after it issued a proposed rule to finalize the definition of *gluten-free*. The FDA issued a proposed rule in January 2007 and subsequently reopened the comment period in August 2011. Food Labeling; Gluten-Free Labeling of Foods, 78 Fed. Reg. 47,154, 47,157–58 (Aug. 5, 2013) (to be codified at 21 C.F.R. pt. 101). On August 5, 2013, the FDA promulgated the final rule regarding the meaning of *gluten-free* on food labels pursuant to the Food Allergen Labeling and Consumer Protection Act of 2004's (FALCPA's) directive. *Id.* at 47,154.

[106] *See* Letter from Leslie Kux, Assistant Comm'r for Policy, FDA, to Judges Yvonne Gonzalez Rogers, Jeffrey S. White, & Kevin McNulty 3 (Jan. 6, 2014), *available at* www.hpm.com/pdf/blog/FDA%20Lrt%201-2014%20re%20Natural.pdf ("[W]e respectfully decline to make a determination at this time regarding whether and under what circumstances food products . . . may or may not be labeled 'natural.'").

[107] *Id.* at 2.

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

B. The Difficulties of Defining Natural *Foods: A Problem for Plaintiffs*

Although the lack of an enforceable standard for *natural* has made the term a target for consumer protection lawsuits, these cases illustrate the difficulties inherent in defining the term. Because the plaintiffs have alleged that the various *natural* claims on food labels are misleading and deceptive in violation of consumer protection statutes, to achieve class certification and prevail on their claims, they must demonstrate that the food producer's use of the term *natural* was inconsistent with a reasonable consumer's definition of *natural*.[113] Given the ambiguity and ubiquity of the term, the wide variety of products which feature the term, and the lack of any uniform standard, identifying the meaning of *natural* according to the "reasonable person" is no simple task. Both the FDA and FTC have indicated that this task may be insurmountable. As the FDA has recognized, consumers, food industry experts, and scientists adopt widely divergent views about the meaning of *natural* food products.[114] The FTC, meanwhile, has declined to adopt a definition of *natural* because "natural may be used in numerous contexts and may convey different meanings depending on that context."[115]

Plaintiffs in these *natural* lawsuits take exception to the inclusion of GMOs,[116] high fructose corn syrup ("HFCS"),[117] synthetic ingredients,[118] pesticides,[119] and processing aids, such as hexane, in foods labeled *natural*.[120] For example, the consumer class in *Janney*[121] asserts that *natural* labels should be applied only to "products that contain no artificial or synthetic ingredients and consist entirely of ingredients that are minimally processed."[122] In a lawsuit against Pepperidge Farm, the plaintiff advocated a similar, but not identical definition—claiming that

---

[113] *See* Astiana v. Kashi Co., 291 F.R.D. 493, 508 (S.D. Cal. 2013).

[114] *See* 58 Fed. Reg. 2302, 2407 (Jan. 6, 1993) (to be codified at 21 C.F.R. pts. 5, 101).

[115] Pelayo v. Nestle USA, Inc., No. CV 13-5213-JFW (AJWx), 2013 WL 5764644, at *5 (C.D. Cal. Oct. 25, 2013) (quoting 75 Fed. Reg. 63,552, 63,586 (Oct. 15, 2010) (to be codified at 16 C.F.R. pt. 260)) (internal quotation marks omitted).

[116] Class Action Complaint at 1, 6–7, Briseño v. ConAgra Foods, Inc., No. CV11-05379MMM (AGBx), 2011 WL 7939790 (C.D. Cal. June 28, 2011).

[117] Class Action Complaint at 2, Janney v. Gen. Mills, 944 F. Supp. 2d 806 (N.D. Cal. 2013) (No. 4:12-cv-03919-PJH).

[118] *Id.*

[119] Class Action Complaint at 2, Von Slomski v. Hain Celestial Grp., Inc., No. 8:13-cv-01757-AG-AN (C.D. Cal. filed Nov. 6, 2013).

[120] *See, e.g.*, Astiana v. Kashi Co., 291 F.R.D. 493, 498, 509 (S.D. Cal. 2013).

[121] The plaintiffs allege that General Mills's Nature Valley brand food products' *natural* labels are deceptive because the products contain high fructose corn syrup and other processed sweeteners. *Janney*, 944 F. Supp. 2d at 809.

[122] Class Action Complaint at 2, *Janney*, 944 F. Supp. 2d 806 (No. 4:12-cv-03919-PJH).

GMO ingredients and artificial or synthetic substances are "by definition, *not* natural, and reasonable consumers reasonably do not expect food labeled as 'natural' . . . to include artificial or synthetic substances."[123]

The same difficulties cited by the FDA and FTC in their refusing to establish a uniform and enforceable standard of the term *natural* have also been problematic for some plaintiffs, particularly at the class certification stage when they must demonstrate that common issues predominate over considerations individual to each class member.[124] In *Astiana v. Kashi Company* and *Thurston v. Bear Naked*, the Southern District of California declined to certify classes of purchasers of Kashi and Bear Naked products that contained synthetic ingredients and were labeled *natural* because the plaintiffs failed to show that the term "has any kind of uniform definition among class members."[125] The plaintiffs were therefore unable to demonstrate "that a sufficient portion of class members would have relied to their detriment on the representation, or that Defendant's representation of 'All Natural' in light of the presence of the challenged ingredients would be considered to be a material falsehood by class members."[126] The court emphasized the disagreement among the named plaintiffs regarding the definition of *natural*, and as to whether the allegedly unnatural ingredients failed to meet their expectations of *all-natural* food products.[127] For example, one plaintiff testified "that 'all natural' is 'synonymous with organic,' although she also considers 'nonorganic fruits or vegetables to be all natural.'"[128] Another plaintiff disagreed, stating that "'all natural' is not the same as 'organic.'"[129] One plaintiff's definition is merely that there is "nothing

---

[123] Class Action Complaint at 8–9, Koehler v. Pepperidge Farm, Inc., No. 13-cv-02644-YGR, 2013 WL 4806895 (N.D. Cal. Sept. 9, 2013). The CFS supports this definition and argues that "[m]ost consumers, if asked, would *not* consider GE foods as *natural*, under the generally recognized meaning of the term." Kimbrell & Freese, *supra* note 100, at 4.

[124] *Astiana*, 291 F.R.D. at 504.

[125] *Id.* at 508; Thurston v. Bear Naked, Inc., No. 3:11-cv-02890-H(BGS), 2013 WL 5664985, at *8 (S.D. Cal. July 30, 2013). In *Astiana*, the court certified a narrow class covering products containing calcium pantothenate, pyridoxine hydrochloride, and/or hexane-processed soy ingredients but labeled "All Natural." *Astiana*, 291 F.R.D. at 509. In *Thurston*, the court certified a class of California purchasers of Bear Naked's products that contain hexane-processed soy ingredients. *Thurston*, 2013 WL 5664985, at *9.

[126] *Astiana*, 291 F.R.D. at 508; *see also Thurston*, 2013 WL 5664985, at *8 (resulting in the same conclusion as the *Astiana* decision when using the term *natural* rather than *Astiana's* use of the term *all-natural*).

[127] *Astiana*, 291 F.R.D. at 508; *Thurston*, 2013 WL 5664985, at *8.

[128] Defendant Kashi Co.'s Opposition to Plaintiffs' Motion for Class Certification at 8, *Astiana*, 291 F.R.D. 493 (No. 3:11-cv-01967-H-BGS).

[129] *Id.*

bad for you in there."[130] While another views *all natural* as food that is "completely unprocessed,"[131] one plaintiff testified "that allegedly synthetic vitamins are acceptable in 'all natural' products."[132] The lack of a consistent definition of *natural* was fatal to the plaintiffs' request to certify a broad *all natural* class. In denying certification, the court explained that "[i]f the misrepresentation or omission is not material as to all class members, the issue of reliance 'would vary from consumer to consumer' and the class should not be certified."[133]

Similarly, the plaintiff's failure to offer a plausible definition of *natural* provided the court in *Pelayo v. Nestle USA* with a reason to grant Nestle's motion to dismiss without leave to amend.[134] The plaintiff alleged that the "All Natural" claim on Nestle's Buitoni Pastas is "false, misleading, and reasonably likely to deceive the public because the Buitoni Pastas contain . . . ingredients that are unnatural," such as "synthetic xanthan gum and soy lecithin."[135] In her complaint, the plaintiff offered several definitions of *natural*, such as "produced or existing in nature and not artificial or manufactured."[136] The plaintiff nevertheless admitted that these definitions from Webster's Dictionary do not apply to Buitoni Pastas because they are mass-produced and the reasonable consumer understands "that Buitoni Pastas are not springing fully-formed from Ravioli trees and Tortellini bushes."[137] The plaintiff also attempted to define *natural* by arguing "that none of the ingredients in a 'natural' product are 'artificial' as that term is defined by the Food and Drug Administration."[138] However, "the FDA definition of 'artificial' applies only to flavor additives."[139] The FDA provides the following definition:

> The term "artificial flavor" or "artificial flavoring" means any substance, the function of which is to impart flavor, which is not

---

[130] *Id.*

[131] *Id.*

[132] *Id.* at 10.

[133] *Astiana*, 291 F.R.D. at 508 (quoting Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1022–23 (9th Cir. 2011)).

[134] Pelayo v. Nestle USA, Inc., No. CV 13-5213-JFW (AJWx), 2013 WL 5764644, at *5 (C.D. Cal. Oct. 25, 2013).

[135] *Id.* at *1. Plaintiff alleged claims under the California Unfair Competition Law ("UCL") and California Consumer Legal Remedies Act ("CLRA"). *Id.* at *2.

[136] *Id.* at *4 (quoting First Amended Class Action Complaint at 7, *Pelayo*, 2013 WL 5764644, ECF No. 18) (internal quotation marks omitted).

[137] *Id.* (quoting Plaintiff's Opposition to Defendants' Motion to Dismiss First Amended Complaint at 16, *Pelayo*, 2013 WL 5764644, ECF No. 33) (internal quotation marks omitted).

[138] *Id.*

[139] *Id.*; *see also* 21 C.F.R. § 101.22(a)(1) (2013).

> derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible yeast, herb, bark, bud, root, leaf or similar plant material, meat, fish, poultry, eggs, dairy products, or fermentation products thereof.[140]

Although the plaintiff alleged that ingredients in the pastas such as "xanthan gum, soy lecithin, sodium citrate, maltodextrin, sodium phosphate, disodium phosphates, and ferrous sulfate . . . are 'unnatural, artificial and/or synthetic ingredients,'" the plaintiff did not allege that any of the those ingredients satisfy the FDA's definition of "artificial," nor did she assert that those ingredients are flavor additives.[141] On this basis, the court held this definition of *natural* to be inapplicable.[142]

The plaintiff's third attempt to offer a plausible definition also failed. The plaintiff alleged "that none of the ingredients in a 'natural' product are 'synthetic' as that term is defined by the National Organic Program ('NOP')."[143] Under that definition, a synthetic ingredient is a "substance that is formulated or manufactured by a chemical process or by a process that chemically changes a substance extracted from naturally occurring plant, animal, or mineral sources."[144] The court held that "because Buitoni Pastas are not labeled as 'organic,' the definition of 'synthetic' under the NOP does not apply."[145]

These cases illustrate the formidable task of identifying a definition of *natural* food. As the FDA recognized, there is no uniform definition among food producers or consumers—or, as *Astiana* and *Thurston* demonstrate, among plaintiffs in a lawsuit. These cases, as well as the *Pelayo* decision, also underscore the FTC's point regarding the permeable meaning of *natural* in light of the varying contexts in which it is used. As Kashi argued—and the court appeared to credit—the plaintiffs' allegations regarding ninety different *natural* products containing different ingredients and featured in different advertising campaigns "inspire different calculations in the minds of prospective customers."[146] Class action plaintiffs arguing that a processed food product is deceptively labeled *natural* because it contains a variety of allegedly synthetic substances will likely face the same challenges as the plaintiffs in *Astiana*, *Thurston*, and *Pelayo* in proving that the consumer class held and relied upon a uniform definition of *natural* and that they viewed the presence of each challenged ingredient as *unnatural*.

---

[140] § 101.22(a)(1).

[141] *Pelayo*, 2013 WL 5764644, at *4 (quoting First Amended Class Action Complaint at 7, *Pelayo*, 2013 WL 5764644, ECF No. 18).

[142] *Id.*

[143] *Id.*

[144] 7 C.F.R. § 205.2 (2013).

[145] *Pelayo*, 2013 WL 5764644, at *4.

[146] Astiana v. Kashi Co., 291 F.R.D. 493, 508 (S.D. Cal. 2013).

On the other hand, plaintiffs alleging that a product containing GMOs is not *natural*[147] may fare better in certifying a class and surviving dispositive motions. In these cases, class action plaintiffs have an easier task of articulating a uniform definition of *natural* that simply identifies the absence of GMOs. Support for this position is abundant. For example, as the CFS has asserted, GMOs are not *natural* because they have been developed through artificial means, by "inserting foreign (often bacterial) genetic material into a food plant, crop or animal."[148] Additionally, Black's Law Dictionary defines *natural* as something that is "[i]n accord with the regular course of things in the universe and without accidental or purposeful interference" or "[b]rought about by nature as opposed to artificial means."[149] Plaintiffs in their class action complaints[150] have also referenced Monsanto's definition of GMOs: "Plants or animals that have had their genetic makeup altered to exhibit traits *that are not naturally theirs*. In general, genes are taken (copied) from one organism that shows a desired trait and transferred into the genetic code of another organism."[151] The World Health Organization similarly defines genetically engineered organisms as "organisms in which the genetic material (DNA) has been altered in a way that *does not occur naturally*."[152]

Defining *natural* with respect to the absence of GMOs may help plaintiffs in these lawsuits succeed on their claims. Yet in light of the entire *natural* litigation landscape and the variety of problems involved in defining the term, it is doubtful that a class of plaintiffs will be able to offer a uniform and comprehensive definition of *natural* that will take into account all of the ingredients and processes which plaintiffs challenge as being unnatural.

C. The Difficulties of Defining Natural *Foods: The Inadequacy of Judge-made* Natural *Law*

Although none of the issues in the *natural* lawsuits have been resolved at trial, judges have recently issued orders on dispositive

---

[147] *See* Class Action Complaint at 14, Briseño v. ConAgra Foods, Inc., No. CV11-05379MMM (AGBx), 2011 WL 7939790 (C.D. Cal. June 28, 2011).

[148] Press Release, Ctr. for Food Safety, Center for Food Safety Tells FDA: "Natural" Label Should Not Include GE Foods (Dec. 19, 2013), *available at* http://www.centerforfoodsafety.org/rss/press-releases/.

[149] BLACK'S LAW DICTIONARY 1126 (9th ed. 2009).

[150] *See* Class Action Complaint at 6, *Briseño*, No. 2011 WL 7939790.

[151] *Glossary*, MONSANTO, http://www.monsanto.com/newsviews/Pages/glossary.aspx#gmo (last visited Mar. 19, 2014) (emphasis added).

[152] WORLD HEALTH ORGANIZATION, 20 QUESTIONS ON GENETICALLY MODIFIED (GM) FOODS 1 (2014) (emphasis added), *available at* http://www.who.int/foodsafety/publications/biotech/en/20questions_en.pdf?ua=1.

motions in several of these cases. As courts continue to analyze whether a *natural* claim on a food label is false or misleading in each case,[153] a definition for the term *natural* may emerge. The courts have explained that the FDA's views are "relevant to the issue of whether these labels could be deceptive or misleading to a reasonable consumer," and "would likely be highly relevant to the Court's determinations"; yet they have also announced that the issues "are squarely within the conventional experience of judges."[154] As discussed above, the claims in these lawsuits require courts to evaluate whether a "reasonable consumer" would be misled by the *natural* claim.[155] Thus, answering this question requires a determination as to what a "reasonable consumer" would consider to be a *natural* food. A majority of courts have concluded that the FDA's refusal to promulgate an enforceable *natural* standard "implies that the FDA does not believe that the term 'natural' requires uniformity in administration."[156] Recent decisions demonstrate that allowing judges to use their own conventional experience to determine what *natural* means to consumers on a case-by-case basis will result in inconsistent and inaccurate definitions.[157] If the FDA and FTC, the federal agencies responsible for preventing misleading claims, cannot establish a definition of the term *natural*, how can judges do so?

The recent *Astiana*, *Thurston*, and *Pelayo* decisions demonstrate the problem with a judge-made rule regarding the meaning of *natural*. In *Astiana* and *Thurston*, the court credited Kashi's and Bear Naked's argument that consumers, including named plaintiffs, "often equate 'natural' with 'organic' or hold 'organic' to a higher standard."[158]

---

[153] The majority of cases holds that this issue is within the province of the courts. *See, e.g.*, Jones v. ConAgra Foods, Inc., 912 F. Supp. 2d 889, 898–99 (N.D. Cal. 2012); Reid v. Johnson & Johnson, No. 11cv1310 L (BLM), 2012 WL 4108114, at *11 (S.D. Cal. Sept. 18, 2012); Lockwood v. ConAgra Foods, Inc., 597 F. Supp. 2d 1028, 1035 (N.D. Cal. 2009). Furthermore, the court in *Jones* explained that "allegations of deceptive labeling do not require the expertise of the FDA to be resolved in the courts, as 'every day courts decide whether conduct is misleading.'" *Jones*, 912 F. Supp. 2d at 898–99 (citation omitted) (quoting *Lockwood*, 597 F. Supp. 2d at 1035).

[154] Bohac v. Gen. Mills, Inc., No. 12-cv-05280-WHO, 2013 WL 5587924, at *3–4 (N.D. Cal. Oct. 10, 2013) (citations and internal quotation marks omitted).

[155] *Id.* at *3.

[156] *Jones*, 912 F. Supp. 2d at 898 (internal quotation marks omitted); *see also Bohac*, 2013 WL 5587924, at *4; Janney v. Gen. Mills, No. 12-cv-03919-WHO, 2013 WL 1962360, at *3 (N.D. Cal. Oct. 10, 2013).

[157] *Compare* Barnes v. Campbell Soup Co., No. C 12-05185 JSW, 2013 WL 5530017, at *8 (N.D. Cal. July 25, 2013) (holding that the primary jurisdiction doctrine applies), *with* Krzykwa v. Campbell Soup Co., 946 F. Supp. 2d 1370, 1374–75 (S.D. Fla. 2013) (holding that the primary jurisdiction doctrine does not apply).

[158] Astiana v. Kashi Co., 291 F.R.D. 493, 508 (S.D. Cal. 2013); Thurston v. Bear Naked, Inc., No. 3:11-CV-02890-H(BGS), 2013 WL 5664985, at *8 (S.D. Cal. July 30, 2013).

Therefore, because many of Kashi's and Bear Naked's allegedly unnatural ingredients are permitted in certified "organic" foods, the court concluded that plaintiffs failed to demonstrate that class members would view those ingredients as unnatural.[159] The *Pelayo* court interpreted *Astiana*'s assumption that consumers "often equate 'natural' with 'organic'" as a holding, adopted this reasoning, and thus concluded that "it is implausible that a reasonable consumer would believe ingredients allowed in a product labeled 'organic,' such as the [allegedly unnatural ingredients in Buitoni Pastas], would not be allowed in a product labeled 'all natural.'"[160] By announcing as a matter of law what reasonable consumers generally believe regarding the term *natural*, these judges offered their own interpretation of the term and thus set the parameters of *natural's* meaning. In this way, a definition of *natural* may emerge from the courts, but not a definition that withstands scrutiny. Contrary to the courts' conclusion, it is plausible that a reasonable consumer would believe that *natural* foods are different from, and are held to a higher standard than, *organic*. As surveys demonstrate, consumers express a preference for products labeled *natural* over those labeled *organic*.[161] While 50% of polled consumers in 2009 said the *natural* label on food was either "important" or "very important," only 35% believed *organic* carried the same value.[162] While consumers define the terms in a similar manner, *natural* claims are more strongly associated with the absence of artificial flavors, colors, and preservatives.[163] A majority of respondents in a 2010 poll believed the term *natural* implied "absence of pesticides," "absence of herbicides," and "absence of genetically modified foods."[164]

---

[159] *Astiana*, 291 F.R.D. at 508; *Thurston*, 2013 WL 5664985, at *8.

[160] Pelayo v. Nestle USA, Inc., No. CV 13-5213-JFW (AJWx), 2013 WL 5764644, at *4 (C.D. Cal. Oct. 25, 2013).

[161] CONTEXT MARKETING, BEYOND ORGANIC: HOW EVOLVING CONSUMER CONCERNS INFLUENCE FOOD PURCHASES 4 (2009), *available at* http://www.contextmarketing.com/foodissuesreport.pdf.

[162] *Id.*

[163] While 66% of respondents associated *organic* foods with no artificial flavors, colors, or preservatives, 73% associated *natural* foods with an absence of these additives. *Where Organic Ends and Natural Begins*, HARTMAN GROUP (Mar. 23, 2010), http://www.hartman-group.com/hartbeat/where-organic-ends-and-natural-begins.

[164] *Id.* These results prove that consumers are confused about the meaning of *natural* and *organic*. Although one author predicted in 1991 that "[a] clear distinction between organically grown produce and natural foods should be resolved by the regulations to be promulgated under the Organic Foods Production Act of 1990," Gordon G. Bones, *State and Federal Organic Food Certification Laws: Coming of Age?*, 68 N.D. L. REV. 405, 405 n.3 (1992), this did not occur. Unlike the term *natural*, *organic* foods are governed by a comprehensive set of requirements. The National Organic Program ("NOP")—implemented in 2002 by the U.S. Department of Agriculture ("USDA")—holds the industry to strict

Moreover, the conclusion that a reasonable consumer would equate *natural* with *organic* runs afoul of the FDA's policy that *natural* means "*nothing* artificial or synthetic (including colors regardless of source) is included in, or has been added to, the product that would not normally be expected to be there."[165] In contrast, synthetic substances approved by The National Organic Standards Board are permitted in the production of *organic* crops.[166] To illustrate, the FDA issued an import alert against an Israeli "berry juice," citing, among other things, its claim of *natural*

---

standards in the production and sale of such foods. *Organic Certification*, USDA, http://www.ers.usda.gov/topics/natural-resources-environment/organic-agriculture/organic-certification.aspx#.UwQN0rQjeZE (last updated May 26, 2012). The NOP was established by the Organic Foods Production Act of 1990 ("OFPA"), in order, "(1) to establish national standards governing the marketing of certain agricultural products as organically produced products; (2) to assure consumers that organically produced products meet a consistent standard; and (3) to facilitate interstate commerce in fresh and processed food that is organically produced." 7 U.S.C. § 6501 (2012). "Organic" refers not only to the food itself, but also to how it was produced. *See* Agric. Mktg. Serv., *Organic Standards*, USDA, http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateN&navID=OrganicStandardsLinkNOPFAQsHome&rightNav1=OrganicStandardsLinkNOPFAQsHome&topNav=&leftNav=&page=NOPOrganicStandards&resultType=&acct=nopgeninfo (last updated Apr. 4, 2013) [hereinafter *Organic Standards*]. To qualify as organic, crops must be grown without synthetic pesticides (unless that substance is on the National List of Allowed and Prohibited Substances) or bioengineered genes. *See* Agric. Mktg. Serv., *About the National List*, USDA, http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateJ&navID=AboutNationalListLinkNOPOrganicStandards&rightNav1=AboutNationalListLinkNOPOrganicStandards&topNav=&leftNav=&page=NOPNationalList&resultType=&acct=nopgeninfo (last updated Mar. 12, 2014). Organic foods also may not be irradiated. *Organic Standards*, *supra*. All organic production and handling operations must be certified by third parties accredited by the USDA. *See* Agric. Mktg. Serv., *Organic Certification & Accreditation*, USDA, http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateN&navID=OrgCertLinkNOPOrganicStandards&rightNav1=OrgCertLinkNOPOrganicStandards&topNav=&leftNav=&page=NOPAccreditationandCertification&resultType=&acct=nopgeninfo (last updated Dec. 31, 2012). The regulations require that products labeled "100% organic" contain only organic ingredients, 7 C.F.R. § 205.102, 205.303 (2013), and that products labeled "Organic" contain at least 95% organic materials, § 205.301(b). Products in this or the first category can (but are not required to) display the USDA Organic seal. § 205.303. Products that contain "between 70 and 95 percent organically produced ingredients may use the phrase, 'made with organic (specified ingredients or food group(s)),'" but the label "must not list more than three organic ingredients." § 205.309. Products with less than 70% organic ingredients may not use the term organic other than to list specific organic ingredients. § 205.305.

[165] 1991 Proposed Food Labeling Reg., *supra* note 14, at 60,466 (emphasis added).

[166] 7 C.F.R. § 205.601; *see* Agric. Mktg. Serv., *About the National List*, USDA, http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateJ&navID=AboutNationalListLinkNOPOrganicStandards&rightNav1=AboutNationalListLinkNOPOrganicStandards&topNav=&leftNav=&page=NOPNationalList&resultType=&acct=nopgeninfo (last updated Mar. 12, 2014).

despite the inclusion of sulfur dioxide.[167] In the alert, the FDA explained that although it "has not established a regulatory definition for the term natural[,] . . . the Agency has a long-standing policy that restricts the use of the term natural when a product is formulated with added color, synthetic substances, and flavors . . . that would not normally be expected to be in the food."[168] Because the product contains "sulfur dioxide, which is listed in the ingredient statement as a preservative[,] . . . the product name can not [sic] include the term Natural."[169] Sulfur dioxide is, however, permitted in wines labeled "made with organic grapes."[170] The NOP also allows ingredients that, even though they may be naturally derived, would, within context, be considered unnatural, such as beet or carrot juice extract for coloring in a product.[171] Under the FDA's policy, by contrast, a *natural* product does not contain coloring agents "regardless of source."[172]

As the *Astiana*, *Thurston*, and *Pelayo* decisions illustrate, a judge's use of his or her conventional experience to uncover the meaning of *natural* is likely to miss the mark regarding the term's meaning, both in terms of the perception of reasonable consumers and the FDA's limited guidance.

II. EFFORTS TO LEGISLATE A *Natural* STANDARD

In the absence of a comprehensive and enforceable definition from court decisions in the *natural* lawsuits, there have been efforts to legislate a definition. The following Part of this Article evaluates the efforts of Congress and state legislatures to fill the "gaping hole in the current regulatory landscape for 'natural' claims."[173] The Organic Foods Production Act of 1990 ("OFPA")[174] exemplifies a successful effort by Congress to address an issue very similar to defining *natural*; it established uniform and enforceable standards for *organic* foods.[175]

---

[167] *Import Alert 99-20: Detention Without Physical Examination of Imported Food Products Due to NLEA Violations*, FDA (Apr. 3, 2012), http://www.accessdata.fda.gov/cms_ia/importalert_264.html.

[168] *Id.*

[169] *Id.*

[170] Sulfur dioxide is permitted "for use only in wine labeled 'made with organic grapes,' [p]rovided, [t]hat, [the] total sulfite concentration does not exceed 100 ppm." 7 C.F.R. § 205.605 (2011).

[171] *See* National Organic Program, 7 C.F.R. § 205.606(d) (2013).

[172] 1991 Proposed Food Labeling Reg., *supra* note 14, at 60,466.

[173] Cox v. Gruma Corp., No. 12-CV-6502 YGR, 2013 WL 3828800, at *2 (N.D. Cal. July 11, 2013).

[174] 7 U.S.C. §§ 6501 to 6523 (2013).

[175] *See* Negowetti, *supra* note 1, at 595. For a discussion of issues related to the effects of the FDA's informal *natural* policy, see *id.* at 591–99.

Congress enacted the OFPA to address inconsistency among states in *organic* food labeling,[176] dilution of the term's meaning,[177] and confusion among consumers.[178] Similar to *natural* foods, consumer surveys revealed a demand for *organic* foods and a willingness to pay more for those products.[179] At that time, "even the most sophisticated consumer" could not have understood what the term *organic* really meant because food labeled *organic* was allowed to consist of anywhere from 20% to 100% organically-grown ingredients.[180] As was recognized in the context of establishing the *organic* standard, "[t]he clear and consistent definition needs to be enforceable, needs to be definable, and it needs to be practical."[181] This sentiment accurately summarizes the requirements for formulating a *natural* standard. Although the Organic Program provides an analog to the creation of a legal standard for a food term that created (and still creates) confusion among consumers, there is no indication that *natural* will receive the same legislative and resulting regulatory treatment at the federal level in the near future. One recent bill proposal in the House and Senate and several state initiatives have sought to establish a *natural* standard.[182]

The Food Labeling Modernization Act of 2013, recently introduced in the House and Senate, would amend the FDCA to establish a

---

[176] *See Proposed Organic Certification Program: J. Hearing Before the Subcomm. on Domestic Mktg., Consumer Relations, & Nutrition & the Subcomm. on Dep't Operations, Research, & Foreign Agric. of the H. Comm. on Agric.*, 101st Cong. 2 (1990) (statement of Rep. Hatcher, Chairman, H. Subcomm. on Domestic Mktg., Consumer Relations, & Nutrition) [hereinafter *Proposed Organic Certification Program*]. When the OFPA was passed, there were twenty-two states with varying organic programs. *Id.*

[177] *See id.* at 13 (statement of Rep. DeFazio) ("[S]ome farmers are actually labeling things organic which are produced in a manner no different than other conventional agricultural practices, yet it gives them a distinct marketing advantage. . . . [T]he playing field is not level . . . those less scrupulous persons in the industry who would label nonorganic products as organic are getting a marketing advantage above them and a premium price for a product which is essentially no different."); *see also* RENÉE JOHNSON, CONG. RESEARCH SERV., RL31595, ORGANIC AGRICULTURE IN THE UNITED STATES: PROGRAM AND POLICY ISSUES 3 (2008) (explaining that the organic industry petitioned for federal standards to "reduce consumer confusion over the many different state and private standards then in use, and . . . promote confidence in the integrity of organic products over the long term").

[178] Kenneth C. Amaditz, *The Organic Foods Production Act of 1990 and Its Impending Regulations: A Big Zero for Organic Food?*, 52 FOOD & DRUG L.J. 537, 538 (1997).

[179] *Id.* at 540; Negowetti, *supra* note 1, at 583.

[180] Amaditz, *supra* note 178, at 539.

[181] *Proposed Organic Certification Program*, *supra* note 176, at 13–14.

[182] *See infra* notes 183–95 and accompanying text.

standard definition for the term *natural*.[183] According to the proposed standard, a food labeled as *natural* would be misbranded if it contains any artificial ingredient, including any artificial flavor, artificial color, synthetic version of a naturally occurring substance, or any ingredient "that has undergone chemical changes," such as high-fructose corn syrup and cocoa processed with alkali.[184] A food may be labeled *natural* even though it has undergone a traditional process, such as smoking or freezing, to make it edible, preserve it, or make it safe.[185] A "food that has undergone traditional physical processes that do not fundamentally alter" the food or only separates the whole food into parts, such as pressing fruits to produce juice, may also be labeled *natural*.[186] The definition also prohibits "any other artificially-created ingredient" that the FDA identifies in regulations.[187] Although this definition is more comprehensive than that offered by the FDA and it addresses several issues identified in the *natural* lawsuits, such as whether HFCS and processing render a product unnatural, there is a key inadequacy. Notably missing from this proposed definition is perhaps the most contentious issue—whether GMOs may be considered *natural*. Therefore, if this definition were to have the force of law, the issue of GMOs would remain unaddressed.

Although unresolved by the federal Food Labeling Modernization Act, the issue of whether food containing GMOs may be labeled *natural* has been addressed by several state legislatures in bills requiring the labeling of GMO foods. Currently, Connecticut and Maine are the only

---

[183] The House and Senate versions of the proposed amendments to 21 U.S.C. § 343 are identical. *Compare* Food Labeling Modernization Act of 2013, S. 1653, 113th Cong. § 4(a) (introduced Nov. 5, 2013) (proposing amendment of 21 U.S.C. § 343 (2006), titled "Misbranded food"), *and* Food Labeling Modernization Act of 2013, H.R. 3147, 113th Cong. § 4(a) (introduced Sept. 19, 2013) (same), *with* 21 U.S.C. § 343 (2006) (defining "Misbranded Food"). Therefore, only the Senate version, introduced more recently, will be cited hereinafter.

[184] *Compare* S. 1653 at § 4(a) (proposing FDCA amendment by adding subsection (aa)(2), which would prohibit the use of a *natural* label on foods containing these ingredients, among others), *with* 21 U.S.C. § 343 (defining "Misbranded Food"). These ingredients have been the subject of several *natural* lawsuits. *See, e.g., infra* notes 228–44.

[185] *Compare* S. 1653 at § 4(a) (proposing FDCA amendment by adding subsection (aa)(2)(A), which exempts foods that have undergone these processes from a general rule prohibiting the use of a *natural* label on foods that have undergone chemical changes), *with* 21 U.S.C. § 343 (defining "Misbranded Food").

[186] *Compare* S. 1653 at § 4(a) (proposing FDCA amendment by adding subsection (aa)(2)(B), which exempts foods that have undergone certain "traditional physical processes" from a general rule prohibiting the use of a *natural* label on foods that have undergone chemical changes), *with* 21 U.S.C. § 343 (defining "Misbranded Food").

[187] *Compare* S. 1653 at § 4(a) (proposing FDCA amendment by adding subsection (aa)(3), which would prohibit the use of a *natural* label on foods containing such ingredients), *with* 21 U.S.C. § 343 (defining "Misbranded Food").

states which have enacted such laws, but similar laws have been proposed in twenty-six states.[188] For example, GMO labeling bills proposed in Indiana[189] and Massachusetts[190] would prohibit GMO foods from being labeled as *natural*. According to Connecticut's new law, "'natural food' . . . has not been treated with preservatives, antibiotics, synthetic additives, artificial flavoring or artificial coloring"; "has not been processed in a manner that makes such food significantly less nutritive"; and "has not been genetically-engineered." [191] A food that is processed "by extracting, purifying, heating, fermenting, concentrating, dehydrating, cooling or freezing shall not, of itself, prevent the designation of such food as 'natural food.'"[192] California's defeated Genetically Engineered Foods Labeling ballot initiative, Proposition 37,[193] also prohibited the labeling of foods containing GMOs as *natural*, but its standard went further and could be interpreted as prohibiting the labeling or advertising as *natural* any processed food.[194] This definition of *natural* would have conflicted with the standard in Connecticut. "Processed food" was defined to mean "any food other than a raw agricultural commodity, and includes any food produced from a raw agricultural commodity that has been subject to processing such as canning, smoking, pressing, cooking, freezing, dehydration, fermentation, or milling."[195] This strict standard for *natural* would prohibit smoked almonds or frozen vegetables, for example, from being labeled as *natural*.

---

[188] Stephanie L. Russ, *Does This Law Make My Butt Look Big? A Survey of Health-Related and Food Labeling Laws Food Service Franchise Systems Should Know*, 33 FRANCHISE L.J. 217, 228 (2013); *Consumers Demand Food & Chemical Companies Stay Out of GE Labeling Fight*, JUST LABEL IT (Oct. 25, 2013), http://justlabelit.org/consumers-demand-food-and-chemical-companies-stay-out-of-ge-fightlabeling/.

[189] H.R. 1196, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013) (introduced on January 10, 2013).

[190] H.R. 2037, Gen. Ct. (Mass. 2013).

[191] An Act Concerning Genetically Engineered Food, No. 13-183, § 1(17), 2013 Conn. Pub. Acts 1, 5 (amending § 21a-92 of Connecticut's general statutes).

[192] *Id.*

[193] DEBRA BOWEN, CAL. SEC'Y OF STATE, STATEMENT OF VOTE NOVEMBER 6, 2012, GENERAL ELECTION 13 (2012), *available at* http://www.sos.ca.gov/elections/sov/2012-general/sov-complete.pdf.

[194] DEBRA BOWEN, CAL. SEC'Y OF STATE, CALIFORNIA GENERAL ELECTION: OFFICIAL VOTER INFORMATION GUIDE 55 (2012), *available at* http://vig.cdn.sos.ca.gov/2012/general/pdf/complete-vig-v2.pdf. For the relevant, official text of the defeated ballot initiative, see *id.* at 111–12.

[195] *Id.* at 111. *But see* An Act Concerning Genetically Engineered Food, No. 13-183, § 1(17), 2013 Conn. Pub. Acts 1, 5 (allowing the *natural* label on food that "has not been processed in a manner that makes such food significantly less nutritive").

These federal and state attempts to define *natural* provide other evidence for the difficulties of defining the term and inconsistencies that will result if the FDA leaves this issue to be addressed by courts or legislatures. A comprehensive definition of *natural* must address which ingredients and processing aids may or may not be included, which methods of processing are permitted, and whether GMOs constitute a *natural* food.

III. DEFINING *NATURAL* IN THE MARKETPLACE

The threat of a class action lawsuit or dilution of the term's impact on consumers could prompt food producers or retailers to create a uniform standard for the industry. In fact, an attempt to create standards for use of the word *natural* in food marketing is currently being undertaken by the Natural Products Association ("NPA"), a non-profit organization that represents *natural* product retailers, manufacturers, wholesalers, and distributors.[196] Although the NPA has not yet revealed its standards or how it will implement its system, the NPA has stated that its goal is to "give consumers confidence that foods featuring the [*natural*] seal adhere to [a] clear set of standards."[197]

A. Food Producers

Although the NPA's goal is to create an industry standard, as the *natural* lawsuits reveal, there is little agreement among producers regarding the term's meaning.[198] For example, Barbara's Bakery, which

---

[196] Negowetti, *supra* note 1, at 599; John Shaw, *Defining 'Natural' Is a Priority for NPA in 2014*, NUTRA INGREDIENTS-USA.COM (Dec. 18, 2013), http://www.nutraingredients-usa.com/Regulation/Defining-natural-is-a-priority-for-NPA-in-2014.

> Founded in 1936, the Natural Products Association is the nation's largest and oldest nonprofit organization dedicated to the natural products industry. NPA represents over 1,900 members accounting for more than 10,000 retail, manufacturing, wholesale, and distribution locations of natural products, including foods, dietary supplements, and health/beauty aids. NPA unites a diverse membership, from the smallest health food store to the largest dietary supplement manufacturer. NPA is recognized for its strong lobbying presence in Washington, D.C., where it serves as the industry watchdog on regulatory and legislative issues.

About the Natural Products Association, NATIONAL PRODUCTS ASSOCIATION, http://www.npainfo.org/NPA/About_NPA/NPA/AboutNPA/AbouttheNaturalProductsAssociation.aspx?hkey=8d3a15ab-f44f-4473-aa6e-ba27ccebcbb8 (last visited Mar. 19, 2014).

[197] Elaine Watson, *NPA Weighs Into 'Natural' Debate as Natural Seal Initiative for Food Gathers Pace*, NUTRA INGREDIENTS-USA.COM (Nov. 7, 2011), http://www.nutraingredients-usa.com/Regulation/NPA-weighs-into-natural-debate-as-Natural-Seal-initiative-for-food-gathers-pace.

[198] For example, "Kashi encountered this divergence when it undertook an internal project [details of which were filed under seal] to create an 'aspirational definition of

recently settled a lawsuit accusing the cereal company of deceptively labeling its products as *natural* although they contained GMOs,[199] had defined the term *natural* as "no artificial preservatives, flavors, colors or ingredients."[200] However, the company now considers the term to be "vague and confusing."[201]

Although many producers of *natural* foods do not identify how their products qualify as *natural*,[202] Kashi, sued for making allegedly misleading *natural* claims, has offered a definition. On its website, Kashi

> define[d] natural as: Natural Food is made without artificial ingredients like colors, flavors or preservatives and is minimally processed. A natural ingredient is one that comes from or is made from a renewable resource found in nature. Minimal processing involves only kitchen chemistry, processes that can be done in a family kitchen and does not negatively impact the purity of the natural ingredients.[203]

Comparing this definition to several *natural* food products illustrates the inconsistency with which the term is used on food labels. For example, the definition which states that "natural food" is "minimally processed" and "comes from . . . a renewable resource *found in nature*"[204] implies the exclusion of GMOs from the definition. Certainly food producers such as Frito Lay,[205] ConAgra,[206] Bear Naked,[207] Campbell Soup,[208] and others being sued for deceptive use of *natural* claims on products containing

---

"natural" for the industry.'" Defendant Kashi Co.'s Opposition to Plaintiffs' Motion for Class Certification, *supra* note 128, at 7.

[199] *Compare* Class Action Complaint at 4, Trammel v. Barbara's Bakery, Inc., No. 3:12-cv-02664-CRB (N.D. Cal. May 23, 2012) (alleging harm to consumers by falsely labeling a product *natural* while it contains GMOs), *with* Final Judgment at 1, 5, Trammel v. Barbara's Bakery, Inc., No. 3:12-cv-02664-CRB (N.D. Cal. Nov. 8, 2013) (defining terms of the settlement of the lawsuit), *and* BARBARA'S BAKERY SETTLEMENT WEBSITE, https://barbarasbakerysettlement.com/ (last visited Feb. 28, 2014) (providing information about the lawsuit to potential class members).

[200] Esterl, *supra* note 4.

[201] *Id.*

[202] *See* CHARLOTTE VALLAEYS ET AL., CEREAL CRIMES: HOW "NATURAL" CLAIMS DECEIVE CONSUMERS AND UNDERMINE THE ORGANIC LABEL—A LOOK DOWN THE CEREAL AND GRANOLA AISLE 9 (2011), *available at* http://cornucopia.org/cereal-scorecard/docs/Cornucopia_Cereal_Report.pdf.

[203] Defendant Kashi Co.'s Opposition to Plaintiffs' Motion for Class Certification, *supra* note 128, at 4–5.

[204] *Id.* (emphasis added).

[205] *In re* Frito-Lay N. Am., Inc. All Natural Litig., No. 12-MD-2413 (RRM) (RLM), 2013 WL 4647512, at *1 (E.D.N.Y. Aug. 29, 2013).

[206] Jones v. ConAgra Foods, Inc., 912 F. Supp. 2d 889, 893 (N.D. Cal. 2012).

[207] Thurston v. Bear Naked, Inc., No. 3:11-cv-02890-H(BGS), 2013 WL 5664985, at *1 (S.D. Cal. July 30, 2013).

[208] Krzykwa v. Campbell Soup Co., 946 F. Supp. 2d 1370, 1371 (S.D. Fla. 2013).

GMOs or synthetic additives would object to this definition. Nestle, sued for deceptive use of the *natural* claim on Buitoni Pastas containing synthetic ingredients such as "xanthan gum, soy lecithin, sodium citrate, maltodextrin, sodium phosphate, disodium phosphates, and ferrous sulfate,"[209] would likely disagree that *natural* foods are made only through "processes that can be done in a family kitchen."[210] Likewise, Tropicana, which markets its pasteurized, deaerated, colored, and flavored orange juice as *natural*,[211] would also take exception to a definition of *natural* that "involves only kitchen chemistry."[212]

The divergence of opinion regarding whether products containing GMOs should be labeled further demonstrates that food producers are not likely to agree on a uniform definition of *natural* that will take into consideration contentious ingredients such as GMOs. For example, the opposition to the GMO state labeling campaigns in California and Washington included large food companies such as PepsiCo, Coca-Cola, Nestle, and Kraft, while top contributors to the "Yes" campaign included Nature's Path Foods, Good Earth Natural Foods, Wehah Farm Inc., and Amy's Kitchen.[213]

Although the development of a uniform standard through collaboration of food producers is highly unlikely, it is foreseeable that many individual food producers will undertake efforts to distinguish their truly *natural* products from competitors. For example, in light of ambiguity about what *natural* claims mean, organic producers, such as yogurt company Stonyfield, are developing labeling initiatives that distinguish their *organic* products from *natural* competitors.[214] Stonyfield's new packaging features a logo that includes the phrase "no

---

[209] Thurston v. Bear Naked, Inc., No. 3:11-cv-02890-H(BGS), 2013 WL 5664985, at *4 (S.D. Cal. July 30, 2013).

[210] Defendant Kashi Co.'s Opposition to Plaintiffs' Motion for Class Certification, *supra* note 128, at 5.

[211] *See* Lynch v. Tropicana Prods., Inc., No. 2:11-cv-07382 (DMC)(JAD), 2013 WL 2645050, at * 1 (D.N.J. June 12, 2013).

[212] Defendant Kashi Co.'s Opposition to Plaintiffs' Motion for Class Certification, *supra* note 128, at 5.

[213] Eliza Barclay & Martin Kaste, *Washington State Says 'No' To GMO Labels*, NPR (Nov. 7, 2013, 11:41 AM), http://www.npr.org/blogs/thesalt/2013/11/06/243523116/washington-state-says-no-to-gmo-labels; Dan Flynn, *GM Food Labeling in California Goes Down in Defeat*, FOOD SAFETY NEWS (Nov. 7, 2012), http://www.foodsafetynews.com/2012/11/big-setback-for-right-to-know-about-gm-foods-prop-37-goes-down-in-crushing-defeat/#.Umv753Aqhjo; Lewis Kamb, *Foes of Food-Labeling Initiative 522 Set Funding Record*, SEATTLE TIMES (Oct. 28, 2013, 7:58 PM), http://seattletimes.com/html/localnews/2022143831_gmofundraisingxml.html.

[214] *Stonyfield Packaging Overhaul Highlights Absence of 'Toxic Pesticides'*, FOOD NAVIGATOR-USA (Oct. 28, 2013), http://www.foodnavigator-usa.com/Trends/Natural-claims/Stonyfield-packaging-overhaul-highlights-absence-of-toxic-pesticides.

toxic pesticides used here" in response to research suggesting seventy-four percent of Americans prefer food produced with fewer pesticides.[215] Stonyfield's website also features a discussion of the difference between *natural* and *organic* foods, and it explains that "[w]hile 'natural' assures you of little, 'organic' tells you you're buying food made without the use of toxic persistent pesticides, GMOs, antibiotics, artificial growth hormones, sewage sludge or irradiation."[216] Ice cream producer Ben & Jerry's, whose mission is "[t]o make, distribute and sell the finest quality *all natural* ice cream . . . with a continued commitment to incorporating wholesome, *natural ingredients*,"[217] has announced that it will source only non-GMO ingredients for all its products everywhere by midyear 2014.[218]

These trends indicate that food producers are unlikely to reach consensus on the meaning of *natural*, but *true natural* food producers will likely capitalize on the distrust of consumers by developing and publicizing their own standards of *natural* to distinguish themselves from competitors.

B. Retailers

Perhaps consumer interest and demand will cause retailers and wholesalers to set standards for the *natural* products they sell. If food producers will not establish a consistent standard in the industry, they may be required to comply with a *natural* standard set by those selling their products. Several retailers have made attempts to educate consumers about the contents of the *natural* foods products in their stores. For example, Whole Foods Market publishes its standards and a list of unacceptable ingredients for the *natural* products it sells.[219] Ingredients such as artificial flavors and colors, HFCS, hydrogenated fats, irradiated foods, lead soldered cans, monosodium glutamate

---

[215] *Id.*

[216] Amy VanHaren, *Do "Natural" and "Organic" Mean the Same Thing? (The Short Answer: Nope.)*, STONYFIELD (Sept. 3, 2013), http://www.stonyfield.com/blog/natural-and-organic/.

[217] *Ben & Jerry's Mission Statement*, BEN & JERRY'S, http://www.benjerry.com/values (last visited Mar. 19, 2014) (emphasis added).

[218] *Our Position on Genetically Modified Organisms (GMOs)*, BEN & JERRY'S, http://www.benjerry.com/values/issues-we-care-about/our-stance-on-gmo (last visited Mar. 19, 2014).

[219] *See* Joe Dickson, *"Natural" Means... What?*, WHOLE STORY WHOLE FOODS BLOG (Mar. 20, 2009), http://www.wholefoodsmarket.com/blog/whole-story/natural-meanswhat. To view Whole Foods Market's list of unacceptable ingredients see *Unacceptable Ingredients for Food*, WHOLE FOODS MARKET, http://www.wholefoodsmarket.com/about-our-products/quality-standards/unacceptable-ingredients-food (last visited Mar. 19, 2014) [hereinafter *Unacceptable Ingredients*].

("MSG"), nitrates/nitrites, and partially hydrogenated oil are prohibited in all the *natural* products sold at Whole Foods.[220] These standards are "widely regarded by the industry and consumers as the touchstone for acceptable natural food ingredients."[221] Whole Foods is also "the first national grocery chain to set a deadline for full GMO transparency."[222] In March 2013, the company announced that all products in its U.S. and Canadian stores must be labeled to indicate whether they contain GMOs by 2018.[223] The grocery chain Kroger also lists the 101 ingredients they avoided in developing the "Simple Truth" line of *natural* products.[224] On its website, the grocer defines *natural* as "appl[ying] broadly to foods that are minimally processed and free of: synthetic preservatives[,] hydrogenated oils[,] stabilizers[,] emulsifiers[,] artificial sweeteners[,] most artificial colors[,] artificial flavors[, and] artificial additives."[225] EarthFare is another grocer that has banned from its stores products containing certain artificial ingredients[226] and is committed to selling food that is "as close to the ground as it gets."[227]

---

[220] *Unacceptable Ingredients*, *supra* note 219.

[221] Defendant Kashi Company's Opposition to Plaintiffs' Motion for Class Certification, *supra* note 128, at 4.

[222] *GMO: Your Right to Know*, WHOLE FOODS MARKET, http://www.wholefoodsmarket.com/gmo-your-right-know (last visited Feb. 28, 2014).

[223] *The United States and Agricultural Biotechnology Newsletter*, FOREIGN AGRICULTURAL SERVICE (USDA/Office of Agric. Aff., U.S. Embassy, Paris, Fr.), May 2013, at 4, *available at* http://www.usda-france.fr/media/Biotech%20newsletter%20May%20 2013%20new.pdf. Whole Foods has "designated certified organic, which prohibits the intentional use of GMOs, and the Non-GMO Project Verified program as the only two verification methods that [it] will permit as substantiation that a product can be considered non-GMO within Whole Foods Market." A.C. Gallo, *Three-Month Update on GMO Labeling*, WHOLE STORY WHOLE FOODS BLOG (June 18, 2013), http://www.wholefoodsmarket.com/blog/three-month-update-gmo-labeling. In addition, "meat, dairy, egg, and farmed seafood vendors also will need to verify whether or not animals were fed GMO corn, soy or alfalfa. In [its] Whole Body department, the ingredient list of each product will have to be examined for possible GMO-derived items." *Id.*

[224] *Free From 101*, SIMPLE TRUTH, http://www.simpletruth.com/about-simple-truth/ 101-free/ (last visited Mar. 19, 2014); *see also* Wendy Koch, *Wal-Mart Announces Phase-Out of Hazardous Chemicals*, USATODAY.COM (Sept. 12, 2013, 7:30 PM), http://www.usatoday.com/story/news/nation/2013/09/12/walmart-disclose-phase-out-toxic-chemicals-products-cosmetics/2805567/.

[225] *Natrual Meat and Poultry*, SIMPLE TRUTH, http://www.simpletruth.com/about-simple-truth/natural/ (last visited Feb. 28, 2014).

[226] EARTH FARE, BOOT LIST, *available at* https://www.earthfare.com/~/media/V3/ Files/Boot%20List/9-7_New%20Boot%20List.pdf (last visited Mar. 19, 2014); *Food Philosophy*, EARTH FARE, https://www.earthfare.com/food/foodphilosophy (last visited Mar. 19, 2014).

[227] EARTH FARE, TEAM MEMBER HANDBOOK 7 (2013), *available at* http://www.team earthfare.com/~/media/TeamEarthFareV2/HR%20Resources/Handbook.pdf.

These efforts by retailers provide a significant incentive for food producers to adhere to some standard for use of the term *natural*. These retailers are also helping to educate consumers regarding the meaning of *natural* as used on the products they sell. However, these approaches will surely lead to inconsistent standards. Additionally, the impact on consumers is slight—the majority of consumers without access to these stores, either because of their location or because they cannot afford to shop there, will continue to be confused about what *natural* means.

IV. UNDERSTANDING *NATURAL* CLAIMS: IMPETUS ON CONSUMERS?

The inconsistencies among food producers' use of *natural*, the FDA's lack of enforcement against misleading *natural* claims, and the insufficiency of the courts to address deceptive *natural* claims on an *ad hoc* basis leave the average consumer effectively unprotected against misleading products claiming to be *natural*. Cases deciding whether consumers have a reasonable expectation regarding the *naturalness* of a product have been divided regarding the effect of a product's ingredient lists to decode its *natural* claims. Thus, the case law presents a mixed message regarding whether the impetus is on the consumer to understand a food producer's meaning of *natural* or, conversely, whether a food producer should use that *natural* claim in a way that meets a reasonable consumer's expectation of the term.

In *Lynch v. Tropicana Products, Inc.*, Tropicana argued that a consumer could not reasonably claim that she was induced into believing that the claim "100% pure and natural orange juice" meant that the juice was freshly-squeezed when the statement "pasteurized" was displayed on the front of the label.[228] Plaintiffs asserted that Tropicana falsely claimed that its "not-from-concentrate" orange juice is 100% pure and *natural* orange juice; however, the product is "pasteurized, deaerated, stripped of flavor and aroma, stored for long periods of time before available to the public, and colored and flavored before being packaged."[229] Tropicana moved to dismiss the complaint for failure to allege facts demonstrating the plaintiffs' reasonable expectation that the juice was *natural*.[230] Citing *Williams v. Gerber Products Company*,[231] the

---

[228] Lynch v. Tropicana Prods., Inc., No. 2:11-cv-07382 (DMC)(JAD), 2013 WL 2645050, at *6 (D.N.J. June 12, 2013).

[229] *Id.* at *1.

[230] *Id.* at *6.

[231] 552 F.3d 934, 939 (9th Cir. 2008) (holding that "reasonable consumers should [not] be expected to look beyond misleading representations on the front of the box to discover the truth" and explaining that "[w]e do not think that the FDA requires an ingredient list . . . to correct those [consumer] misinterpretations and provide a shield for liability for the deception").

New Jersey District Court denied Tropicana's motion to dismiss, explaining that discovery is needed to ascertain plaintiffs' expectations regarding the juice.[232]

In *Williams*, plaintiffs alleged that Gerber's Fruit Juice Snacks, packaged with pictures of different fruits and claiming to be made with "fruit juice and other all natural ingredients," were deceptively marketed because the most prominent ingredients were corn syrup and sugar.[233] The district court granted Gerber's motion to dismiss because it found that Gerber's claims were unlikely to deceive a reasonable consumer, given that the ingredients were listed on the side of the box.[234] The Ninth Circuit reversed the decision, reasoning that

> [w]e disagree with the district court that reasonable consumers should be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box. . . . We do not think that the FDA requires an ingredient list so that manufacturers can mislead consumers and then rely on the ingredient list to correct those misinterpretations and provide a shield for liability for the deception. Instead, reasonable consumers expect that the ingredient list contains more detailed information about the product that *confirms other representations* on the packaging.[235]

Similarly, the *Lynch* court concluded that Tropicana's "'pasteurized' [claim on its label] does not inherently 'provide a shield for liability for the deception' that its product has no added flavoring or is 100% pure and natural orange juice."[236]

Other courts have reached the opposite conclusion regarding the import of other information on a food label and inclusion of allegedly unnatural ingredients in the ingredients list.[237] For example, in *Kane v. Chobani, Inc.*, the Northern District of California held that because Chobani disclosed "fruit or vegetable juice concentrate [*for color*]" on its labels and the plaintiffs acknowledged that they read the label and ingredient list, the court concluded that it was not plausible that the plaintiffs believed, based on Chobani's "all natural" claims, that the

---

[232] *Lynch*, 2013 WL 2645050, at *7.

[233] *Williams*, 552 F.3d at 936.

[234] *Id.* at 937; Williams v. Gerber Prods. Co., 439 F. Supp. 2d 1112, 1116–17 (S.D. Cal. 2006), *rev'd*, 552 F.3d 934.

[235] *Williams*, 552 F.3d at 939–40 (emphasis added).

[236] *Lynch*, 2013 WL 2645050, at *7 (quoting *Williams*, 552 F.3d at 939).

[237] *See, e.g.*, McKinniss v. Gen. Mills, Inc., No. CV 07–2521 GAF (FMOx), 2007 WL 4762172, at *3 (C.D. Cal. Sept. 18, 2007) ("A reasonable consumer would . . . be expected to peruse the product's contents simply by reading the side of the box containing the ingredient list.").

yogurts did not contain added fruit juice.[238] The plaintiffs alleged that Chobani falsely stated that its yogurts "contain '[o]nly natural ingredients' and are 'all natural'" although they "include artificial ingredients, flavorings, and colorings as well as chemical preservatives."[239] In particular, the plaintiffs alleged that the *natural* claims are misleading because some of Chobani's yogurts are colored "artificially" using "fruit or vegetable juice concentrate."[240] The court concluded that plaintiffs' allegation that they would not have purchased the yogurts had they known that they "contained . . . unnatural ingredients" was insufficient to demonstrate that they relied on the *natural* claim.[241] Accordingly, the court dismissed the plaintiffs' claims without prejudice.[242] Similarly, in *Pelayo*, the court determined that because the "All Natural" term on the back of the package appears immediately above the list of ingredients, "to the extent there is any ambiguity regarding the definition of 'All Natural' with respect to each of the Buitoni Pastas, it is clarified by the detailed information contained in the ingredient list."[243]

The decisions in *Kane* and *Pelayo* can be interpreted as contrary to *Williams*. These decisions seem to require a reasonable consumer "to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box."[244] As surveys demonstrate, consumers are enticed by a *natural* claim.[245] Under these decisions, a food producer may lure consumers with the *natural* claim and then "correct those misinterpretations"[246] by including the unnatural ingredients in the ingredients list. As a result, consumers are required to thoroughly investigate the product to discern how the food producer defines *natural*. This seems to be a perverse standard. As the Ninth Circuit correctly noted, a reasonable consumer is likely to believe that the ingredient list provides more detailed

---

[238] Kane v. Chobani, Inc., No. 12-CV-02425-LHK, 2013 WL 5289253, at *10 (N.D. Cal. Sept. 19, 2013) (alteration in original).

[239] *Id.* at *2. Plaintiffs also allege that the Defendant's "evaporated cane juice" and "no sugar added" claims are false and misleading. *Id.* at *1–2.

[240] *Id.* at *10.

[241] *Id.* California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act (designated UCL, FAL, and CLRA respectively), *id.* at *3, require the plaintiff to demonstrate reliance on the alleged misrepresentation in order to demonstrate standing. *Id.* at *8.

[242] *Id.* at *10.

[243] Pelayo v. Nestle USA, Inc., No. CV 13-5213-JFW (AJWx), 2013 WL 5764644, at *5 (C.D. Cal. Oct. 25, 2013).

[244] Williams v. Gerber Prods. Co., 552 F.3d 934, 939 (9th Cir. 2008).

[245] Esterl, *supra* note 4.

[246] *Williams*, 552 F.3d at 939.

information which confirms the representations made elsewhere on the product.[247] Assuming that a reasonable consumer would and should review the ingredients list of a product, a consumer who believes that a *natural* product is free of GMOs, for example, would have no way to verify that from the ingredients list unless the product is certified as non-GMO. Because the FDA does not recognize any meaningful difference between GMOs and foods developed by traditional plant breeding, it does not require labeling of products containing GMOs.[248]

Thus, regardless of the legal issues, the practical impact of lax regulatory oversight of the *natural* claim is that the impetus to understand what *natural* means for each food producer is currently on the consumer. Those who are concerned with purchasing products that are free of HFCS and artificial colors or ingredients will have to look beyond the *natural* claim to the ingredients list. However, consumers who desire products free of GMOs, pesticides, synthetic fertilizers, synthetic processing aids, such as hexane, cannot determine whether the food contains these items from information on the package. To verify the *naturalness* of certain products thus requires a thorough investigation of how the food is produced. A consumer who believes that a food represented as *natural* is "from the earth," "wholesome," and free of harmful substances, would be mistaken to trust in a consistent application of the term.

CONCLUSION

As this Article has demonstrated, there is no indication that the FDA, courts, Congress, state legislatures, or the marketplace will create a comprehensive, uniform, and enforceable definition of *natural* anytime in the near future. Regardless of how the *natural* food lawsuits will be resolved,[249] the impact of the litigation will be two-fold. First, consumer surveys already demonstrate that the publicity surrounding the *natural* litigation will lead to further consumer distrust of the term. For

---

[247] *Id.* at 939–40.

[248] *See* Statement of Policy: Foods Derived from New Plant Varieties, 57 Fed. Reg. 22,984, 22,984–85 (May 29, 1992); *Guidance for Industry: Voluntary Labeling Indicating Whether Foods Have or Have Not Been Developed Using Bioengineering; Draft Guidance*, FDA, http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm059098.htm (last updated Feb. 21, 2014).

[249] Several of the *natural* lawsuits have recently resulted in successful settlements for the class action plaintiffs. *See, e.g.*, Final Judgment at 1, Trammel v. Barbara's Bakery, Inc., No. 3:12-cv-02664-CRB (N.D. Cal. Nov. 8, 2013); (In Chambers) Order Re Motion For Preliminary Approval of Class Action Settlement at 1, Pappas v. Naked Juice Co. of Glendora, No. 2:11-cv-08276-JAK-PLA (C.D. Cal. Aug. 7, 2013); Order Granting Preliminary Approval of Class Action Settlement at 1, *In re*: Alexia Foods, Inc. Litig., No. 4:11-cv-06119-PJH (N.D. Cal. Jul. 10, 2013).

example, "[o]nly 22.1% of food products and 34% of beverage products launched in the U.S. during the first half of 2013 claimed to be 'natural.'" [250] In 2009, 30.4% of new food products and 45.5% of new beverages were labeled with the term.[251] Secondly, food producers are already abandoning use of *natural* on their food labels.[252] As the Wall Street Journal recently reported, "'Natural' Goldfish crackers will soon be just Goldfish. 'All Natural' Naked juice is going stark Naked. 'All Natural' Puffins cereal is turning into plain old Puffins."[253] As consumers increasingly demand healthy, wholesome food that is free of GMOs and artificial ingredients, the food industry will entice consumers with other claims. For example, Barbara's Bakery no longer labels its products *natural*, but now "plans to rely on terms such as 'simple,' 'wholesome,' 'nutritious,' and 'minimally processed.'"[254] Although the *natural* claim may be disappearing from food labels, the difficulties of defining the term highlight the issue of transparency in food labeling—an issue that demands the FDA's attention and expertise.

---

[250] Esterl, *supra* note 4.

[251] *Id.*

[252] *See id.*

[253] *Id.*

[254] *Id.*

FRAUD IN THE MARKET

Samuel R. Wiseman[*]

TABLE OF CONTENTS

INTRODUCTION

Consumers in the United States are flocking to local food. The number of farmers' markets around the country—many of which purport to sell only locally grown produce—has rapidly grown in recent years.[1] The allure of producers' markets[2] is easy to understand. *Locavores*[3]

---

[*] B.A., Yale University (2003); J.D., Yale Law School (2007); Assistant Professor, Florida State University College of Law. Many thanks to Nicholas Lee, Courtney Turner, Rebecca Vermette, and the Regent Law Review staff for doing a terrific job organizing this symposium.

[1] LYDIA OBERHOLTZER & SHELLY GROW, PRODUCER-ONLY FARMERS' MARKETS IN THE MID-ATLANTIC REGION: A SURVEY OF MARKET MANAGERS 2 (2003).

[2] *Id.* at 3 (noting that the term "producer-only" market is relatively recent and defining it as meaning that vendors "produce the goods that they sell directly to retail customers").

[3] A *locavore* is defined as "a person whose diet consists only or principally of locally grown or produced food." NEW OXFORD AMERICAN DICTIONARY 1025 (Angus Stevenson & Christine A. Lindberg eds., 3d ed. 2010); *see also* Stephanie Tai, *The Rise of U.S. Food*

prefer small farms to massive, distant agribusiness for freshness, environmental, social, and safety-based reasons, and they assume, when so assured by the market, that the food at the market is in fact local. Beyond the health and safety benefits that some consumers believe flow from knowledge of food production practices,[4] buyers enjoy the quality and taste of just-picked produce,[5] and they derive substantial utility from the knowledge that they have supported local agriculture.[6] Many also believe that fresh, local produce is healthier and less environmentally damaging.[7] Producers are equally pleased by the trend toward local food and farmers' markets—local food often sells at a premium,[8] and direct sales to consumers reduce packaging and marketing costs,[9] an important consideration for small producers.

Sustainability Litigation, 85 S. CAL. L. REV. 1069, 1074–1080 (2012) (describing the "modern sustainable food movement").

[4] Shermain D. Hardesty, *Role of Direct Marketing in California*, 10 AGRIC. & RESOURCE ECON. UPDATE Jan.–Feb. 2007, at 5 (noting consumers' "sense of food safety" associated with local produce comes from their familiarity with the source); *see also* RICH PIROG & ANDY LARSON, CONSUMER PERCEPTIONS OF THE SAFETY, HEALTH, AND ENVIRONMENTAL IMPACT OF VARIOUS SCALES AND GEOGRAPHIC ORIGIN OF FOOD SUPPLY CHAINS 2, 10 (2007) (concluding, from a survey that produced 500 usable responses, that "[e]ighty-five percent indicated that local produce was 'somewhat' or 'very' safe, with 74 percent indicating they perceived the national food supply chain to be safe.").

[5] KIM DARBY ET AL., WILLINGNESS TO PAY FOR LOCALLY PRODUCED FOODS: A CUSTOMER INTERCEPT STUDY OF DIRECT MARKET AND GROCERY STORE SHOPPERS 6, 10 (2006) (finding, based on a survey of 530 consumers, that "[f]reshness was the most frequently cited" reason for buying local produce and that "[t]aste also ranked high"); Kynda R. Curtis, *Are All Direct Market Consumers Created Equal?*, 42 J. FOOD DISTRIBUTION RES. 26, 28, (2011), (showing "taste" as the most important produce attribute cited by community supported agriculture ("CSA") and farmers' market customers); Hardesty, *supra* note 4, at 5 ("Consumers have reported that quality is the number one reason they shop at farmers' markets; they are attracted by the fresh-picked, and vine- and tree-ripened produce.").

[6] Kim Darby et al., *Decomposing Local: A Conjoint Analysis of Locally Produced Foods*, 90 AM. J. AGRIC. ECON. 476, 485 (2008).

[7] *See, e.g.*, Curtis, *supra* note 5, at 26–28, 31 (noting that although both farmers' market and CSA customers "rated product taste as the most important attribute" they sought in produce, CSA customers also cared about whether the produce was "organic," high "quality," and "local"—more so than farmers' market customers).

[8] *See, e.g.*, DARBY ET AL., *supra* note 5, at 25 (concluding that "consumers are willing to pay more for locally produced foods"); *see also* OBERHOLTZER & GROW, *supra* note 1, at 2 (citing TIM PAYNE, U.S. DEP'T. OF AGRIC., U.S. FARMERS MARKETS—2000: A STUDY OF EMERGING TRENDS, at iv (2002) (describing broad economic benefits to farmers, and noting that, in 2000, more than 19,000 farmers "exclusively" sold their produce at farmers' markets)). *But see* JAKE CLARO, VERMONT FARMERS' MARKETS AND GROCERY STORES: A PRICE COMPARISON 23 (2011) (finding that "prices at farmers' markets are in many cases competitive with prices at grocery stores"); RICH PIROG & NICK MCCANN, IS LOCAL FOOD MORE EXPENSIVE? A CONSUMER PRICE PERSPECTIVE ON LOCAL AND NON-LOCAL FOODS PURCHASED IN IOWA 7–11 (2009) (comparing local and non-local prices for zucchini,

Consumer demand for localism, with the price premiums that follow, creates an incentive for fraud—passing off non-locally-produced food as farm-raised.[10] It is difficult for both consumers and market managers to distinguish between a carrot grown at the farm down the road and a carrot plucked from the shelves of a chain grocery store and resold on market day.[11] The threat of farmers' market fraud is not merely theoretical. Investigations by a news station in California uncovered numerous incidents of farmers selling produce that they had not grown.[12] Market managers around the country have similarly found farmers selling purportedly local food out of season[13] and, when visiting farms, have observed piles of dirt rather than crops.[14] Although the extent of the fraud is not currently known—and the great majority of sellers are very likely honest—the number and variety of incidents so far suggests that it could be fairly widespread. Farmers' markets will likely continue to grow,[15] and as demand for local produce increases,[16] the

---

summer squash, cucumbers, string beans, cabbage, sweet onions, tomatoes, corn, eggs, and certain meats and noting that in terms of statistical significance only string beans were more expensive at farmers' markets).

[9] *See, e.g.*, Nina W. Tarr, *Food Entrepreneurs and Food Safety Regulation*, 7 J. FOOD L. & POL'Y 35, 36, 46–47 (2011) (noting that if a "farmer had bagged . . . lettuce before taking it to market, she would have engaged in 'processing'" and would have been "subject to more regulation," but also noting that even farmers who sell raw produce at markets already must comply with a variety of safety-related regulations, although this varies by state).

[10] For examples, *see infra* Part II.

[11] As shown by recent scandals relating to mislabeled fish and olive oil, this problem is not confined to farmers' markets. *See, e.g.*, Kirk Johnson, *Survey Finds That Fish Are Often Not What Label Says*, N.Y. TIMES, Feb. 21, 2013, at A13, *available at* http://www.nytimes.com/2013/02/21/us/survey-finds-that-fish-are-often-not-what-label-says.html?_r=0; Elizabeth Weise, *Study: Imported Extra Virgin Olive Oil Often Mislabeled*, USA TODAY, (July 16, 2010, 12:16 PM), http://usatoday30.usatoday.com/money/industries/food/2010-07-15-Oliveoil15_ST_N.htm?csp=34.

[12] Joel Grover & Matt Goldberg, *False Claims, Lies Caught on Tape at Farmers Markets*, NBC L.A. (Sept. 23, 2010, 11:28 AM), http://www.nbclosangeles.com/news/local/Hidden-Camera-Investigation-Farmers-Markets-103577594.html.

[13] *See infra* notes 66–67 and accompanying text.

[14] *See infra* text accompanying note 58.

[15] In addition to the benefits to consumers, producers, and communities, the Food Safety Modernization Act also might encourage more direct sales to consumers as, under the Act, farmers are exempt from certain stricter food safety standards if they can show that during a three-year period they had a higher "average annual monetary value of the food . . . sold *directly to qualified end-users*" than the average annual monetary value of all "food manufactured, processed, packed, or held" at the facility and "the average annual monetary value of all food sold by such facility" during the three-year period was less than $500,000. FDA Food Safety Modernization Act, sec. 103, § 418(*l*)(1)(C)(ii), Pub. L. No. 111-353, 124 Stat. 3892 (2011) (codified as amended at 21 U.S.C. § 350g(*l*)(1)(C)(ii) (2012)) (emphasis added).

problem may become more acute. If so, it could undermine legitimate local food sellers through direct competition as well as by threatening consumer confidence in producer-only markets as a whole.[17]

Public and private responses to the problem vary. Current market and government anti-fraud efforts range from the non-existent to the highly involved, but even careful attempts to ensure the produce is truly local sometimes fail. Farm visits, a measure commonly included in market rules,[18] can only verify produce that is growing at the time of the visit, and in some cases not even that—produce stored on site and observed by the market manager was not necessarily produced on site.[19] Programs that rely on farmer self-certification, including descriptions and maps of crops, can be gamed, particularly in larger markets where peer monitoring is less likely to be effective. And although state regulatory or criminal penalties can be significant, the few states that have attempted to implement a relatively comprehensive anti-fraud regulatory regime at markets lack the resources to fairly and consistently enforce these rules.[20]

To ensure that consumers get what they think they are buying, and to protect honest producers' businesses, more effective efforts to curb farmers' market fraud may be necessary, at least in some areas. But if enough consumers can distinguish genuine from fraudulent local food, and there is sufficient competition among local food outlets, markets may have the necessary incentives to police themselves. Any proposed solution must be sensitive to the need to minimize costs to market participants (in dollars, time, and effort) to ensure that farmers' markets remain attractive to consumers and producers, as well as to the many competing demands on police and regulatory agencies. This Article identifies the problem of farmers' market fraud, explores existing efforts to prevent it, and makes some tentative suggestions as to how markets and governments can better address the problem.

---

[16] LINDSAY DAY-FARNSWORTH ET AL., SCALING UP: MEETING THE DEMAND FOR LOCAL FOOD, at i (2009).

[17] *See* NEIL D. HAMILTON, NAT'L. CTR. FOR AGRIC. LAW RESEARCH & INFO., FARMERS' MARKETS: RULES, REGULATIONS AND OPPORTUNITIES 28 (2002), *available at* http://www.nyfarmersmarket.com/pdf_files/fmruleregs.pdf ("There is widespread agreement among public officials, market advocates, and farmers that allowing other products to be sold can be detrimental to both the value of the market for farmers and to the quality of the market experience for shoppers. . . . The sale of produce by those who did not raise it defeats the idea of a 'farmers' market, is deceptive for consumers who may not realize the distinction, and creates unfair competition for local farmers at the market.").

[18] *See, e.g. infra* Part III.A.2.

[19] *See infra* text accompanying note 104.

[20] *See infra* notes 59, 127 and accompanying text.

Part I describes the rise of the local food movement and why direct sales to consumers through farmers' markets are so popular with both farmers and consumers. Part II, however, shows that some consumers might not be getting the produce they believe they are purchasing and how seller fraud can damage honest farmers' businesses by both undercutting them in the short term and potentially eroding consumer trust in the long term. Part III of this Article explores solutions, including market and seller agreements, regulatory approaches, and criminal penalties. It concludes that where consumers are able to differentiate between locally-grown and distant produce and where there is healthy competition among markets in a region, markets will likely be adequately incentivized to police themselves by heightening rules and enforcement. For markets that lack these competitive incentives, however, state regulations implemented by market boards and managers (taking advantage of their local knowledge) would likely be an attractive approach. With more attention to the potential for fraud, markets and governments can better protect both consumers and farmers.

I. THE VALUE OF LOCAL FOOD

Farmers' markets are increasingly popular, rising from 1,755 markets operating in 1994 to 8,144 in 2013.[21] Consumers demand local food to fulfill various environmental and social values[22]—or simply to find better-tasting produce[23]—and farmers benefit from opportunities for high-priced sales to loyal buyers.[24] There is no widely-accepted definition of "local,"[25] but this Article addresses the type of local food that consumers think they are buying at producer-only farmers' markets: produce that was grown at a farm somewhere nearby.[26] These producer-

---

[21] Agric. Mktg. Serv., *National Count of Farmers Market Directory Listing Graph: 1994–2013*, U.S. DEP'T AGRIC., http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateS&leftNav=WholesaleandFarmersMarkets&page=WFMFarmersMarketGrowth&description=Farmers%20Market%20Growth (last modified Aug. 8, 2013).

[22] *See supra* note 7 and accompanying text.

[23] *See* Curtis, *supra* note 5, at 28.

[24] *See supra* note 8 and accompanying text.

[25] STEVE MARTINEZ ET AL., U.S. DEP'T OF AGRIC., LOCAL FOOD SYSTEMS: CONCEPTS IMPACTS AND ISSUES, at iii (2010) (observing that "[t]hough 'local' has a geographic connotation, there is no consensus on a definition in terms of the distance between production and consumption," and noting that the 2008 Food, Conservation, and Energy Act defines "locally and regionally produced" food as food that is transported "less than 400 miles from its origin or within the state in which it is produced"); Megan Galey & A. Bryan Endres, *Locating the Boundaries of Sustainable Agriculture*, 17 NEXUS: CHAP. J.L. & POL'Y 3, 5 (2012) (noting different definitions used by states, "grocery stores, restaurants, and farmers' markets" and in the Farm Bill).

[26] See *supra* note 2 for a definition of producer-only farmers' markets.

only markets are popular, comprising more than 60% of all farmers' markets.[27] The sources of their popularity are explored briefly below.

A. Consumers

A diverse, incompletely overlapping set of consumer values drives the steadily growing demand for local food. Alice Waters, Michael Pollan, and other leaders of the U.S. slow food movement believe that "cooking should be based on the finest and freshest seasonal ingredients that are produced sustainably and locally"[28] and view the movement as embodying a "set of cultural practices" and "even a way of life."[29] These connoisseurs of local produce tie together taste and social values, demanding delicious produce and a "food economy that is 'good, clean, and fair,'"[30] and, increasingly, consumers share some or all of these values. Buyers looking for freshness and flavor are drawn to producer-only markets for obvious reasons. Consumers seeking fairness in food derive substantial utility from the knowledge that they are supporting a local farmer, whom they may know,[31] rather than a large, faceless agribusiness. Agribusiness nearly always wins out in the national market for food, with its economies of scale and government subsidies, but some consumers of local food hope to tilt the scales in favor of the family farmer.

The values of "clean" and "fair food" also connote environmental concerns. Large factory farms send massive quantities of pollution into interstate rivers,[32] and many consumers view family farms—particularly

---

[27] U.S. DEP'T OF AGRIC., NATIONAL FARMERS MARKET MANAGER SURVEY 2006, at 20 (2009) (showing that 60.1 percent markets involve direct retail sales only). It is not clear that all retail sales involve sales directly from the producer, but the same report indicates that on average nationwide, more than 70% of vendors "reported to be producers selling goods they had grown and/or produced themselves." *Id.* at 51.

[28] Stella Lucia Volpe, *The Slow Food Movement*, ACSM'S HEALTH & FITNESS J., May–June 2012, at 29, 29; CHEZ PANISSE RESTAURANT, http://www.chezpanisse.com/about/alice-waters (last visited Mar. 17, 2014).

[29] Michael Pollan, *Cruising on the Ark of Taste*, MOTHER JONES, May–June 2003, at 75, 76.

[30] CHEZ PANISSE RESTAURANT, *supra* note 28.

[31] DARBY ET AL., *supra* note 5, at 6, 10 (concluding from a survey of 530 respondents that, after freshness, "[s]upporting local businesses was the next most frequently cited reason" for purchasing local produce); Curtis, *supra* note 5, at 30 (noting the "high importance" that CSA members, in particular, place on "supporting local farmers").

[32] U.S. ENVTL. PROT. AGENCY, NATIONAL WATER QUALITY INVENTORY 2000 REPORT, at ES-3, 65, 74, 80, 82, 96, 140 (2002) (noting that states reported that agricultural nonpoint source ("NPS") pollution was the leading source of water quality impairment and that the use of animal feeding operations, pesticides, irrigation water and fertilizer, among other activities, can cause this pollution).

those they can visit and thus experience first-hand—as more benign.[33] Some vendors at farmers' markets also offer organic or "pesticide-free" produce,[34] which can reduce harmful pollution and potentially provide health benefits to consumers.[35] Locavores further point to the shorter transport distances required for local produce,[36] although some studies suggest that local agriculture does not have a smaller carbon footprint than its centralized counterpart.[37] Beyond pollution, some local food enthusiasts prefer the non-genetically modified "heirloom" produce that some small farms offer, favoring plant diversity and traditional agriculture over the engineered monocultures that tend to dominate large farms and their perceived health and environmental risks.[38] Finally, meat consumers prefer free-range chicken and pasture-fed beef not only for taste but also to avoid supporting inhumane conditions on factory farms.[39] And as introduced above, consumers of local food like knowing where their food came from and how it was grown for safety reasons.[40] In a world of e-coli scares and growing distrust of the government's ability to protect the food supply, local food plucked fresh from the fields seems safer and more predictable.

---

[33] *See, e.g.*, PIROG & LARSON, *supra* note 4, at 2 (noting that consumers in one survey placed "high importance" on "pesticide use on fresh produce they purchase").

[34] *Cf. Organic Market Overview*, U.S. DEP'T AGRIC., http://www.ers.usda.gov/topics/natural-resources-environment/organic-agriculture/organic-market-overview.aspx#.UuPeTfQo6c9 (last updated June 19, 2012) (noting that "7 percent of U.S. organic food sales occur through farmers' markets, foodservice, and marketing channels other than retail stores").

[35] PIROG & LARSON, *supra* note 4, at 3 (explaining that a majority of survey respondents perceived organic and locally-grown food to be healthier than conventionally sourced food, and noting that although there are few studies linking organics to better health, such studies are growing in number). *But cf.* Crystal Smith-Spangler et al., *Are Organic Foods Safer or Healthier than Conventional Alternatives?*, 157 ANNALS INTERNAL MED. 348, 359 (2012) (finding few health benefits from eating organic in lieu of conventional produce).

[36] *See* PIROG & LARSON, *supra* note 4, at 2, 7 (noting, based on a survey with 500 usable responses, that 50% responded that the "distance traveled" (by the produce) was "'somewhat' or 'very' important," although higher percentages of respondents cared about "pesticide use," "date harvested," and "food safety inspection").

[37] Christopher L. Weber & H. Scott Matthews, *Food-Miles and the Relative Climate Impacts of Food Choices in the United States*, 42 ENVTL. SCI. & TECH. 3508, 3508 (2008).

[38] *See, e.g.*, Pollan, *supra* note 29, at 75 (noting that members of the local food movement "aimed to save endangered domestic plants and animals").

[39] *Cf.* Kelli Boylen, *Marketing Animal Welfare with Certification*, HAY & FORAGE GROWER (Aug. 10, 2012), http://hayandforage.com/beef/marketing-animal-welfare-certification (describing increasingly popular "Animal Welfare Approved" ("AWA") certification and an AWA-certified farmer who sells grass-fed beef at a farmers' market); *Standards*, ANIMAL WELFARE APPROVED, http://animalwelfareapproved.org/standards (last visited Mar. 20, 2014) (describing standards for the humane treatment of farm animals).

[40] *See supra* note 4 and accompanying text.

B. Farmers and Communities

Small farmers have responded enthusiastically to the steadily rising demand for local foods. Some accommodate consumers' desire for a connection with their food source by posting pictures of their goats and cows at their sales booths and offering farm tours. They pile oddly-shaped heirloom tomatoes and purple carrots into baskets, offer free samples to highlight the flavor of freshly-picked produce, and suggest recipes for experimenting with new seasonal vegetables that consumers might not have previously encountered. And in exchange, they collect a healthy price for their wares. Farmers are often able to set prices that are comparable to, if not higher than,[41] those found in grocery stores while avoiding shipping costs and more stringent labeling and packaging requirements.[42] Cutting out the middleman can also generate substantial savings—farmers in California, for example, make "less than 20 cents on the consumer's full dollar" when selling through wholesalers.[43] Studies of farmer revenues from farmers' markets show average annual sales per farmer ranging from $7,000 to more than $11,000 annually,[44] and that a substantial percentage of farmers at markets rely solely on these venues for produce sales.[45]

Farmers' markets also benefit communities—creating direct economic impacts and sometimes pulling shoppers to downtown areas and causing spending beyond the food sector. In terms of direct impact, the City of Portland, Oregon, for example, estimates that "[i]n 2007, the 14 farmers' markets in Portland sold goods totaling an estimated aggregate of nearly $11.2 million,"[46] which created "just under 100 direct jobs," "over $1.3 million in employee compensation," and "induced" contributions—such as "personal spending done by the farmer . . . or her market worker"—of more than $1.8 million.[47] More broadly, farmers'

---

41 *See supra* note 8 and accompanying text.

42 *See supra* note 9 and accompanying text.

43 *See* Hardesty, *supra* note 4, at 5.

44 Cheryl Brown & Stacy Miller, *The Impacts of Local Markets: A Review of Research on Farmers Markets and Community Supported Agriculture (CSA)*, 90 AM. J. AGRIC. ECON. 1296, 1297 (2008). Some states had lower sales, though. In Iowa, only 30% of market vendors had "annual sales greater than $5,000." *Id.* (citing Theresa Varner & Daniel Otto, *Factors Affecting Sales at Farmers' Markets: An Iowa Study*, 30 REV. AGRIC. ECON. 176, 185 (2008)).

45 *Id.* (showing that in 2006, 25% of vendors relied on farmers' market sales for their "sole source of farm income").

46 Memorandum from Bonnie Gee Yosick to Clark Worth (Sept. 23, 2008), *available at* http://www.portlandoregon.gov/bps/article/236588.

47 *Id.*

markets can drive economic and social interactions that "create the basis for the emergence of new local food systems."[48]

II. THE THREAT OF FRAUD

In light of the growth of farmers' markets, and the opportunity to resell certain mass-produced produce at a premium[49] without dealing with labeling, packaging and middlemen,[50] there are reasonably strong incentives for farmers' market fraud. And fraud detection is difficult: A local carrot may be nearly identical to a "foreign" carrot. Fraud harms both consumers, who do not get what they pay for, and honest farmers, who are undercut by more cheaply-produced produce masquerading as local.[51] As one Wisconsin farmer complained with respect to resellers, "'We sell four cucumbers for $1 and they sell eight for $1.'"[52]

Equally troublingly, an erosion of consumer trust in farmers' claims that they grew the food they sell could damage the entire enterprise, harming both consumers and farmers. Although there appear to have been no empirical studies of the extent or degree of fraud, anecdotal evidence suggests that it is a common concern among market organizers and, in some cases, governments and consumers.

In California, where the state has certified certain markets as local since 1977[53] and boasts the largest number of farmers' markets in the country,[54] there have been numerous recent allegations of fraud. A Los Angeles television station conducted an undercover investigation in 2010 and found one seller "loading up his truck, with boxes of produce from big commercial farms as far away as Mexico."[55] The seller indicated that "everything" he sold at the farmers' market came from his field, but when the NBC crew investigated his farm, he could not show the investigators "most of the produce he was selling, such as celery, garlic, and avocados."[56] When asked about the lack of avocados on his property,

---

48 Brown & Miller, *supra* note 44, at 1300.

49 *See supra* note 8.

50 *See supra* note 9.

51 *See supra* note 17 and accompanying text.

52 Lauren Etter, *Food for Thought: Do You Need Farmers for a Farmers Market?*, WALL ST. J., Apr. 29, 2010, at A1.

53 *See Certified Farmers Market Program*, CAL. DEP'T FOOD & AGRIC., http://www.cdfa.ca.gov/is/i_&_c/cfm.html (last visited Mar. 20, 2014).

54 Press Release, U.S. Dep't of Agric., USDA Celebrates National Farmers Market Week, August 4–10 (Aug. 5, 2013), *available at* http://www.usda.gov/wps/portal/usda/usdamediafb?contentid=2013/08/0155.xml&printable=true&contentidonly=true (showing 759 markets in California, followed by 637 in New York and 336 in Illinois).

55 Grover & Goldberg, *supra* note 12.

56 *Id.*

the seller responded, "That I'll be honest. That stuff came from somewhere else."[57] In other field visits, the journalists "found farms full of weeds, or dry dirt, instead of rows of the vegetables that were being sold at the markets."[58] The investigation stoked enough concern among farmers, market managers, and consumers to cause the state's Farmers' Market Advisory Committee to propose a new enforcement program with higher fees and closer enforcement.[59] An attorney for the California Federation of Certified Farmers' Markets suggested that there was "a growing trend of misrepresentations in all forms . . . of agricultural product marketing."[60] From August 2012 through August 2013, the state issued nine suspensions, revocations, or fines to sellers for "selling product not of [their] own production,"[61] and sixty-six notices of noncompliance to sellers selling products not listed on their state producer certifications.[62]

In a separate California investigation in 2012, San Diego County's Department of Agriculture, Weights, and Measures, through undercover agents, found one seller who "wasn't even growing the broccoli or Brussels sprouts he was selling."[63] The seller later "pleaded guilty to a violation of Business and Professions Code section 17500 [false/misleading advertising]."[64]

Anecdotal evidence of fraud is not limited to California. According to a state newspaper, the manager of the Coventry Regional Farmers Market in Connecticut notes that "constant rumbling" about fraud is a

---

[57] *Id.*

[58] *Id.*

[59] Kate Campbell, *Farmers Market Enforcement Fees Could Increase*, AG ALERT (Mar. 16, 2011), http://www.agalert.com/story/?id=1889 (noting that "interest was heightened" following Southern California media reports of conventional produce being sold at farmers' markets).

[60] *Id.*

[61] CAL. DEP'T OF FOOD & AGRIC., CERTIFIED FARMERS MKT. PROGRAM, REVOKED, SUSPENDED, AND/OR FINED LIST (2013), *available at* www.cdfa.ca.gov/is/pdfs/CPC_Suspension_2013_2nd_quarter.pdf.

[62] CAL. DEP'T OF FOOD & AGRIC., CERTIFIED FARMERS MKT. PROGRAM, CFM NON-COMPLIANCE WORKSHEET JANUARY–DECEMBER 2013, *available at* http://www.cdfa.ca.gov/is/pdfs/CFM_Noncompliance_List.pdf.

[63] Clare Leschin-Hoar, *When Fraud Hits the Farmers Market*, VOICE OF SAN DIEGO, (Apr. 9, 2013), http://voiceofsandiego.org/2013/04/09/when-fraud-hits-the-farmers-market/.

[64] Letter from Kathryn Lange Turner, Deputy City Attorney, Office of the City Attorney, City of San Diego, to Mark Lyles, Inspector, Dep't of Agric., Weights & Measures (Mar. 13, 2013) (alteration in original), *available at* http://voiceofsandiego.org/wp-content/uploads/2013/05/51644b41b3233.pdf.pdf.

"huge concern,"[65] and at least one seller in Shelton "had strawberries, an early crop, in late summer."[66] In Milwaukee, Wisconsin, a seller had out of season zucchinis with "wax on them"—a tip-off that the zucchinis had not been plucked fresh from the field.[67] And in Michigan, a well-known, local organic farmer was accused of buying produce from wholesalers.[68] Furthermore, a Virginia study found that "[s]ome farmers seem to be buying a great volume of the produce they sell,"[69] and an organization in Pennsylvania believes that resellers of produce "capture over 90 percent" of the value of Farmers' Market Nutrition Program vouchers, through which certain individuals can use government-issued checks to purchase produce at farmers' markets.[70] The problem does not appear to be limited to the United States—in the United Kingdom, market managers observed: "The markets are only supposed to stock 'local produce,' but last week we discovered spinach from Portugal and Spain—produced by another supermarket supplier—being sold at a farmers market . . . even legitimate stallholders are 'topping up' their locally grown produce with vegetables bought from Britain's wholesale markets."[71]

It is difficult to assess the scope of the fraud problem. Much fraud may be undetected, and much detected fraud may be unreported. Nonetheless, market managers and sellers worry that even a few incidents can have potentially large impacts on markets. In one West Virginia survey with 102 vendor respondents, when asked about the "largest obstacles to their success," 20 vendors "indicated an obstacle with vendors who sold products they did not produce themselves, many of them charging lower prices making it difficult to compete."[72] And,

---

[65] Jan Ellen Spiegel, *Fraud Happens at Connecticut's Farmers' Markets—but Not Often*, CT. MIRROR (Aug. 3, 2012), http://www.ctmirror.org/fraud-happens-connecticuts-farmers-markets-not-often/.

[66] *Id.*

[67] Etter, *supra* note 52.

[68] Kimberley Willis, *Fraud at the Farmers Market*, EXAMINER.COM (Sept. 22, 2010), http://www.examiner.com/article/fraud-at-the-farmers-market.

[69] VA. DEP'T FOR THE AGING, SENIOR FARMERS' MARKET NUTRITION PROGRAM 4 (2012).

[70] SHELLY GROW & LYDIA OBERHOLTZER, THE USE OF FARMERS' MARKET NUTRITION PROGRAMS IN THE MID-ATLANTIC 6 (2003).

[71] Jonathan Ungoed-Thomas & Claire Newell, *Focus: Farmers' Markets Sell 'Supermarket' Foods*, SUNDAY TIMES (Apr. 8, 2007), http://www.thesundaytimes.co.uk/sto/news/uk_news/article62830.ece.

[72] Stacy Miller et al., *Educational Needs and Perceived Obstacles Identified by Farmers' Markets in West Virginia*, *in* 2006 NORTH CENTRAL AGRICULTURAL EDUCATION RESEARCH CONFERENCE 122, 130 (Neil A. Knobloch ed. 2006), *available at* http://aged.caf.wvu.edu/Research/AAAE-NC-2006/2006%20North%20Central%20Research%20Conference%20Proceedings.pdf#page=131.

although they believe that the fraud is not widespread,[73] Connecticut farmers worry that "'[y]ou're one news story away from ruining it for everyone'"[74] by eroding consumer trust. Indeed, fear of losing customers may have driven at least one farmers' market to try to cover up fraud allegations: A market manager who worked for an organization that ran 18 Southern California markets alleged that the organization discouraged her from reporting fraud "violations to authorities" and "retaliated against her after she did so anyway."[75] This demonstrates that although competition among markets to attract locavores will often inspire careful monitoring of producer-only claims, it could also lead to a damaging tendency to cheat on a market level.

III. PREVENTING FRAUD

To combat the threat of fraud, markets, local governments, and states have experimented with a variety of approaches, including contractual, regulatory, and criminal solutions. This Part explores these approaches to fraud and suggests that where consumers can adequately differentiate local and non-local produce and there is market competition in the area, markets will be adequately incentivized to enhance and enforce producer-only rules. Conversely, where these conditions are not present, a hybrid model in which a state-mandated enforcement regime is carried out by local market managers may be a cost-effective solution. This will be particularly important for larger markets, which cannot simply rely on norms and vendor monitoring to address fraud concerns.[76]

A. Contractual Approaches

Market managers and farmers' market boards—and the participant sellers—are closest to the problem, and many markets already attempt to regulate fraud through various provisions in market rules and seller agreements. Indeed, producer-only markets that fear losing discerning customers to other competing markets will be highly incentivized to expand these protections. The most common approaches include

---

[73] *See* Spiegel, *supra* note 65.

[74] *Id.*

[75] David Karp, *Market Watch: Farmers Market Cheating Alleged*, L.A. TIMES, Nov. 10, 2010, http://articles.latimes.com/2010/nov/10/food/la-fo-marketwatch-20101105.

[76] *See, e.g.*, GARRY STEPHENSON ET AL., UNDERSTANDING THE LINK BETWEEN FARMERS' MARKET SIZE AND MANAGEMENT ORGANIZATION 13 (2007), *available at* http://smallfarms.oregonstate.edu/sites/default/files/small-farms-tech-report/eesc_1082-e.pdf (quoting one market manager: "You can't be everywhere and you don't know what's happening at that other end of the market now. . . . When it's a smaller market you have a much closer relationship. And so vendor problems are part of it; you have more vendor problems with a large market.").

requiring producer commitments to sell only producer-grown produce, mandating submission of lists of products to be sold throughout the upcoming market season, and conducting farm inspections to verify production, backed by sanctions including expulsion. A 2002 survey of market managers at Mid-Atlantic producer-only markets found that "[t]hirty-seven percent of managers used an application or contract that spells out the producer-only rule," with two of these managers requiring plans describing what producers will sell.[77] Forty-seven percent of respondents indicated "that they do farm inspections, either personally or by committee," although not always regularly.[78]

1. Matching Crop Lists and Acreages with Products Sold

Market agreements between market managers and sellers often require sellers to provide, before the selling season, lists of the crops that they will sell or acreages of crops and, in some cases, how much of which crop they will sell.[79] Actual sales must then match these lists.[80] Descriptions of acreages indicate the amount of food that farmers can realistically sell; if a farmer with a half-acre comes to market with 500 watermelons, market managers will likely be suspicious. Based on the author's non-scientific survey of market rules, requirements for crop lists and acreages are common among producer-only markets. Washington, DC's FRESHFARM Markets provide, for example,

> Only items listed in your completed application can be sold at the FRESHFARM Markets. You must list all food and products that you plan to bring to market. Items not listed will be allowed for sale only with advance approval by the FRESHFARM Markets' management.
>
> If you want to bring additional or new products to market that are not on your original market application, you must let market management know in writing what those products are and get prior approval from market management before bringing these products to market.[81]

---

[77] OBERHOLTZER & GROW, *supra* note 1, at 15.

[78] *Id.*; *see also* HAMILTON, *supra* note 17, at 28 (noting that "[t]o accomplish the 'producer only' goal, markets typically have rules defining what can and cannot be sold at the market and creating extensive processes for determining the eligibility of products and producers to participate in the market" and providing examples of market rules).

[79] *See, e.g.*, Market Agreement, Urban Harvest, Inc., Urban Harvest Farmers Market Vendor Application, *available at* http://urbanharvest.org/documents/118591/226131/market+vendor+application.pdf/.

[80] *See, e.g., id.*

[81] Market Rules, FRESHFARM Markets., FRESHFARM Markets Rules and Procedures 13 (2013–2014) [hereinafter FRESHFARM Market Rules], *available at* http://www.freshfarmmarket.org/pdfs/2013_rules_and_regulations.pdf.

The City of Chicago, which prohibits vendors from selling "products from another farm without full transparency," asks vendors to "list all sites including a map" for each farm or orchard site, showing "farm boundaries, growing areas, crop locations, and storage sheds, packing/processing facility locations," as well as the number of acres on the farm and acres in production.[82]

The Putnam Farmers' Market in West Virginia similarly requires that producers only sell food they have produced, although they may resell other local farmers' food under a "provisional arrangement."[83] Putnam also requires vendors to submit a "product plan with their application,"[84] which must list the products they grow,[85] just as the Brownsville, Texas market, which requires that "[a]ll vendors' farms or production areas must be located within the state of Texas,"[86] mandates that vendors "list all items that you would like to sell" and, if they sell shrimp, to show that they "own the boats that caught the shrimp."[87]

The Hernando, Mississippi Farmers Market indicates that its market managers "believe strongly in the origin of a product and promote our market as a place where customers can buy LOCAL products."[88] The vendor application also asks the seller: "Do you grow all your produce and/or raise all your animals . . . ?" and indicates that if the seller "anticipate[s] purchasing any crops/product from, or selling for, a local farmer," she must have a certificate for these crops.[89] Sellers at the

---

[82] Market Agreement, City of Chicago, City of Chicago Farmers Markets Application 2013 (Nov. 2012) (on file with the Regent University Law Review).

[83] Market Rules, Putnam Farmers' Market, Market Rules of the Putnam Farmers' Market 2012, at 1–2 (2012) [hereinafter Putnam Market Rules], *available at* http://putnamfarmersmarket.weebly.com/uploads/6/9/6/4/6964545/market_rules_of_the_putnam_farmers.pdf.

[84] *Id.* at 2.

[85] Market Application, Putnam Farmers' Market, 2014 Vendor Application of Interest (2014), *available at* http://putnamfarmersmarket.weebly.com/uploads/6/9/6/4/6964545/vendor_application_2014.pdf (requiring the applicant to indicate which items they are interested in selling).

[86] Market Agreement, Brownsville Farmers' Market, Brownsville Farmers' Market Vendor Contract (2009–2010), *available at* http://www.brownsvillefarmersmarket.com.php5-13.dfw1-1.websitetestlink.com/wp-content/uploads/2010/07/Vendor_Contract_2009-2010-Season.pdf.

[87] Market Application, Brownsville Farmers' Market, Produce Vendor Application Form, *available at* http://www.brownsvillefarmersmarket.com.php5-13.dfw1-1.websitetestlink.com/wp-content/uploads/2010/07/Produce-Vendor-Application-Form.pdf.

[88] Market Application, Hernando Farmers Market, Hernando Farmers Market 2013 Vendor Application (2013) [hereinafter Hernando Market Application], *available at* http://cityofhernando.org/wp-content/uploads/2012/02/2013-Hernando-Farmers-Market-application-packet.pdf.

[89] *Id.*

Hernando market must submit an Affidavit/Grower Certificate that describes the total acreage of the farm and the acreage of "fruits, vegetables, or flowers for sale" as well as a list of all of the produce the farmer "intend[s] to sell" during the year.[90]

Not all markets are so stringent, however. In Walpole, New Hampshire, market guidelines provide that "[g]rowers may sell only what they grow or raise on their own farms," and "[e]ach vendor must agree, in writing, to comply with the letter and spirit of these guidelines," with "fraudulent or dishonest practices" prohibited.[91] Vendors also must list "what [they]'d like to sell" and the location of their land, but crop lists and acreages are not required.[92] Other markets similarly do not request specific produce lists but demand certification, in writing, that sellers will grow the produce they propose to sell. The City of Parkersburg, West Virginia Downtown Farmers' Marketplace rules and regulations provide that "[a]ll products for sale at the Marketplace must be produced by the vendor"[93] and require vendor applicants to verify that they are "the actual producers of the specifi[c] items which they intend to sell."[94]

Even for markets that require a list of produce to be sold or acreage of the crops that will produce vegetables and fruits to be sold, or a written certification showing that produce is local, it is not clear how carefully or how often market managers compare lists and acreages with the types and quantities of produce sold. And even with careful checking, quantities are very difficult to verify; if a grower has indicated a particular acreage or listed a particular type and amount of produce she will sell, the amount actually sold at market weekly can only be roughly compared with the amount of produce the farmer claimed she would produce. Verifying whether produce is locally grown is also difficult from a seasonal perspective—although a farmer might list strawberries as a type of fruit to be sold at market, managers should be suspect if a farmer in New England sells strawberries, an early summer crop, in August. Within market rules and vendor agreements many market managers

---

90 *Id.*

91 Market Rules, Walpole Farmers Market, Walpole Farmers Market Guidelines 5–6 (2013) [hereinafter Walpole Market Rules], *available at* http://walpolenhfarmersmarket.files.wordpress.com/2013/06/walpole-farmers-market-guidelines-2013.pdf.

92 *Market Admin*, WALPOLE FARMERS MARKET, http://walpolefarmersmarket.com/market-admin (last visited Mar. 20, 2014).

93 Market Rules, City of Parkersburg, Downtown Farmers' Marketplace 2013 Market Rules and Regulations 2 (2013) [hereinafter Parkersburg Market Rules], *available at* http://downtownfarmersmarketplace.com/downloads/2013-Market-Rules-and-Regulations-Final.pdf.

94 *Id.* at 3.

have some options for enforcement, however, as discussed in the following section.

2. Inspections and Peer Monitoring

Some farmers' markets stop at requiring crop lists. The Hernando, Mississippi Farmers' Market, for example, lists as a possible violation of the rules "[s]elling items not within the guidelines of the market," but does not include other mechanisms for identifying violations.[95] Many farmers' markets, however, use inspections by a market manager or board as an enforcement mechanism. In Putnam, West Virginia, "[a]ll new [vendor] applicants will be visited by the Verification committee" to confirm that they are producers "of the specified items that they intend to sell."[96] In the same state, the Parkersburg market rules provide: "By submitting an application, vendors agree that the Farmers Market Manager or their designee may inspect the vendor's farm or facilities to insure [sic] compliance."[97] In California, the North San Diego Certified Farmers Market ("NSDCFM") is even more explicit in granting market managers permission to inspect: "Producer/seller grants permission to the NSDCFM manager or other NSDCFM staff to enter the seller's premises for the reasonable inspection of land, facilities, product(s) and records in order to determine whether the seller is in compliance with Market regulations and permit conditions."[98]

Several Texas markets have similar provisions. The Brazos Valley Farmers' Market indicates that "[m]embers are allowed to sell farm products that are grown and/or made by themselves,"[99] and growers, in submitting membership applications, agree to permit farm inspections and to "sell only items as specified" by the market rules.[100] The San Antonio Farmers' Market appoints a market board member-at-large to chair the "Produce Verification" committee, which conducts an "initial land verification" and presents its "findings to [the] membership

---

[95] Hernando Market Application, *supra* note 88.

[96] Putnam Market Rules, *supra* note 83, at 4.

[97] Parkersburg Market Rules, *supra* note 93, at 6.

[98] Market Rules, North San Diego Certified Farmers Market, 2013–2014 Market Rules 9 (2013) [hereinafter NSDCFM Market Rules], *available at* http://docs.nsdcfm.com/MarketRules.pdf.

[99] Market Rules, Brazos Valley Farmers' Market Association, Rules and Regulations 1, *available at* http://brazosvalleyfarmersmarket.com/wp-content/uploads/2013/01/2009-Rules-and-Regulations.pdf.

[100] Market Application, Brazos Valley Farmers' Market Association, 2014 Application for Membership 1 (2014), *available at* http://brazosvalleyfarmersmarket.com/wp-content/uploads/2013/01/Brazos-Valley-Farmers-Market-application-form-2008-1.pdf.

committee."[101] And the Barton Creek Farmers Market in Austin, Texas, provides for farm inspections "by a professional inspector or a Market Manager" or "participating growers," and farmers must be prepared for "surprise inspections immediately following (but not limited to) the market day."[102] Chicago also allows inspection without notification, and "[f]ailure to allow such an inspection will constitute a violation of market rules."[103]

Inspections, of course, are not foolproof mechanisms for enforcement. Produce might be simply sitting on site, not growing, thus failing to indicate whether it was produced in state, or the produce might not be the type of crop it appears to be in the field. As a Milwaukee, Wisconsin manager noted when she inspected a watermelon farm, "all of the melons were . . . in a pile under a tree," and "[i]t was impossible to tell whether they had bought them and stored them there, or whether they had grown and harvested them."[104] Other monitors in Connecticut indicated that a farmer "'showed us a large planting of corn and said, "There's my sweet corn," . . . . Later we learned that he showed us a field of cow corn.'"[105]

Other markets explicitly rely on peer monitoring in addition to or in lieu of direct farm inspections. Under Walpole, New Hampshire's market guidelines, "Any vendor who becomes aware of a violation of these guidelines is responsible to report that violation, in writing, to a Coordinator."[106] In some cases, at least, producers do appear to monitor each other—too much so, in fact. In East Granby, Connecticut, farmers who accuse peers of cheating must pay a fee for doing so; if they are correct, the fee is returned, but they forfeit the fee if the accusation is meritless.[107]

---

[101] Market Rules, San Antonio Farmer's Market Association, By-Laws 2010, at 4–5 (2010), *available at* http://www.sanantoniofarmersmarket.org/S_A_Farmers_Mkt_by-laws.pdf.

[102] Market Rules, Barton Creek Farmers Market, Rules 9 (2011) [hereinafter Barton Creek Market Rules], *available at* http://www.bartoncreekfarmersmarket.org/wp-content/uploads/vendorrules.pdf.

[103] Market Rules, City of Chicago, 2014 Chicago Farmers and Community Market Program Rules & Regulations for Growers, Food Producers, and Non-Food Vendors (2014) [hereinafter Chicago Market Rules] *available at* http://www.cityofchicago.org/content/dam/city/depts/dca/Farmers%20Market/FarmersMarketRulesRegs2014.pdf.

[104] Sarah Johnson, *Defining and Defending a Producer-Only Market*, MARKET BEET (Farmers Mkt. Coal., Kimberton, Pa.), Winter 2010, at 3, 4, *available at* http://ecbiz71.inmotionhosting.com/~farmer8/wp-content/uploads/2010/01/FMC-Market-Beet-Winter-2010_w_links.pdf.

[105] Spiegel, *supra* note 65.

[106] Walpole Market Rules, *supra* note 91, at 7.

[107] Spiegel, *supra* note 65.

3. Sanctions

Whether producer fraud is revealed through an inspection or a peer complaint, sanctions appear to be similar around the country. Many market rules provide that sellers will be suspended for one day from the market if a violation is found, or for several weeks.[108] If repeat violations occur, or a particularly egregious deviation from rules is found, the vendor might be suspended from the market for the season.[109] Under "three strikes" provisions or sanctions for the worst violations, vendors are permanently suspended from selling at the market.[110] Fines are, in some cases, issued for any of these violation stages, and vendors typically may appeal the violation to a market board designated for this purpose.[111] The North San Diego Certified Farmers' Market shows how violations depend on the frequency with which they occur or, for each violation, the level of egregiousness of the violation: "The severity of any penalty or discipline imposed by the Market Manager shall be directly related to the gravity or repetition of the violation."[112] Producers who for the first time "sell products not of their own production" are suspended from the market for 30 days, whereas a second violation of the producer-only requirement "shall result in permanent disqualification from the market."[113] Identical language with respect to gravity and repetition of the violation is used in Chicago,[114] and if the city's Department of Cultural Affairs and Special Events "repeatedly suspects a vendor of re-selling product, this is grounds for suspension or dismissal from market. It is the vendor's responsibility to provide proof of production in a

---

[108] *E.g.*, Barton Creek Market Rules, *supra* note 102 (explaining the market manager may suspend vendors who violate the rules); Chicago Market Rules, *supra* note 103 (reserving the right to refuse any vendor who does not keep the rules); Hernando Market Application, *supra* note 88 (providing that penalties range from one day suspension to permanent expulsion); NSDCFM Market Rules, *supra* note 98, at 10 (providing for a thirty day suspension for selling produce grown by others).

[109] *E.g.*, NSDCFM Market Rules, *supra* note 98, at 10 (noting that penalties for violations can include suspension for up to eighteen months).

[110] *See, e.g.*, Market Rules, Noblesville Main Street, Noblesville Farmers Market 2014 Agreement 4–5 (2014), *available at* http://www.noblesvillemainstreet.org/uploads/Farmers_Market_Agreement_2014__final2.*6.14*_.pdf; NSDCFM Market Rules, *supra* note 98, at 10.

[111] *E.g.*, Barton Creek Market Rules, *supra* note 102 (explaining the market manager's authority to impose fines for violations and the corresponding appeal process); NSDCFM Market Rules, *supra* note 98, at 2 (explaining an appeals process).

[112] NSDCFM Market Rules, *supra* note 98, at 10.

[113] *Id.*

[114] Chicago Market Rules, *supra* note 103 ("The severity of any penalty or discipline imposed by DCASE will be directly related to the gravity or repetition of the violation.").

written appeal."[115] At Crescent City Farmers' Market in New Orleans, individuals tasked with enforcement provide written notification to vendors for the first four violations, followed by allowing the vendor to stay at the market on the day of the fourth strike but suspending her the following week, a similar action but a two-week suspension for the fifth strike, a month-long suspension for strike six, and permanent suspension beyond this.[116]

4. Advantages and Disadvantages of Contractual Approaches

Most farmers' markets take on primary responsibility for setting rules and enforcing them, although some are more diligent than others in ensuring that violations will be noticed and enforced. There are substantial advantages to this dispersed system, which relies on those closest to the farmers to ensure that produce sold at markets is produced nearby. This system takes advantage of local knowledge—in small towns, market managers might happen to drive by farms even when not formally inspecting them. Local decision-making also allows markets to adapt rules, inspections, and enforcement policies to local conditions and needs; in states where crops can be grown in several seasons, for example, market managers might not need to make as many inspections during the year to confirm that the produce sold week-to-week is local. Markets in small towns without much farmer entry and exit might also be able to impose relatively light rules, as norms likely will prevail within these relatively closed communities. Farmers in these communities know their neighbors and will impose various shaming mechanisms and other informal modes of punishment if cheating occurs at the market. Additionally, competition for locavores will drive both vendors and market managers to closely monitor grower behavior.

Despite the many advantages of relying primarily on markets to set their own rules and enforce them, the system has substantial downsides similar to those observed in a federal-state regulatory system. Markets—particularly relatively new ones that are just establishing a presence in a community—might lack the resources to hire managers and other officials and pay them to conduct regular and thorough inspections.[117] And the number of inspections or other mechanisms needed to verify that produce is local will often require too much time and effort for

---

[115] *Id.*

[116] HAMILTON, *supra* note 17, at 22.

[117] *See* KARL FOORD, UNIV. OF MINN. EXTENSION SERV., MANAGING THE FARMERS' MARKET 9–10 (n.d.), *available at* http://mfma.le3.getliveedit.com/files/283.pdf (suggesting that Minnesota farmers oppose a system like California's certification of producer's only markets, as inspection fees associated with certification—$250 annually—would be viewed negatively).

volunteers. Further, as shown by the allegations that one market organization discouraged a manager from publicizing fraud,[118] internal politics could prevent market managers from consistently and fairly enforcing rules. Managers want markets to succeed and might be hesitant to encourage strict policing; they might also favor certain sellers over others, thus leading to inconsistent and unfair enforcement. Both norms and more formal policies can lead to unpalatable conduct. In Tomah, Wisconsin, a local farmer who asked the city council to consider banning resellers reported that "a vendor who grows his apples but also resells pumpkins[] made 'verbal threats to bash my head in while swinging a cane in my direction.'"[119]

B. Regulatory

Rather than rely on markets to police themselves, some state and local governments have deployed regulatory schemes to address farmers' market fraud. This regulation occurs at the city, county, or state level, and it often mimics rules, enforcement mechanisms, and penalties imposed by markets, although it sometimes takes a more stringent approach.

1. County and State Laws

California appears to have one of the most aggressive farmers' market regulatory programs. State laws allow county agricultural commissioners to issue "[a] certified farmers' market certificate," which is valid for twelve months after it is issued.[120] This certificate guarantees that only local produce is sold at the farmers' market, and the state provides various mechanisms to fund county enforcement of provisions that ensure localism.[121] Agricultural commissioners "may charge a certification and inspection fee up to a maximum rate of sixty dollars ($60) per hour."[122] Although the rules do not specify that producers at the markets must be certified, they have provisions for certifying individual producers and require markets to pay "a fee equal to the number of certified producer certificates and other agricultural producers participating on each market day."[123] For each certified producer at each market, the commissioner must "perform at least one annual onsite inspection" of the site(s) listed on each seller's certificate "to verify

---

[118] *See* Karp, *supra* note 75.

[119] Etter, *supra* note 52.

[120] CAL. FOOD & AGRIC. CODE § 47020(a) (Westlaw through 2013 Reg. Sess.).

[121] *E.g.*, *id.* § 47020 (Westlaw) (providing that fees may be charged for inspections).

[122] *Id.* § 47020(a) (Westlaw).

[123] *Id.* § 47021(a) (Westlaw).

production of the commodities listed on the certificate or the existence in storage of the harvested production, or both."[124] Enforcing officers also "may seize and hold as evidence" produce if a violation is suspected,[125] and the produce may be used as evidence in actions taken by counties.[126]

These inspection rules do not solve the problems experienced by many markets with similar inspection provisions, as they allow inspectors to simply verify that the product is on site, rather than actually growing. (This is of course acceptable for certain storable products, which farmers might legitimately keep on site, but it fails to directly verify that the products were grown on site.) The required inspections also do not confirm produce within each growing season. In addition to the substantive limitations of these annual site visits, California lacks adequate numbers of inspectors.[127]

Sanctions under the certified program are also similar to those issued by markets that run their own programs in that they increase in severity with repetition and seriousness. The sanctions are somewhat more serious, however, in that they involve defined civil penalties in addition to suspensions. "Serious . . . repeat or intentional violations" receive a civil penalty between $401 and $1,000, "moderate" repeat violations receive $151–$400 penalties, and "minor" procedural violations are subject to $50–$150 penalties.[128] Sellers charged with violating the rules are entitled to written notice and may request a hearing at which the sellers may present their own evidence.[129] Sellers are also entitled to make written appeals to the Secretary of Food and Agriculture.[130]

Connecticut has a similar state certification program through which the Connecticut Department of Agriculture Certifies certain markets as selling only locally-grown produce.[131] Farmers participating in certified

---

[124] *Id.* § 47020(b) (Westlaw).

[125] *Id.* § 47005.2 (Westlaw).

[126] *Id.* § 47005.3 (Westlaw).

[127] *See, e.g.*, Campbell, *supra* note 59 (noting requests by "farmers, market managers[,] and consumers" for enhanced enforcement).

[128] § 47025(b) (Westlaw) (defining "serious" as "repeat or intentional violations", "moderate" as "repeat violations or violations that are not intentional," and "minor" as "violations that are procedural in nature").

[129] *Id.* § 47025(c) (Westlaw).

[130] *Id.* § 47025(d) (Westlaw).

[131] *See* Market Agreement, Connecticut Department of Agriculture, Memorandum of Understanding (2012), *available at* http://www.ct.gov/doag/lib/doag/marketing_files/2012_fm_mou_fillable.pdf (showing a memorandum of understanding form through which the state recognizes the market as offering Connecticut farm products "with a traceable point of origin within Connecticut"); *see also* CONN. GEN. STAT. ANN. § 22-6r (Westlaw through 2013 Jan. Reg. Sess.) (defining certified farmers' markets).

markets must provide a crop plan to the Department describing total acres on the farm, "[t]otal [a]cres [c]ultivated," and specific numbers of acres, rows per foot, greenhouse square feet, or number of trees for various types of produce grown.[132] The head of the farmers' market certification program reports that farms new to certified markets are inspected but that re-certifications are done only every three years, and typically without visits.[133] "The Commissioner of Agriculture may impose civil penalties for" violations of the certification requirement up to a maximum of $2,500 for each violation.[134]

Mississippi offers a voluntary certification of markets by the Mississisippi Department of Agriculture and Commerce.[135] To qualify, at least half of the products at the market must be grown by the grower or a representative in Mississippi, and the grower or a representative must be present at the market.[136] The state provides that it may deny a market's application or revoke certification for failure to meet market criteria.[137] The state does not, however, appear to have formal rules regarding inspection to verify that fifty percent of products are local or associated sanctions for fraud. On the market certification application, the state asks the market to identify "the process by which your growers/vendors are certified to sell at your market," with options of "[o]n-site inspection," "[t]elephone verification," "[w]ritten confirmation," and "[o]ther."[138] Certification of crop lists by agricultural extension agents is another fraud prevention strategy. The Hernando, Mississippi Farmers Market, discussed above, requires that the crop list affidavit be

---

[132] CONN. DEP'T OF AGRIC., BUREAU OF AGRIC. DEV. & RES. PRES., 2012–2014 CROP PLAN (2011), *available at* http://www.ct.gov/doag/lib/doag/marketing_files/2012-2014_-_crop_plan_fillable_.pdf.

[133] Spiegel, *supra* note 65.

[134] CONN. GEN. STAT. ANN. § 22-7 (Westlaw through 2013 Jan. Reg. Sess.).

[135] 02-001-212 MISS. CODE R. § 100 (LEXIS through Jan. 3, 2014); *Mississippi Certified Farmers Markets Program*, MISS. DEP'T AGRIC. & COM., http://www.mdac.state.ms.us/departments/ms_farmers_market/certified-markets.htm (last visited Mar. 20, 2014).

[136] § 102 (LEXIS); *see also* MISS. DEP'T OF AGRIC. & COMMERCE, CERTIFIED FARMERS MARKET PROGRAM REGULATIONS (2013) [hereinafter MISSISSIPPI CERTIFIED FARMERS MARKET PROGRAM REGULATIONS], *available at* http://www.mdac.state.ms.us/departments/ms_farmers_market/pdf/CFM_regs.pdf.

[137] §§ 102, 104 (LEXIS); MISSISSIPPI CERTIFIED FARMERS MARKET PROGRAM REGULATIONS, *supra* note 136.

[138] Market Application, Mississippi Department of Agriculture and Commerce, Mississippi Certified Farmers Market Membership Application, *available at* http://www.mdac.state.ms.us/departments/ms_farmers_market/pdf/CFM_app.pdf.

signed by an agricultural extension agent, as do Washington, D.C.'s FRESHFARM Markets.[139]

Consumer protection divisions are another potential option to protect locavores against market fraud. In Texas, for example, the Consumer Protection Division may seek a restraining order against "causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services."[140]

Although a few states have taken steps toward certifying food localism, most leave this responsibility to the markets themselves, in some cases loosely regulating them as required by the federal Farmers' Market Nutrition Program,[141] in which consumers may use food assistance funds to purchase local produce.

2. Federal Laws

The majority of responsibility for specifically defining and enforcing localism falls to markets, or to local and state governments, but the federal government initially drove the definition of "local" food and the means of enforcing it. The WIC Farmers' Market Nutrition Program ("FMNP")[142] provides federal funds specifically for purchases of "fresh, nutritious, unprepared, locally grown fruits, vegetables and herbs for human consumption."[143] It also directs state agencies, which administer the program, to "consider locally grown to mean produce grown only within State borders," although a state may also "include areas in neighboring States adjacent to its borders."[144] To enforce the "locally grown" mandate, the USDA requires states to create a system for

---

[139] Hernando Market Application, *supra* note 88; FRESHFARM Market Rules, *supra* note 81, at 13. The FRESHFARM market rules also allow for another "3rd party inspector (i.e., USDA Organic, Food Alliance)." *Id.*

[140] TEX. BUS. & COM. CODE ANN. §§ 17.46–47 (Westlaw through 2013 3d Called Sess.).

[141] 7 C.F.R. § 248.4 (2012).

[142] There is also a Senior FMNP. *Senior Farmers' Market Nutrition Program*, U.S. DEP'T AGRIC., http://www.fns.usda.gov/sfmnp (last visited Mar. 20, 2014); *see also* Marne Coit, *Jumping on the Next Bandwagon: An Overview of the Policy and Legal Aspects of the Local Food Movement*, 4 J. FOOD L. & POL'Y 45, 63–66 (2008) (discussing the Farmers' Market Nutrition Program and the Senior Farmers' Market Nutrition Program, created by the Child Nutrition Act of 1996 and the Farmer-to-Consumer Direct Marketing Act of 1976, respectively); Jason J. Czarnezki, *Food, Law & the Environment: Informational and Structural Changes for a Sustainable Food System*, 31 UTAH ENVTL. L. REV. 263, 273 (2011) (describing the extension of SNAP and WIC to farmers' markets).

[143] 7 C.F.R. § 248.2 (defining "[e]ligible foods"); *see also* § 248.1 (stating one purpose of the FMNP is "[t]o provide resources in the form of fresh, nutritious, unprepared foods (fruits and vegetables) from farmers' markets to women, infants, and children who are nutritionally at risk").

[144] § 248.2.

"identifying high risk farmers, farmers' markets [if the state chooses to certify markets], and roadside stands and ensuring on-site monitoring, conducting further investigation, and sanctioning of" these businesses "as appropriate."[145] As part of this system, states must "conduct annual, on-site monitoring for at least 10 percent of farmers and 10 percent of farmers' markets" that participate in the program, with the highest risk farmers and markets being included within this 10 percent.[146]

In states that certify markets, certification of a market as WIC FMNP shows all consumers—not just those using federal assistance—that the food at that market is local. To fulfill the federal requirements of risk ranking, inspection, and sanctions, participating states must write and follow state plans,[147] and these plans often go beyond the minimum federal requirements to define and enforce localness. As Connecticut defines its WIC FMNP, "[t]he program shall supply Connecticut-grown fresh produce to participants of the special supplemental food program through the distribution of vouchers that are redeemable only at designated Connecticut farmers' markets."[148] Vendors at these markets must be certified by the state and as part of certification must agree "to maintain only Connecticut-grown fresh produce on display in a certified vendor stall."[149] Vendors also must submit "a completed application and crop plan to the department."[150] Most penalties outlined by the state are for vendors' failure to comply with requirements for properly submitting vouchers to the state. There are no precertification requirements for farm inspections to verify that produce was locally grown, but the refusal to allow an inspection when the point of origin is in question is a violation.[151]

Massachusetts similarly provides that "[o]nly locally grown produce from local farms is eligible" for the FMNP, although some FMNP-certified markets in the state are allowed to sell produce from border states.[152] Massachusetts also conducts some farm inspections under its

---

[145] *Id.* § 248.10(e).

[146] *Id.* § 248.10(e)(2).

[147] *Id.* § 248.4; The plans contain a number of guidelines unrelated to verifying localism; these include, for example, provisions for coupon reimbursement and price posting. *Id.*

[148] CONN. GEN. STAT. ANN. § 22-6h (Westlaw through 2013 Jan. Reg. Sess.).

[149] *Id.* § 22-6*l* (Westlaw).

[150] *Id.* (Westlaw).

[151] *Id.* § 22-6n (Westlaw).

[152] MASS. DEP'T OF AGRIC. RES., 2013 MASSACHUSETTS FARMERS' MARKET COUPON PROGRAM GUIDELINES FOR FARMERS AND FARMERS' MARKETS 2 (2013) [hereinafter MASSACHUSETTS FARMERS' MARKET GUIDELINES] (on file with the *Regent University Law Review*).

FMNP program, as do market managers.[153] Growers receiving more than $1,000 in WIC farmers' market coupons in a year are required to file acreage reports (a "crop plan") the following year, and they may only sell food included on these lists.[154] Through this program, the state suspended several farmers who sold non-local produce to FMNP customers and has issued warnings.[155]

Other states have similar requirements. For farmers' markets to participate in the New York FMNP, they must submit a market application showing that the market will be comprised of at least fifty percent "*bona fide* New York State farmers . . . who grow and harvest [at least fifty percent of their] fresh fruits and vegetables on land owned or leased by them and who sell directly to consumers."[156] To certify farmers, markets are to use crop plans "with specific farm location(s) and a list of the vegetables and/or fruits expected to be grown for sale at the market."[157] Market managers and the state also may conduct farm inspections to "verify Crop Plans," and a failed inspection results in immediate disqualification of the farmer from the FMNP program.[158] Arizona's FMNP agreement mandates a crop plan and that farmers at approved farmers' markets must "[b]e subject to both overt and covert monitoring for compliance with AZ FMNP requirements," including "[m]arket visits, compliance buys and inspections of food production areas."[159]

Florida does not certify markets as FMNP-approved, but rather identifies markets with participating farmers[160] and certifies individual

---

[153] *Id.* ("ALL certified farmers must agree to allow on-farm inspections by MDAR to verify product sources and acreage under production."); E-mail from David Webber, Farmers' Mkt. Program Coordinator, Mass. Exec. Office of Energy & Envtl. Affairs, to author, (Nov. 21, 2013, 15:29 EST) (on file with the Regent University Law Review) (explaining that market managers also conduct inspections).

[154] MASSACHUSETTS FARMERS' MARKET GUIDELINES, *supra* note 152, at 2; Webber, *supra* note 153.

[155] Webber, *supra* note 153.

[156] N.Y. STATE DEP'T OF AGRIC. & MKTS., PARTICIPATION REQUIREMENTS FOR FARMERS' MARKETS (2013), *available at* http://www.agriculture.ny.gov/AP/agservices/fmnp/FMNP_Farmers_Market_Package.pdf.

[157] *Id.* (emphasis omitted).

[158] *Id.* at 4.

[159] ARIZ. DEP'T OF HEALTH SERVS., MANUAL FOR GROWERS AND FARMERS' MARKET MANAGERS 20 (2014), *available at* http://www.azdhs.gov/azwic/documents/local_agencies/az-fmnp-growers-manual.pdf.

[160] *See* Attachment E, FMNP Market Locations and WIC Sites Maps and Proximities, provided by Carl Penn, Development Representative II, Fla. Dep't of Agric. & Consumer Servs. (Jan. 23, 2014) (on file with the Regent University Law Review).

farmers[161] to sell to FMNP coupon customers at markets around the state. Under the state's FMNP plan, state officials must "[c]onduct compliance buys" to verify that farmers are selling only "eligible products (i.e., locally grown Florida fresh fruits and vegetables)" to FMNP customers.[162] Farmers must also "allow on-farm visits by the local county extensive agents to verify product sources and acreage under production."[163]

Although the WIC FMNP certification is a somewhat indirect means to certifying compliance, as it only applies to certain participating markets and farmers and contains many standards unrelated to certifying localness, it shows that federal regulations for local food could be implemented if there was sufficient demand for them. Just as the USDA produced a regulatory definition of organic food and established a certification program,[164] the USDA could extend its FMNP definition of local foods, or create a new one, and administer a local certification program directly or through the states. As discussed in the following section, generally-applicable consumer protection laws are another avenue for addressing farmers' market fraud, albeit one that does not appear to be widely used.

3. Advantages and Barriers to Regulatory Enforcement

In some cases, producers are so concerned about fraud that they have demanded more regulation or certification. Some, for example, have requested that "a sting operation be conducted in order to 'bust those liars and cheats,'"[165] which, according to at least one study, "is consistent with the feeling reported by many vendors that specific regulations should prevent . . . re-sellers from participating in markets."[166] Moving the responsibility for ensuring localism from individual markets to a local, state, or federal regulatory body would centralize expertise that is currently dispersed. It would also provide a forum through which consumers, farmers, and market managers could focus on and agree

---

[161] *See* FLA. DEP'T AGRIC. & CONSUMER SERVS., GROWER'S HANDBOOK 2 (2012) [hereinafter GROWER'S HANDBOOK] (on file with the Regent University Law Review) (describing farmer certification "by the Florida Department of Agriculture and Consumer Services to participate in the program").

[162] State of Florida Farmers Market Nutrition Program, Memorandum of Understanding between the Fla. Dep't of Agric. & Consumer Servs. and the Fla. Dep't of Health 3 (Oct. 31, 2013) (on file with the Regent University Law Review).

[163] GROWER'S HANDBOOK, *supra* note 161, at 2.

[164] 7 U.S.C. § 6501 (2012) ("It is the purpose of this chapter . . . to establish national standards governing the marketing of certain agricultural products as organically produced products . . . ."); *see generally* §§ 6501–23.

[165] Miller et al., *supra* note 72, at 130–31.

[166] *Id.* at 131.

upon standards that would better ensure that local food was in fact local. Further, it would provide economies of scale in administering standards; inspections and enforcement are not likely to be a full-time job in all but the biggest markets, and it would be more efficient for well-trained inspectors to operate in more areas. As these inspectors gained experience through incidents at a variety of farms and markets, they would also better know which problems to look for, and the times and types of inspections that were most effective.

There are, however, substantial obstacles to a regulatory proposal. As with any effort to protect the values of a large and dispersed group of stakeholders, it will be difficult to expand the regulatory state to address fraudulent sales of local produce. In California, following the NBC investigation that revealed relatively egregious fraud, a bill was introduced to increase market operator fees in order to pay for better inspections.[167] The bill died in committee because "[a]ccording to legislative insiders, the bill's great many provisions and complex language, including new penalties and mandates, did not work in its favor."[168]

Even if expanded regulatory oversight of localism were feasible, it is not in all cases advisable. Market managers and farmers likely have the most knowledge about the type of fraud that occurs and how to best address it given the culture and norms within particular communities, and uniform regulation threatens to drown these nuances. In many cases, regulation therefore will not be needed: consumer discernment and competition among markets to prove "localness" will often be enough. Particularly where markets are small, farmers can police themselves; indeed, they might not be able to afford anything else.[169] Relying on self-policing, however, sometimes leads to friction[170] that is

---

[167] David Karp, *Bill Targeting Cheaters at Farmers Markets is Put Off Another Year*, L.A. TIMES, May 24, 2013, http://www.latimes.com/features/food/dailydish/la-dd-bill-cheaters-farmers-markets-20130524,0,2483274.story.

[168] *Id.*

[169] *See* GARRY STEPHENSON ET AL., WHEN THINGS DON'T WORK: SOME INSIGHTS INTO WHY FARMERS' MARKETS CLOSE 9 (2006), *available at* http://smallfarms.oregonstate.edu/sites/default/files/small-farms-tech-report/eesc_1073.pdf (noting "situations in which a high level of effort is required to manage a market but the market administrative revenue is insufficient for adequate salary" for a manager, and that this can occur for small markets).

[170] RAMU GOVINDASAMY ET AL., FARMERS MARKETS: MANAGERS CHARACTERISTICS AND FACTORS AFFECTING MARKET ORGANIZATION, at v, 8 (1998), *available at* http://ageconsearch.umn.edu/bitstream/36723/2/pa980898.pdf (noting that "rivalry among vendors" sometimes "threatens to hinder the continuity and efficiency of these marketing venues" and "that open hostility, negative remarks, false accusations about the origin of the produce and problems with respect to the acceptance of food stamps or WIC vouchers put a strain on the normal development of the markets' activities").

best solved by a more formal and predictable regulatory regime.[171] As one market manager notes, as markets get larger, enforcement becomes more important: "You can't be everywhere and you don't know what's happening at that other end of the market now. You have to trust more, have more structure, and have systems for enforcement of rules."[172] But this is not to say that these rules must be imposed through regulation, rather than by the markets themselves. With adequate competition for localness, market managers will write and enforce rules themselves—as they currently do: "A lot of regulation is put on managers" in modern large markets.[173]

C. Criminal

In addition to expanding the administrative state to localism, governments could, and sometimes do, criminally punish farmers' market fraud. This approach, with its threat of more severe sanctions, would likely deter more individuals from defrauding customers given the same odds of detection. This section explores this somewhat extreme approach to addressing the problem of dishonest produce sales.

1. Extension of Existing Laws to Market Fraud

Many state consumer protection laws cover agricultural fraud. Virginia's code provision labeled "Misrepresentation as to agricultural products" provides that "[m]isrepresentation by advertising in the press or by radio or by television, or misrepresentation by letter, statement, mark representing grade, quality or condition, label or otherwise in handling, selling, offering or exposing for sale any agricultural commodities is hereby prohibited."[174] In Texas, "[a] person commits an offense if in the course of business he intentionally, knowingly, [or] recklessly" sells "an adulterated or mislabeled commodity."[175]

In states like California, where incidents of market fraud have been highly publicized (and criticized), governments are beginning to use criminal laws to enforce localism—in conjunction with regulatory schemes.[176] As introduced in Part II, after undercover state agents noticed that a seller was selling produce he did not grow and that

---

[171] FOORD, *supra* note 117, at 9 (noting that certification "eliminates a potential friction point among vendors, who might suspect other vendors of selling products they have purchased rather than products that they have produced").

[172] STEPHENSON ET AL., *supra* note 76, at 13.

[173] *Id.* at 12.

[174] VA. CODE ANN. § 18.2-225 (LEXIS through 2013 Spec. Sess. I).

[175] TEX. PENAL CODE ANN. § 32.42 (Westlaw through 2013 3d Called Sess.).

[176] David Karp, *Produce Inspectors Keep Farmers Markets Honest*, L.A. TIMES, Dec. 26, 2013, http://www.latimes.com/local/la-me-farmers-market-20131227,0,2801845.story.

contained pesticides, the city attorney of San Diego charged the seller for a violation of a section of the state's Business and Professions Code.[177] The Code provides that it is unlawful for persons disposing of real or personal property to "disseminate" information that "is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading."[178] The defendant received three years' probation and "was ordered to violate no law; not to sell or offer for sale produce at certified farmers markets in San Diego County; and to pay a $1,000 fine."[179]

2. Advantages and Barriers to Criminal Enforcement

Criminally punishing a farmer for selling produce he did not grow may seem an extreme approach to market fraud, but it is a relatively cheap one from the perspective of the state. An enforcement apparatus already exists for crime, and police would simply have to investigate a few additional incidents. And as shown by the California guilty plea, the sanctions for criminal approaches to market fraud can involve penalties higher than those imposed by a regulatory scheme, including jail time. Prison terms for consumer fraud tend to be light, but states that were serious about addressing market fraud could increase jail time. Criminal penalties also generally create more stigma than their civil counterparts, thus punishing past behavior by shaming individuals for bad acts and further deterring future fraud by the stigmatized individuals.

A criminal approach, despite being cheap from an administrative perspective and deterring greater amounts of fraud for the same amount of enforcement, has disadvantages. Police are unlikely to prioritize food fraud in all but the biggest cases or the safest towns. Prosecutors and judges also may view criminal penalties for this type of fraud as unusually harsh and will be hesitant to charge defendants, particularly in light of other prosecutorial priorities. Criminal sanctions would likely be quite effective at improving seller honesty if uniformly implemented and strictly enforced, but relating to harshness, and the many other problems that already burden the criminal justice system, make it a less than perfect solution to farmers' market fraud.

CONCLUSION

As farmers' markets become more lucrative, fraud may become a larger problem. Maintaining consumer confidence is critical, and the

---

[177] *Supra* notes 63–64 and accompanying text.

[178] CAL. BUS. & PROF. CODE § 17500 (Westlaw through 2013 Reg. Sess.); *supra* note 64 and accompanying text (describing the charge and the guilty plea).

[179] Turner, *supra* note 64.

honest farmers have the most to lose—one bad apple can spoil the whole bunch.

For small markets and towns where farmers and consumers know each other (and who is growing what), informal mechanisms may be sufficient. For big markets and cities, if enough consumers are able to discern the difference between local and fraudulent produce, markets may be well advised to adopt more rigorous enforcement measures—and to advertise it when they do. In the long run, if consumers demand greater assurance that they are getting what they pay for, the market(s) should respond. On the other hand, if there is insufficient competition among local food outlets, or consumers are not able to adequately distinguish between local and non-local foods, more government intervention may be necessary. If so, direct government enforcement is likely to be limited, but requiring more rigorous self-regulation in certification processes may be a possibility. Given that most jurisdictions are probably unlikely to create an adequate regulatory enforcement regime, the markets themselves may be the best bet, with criminal enforcement of chronic or widespread fraud. Requiring, perhaps, unannounced farm visits, documentation of plantings and sales, and ensuring adequate oversight of market supervisors would be a logical place to start, and, as outlined above, the framework for such a requirement already exists. But perhaps the most effective step would be educating consumers: In the long run, if consumers learn to demand greater assurance that their local avocado is what it says it is, fraud will be less profitable.

EGGS, EGG CARTONS, AND CONSUMER PREFERENCES

Donna M. Byrne[*]

INTRODUCTION

Red junglefowl, the wild ancestor of domesticated chickens, live in small flocks,[1] *but a typical cage-free poultry house holds 20,000 or more birds.*[2]

As of 2013, around 172 egg-producing companies had approximately 95% of all "layers" in the United States.[3]

From May through November 2010, nearly 2000 people reportedly became ill with *Salmonella enteriditis* poisoning attributed to shell eggs.[4] The actual number of illnesses was almost certainly much greater, as many illnesses are not reported. When the *Salmonella* was traced back to two Iowa egg producers, the resulting recall was one of the largest egg recalls on record—over half a billion eggs were subject to the recall.[5] What's a consumer to do? "[T]reat eggs with the assumption that they're contaminated with salmonella," according to Carol Tucker Foreman, a

---

[*] Professor of Law, William Mitchell College of Law. Neil Pederson, William Mitchell College of Law class of 2015, provided invaluable research assistance even as he was establishing his own flock of backyard chickens. I would like to thank participants of the Regent Law Review 2013 Symposium for their excellent insight and comments, and the staff and editors of the Law Review for their flexibility, patience, and insight. All of the mistakes and weaknesses are mine.

[1] Nicholas E. Collias & Elsie C. Collias, *Social Organization of a Red Junglefowl,* Gallus gallus, *Population Related to Evolution Theory*, 51 ANIMAL BEHAV. 1337, 1337, 1341–42 (1996).

[2] LYDIA OBERHOLTZER ET AL., U.S. DEP'T AGRIC., ORGANIC POULTRY AND EGGS CAPTURE HIGH PRICE PREMIUMS AND GROWING SHARE OF SPECIALTY MARKETS 6–7 (2006).

[3] *Egg Industry Fact Sheet*, AM. EGG BOARD, http://www.aeb.org/egg-industry/industry-facts/egg-industry-facts-sheet (last updated Oct. 29, 2013). Note that the 172 producers were those with flocks of over 75,000 birds. *Id.*

[4] *Multistate Outbreak of Human* Salmonella *Enteritidis Infections Associated with Shell Eggs (Final Update)*, CENTERS FOR DISEASE CONTROL & PREVENTION (Dec. 2, 2010), http://www.cdc.gov/salmonella/enteritidis/index.html [hereinafter *Multistate Outbreak*]. S. enteriditis is one of the most common serotypes of *Salmonella enterica* subsp. *Enterica* in the United States. Thomas Hammack, FDA, Salmonella *Species*, *in* BAD BUG BOOK 12, 12 (Keith A. Lampel et al. eds., 2d ed. 2012), *available at* http://www.salmonellablog.com/uploads/image/Bad%20Bug%20Book%20PDF%202nd.pdf.

[5] William Neuman, *Growing Concern About Tainted Eggs as Millions More Are Recalled*, N.Y. TIMES, Aug. 21, 2010, at B1. There were actually 3 recalls: an initial Wright County Egg recall, an expanded Wright County Egg recall, and the Hillandale Farms recall. *Id.*

food safety expert for the Consumer Federation of America, as reported in a 2010 New York Times article.[6]

As consumers, we probably share common values around food. Food should not poison us. It should be wholesome and nutritious. Its production should not cause undue harm to the environment, workers, or animals. And we as consumers should have a way of knowing how our food was produced. All of these issues come together in the henhouse and on the egg carton. While the main focus for many consumers is food safety, in the case of eggs, preventing *Salmonella* also tends to improve the lot of the hens involved. Moreover, the consumers who think about egg-laying hens at all prefer to think the hens are living acceptable lives.[7] Thus consumers have three main interests regarding eggs: (1) that the eggs be safe, (2) that the hens be treated well, and (3) that the label information reports accurately on the first two.

This Article explores these consumer interests. Part I provides a brief background on *Salmonella enteriditis* in eggs and general food safety hazards for eggs. Part II outlines regulatory efforts to prevent *Salmonella* contamination and provide for animal welfare, pointing out that there is virtually no legislation or regulation protecting the welfare of egg-laying hens. Part III turns to consumer and industry measures for improving the welfare of egg-laying hens. Finally, Part IV describes the mismatch between consumer expectations and preferences on the one hand and egg production and labeling on the other. The Article concludes that even with the most recent developments in hen welfare and regulation, consumers are probably not getting what they want.

I. COOKIE DOUGH IS DANGEROUS BECAUSE OF EGGS—*SALMONELLA* IN EGGS AND FLOCKS.

Most of us have been scolded at some point for eating raw cookie dough. Raw cookie dough contains raw egg, which could be contaminated with *Salmonella*.[8] This Part discusses the incidence of *Salmonella* and

---

[6] *Id.*

[7] Consumers do express a preference for enhanced hen welfare. *See* ELLEN GODDARD ET AL., CONSUMER ATTITUDES, WILLINGNESS TO PAY AND REVEALED PREFERENCES FOR DIFFERENT EGG PRODUCTION ATTRIBUTES: ANALYSIS OF CANADIAN EGG CONSUMERS 61–62 (2007); YAN HENG ET AL., CONSUMERS' PREFERENCES FOR FARM ANIMAL WELFARE: THE CASE OF LAYING HEN 4 (2012); YIQING LU ET AL., CONSUMER PREFERENCE FOR EGGS FROM ENHANCED ANIMAL WELFARE PRODUCTION SYSTEM: A STATED CHOICE ANALYSIS 23 (2013); William J. Allender & Timothy J. Richards, *Consumer Impact of Animal Welfare Regulation in the California Poultry Industry*, 35 J. AGRIC. & RESOURCE ECON. 424, 440 (2010) (explaining that cage-free eggs are still largely bought by higher income or smaller households).

[8] The author would like to point out that flaxseed meal mixed with water makes a fine substitute for the eggs in cookie dough recipes. *See* Cory Ramey, *Replacing Eggs*

briefly visits the ways in which regulation tries to prevent or minimize *Salmonella* contamination. To do so it asks, does the *Salmonella* begin with the chicken?[9] Or does it begin with the egg?

Salmonella is dangerous and common and therefore one of the most common causes of foodborne illness.[10] Symptoms include an unpleasant combination of diarrhea, fever, headaches, vomiting, and more.[11] And while most people get better, not everyone does. *Salmonella* infections can be fatal.[12] As noted above, the seven-month period from May through November 2010 saw almost 2000 reported cases of *Salmonella enteritidis* infections that were associated with contaminated shell eggs, according to the Centers for Disease Control and Prevention.[13] But eggs are not the only source of *Salmonella* infection. People can also contract *Salmonella* infections from consuming undercooked contaminated chicken, as well as handling diseased chickens or pet turtles and hedgehogs.[14]

Salmonella is an "enteric" disease, which means that it infects the intestines of people and animals.[15] So how do eggs become contaminated?

With . . . Flax?, DINER'S J. BLOG (Sept. 4, 2009, 1:47 PM), http://dinersjournal.blogs.nytimes.com/2009/09/04/replacing-eggs-with-flax/?_php=true&_type=blogs&_r=0; *see also Egg Substitutions*, CHEF IN YOU, http://chefinyou.com/egg-substitutes-cooking/ (last visited Mar. 20, 2014) (soy flour with water as egg replacer). There are many such resources on the internet. Of course, other raw ingredients can also be contaminated with *Salmonella* or other pathogens. *See, e.g.*, Bassam A. Annous et al., *Commercial Thermal Process for Inactivating* Salmonella *Poona on Surfaces of Whole Fresh Cantaloupes*, 76 J. FOOD PROTECTION 420, 420 (2013) (attributing an outbreak of *Salmonella typhimurium* to cantaloupe); Anahad O'Connor, *Beware of Raw Cookie Dough*, N.Y. TIMES WELL BLOG (Dec. 12, 2011, 4:27 PM), http://well.blogs.nytimes.com/2011/12/12/beware-of-raw-cookie-dough/?_r=0 (attributing an outbreak of *E. coli* to raw flour in cookie dough).

[9] In this Article, the word "hen" refers to female egg layers (which are also referred to at times as "layers"), while "chicken" is used more broadly to include broilers, pets, or other fowl where the ability to lay eggs is not paramount.

[10] Elaine Scallan et al., *Foodborne Illness Acquired in the United States—Major Pathogens*, 17 EMERGING INFECTIOUS DISEASES 7, 7 (2011); *see also* CDC, FOOD SAFETY PROGRESS REPORT FOR 2012 (2012), *available at* http://www.cdc.gov/features/dsfoodnet2012/food-safety-progress-report-2012-508c.pdf. For 2012, *Salmonella* infection appears to be one of the most common foodborne disease agents, with *Campylobacter* following close behind and increasing. *Id.*

[11] GEO. F. BROOKS ET AL., MEDICAL MICROBIOLOGY 239 (26th ed. 2012).

[12] *Salmonella* accounts for almost one-third of foodborne-illness related deaths each year. Scallan et al., *supra* note 10, at 7.

[13] *Multistate Outbreak*, *supra* note 4.

[14] Karin Hoelzer et al., *Animal Contact as a Source of Human Non-Typhoidal Salmonellosis*, 42 VETERINARY RES., art. 34, Feb. 2011, at 1, 13, 16; James Andrews, *Foster Farms Outbreak Highlights Prevalence of Salmonella on Chicken*, FOOD SAFETY NEWS (Oct. 9, 2013), http://www.foodsafetynews.com/2013/10/foster-farms-outbreak-highlights-prevalence-of-salmonella-on-chicken.

[15] *See* Hammack, *supra* note 4, at 13–14. According to the FDA's *Bad Bug Book*, there are two main species of the *Salmonella* genus that cause harm to humans. These two

When non-animal foods such as fruits and vegetables cause *Salmonella* poisoning, it is obvious that the *Salmonella* got into or onto the food through improper handling or perhaps while the plants were still in the field before being harvested.[16] But eggs come from hens who themselves may be infected. *Salmonella* can get into the egg before the egg is laid, in which case the contamination is not just a result of improper handling or storage, nor is it necessarily the result of unsanitary chicken houses.[17] While we used to believe that *Salmonella* was always an external contaminant passed from an affected chicken to the egg as it was laid, we now know that the *Salmonella* may start in the chicken and get into the egg as the shell is forming.[18] This means that an infected chicken can lay contaminated eggs, and no amount of cleaning on the outside of the shell can possibly remove the contamination. Any plan to ensure safe eggs, then, must include keeping hens healthy.

II. FOOD SAFETY AND *SALMONELLA* REGULATION–WHICH COMES FIRST? CHICKEN REGULATION OR EGG REGULATION?

Federal and state regulations have addressed the egg *Salmonella* problem with hen-related rules and egg-handling and processing rules.[19] These regulations have had some effects. Food regulation falls into a small number of categories. While consumers are likely to have concerns about price and animal welfare,[20] federal regulation of food animals tends to focus on food safety and maintaining healthy herds and flocks.[21] Ensuring that food is safe to eat is a matter of public health and safety. States can regulate food safety issues within their boundaries under

---

species are further divided into subspecies and serotypes. This Article will simply use the term "Salmonella" for any and all of them; this Article's focus is on hens and egg production rather than the differences among variants of *Salmonella*. *Id.* at 12.

[16] Larry R. Beuchat & Jee-Hoon Ryu, *Produce Handling and Processing Practices*, 3 EMERGING INFECTIOUS DISEASES 459, 459–60 (1997).

[17] Inne Gantois et al., *Mechanisms of Egg Contamination by* Salmonella *Enteritidis*, 33 FEMS MICROBIOLOGY REVIEWS 718, 719–20 (2009).

[18] Sandra B. Eskin, *Putting All Your Eggs in One Basket: Egg Safety and the Case for a Single Food-Safety Agency*, 59 FOOD & DRUG L.J. 441, 445 (2004). *Compare* Kenneth D. Quist, *Salmonellosis in Poultry*, 78 PUB. HEALTH REP. 1071, 1072 (1963) (stating that although "Salmonellae in bulk egg products have been generally attributed to contamination from the eggshells during breaking operations," others have "suggest[ed] that the chief source of salmonellae may be from within the egg"), *with* Gantois et al., *supra* note 17, at 719 (describing two different routes for *Salmonella* to contaminate an egg including contamination while still within a chicken's reproductive organs).

[19] *See* 9 C.F.R. §§ 145.1–.3 (2013); *see, e.g.*, Minn. R. 1520.5200–.7200 (2009); 2 VA. ADMIN. CODE § 5-90-30 (LEXIS through 30:8 Va. R., Dec. 16, 2013) (incorporating the National Poultry Improvement Plan into state regulations).

[20] *See* LU ET AL., *supra* note 7, at 23; Allender & Richards, *supra* note 7, at 440.

[21] *See infra* Part II.B.

their police powers,[22] but Congress has authority to regulate food safety and animal health under the Commerce Clause of the United States Constitution.[23] Much regulation related to chickens and eggs falls into the latter category.[24]

While consumer protection regulation can focus on safety, it can also focus on the free market. Consequently, consumer protection regulation that helps assure consumers that they get what they pay for is fairly common in the food context.[25] Most labeling rules fall into this category[26] and some of the earliest food laws were aimed at preventing food fraud.[27]

---

[22] Kyle W. Lathrop, Note, *Pre-empting Apples with Oranges: Federal Regulation of Organic Food Labeling*, 16 J. CORP. L. 885, 901 (1991) ("Using the police power, a state can regulate food safety and labeling as an issue that affects the public health and welfare of its citizens."); *see also* L & L Started Pullets, Inc. v. Gourdine, 762 F.2d 1, 1, 4 (2d Cir. 1985); Parrott & Co. v. Benson, 194 P. 986, 987 (Wash. 1921).

[23] U.S. CONST. art. I, § 8, cl. 3; Wickard v. Filburn, 317 U.S. 111, 125 (1942) (allowing Congress to regulate farm activity that "exerts a substantial economic effect on interstate commerce"); *see also* 21 U.S.C. §§ 451, 1031 (2012) (linking regulation of poultry and eggs to interstate commerce); Rose Acre Farms, Inc. v. United States, 559 F.3d 1260, 1262–64, 1279, 1283 (Fed. Cir. 2009) (upholding USDA authority to restrict distribution of shell eggs from a location affected by *Salmonella enteritidis*, and holding the egg producer did not suffer a compensable taking under the Fifth Amendment). *See generally* Anastasia S. Stathopoulos, Note, *You Are What Your Food Eats: How Regulation of Factory Farm Conditions Could Improve Human Health and Animal Welfare Alike*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 407, 435–37 (2010) (describing the authority given to the USDA and the FDA to regulate farm animals and food products).

[24] *See, e.g.*, Poultry Products Inspection Act, 21 U.S.C. §§ 451–71 (2012); Egg Products Inspection Act, 21 U.S.C. §§ 1031–56 (2012).

[25] *See, e.g.*, Fed. Sec. Adm'r v. Quaker Oats Co., 318 U.S. 218, 232 (1943) ("[T]he legislative history of the [Federal Food, Drug and Cosmetic Act] manifests the purpose of Congress . . . to give to consumers . . . what they may reasonably expect to receive."); United States v. Lane Labs-USA Inc., 427 F.3d 219, 227 (3d Cir. 2005) ("Such a mandate [in the Federal Food, Drug and Cosmetic Act] protects not only the public's health, but also its economic interest in purchasing products that are what they claim to be."); Armour & Co. v. Ball, 468 F.2d 76, 81 (6th Cir. 1972) ("[O]ne purpose of the Wholesome Meat Act is to empower the Secretary to adopt definitions and standards of identity or composition so that the 'integrity' of meat food products could be 'effectively maintained.'").

[26] *See, e.g.*, Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451–61 (2012) (establishing laws governing accurate labeling to inform and protect consumers); Richard A. Merrill & Earl M. Collier, Jr., *"Like Mother Used to Make": An Analysis of FDA Food Standards of Identity*, 74 COLUM. L. REV. 561, 561 (1974) (noting the FDA's role in protecting consumers).

[27] For example, in 1906 Congress passed the first legislation of its kind, which prohibited misleading food labels. *See* Pure Food and Drug Act of 1906, ch. 3915, 34 Stat. 768 (1906) (repealed 1938). The Federal Food, Drug, and Cosmetic Act of 1938, which repealed the 1906 Act, also regulates mislabeled foods. Ch. 675, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C §§ 301–99). For historical background regarding the development of the Food and Drug Administration in the context of food fraud, see JAMES T. O'REILLY, 1 FOOD AND DRUG ADMINISTRATION § 3:2 (2d ed. 2005).

Interestingly, both food safety regulation and consumer fraud prevention are also good for industry as a whole. When consumers believe that a type of food is unsafe, all producers suffer. For example, when *E. coli* in bagged spinach caused a deadly outbreak in 2006, all bagged produce sales declined.[28] The market for all spinach declined as well, causing significant economic damage to the spinach industry.[29] The result was an industry-wide effort to prevent further such events and to reassure consumers.[30] Since the outbreak, 99% of California leafy green producers, which produce a significant proportion of total U.S. leafy greens, operate under a voluntary marketing agreement called the Leafy Greens Marketing Agreement. The agreement imposes food safety standards and inspections on producers who choose to participate.[31] Regulation of poultry operations is no exception. Before there was actual federal regulation of laying hens, there was industry self-regulation, and joint industry-government regulation.[32]

Finally, some food-related regulation is not aimed at food safety or consumer fraud, but at other issues of interest to consumers, such as animal welfare,[33] or of interest to producers, such as preventing loss of a valuable resource (in this case, a flock).[34] To some extent, animal welfare concerns and healthy flock concerns overlap.[35] This is not surprising; any rule that increases consumer trust should be beneficial for producers,

---

[28] Elizabeth Weise & Julie Schmit, *Spinach Recall: 5 Faces. 5 Agonizing Deaths. 1 Year Later*, USA TODAY, Sept. 24, 2007, *available at* http://usatoday30.usatoday.com/money/industries/food/2007-09-20-spinach-main_N.htm ("The outbreak would ultimately cost the leafy green industry more than $350 million .... Sales of packaged spinach are still off about 20% from pre-outbreak levels, industry executives say."); *see also* A. Bryan Endres & Nicholas R. Johnson, *Integrating Stakeholder Roles in Food Production, Marketing, and Safety Systems: An Evolving Multi-Jurisdictional Approach*, 26 J. ENVTL. L. & LITIG. 29, 51 (2011).

[29] *See* sources cited *supra* note 28.

[30] *See* Endres & Johnson, *supra* note 28, at 66–67.

[31] The participants represent the largest leafy green growers in California. *See id.*; *see also* Marketing Agreement, Cal. Dep't of Food & Agric., California Leafy Green Products Handler Marketing Agreement (Mar. 5, 2008), *available at* http://www.caleafygreens.ca.gov/sites/default/files/LGMA%20marketing%20agreement%2003.08.pdf.

[32] Glenn E. Bugos, *Intellectual Property Protection in the American Chicken-Breeding Industry*, 66 BUS. HIST. REV. 127, 134–36 (1992).

[33] *See infra* Part III.

[34] *See infra* Part II.A.; *see also* William Boyd, *Making Meat: Science, Technology, and American Poultry Production*, 42 TECH. & CULTURE 631, 640–41 (2001).

[35] *Cf.* Lucinda Valero & Will Rhee, *When Fox and Hound Legislate the Hen House: A Nixon-in-China Moment for National Egg-Laying Standards?*, 65 ME. L. REV. 651, 659 (2013) ("If increasing animal welfare guaranteed greater profits, all agricultural firms most probably would support increased animal welfare.").

and this is as true of food-related legislation and regulation as for any other.[36] In the case of eggs, regulation is mostly about protecting flocks from disease.[37] While this may seem like a food safety or animal welfare issue, the original impetus was actually preservation of flocks—a concern for animal welfare per se had little to do with it.[38]

Numerous regulatory agencies are involved at different levels:[39] The United States Department of Agriculture ("USDA"), Food and Drug Administration ("FDA"), state and local agencies, and industry itself all have roles in regulating eggs and poultry. These intersecting purposes and the multitude of agencies can make the egg and chicken regulatory landscape seem as intractable as the chicken and egg question.

A. On Farm Regulation

Let us begin with the chicken (setting aside for the moment the question of which came first). Chickens on the farm are raised under the surveillance of the USDA, in particular, by the Animal and Plant Health Inspection Service ("APHIS").[40] Actual regulations are few, however.[41] The National Poultry Improvement Plan ("NPIP") is a joint effort of state agriculture departments, industry, and APHIS.[42] The goal of this effort is to prevent *Salmonella* and other diseases from destroying commercial flocks. In that sense it is very much an industry-favorable program aimed at maintaining the industry. Let's look at the features of NPIP.[43]

Almost a century ago, in the 1930s, there were problems with *Salmonella pullorum*, a strain of *Salmonella* lethal to chicks.[44] In some

---

[36] *See id.*

[37] National Poultry Improvement Plan for Commercial Poultry, 9 C.F.R § 146 (2013); Production, Storage, and Transportation of Shell Eggs, 21 C.F.R. § 118 (2013) (addressing specifically *Salmonella* in eggs).

[38] Boyd, *supra* note 34, at 640 (explaining that food safety was not the main purpose for passing regulations because the fear was loss of flocks, not contaminated food products).

[39] Sandra Eskin's article, *supra* note 18, provides an excellent overview of agency egg regulation in particular. Morris E. Potter's statement on egg safety before the Senate Committee on Government Affairs is another useful background source. *Statement on Egg Safety: Are There Cracks in the Federal Food Safety System?: Hearing Before the Subcomm. on Oversight of Gov't Mgmt., Restructuring, & the D.C. of the S. Comm. on Governmental Affairs*, 106th Cong. (1999) (statement of Morris E. Potter, Director of Food Safety Initiatives), *available at* http://www.hhs.gov/asl/testify/t990701a.html.

[40] 9 C.F.R. § 145.1–.2.

[41] *See, e.g.*, Animal Welfare Act, 7 U.S.C § 2132(g) (2012) (defining "animal" to exclude poultry).

[42] 9 C.F.R. § 145.1–.3.

[43] For an example of how a state has incorporated the NPIP into its own statutes, see MINN. R. 1520.5200–.7200 (2009).

[44] Boyd, *supra* note 34, at 640 & n.28.

cases 80 percent of an infected flock would be wiped out.[45] The NPIP was developed to fight this dangerous pathogen by ensuring healthy flocks.[46] Chicks are not food, so the *Salmonella* at issue would not have affected food safety unless the few chicks that survived remained infected and were introduced into the food supply or produced contaminated eggs. Rather, saving these flocks was necessary to keep the poultry and egg industries healthy. Participation in NPIP was (and is) voluntary, but it is all or nothing—if one part of an operation participates, the whole operation must participate.[47] Participants earn the right to use a logo on their products to show compliance with the program.[48] The program generally requires that all chicks come from participating hatcheries and that they be kept in sanitary conditions.[49] What are sanitary conditions in a henhouse? The walls, ceilings, and floors of the rooms where eggs are kept before hatching have to be cleaned and disinfected twice a week, as does certain equipment.[50] In addition, the eggs are inspected to make sure that they are "reasonably uniform in shape."[51] The objective is to prevent the pathogen from entering the henhouse, and to monitor frequently to detect its presence.[52]

Disease-free chicks are the starting point. Strictly maintaining a clean environment is the next phase, and this means preventing people or animals from bringing in disease.[53] Finally, the environment is tested.[54] When pathogens are found in the environment, say in the

---

[45] ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., PROGRAM AID NO. 1708, HELPING YOU, THE POULTRY BREEDER, PREVENT DISEASE, (rev. ed. 2009), *available at* http://www.aphis.usda.gov/publications/animal_health/content/printable_version/HelpingYouPoultryBreeder-PA1708-FinalJuly09.pdf.

[46] 9 C.F.R. § 146; Boyd, *supra* note 34, at 640–41; U.S. DEP'T OF AGRIC., AGRIC. HANDBOOK 75, EGG-GRADING MANUAL 2 (rev. ed. 2000).

[47] 9 C.F.R. §§ 145.3, 146.3. Moreover, if a person is "responsibly connected" (for example, a partner, officer, or director) with more than one hatchery, then all such hatcheries must participate or none will be certified. *Id.* § 145.6(f).

[48] *Id.* § 145.10. There are several logos, which are specific to the various diseases for which monitoring may be undertaken. *See, e.g., id.* § 145.10(o) (displaying a picture of the "*U.S. Salmonella monitored*" logo).

[49] *See id.* §§ 145.3(c), 145.5, 147.21–.22.

[50] *Id.* § 145.6(a)(1).

[51] *Id.* § 145.6(d).

[52] *See id.* § 145.6; Boyd, *supra* note 34, at 640–41. Facilities must keep records and they are audited at least annually. If a state inspector determines that there has been a breach of sanitation, then more extensive testing is done to try to detect pathogens before they do much damage. 9 C.F.R. § 145.12. In addition, for hatcheries that produce layers, additional requirements apply, such as feed requirements and blood tests. *See id.* § 145.73(d).

[53] *See id.* § 147.24(c). We will return to this when we consider free range hens.

[54] *Id.* § 147.12.

bedding in the henhouse, a sample of birds must undergo testing.[55] Since some diseases might not make the adult birds appear sick, blood tests may be needed.[56] If there is even one positive for *Salmonella enteritidis* out of a sample of 30 or 60 birds, the whole flock is disqualified.[57] Accordingly, the program encourages producers to do everything possible to eliminate disease by carefully ensuring that none gets started. Record-keeping and annual audits round out the picture.[58] This is expensive. And none of this applies to smaller flocks or to farmers who sell all of their eggs directly to consumers and choose not to participate in NPIP.[59]

NPIP, as we noted, is a joint program of the poultry industry and APHIS.[60] APHIS is not a food agency, however.[61] Rather, APHIS has a broad general mission: "to protect the health and value of American agriculture and natural resources."[62] For example, APHIS is charged with administering the Animal Welfare Act of 1966,[63] the mission of which is "to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment" because Congress found that such animals "are either in interstate or foreign commerce or substantially affect such commerce or

---

[55] *See id.* § 147.10, .12(a)(1).

[56] *Id.* § 145.15 (demonstrating that NPIP is not only aimed at *Salmonella*).

[57] *Id.* § 145.73(d)(2). The regulation allows for a second test if there was initially only one positive, and if there are no positives following the second test, then the flock is not disqualified. *Id.*

[58] *Id.* § 146.11.

[59] *See supra* note 47 and accompanying text.

[60] *Animal Health: Poultry Disease Information, Animal & Plant Health Inspection Service*, U.S. DEP'T OF AGRIC., http://www.aphis.usda.gov/animal_health/animal_dis_spec/poultry/ (follow "Avian" hyperlink) (last updated Feb. 7, 2014) ("The National Poultry Improvement Plan was established in the early 1930's to provide a cooperative industry, state, and federal program through which new diagnostic technology can be effectively applied to the improvement of poultry and poultry products throughout the country."); *see also* 9 C.F.R. §§ 145.1–.3.

[61] *See* Terence P. Stewart & Caryn B. Schenewerk, *The Conflict Between Facilitating International Trade and Protecting U.S. Agriculture from Invasive Species: APHIS, the U.S. Plant Protection Laws, and the Argentine Citrus Dispute*, 13 J. TRANSNAT'L L. & POL'Y 305, 306 (2004). The United States Department of Agriculture includes several other agencies that are involved with food: the Food Safety and Inspection Service, the Food and Nutrition Service, the Center for Nutrition Policy and Promotion, and the National Institute of Food and Agriculture. *See USDA Agencies and Offices*, USDA, http://usda.gov/wps/portal/usda/usdahome?navtype=MA&navid=AGENCIES_OFFICES_C (last updated May 6, 2013).

[62] *About APHIS, Animal & Plant Health Inspection Service*, U.S. DEP'T OF AGRIC., http://www.aphis.usda.gov/about_aphis/ (last modified Jan. 30, 2014).

[63] Animal Welfare Act, 7 U.S.C. §§ 2131–59 (2012); *see also* Christina Widner, *Channeling Cruella De Vil: An Exploration of Proposed and Ideal Regulation on Domestic Animal Breeding in California*, 20 SAN JOAQUIN AGRIC. L. REV. 217, 221–22 (2011).

the free flow thereof."[64] For purposes of the Animal Welfare Act, the term "animal" *excludes* "farm animals, such as, but not limited to livestock or poultry."[65] So chickens are not animals under this legislation, and the legislation does not apply to them.[66] The second federal statute governing animal welfare is the Humane Methods of Slaughter Act[67] which amended the Federal Meat Inspection Act,[68] enforced by the Food Safety and Inspection Service, another arm of the USDA.[69] This statute also does not apply to chickens.[70] In any event, this legislation kicks in at slaughter and not on the farm.

Finally, the Animal Health Protection Act does apply to chickens.[71] In fact, it applies to all animals, even those raised for food, and even poultry, but it operates primarily by creating authority to order destruction or quarantine of animals and disinfection of equipment and living quarters.[72] It does not actually impose requirements on how animals are raised.[73] Thus, when APHIS regulates chicken or hen welfare under NPIP, its purpose is to protect a food supply, not to ensure animal welfare per se. To the extent that consumers have a preference for eggs from well treated hens,[74] federal legislation does not protect that preference.

B. Food Safety Regulation of Poultry—Egg Safety Final Rule (as of 2010)

The FDA is charged with maintaining egg safety.[75] After years of consideration, the FDA announced its Egg Safety Final Rule in 2009, bringing the food safety arm of the government into the picture for

---

64 7 U.S.C. § 2131 (2012).

65 *Id.* § 2132(g).

66 *Id.*

67 *Id.* §§ 1901–07.

68 *See* 21 U.S.C. §§ 601–95 (2012).

69 A. Bryan Endres, *United States Food Law Update*, 3 J. FOOD L. & POL'Y 103, 107–09 (2007).

70 *See* 7 U.S.C. § 1901.

71 *Id.* §§ 8301–22.

72 *Id.* §§ 8302(1), 8303, 8306.

73 *See generally id.* §§ 8301, 8303–08.

74 *See* sources cited *supra* note 7.

75 *See* 21 U.S.C. § 331(a)–(c) (2012) (prohibiting the introduction of adulterated food into interstate commerce under the Federal Food, Drug, and Cosmetic act, which is enforced by the Food and Drug Administration); *id.* § 342(a) (providing a definition for "adulterated"); *see, e.g.*, 21 C.F.R. § 115.50(e) (2013) (authorizing the FDA to regulate shell eggs to prevent adulteration).

eggs.[76] The Egg Safety Rule applies to any flock with more than 3000 hens.[77] In general, the rule provides guidelines intended to prevent *Salmonella* contamination,[78] and it is similar to the NPIP in that regard.[79]

Accordingly, a farmer must buy chicks only from certified suppliers who comply with the NPIP requirements or its equivalent.[80] In addition, a farmer must prevent rodents and other pests from interacting with the hens.[81] The barnyard in Charlotte's Web, where Templeton the rat comes and goes at will, would surely not qualify.[82] But barnyards we see in stories do not have 3000 hens. Most large operations keep the hens indoors and rodent prevention may be possible. There are, however, some operations of over 3000 hens that allow the hens to roam freely on

---

[76] Prevention of Salmonella Enteritidis in Shell Eggs During Production, Storage, and Transportation, 74 Fed. Reg. 33,030 (July 9, 2009) (to be codified at 21 C.F.R. pt. 16 & 118).

[77] 21 C.F.R. § 118.1(a).

[78] *E.g.*, *id.* § 118.4.

[79] *Compare id.* (requiring all shell egg producers to comply with a list of *Salmonella* prevention measures), *with* 9 C.F.R. § 145.23(d)(1) (2013) (establishing various feed standards and *Salmonella* testing methods with which egg producers must comply in order to achieve compliance under the National Poultry Improvement Plan).

[80] To that extent, the Egg Safety Final Rule is similar to NPIP. *Compare* 9 C.F.R. §§ 145.1, 145.3, 145.4(d) (requiring NPIP participants to by all "hatching eggs, baby poultry, and started poultry" from other NPIP participants), *with* Prevention of Salmonella Enteritidis in Shell Eggs During Production, Storage, and Transportation, 74 Fed. Reg. 33,030, 33,034 (July 9, 2009) (requiring regulated farmers to procure chicks from *Salmonella* monitored suppliers that meet NPIP or equivalent standards).

[81] 21 C.F.R. § 118.4(c)(1)–(3).

[82] E.B. WHITE, CHARLOTTE'S WEB 44–45, 47 (1952).

> It was on a day in early summer that the goose eggs hatched. This was an important event in the barn cellar. . . . At this point, Templeton showed his nose from his hiding place under Wilbur's trough. He glanced at Fern, then crept cautiously toward the goose, keeping close to the wall. Everyone watched him, for he was not well liked, not trusted. "Look," he began in his sharp voice, "you say you have seven other goslings. There were eight eggs. What happened to the other egg? Why didn't it hatch?" "It's a dud, I guess," said the goose. "What are you going to do with it?" continued Templeton, his little round beady eyes fixed on the goose. "You can have it," replied the goose. "Roll it away and add it to that nasty collection of yours." . . . With her broad bill the goose pushed the unhatched egg out of the nest, and the entire company watched in disgust while the rat rolled it away. Even Wilbur, who could eat almost anything, was appalled. "Imagine wanting a junky old rotten egg!" he muttered. . . . [Templeton] disappeared into his tunnel, pushing the goose egg in front of him.

Id.

pasture.[83] These pastured operations present special challenges to which we will return.

Other requirements include testing of the henhouse environment and sometimes the eggs, timely refrigeration of eggs, and a written *Salmonella* prevention plan.[84] While eggs may be safer now, the grand effect of all of this legislation for chicken welfare is almost nothing. Federal law does not create any requirements for the type or size of cages, access to the outdoors, type of feed, or anything else one might consider. As far as chickens are concerned, it is a hen-peck-hen sort of world.

There are, however, some lifestyle guarantees for organically raised chickens. For organically raised chickens producing organic eggs or being raised as broilers, the USDA is still the agency in charge, but in addition to APHIS, the National Organic Program is involved.[85] The National Organic Program is administered under another part of the USDA, the Agricultural Marketing Service ("AMS").[86] Accordingly, although the National Organic Program rules dictate how organic chickens are raised, the purpose of organic certification is somewhat marketing oriented, aimed at "[e]nsuring the integrity of USDA organic products in the U.S. and throughout the world."[87] The integrity of an organic chicken is ensured when an authorized third-party certifier confirms that the farmer is following the organic program rules.[88] For the chicken, this means that it has been under organic management since at least the second day of life.[89] Organic chickens do not need to be born organic.[90]

Organic chickens have to be kept in circumstances that will protect their health and welfare, which means, *inter alia*, "conditions which allow for exercise, freedom of movement, and reduction of stress

---

[83] *See, e.g.*, Dan Charles, *The FDA Doesn't Want Chickens to Explore the Great Outdoors*, NPR (July 25, 2013, 11:59 AM), http://www.npr.org/blogs/thesalt/2013/07/24/205230655/the-fda-doesnt-want-chickens-to-explore-the-great-outdoors.

[84] Production, Storage, and Transportation of Shell Eggs, 21 C.F.R. § 118.4 ("[Y]ou must have and implement a written [*Salmonella entertidis*] prevention plan that is specific to each farm where you produce eggs . . . ."); *id.* § 118.4(e) (describing the requirement of refrigeration); *id.* § 118.5(a) (detailing environmental testing procedures for henhouses and eggs).

[85] *See* Organic Foods Production Act, 7 U.S.C. §§ 6501–23 (2012); National Organic Program, 7 C.F.R. § 205.236(a)(1) (2013).

[86] *See* 7 C.F.R. § 205.2.

[87] Regulatory Information Service Center: Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions, 79 Fed. Reg. 896, 907, 911 (Jan. 7, 2014).

[88] *See* 7 U.S.C. §§ 6502(3), 6503(d).

[89] 7 C.F.R. § 205.236(a)(1).

[90] *Id.*

appropriate to the species."[91] In addition, all organic animals must have access to the outdoors for at least part of the year.[92] As we will see, this means that some conventional poultry practices are not acceptable for organic chickens.[93]

Finally, even though there are no federal requirements regarding the treatment of chickens in general, the NPIP, with its goals of minimizing or eliminating disease, does provide some standards, as we have seen.[94] Whether those standards improve the welfare of poultry in the program is a subject of discussion a bit further on in this Article.[95]

Once a hen has laid an egg, we can focus on regulation of the eggs themselves. We make a distinction between "shell eggs," which are eggs still inside intact shells, and "egg products," which are all other eggs.[96] Mostly, "egg products" means eggs that were cracked (intentionally) to make liquid or processed egg products.[97] Shell eggs must be handled carefully and correctly to prevent growth of pathogens such as *Salmonella*. Although the FDA has jurisdiction over shell eggs on the farm and at the market,[98] the USDA's Agricultural Marketing Service administers the grading and quality classifications.[99] Processed eggs, on the other hand, are inspected by another arm of the USDA, the Food Safety and Inspection Service ("FSIS").[100]

So to summarize, there is very little regulation of chickens at the federal level. If a chicken farmer wants organic certification, then the National Organic Program has oversight. If the farmer wants NPIP

---

[91] *Id.* § 205.238(a)(4). Nonetheless, organic animals may undergo "physical alterations as needed to promote the animal's welfare and in a manner that minimizes pain and stress." *Id.* § 205.238(a)(5). For a chick, this usually means a debeaking procedure. Since chicks do not have to be organically raised until the second day, organic and conventional chicks can come from the same broods.

[92] *Id.* § 205.239(a)(1).

[93] *See infra* Part IV (describing many poultry practices that are normal in the current poultry industry).

[94] *See supra* notes 44–59 and accompanying text.

[95] *See infra* Part III.

[96] *Compare* 21 U.S.C. § 1033(f) (2012) (defining "egg product"), *with* Production, Storage, and Transportation of Shell Eggs, 21 C.F.R. § 118.2 (2013) (defining "shell egg").

[97] § 1033(f) (defining "egg product").

[98] *See id.* § 331(a)–(c); *see, e.g.*, 21 C.F.R. § 115.50(e).

[99] *See, e.g.*, Agricultural Marketing Service, 7 C.F.R. § 56.4 (2013); *see also Specifics About Eggs*, AM. EGG BOARD, http://www.aeb.org/foodservice-professionals/egg-products (last visited Mar. 20, 2014) (summarizing egg sizes and grade meanings).

[100] 21 U.S.C. § 1034(e)(1); *see* Food Safety and Inspection Service, Department of Agriculture, 9 C.F.R. § 300.2. The Secretary of the Department of Health and Human Services (HHS) has authority and responsibility for inspecting food manufacturing establishments, institutions, and restaurants that are not egg packers. § 1034(d). Egg handlers with flocks of less than 3000 are exempt from USDA inspection. *Id.* § 1034(e)(4).

certification, then APHIS has oversight. And if the farmer wants to sell shell eggs labeled with grade and quality, then AMS has some say. Compliance with these sources of regulation and standards is voluntary,[101] but most chickens and eggs fit into one of them.

III. HEN WELFARE—CONSUMERS WANT EGGS FROM HAPPY HENS

In addition to concerns about *Salmonella*, some consumers have concerns about chicken welfare.[102] The egg industry is said to be the worst offender in terms of animal cruelty and environmental degradation.[103] While there is no actual animal welfare legislation that applies to chickens, industry efforts at self-regulation are slowly moving towards systems that allow more natural behaviors. Nevertheless, most commercial eggs come from chickens raised in cramped conditions in battery cages. Given the almost universal picture of hens scratching in dirt, how did chickens come to be kept in such cramped conditions?

A century ago, most eggs were produced in flocks of fewer than 400 birds.[104] Today, 99% of the egg-laying hens live on farms with 400 or more layers,[105] and some flocks have over a million birds.[106] What difference does this large scale production make? Aren't eggs just eggs? While regulatory efforts, as we have seen, attempt to keep disease away from eggs, consumers are also interested in the lifestyles of the hens that

---

[101] 7 C.F.R. § 56.20 (describing who may initiate the voluntary application process for AMS shell egg grading service); 9 C.F.R. § 145.3 (detailing the voluntary participation standard for the APHIS's NPIP certification).

[102] *See* LU ET AL., *supra* note 7, at 3 ("Research on consumer attitudes . . . shows that people in Europe, Australia, US[,] and Canada are concerned about farm animal welfare issues."); *see also* RW Prickett et al., *Consumer Preferences for Farm Animal Welfare: Results from a Telephone Survey of US Households*, 9 ANIMAL WELFARE 335, 336 (2010) ("Studies have demonstrated that Americans as a whole are concerned about farm animal welfare. . . . [I]t is clear that some [Americans] exhibit great concern for the well-being of farm animals . . . .").

[103] *See* MICHAEL POLLAN, THE OMNIVORE'S DILEMMA 317–18 (2006); PETER SINGER & JIM MASON, THE ETHICS OF WHAT WE EAT 37–41 (2006).

[104] *Cf.* 5 BUREAU OF THE CENSUS, DEP'T OF COMMERCE, FOURTEENTH CENSUS OF THE UNITED STATES: TAKEN IN THE YEAR 1920, at 678–79, *available at* http://www.agcensus.usda.gov/Publications/Historical_Publications/1920/Livestock_Products.pdf (noting 359,537,127 total chickens on hand in 1920, out of 5,837,367 farms reporting chickens, yielding an average of 61.6 chickens per farm).

[105] *See* 1 U.S. DEP'T OF AGRIC., 2007 CENSUS OF AGRICULTURE 24 (Dec. 2009 ed.) (indicating that 346,329,244 of the nation's 349,772,508 egg-laying hens, or 99% of hens, come from farms with 400 or more layers). In fact, over 90% of layers live on farms with 20,000 or more egg-laying hens. *See id.*

[106] Marsha Laux, *Eggs Profile*, AGRIC. MKTG. RES. CTR. (Oct. 2013), http://www.agmrc.org/commodities__products/livestock/poultry/eggs-profile/.

lay the eggs.[107] Producers are aware that consumers prefer to eat eggs from hens living the good life, and we see the evidence of this on egg carton labels. Most consumers have at least noticed that some egg cartons say "cage free." Other commonly seen labels proclaim "vegetarian fed" and "free range." Consumers want to know that their eggs come from hens that are not mistreated. Unfortunately, consumers imagine that hen conditions are better than they really are.

In *Eat Like You Care*, law professors Gary Francione and Anna Charlton describe animal agriculture as producing "an absolutely staggering amount of suffering and death."[108] Most people agree, moreover, that we should not cause unnecessary suffering to animals.[109] Economists have tried to quantify this moral preference through various studies. In general, studies show that consumers state a preference for eggs from well-treated hens. For example, Lu, Cranfield, and Widowski asked Canadian study subjects their preferences for different housing systems—including typical cages or enhanced cages that allow for natural behaviors.[110] Consumers were willing to pay more for eggs from free range and cage-free systems, but not for eggs from enhanced cage systems.[111] In addition, the study demonstrated willingness to pay for specific features such as nest boxes, perches, and more space.[112]

On the other hand, studies of actual market behavior show that consumers are more price-motivated than they think they are. In other words, they don't behave in the grocery store the way they claim they will when answering survey questions. For example, a California study examined actual grocery purchases of households that purchased eggs on a regular basis before the California Proposition 2 cage-free egg

---

[107] *See* HENG ET AL., *supra* note 7, at 2 (noting that an increase in the United States of awareness of farm animal welfare has led to changes in state regulations and industry standards); LU ET AL., *supra* note 7, at 2–3 (stating that increasing awareness of and concern about animal welfare impacts the production and marketing methods of animal products); GODDARD ET AL., *supra* note 7, at 62 (finding that there are key characteristics in consumers that drive animal welfare concerns); Allender & Richards, *supra* note 7, at 440 (concluding that consumers express a preference for enhanced animal welfare standards but are less willing to actually pay for it).

[108] GARY L. FRANCIONE & ANNA CHARLTON, EAT LIKE YOU CARE 9 (2013).

[109] Gary L. Francione, *Animal Rights and Animal Welfare*, 48 RUTGERS L. REV. 397, 398 (1996) ("Almost *everyone*—including those who use animals in painful experiments or who slaughter them for food—accepts as an abstract proposition that animals ought to be treated 'humanely' and not subject to 'unnecessary' suffering.").

[110] *See* LU ET AL., *supra* note 7, at 9.

[111] *Id.* at 23.

[112] *Id.*

debate.[113] The study found that for many consumers, higher egg costs could significantly curtail egg consumption.[114]

Of course, what consumers understand about egg production may not fit reality, and it is possible that more information about actual production practices might induce people to change their purchasing behavior. I have argued elsewhere that label information is most important for people who would have a preference if they knew more about their available purchasing choices.[115] Next, this Article will explore the available label information and its meaning.

Remember the Little Red Hen? The Little Red Hen is a children's story about a very busy hen who lived on a farm with several other animals. The busy little hen asked for help to plant, grow, and harvest wheat, and then to take the grain to the miller, bring back the flour, and make bread. The other animals, who were lazy, were never willing to help. And when the bread was ready, the hen refused to share it with them. The intended moral, of course, is that work is important because that's how we get bread. But there is another, perhaps unintended, message. In this story and other stories with hens, there are a very small number of barnyard hens involved. They freely go in and out, and they eat grain. This is the picture of hens and chickens that most of us imagine. It is the picture of chickens and hens painted by great artists. It is the barnyard scene in Cinderella.[116] It is in Charlotte's Web.[117] But this is a picture of backyard chickens, not industrial egg layers.

IV. YOU CAN'T REALLY GET WHAT YOU WANT—LABELS ARE MISLEADING, AND RECENT WELFARE EFFORTS MAY BE MISGUIDED

In some urban areas, interest in backyard chicken coops has been on the rise. Martha Stewart says, "[k]eeping and caring for chickens

---

[113] Allender & Richards, *supra* note 7, at 440. Proposition 2 was a 2008 California ballot measure that will require that calves raised for veal, egg-laying hens and pregnant pigs be confined only in ways that allow these animals to lie down, stand up, fully extend their limbs and turn around freely. The measure passed with 63% of the vote, and some provisions will take effect in January 2015. *See also* Cal. Sec'y of State, *Prevention of Farm Animal Cruelty Act*, *in* CALIFORNIA GENERAL ELECTION: OFFICIAL VOTER INFORMATION GUIDE 82 (2008), *available at* http://vig.cdn.sos.ca.gov/2008/general/pdf-guide/vig-nov-2008-principal.pdf (requiring that calves raised for veal, egg-laying hens, and pregnant pigs be confined only in ways that allow those animals to lie down, stand up, fully extend their limbs, and turn around freely).

[114] Allender & Richards, *supra* note 7, at 439–40.

[115] *See* Donna M. Byrne, *Cloned Meat, Voluntary Labeling, and Organic Oreos*, 8 PIERCE L. REV. 31, 70–71 (2009).

[116] *See* DAVID WHITLEY, THE IDEA OF NATURE IN DISNEY ANIMATION 34–36 (2d ed. 2012).

[117] *See* WHITE, *supra* note 82, at 68 (referencing a "henhouse").

myself means I know exactly how they are housed, what they eat, and what goes into their delicious eggs."[118] The implication, of course, is that how a hen is housed, what she eats, and therefore what goes into her eggs is important to Martha (and by extension to her readers). But most consumers do not know that most hens spend their lives in cramped cages indoors, or that "cage free" merely means packed by the thousands into a closed building instead of into small cages.[119] Most consumers do not get to make choices about the kind of hens that lay their eggs because they simply do not know there is a choice. The horrific reality of egg production is well described elsewhere; the goal is to simply show that consumers are not getting clear information that they may want. This is the lite version.

This section describes some of the hen welfare issues that are, or may be, of interest to consumers and discusses the reality behind the label.[120] Any legislation regarding hen welfare is likely to address some or all of these issues.[121] The section first describes the issues and then examines the provisions of the former United Egg Producers ("UEP") and Humane Society of the United States' ("HSUS") agreement regarding hen welfare.[122] While the agreed-upon changes would have moved egg production a bit closer to the ideal "hens-in-the-yard" picture, the new standards still would not reflect the picture consumers are likely to hold in their imaginations. Moreover, even if the agreement were more helpful for hen welfare, United Egg Producers decided in February 2014 not to renew its agreement with the Humane Society.[123]

---

[118] Martha Stewart, *The Chicken and the Egg*, MARTHA STEWART LIVING, Apr. 2013, at 23, 23.

[119] *See* Angela R Green, A Systematic Evaluation of Laying Hen Housing for Improved Hen Welfare 2–3 (2008) (unpublished Ph.D. dissertation, Iowa State University) (on file with the Regent University Law Review) (discussing the size of flocks in cage-free systems).

[120] *See* Richard L. Cupp, Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 SAN DIEGO L. REV. 27, 83 (2009) ("[P]ublic interest in humane treatment of animals has probably never been stronger.").

[121] There is currently no federal legislation regarding the welfare of layer hens. In 2012, United Egg Producers and the Humane Society of the United States agreed that the two organizations would work to pass legislation that would ban conventional battery cages. *See* JOEL L. GREENE & TADLOCK COWAN, CONG. RESEARCH SERV., R42534, TABLE EGG PRODUCTION & HEN WELFARE: THE UEP-HSUS AGREEMENT AND H.R. 3798 (2012). To that end, legislation which would amend the Egg Products Inspection Act, 21 U.S.C. §§ 1031–56 (2012), has been introduced but not yet passed. *See* S. 820, 113th Cong. (2013); H.R. 1731, 113th Cong. (2013). In February 2014, United Egg Producers announced that it would cease pursuing the legislation. Dudley W. Hoskins, *United Egg Producers Decline to Renew MOU with HSUS*, NASDA (Feb. 19, 2014), http://www.nasda.org/News/24781.aspx.

[122] *See generally* GREENE & COWAN, *supra* note 121.

[123] Hoskins, *supra* note 121.

Finally, we consider the role of egg carton labels and conclude that egg labels are and will continue to be misleading for many consumers.

The UEP estimates that worldwide, 90% of eggs produced come from hens living out their lives in battery cages.[124] In the United States, the figure is higher—95% or more.[125] The conventional battery cages hold 6 to 10 birds per cage and provide about 67 to 86 square inches per bird.[126] For comparison, a sheet of notebook paper is 93.5 square inches, but if someone tore a 2.5 inch strip off the end, the resulting 8.5 inch square would have 72.25 square inches, about the amount of space allowed to a typical egg-laying hen.[127] To put this density in context, the University of Minnesota Extension Service recommends 3 to 5 square feet (or 432 to 720 square inches) per bird for backyard hens, or around 8 to 10 times the space provided in a typical battery cage.[128] The cages, holding 6 to 8 hens each, are situated in long rows, three to five rows high—a battery of cages.[129] Cages facilitate egg collection, feeding, and removal of fecal material. They also serve to keep hens safe from predators.[130] When an egg carton label says "cage free" these are the cages from which the layers are free.

While battery cages provide for efficient egg production, they really do not allow hens to engage in typical chicken-like behavior. Chickens are jungle fowl; in the wild, they would roost in trees and other surfaces

---

[124] *See* UNITED EGG PRODUCERS, ANIMAL HUSBANDRY GUIDELINES FOR U.S. EGG LAYING FLOCKS 1 (2010 ed. 2010) [hereinafter GUIDELINES] (estimating that 95% of United States commercial egg production and 90% of world egg production comes from caged layers).

[125] *See id.*

[126] *See id.* at 18; *see also* GREENE & COWAN, *supra* note 121, at 3.

[127] The space allowed to broilers is specified in inches per pound of bird weight. Although broilers also share space with each other, they may not experience the same crowding as layers. Under the National Chicken Council guidelines, stocking density depends on weight and is specified in pounds per square foot. *See* NAT'L CHICKEN COUNCIL, NATIONAL CHICKEN COUNCIL ANIMAL WELFARE GUIDELINES AND AUDIT CHECKLIST FOR BROILERS 4 (2010), *available at* http://www.nationalchickencouncil.org/wp-content/uploads/2012/01/NCC-Animal-Welfare-Guidelines-2010-Revision-BROILERS.pdf. The range is 6.5 to 8.5 pounds per square foot. *Id.* This means just under one and a half 5.5-pound broilers per square foot.

[128] BETSY WIELAND & NORA NOLDEN, UNIV. OF MINN. EXTENSION, BACKYARD CHICKEN BASICS (2011), *available at* http://www.extension.umn.edu/food/small-farms/livestock/poultry/backyard-chicken-basics/docs/backyard-chicken-basics.pdf.

[129] Green, *supra* note 119, at 21.

[130] *Id.* at 20, 40 (noting benefits of traditional cage systems, including better performance and health and a reduction of the risk from predators for hens that have access to the outdoors, such as free-range hens).

off the ground.[131] They would make nests. They would scratch in the dirt, stretch their wings, and develop a social hierarchy—a pecking order.[132] None of these behaviors is possible in a battery cage.

In cage-free production, battery cages are eliminated.[133] A typical cage-free barn may contain 20,000 birds, however, so crowding is still part of the lifestyle.[134] But perches and roosting places off the ground can be made available, along with dark nesting boxes.[135] Roosting and nesting places are recommended for backyard hens too because these allow for natural behaviors.[136] But cage-free poultry houses are still a far cry from the chicken yards consumers imagine. Chickens do not naturally form flocks of 20,000 birds, and this flock size makes it difficult or impossible to develop a social hierarchy.[137] In addition, such a large number of birds means a lot of bird waste. Keeping ammonia levels down in poultry barns can be a challenge, especially when ventilation is limited to preserve heat.[138] And although cage-free hens are able to roost and nest, other natural behaviors may still be inhibited.[139] Egg industry websites suggest that the cage-free barns are less sanitary than cage systems—for example, eggs and birds are more likely to come into contact with fecal material—and less safe for the birds, which are more likely to be injured or trampled because of their increased movement.[140]

Another way in which commercial egg production does not quite fit the chicken yard picture is that for the most part, commercial hens spend their lives indoors. It should be obvious that caged hens have no access to the outdoors, but cage-free hens also typically spend their

---

[131] Jennifer Cook, *Backyard Chickens*, COLO. ST. U. (2011), http://www.ext.colostate.edu/sam/backyard-chickens.pdf (stating chickens in the wild roost in trees).

[132] Chickens are said to recognize up to 100 other birds in order to develop this social order. Michael Specter, *The Extremist*, NEW YORKER, Apr. 14, 2003, at 52, 64.

[133] Green, *supra* note 119, at 2.

[134] *Id.* at 2–3 (stating flocks in cage-free systems range from just a few thousand to well over 100,000).

[135] *See id.* at 24.

[136] WIELAND & NOLDEN, *supra* note 128.

[137] *See* PETER SINGER, ANIMAL LIBERATION 100 (2009) (discussing aspects of social interaction between chickens and the impact high-density housing has on those interactions).

[138] *See* GUIDELINES, *supra* note 124, at 28 (establishing UEP guidelines for ammonia concentration of no more than 25 ppm and preferably under 10 ppm, although higher exposure for brief periods may be acceptable); *see also* NAT'L CHICKEN COUNCIL, *supra* note 127, at 3 (requiring an ammonia concentration, for broilers rather than layers, of no more than 25 ppm at the bird height).

[139] *See infra* notes 141–47 and accompanying text.

[140] *See Cage-Free Farm Tour*, UNITED EGG PRODUCERS, http://www.uepcertified.com/VirtualTours/vtModernCageFreeHR.html (last visited Mar. 20, 2014).

whole lives indoors.[141] There is no chicken yard in their lives, and they may never see the outdoors at all. But consumers like to imagine hens free to scratch in the dirt, so some egg producers are willing to provide "free range" eggs from hens that were free to go outside.[142] This designation does not mean that the hens actually went outside; it only means that they had the option.[143] The caricature of chickens as being fearful is well deserved,[144] and in a large poultry house with a small door leading out to a bright world, few hens are likely to be outside at any time.[145]

Because most hens spend their lives indoors, they miss out on seasonal cues such as day length. Seasons matter, however. In the normal scheme of things, hens "molt"—lose their feathers and grow new ones—in the fall when days get shorter.[146] They lay more eggs in the spring when days get longer.[147] This seasonal molting cycle results in greater egg production overall, although there may be a decrease during the molting period.[148] Unfortunately, without seasonal cues, hens do not molt and their egg production merely declines.[149] Farmers interested in egg production have the choice of either killing the hens after that first laying cycle, or finding a way to get the hens to molt, ideally all at the same time.[150] This induced molt can be accomplished in various ways, the traditional approach being to withdraw feed for a week or two.[151] The feed-withdrawal method of inducing molting is now seen as inhumane

---

141 Green, *supra* note 119, at 24.

142 *Id.*

143 *See id.* at 24, 41.

144 *Id.* at 41.

145 *Id.*

146 SINGER, *supra* note 137, at 118; *see also* Kathy Shea Mormino, *Molting—What Is It & How to Help Chickens Get Through It*, GRIT (July 27, 2012, 3:01 PM), http://www.grit.com/animals/molting-what-is-it--how-to-help-chickens-get-through-it (describing the molting process and providing pictures of molting hens).

147 *See generally* SINGER, *supra* note 137, at 118; *see also* Mormino, *supra* note 146 (explaining that chickens lay eggs more frequently in the spring).

148 A.B. Webster, *Physiology and Behavior of the Hen During Induced Molt*, 82 POULTRY SCI. 992, 992 (2003).

149 SINGER, *supra* note 137, at 118.

150 *See id.*

151 ERIN E. WILLIAMS & MARGO DEMELLO, WHY ANIMALS MATTER 41 (2007).

and is no longer favored.[152] Instead there are now various non-feed-withdrawal methods.[153]

Molting is not the point here. Rather, it is that consumers with the henyard model in their minds have no idea that this is part of the process. Would they care about molting if they knew? It is hard to know because labels are silent about most aspects of egg production, including molting. When did you last see a label that read "no-forced-molt eggs"? Industry advocates argue that induced molting gives chickens a longer productive life and thus a longer life in general.[154] Surely a longer life is better than a short one, but this is a somewhat ingenuous argument. Chickens can live up to ten or fifteen years.[155] A laying hen, however, has a useful lifespan of about one to three years.[156] But the life of a layer is not much to envy.

Breeding itself can reduce the quality of life for hens. Selecting for hens that lay more eggs may mean selecting hens that have more fragile bones.[157] Accordingly, broken bones and the attendant suffering they produce may be higher than necessary among layers.[158] Fragile bones may also result from cage production itself. When hens cannot move around, they lose muscular strength, resulting in increased fractures.[159]

Moreover, hens in close quarters deprived of normal behavior may experience hysteria and peck each other,[160] so a standard practice is to sear off the end of the beak within a week or two of hatching.[161] The UEP

---

[152] *See* GUIDELINES, *supra* note 124, at 10 (noting that current UEP-certified guidelines allow only non-feed withdrawal methods).

[153] P.E. Biggs et al., *Further Evaluation of Nonfeed Removal Methods for Molting Programs*, 83 POULTRY SCI. 745, 745 (2004) (researching eight alternative methods to complete feed removal molt induction).

[154] *See* SINGER, *supra* note 137, at 118 (describing how molting increases production).

[155] WILLIAMS & DEMELLO, *supra* note 151, at 29 (contrasting the lifespan of a broiler of just forty-five days with a chicken's typical lifespan of up to fifteen years).

[156] *See* GUIDELINES, *supra* note 124, at 9; *see also* Ruth C. Newberry, *Contemporary Issues in Farm Animal Housing and Management: Poultry Well-being*, *in* SUSTAINABLE AGRICULTURE 338, 339 (Christine Jakobsson ed., 2012) (asking whether it would be better to terminate the lives of hens after the first productive cycle rather than inducing a molt).

[157] WILLIAMS & DEMELLO, *supra* note 151, at 40 (remarking how vitamin deficiency, lack of exercise, and over-breeding to further egg production cause the majority of laying hens to have osteoporosis).

[158] *See id.*

[159] *Id.*

[160] While "pecking" is natural behavior (hence the term "pecking order"), in close quarters, the pecked hen has no escape. *See* D.C. Lay Jr. et al., *Hen Welfare in Different Housing Systems*, 90 POULTRY SCI. 278, 283 (2011).

[161] WILLIAMS & DEMELLO, *supra* note 151, at 37 (stating that, typically, within one to two weeks of birth the beaks of chicks are removed).

cites some advantages: less pecking, feather pulling, and cannibalism, and better stress levels and feather condition.[162] On the other hand, debeaked hens may have difficulty eating in addition to pain and stress from the procedure.[163] But the welfare question is not whether the advantages outweigh the disadvantages; the real issue is that production practices that lead to pecking, feather pulling, and stress, and lead to a perceived need for such an invasive and painful procedure as beak trimming, are far from the consumer picture of happy hens in a courtyard. To a large extent, consumers are not getting what they think they are. For many people, eggs are eggs, but if consumers believe the eggs come from hens like those pictured in story books and on egg cartons, then consumers are being misled.

Consumers do care about animal welfare, and the UEP has made an effort to respond to animal welfare concerns. It has developed voluntary guidelines and a "UEP certified" logo.[164] The UEP website proudly exhorts consumers to "[s]how your commitment to animal welfare and buy UEP certified eggs."[165] The website points out that although caged hens don't seem to have much room, they naturally huddle together anyway, even when they have more room.[166] Nonetheless, although cage-free hens can move about more and exhibit more natural hen behaviors, they are more likely to be injured as a result and there is greater possibility of hens and eggs coming in contact with fecal material.[167] Intensive egg production means that hens are raised in large groups; as a result, debeaking is necessary for caged and cage-free flocks alike.[168] But is this what consumers want? Is it what consumers think they are buying?

Ignorance is bliss, and to an extent it may be utility maximizing. If consumers have no idea an issue or choice exists, then they suffer no

---

[162] GUIDELINES, *supra* note 124, at 8.

[163] *Id.*

[164] *Id.* at 5–6 (defining and explaining the UEP-Certified logo, as well as procedures that certified companies must implement when choosing to display the logo on their products).

[165] UNITED EGG PRODUCERS, http://www.uepcertified.com/ (last visited Mar. 20, 2014) (inviting website visitors to link to the UEP on Facebook to show commitment to animal welfare).

[166] *Modern Cage Farm Tour*, UNITED EGG PRODUCERS, http://www.uepcertified.com/VirtualTours/vtCagedHR.html (follow "Cage Space" hyperlink) (last visited Mar. 20, 2014) (explaining that hens naturally flock and huddle together regardless of space).

[167] *Cage-Free Farm Tour*, UNITED EGG PRODUCERS, http://www.uepcertified.com/VirtualTours/vtModernCageFreeHR.html (follow "Smothering" hyperlink) (last visited Mar. 19, 2014).

[168] *Id.*

direct loss of utility by being deprived of choice.[169] But when consumers do know about an issue and care about it, utility is affected by choice. The problem is that sometimes consumers *would* care if they knew an issue existed, but because they are ignorant of the issue altogether, they have no preference. Food labels perform a variety of functions, one of which is education.[170] Labels may alert us to issues we might not otherwise realize are issues, and labels may provide information about those issues. When consumers know enough about an issue to form a preference, they are best able to maximize their utility through market choices based on information about products.[171]

CONCLUSION

Martha Stewart asks whether backyard coops are a possible solution to the food safety, animal welfare, and sustainability concerns related to egg production.[172] But this is not an Article about backyard chicken coops. Rather, we are focused on the mismatch between consumer beliefs and expectations, and the eggs available in the grocery store. As we have noted, people care about animals, but perhaps surprisingly, there are very few if any laws or regulations specifically aimed at the well-being of poultry. Nevertheless, due to consumer concerns, chicken welfare is an issue, and the industry is attempting to self-regulate as a way of warding off mandatory regulations.[173]

Consumer studies show a stated preference for eggs from hens with opportunities for natural behavior. Moreover, the preference is affected by information about egg production practices. This suggests that even in the presence of labels proclaiming "cage free" and "free range," consumers don't have enough information to make informed choices. If consumers would choose differently given more information, then they are essentially being misled to their detriment by being kept in the dark.

---

[169] Consumers are blissfully ignorant of the fate of male chicks in egg production, for example. Male chicks, as well as hens that have become unproductive, are "euthanized." *See* WILLIAMS & DEMELLO, *supra* note 151, at 35–37. The UEP provides guidelines for how this is to be accomplished. GUIDELINES, *supra* note 124, at 12–14. Euthanasia is supposed to be instantaneous and painless. Acceptable methods are based on American Veterinary Medical Association guidelines and do not allow for throwing live chicks in the trash. *See* AM. VETERINARY MED. ASS'N, AVMA GUIDELINES FOR THE EUTHANASIA OF ANIMALS 6 (2013 ed. 2013).

[170] *See* Byrne, *supra* note 115, at 37.

[171] *Id.* at 60 (stating labels alert the consumer to the existence of an issue, playing an educational role, and provide information to allow the consumer to make a choice, fulfilling an informational role).

[172] *See* Stewart, *supra* note 118, at 24–26.

[173] The UEP's mission includes "guidelines that are driven by the industry rather than government mandates or legislation." GUIDELINES, *supra* note 124, at 3.

The result is that many consumers who buy cheap conventional eggs may actually be *overpaying*. The Food, Drug, and Cosmetic Act labeling provisions are intended to prevent misleading consumers to their detriment, but egg cartons, with their pictures of individual hens, open fields, and sun shining on barns, mislead consumers just as inaccurate label words might do.

Given the failure of the UEP-HSUS agreement, it seems unlikely that either consumers or hens have much hope of improving conditions in the near future. Indeed, until consumers really have complete information about hen welfare, they cannot truly exercise their market preferences.

LITIGATION TO ADDRESS MISLEADING FOOD LABEL CLAIMS AND THE ROLE OF THE STATE ATTORNEYS GENERAL

*Jennifer L. Pomeranz**

INTRODUCTION

The increased global prevalence of diet-related diseases, such as diabetes, heart disease, and cancer, elevates the importance of truthful and accurate nutrition information in the marketplace.[1] Consumers report an increased interest in consuming healthy food but concurrently evidence an inability to determine a food's healthfulness based on food labels.[2] Individuals also comprehend food labels to varying degrees,[3] so it is critical that the information disclosed on packaging is clear and not misleading.

Federal regulations require standardized ingredient information and nutritional disclosures on packaging.[4] Food manufacturers utilize

---

* Jennifer L. Pomeranz, JD, MPH, Assistant Professor, Department of Public Health, Center for Obesity Research and Education, Temple University, jennifer.pomeranz@temple.edu. Funding for this paper was provided by the Robert Wood Johnson Foundation through a grant to the Yale Rudd Center for Food Policy & Obesity, Yale University. Thank you to Regent Law Review for their work on this Article.

1 William Kasapila & Sharifudin Shaarani, *Harmonisation of Food Labelling Regulations in Southeast Asia: Benefits, Challenges and Implications*, 20 ASIA PAC. J. CLINICAL NUTRITION 1, 1 (2011), http://apjcn.nhri.org.tw/server/APJCN/20/1/1.pdf; *see* Josephine M. Wills et al., *Exploring Global Consumer Attitudes Toward Nutrition Information on Food Labels*, 67 NUTRITION REVIEWS (SUPP.) S102, S105, (2009), http://www.nutrociencia.com.br/upload_files/artigos_download/food%20labels.pdf.

2 *See* NIELSEN, BATTLE OF THE BULGE & NUTRITION LABELS: HEALTHY EATING TRENDS AROUND THE WORLD 1, 3–4 (2012), *available at* http://dk.nielsen.com/site/documents/NielsenGlobalHealthyEatingReportJan2012FINAL.PDF; *see also* Miri Sharf et al., *Figuring Out Food Labels. Young Adults' Understanding of Nutrition Information Presented on Food Labels Is Inadequate*, 58 APPETITE 531, 532 (2012), *available at* http://www.sciencedirect.com/science/article/pii/S0195666311006805 (discussing a study revealing how many people did not understand food labels as well as they thought they did); Wills et al., *supra* note 1, at S102–03; Press Release, Am. Dietetic Assoc., How Important Is It to You? Diet, Nutrition and Physical Activity Differ for Men and Women, Says American Dietetic Association Survey (Sept. 27, 2011), *available at* http://www.eatright.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=6442465294&libID=6442465277 (explaining statistics that show an increased interest in diet and nutrition).

3 *See* Wills et al., *supra* note 1, at S102–03, S105.

4 Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 343-1(a)(3)–(4) (2012). Internationally, the Codex Alimentarius ("Codex") was created in 1963 to develop international food standards. F. Edward Scarbrough, *Codex—What's All the Fuss?*, 65 FOOD & DRUG L.J. 631, 631 (2010). Codex is recognized "as the primary international

the remaining label space to draw consumers to their products and to stand out from their competitors. Given the increased interest in health, manufacturers have steadily expanded the number and type of nutrition-related claims on food packaging.[5] Research indicates that many such statements may be misleading,[6] and public health advocates have called for increased regulation to address unruly claims.[7]

The Food and Drug Administration ("FDA") has authority over food labels pursuant to the Food, Drug, and Cosmetic Act.[8] Conversely, the Federal Trade Commission ("FTC") is responsible for the veracity of food advertising.[9] Congress passed the Nutrition Labeling and Education Act ("NLEA") in 1990 authorizing the FDA to require the disclosure of

---

authority on food issues," and Codex documents serve as "templates for national regulations." Peter J. Aggett et al., *Nutrition Issues in Codex: Health Claims, Nutrient Reference Values and WTO Agreements: A Conference Report*, 51 EUR. J. NUTRITION (SUPP.) S1, S1–2 (2012), *available at* http://link.springer.com/article/10.1007%2Fs00394-012-0306-8#page-1. Despite this goal, country-specific regulations are not uniform globally. *See* Kasapila & Shaarani, *supra* note 1, at 2. For example, in a study of ten Southeast Asian countries, the countries utilized a mix of Codex nutrition labeling guidelines and U.S. standards, with the addition of country-specific values for nutrient references. *See id.* at 1–2.

[5] STEVE W. MARTINEZ, ERS, ECONOMIC INFORMATION BULLETIN 108, INTRODUCTION OF NEW FOOD PRODUCTS WITH VOLUNTARY HEALTH- AND NUTRITION-RELATED CLAIMS, 1989–2010, at iii (2013), *available at* http://www.ers.usda.gov/publications/eib-economic-information-bulletin/eib108.aspx#.UmusR1PW41I.

[6] *See* Jennifer L. Harris et al., *Nutrition-Related Claims on Children's Cereals: What Do They Mean to Parents and Do They Influence Willingness to Buy?*, 14 PUB. HEALTH NUTRITION 2207, 2207, 2211 (2011) [hereinafter Harris et al., *Nutrition-related Claims on Children's Cereals*], http://journals.cambridge.org/download.php?file=%2FPHN%2FPHN14_12%2FS1368980011001741a.pdf&code=620054c23c3918398a9e7b504bdd5319; *see also* Adam Drewnowski et al., *Testing Consumer Perception of Nutrient Content Claims Using Conjoint Analysis*, 13 PUB. HEALTH NUTRITION 688, 688 (2010), http://journals.cambridge.org/download.php?file=%2FPHN%2FPHN13_05%2FS1368980009993119a.pdf&code=46253c1097d3cd35a467b20ce538f628 (discussing different types of labels as well as FDA action to prevent false or misleading labels).

[7] *See* Marion Nestle & David S. Ludwig, *Front-of-Package Food Labels: Public Health or Propaganda?*, 303 J. AM. MED. ASS'N 771, 772 (2010), http://jama.ama-assn.org/cgi/content/full/303/8/771.

[8] Matthew R. Kain, Comment, *Throw Another Cloned Steak on the Barbie: Examining the FDA's Lack of Authority to Impose Mandatory Labeling Requirements for Cloned Beef*, 8 N.C. J. L. & TECH. 303, 347 (2007); *see* 21 U.S.C. § 343; *see also* Memorandum of Understanding Between The Federal Trade Commission and The Food and Drug Administration, MOU 225-71-8003 (1971), http://www.fda.gov/AboutFDA/PartnershipsCollaborations/MemorandaofUnderstandingMOUs/DomesticMOUs/ucm115791.htm [hereinafter Memorandum of Understanding] (explaining the FDA's responsibilities and jurisdiction over misbranded food).

[9] Memorandum of Understanding, *supra* note 8.

nutrition information and to regulate certain nutrition-related claims.[10] In 1993, the FDA issued regulations that were groundbreaking at the time but that are now outdated and do not reflect manufacturers' current use of claims or scientific advances in nutrition information.[11] Some categorically unhealthy products bear several nutrition-related claims per package consistent with the law's permissive allowances.[12] In addition, the FDA does not consistently enforce all violations of its own regulations.[13]

As a result of outdated regulations and lax enforcement, the initiation of private lawsuits has escalated.[14] These lawsuits range from advocacy efforts to reign in problematic claims and hold food companies accountable to private plaintiffs claiming damages due to a misbranded or misleading label.[15] Also of note are litigious actions initiated by food manufacturers under the Lanham Act or the industry's self-regulatory body, the National Advertising Division ("NAD") of the Council of Better Business Bureaus,[16] both of which are based on concerns over unfair competition and which have interesting parallels to consumer-based activity. However, such litigation is time consuming and costly and

---

[10] Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (codified at 21 U.S.C. § 343 (2012)).

[11] *See* Food Labeling Modernization Act of 2013, H.R. 3147, 113th Cong. § 1 (2013); Food Labeling, 21 C.F.R. § 101 (1994); Pauline M. Ippolito & Alan D. Mathios, *New Food Labeling Regulations and the Flow of Nutrition Information to Consumers*, 12 J. PUB. POL'Y & MARKETING 188, 188 (1993); *see also*, Elaine Watson, *Food Labeling Bill Proposes Radical Changes to 'Natural' Claims, Wholegrain Labels, Added Sugars; but Chances of Success Are Slim, Say Lawyers*, FOOD NAVIGATOR-USA.COM (Sept. 19, 2013), http://www.foodnavigator-usa.com/Regulation/Food-labeling-bill-proposes-radical-changes-to-natural-claims-wholegrain-labels-added-sugars-but-chances-of-success-are-slim-say-lawyers.

[12] JENNIFER L. HARRIS ET AL., RUDD CTR. FOR FOOD POL'Y & OBESITY, CEREAL FACTS: EVALUATING THE NUTRITION QUALITY AND MARKETING OF CHILDREN'S CEREALS 41, 54, 58 (2009) [hereinafter CEREAL FACTS], *available at* http://www.cerealfacts.org/media/Cereal_FACTS_Report_2009.pdf.

[13] *See, e.g.*, Jennifer L. Pomeranz, *A Comprehensive Strategy to Overhaul FDA Authority for Misleading Food Labels*, 39 AM. J.L. & MED. 617, 629–30 (2013).

[14] Elaine Watson, *Improper Nutrient Content Claims Cited in New Wave of Class Action Suits*, FOOD NAVIGATOR-USA.COM (Apr. 19, 2012), http://www.foodnavigator-usa.com/Regulation/Improper-nutrient-content-claims-cited-in-new-wave-of-class-action-suits [hereinafter Watson, *Improper Nutrient Content Claims*]; *see also Litigation Project*, CTR. FOR SCI. PUB. INTEREST, http://www.cspinet.org/litigation/index.html (last visited Mar. 20, 2014) (explaining reasons for increased litigation by the Center for Science in the Public Interest).

[15] *See* Red v. Kraft Foods, Inc., 754 F. Supp. 2d 1137, 1142–44 (C.D. Cal. 2010); Chacanaca v. Quaker Oats Co., 752 F. Supp. 2d 1111, 1114, 1126 (N.D. Cal. 2010).

[16] *See infra* Part II.A.

sometimes produces different results for the same issue.[17] Although there have been individual successful cases, current litigation efforts have not precluded the introduction of new questionable nutrition-related claims on labels or effectively addressed the problematic food-labeling environment as a whole.[18]

A more effective alternative than private litigation would be for the state attorneys general ("attorneys general") to individually or collectively pursue litigation and other actions to address questionable food labels. Attorneys general have a unique set of authorities that are unavailable to other parties or government entities.[19] Their charge includes protecting consumers and supporting conditions for fair competition and transparency in the commercial marketplace.[20] Attorneys general can address questionable labeling practices through litigation and pre-litigation means and join together in concerted effort to effectuate industry-wide changes. A successful consumer protection action by the attorneys general can have wide-range implications and provide a stronger deterrent than private litigation. However, to date, attorneys general have not addressed misleading food-labeling issues to the extent their authority permits or to the level of other similar consumer protection issues.

Part I of this Article briefly describes the FDA's regulatory authority over food label claims and how the law hinders certain private attempts to enforce the regulations. This Article goes on to discuss the successes and limitations of the two primary types of private-party litigation in Part II. The first section of Part II briefly addresses manufacturer-initiated actions. The second portion of Part II addresses lawsuits initiated by consumers and consumer advocates pursuant to state consumer protection statutes. In Part III, this Article explains the

---

[17] *See* Elaine Watson, *Evaporated Cane Juice Lawsuits Update: Blue Diamond, Trader Joe's, Wallaby Yogurt Co Under Fire, Chobani Off the Hook?*, FOOD NAVIGATOR-USA.COM (Oct. 9, 2013), http://www.foodnavigator-usa.com/Regulation/Evaporated-cane-juice-lawsuits-update-Blue-Diamond-Trader-Joe-s-Wallaby-Yogurt-Co-under-fire-Chobani-off-the-hook.

[18] *See infra* Part II.

[19] *See infra* Part III.A.

[20] *See, e.g.*, ATT'Y GEN. ERIC T. SCHNEIDERMAN, http://www.ag.ny.gov/ (last visited Mar. 20, 2014) ("Law enforcement actions are taken by the [New York] Attorney General to protect the public good and to ensure a fair market place."). Attorneys general separately work on antitrust issues to support a fair marketplace that also protects consumers. *See generally A Federal-State Partnership on Competition Policy: State Attorneys General as Advocates*, FTC (Oct. 1, 2003), http://www.ftc.gov/public-statements/2003/10/federal-state-partnership-competition-policy-state-attorneys-general ("The past 20 years has seen the emergence of a strong consensus in antitrust that enhancing consumer welfare is and should be its *single* unifying goal."). Antitrust litigation is beyond the scope of this paper.

litigation and pre-litigation authority of attorneys general to protect consumers in the food-labeling context and discusses how attorneys general can utilize this power to broadly address questionable food-labeling practices. Although the consumer protection authority of attorneys general is the focus of this section, a brief discussion of litigation pursuant to their *parens patriae* authority in the context of food and food labeling is included.

I. THE FOOD, DRUG, AND COSMETIC ACT

Pursuant to the Food, Drug, and Cosmetic Act ("FDCA"), the FDA regulates the safety and labeling of packaged food.[21] The NLEA authorizes the FDA to require the disclosure of ingredient information and specific facts on the Nutrition Facts Panel and to regulate nutrition and health-related claims.[22] Food labels are considered commercial speech and are protected to an intermediate degree under the First Amendment.[23] As such, the government may "require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive."[24] The government may also constitutionally restrict commercial claims found to be "[f]alse, deceptive, or misleading."[25] The FDA is the government entity in charge of policing food labels, but it is faced with resource and authority limitations.[26]

A. Labeling

The FDA permits food manufacturers to utilize several types of claims on food packaging: health claims,[27] qualified health claims,[28]

---

[21] *See* Food, Drug, and Cosmetic Act, 21 U.S.C. § 343 (2012).

[22] Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (codified at 21 U.S.C. § 343 (2012)).

[23] *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 478, 481–83 (1995).

[24] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976).

[25] *In re* R.M.J., 455 U.S. 191, 200, 203 (1982).

[26] A brief synopsis of these issues is presented in this paper. For a comprehensive discussion of the FDA's authority and lack thereof, see Pomeranz, *supra* note 13, at 630, 633–34, 636–37. Also see generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-102, FOOD LABELING: FDA NEEDS TO REASSESS ITS APPROACH TO PROTECTING CONSUMERS FROM FALSE OR MISLEADING CLAIMS 24–25, 27 (2011) [hereinafter GAO, FDA NEEDS TO REASSESS ITS APPROACH], *available at* http://www.gao.gov/assets/320/314473.pdf (discussing the FDA's authority as well as its lack of authority).

[27] Health claims characterize the relationship of a substance to a disease or health-related condition, and they must be based on a "significant scientific agreement" standard. Food Labeling, 21 C.F.R. § 101.14(c) (2013). An example is: "Healthful diets with adequate folate may reduce a woman's risk of having a child with a brain or spinal cord birth defect." *Id.* § 101.79(d)(1)(i).

structure/function claims, and nutrient content claims.[29] The latter two categories of claims have been the subject of most of the food packaging litigation.[30] According to the FDA, "[s]tructure/function claims describe the role of a nutrient or dietary ingredient intended to affect normal structure or function in humans, for example, 'calcium builds strong bones.'"[31] These make up 5.5% of claims on food labels.[32] The FDA does not require pre-approval for structure/function claims (i.e., there are no nutrition-related criteria to utilizing them), rendering manufacturers alone responsible for their accuracy.[33]

The vast majority of claims on food products (86.9%) are a type of nutrient content claim,[34] which "expressly or implicitly characterizes the level of a nutrient of the type required to be [disclosed] in nutrition labeling," such as "low sodium."[35] There are specific guidelines manufacturers must follow to make nutrient content claims.[36] In addition, if a product is high in fat, saturated fat, sodium, or cholesterol, the claim must be accompanied by a statement to consult the Nutrition Facts Panel.[37] Notably absent from this list are trans fat and added

---

[28] Qualified health claims are permitted when credible, emerging, or limited scientific evidence supports a relationship between a food and reduced risk of a "disease or health-related condition." Office of Nutrition, Labeling, & Dietary Supplements, FDA, *Guidance for Industry: Evidence-Based Review System for the Scientific Evaluation of Health Claims—Final* (Jan. 2009), http://www.fda.gov/food/guidanceregulation/guidancedocumentsregulatoryinformation/labelingnutrition/ucm073332.htm.

[29] Timothy D. Lytton, *Banning Front-of-Package Food Labels: First Amendment Constraints on Public Health Policy*, 14 PUB. HEALTH NUTRITION 1123, 1123 (2011), http://journals.cambridge.org/download.php?file=%2FPHN%2FPHN14_06%2FS1368980010002843a.pdf&code=6eb5028a6ceb6e6d3592b187924f0996.

[30] Marc Sanchez, *70 Percent of Dietary Supplement Companies Violate FDA Regulations*, NATURALPRODUCTSINSIDER.COM (Nov. 7, 2013), http://www.naturalproductsinsider.com/articles/2013/11/70-percent-of-dietary-supplement-companies-violat.aspx; Watson, *Improper Nutrient Content Claims*, *supra* note 14.

[31] *Claims that Can Be Made for Conventional Foods and Dietary Supplements*, FDA (Sept. 2003), http://www.fda.gov/food/ingredientspackaginglabeling/labelingnutrition/ucm111447.htm.

[32] GAO, FDA NEEDS TO REASSESS ITS APPROACH, *supra* note 26, at 13.

[33] *See* Taryn M. DeVeau, Note, *Naturally Confusing Consumers: Express Federal Preemption of State Claims Regarding False and Misleading Food Product Labels*, 5 KY. J. EQUINE AGRIC. & NAT. RESOURCES L. 119, 136 (2012–2013); Alexandra Ledyard, Comment, *Snake Oil in Your Pomegranate Juice: Food Health Claims and the FTC*, 47 U.S.F. L. REV. 783, 792 (2013).

[34] GAO, FDA NEEDS TO REASSESS ITS APPROACH, *supra* note 26, at 13. The FDA divides nutrient content claims into four distinct categories: "nutrient content claim," "significant source claim," "'healthy' claim," and "other implied nutrient content claim." *Id.*

[35] Food Labeling, 21 C.F.R. § 101.13(b)(1)–(2) (2013).

[36] *See id.* § 101.13 (defining nutrient content claims and restricting their size and placement).

[37] *Id.* § 101.13(h)(1); *see also id.* § 101.14(a)(4).

sugar. Therefore, foods often bear nutrient content claims that highlight a positive aspect of the product (e.g., "healthy" or "high in antioxidants") despite the presence of other negative properties, which is most often added sugar.[38] The FDA has not evidenced a plan to update the regulations with respect to permissible claims.[39]

Congress granted the FDA the authority to protect consumers from misbranded food products, which are defined to include false or misleading labels, labels with information and claims not disclosed in the manner required by the regulations, or products that are not properly named or identified.[40] However, Congress did not grant the FDA the necessary authority or resources to adequately police these issues.[41] When the Agency finds a violation, it may issue a Warning Letter to the manufacturer and thereafter it may bring the matter to the Department of Justice for prosecution; however, this latter tool is rarely utilized in this context.[42] Although Warning Letters seem to hold little practical weight,[43] FDA enforcement is still inconsistent, and the Agency does not issue Warning Letters for every potential violation it finds.[44] For example, both Diet Coke Plus and Cherry 7Up Antioxidant directly violated the FDA's Policy on Fortification,[45] but only the manufacturer of the former received a Warning Letter.[46] The Agency additionally does not seem to enforce the general prohibition on misleading claims.[47]

---

[38] *See* CEREAL FACTS, *supra* note 12, at 28, 41; Pomeranz, *supra* note 13, at 623–24.

[39] However, the FDA has indicated that it plans to update the Nutrition Facts Panel, and it is considering including a requirement to disclose added sugar. *See* Notice, Experimental Study on Consumer Responses to Nutrition Facts Labels with Various Footnote Formats and Declaration of Amount of Added Sugars, 78 Fed. Reg. 32,394, 32,394–96 (May 30, 2013).

[40] *See* Food, Drug, and Cosmetic Act, 21 U.S.C. § 343 (2012).

[41] For a more comprehensive discussion of the FDA's lack of authority, see Pomeranz, *supra* note 13, at 619.

[42] Erin J. Asher, Comment, *Lesson Learned from New Zealand: Pro-Active Industry Shift Towards Self-Regulation of Direct-to-Consumer Advertising Will Improve Compliance with the FDA*, 16 ALB. L.J. SCI. & TECH. 599, 605 (2006); *see* 21 U.S.C. § 335.

[43] *See* Watson, *Improper Nutrient Content Claims*, *supra* note 14; *see also* Pomeranz, *supra* note 13, at 619–20.

[44] *See* Massachusetts v. EPA, 549 U.S. 497, 527 (2007) ("As we have repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities. That discretion is at its height when the agency decides not to bring an enforcement action." (citation omitted)).

[45] Pomeranz, *supra* note 13, at 626–27.

[46] *See id.* at 627; Warning Letter from Roberta F. Wagner, Director, FDA Office of Compliance, to Muhtar Kent, President and CEO, Coca-Cola Co. (Dec. 10, 2008), *available at* http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2008/ucm1048050.htm.

[47] GAO, FDA NEEDS TO REASSESS ITS APPROACH, *supra* note 26, at 27; *see also* Food, Drug, and Cosmetic Act, 21 U.S.C. § 343(a) (defining a misleading label).

Due to lax requirements and enforcement mechanisms, many food products bear claims that appear legally sound but are nutritionally questionable. If the FDA questions whether a label violates the regulations, the Agency cannot require the food manufacturer to turn over the scientific basis for the claim, referred to as substantiation documents.[48] Unlike the FTC, which has this power, the FDA must actually conduct its own research to determine if it is scientifically valid—a requirement that is prohibitive given the limited resources of the Agency.[49]

B. "Enforcing" the Nutrition Labeling and Education Act

Consumers, advocacy groups, and food manufacturers attempt to utilize litigation as a tool to address food-labeling deficiencies and fulfill the enforcement gaps left by the FDA. However, the FDCA does not

---

Internationally, Codex Alimentarius general principles state that "no food should be described or presented in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character in any respect." WORLD HEALTH ORG. & FOOD & AGRIC. ORG. OF THE U.N., CODEX ALIMENTARIUS: FOOD LABELLING § 1.2, at 21 (5th ed. 2007), *available at* ftp://ftp.fao.org/codex/Publications/Booklets/Labelling/Labelling_2007_EN.pdf. Countries generally prohibit misleading labels but have taken different approaches in permitting or restricting specific types of nutrition-related claims. *See* Kasapila & Shaarani, *supra* note 1, at 2, 4.

[48] GAO, FDA NEEDS TO REASSESS ITS APPROACH, *supra* note 26, at Highlights, 27.

[49] *Id.* at 27. A striking example of this point is the case of Kellogg's claim that its Rice Krispies cereal "helps support your child's immunity." Press Release, Or. Dep't of Justice, Kellogg Settlement Will Provide Nearly 500,000 Boxes of Cereal to the Hungry (Dec. 17, 2009) [hereinafter Kellogg Settlement], *available at* http://www.doj.state.or.us/releases/pages/2009/rel122209.aspx. The FDA did not issue a Warning Letter to Kellogg based on this claim likely because it is considered a structure/function claim, over which the Agency did not establish guidelines, *see* DeVeau, *supra* note 33, at 136, and because it could not obtain substantiation documents to determine the veracity of the claim, which the Agency has limited ability to obtain, *see* GAO, FDA NEEDS TO REASSESS ITS APPROACH, *supra* note 26, at Highlights, 27. However, the Oregon Attorney General issued a letter to Kellogg's demanding the company explain the scientific basis for the claim. NAT'L POL'Y & LEGAL ANALYSIS NETWORK, FACT SHEET: STATE AG ENFORCEMENT OF FOOD MARKETING LAWS: A BRIEF HISTORY 3 (2010) [hereinafter FACT SHEET: STATE AG ENFORCEMENT], *available at* http://publichealthlawcenter.org/sites/default/files/resources/phlc-fs-agstatefoodenforce-2010.pdf. Thereafter, the FTC investigated the immunity claim in the advertising for the product. *See* Press Release, FTC Investigation of Ad Claims that Rice Krispies Benefits Children's Immunity Leads to Stronger Order Against Kellogg (June 3, 2010) [hereinafter FTC Investigation of Ad Claims], *available at* http://www.ftc.gov/news-events/press-releases/2010/06/ftc-investigation-ad-claims-rice-krispies-benefits-childrens. The FTC and attorneys general have similar authorities and both had the jurisdiction to pursue the claim, while the FDA did not. Pomeranz, *supra* note 13, at 634; *see* FACT SHEET: STATE AG ENFORCEMENT, *supra*, at 3; Kellogg Settlement, *supra*. Kellogg withdrew the statement and settled with the Attorney General and was reprimanded by the FTC. FTC Investigation of Ad Claims, *supra*; Kellogg Settlement, *supra*.

provide a private right of action to enforce the regulations.[50] This means that a private party cannot sue under the Act to claim a violation of the NLEA. Therefore, aggrieved parties attempt to sue pursuant to other federal and state laws.[51] But the NLEA also contains a preemption provision, which, although narrow, further confines such lawsuits.[52]

The NLEA's preemption provision explicitly states that it preempts efforts that seek to compel manufacturers to label food in a manner that is "not identical to" the federal requirements.[53] Therefore, state laws that "are affirmatively different from the Federal requirements" are preempted.[54] This protects manufacturers from competing state laws, such as having to comply with fifty different state requirements for a Nutrition Facts Panel, which would make conducting business in each state prohibitive. The preemption provision does, however, permit plaintiffs to bring lawsuits that seek to enforce identical requirements of the NLEA contained in state law[55] and address practices that the FDA has chosen not to regulate.[56]

Sometimes a claim might not be preempted, but a court will decline to entertain the case based on the doctrine of primary jurisdiction.[57] This

---

[50] Chavez v. Blue Sky Natural Beverage Co., 268 F.R.D. 365, 372–73 (N.D. Cal. 2010); *see also* 21 U.S.C. § 337(a); Khasin v. Hershey Co., No. 5:12-CV-01862 EJD, 2012 U.S. Dist. LEXIS 161300, at *11–12 (N.D. Cal. Nov. 9, 2012).

[51] *See, e.g.*, Smajlaj v. Campbell Soup Co., 782 F. Supp. 2d 84, 91 (D.N.J. 2011) (discussing plaintiff's claims based on the New Jersey Consumer Fraud Act and breach of express warranty); Chacanaca v. Quaker Oats Co., 752 F. Supp. 2d 1111, 1114 (N.D. Cal. 2010) (hearing complaints against Quaker Oats based on the Lanham Act and California law); *In re* Pepsico, Inc., Bottled Water Mktg. & Sales Practices Litig., 588 F. Supp. 2d 527, 528–29 (S.D.N.Y. 2008) (examining plaintiffs' allegations that defendant violated consumer protection statutes, was unjustly enriched, and violated California's Song-Beverly Consumer Warranty Act).

[52] 21 U.S.C. § 343-1(a).

[53] *Id.* § 343-1(a)(5).

[54] *Chacanaca*, 752 F. Supp. 2d at 1118 (quoting Beverages: Bottled Water, 60 Fed. Reg. 57,076, 57,120 (Nov. 13, 1995) (codified at 21 CFR pts. 103, 129, 165, 184)).

[55] Turek v. Gen. Mills, Inc., 662 F.3d 423, 426 (7th Cir. 2011).

[56] *See In re* Simply Orange Orange Juice Mktg. & Sales Practices Litig., No. 4:12-MD-02361-FJG, 2013 U.S. Dist. LEXIS 28080, at *1–2, *8–9 (W.D. Mo. Mar. 1, 2013) (allowing plaintiffs to make allegations that fruit juices improperly used the word *natural* on their labels); Red v. Kraft Foods, Inc., 754 F. Supp. 2d 1137, 1142, 1145 (C.D. Cal. 2010) (denying defendant's motion to dismiss plaintiff's suit alleging that defendant had improperly claimed its foods contained real vegetables); *Chacanaca*, 752 F. Supp. 2d at 1123–24 (refusing to preempt plaintiffs' state claims that the word "wholesome" was used inappropriately on a label). *But see* Astiana v. Hain Celestial Grp., Inc., 905 F. Supp. 2d 1013, 1016 (N.D. Cal. 2012) (declining to determine whether cosmetics labels improperly used the word *natural*).

[57] Elaine Watson, *GMOs and Natural Claims: 'FDA Is Losing Credibility with Industry, Consumers and the International Community by Ignoring Key Food Labeling Controversies', Says Attorney*, FOOD NAVIGATOR-USA.COM (Sept. 12, 2013),

occurs when a court determines that Congress delegated the determination of an area of law to a regulatory agency and the court is faced with a novel or particularly complicated issue.[58] In this context, a court might determine that the FDA has primary jurisdiction over the issue and that the court should abstain from deciding the case in order to protect the "integrity of a regulatory scheme."[59] If the FDA has not indicated whether a particular claim is unlawful or misleading, a court may not want to make that determination.[60] Conversely, when FDA policy is clear or if the Agency affirmatively opted out of regulating an issue, this doctrine is inapplicable because a court would be less concerned that it could undermine the FDA's authority.[61]

One method to avoid preemption or the doctrine of primary jurisdiction is for plaintiffs to bring a lawsuit based on an advertising campaign that uses the same misleading language as the label. As opposed to the FDCA, the FTC Act contains a savings clause expressly permitting litigation based on state statutes that prohibit unfair and deceptive marketing.[62] If a consumer were induced to purchase a product based on the misleading advertisements, then the alleged injury would exist regardless of the label, and thus litigation based on this claim is not preempted by the FDCA.[63]

II. LITIGATION TO ADDRESS MISLEADING FOOD LABELS

Litigation by consumers and consumer advocates has escalated in the context of food labels. Unlike manufacturer-initiated litigation, consumers and advocates sometimes initiate litigation for the very purpose of protecting the public and improving the food-labeling landscape. Proponents of such litigation deem a substandard regulatory environment the opportune setting to use litigation to fill gaps in the law

---

http://www.foodnavigator-usa.com/Regulation/GMOs-and-natural-claims-FDA-is-losing-credibility-with-industry-consumers-and-the-international-community-by-ignoring-key-food-labeling-controversies-says-attorney [hereinafter Watson, *GMOs and Natural Claims*].

[58] *See* Ivie v. Kraft Foods Global, Inc., No. C-12-02554-RMW, 2013 U.S. Dist. LEXIS 25615, at *15 (N.D. Cal. Feb. 25, 2013).

[59] United States v. Phila. Nat'l Bank, 374 U.S. 321, 353 (1963). The Northern District of California recently applied the doctrine of primary jurisdiction to a food law case. *See Ivie*, 2013 U.S. Dist. LEXIS 25615, at *14 (quoting *Syntek Semiconductor*, 307 F.3d at 781).

[60] *Ivie*, 2013 U.S. Dist. LEXIS 25615, at *18.

[61] *Id.*

[62] 15 U.S.C. § 57b(e) (2012).

[63] Loreto v. Proctor & Gamble, 515 F. App'x 576, 579–80 (6th Cir. 2013). This type of claim mimics the complaints by the FTC for the Kellogg "immunity" claim described in FTC Investigation of Ad Claims, *supra* note 49.

and fulfill an agency's duty to police regulatory infractions.[64] Litigation in this context is also considered a useful tool when other forms of advocacy have not proven successful.[65] But even proponents recognize the need to use the tool carefully to avoid unintended consequences.[66]

Consumer-based litigation has led to great public health victories. For example, litigation in the area of motor vehicle safety resulted in safer product design for automobiles, protecting all consumers.[67] Sometimes, however, litigation is a misguided effort to ostensibly further public interests because it is based on incorrect scientific conclusions[68] or on promising but undeveloped legal theories,[69] and it backfires for public interests related to health and consumer protection.[70] For example, when two teenagers unsuccessfully sued McDonald's alleging that the restaurant's food caused them health problems such as obesity and diabetes, the National Restaurant Association ran a successful nationwide campaign to pass legislation blocking this type of lawsuit.[71] Now, at least twenty-five states have laws preempting a plaintiff's ability to bring such a case, which has had farther-reaching ramifications for public health than simply obstructing personal injury lawsuits.[72]

---

[64] Stephen P. Teret, *Litigating for the Public's Health*, 76 AM. J. PUB. HEALTH 1027, 1027 (1986), *available at* http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.76.8.1027.

[65] *Id.*

[66] *Id.*

[67] *See* Jon S. Vernick et al., *Role of Litigation in Preventing Product-Related Injuries*, 25 EPIDEMIOLOGIC REVS. 90, 92–93 (2003), http://epirev.oxfordjournals.org/content/25/1/90.full.pdf.

[68] *See, e.g.*, PAUL A. OFFIT, AUTISM'S FALSE PROPHETS: BAD SCIENCE, RISKY MEDICINE, AND THE SEARCH FOR A CURE 156, 158, 175 (2008) (describing litigation based on falsified study results showing that autism is caused by vaccinations—a now debunked theory).

[69] *See, e.g.*, Pelman v. McDonald's Corp., 237 F. Supp. 2d 512, 516, 519 (S.D.N.Y. 2003) (granting McDonald's motion to dismiss claims that the corporation was liable for causing health problems such as obesity).

[70] *See* State v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 435–36 (R.I. 2008) (holding that defendants were not liable for the alleged creation of a nuisance due to lead paint on their products); OFFIT, *supra* note 68, at 175 (explaining that the court's decision in the Omnibus Autism Proceeding left "virtually no room for a successful appeal"); Melanie Warner, *The Food Industry Empire Strikes Back: Lobbying Effort to Shield Companies from Court Action is Gaining Ground*, N.Y. TIMES, July 7, 2005, at C1, *available at* http://www.nytimes.com/2005/07/07/business/07food.html?pagewanted=all&_r=1& (describing how food companies responded by successfully lobbying for laws protecting them from suits alleging their products caused consumers' obesity).

[71] Warner, *supra* note 70, at C1.

[72] Cara L. Wilking & Richard A. Daynard, *Beyond Cheeseburgers: The Impact of Commonsense Consumption Acts on Future Obesity-Related Lawsuits*, 68 FOOD & DRUG L.J. 229, 230, 237 (2013); *see also Study of State Cheeseburger Bills Finds They Go Well*

Consumer-initiated litigation in the area of food labels has not had such disconcerting outcomes or backfired in the same manner. The drawback, however, is that it is not fulfilling the need for a robust regulatory scheme and has not led to a comprehensive or even notable shift in the food-labeling environment. In order for this strategy to work, it must foster industry-wide change. Such change has not been borne out by current litigation efforts. Further, there is a concern that litigation provides an excuse for needed agency action or congressional intervention to address the current regulatory deficiencies and related resource needs.[73] Therefore, acknowledging the weak regulatory environment and recognizing the political reality that Congress is not imminently overhauling food-labeling regulations and the FDA is not undertaking this on its own, this Article argues that if litigation is the last alternative, it should be initiated by the attorneys general.

The remainder of this section briefly discusses manufacturer-initiated litigation under the Lanham Act and actions under NAD to dispose of any notions that this strategy can effectively protect the public[74] and to show the overlapping interests that manufacturers and consumers have in truthful, clear labeling. It then discusses the successes and failures of consumer-initiated litigation in the context of food-labeling cases.

A. Food Manufacturer Plaintiffs

The Lanham Act is traditionally regarded as a trademark protection act but functions to protect fair competition in business.[75] The Lanham Act provides a cause of action to a manufacturer who believes it has been or is likely to be damaged by a competitor's food label that has a false or misleading description or representation of fact (using words or images) or that "misrepresents the nature, characteristics, qualities, or geographic origin of . . . [the] goods."[76] There is no consumer right of action under the Lanham Act, so only commercial competitors with an

---

Beyond "Tort Reform," PUB. HEALTH ADVOC. INST. (Aug. 26, 2013), http://www.phaionline.org/2013/08/26/study-of-state-cheeseburger-bills-finds-they-go-well-beyond-tort-reform/.

[73] *See* Ledyard, *supra* note 33, at 787, 805.

[74] The suggestion that Lanham Act litigation could be used to address food industry violations of the FDCA was made to the author by a prominent corporate attorney who later worked with public health experts at a leading public health school.

[75] Dustin Marlan, Comment, *Trademark Takings: Trademarks as Constitutional Property Under the Fifth Amendment Takings Clause*, 15 U. PA. J. CONST. L. 1581, 1606 (2013).

[76] 15 U.S.C. § 1125(a)(1) (2012).

economic interest may sue pursuant to it.[77] Successful plaintiffs can obtain monetary damages, lost profits, or injunctive relief. In order to obtain monetary damages for a Lanham Act violation, the plaintiff must show that consumers were "actually" misled by the statement through survey evidence.[78] Plaintiffs seeking injunctive relief must show that the "representations 'have a tendency to deceive consumers.'"[79] Given the expense of pursuing a successful Lanham Act case, many manufacturers initiate less formal, less costly proceedings before the industry self-regulatory body, NAD.[80]

NAD does not require discovery or survey evidence and NAD proceedings are relatively quick compared to actual lawsuits, but the results of NAD decisions are non-binding on the parties.[81] Despite the voluntary nature of NAD proceedings, compliance is said to be high.[82] Both Lanham Act and NAD cases in the context of food products are based on allegations that a manufacturer utilized false, misleading, or deceptive claims to improperly draw consumers to its product based on faulty information, which allegedly hurt the plaintiff whose product the consumer might have otherwise chosen.[83]

---

[77] *See* Sandoz Pharm. Corp. v. Richardson-Vicks, Inc., 902 F.2d 222, 224, 230–32 (3d Cir. 1990) (applying the Lanham Act to a dispute between direct commercial competitors); *see also* Leonetti's Frozen Foods, Inc. v. Am. Kitchen Delights, Inc., No. 11-6736, 2012 U.S. Dist. LEXIS 47815, at *29 (E.D. Pa. Apr. 4, 2012) (quoting EVCO Tech. & Dev. Co. v. Buck Knives, Inc. No. 05-CV-6198, 2006 U.S. Dist. LEXIS 68549, at *2 (E.D. Pa. Sept. 22, 2006)) (explaining that "'parties not in direct competition may have standing to sue if they meet the "reasonable interest" standard'").

[78] Pizza Hut, Inc. v. Papa John's Int'l, Inc., 227 F.3d 489, 497 (5th Cir. 2000).

[79] *Id.* (quoting Balance Dynamics Corp. v. Schmitt Indus., 204 F.3d 683, 690 (6th Cir. 2000)).

[80] John E. Villafranco & Jennifer Ngai, *Making It Stop: A Practical Guide to Challenging Your Competitor's Advertising Claims*, METRO. CORPORATE COUNSEL, Oct. 2008, at 39, 39. NAD accepts consumer complaints, but the majority of the cases considered by the body are initiated by the Division itself or a competitor. *See* Andrew Strenio et al., *Self-Regulatory Techniques for Threading the Antitrust Needle*, ANTITRUST, Summer 2004, at 57, 57, 59; *Consumer Complaints*, ADVER. SELF-REGULATION COUNCIL, http://www.asrcreviews.org/2011/08/consumer-complaint-nad/ (last visited Mar. 20, 2014).

[81] Villafranco, *supra* note 80; Hugh Latimer & John W. Kuzin, *The NAD: A Primary Forum for Resolving Advertising Disputes*, METRO. CORPORATE COUNSEL, Jan. 2009, at 17, 17.

[82] Latimer & Kuzin, *supra* note 81. NAD states its purpose is to uphold "the integrity of advertising by ensuring that the claims and messages conveyed to consumers in advertising (including claims on product packaging) are accurate and properly substantiated." Nestle USA, Inc. v. Conagra Foods, Inc., Re: Marie Callender's Frozen Three Meat & Four Cheese Lasagna, NAD Case No. 5446, at 7 (Apr. 5, 2012).

[83] *See, e.g.*, Pom Wonderful v. Coca-Cola Co., 679 F.3d 1170, 1174–75 (9th Cir. 2012); *see also* Merisant Co. v. McNeil Nutritionals, 515 F. Supp. 2d 509, 526, 536 (E.D. Pa. 2007) (claiming that "Merisant's positioning of its artic ficial sweeteners as 'natural'" was misleading); Campbell Soup Co. v. Dr. Pepper Snapple Grp., Inc., Re: Mott's Garden Blend

Because Lanham Act plaintiffs conduct surveys to prove that consumers have been misled by the label in question, there is sometimes a misconception that litigation under the Lanham Act acts as the "'vicarious avenger' of the public's right to be protected against false advertising."[84] Courts are clear that it is not.[85] Rather, "the public interest is presumed to be adequately represented by the FDA" instead of a party acting as "a private attorney general."[86] Thus, although a successful Lanham Act plaintiff can effectively remove a problematic claim from the marketplace, this is a side benefit predicated on winning the case and does not function to overhaul other questionable claims or industry-wide practices that do not harm competition. Litigation pursuant to the Lanham Act is also not a method to circumvent jurisdictional barriers.[87] Notably, Lanham Act litigants are not immune from the FDCA's preemption provision or the doctrine of primary jurisdiction, and thus have been unable to pursue claims.[88]

Lanham Act and NAD cases do reveal a business interest in factually-accurate labels to support honest competition. For example, Pom Wonderful brought a series of cases alleging that their competitors were selling adulterated pomegranate juice despite the label claim that it was "100% pomegranate" or "100% pure."[89] Pom tested the juices to discover one of its competitor's juices was in fact diluted, and thus the

---

Vegetable Juice, NAD Case No. 5413, at 1–2 (Jan. 6, 2012) (alleging that Mott's Garden Blend Vegetable Juice was tomato-based and not comprised of "garden fresh vegetables" as stated).

[84] Am. Home Prods. Corp. v. Johnson & Johnson, 672 F. Supp. 135, 145 (S.D.N.Y. 1987) (quoting John Wright, Inc. v. Casper Corp., 419 F. Supp. 292, 324–25 n.18 (E.D. Pa. 1976)) (internal quotation marks omitted).

[85] *Id. See also* Sandoz Pharm. Corp. v. Richardson-Vicks, Inc., 902 F.2d 222, 230 (3d Cir. 1990).

[86] *Am. Home Prods.*, 672 F. Supp. at 145 ("If the intercession of a private attorney general is needed to press the FDA to perform that duty with respect to a particular product label, the quickest and most effective relief could be obtained through a direct petition to the agency and not through an unfair competition action against the manufacturer.").

[87] *See, e.g., Pom Wonderful*, 679 F.3d at 1175–76; CytoSport, Inc. v. Vital Pharm., Inc., 894 F. Supp. 2d 1285, 1293–94 (E.D. Cal. 2012) (using a hybrid reason to dismiss the claims, stating that the FDA has primary enforcement authority and has already spoken on the labeling concern at issue).

[88] *See, e.g.*, Mylan Labs., Inc. v. Matkari, 7 F.3d 1130, 1139 (4th Cir. 1993) (dismissing plaintiffs' Lanham Act claims under a preemption theory); *see also* Healthpoint, Ltd. v. Ethex Corp., 273 F. Supp. 2d 817, 838 (W.D. Tex. 2001) (explaining that the FDA had primary jurisdiction to decide part of the Lanham Act claim).

[89] *See* Pom Wonderful v. Organic Juice USA, Inc., 769 F. Supp. 2d 188, 190–91 (S.D.N.Y. 2011); Pom Wonderful v. Purely Juice, Inc., No. CV-07-02633 CAS (JWJx), 2008 U.S. Dist. LEXIS 55426, at ¶¶ 12–16, 32 (C.D. Cal. July 17, 2008).

purity claim was literally false.[90] But not all cases produce positive outcomes. In another case initiated by Pom under the Lanham Act against a competitor for deceptively labeling and marketing juice, the jury found that although Pom proved its anti-competitive claims, it failed to prove that it suffered an injury.[91] Thus, Pom ostensibly won but did not actually obtain the relief it sought.[92] If attorneys general increased litigation under their state statutes to address such deceptive practices, companies like Pom would not need to police the marketplace to the magnitude they have. Attorney general action would be premised on fostering a fair marketplace,[93] which protects honest manufacturers as well.

B. Consumer Plaintiffs

Consumers and consumer advocates initiate litigation against manufacturers for questionable labeling practices pursuant to traditional theories of tort liability and the same state statutes utilized by the attorneys general.[94] Each state and the District of Columbia have statutes that are patterned after the FTC Act to varying degrees.[95] These laws are colloquially referred to as UDAP statutes. The name stems from the FTC Act's prohibition on "unfair or deceptive acts or practices."[96] The state statutes likewise generally prohibit "unfair or deceptive acts or practices" or UDAP.[97]

State consumer protection statutes permit consumers to recover for harm caused by unfair or deceptive practices.[98] However, there are preconditions that must be met in order for a private plaintiff to have standing to sue. At least forty-eight of these UDAP statutes require the

---

[90] *Purely Juice*, 2008 U.S. Dist. LEXIS 55426, at ¶¶ 53–56.

[91] *See* Pom Wonderful v. Welch Foods, Inc., No. CV 09-567 AHM (AGRx), 2010 U.S. Dist. LEXIS 126323, at *2–3 (C.D. Cal. Nov. 18, 2010).

[92] *Id.*

[93] *See, e.g.*, ATTORNEY GENERAL ERIC T. SCHNEIDERMAN, *supra* note 20 ("Law enforcement actions are taken by the Attorney General to protect the public good and to ensure a fair market place."); *see also* Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 645 (2005).

[94] CAROLYN L. CARTER & JONATHAN SHELDON, NAT'L CONSUMER LAW CTR., UNFAIR AND DECEPTIVE ACTS AND PRACTICES 722 (8th ed. 2012).

[95] Glenn Kaplan & Chris Barry Smith, *Patching the Holes in the Consumer Product Safety Net: Using State Unfair Practices Laws to Make Handguns and Other Consumer Goods Safer*, 17 YALE J. ON REG. 253, 275–76 (2000); CARTER & SHELDON, *supra* note 94, at 1.

[96] Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (2012).

[97] *See, e.g.*, Consumer Protection Act—Unfair or Deceptive Acts or Practices, WASH. REV. CODE § 61.24.135 (Westlaw through 2013 Legis.).

[98] CARTER & SHELDON, *supra* note 94, at 627–631.

plaintiff to have suffered actual injury (often monetary damages) in order to bring a claim for damages or even for injunctive relief.[99] This is a crucial point because such statutes bar suits where a plaintiff is acting as a private attorney general and only trying to protect the public.[100] Seven states additionally require that the action be in the public interest, which means that in addition to being personally injured, the plaintiff's action must also vindicate the public's right to be protected from such unfair or deceptive claims.[101] Ten states further require plaintiffs to engage in pre-litigation attempts to settle the dispute informally, such as sending a notice or demand letter or engaging in informal dispute resolution procedures.[102] Compliance with these legal requirements must be pleaded and proven to the court.[103]

Aside from these statutory limitations, there are still additional barriers to bringing suit. Manufacturers have avoided liability by arguing that a plaintiff lacks standing because the claim is preempted or that the court lacks jurisdiction based on the FDA's primary jurisdiction. An example illustrating a successful preemption defense is a case in which plaintiffs sought to impose a disqualifying level of trans fats that would preclude a manufacturer from making nutrient content claims.[104] Because these requirements on manufacturers were dissimilar to those required by the NLEA, such a mandate is preempted by the NLEA.[105] Similarly the doctrine of primary jurisdiction was successfully invoked when a plaintiff challenged the serving size on a breath mint container. The court found that "the FDA is currently engaged in rulemaking procedures to *change* its existing requirements for breath mints, and

---

[99] *See id.*

[100] Mason v. Coca-Cola Co., 774 F. Supp. 2d 699, 704–05 (D.N.J. 2011) (dismissing case because plaintiffs did not suffer an injury by Diet Coke Plus's violation of the NLEA).

[101] CARTER & SHELDON, *supra* note 94, at 651–664. These states overlap with the 49 states that require injury. *Id.* at 628–29.

[102] *Id.* at 667. This is a strategy employed by the Center for Science in the Public Interest as an attempt to urge companies to change their marketing practices prior to, and in lieu of, the initiation of litigation. *See About CSPI*, CTR. FOR SCI. IN THE PUB. INTEREST, http://www.cspinet.org/about/index.html (last visited Mar. 20, 2014); *Litigation Project–Closed Cases*, CTR. FOR SCI. IN THE PUB. INTEREST, http://www.cspinet.org/litigation/closed.html (last visited Mar. 20, 2014); *see also* Stephen Gardner, *Litigation as a Tool in Food Advertising: A Consumer Advocacy Viewpoint*, 39 LOY. L.A. L. REV. 291, 304–05 (2006).

[103] CARTER & SHELDON, *supra* note 94, at 626.

[104] Chacanaca v. Quaker Oats Co., 752 F. Supp. 2d 1111, 1122 (N.D. Cal. 2010).

[105] *Id.* at 1123; *see also* Food, Drug, and Cosmetic Act, 21 U.S.C. § 343-1(a)(5).

thus the doctrine of primary jurisdiction is appropriate" because activity in this area would usurp the FDA's expertise.[106]

Attorneys representing food companies urge their clients to additionally defend against these types of lawsuits by "invoking common sense and plausibility to challenge the sufficiency of plaintiffs' claims."[107] The "common sense and plausibility" defense is derived from the fact that consumer plaintiffs are bound by a "reasonable consumer standard."[108] This means that a court looks to determine as a matter of law if a reasonable consumer would be misled by the claims at issue. Courts have dismissed cases on this basis. For example, a court found that a box of crackers depicting vegetables and stating, "Made with Real Vegetables," was not misleading because a reasonable consumer would not "be deceived into thinking a box of crackers is healthful or contains huge amounts of vegetables."[109] Another court found that a reasonable consumer would not be misled to think that "crunchberries" were derived from real berries.[110]

Courts have allowed claims to go forward when the plaintiff seeks remedies under the state UDAP statutes that are identical to the FDA requirements, for example, when a manufacturer fails to make the required disclosure for nutrient content claims[111] or when the FDA has not defined a term, such as the word *wholesome*, and it is alleged to be misleading in the context of the overall nutritional quality of the food product.[112] Cases that are not dismissed tend to settle. For example, plaintiffs challenged Kellogg's labeling and advertising campaign that claimed that Frosted Mini-Wheats cereal was clinically shown to improve children's attentiveness and other cognitive functions.[113] The

---

[106] Ivie v. Kraft Foods Global, Inc., No. C-12-02554-RMW, 2013 U.S. Dist. LEXIS 25615, at *19, *21 (N.D. Cal. Feb. 25, 2013).

[107] *Food Labeling Litigation: Recent Decisions on Preemption and Primary Jurisdiction*, Goodwin Proctor Alert (Goodwin Proctor LLP, Boston, Mass.), May 14, 2013, at 1, *available at* http://www.goodwinprocter.com/Publications/Newsletters/Client-Alert/2013/0514_Food-Labeling-Litigation_Recent-Decisions-on-Preemption-and-Primary-Jurisdiction.aspx?article=1.

[108] CARTER & SHELDON, *supra* note 94, at 219.

[109] Red v. Kraft Foods, Inc., No. CV 10-1028-GW(AGRx), 2012 U.S. Dist. LEXIS 164461, at *11–12 (C.D. Cal. Oct. 25, 2012).

[110] Sugawara v. Pepsico, Inc., No. 2:08-cv-01335-MCE-JFM, 2009 U.S. Dist. LEXIS 43127, at *8 (E.D. Cal. May 21, 2009).

[111] *Ivie*, 2013 U.S. Dist. LEXIS 25615, at *31–32.

[112] Chacanaca v. Quaker Oats Co., 752 F. Supp. 2d 1111, 1123–24 (N.D. Cal. 2010).

[113] Dennis v. Kellogg Co., No. 09-CV-1786-L (WMc), 2013 U.S. Dist. LEXIS 163118, at *2 (S.D. Cal. Nov. 14, 2013); *Mini-Wheats Class Action Settlement*, CEREALSETTLEMENT.COM, http://www.cerealsettlement.com/ (last visited Mar. 20, 2014).

cereal company denied wrongdoing[114] but was reprimanded by the FTC for the advertising portion of the campaign,[115] and thereafter, the company settled for $4 million.[116]

One of the most common bases for consumer-based litigation is the term *natural*.[117] The FDA has not formally defined the term *natural*,[118] but the Agency's informal policy states that it will not "restrict the use of the term 'natural,' except for added color, synthetic substances, and flavors."[119] The FDA has noted "considerable interest to consumers and industry" in the use of the term *natural* but explained that due to limited resources and competing priorities, the FDA would not undertake rulemaking to define *natural*.[120] Consumers and advocacy groups have initiated considerable litigation over the term. For example, Ben & Jerry's was sued for calling its ice-cream *all natural* although it contained alkalized cocoa, which the plaintiffs argued was a synthetic ingredient.[121] In another case, consumers filed suit alleging AriZona Iced Teas were incorrectly labeled as *natural* because they contained high fructose corn syrup and citric acid.[122] Similarly, Snapple's products were allegedly mislabeled as *natural* because they contained high fructose corn syrup.[123] More recently, the *natural* claim has been challenged when products contain a genetically modified organism ("GMO") as an

---

[114] *Mini-Wheats Class Action Settlement*, *supra* note 113.

[115] FTC Investigation of Ad Claims, *supra* note 49.

[116] *Dennis*, 2013 U.S. Dist. LEXIS 163118, at *9; *Mini-Wheats Class Action Settlement*, *supra* note 113.

[117] *See* Nestle USA, Inc. v. LALA-USA, Inc., Re: La Crème Real Dairy Creamer, NAD Case No. 5359, at 1–2, 6–7 (Aug. 8, 2011) (challenging the claim that a dairy creamer containing disodium phosphate, sodium citrate, carrageenan, and lactase is *natural*). Another example is a suit brought by the company that manufactures the artificial sweeteners Equal and NutraSweet, in which it sued the maker of Splenda under the Lanham Act, alleging that Splenda's advertising claims that it is "Made From Sugar" and is *natural* were false, misleading, and confusing to consumers. Merisant Co. v. McNeil Nutritionals, 515 F. Supp. 2d 509, 514 (E.D. Pa. 2007).

[118] Erik Benny, Essay, *"Natural" Modifications: The FDA's Need to Promulgate an Official Definition of "Natural" that Includes Genetically Modified Organisms*, 80 GEO. WASH. L. REV. 1504, 1508 (2012); Watson, *GMOs and Natural Claims*, *supra* note 57.

[119] Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. 2302, 2407 (Jan. 6, 1993) (to be codified at 21 C.F.R. pts. 5, 101).

[120] *Id.*

[121] Astiana v. Ben & Jerry's Homemade, Inc., Nos. C 10-4387 PJH, C 10-4937 PJH, 2011 U.S. Dist. LEXIS 57348, at *1–2 (N.D. Cal. May 26, 2011).

[122] Ries v. Hornell Brewing Co., No. 10-1139-JF (PVT), 2010 U.S. Dist. LEXIS 86384, at *2–3 (N.D. Cal. July 23, 2010).

[123] Holk v. Snapple Beverage Corp., 575 F.3d 329, 332 (3d Cir. 2009).

ingredient.[124] For example, consumers alleged that Wesson vegetable oils made from GMOs are not "100% natural" despite the company's claims to the contrary.[125] The presence of GMOs compounds the labeling confusion because the FDA does not require that companies disclose bioengineered food,[126] but also has not indicated whether the Agency considers GMOs to be *natural*.[127]

The *natural* cases have mixed results.[128] Courts have dismissed *natural* claims based on the doctrine of primary jurisdiction,[129] or stayed the case to seek clarification from the FDA,[130] even though the Agency repeatedly declines to intervene or further define the term.[131] One court's decision was exacting and found that the claim that high fructose corn syrup is not *natural* because it "cannot be grown in a garden or field, it cannot be plucked from a tree, and it cannot be found in the oceans or seas of this planet," is "rhetoric" and not based on any evidence.[132] Two cases were recently settled where the *natural* claims were linked to questionable GMO claims. Barbara's Bakery, which produces Puffins

---

[124] *See In re* Frito-Lay N. Am., Inc., No. 12-MD-2413 (RRM)(RLM), 2013 U.S. Dist. LEXIS 123824, at *1 (E.D.N.Y. Aug. 29, 2013); Alison Frankel, *Labeling Genetically Modified Food: Regulation Via Litigation Is Back*, REUTERS (Oct. 16, 2013), http://blogs.reuters.com/alison-frankel/2013/10/16/labeling-genetically-modified-food-regulation-via-litigation-is-back/.

[125] Briseno v. Conagra Foods, Inc., No. CV 11-05379 MMM (AGRx), 2011 U.S. Dist. LEXIS 154750, at *4–5 (C.D. Cal. Nov. 23, 2011).

[126] FDA, *Guidance for Industry: Voluntary Labeling Indicating Whether Foods Have or Have Not Been Developed Using Bioengineering; Draft Guidance* (Jan. 2001), http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm059098.htm.

[127] *See generally* Cox v. Gruma Corp., No. 12-CV-6502 YGR, 2013 U.S. Dist. LEXIS 97207, at *5 (N.D. Cal. July 11, 2013); Maggie Hennessey, *Timing Right for Federal Standard on GMO: AHPA*, FOOD NAVIGATOR-USA.COM (Nov. 8, 2013), http://www.foodnavigator-usa.com/Regulation/Timing-right-for-federal-standard-on-GMO-AHPA.

[128] Mike Esterl, *The Natural Evolution of Food Labels*, WALL ST. J., Nov. 6, 2013, at B1.

[129] *See* Astiana v. Hain Celestial Grp., Inc., 905 F. Supp. 2d 1013, 1016–17 (N.D. Cal. 2012).

[130] *See* Holk v. Snapple Beverage Corp., No. 07-3018 (MLC), 2010 U.S. Dist. LEXIS 81596, at *8 (D.N.J. Aug. 10, 2010).

[131] *See id.* at *1, *3; Watson, *GMOs and Natural Claims*, *supra* note 57. The failure of plaintiffs to certify a class also arises as a barrier to plaintiff suits. Watson, *GMOs and Natural Claims*, *supra* note 57. However, a successful individual plaintiff could effectively remove a problematic claim from the marketplace, making class certification a moot benchmark for success in consumer protection cases.

[132] Ries v. Ariz. Beverages USA, No. 10-01139 RS, 2013 U.S. Dist. LEXIS 46013, at *15 (N.D. Cal. Mar. 28, 2013) (quoting Plaintiffs' [Redacted] Consolidated Opposition to Defendants' Motion for Summary Judgment and Motion for Decertification at 16, *Ries*, 2013 U.S. Dist. LEXIS 46013, ECF No. 184).

cereal, and PepsiCo, owners of Naked Juice, settled similar claims for $4 million and $9 million respectively.[133] Furthermore, some manufacturers have reportedly started to pull the *natural* claim, especially when they use GMOs, due to the influx of litigation and the uncertainty of the FDA's position.[134] Admittedly, companies' voluntary withdrawals of *natural* claims as a matter of practice or due to a settlement are a mark of success. However, of the scores of lawsuits filed, there are still only a handful of companies voluntarily discontinuing the claim and two large settlements to date.[135] After years of effort, this only represents a victory for the removal of just one term from a limited number of products.

On rare occasions, consumers successfully win a food-labeling case in court. In the seminal case on this topic, the Ninth Circuit held that Gerber's fruit snacks would "likely deceive a reasonable consumer" because "the packaging pictures a number of different fruits, potentially suggesting (falsely) that those fruits or their juices are contained in the product."[136] The court found that "reasonable consumers should [not] be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list . . . on the side of the box."[137] Such a success effectively requires the company to change the package label, protecting all consumers. It is noteworthy that the California Attorney General wrote an amicus brief in support of the plaintiffs in the *Gerber* case.[138]

The promising win in *Gerber* has not been replicated widely, nor have individual settlements resulted in a significant positive shift in the food-labeling environment as a whole. Consumers simply cannot and should not be expected to police food labels to the extent necessary to correct the food-labeling environment or fill the gaps in regulatory enforcement.

III. ATTORNEY GENERAL ACTIONS

The authority of attorneys general "lies at the intersection of law and public policy" specifically for the purpose of protecting their states' interests.[139] They have two powers relevant to addressing food labels

---

[133] Esterl, *supra* note 128.

[134] *Id.*

[135] *Id.*

[136] Williams v. Gerber Prods. Co., 552 F.3d 934, 939 (9th Cir. 2008).

[137] *Id.*

[138] *Id.* at 937.

[139] Jennifer L. Pomeranz & Kelly D. Brownell, *Advancing Public Health Obesity Policy Through State Attorneys General*, 101 AM. J. PUB. HEALTH 425, 425 (2011); *see also* Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL'Y 1, 3–4 (1993).

through litigation. Attorneys general may bring an action pursuant to states' UDAP statutes or vindicate states' "quasi-sovereign" interests under states' *parens patriae* authority.[140] Each is addressed below.

A. Consumer Protection Authority

Attorneys general have the ability to protect consumers and the public interest by bringing actions pursuant to state UDAP statutes.[141] To date, attorneys general have not utilized this authority to address food-labeling deficiencies to a significant degree. Examples below are drawn from a diverse range of consumer protection activity related to labeling generally and, when available, food-related actions are referenced. The goal of attorney general action in the context of food labels (and related marketing campaigns) should specifically be to protect the public from false, deceptive, and misleading claims. This is the critical piece that has not been and cannot be accomplished to the same extent through private litigation on the same topic. Moreover, engagement by attorneys general in the topic would send an industry-wide message that they consider this an important consumer protection issue, which would likely provide an element of deterrence that does not exist under the FDA.

Although attorneys general do not want to interfere with the FDA's primary jurisdiction over food labels or pursue an action potentially preempted by the NLEA, attorneys general have access to unique strategies of the office and can pursue litigation to a greater extent than any other party. The FDCA has a section that permits an attorney general to bring proceedings in the state's name for violations of certain provisions of the NLEA,[142] directly vitiating primary jurisdiction issues. Notably excluded from this allowance is the clause which prohibits false and misleading labels; however, other relevant provisions such as guidelines for nutrition information and health-related claims are captured by this section.[143] Regardless, the attorneys general can bring actions to vindicate deceptive practices pursuant to their state UDAP statutes.[144] Misleading claims are still prohibited by the FDCA, and attorneys general can pursue this topic under their traditional consumer

---

[140] *See* CARTER & SHELDON, *supra* note 94, at 146; Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of* Parens Patriae, 74 TUL. L. REV. 1859, 1867 (2000).

[141] Kaplan & Smith, *supra* note 95, at 325.

[142] Food, Drug, and Cosmetic Act, 21 U.S.C. § 337(b)(1) (2012).

[143] *Id.* Section 337 allows attorneys general to bring claims under twelve specific sections of the NLEA but § 343(a), the section that addresses false or misleading labels, is not one of those twelve. *Id.*

[144] *See* CARTER & SHELDON, *supra* note 94, at 146.

protection authority. Further, they can pursue questionable labeling practices through pre-litigation means and by collaborating with the FDA. These powers are unique to the office of attorney general and allow the attorneys general to avoid barriers to standing faced by other parties, as discussed below.

Attorneys general can also bring actions based on broader advertising campaigns, which include the misleading or deceptive labels at issue in this Article.[145] When the marketing campaign captures the language of the label, whether by utilizing the same claim or by including the image of the package in the advertisement, attorney general activity against the marketing campaign avoids concerns over usurping the FDA's authority or interfering with the regulatory scheme and is not preempted by the FDCA.[146] Because companies often seek to settle with the attorney general, a settlement can include reforms to broader marketing campaigns in addition to labeling practices.

There are several strengths associated with the office of attorney general that support litigation by attorneys general rather than by private parties. First, attorneys general possess broader authority to pursue UDAP claims than consumers and can bring a case when private plaintiffs are limited by the requirements of the statutes.[147] Attorneys general do not face any of the preliminary standing requirements of private plaintiffs because their authority is premised on their ability to bring actions to vindicate the public interest. Thus, they do not need to rely on the presence of an actual injury. This is especially relevant when food labels are misleading but do not necessarily result in a cognizable injury.

Second, attorneys general do not need to argue that a "reasonable consumer" would be deceived by the claim, but rather that the food label has the capacity to deceive the public.[148] Despite the fact that research indicates that reasonable consumers are confused by current food-labeling practices,[149] courts are not always convinced that this is the case in the context of consumer suits.[150] Courts are, however, more deferential to attorney general-initiated suits because attorneys general have the additional authority to protect the greater citizenry, which includes vulnerable persons such as the elderly and children, who may be more

---

[145] *See id.* at 831; Note, *Developments in the Law: Deceptive Advertising*, 80 HARV. L. REV. 1005, 1124–25 (1967).

[146] Additionally, the FTC Act has a savings clause. 15 U.S.C. § 57b(e) (2012).

[147] CARTER & SHELDON, *supra* note 94, at 846.

[148] *Id.* at 832–33.

[149] Harris et al., *Nutrition-related Claims on Children's Cereals*, *supra* note 6, at 2207–09; *see also* Drewnowski et al., *supra* note 6, at 692–93.

[150] *See supra* Part II.B.

susceptible to questionable labeling practices than a "reasonable consumer."[151]

Third, by virtue of their position, attorneys general can work in a variety of methods using different strategies of the office. They can work independently or together, and can simultaneously work with federal agencies.[152] Working in concert makes sense when the actionable practice occurs nationally (such as through labeling or marketing campaigns) and impacts states similarly. In one such example, thirty-eight attorneys general brought a lawsuit against Janssen Pharmaceuticals, Inc., charging it with improper marketing and advertising of its anti-psychotic drugs, which resulted in the "largest multi-state consumer protection-based pharmaceutical settlement in history."[153] Multi-state action also fosters non-monetary outcomes such as increased disclosures by the company. In another case, nineteen attorneys general investigated alleged misrepresentations by Pfizer related to its drug Zithromax.[154] As part of the settlement, the drug company agreed to make specific, factual disclosures aimed at protecting and educating consumers about antibiotic resistance in its future marketing materials.[155]

Attorneys general also collaborate with federal regulatory agencies.[156] These "State-Federal Partnership[s]" utilize the authority and expertise of both offices and can effectuate positive policy objectives

---

[151] CARTER & SHELDON, *supra* note 94, at 833. In addition, courts may be more deferential to novel theories of unfairness when brought by an attorney general. *Id.*

[152] An attorney general might decide to pursue an issue that is particularly relevant to his or her state's population. For example, the Louisiana Attorney General pursued claims on his own against the health care giant, GlaxoSmithKline, for Medicaid fraud and deceptive marketing practices in order to obtain a larger settlement for the state than by joining a parallel multi-state action. *See Attorney General Recovers $45 Million for Louisiana in Litigation with GSK*, KLAX-TV ABC 31 (July 29, 2013, 10:21 AM), http://klax-tv.com/attorney-general-recovers-45-million-for-louisiana-in-litigation-with-gsk/ ("By pursuing GSK on our own, we have recovered 20 times more money for the state of Louisiana than we would have in the multi-state settlement approved last November." (internal quotation marks omitted)).

[153] Press Release, N.Y. State Office of the Attorney Gen., A.G. Schneiderman Settles $181 Million Deceptive Marketing Case with Janssen Pharmaceuticals and Johnson & Johnson (Aug. 30, 2012), *available at* http://www.ag.ny.gov/press-release/ag-schneiderman-settles-181-million-deceptive-marketing-case-janssen-pharmaceuticals.

[154] Press Release, Md. Attorney Gen., Attorneys General Announce Settlement with Pfizer over Zithromax Advertising (Jan. 6, 2003), *available at* http://www.oag.state.md.us/Press/2003/0106a03.htm.

[155] *Id.*

[156] *See* Dina ElBoghdady, *Skechers Agrees to $40 Million Settlement*, WASH. POST, May 17, 2012, at A11 (describing how forty-four attorneys general and the FTC settled a lawsuit against Skechers, the makers of rocker-bottom athletic shoes, for unsubstantiated health-related claims in the advertising of the shoes).

to a greater extent than working in silos towards the same goal.[157] For instance, thirty-nine states and the FTC worked cooperatively to pursue the Dannon Company for making unsubstantiated claims (not backed by adequate scientific proof) of health benefits associated with consuming its Activia and DanActive products.[158] The parties settled, and Dannon was forced to pay $21 million to the states, which was "the largest payment to date in a multistate settlement with a food producer."[159] Collaborating with the FDA to enforce the FDCA is also a method for attorneys general to work towards the common goal of increased enforcement without eliciting primary jurisdiction issues.

Fourth, attorneys general have pre-litigation powers unavailable to private parties or other government entities. Attorneys general can issue civil investigative demands and subpoenas, both of which are investigative tools to obtain documents and responses to targeted inquiries.[160] An attorney general can use these tools to determine if a UDAP violation exists prior to, or instead of, formally bringing a lawsuit.[161] This method has proven effective in bringing about change even when there might have been standing issues had the attorneys general pursued litigation. For example, without resorting to litigation, thirty-four attorneys general settled with Santa Fe Natural Tobacco Company over an argument that the company's *organic* label potentially misled consumers to believe organic tobacco was less harmful than other tobacco products.[162] Part of the agreed-upon terms required all future

---

[157] Thurbert Baker, *Attorneys General Spring Meeting: "State-Federal Partnership" Theme Is the Message*, POL., L. & POL'Y BLOG (Mar. 12, 2012), http://www.politicsandlawblog.com/2012/03/12/attorneys-general-spring-meeting-state-federal-partnership-theme-is-the-message/ (stating that the theme of the 2012 Spring National Association of Attorneys General (NAAG) meeting was "'State-Federal Partnership,' [which shows that] the work of State Attorneys General is clearly a growth area in public policy, given the likelihood of extensive collaboration between federal agencies and State AGs."). Thurbert Baker is a former attorney general and President of NAAG. *Id.*

[158] Press Release, Attorney Gen. of Mass., Massachusetts Attorney General Martha Coakley and 38 Other States Settle with Dannon for $21 Million Regarding Deceptive Advertising of Activia and DanActive Yogurt Products (Dec. 15, 2010), *available at* http://www.mass.gov/ago/news-and-updates/press-releases/2010/ag-coakley-and-38-other-states-settle-with.html.

[159] *Id.*

[160] CARTER & SHELDON, *supra* note 94, at 835.

[161] *See id.* (explaining that attorneys general may determine whether UDAP violations exist by using administrative subpoenas).

[162] Press Release, Cal. Attorney Gen., Brown Secures Agreement with American Spirit Cigarettes Maker Over Alleged Misleading Marketing of Organic Tobacco Products (Mar. 1, 2010), *available at* http://oag.ca.gov/news/press-releases/brown-secures-agreement-american-spirit-cigarettes-maker-over-alleged-misleading; *see also* Assurance of Voluntary Compliance, Agreement Between Santa Fe Natural Tobacco Co. and State Attorneys

organic cigarette advertisements to prominently warn that "[o]rganic tobacco does NOT mean a safer cigarette."[163] This effectively changed the labels to protect consumers. Another example stemmed from a 2009 investigation by the Connecticut Attorney General of the food industry's Smart Choices program.[164] This involved an industry-generated symbol that labeled food as a "smart choice[]" despite a questionable nutrition profile.[165] The FDA thereafter initiated an investigation, but the program was discontinued within weeks of the Attorney General's request for information.[166]

Sometimes attorneys general engage in less formal requests to agencies or companies pursuant to their consumer protection authority. For example, in May 2013, forty-three attorneys general requested that the FDA require warning labels for pain relievers "to alert pregnant women that use of such drugs may harm infants."[167] This is particularly relevant when current labeling regulations do not require increased information but such a disclosure could protect and inform consumers.[168] Attorneys general may also send letters to agencies seeking broader action. For example, attorneys general have recently asked the FDA to regulate the entire product category of electronic cigarettes. Forty attorneys general cited the Tobacco Control Act as the authority for the FDA to regulate electronic cigarettes as "tobacco products" and requested that the FDA "ensure that all tobacco products are tested and regulated."[169]

Similarly, attorneys general issue letters to industry leaders requesting them to change their practices, which attorneys general may do as either a precursor to stronger actions or as an alternative for a

---

General 1 (Mar. 1, 2010) [hereinafter Santa Fe Assurance of Voluntary Compliance], *available at* http://oag.ca.gov/system/files/attachments/press_releases/n1865_santa_fe_natural_tobacco_co_agreement.pdf (memorializing the reasons for the settlement).

[163] Santa Fe Assurance of Voluntary Compliance, *supra* note 162, at 5–6.

[164] William Neuman, *Connecticut to Scrutinize Food Labels*, N.Y. TIMES, Oct. 15, 2009, at B1.

[165] *Id.*

[166] Julie Gallagher, *Companies to Discontinue Smart Choices*, SUPERMARKET NEWS (Oct. 29, 2009), http://supermarketnews.com/news/smart_choices_1029.

[167] Andrew Zajac & Anna Edney, *Attorneys General Ask FDA to Require Warning for Pain Drugs (2)*, BLOOMBERG BUSINESSWEEK (May 13, 2013), http://www.businessweek.com/news/2013-05-13/attorneys-general-ask-fda-to-require-warning-for-pain-drugs-2.

[168] Kaplan & Smith, *supra* note 95, at 317–18 (discussing the authority of the attorneys general to issue regulations and noting that if such state regulations are preempted, "[a] state attorney general is more likely to lobby the federal agencies to take action in these circumstances in lieu of taking on such a regulatory burden directly").

[169] Letter from Nat'l Ass'n of Attorneys Gen., to the Honorable Margaret Hamburg, Comm'r, FDA (Sept. 24, 2013), *available at* www.tn.gov/attorneygeneral/cases/ecigarettes/ecigaretteletter.pdf.

topic area where attorneys general might not have the authority or inclination to pursue further.[170] The latter often occurs when a company is not technically breaking the law but is still not being a "good corporate citizen" and when attorneys general seek to persuade self-corrective action.[171] Whether companies comply with such requests likely depends on whether the attorney general could pursue a stronger case through enforcement mechanisms.[172]

One example combining several of the aforementioned practices over a period of three years involved caffeinated alcoholic beverages.[173] About half of the attorneys general wrote letters to two different companies that produced caffeinated alcoholic beverages warning them that the products were dangerous,[174] and eighteen attorneys general also petitioned the FDA to take action.[175] Thereafter, both the FDA and FTC initiated action, warning the companies that their products were adulterated and that the advertisements may be unfair and deceptive.[176] Two leading producers voluntarily discontinued producing the products, and others were subject to further state actions.[177]

B. Food Label Actions

New false, deceptive, and misleading food labels are continuously emerging. However, aside from a few instances, attorneys general have

---

[170] *See* Press Release, Fla. Office of Attorney Gen., Attorney General Pam Bondi and Two Other Attorneys General Urge Kitson, Inc. to End Clothing Line Glamorizing Prescription Drugs (Sept. 5, 2013), *available at* http://www.myfloridalegal.com/newsrel.nsf/newsreleases/FDFCFA1F590A5C8685257BDD006F38E4.

[171] *See* Press Release, Md. Attorney Gen., Attorney General Gansler Calls on Pabst Brewing to End Production of Blast: "Binge-in-a-Can" Targets Youth; Flavored Malt Beverage Poses Serious Health Risks (Apr. 21, 2011), *available at* http://www.oag.state.md.us/Press/2011/042111.html. In a letter sent to the Pabst Brewing Company, eighteen attorneys general entreated the company that produces Blast by Colt 45 to change its marketing practices. *Id.* The attorneys general called the fruit flavored malt beverage that comes in 23.5 ounce cans, a "'binge-in-a-can' [that] targets youth." *Id.* This effort did not seem to change the company's practices: Pabst Blast still exists in fruit flavors and 23.5 ounce cans. *See Pabst Brewing Company Beer Portfolio*, PABST BREWING CO., http://pabstbrewingco.com/beers/ (last visited Mar. 20, 2014).

[172] Attorneys general have additional non-litigation powers that are relevant in the context of misleading food labels. They can conduct education programs and write amicus briefs, such as the California Attorney General did in the *Gerber* case. *See supra* note 138 and accompanying text.

[173] *See* Dennis Cuevas, *Law Enforcement Takes Action Against Caffeinated Alcoholic Beverages*, NAAGAZETTE, Dec. 2010, at 3–4, *available at* http://www.naag.org/assets/files/pdf/gazette/4.12.Gazette.pdf.

[174] *Id.*

[175] *Id.* at 3.

[176] *Id.*

[177] *Id.* at 4.

not utilized their vast consumer protection authority in the context of food labels. Attorneys general devoting attention to food labels would have short and long-term benefits for consumers. First, there are many food-labeling corollaries to the above noted issues that likely warrant the collective attention of attorneys general; a few obvious ones are noted below.[178] Attorneys general have the power of their office to pursue these and other individual cases, and even distinct wins by attorneys general would have broader-reaching implications than individual successes brought by private plaintiffs. Attorney general involvement tends to induce companies to respond quickly.[179] For instance, it would not likely have taken years of litigation and a hundred lawsuits for attorneys general to engender company and industry changes on the *natural* claims. Further, if the attorneys general collectively address food labels as a regular part of their consumer protection authority, this would send an industry-wide message that they are dedicating the resources and authority of their office to the issue of food labels. Companies would be more likely to consider the legal ramifications of utilizing a questionable label prior to launching the campaign.

Some examples of individual food issues can be analogized to the cases noted above. Recall the Smart Choices example.[180] Without coming to a conclusion about its potential for deception or whether it qualifies as unfair, another industry-generated symbol manufacturers pay to display on their food packages is the Whole Grain Stamp.[181] It is unclear if consumers understand that the stamp is not a government-initiated program or if consumers perceive it to indicate stricter nutrition standards than utilized.[182] A recent study found that products bearing the Whole Grain Stamp had the most sugar of 545 whole grain products

---

[178] This section provides some of the more obvious examples. Steve Gardner from the Center for Science in the Public Interest and Jennifer Harris from the Rudd Center presented other examples at an October 28, 2013 meeting at NAAG.

[179] *See, e.g.*, *supra* notes 164–66 and accompanying text (discussing Connecticut Attorney General Blumenthal's successful work to end the food industry's deceptive use of "Smart Choices" labeling).

[180] *See, e.g.*, *supra* notes 164–66 and accompanying text.

[181] *See* Kathleen Doheny, *Not All Whole Grain Products Are Created Equal, Study Claims*, HEALTHDAY (Jan. 17, 2013), http://consumer.healthday.com/vitamins-and-nutritional-information-27/dietary-fiber-health-news-308/not-all-whole-grain-products-are-created-equal-study-claims-672502.html (stating that companies pay dues to belong to the Whole Grains Council that created the Whole Grains Stamp). The Whole Grain Stamp is a very popular labeling tool. *See generally* Elaine Watson, *The Rise and Rise of Whole Grain: Whole Grain Stamp Now On 7,600+ Products in 35 Countries*, FOOD NAVIGATOR-USA.COM (Oct. 18, 2012), http://www.foodnavigator-usa.com/Markets/The-rise-and-rise-of-whole-grain-Whole-Grain-stamp-now-on-7-600-products-in-35-countries (describing the acceleration in popularity of the label in the eleven years following 2000).

[182] *See* Doheny, *supra* note 181.

assessed.[183] Attorneys general could investigate this stamp to determine if issues exist similar to that of Smart Choices and the extent to which consumers understand the realities behind its usage.

Another example involves two related categories of products in need of increased FDA regulation and enforcement: energy drinks and caffeinated food. Energy drinks are beverages that proclaim to provide the user increased energy through the addition of caffeine and approved and unapproved food additives, and have been linked to adverse health events.[184] Energy drinks are sometimes labeled by companies as dietary supplements instead of beverages and contain excessively more caffeine than recognized as safe through the FDA's "Generally Recognized as Safe" ("GRAS") protocol.[185] Senators[186] and physicians[187] wrote letters to the FDA requesting the Agency to increase regulation of energy drinks. The related product category, caffeinated food, is exactly that—food, such as waffles and syrup, with added caffeine.[188] The FDA explained that "[e]xisting rules never anticipated the current proliferation of caffeinated products."[189] The Agency said it is prepared to regulate but concurrently expressed "hope" that the industry would voluntarily regulate itself.[190] Attorneys general can investigate and actually bring actions against the companies for violating FDA regulations and GRAS safety recommendations for caffeine. The attorneys general can seek industry agreement to include warning labels on these products and also work with and urge increased FDA attention to the issue, as they did with caffeinated alcoholic beverages.

---

[183] Rebecca S. Mozaffarian et al., *Identifying Whole Grain Foods: A Comparison of Different Approaches for Selecting More Healthful Whole Grain Products*, 16 PUB. HEALTH NUTRITION 2255, 2261 (2013).

[184] Barry Meier, *Caffeinated Drink Cited in Reports of 13 Deaths*, N.Y. TIMES, Nov. 15, 2012, at B1.

[185] Jennifer L. Pomeranz et al., *Energy Drinks: An Emerging Public Health Hazard for Youth*, 34 J. PUB. HEALTH POL'Y 254, 256–57 (2013).

[186] Laurie Tarkan, *Lawmakers Urge FDA to Regulate Energy Drinks*, FOXNEWS.COM (Nov. 16, 2012), http://www.foxnews.com/health/2012/11/16/lawmakers-urge-fda-to-regulate-energy-drinks/.

[187] Barry Meier, *Doctors Urge F.D.A. to Restrict Caffeine in Energy Drinks*, NYTIMES.COM (Mar. 19, 2013), http://www.nytimes.com/2013/03/20/business/doctors-urge-fda-to-restrict-caffeine-in-energy-drinks.html?_r=0.

[188] *FDA to Investigate Added Caffeine*, FDA CONSUMER HEALTH INFO., May 2013, at 1–2, *available at* http://www.fda.gov/downloads/ForConsumers/ConsumerUpdates/UCM350740.pdf.

[189] *Id.* at 2.

[190] *Id.*; *see also* Saundra Young, *Wrigley Halts Production of Caffeine Gum*, CNN HEALTH (May 8, 2013), http://www.cnn.com/2013/05/08/health/wrigley-caffeine-gum-production/. Although Wrigley halted its production of caffeine gum, Wrigley may, unfortunately, be the exception in that respect.

Attorney general attention could still be helpful in the context of the controversial terms *natural* and *all natural*.[191] Manufacturer surveys during Lanham Act litigation[192] and independent research indicate that consumers are in fact confused by the term.[193] Concerted attorney general action in this context would address the confusion. Attorneys general could investigate food manufacturers that label a product *natural* in the vein of the Santa Fe *organic* tobacco case.[194] One goal could be a settlement that requires a disclosure to alert consumers that the term *natural* does not mean that the product or ingredient was "grown in a garden or field," or "plucked from a tree."[195] Another disclaimer could alert consumers that the term *natural* is not regulated by the FDA.[196]

There are a wide range of current and emerging food-labeling issues that are ripe for attorney general involvement.[197] Attorneys general can work with advocacy groups that track food marketing practices and consumer responses. Further, attorneys general can urge action by the FDA to strengthen and enforce its regulations. Perhaps most importantly, attorneys general can urge Congress to strengthen the NLEA. In 2013, two United States Congressmen introduced such a bill aimed at revising food labeling laws.[198] Attorneys general can join together to support such legislation aimed at overhauling food-labeling regulations which would also reduce the need to litigate. The collective consumer protection action of attorneys general could effectuate real change in the food information environment.

---

[191] *See supra* Part II.B.

[192] Merisant Co. v. McNeil Nutritionals, 515 F. Supp. 2d 509, 526, 536 (E.D. Pa. 2007).

[193] JENNIFER L. HARRIS ET AL., RUDD CTR. FOR FOOD POL'Y & OBESITY, SUGARY DRINK F.A.C.T.S.: EVALUATING SUGARY DRINK NUTRITION AND MARKETING TO YOUTH 112 (2011), *available at* http://sugarydrinkfacts.org/resources/SugaryDrinkFACTS_Report.pdf (highlighting the prevalent use of labels such as *natural* on unhealthy sugary drinks, which misleads even many parents to think that such drinks are healthy).

[194] *See supra* notes 162–63 and accompanying text.

[195] Ries v. Ariz. Beverages USA, No. 10-01139 RS, 2013 U.S. Dist. LEXIS 46013, at *15 (N.D. Cal. Mar. 28, 2013) (quoting Plaintiffs' [Redacted] Consolidated Opposition to Defendants' Motion for Summary Judgment and Motion for Decertification at 16, *Ries*, 2013 U.S. Dist. LEXIS 46013, ECF No. 184).

[196] *See* Holk v. Snapple Beverage Corp., No. 07-3018 (MLC), 2010 U.S. Dist. LEXIS 81596, at *8 (D.N.J. Aug. 10, 2010).

[197] *See, e.g.*, Watson, *supra* note 17 (describing how the newest wave of lawsuits challenge the term "evaporated cane juice," which violates FDA guidance documents).

[198] *See* Food Labeling Modernization Act of 2013, H.R. 3147, 113th Cong. (as introduced in the House, Sept. 19, 2013), *available at* http://beta.congress.gov/113/bills/hr3147/BILLS-113hr3147ih.pdf.

C. Parens Patriae

No discussion of attorney general litigation would be complete without mentioning their *parens patriae* authority. *Parens patriae*, meaning "parent of the country," is an authority held by states and exercised by the attorneys general to protect state interests.[199] Attorneys general can use this authority to vindicate the state's "quasi-sovereign" interests in the physical and economic health, safety, and welfare of the residents in the state.[200] Historically, this common law power was recognized as a method for states to prevent or repair harm caused to property, air, or water rights by another state.[201] Courts later recognized states' standing to sue private parties to seek vindication of similar rights.[202]

The boundaries of *parens patriae* authority are evolving, but actions pursuant to it have a strong foundation in protecting the public's health. Perhaps the most well-known use of *parens patriae* authority for public health occurred during the tobacco litigation of the late 1990s, whereby attorneys general joined together with plaintiffs' attorneys to allege that the tobacco companies violated their states' quasi-sovereign interests.[203] Due to the Master Settlement Agreement, the cases ended without trials on the merits.[204] Legal scholars posit that attorneys general using *parens patriae* in a concerted action may have great implications for joint action in other contexts. Richard Ieyoub, Attorney General of Louisiana when that state sued the tobacco industry, and Theodore Eisenberg, law professor at Cornell and consultant to Louisiana's trial team when it sued the tobacco industry, explain that although this "modern use of *parens patriae* is in its early stages," it is likely appropriate when the interest sought by the state is beyond that of an ordinary tort victim.[205] This means that the state must have an independent interest of its own and seek to address a "behavior that adversely affects a substantial number of the state's citizens."[206]

---

[199] *See* Ieyoub & Eisenberg, *supra* note 140, at 1863.

[200] *See* Maryland v. Louisiana, 451 U.S. 725, 737–38 (1981); Ieyoub & Eisenberg, *supra* note 140, at 1867–68.

[201] Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 258 (1972).

[202] *See id.* at 259–60.

[203] *See* Ieyoub & Eisenberg, *supra* note 140, at 1860–62; Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and* Parens Patriae *Product Litigation*, 49 B.C. L. REV. 913, 935 (2008).

[204] *See* Ieyoub & Eisenberg, *supra* note 140, at 1862. *But see* Texas v. Am. Tobacco Co., 14 F. Supp. 2d 956, 962–63 (E.D. Tex. 1997) (finding the state may maintain action pursuant to its quasi-sovereign interests found at common law).

[205] *See* Ieyoub & Eisenberg, *supra* note 140, at 1859 nn.*, †, 1880.

[206] *Id.* at 1875.

The question is thus whether attorneys general could and should utilize their *parens patriae* authority to launch a multi-state lawsuit against the food industry to mimic the theory utilized during the tobacco litigation. Obesity and food-related nutrition issues are among the foremost public health issues of the day,[207] and "[o]besity's health and economic effects are on a par with those of smoking."[208] Ieyoub and Eisenberg posit that this authority may prove to be particularly relevant when an industry is "seemingly beyond the reach of traditional state regulation, such as consumer protection laws, and too powerful to be subject to federal regulation. For example, the tobacco industry resisted federal and state regulation through massive lobbying as well as lack of candor about the health risks of smoking."[209] One could argue that the same situation exists in the context of food companies and their relationship to the modern food environment. The food industry may very well be beyond traditional state regulation: first, because the NLEA preempts state labeling laws that are stricter than federal law, and second, because the food industry engages in massive lobbying against federal and state regulations.[210] Public health experts have identified additional food industry practices that replicate the highly criticized

---

[207] *See* Risa Lavizzo-Mourey & Jeffrey Levi, *Introduction* to JEFFREY LEVI ET AL., TRUST FOR AMERICA'S HEALTH & THE ROBERT WOOD JOHNSON FOUND., F AS IN FAT: HOW OBESITY THREATENS AMERICA'S FUTURE 2013, at 3–4 (2013), *available at* http://healthyamericans.org/assets/files/TFAH2013FasInFatReportFinal%209.9.pdf (summarizing obesity report findings); *Childhood Obesity Facts*, CDC, http://www.cdc.gov/healthyyouth/obesity/facts.htm (last updated July 10, 2013) (noting nationwide prevalence of childhood obesity).

[208] *Making Healthy Choices Easy Choices*, *Obesity Prevention Source*, HARV. SCH. OF PUB. HEALTH, http://www.hsph.harvard.edu/obesity-prevention-source/policy-and-environmental-change/ (last visited Mar. 20, 2014).

[209] Ieyoub & Eisenberg, *supra* note 140, at 1879–80. *But see* Gifford, *supra* note 203, at 915–16, 923 (opposing the expanded use of *parens patriae* authority and arguing contrary to the assertion that the attorneys general needed to act in the face of government inactivity, but rather "[w]hat frustrated public health and anti-smoking activists and some attorneys general was that the regulatory schemes adopted by the federal and state legislative branches did not go as far as they would have liked").

[210] *See* Lainie Rutkow et al., *Preemption and the Obesity Epidemic: State and Local Menu Labeling Laws and the Nutrition Labeling and Education Act*, 36 J.L. MED. & ETHICS 772, 773 (2008) (explaining how the NLEA preempts more restrictive state and local labeling laws); Christine Spolar & Joseph Eaton, *Food Lobby Mobilizes, As Soda Tax Bubbles Up*, HUFFINGTON POST (May 25, 2011, 3:35 PM), http://www.huffingtonpost.com/2009/11/04/soda-tax-mobilizes-food-l_n_345840.html (detailing lobbying efforts against soda tax initiatives); Duff Wilson & Janet Roberts, *Special Report: How Washington Went Soft on Childhood Obesity*, REUTERS (Apr. 27, 2012, 9:03 AM), http://www.reuters.com/article/2012/04/27/us-usa-foodlobby-idUSBRE83Q0ED20120427 (detailing the food industry's lobbying efforts).

practices utilized by the tobacco industry that could serve as a basis for *parens patriae* standing.[211]

One could thus argue that use of states' *parens patriae* authority by attorneys general, based on the theories utilized during the tobacco litigation, would be appropriate to address the food-labeling deficiencies identified in this Article. However, both Ieyoub and Eisenberg, as well as opponents of the expanded use of *parens patriae*, caution limitations. Ieyoub and Eisenberg suggest that "actions in *parens patriae* should be reserved for substantial and serious harm to the citizenry" when other available remedies and doctrines are wanting or limited, for example, because citizens could not reasonably be expected to seriously take on the case and the state independently suffered harm.[212] Further, Donald Gifford, an opponent of the expanded use of *parens patriae* authority even in the tobacco context, warns that attorneys general should lack standing when the harms sustained by the state are "too remote" or "derivative" and when the victims' identities are not necessarily predicated on their citizenship of a particular state.[213]

In the context of food labeling, it would be difficult to argue that citizens of one state are harmed by such practices due to their identities as citizens of that state. Stated another way, packaged food is subject to the same federal regulations nationally, solidified by the NLEA's preemption provision. Therefore, the entire country of consumers suffers similarly, rather than this resulting in a particular state-specific problem. However, the same would be true of the tobacco companies under the tobacco litigation (as also argued by Gifford).[214] Would this mean that when a perpetrator harms a nation of citizens the result is that the perpetrator is protected against attorney general action, but if the perpetrator harms only one state's citizens it would be subject to an attorney general's *parens patriae* authority?

In a footnote, Gifford admits that the Supreme Court's opinion in *Massachusetts v. Environmental Protection Agency* might suggest that the *parens patriae* standing in that case can be interpreted broadly enough to support standing against a product manufacturer in the context of broadly-caused harms.[215] In that case, twelve states, four local governments, and several private organizations alleged that the EPA

---

[211] Kelly D. Brownell & Kenneth E. Warner, *The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died. How Similar is Big Food?* 87 MILBANK Q. 259, 260–62 (2009).

[212] Ieyoub & Eisenberg, *supra* note 140, at 1880.

[213] Gifford, *supra* note 203, at 935–36.

[214] *Id.* at 937.

[215] *Id.* at 937 n.179.

"abdicated its responsibility under the Clean Air Act to regulate the emissions of four greenhouse gases, including carbon dioxide."[216] The Court found that, of the states, Massachusetts alleged a particularized injury related to coastal waters swallowing coastal land owned by the state.[217] The Court acknowledged that these "climate-change risks are 'widely shared,'" but it explained that this "does not minimize Massachusetts' interest in the outcome of this litigation" because the "harm is concrete" to that state.[218] The Court also made the point that Massachusetts, like other states, surrendered "certain sovereign prerogatives" by entering the Union.[219] Thus, the Court explained that critical to its "standing to sue *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers."[220] The Court noted, however, that the state cannot do certain things as a state in the nation, including, "in some circumstances[,] the exercise of its police powers to reduce in-state motor-vehicle emissions [which] might well be pre-empted."[221] Conversely, the dissent found that the majority created a special concession for Massachusetts because it could not "establish standing on traditional terms."[222] The dissent explained that "[t]he very concept of global warming seems inconsistent with this particularization [of an injury] requirement."[223]

The concept of *parens patriae* authority is evolving.[224] Whether the majority paid lip-service to the individualized injury requirement or whether such an individualized injury within a larger harm plainly supports *parens patriae* standing, it makes little sense that a broadly caused harm cannot be remedied by attorneys general. This case supports the idea that *parens patriae* standing can be appropriate in both the tobacco and food contexts. In terms of food labeling, like under the Clean Air Act,[225] the states are preempted from enacting and enforcing stricter labeling guidelines.[226] Moreover, independent state harm could similarly be predicated on the economic and physical health

---

216 Massachusetts v. EPA, 549 U.S. 497, 505 & nn.2–4 (2007).

217 *Id.* at 522.

218 *Id.*

219 *Id.* at 519.

220 *Id.*

221 *Id.*

222 *Id.* at 540 (Roberts, C.J., dissenting).

223 *Id.* at 541 (Roberts, C.J., dissenting).

224 *See* Ieyoub & Eisenberg, *supra* note 140, at 1880.

225 *See supra* note 220 and accompanying text.

226 *See supra* notes 53–56 and accompanying text.

harms stemming from current food industry practices that harm citizens in one state, among those in other states.

Where *parens patriae* might be lacking, however, is the causal relationship between the labeling deficiencies alone and poor health outcomes. Obesity, diabetes, and other nutrition-related deficiencies in the United States are the result of the modern food environment, arguably perpetrated by some of the same food companies responsible for deceptive labeling.[227] However, despite the fact that the food environment includes questionable food-labeling practices, it also includes broader marketing campaigns, disparities in food access, and the relative cost of healthy and unhealthy food.[228] Such a broad *parens patriae* action to address food industry practices that shape our modern food environment is thus promising, but a closer examination is beyond the scope of this Article. It is likely an issue that will garner increased attention in the near future.[229] In the context of labeling alone, the attorneys general should address such deficiencies through the remedy available: using their consumer protection authority under state UDAP statutes.

CONCLUSION

Consumers are increasingly seeking to purchase healthier food products. A key method to determine which foods are healthy is by referring to nutrition-related information on the food label. Independent research studies and the increase in private litigation indicate that labels are not providing straightforward factual information about food products. Rather, many are deceptively declaring positive nutritional

---

[227] This notion could be predicated on a market share liability theory given that there has been a consolidation of food companies nationally (and internationally). Arguments that the cause of obesity is multi-factorial, including things such as genetics, are not convincing beyond a small amount of obese persons who would have been obese regardless of the food environment. *See Genes Are Not Destiny, Obesity Prevention Source*, HARV. SCH. OF PUB. HEALTH, http://www.hsph.harvard.edu/obesity-prevention-source/obesity-causes/genes-and-obesity/ (last visited Mar. 20, 2014). Further, people's personal responsibility has not changed over the last several decades. What has changed is the modern food environment.

[228] *See* LAUREN DINOUR ET AL., CITY UNIV. OF N.Y. CAMPAIGN AGAINST DIABETES & PUB. HEALTH ASSOC. OF N.Y., REVERSING OBESITY IN NEW YORK CITY: AN ACTION PLAN FOR REDUCING THE PROMOTION AND ACCESSIBILITY OF UNHEALTHY FOOD 7–8 (2008), *available at* http://www.phanyc.org/wp-content/uploads/2012/11/2008unhealthyfoodreport.pdf.

[229] *Compare* Divya Srinath, *A New Weapon in the Obesity Battle: Coordinated State Attorneys General* Parens Patriae *Consumer Protection Lawsuits*, 4 J.L. & SOC. DEVIANCE 40, 118–19 (2012), *available at* http://www.lsd-journal.net/archives/Volume4/Volume4.pdf (arguing in favor of expanded use of *parens patriae* to fight obesity), *with* John B. Hoke, Note, Parens Patriae*: A Flawed Strategy for State-Initiated Obesity Litigation*, 54 WM. & MARY L. REV. 1753, 1757–58 (2013) (arguing against the same).

qualities despite an overall poor nutrition profile. Attorneys general are in a unique position to protect consumers from questionable food labels.

Given the promising but deeply underutilized authority of attorneys general to address misleading food labels, there might be a lack of political will for attorneys general to engage on this topic.[230] Identical issues exist in the food-labeling area, with relatively little attorney general response, as compared to other labeling areas which have garnered concerted attorney general action. Attorneys general are charged with protecting consumers and conditions for fair competition. Current food-labeling practices are a barrier to both objectives. Attorneys general are in the best position to address food labeling through litigation and pre-litigation means and to urge action by the federal government. Attorneys general can accomplish more through litigation than any other party. They can and should also use their bully pulpit to urge federal action to close the regulatory gap that enables the current, misleading food label environment to exist.

---

[230] Note that forty-four attorneys general are elected by popular vote. *About NAAG: Information on the Association*, NAT'L ASS'N OF ATT'YS GEN., http://www.naag.org/about_naag.php (last visited Mar. 20, 2014).

IN DEFENSE OF HUMANITY: WHY ANIMALS CANNOT POSSESS HUMAN RIGHTS

INTRODUCTION

Humans are unique. We possess traits that animals do not, just as animals possess traits that humans do not. One of those traits or abilities is language. You are human; therefore, you are able to speak, write, and even read this Note.[1] Being human means you are part of a unique group that enjoys unique rights and bears unique responsibilities. Until the recent past, this was obvious, self-evident, and noncontroversial. This notion of human uniqueness, or human exceptionalism, however, has increasingly come under attack.[2]

In today's new age, which has arguably blossomed in the light of World War II and the Civil Rights Movement,[3] it seems almost every conversation and headline centers on one's rights. Mary Ann Glendon calls this allure of rights the "romance of rights" and contends that this new rights discourse focuses on influencing the courts rather than influencing society as a whole.[4] However, in this era of expanding rights,

---

[1] As Wesley Smith so cleverly put it, "[i]f you are reading these words, you are a human being." Wesley J. Smith, *Four Legs Good, Two Legs Bad: The Anti-human Values of "Animal Rights,"* HUM. LIFE REV., Winter 2007, at 7, 7 [hereinafter Smith, *Four Legs Good*]. Throughout this Note the traditional terms "animal" and "human" will be used with their obvious connotations. The discourse of animal rights activism has sought to redefine the terminology of the debate by using the term "nonhuman animal" when referring to what is commonly called an animal. *See* Paul Waldau, *Will the Heavens Fall? De-Radicalizing the Precedent-Breaking Decision*, 7 ANIMAL L. 75, 94 (2001). In an effort to entreat people to begin to think of the difference between humans and animals only as a matter of degree, animal rights proponents attempt to subordinate human standing and subliminally undermine the authentic meaning of humanness through word games. *See* Geordie Duckler, *Two Major Flaws of the Animal Rights Movement*, 14 ANIMAL L. 179, 194 (2008).

[2] *See* Steven Best, *Minding the Animals: Ethology and the Obsolescence of Left Humanism*, INT'L J. INCLUSIVE DEMOCRACY, Spring 2009, at 1, 1–2 ("The massive, tangled knot of ideologies involved in the social construction of our *species* identity need to be critically unraveled, so that we can develop new identities and societies and forge sane, ethical, ecological, and sustainable life ways.").

[3] MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE, at x (1991).

[4] *Id.* at 5; *see also* Richard L. Cupp, Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 SAN DIEGO L. REV. 27, 28 (2009) [hereinafter Cupp, *Moving Beyond Animal Rights*] (footnote omitted) ("Since important legal victories against racial discrimination and other forms of discrimination in the 1950s and 1960s, many legal scholars and lawyers have been increasingly attracted to the 'romance of rights.' For these scholars and lawyers, analogies to the civil rights movement seem especially appealing as vehicles for achieving societal change in new fields.").

"rights are not what they used to be."[5]

Glendon observes that the law talk permeating society today is far removed from traditional dialogue by its "simplicity, its prodigality in bestowing the rights label, its legalistic character, its exaggerated absoluteness . . . , and its silence with respect to personal, civic, and collective responsibilities."[6] This dialogue of rights "has become the principal language that we use in public settings to discuss weighty questions of right and wrong."[7]

One of the most rapidly expanding fields in this new era of rights is so-called animal rights.[8] This expansion is evidenced by, among other things, the relatively recent growth in the number of law schools offering courses on animal law[9] and establishing animal rights centers,[10] the number of journals focusing on animal law,[11] the number of established Animal Legal Defense Fund chapters,[12] and, perhaps most telling of all, the amount of money spent each year in animal rights activism.[13]

---

[5] Cupp, *Moving Beyond Animal Rights*, *supra* note 4.

[6] GLENDON, *supra* note 3, at x.

[7] *Id.* at x–xi (noting also that "[t]his unique brand of rights talk often operates at cross-purposes with our venerable rights tradition").

[8] Cupp, *Moving Beyond Animal Rights*, *supra* note 4, at 29.

[9] *Compare* Richard L. Cupp, Jr., *A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones Toward Abolishing Animals' Property Status*, 60 SMU L. REV. 3, 4 (2007) [hereinafter Cupp, *Dubious Grail*] (stating that in 1997 "there were only perhaps one or two animal law courses being taught at United States law schools"), *with Animal Law Courses*, *Animal Law Section*, NAT'L ASS'N FOR BIOMEDICAL RESEARCH, http://www.nabranimallaw.org/Law_Schools/Overview/ (last visited Mar. 31, 2014) ("There are now at least 119 law schools in the United States that offer or have offered credit for an animal law course").

[10] Since 2001, "Bob Barker, [former] host of the television show *The Price Is Right*, has provided million-dollar gifts to nine highly respected law schools to establish animal rights centers." Cupp, *Dubious Grail*, *supra* note 9, at 4; *see* Tamie L. Bryant, *The Bob Barker Gifts to Support Animal Rights Law*, 60 J. LEGAL EDUC. 237, 237 (2010).

[11] Since 1994, five exclusively animal law journals have been established. *Animal Law Journals, Animal Law Section*, NAT'L ASS'N FOR BIOMEDICAL RESEARCH, http://www.nabranimallaw.org/Law_Schools/Animal_Law_Journals/ (last visited Mar. 31, 2014).

[12] The Animal Legal Defense Fund started its first student chapter at Lewis & Clark Law School in 1993. Nancy V. Perry, Introduction, *Ten Years of Animal Law at Lewis & Clark Law School*, 9 ANIMAL L. ix, ix (2003). Today there are 177 chapters in the United States, including at the Regent University School of Law, and nineteen international chapters. *Student Animal Legal Defense Fund Chapters*, ANIMAL LEGAL DEF. FUND, http://aldf.org/about-us/saldf/student-animal-legal-defense-fund-chapters/ (last visited Mar. 31, 2014).

[13] People for the Ethical Treatment of Animals (PETA), with over 3,000,000 members, spent more than $31.8 million on operations in 2012. *See Financial Reports: 2012 Financial Statement*, PETA, http://www.peta.org/about-peta/learn-about-peta/financial-report/ (last visited Mar. 31, 2014); *Membership Services*, PETA,

Indeed, the animal rights discussion "has moved from the periphery and toward the center of political and legal debate."[14] Consistent with society's increasing focus on rights, the core of this move is concentrated on gaining intrinsically human rights for animals.[15] Suits are being filed regularly as activists try to utilize the courts to confer rights upon animals.[16]

Animal *welfare* advocacy starts with laudable premises—"that humans should be alert and even sympathetic to the needs of animals, who are the creatures of God."[17] Very few people would attempt to argue that humans have unlimited license to make animals' lives miserable, to do whatever we want to them, or to destroy their habitat at will without any thought of the consequences.[18] "Not to care, to one degree or another, about animals is not to care, period."[19] As Immanuel Kant wrote, "he who is cruel to animals becomes hard also in his dealings with men."[20]

Most animal rights activists today, however, do not want mere protection for animals.[21] They want moral and legal equivalence, and

---

http://www.peta.org/donate/membership-services/ (last visited Mar. 31, 2014). In 2011, the Humane Society of the United States spent $54,885,997 on "Advocacy and Public Policy" as part of its total expenses of $159,905,374, and ended the year with $200,482,599 in total net assets. THE HUMANE SOC'Y OF THE U.S. & AFFILIATES, CONSOLIDATED FINANCIAL STATEMENTS 2–4 (2011), *available at* http://www.humanesociety.org/assets/pdfs/financials/hsus-and-affiliates-consolidated-financials-2011.pdf.

[14] Cass R. Sunstein, *Introduction: What are Animal Rights?*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 3, 4 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

[15] Cupp, *Moving Beyond Animal Rights*, *supra* note 4, at 31.

[16] *See* Michael Mountain, *Lawsuit Filed Today on Behalf of Chimpanzee Seeking Legal Personhood*, NONHUMAN RTS. PROJECT (Dec. 2, 2013), http://www.nonhumanrightsproject.org/2013/12/02/lawsuit-filed-today-on-behalf-of-chimpanzee-seeking-legal-personhood/; *see, e.g.*, Tilikum v. Sea World Parks & Entm't, Inc., 842 F. Supp. 2d 1259, 1260 (S.D. Cal. 2012) (explaining that Next Friends filed a lawsuit on behalf of a group of orcas at Sea World); Sarah v. Primarily Primates, Inc., 255 S.W.3d 132, 135–36 (Tex. Ct. App. 2008) (dismissing claims filed by attorneys on behalf of a group of primates for lack of standing).

[17] William Murchison, *Wesley J. Smith v. Matthew Scully: Animal Rights and Wrongs*, HUM. LIFE REV., Spring 2010, at 29, 31.

[18] *See, e.g.*, Gary L. Francione, *Animal Rights and Animal Welfare*, 48 RUTGERS L. REV. 397, 398 (1996) ("Almost *everyone*—including those who use animals in painful experiments or who slaughter them for food—accepts as an abstract proposition that animals ought to be treated 'humanely' and not subject to 'unnecessary' suffering.").

[19] Murchison, *supra* note 17, at 31.

[20] IMMANUEL KANT, LECTURES ON ETHICS 240 (Louis Infield trans., 1978).

[21] SUSAN SPERLING, ANIMAL LIBERATORS: RESEARCH AND MORALITY 2 (1988) (explaining that the animal rights movement questions "assumptions about the human relationship to animals that have been fundamental to Western culture," and it does not want to merely reform animal use by humans; it wishes to abolish it altogether).

this is where the advocate and the activist diverge.[22] By showing that certain animals possess attributes or capacities that are akin to humans, today's activists argue that animals are equal to humans[23] and should be given similar rights, including legal personhood and standing to sue.[24] This debate raises important issues about animal welfare and the proper balance between man and beast; however, few animal activists have addressed the implications of the rights they seek for animals.[25] This Note argues that the answer to these issues correctly lies in human responsibility and stewardship—not animal rights. "Developing an artificial construct of formal rights for animals would be harmful both to humans and, ultimately, to animals."[26]

With this growing debate, several experts have emerged on both sides and each have supported his or her belief with particular arguments. The debate has largely been a one-on-one, scholarly point-counterpoint debate that consists of one scholar writing an article or delivering a speech articulating his or her theory, and then another scholar responding by writing a book refuting that particular theory. This Note, therefore, attempts to amalgamate and explain these arguments, while ultimately espousing the theory of human exceptionalism as the proper way of viewing human-animal relationships.

Wesley J. Smith is possibly the foremost expert regarding the theory of human exceptionalism. Among other accomplishments, he is a Senior Fellow at the Discovery Institute's Center on Human Exceptionalism and a prolific author on the topic of human excpetionalism itself.[27] Richard L. Cupp, Jr., another proponent of and prolific author on human exceptionalism, is the John W. Wade Professor

---

[22] WESLEY J. SMITH, A RAT IS A PIG IS A DOG IS A BOY: THE HUMAN COST OF THE ANIMAL RIGHTS MOVEMENT 14–15 (2010) [hereinafter SMITH, A RAT IS A PIG]. Throughout this Note the term "advocate" will refer to one who seeks animal welfare, while the term "activist" will refer to one who fights for animals to have moral equivalence and human rights. This difference between animal welfare advocates and animal rights activists is further explained in Part I.

[23] *See* PETER SINGER, ANIMAL LIBERATION 11 (Updated ed. 2009) [hereinafter SINGER, ANIMAL LIBERATION].

[24] STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS 7 (2000) [hereinafter WISE, RATTLING THE CAGE]; *see also* Tilikum v. Sea World Parks & Entm't, Inc., 842 F. Supp. 2d 1259, 1260 (S.D.Cal. 2012); Sarah v. Primarily Primates, Inc., 255 S.W.3d 132, 135 (Tex. Ct. App. 2008).

[25] *See* Richard A. Posner, *Animal Rights: Legal, Philosophical, and Pragmatic Perspectives*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 51, 56–57 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

[26] Cupp, *Moving Beyond Animal Rights*, *supra* note 4, at 28.

[27] *Wesley J. Smith, Senior Fellow—Discovery Institute*, DISCOVERY INST., http://www.discovery.org/p/13 (last visited Mar. 31, 2014).

of Law and Associate Dean for Research at Pepperdine University School of Law.[28] Smith's seminal book, *A Rat Is a Pig Is a Dog Is a Boy*, articulates human exceptionalism and refutes animal rights in great detail.[29] In the same regard, several of Cupp's works on animal rights theory provide excellent background on the rights movement and a thorough framework through which to view and rebut animal rights arguments.[30] The works of these two expert authors, therefore, are the main sources on which the arguments and logic of this Note relies in espousing the theory of human exceptionalism.

Part I of this Note explores important differences between animal welfare and animal rights. Part II explains the major animal rights theories and critiques their efficacy as viable arguments for human-animal equality. Part III focuses on the intrinsic humanness of our legal system, explains the importance of this structure, identifies the rights that animal advocates seek, and argues that so-called animal rights do not fit into our innately human system. After defining and defending human exceptionalism, Part IV explains human exceptionalism's meaning, how it is the foundational belief upon which all human rights are built, and its importance to the human-animal debate. Finally, Part V concludes that human exceptionalism is the appropriate theory in which to view this debate because it requires human responsibility and accountability that values animals but does not supplant humans' appropriate place as the ultimate stewards of the earth.

I. ANIMAL WELFARE VS. ANIMAL RIGHTS

Animal welfare societies have done much to further the prevention of cruelty to animals, but as Wesley Smith explains, "animal welfare and animal rights represent incompatible moral principles and mutually exclusive goals."[31] Citing animal law attorney Michael Schau, Smith lauds animal welfare, or animal protection advocacy, as having grown out of admirable "principles of humane care and treatment" for animals.[32] Smith warns that these legitimate animal welfare activities, however, must not be conflated with today's animal rights movement because the moral principles and goals of each group sharply diverge after their shared general concern "with the way people treat animals."[33]

---

[28] Cupp, *Dubious Grail*, *supra* note 9, at 3 n.*.

[29] SMITH, A RAT IS A PIG, *supra* note 22, at 15.

[30] *See, e.g.*, Cupp, *Moving Beyond Animal Rights*, *supra* note 4, at 32–34.

[31] SMITH, A RAT IS A PIG, *supra* note 22, at 15.

[32] *Id.* at 15–16 (citing Michael Schau, *Animal Law Research Guide*, 2 BARRY L. REV. 147, 148 (2001)).

[33] *Id.* at 15.

Schau explains that animal welfare advocates seek to improve animal husbandry methods, alleviate needless pain and suffering, and ensure that animals receive "essential food, water[,] shelter, [and] health care."[34] Smith adds that welfarists accept human exceptionalism and "believe we have a human duty to prevent *unnecessary* animal suffering."[35] They do not believe that animals should be given human-type rights, and they "acknowledge that, assuming appropriate practices, we are entitled to benefit from animals in furtherance of human interests."[36] Most importantly, however, is that animal welfare advocates "do not seek to create a moral equivalence between human beings and animals."[37]

Animal rights activists, on the other hand, do seek moral equivalence. They fervently "deny that human beings have the right to use animals to further any human purpose,"[38] period, and they zealously oppose "the idea that animals can ever properly be considered property."[39] Even Professor Gary L. Francione, a leading animal rights advocate and author, admits that today's "animal 'rights' movement is fundamentally different from . . . the animal welfare movement" because it patently rejects the beliefs that animals are the property of humans and that animals may be used for human benefit.[40] Additionally, he states that animal rights activists think that at least some animals should possess rights that absolutely insulate them from harm, just as human rights protect humans from harm.[41] Thus, they demand the "abolition of *all* exploitation of animals, on the grounds that animals have inherent, inviolable rights" that are non-negotiable.[42] Moreover, animal rights activists believe that animal welfarism is "per se

---

[34] Michael Schau, *Animal Law Research Guide*, 2 BARRY L. REV. 147, 148 (2001).

[35] Smith, *Four Legs Good*, *supra* note 1, at 8 (emphasis added). Welfarists do not seek to end *all* animal suffering. *See id.*

[36] SMITH, A RAT IS A PIG, *supra* note 22, at 15; *see also* Schau, *supra* note 34, at 148 ("[Animal welfare] advocates will ardently support animal use practices that are perceived to produce widespread benefits to society, thus justifying required use of animals, but reject support for nonessential use.").

[37] SMITH, A RAT IS A PIG, *supra* note 22, at 15.

[38] *Id.* at 16.

[39] *Id.*

[40] Francione, *supra* note 18, at 397 n.*, **, 401; *see also* ROBERT GARNER, ANIMALS, POLITICS AND MORALITY 60 (2d ed. 2004) ("[T]he terms welfare and rights are indicative of the key division within the animal protection movement; between those who consider that animal interests should take a subordinate, albeit important, position and those who recognise a higher moral status for animals.").

[41] Francione, *supra* note 18, at 401.

[42] JAMES M. JASPER & DOROTHY NELKIN, THE ANIMAL RIGHTS CRUSADE: THE GROWTH OF A MORAL PROTEST 9 (1992) (emphasis added).

insufficient,"[43] "outdated and fundamentally immoral."[44]

The significance of the differences in the two movements seems more or less clear; however, Smith explains that animal rights activists have muddied the waters by co-opting the welfare approach.[45] He points to early activists who recognized that arguing for human-type rights for animals might be viewed as radical by the "general public that love[s] animals but still consider[s] them less important than people."[46] Accordingly, Smith reasons, animal rights organizations are able to ride the coattails of support that animal welfare organizations enjoy by concealing their true intentions.[47] Through this tactic, rights organizations are able to pursue their radical ideologies by garnering "substantial financial and moral support from animal lovers who believe they are promoting animal welfare."[48] Smith points out, however, that in the long run this has had a detrimental effect for animals because organizations pursuing radical ideologies "have drained funds from traditional welfare activities . . . which have really helped animals historically."[49]

II. THE THEORIES

The animal rights movement has developed many theories to support its pursuit of moral equality for animals. Some activists cite consciousness,[50] some cite sentience,[51] others cite autonomy,[52] and still others base their argument upon an amalgamation of the three. The two major theories, however, are those espoused by Peter Singer and Steven Wise. Accordingly, this Note will address those two theories in turn.

A. A Utilitarian Quality of Life Ethic

The utilitarian philosopher Peter Singer became the instigator and godfather of the animal rights movement when he published *Animal*

---

43 Francione, *supra* note 18, at 400.

44 SMITH, A RAT IS A PIG, *supra* note 22, at 17.

45 *Id.*

46 *Id.*

47 *Id.* at 18.

48 *Id.*

49 *Id.* (quoting Interview by Wesley J. Smith with Frederick K. Goodwin (Oct. 28, 1998)) (internal quotation marks omitted).

50 *See* STEVEN M. WISE, DRAWING THE LINE: SCIENCE AND THE CASE FOR ANIMAL RIGHTS 35–38 (2002) [hereinafter WISE, DRAWING THE LINE].

51 *See* Gary L. Francione, *Animals—Property or Persons?*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 108, 127 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

52 *See* discussion *infra* Part II.B.

Liberation in 1975.[53] It was in this book that Singer popularized the term "speciesism," which had been conceived a few years earlier by British psychologist Richard Ryder.[54] Singer defined speciesism as "a prejudice or attitude of bias in favor of the interests of members of one's own species and against those of members of other species,"[55] and he later asserted that "[s]peciesism is logically parallel to racism and sexism."[56] Under his utilitarian framework, Wesley Smith points out, Singer was the first to seriously argue "that the 'interests' of animals should be accorded 'equal consideration' with those of people."[57] Ultimately, Smith argues, Singer's ideology is a masked argument supporting a "new moral hierarchy in which individual capacities are what matter morally."[58]

Singer's argument for equal consideration is based on what he calls the "quality of life" ethic,[59] which, in other contexts, has been lauded as "a species neutral way of grouping creatures."[60] Singer seeks to eradicate speciesism, but according to Smith this does not make Singer a believer in animal rights because Singer not only rejects the intrinsic value of life, but "he rejects the very concept of rights."[61] In lieu of inherent worth, Smith explains, Singer posits an equation whereby the cognitive capacities of "person[s]," which he defines as "any being that exhibits . . . 'rationality and self consciousness,'"[62] are measured against each other.[63]

---

[53] *See* SMITH, A RAT IS A PIG, *supra* note 22, at 23; *see also* Neale Duckworth, *Living and Dying with Peter Singer*, PSYCHOL. TODAY, Jan.–Feb. 1999, at 56, 57.

[54] Joan Dunayer, *Advancing Animal Rights: A Response to Jeff Perz's "Anti-Speciesism," Critique of Gary Francione's Work and Discussion of My Book* Speciesism, 3 J. ANIMAL L. 17, 35 (2007).

[55] SINGER, ANIMAL LIBERATION, *supra* note 23, at 6.

[56] Peter Singer, *Ethics Beyond Species and Beyond Instincts*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 78, 79 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

[57] SMITH, A RAT IS A PIG, *supra* note 22, at 23; *see also* R. George Wright, *Michael Perry, Peter Singer, and Quasimodo: Persons with Disabilities and the Nature of Rights*, 14 J.L. & RELIGION 113, 128 (1999–2000).

[58] SMITH, A RAT IS A PIG, *supra* note 22, at 231.

[59] *See* PETER SINGER, RETHINKING LIFE AND DEATH: THE COLLAPSE OF OUR TRADITIONAL ETHICS 190–91 (1994) [hereinafter SINGER, RETHINKING LIFE AND DEATH]; SMITH, A RAT IS A PIG, *supra* note 22, at 27.

[60] *See, e.g.*, John Harris, *The Concept of the Person and the Value of Life*, 9 KENNEDY INST. ETHICS J. 293, 307 (1999) (discussing how the re-definition of personhood to account for a creature's "capacity to value existence" allows for the neutral characterization of all species).

[61] SMITH, A RAT IS A PIG, *supra* note 22, at 31; *see* SINGER, ANIMAL LIBERATION, *supra* note 23, at 19.

[62] SMITH, A RAT IS A PIG, *supra* note 22, at 27 (quoting PETER SINGER, PRACTICAL ETHICS 74 (3d ed. 2011)).

[63] *Id.*

In this equation, the "person" with "higher capacities, whether human or animal, [is] deemed to have greater value than [the "person"] with lower capacities," and thus, when the interests of two "persons" are in conflict, the interests of the being estimated to have the greater value receives priority.[64]

At first glance, one may not notice the inherent atrocities that this theory supports. Smith concedes that Singer's language of equality can be misleading.[65] Smith, however, uses Singer's own words to illuminate the radical departure in human morality that Singer is suggesting:

> To avoid speciesism we must allow that beings who are similar in all relevant respects have a similar right to life—and mere membership in our own biological species cannot be a morally relevant criterion for this right. . . . We may legitimately hold that there are some features of certain beings that make their lives more valuable than those of other beings; but there will surely be some nonhuman animals, whose lives, by any standards, are more valuable than the lives of some humans. A chimpanzee, dog, or pig, for instance, will have a higher degree of self-awareness and a greater capacity for meaningful relations with others than a severely retarded infant or someone in a state of [advanced] senility. So, if we base the right to life on these characteristics we must grant these animals a right to life as good as, or better than, such retarded or senile human beings.[66]

Judge Richard A. Posner gives an example that further illustrates the outrageousness of Singer's philosophy:

> Suppose a dog menaced a human infant and the only way to prevent the dog from biting the infant was to inflict severe pain on the dog—more pain, in fact, than the bite would inflict on the infant. Singer would have to say, let the dog bite, for Singer's position is that if an animal feels pain, the pain matters as much as it does when a human being feels pain, provided the pain is as great; and it matters more if it is greater. But any normal person . . . would say that it would be monstrous to spare the dog, even though to do so would minimize the sum of pain in the world.[67]

Smith illuminates, therefore, that accepting Singer's theory—that being human "is irrelevant to moral value" and to protecting human interests—would mean the end of universal human rights.[68] Dr. Alasdair Cochrane submits that universal human rights are grounded in the notion that "human beings possess dignity," and thus we have "direct

---

64 *Id.*

65 *See id.* at 26.

66 *Id.* at 27 (first alteration in original, bracketed alteration corrects Smith's misquotation of Singer) (quoting SINGER, ANIMAL LIBERATION, *supra* note 23, at 19).

67 Posner, *supra* note 25, at 64.

68 SMITH, A RAT IS A PIG, *supra* note 22, at 26.

moral obligations" to every human.[69] He highlights that the Universal Declaration of Human Rights recognizes this: "All *human beings* are born free and equal in dignity and rights."[70] The United States Declaration of Independence is grounded in the same notion: "W[e] hold these Truths to be *self-evident*, that all *Men* are created equal, that they are endowed by their Creator with certain unalienable Rights."[71]

Furthermore, not only would this end human rights, "ironically it would preclude establishing a regime of animal rights, since an individual's value and the protection of his or her interests and preferences would be subject to change over time with increases or decreases in capabilities."[72] Smith concludes that by arguing for a hierarchy based on cognitive capacities, in which beings with higher capacities have greater moral worth than those with lower capacities, Singer would create a rights system that doles out or takes away rights on a case-by-case, moment-by-moment basis.[73] Smith deduces, therefore, that by inventing moral equivalency between all living beings, Singer's theory deprives so-called irrational or unaware humans of legal personhood.[74] This creates an untenable paradigm that maintains "[s]ince neither a newborn human infant nor a fish is a person, the wrongness of killing such beings is not as great as the wrongness of killing a person."[75]

B. Practical Autonomy

The second major theory is practical autonomy. Steven Wise, one of today's most prominent animal rights activists,[76] claims that no "objective, rational, legitimate, and nonarbitrary quality" exists that every human possesses, but no animal possesses, entitling all humans,

---

69 Alasdair Cochrane, *Undignified Bioethics*, 24 BIOETHICS 234, 236 (2010).

70 *Id.* (emphasis added) (quoting Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 1, at 2 (Dec. 10, 1948)) (internal quotation marks omitted).

71 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

72 SMITH, A RAT IS A PIG, *supra* note 22, at 27.

73 *See id.* at 27–28; Gary L. Francione, *Animal Rights Theory and Utilitarianism: Relative Normative Guidance*, 3 ANIMAL L. 75, 100 (1997).

74 SMITH, A RAT IS A PIG, *supra* note 22, at 28.

75 SINGER, RETHINKING LIFE AND DEATH, *supra* note 59, at 220. Through this philosophy, Singer justifies his argument "that infanticide and euthanasia should be permitted." David P. Gushee, *Can A Sanctity-of-Human-Life Ethic Ground Christian Ecological Responsibility?*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 471, 483 (2009).

76 SMITH, A RAT IS A PIG, *supra* note 22, at 61; Cupp, *Dubious Grail*, *supra* note 9, at 7; David J. Wolfson, *Steven M. Wise: Rattling the Cage—Toward Legal Rights for Animals*, 6 ANIMAL L. 259, 260 (2000).

but no animal, to basic dignity rights.[77] Wise argues, however, he has identified the one quality that is "sufficient to entitle *any* being, of *any* species, to basic liberty rights."[78] He calls this quality "practical autonomy."[79] According to Wise,

> [a] being has practical autonomy, and is entitled to personhood and basic liberty rights, if she
>
> 1. can desire;
> 2. can intentionally try to fulfill her desire; and
> 3. possesses a sense of self sufficiency to allow her to understand, even dimly, that she is a being who wants something and is trying to get it.[80]

For Wise, "[c]onsciousness is the bedrock of practical autonomy," and he links self-recognition, intelligence, and communication to the concept of consciousness.[81]

Other animal rights activists espouse different theories about what qualities are sufficient to entitle an animal to rights.[82] Gary L. Francione holds that the ability to suffer, or sentience, is the quality that entitles a species to rights.[83] Tom Regan's "subject-of-a-life criterion" grants rights to animals that have desires, emotions, preferences, perceptions, "a sense of the future," or any of the many other criterion that can be associated with being alive and conscious.[84] These alternate capacity theories, however, can easily be categorized under Wise's umbrella quality of practical autonomy.

Wise utilizes the abolition, civil rights, and gender equality movements as a roadmap[85] to illustrate the "history of extending rights to formerly excluded persons."[86] Similarly, other animal rights activists

---

[77] Steven M. Wise, *Animal Rights, One Step at a Time*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 19, 27 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004). The basic dignity rights, Wise suggests, are the rights to bodily integrity and bodily liberty. He defines bodily integrity as the right not to have one's body invaded without consent and bodily liberty as the right not to be enslaved. *Id.* at 30.

[78] *Id.* at 27 (emphasis added).

[79] *Id.*

[80] *Id.* at 32. Wise also clarifies that "[c]onsciousness . . . and sentience are implicit in practical autonomy." *Id.*

[81] *See* WISE, DRAWING THE LINE, *supra* note 50, at 35–37.

[82] *See* Sunstein, *supra* note 14, at 13–14 (describing the beliefs of other activists such as James Rachels, Lesley Rogers, Gisela Kaplan, Martha Nussbaum, and Amartya Sen).

[83] Francione, *supra* note 51, at 127.

[84] *See* TOM REGAN, THE CASE FOR ANIMAL RIGHTS 243 (1983) (emphasis omitted).

[85] WISE, RATTLING THE CAGE, *supra* note 24, at 49 (using *Somerset v. Stewart*, the famous English slavery case, and *Dred Scott v. Sandford* to "set the stage" for his arguments); *see also* Cupp, *Moving Beyond Animal Rights*, *supra* note 4, at 43.

[86] Posner, *supra* note 25, at 55.

analogize animal to human suffering by referencing historical events.[87] Wise draws analogies to these movements to support his assertion that "notions about the nature and existence of rights have evolved in keeping with shifting societal mores and values and new scientific discoveries, and . . . we have evolved to a point where courts should extend some degree of basic rights to these animals."[88] Wise further argues liberty and equality require that all persons enjoy liberty and that "likes should be treated alike."[89]

In order to decide what animals should be awarded personhood and rights, Wise creates a scale of practical autonomy divided into four categories.[90] The more any particular animal "feels or wants or acts intentionally or thinks or knows or has a self," the larger the proportion of rights it should be awarded.[91] At the top of the scale are "Category One" animals that "clearly [have] practical autonomy and [are] entitled to the basic liberty rights," and at the bottom are "Category Four" animals that "lack[] practical autonomy and [are] not entitled to liberty rights."[92] When scientific uncertainty exists as to an animal's autonomy level, it falls into Categories Two and Three.[93] For these unknown animals, Wise argues courts should adopt a "precautionary principle" and award proportional rights to these animals in anticipation of their potential autonomy.[94] "In other words," as Richard Cupp says, "giv[e] them the benefit of the doubt."[95]

In an article critiquing Wise's views, Judge Posner states that practical autonomy "is certainly *relevant* to rights[,] . . . . [b]ut most people would not think it either a necessary or a sufficient condition of

---

[87] *See, e.g.*, SMITH, A RAT IS A PIG, *supra* note 22, at 37–40 (describing PETA's 2003 "Holocaust on Your Plate" campaign, which juxtaposed "a gruesome photograph of the piled bodies of emaciated Jewish Holocaust victims . . . with the picture of a pile of dead pigs" conveying a horrific message that killing pigs is equivalent to killing Jews).

[88] Cupp, *Dubious Grail*, *supra* note 9, at 8, 20.

[89] Steven M. Wise, *An Argument for the Basic Legal Rights of Farmed Animals*, 106 MICH. L. REV. FIRST IMPRESSIONS 133, 134 (2008).

[90] *See* WISE, DRAWING THE LINE, *supra* note 50, at 35–38 (adopting this probability scale from the work of Dr. Donald Griffin, whom Wise calls the father of "cognitive ethology").

[91] *Id.* at 35.

[92] *Id.* at 38.

[93] *See id.* at 38, 43.

[94] *See id.* at 38–39, 43. Wise takes the precautionary principle from environmental policymakers. In the environmental context, the principle holds that if uncertainty exists regarding whether something will have a negative impact on the environment, policymakers should make decisions and act with the assumption that it will negatively impact the environment. *Id.* at 39.

[95] Cupp, *Dubious Grail*, *supra* note 9, at 15.

having rights."[96] By comparing the highest functioning animals to the lowest functioning humans, such as infants and mentally incapable adults who may have less autonomy than certain animals but are still afforded rights, Wise creates a "surface appeal" for his argument that some animals should be given rights.[97] Cupp's argument, and many others like it, rely on this comparison to "the rights status of children and incompetent adults to illustrate that rights exist on a scale, and that personhood [and its concurrent rights] may be granted" to animals on the same scale.[98] However, "[d]espite its intuitive appeal . . . important distinctions exist."[99] A child or incompetent adult may lack certain aspects of autonomy, and therefore, according to the practical autonomy scale, a highly intelligent ape may be considered more autonomous.[100] However, the ape and the infant still "differ in kind."[101] Cupp contends that the infant has "the potential for full autonomy" because he or she is human.[102] The ape, on the other hand, will never possess the consciousness of a human.[103]

The practical autonomy theory also leads to other untenable consequences.[104] Cupp reasons that if the basis for personhood is consciousness, then "even computers demonstrating artificial intelligence may one day need to be granted personhood status."[105] Furthermore, he explains, assignment of rights based on comparisons to mental capacities endangers the weakest members of human society and directly challenges human dignity.[106] Cupp determines that if some animals are awarded rights because "they are sufficiently intelligent," this necessarily "implies that perhaps some humans should lose their dignity rights if they are sufficiently unintelligent."[107] Ultimately, though some of their arguments create a surface appeal for awarding animals rights, both Singer's and Wise's theories are tragically misguided and create outrageous consequences that would mean the end

---

96 Posner, *supra* note 25, at 56 (giving the right to vote as an example of a right to which autonomy is relevant).

97 Cupp, *Moving Beyond Animal Rights*, *supra* note 4, at 46–48, 50–51.

98 Cupp, *Dubious Grail*, *supra* note 9, at 17.

99 *Id.* at 18.

100 *Id.* at 17–19.

101 MORTIMER J. ADLER, HOW TO THINK ABOUT THE GREAT IDEAS 64–65 (Max Weismann ed., 2000).

102 Cupp, *Dubious Grail*, *supra* note 9, at 18–19.

103 *See* ADLER, *supra* note 101, at 86.

104 *See* Cupp, *Moving Beyond Animal Rights*, *supra* note 4, at 76.

105 Cupp, *Dubious Grail*, *supra* note 9, at 19.

106 Cupp, *Moving Beyond Animal Rights*, *supra* note 4, at 76.

107 *Id.* at 76–77.

of human rights as we know them.[108]

III. A LEGAL SYSTEM FOR HUMANS BY HUMANS

Another scholar who argues in support of human exceptionalism, Geordie Duckler, highlights that around the year 534 A.D., Justinian credited the Roman jurist Hermogenian with having written "*hominum causa omne ius constitutum sit*," which translates to "all law is established for men's sake."[109] Duckler goes on, stating that this statement was true then, and "some 1,500 years later, . . . [it] still holds firm: Humans alone possess legal rights, while animals . . . are denied legal rights."[110] The truth of this statement, it seems, may be so self-evident it remains unseen.

A. The Intrinsic Humanness of our Legal System

Our legal system was made for humans by humans;[111] therefore, Richard Cupp concludes, it is "intrinsically human."[112] Furthermore, law, government, and rights "properly understood are distinctly and exclusively a human concept that can only apply to human actions."[113] Put another way, "[a]nimals cannot be the bearers of rights because the concept of right is *essentially human*; it is rooted in the human moral world and has force and applicability only within that world."[114]

There are countless reasons for this conclusion. Many scholars have posited explanations,[115] but perhaps James Madison said it most succinctly: "If men were angels, no government would be necessary."[116] Law and government were established solely for human social benefit,

---

[108] *See* FRANS DE WAAL, GOOD NATURED: THE ORIGINS OF RIGHT AND WRONG IN HUMANS AND OTHER ANIMALS 215 (1996).

[109] DIG. 1.5.2 (Hermogenianus, Libro Primo Iuris Epitomarum 1) (THE DIGEST OF JUSTINIAN (Theodore Mommsen & Paul Krueger eds., Alan Watson trans., Univ. of Pa. Press 1985) (c. 534 B.C.)); *see also* Duckler, *supra* note 1, at 180.

[110] Duckler, *supra* note 1, at 180.

[111] *Id.*

[112] Cupp, *Dubious Grail*, *supra* note 9, at 54.

[113] SMITH, A RAT IS A PIG, *supra* note 22, at 233.

[114] CARL COHEN & TOM REGAN, THE ANIMAL RIGHTS DEBATE 30 (2001).

[115] *See* 28 THOMAS AQUINAS, SUMMA THEOLOGIÆ pt. I–II, Q. 95, art. 1, at 101–03 (Thomas Gilby O.P. trans., Blackfriars, Cambridge 1966) (1495) ("Not all [men], however, are like that; some are bumptious, headlong in vice, not amenable to advice, and these have to be held back from evil by fear and force, so that they at least stop doing mischief and leave others in peace . . . . This schooling through the pressure exerted through the fear of punishment is the discipline of human law. Consequently we see the need for men's virtue and peace that laws should be established . . . .").

[116] THE FEDERALIST NO. 51, at 291 (James Madison) (Glazier & Co., 1826).

survival, and prosperity,[117] and they are instituted to protect and promote our fundamental human rights.[118] Indeed, a foundational aspect of our law is that it must protect the most vulnerable humans among us;[119] the exact same humans animal rights advocates desire to trample over while clambering to elevate animals to human status.[120]

Though animals may be somewhat social by instinct, Mortimer J. Adler adds that humans are the only beings that develop constitutions, laws, and governments to live by.[121] Duckler describes how these systems and institutions have been born and developed over thousands of years through man's unique language ability.[122] He explains that history demonstrates that humans live "within a communication- and idea-driven social web and express[] [themselves] most formally and most thoroughly through the rule and operation of law."[123] Indeed, Duckler says the foundation of every legal system, and consequently every legal right, is man's "capacity for language,"[124] and without our ability to speak, read, and write, the development of the complex legal systems that operate today would be impossible.[125]

Claire Rasmussen, a political science professor at the University of Delaware, exposes another telling fact: the way in which "legal and philosophical defenses of animal[]" rights are typically mounted.[126] Quoting Elizabeth Anker, Rasmussen describes how animal rights activists "typically take the status of the human as their starting points, asking whether animals are sufficiently like human beings. . . . [And] within this type of framework, animals are entitled to rights only to the degree they resemble the human, reinforcing" the idea that humanness

---

117 *See* ADLER, *supra* note 101, at 380–81.

118 *See* U.S. CONST. pmbl. ("We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution . . . .").

119 *See* Alon Harel & Gideon Parchomovsky, Essay, *On Hate and Equality*, 109 Yale L.J. 507, 526, 531 (1999).

120 *See* SINGER, RETHINKING LIFE AND DEATH, *supra* note 59, at 220.

121 ADLER, *supra* note 101, at 85.

122 Duckler, *supra* note 1, at 180–81. Even Jane Goodall, famous for her research on chimpanzees, admits "sophisticated spoken language is unique to humans." Jane Goodall, Remark, *The Evolving Legal Status of Chimpanzees*, 9 ANIMAL L. 1, 2–3 (2003).

123 Duckler, *supra* note 1, at 182.

124 *Id.* at 181.

125 *Id.*

126 Claire E. Rasmussen, *Are Animal Rights Dead Meat?*, 41 SW. L. REV. 253, 253 n.*, 256 (2012) (internal quotation marks omitted) (quoting Elizabeth Susan Anker, Elizabeth Costello, *Embodiment, and the Limits of Rights*, 42 NEW LITERARY HIST. 169, 170 (2011)).

is the relevant prerequisite in our human legal system.[127]

Historically, theoretically, and by its very nature, the structure of our legal system is intrinsically human; therefore, animal welfare and protection must be addressed with "a humancentric approach."[128] Duckler explains that this is precisely the reason "legal rules should not be applied to animals as if they were no different than humans."[129] The animal rights movement, he argues, fails to adequately address this reality,[130] and it seeks to convince the courts to operate in contravention to and outside of "the parameters within which law operates to define rights and make those rights useful."[131]

B. The Rights Activists Seek: What Are They? Where Do They Originate?

What are these so-called rights that animal activists seek? Steven Wise advocates for what he calls "dignity-rights," which are the rights to bodily integrity and bodily liberty.[132] Peter Singer proposes all animals be given moral equivalence with humans,[133] and still others advocate for additional rights.[134] They all feverishly work, however, to gain rights for animals, often without attempting to describe or justify what rights are or from where they originate.[135]

Legal thinkers and philosophers have debated the rights question for decades. The Universal Declaration of Human Rights states human rights belong to everyone, everywhere, and that these rights are grounded in "the inherent dignity . . . of all members of the human family."[136] Nicholas Wolterstorff, a former Yale philosophy professor and prolific author on rights and ethics,[137] defines rights as "a normative social relationship . . . , [that is,] a legitimate claim to the good of being treated a certain way by persons and by those social entities capable of rational action."[138] Carl Cohen, a University of Michigan philosophy

---

[127] *Id.* (first alteration in original) (internal quotation marks omitted).

[128] Posner, *supra* note 25, at 66–67.

[129] Duckler, *supra* note 1, at 182.

[130] *Id.* at 200.

[131] *Id.* at 191; *see also id.* at 192.

[132] WISE, RATTLING THE CAGE, *supra* note 24, at 49, 267.

[133] *See* SMITH, A RAT IS A PIG, *supra* note 22, at 23, 28 (quoting SINGER, RETHINKING LIFE AND DEATH, *supra* note 59, at 220).

[134] *See, e.g.*, WISE, RATTLING THE CAGE, *supra* note 24, at 7; Cupp, *Moving Beyond Animal Rights*, *supra* note 4, at 31.

[135] *See* Duckler, *supra* note 1, at 191.

[136] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), pmbl., (Dec. 10, 1948).

[137] NICHOLAS WOLTERSTORFF, JUSTICE: RIGHTS AND WRONGS, at back cover (2008).

[138] *Id.* at 385–86.

professor,[139] defines rights as "valid claim[s], or potential claim[s], that may be made by a moral agent, under principles that govern both the claimant and the target of the claim."[140] These claims are all "states of affairs."[141] Wolterstorff explains, for example, that the rights to have some object or to not be physically harmed are the states of affairs of owning that object or of "persons treating and refraining from treating one in certain ways."[142] Therefore, he reasons, "rights are inherently social,"[143] and this "sociality is built into the essence of rights."[144] Wolterstorff adds that a right is always related to someone;[145] consequently, "[r]ights themselves are foundational to human community."[146]

Human rights are characterized in many different ways and separated into many different categories. Wolterstorff lists and provides examples of, among others, the following categories of rights.[147] *Legal* or *socially conferred* rights are those given by the "legislation of some organization or the rules of some social practice."[148] The right to Social Security, which is bestowed by legislation of Congress, is a socially conferred right.[149] *Standing* rights are those that ensue by virtue of one's office or position.[150] For example, a military officer has the intrinsic right and authority to issue commands to his troops and the right to his troops' obedience.[151] The troops' obligation to obey and the officer's right to their obedience "are not generated by the officer's commands; they were already there" by virtue of the officer's standing.[152] Then there are *benefit* or *positive* rights, which are rights to be treated a certain way, such as the right to the benefit of a formal education,[153] and there are

---

[139] COHEN & REGAN, *supra* note 114, at 323.

[140] *Id.* at 17.

[141] WOLTERSTORFF, *supra* note 137, at 137.

[142] *Id.* at 137–38.

[143] *Id.* at 246.

[144] *Id.* at 4.

[145] *Id.*

[146] *Id.* at 5–6.

[147] The examples provided are not an exhaustive list and are lacking greatly in detail. For an excellent and detailed exposition of many additional categories of rights and the justification and grounding of those rights, see generally WOLTERSTORFF, *supra* note 137.

[148] *Id.* at 288.

[149] *Id.* at 291–92.

[150] *Id.* at 269–70.

[151] *Id.*

[152] *Id.*

[153] WOLTERSTORFF, *supra* note 137, at 314; *see* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 26(1–2) (Dec. 10, 1948).

freedom or *negative* rights, which are rights to not be treated a certain way, such as the right not to be tortured.[154] Wolterstorff categorizes the final set of rights as *natural* rights.[155] They are natural, he explains, because they "have not been socially conferred" upon anyone or, phrased a different way, they are rights "that one would possess even if they had not been socially conferred,"[156] regardless of any other factor. These rights are "inherent to those who have them," and "they have them on account of the worth of beings of their sort."[157]

Wolterstorff holds that inherent *natural* rights are the base rights upon which all other rights are founded and evaluated,[158] and "[n]atural law for the right ordering of society is what ultimately grounds justice . . . not the inherent rights of members of society."[159] To that end, rights are tied to justice; they "are trumps."[160] In other words, Wolterstorff explains, no other considerations matter, "[t]he face value of the cards makes no difference," and rights win no matter what.[161] St. Thomas Aquinas wrote that justice is "rendering to each his right[;] . . . [a] man is called just because he safeguards right."[162] In Justinian's *Digest*, the Roman jurist Ulpian defined justice as a "steady and enduring will to render unto everyone his right."[163] Wolterstorf reasons that according to this formula "[p]rimary justice . . . is present in society insofar as the members of society enjoy the goods to which they have a right."[164]

Therefore, because justice is grounded in inherent rights, and because inherent rights and all other rights built upon them inhere on account of a human's worth, the idea of human dignity and worth is central to any discussion of justice or rights.[165] Consequently, all rights flow from "the status of being a human being, a member of the species *Homo sapiens*," and the worth that is attached to that status.[166] Wolterstorff provides the following example: one who has the status of

---

[154] WOLTERSTORFF, *supra* note 137, at 315 n.8, 16.

[155] *Id.* at 33.

[156] *Id.*

[157] *Id.* at 10–11.

[158] *Id.* at 386.

[159] *Id.* at 11.

[160] *Id.* at 291.

[161] *Id.* at 23, 305–06.

[162] AQUINAS, *supra* note 115, vol. 37 at pt. II–II, Q. 58, art. 1 (emphasis omitted).

[163] DIG. 1.10 (Ulpian, Libro Primo Regularum 1) (THE DIGEST OF JUSTINIAN (Theodore Mommsen & Paul Krueger eds., Alan Watson trans., Univ. of Pa. Press 1985)).

[164] WOLTERSTORFF, *supra* note 137, at 24.

[165] *See supra* notes 136–44 and accompanying text.

[166] WOLTERSTORFF, *supra* note 137, at 313.

being a United States citizen age sixty-five or older has the right to a monthly Social Security payment, and everyone understands this to mean "the government shall send this payment to such persons [having attained the status], *period.*"[167] In deciding whether to send the payments, the government is not to consider any utilitarian or capacity-based calculation.[168] The right to the payment comes along with the status, and that right trumps all others.[169] He argues, therefore, that just as the right to Social Security inheres in the status of United States citizen age sixty-five or older, so too do all inherent, natural human rights inhere in the status of human being.[170] No utilitarian or capacity based calculation enters the equation. The whole is greater than the sum of its parts. Wolterstorff argues it is simply because we are *human* that we enjoy *human* rights;[171] therefore, his "trumping principle affirms . . . [n]o human being has a price"[172] and each is "irreducibly precious."[173]

IV. HUMAN EXCEPTIONALISM[174]

Most Americans still believe humans have "irreplaceable significance" and intrinsic dignity,[175] and they "care a great deal about human dignity."[176] Indeed, our history is replete with examples of battles waged for human dignity—"for treating human beings as they deserve to be treated, *solely because of their humanity.*"[177] However, there is a growing movement that believes we share more similarities than differences with animals and that man is not unique.[178]

Wesley Smith defines *human exceptionalism* as the belief that humans possess a unique nature that places us at the "pinnacle of moral worth"[179] and "every human life [has] equal moral value simply and

---

[167] *Id.* at 292.

[168] *Id.*

[169] *Id.*

[170] *Id.* at 292, 313.

[171] *Id.* at 313.

[172] *Id.* at 308.

[173] *Id.* at 361.

[174] The structure of some arguments in this section is based on Wesley J. Smith's *A Rat Is a Pig Is a Dog Is a Boy. See generally* SMITH, A RAT IS A PIG, *supra* note 22, at 231–49.

[175] Peter Augustine Lawler, *Commentary on Meilaender and Dennett*, *in* HUMAN DIGNITY AND BIOETHICS 278, 282 (2008).

[176] Leon R. Kass, *Defending Human Dignity*, *in* HUMAN DIGNITY AND BIOETHICS 297, 298 (2008).

[177] *Id.*

[178] *See* Goodall, *supra* note 122, at 10.

[179] SMITH, A RAT IS A PIG, *supra* note 22, at 3, 235; *see also* Luís Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the*

merely because it is human."[180] Smith holds, just as Alasdair Cochrane similarly explains, that this objective, intrinsic value every human possesses is "the bedrock of universal human rights."[181] Therefore, if one were to accept the argument that humans do not possess inherent worth derived solely from our nature, then the basis of universal human rights and the foundation that all our liberties are built upon are rendered defunct.[182]

Animal rights activists argue that "believing in human exceptionalism shows hubris, a disdainful pride that leads us to believe we are entitled to treat animals as cruelly as we desire."[183] This could not be farther from the truth. Human exceptionalism maintains that humans are unique and superior.[184] As Smith explains, it does not suggest human beings not recognize the nobility of animals or not believe we owe them kindness and respect,[185] and it does not advocate that humans have unlimited license to make animals' lives miserable or to destroy their habitats at will without any thought to the consequences.[186] Smith, as well as other proponents of human exceptionalism, believes the absolutist view that animals are purely property is "as wrong from its end of the spectrum as animal rights ideology is from the other extreme."[187]

A. A Faith-Based Justification

Most people believe humans have unequaled importance and intrinsic dignity;[188] however, some have come to question[189] this "self-evident" truth.[190] Smith points out that a justification for this instinctive belief that human life matters most can be made from faith-based or

---

Transnational Discourse, 35 B.C. INT'L & COMP. L. REV. 331, 392 (2012) (stating that intrinsic value "indentifies the special status of human beings in the world").

[180] Wesley J. Smith, *The Human Exceptionalist*, DISCOVERY INST. (Mar.–Apr. 2012), http://www.discovery.org/a/18881.

[181] SMITH, A RAT IS A PIG, *supra* note 22, at 253; Cochrane, *supra* note 69, at 236.

[182] *See* MORTIMER J. ADLER, THE DIFFERENCE OF MAN AND THE DIFFERENCE IT MAKES 263–64 (1967).

[183] SMITH, A RAT IS A PIG, *supra* note 22, at 243.

[184] *Id.* at 235, 248.

[185] *Id.* at 248–49.

[186] *See* Francione, *supra* note 18, at 398.

[187] SMITH, A RAT IS A PIG, *supra* note 22, at 232; *see, e.g.*, Posner, *supra* note 25, at 67.

[188] Lawler, *supra* note 175, at 282.

[189] SPERLING, *supra* note 21, at 2 (explaining that "animal rights groups question assumptions about the human relationship to animals that have been fundamental to Western culture").

[190] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

secular grounds.[191] Furthermore, as Nicholas Wolterstorff explains, a faith-based justification is fairly easy to come by, "since virtually all major faith traditions promote the proper care of animals but also assert that humans have greater worth than animals."[192]

The Christian tradition teaches man was made in the image of God,[193] and therefore God has bestowed intrinsic dignity and worth upon mankind.[194] Wolterstorff asserts that God loves every human equally, and that love confers matchless worth on humans above any other creature.[195] Another illustration of this principle is Jesus telling his disciples they "are worth more than many sparrows."[196] One theologian points out that St. Francis of Assisi, who founded the Franciscan order of the Roman Catholic Church and is the patron saint of animals and the environment,[197] espoused a "hierarchical view of creation, according to which every living being praises God but is also available for human use and consumption as food."[198] In fact, Judge Posner highlights that "Aquinas and other traditional Catholic thinkers [espoused the belief] that animals are entitled to no consideration, at least relative to human beings, because animals lack souls."[199] However, William Murchison, another proponent of human exceptionalism, explains that the dominant Christian belief is that "man [is not] the owner of the world, rather just the tenant, with positive responsibilities for his treatment of the property and its other inhabitants."[200] Smith expounds that "[e]ven religions that doctrinally require vegetarianism do so because they believe it is our duty not to cause animals to suffer," not because they believe animals are our moral equals.[201]

---

[191] SMITH, A RAT IS A PIG, *supra* note 22, at 238.

[192] WOLTERSTORFF, *supra* note 137, at 237.

[193] *Genesis* 1:26–27 (New International Version).

[194] *See* Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 658–59 (2008).

[195] WOLTERSTORFF, *supra* note 137, at 360; *see also* McCrudden, *supra* note 194, at 659 ("[B]eing made in the image of God mean[s] that Man was endowed with gifts which distinguish[ ] Man from animals.").

[196] *Matthew* 10:31 (New International Version).

[197] Rebecca J. Huss, *Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals*, 86 MARQ. L. REV. 47, 59 (2002); Keith Douglass Warner, *The Moral Significance of Creation in the Franciscan Theological Tradition: Implications for Contemporary Catholics and Public Policy*, 5 U. ST. THOMAS L.J. 37, 49 (2008).

[198] David Grumett, *Vegetarian or Franciscan? Flexible Dietary Choices Past and Present*, 1 J. FOR STUDY RELIGION NATURE & CULTURE 450, 450 (2007).

[199] Posner, *supra* note 25, at 61.

[200] Murchison, *supra* note 17, at 29, 34; *see also Genesis* 1:25–30, 2:15 (New International Version).

[201] SMITH, A RAT IS A PIG, *supra* note 22, at 237–38.

Therefore, it is easy to reach a justification that humans have inherent dignity and worth through a religious appeal to God, the Creator of man and beast. The end result, Wolterstorff posits, is that "being [made] in the image of God . . . gives great worth to those creatures who bear the image."[202] Furthermore, he adds, God's entrusting dominion over the earth to his image bearers gives humans a unique dignity and places us in the exceptional role over animals.[203] "Some animals may engage in behavior rather like the more primitive forms of exercising dominion," but as Wolterstorff highlights, the simple fact remains that animals cannot exercise control or authority in this world, and they do not have the dignity of being God's image-bearers.[204]

B. A Secular Justification

On the other hand, Smith clarifies, a justification for human exceptionalism does not require a belief in an omnipotent Creator.[205] The inherent worth and dignity of humans appears from a secular worldview as well.[206] As one scholar explains, "[a] *pre-religious* intuition recognizes there is something awesome, worthy of holding in dread—*fearful* . . . about a human life," and as such, "[w]e [do not] dare hasten its end."[207] Indeed, Immanuel Kant, dubbed by one scholar as the quintessential secularist,[208] believed "that humanity in a human being . . . is the only thing about human beings that gives them worth,"[209] and Ronald Dworkin believes that almost all of us accept "that human life in all its forms is sacred"[210] and humans are the "highest product of natural

---

[202] WOLTERSTORFF, *supra* note 137, at 347.

[203] *See id.* at 347–48.

[204] *Id.* at 348.

[205] Wesley J. Smith, *The Bioethics Threat to Universal Human Rights*, HUM. LIFE REV., Winter–Spring 2011, at 63, 68 [hereinafter Smith, *Bioethics Threat*].

[206] It should be noted, however, that even a so-called secular viewpoint is ultimately faith-based in that "*everyone* reasons from faith, from presuppositions which cannot be proven but are held nonetheless." W. Ross Blackburn, *Arguing for Human Dignity in Bioethics & Public Policy: A Reply to Wesley J. Smith*, HUM. LIFE REV., Winter 2012, at 35, 44. The argument simply changes based on one's presuppositions.

[207] David Klinghoffer, *Preserved Memories of Wisdom*, HUM. LIFE REV., Spring 2012, at 35, 36.

[208] ALEX SCHULMAN, THE SECULAR CONTRACT 12 (2011).

[209] WOLTERSTORFF, *supra* note 137, at 326.

[210] Ronald Dworkin, *Life is Sacred: That's the Easy Part*, N.Y. TIMES, May 16, 1993, *available at* Bloomberg, http://www.bloomberglaw.com/ (click on "News"; then click in "Keywords" box; then search "Dworkin 'Life is Sacred: That's the Easy Part'"). This further illustrates how any viewpoint is ultimately faith-based, and a secular vocabulary is inadequate for the discussion as Dworkin must "resort to a religious vocabulary in order to . . . . explain the value of human life." Steven D. Smith, *Recovering (from)*

creation."[211]

Smith maintains that the presupposition of human exceptionalism—that every human possesses great status and worth because of an intrinsic human nature[212]—seems so obvious it should be uncontroversial;[213] however, it has become the center of this debate. After all, what other species blushes,[214] has five-year plans, moves around the world simply for a change in scenery, cooks its food, clothes itself, seeks pleasure[215] and entertainment at any cost, researches and "show[s] concern about the welfare of other species,"[216] "builds civilizations, records history, creates art, makes music, thinks abstractly, communicates in language, envisions and fabricates machinery, improves life through science and engineering, or explores the deeper truths found in philosophy and religion?"[217] Obviously, there is no other. Humans are unique.[218] Scientists have discovered many complex behaviors animals instinctively exhibit that are similar to some human behaviors, but as David Oderberg points out, no experiment has ever shown "that animals know *why* they do what they do, or are *free* to choose one course of action over another."[219]

Enlightenment?, 41 SAN DIEGO L. REV. 1263, 1302 n.158 (2004) (citing RONALD DWORKIN, LIFE'S DOMINION 68–101 (1993)).

211 RONALD DWORKIN, LIFE'S DOMINION 82 (1993).

212 *See supra* text accompanying notes 183–85.

213 SMITH, A RAT IS A PIG, *supra* note 22, at 238.

214 CHARLES DARWIN, THE EXPRESSION OF THE EMOTIONS IN MAN AND ANIMALS 309 (Univ. of Chi. Press 1965) (1872) ("Blushing is the most peculiar and the most human of all expressions.").

215 *See* Jesse Bering, *One Reason Why Humans Are Special and Unique: We Masturbate. A Lot*, SCI. AM. (June 22, 2010), http://blogs.scientificamerican.com/bering-in-mind/2010/06/22/one-reason-why-humans-are-special-and-unique-we-masturbate-a-lot/ (stating that humans are the only animals that imagine and that humans alone have the power to conjure up images for sexual pleasure).

216 Charles S. Nicoll, *A Physiologist's Views on the Animal Rights/Liberation Movement*, 34 PHYSIOLOGIST 303, 307–08 (1991).

217 SMITH, A RAT IS A PIG, *supra* note 22, at 238 (offering his own list of uniquely human characteristics); *see also* Marc Bekoff, *Animal Minds and the Foible of Human Exceptionalism*, HUFFINGTON POST (Aug. 5, 2011, 5:21 PM), http://www.huffingtonpost.com/marc-bekoff/animal-minds-and-the-foib_b_919028.html ("[H]umans do indeed show unique capacities such as writing sonnets, solving algebraic equations, and meditating on the structure of the universe . . . .").

218 "[U]nique[:] . . . 1a: being the only one[;] . . . 2: being without a like or equal: single in kind or excellence[;] . . . 3: unusual." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2500 (Philip Babcock Gove ed., 2002).

219 David S. Oderberg, *The Illusion of Animal Rights*, HUM. LIFE REV., Spring–Summer 2000, at 37, 43. David Oderberg is a philosophy professor at the University of Reading in England who published the book, *Applied Ethics*, in 2000 containing his arguments against animal rights. *Id.* at 37.

Human exceptionalism maintains that humans possess the intrinsic qualities that make us the only moral agents.[220] This "[m]oral agency is inherent and exclusive to human *nature*, meaning it is possessed by the *entire species*, not just individuals who happen to possess rational capacities."[221] As Smith declares, animals cannot and do not have the ability to reason morally.[222] Furthermore, Smith adds, it is only our moral human nature that allows us to recognize or even care about animal suffering, and "[t]his uniquely human capacity to empathize with and appreciate 'the other' is one of the best things about us."[223]

Smith makes clear it is because of these beliefs that humans are situated at the apex of the natural world and are the only moral beings.[224] He then highlights that a core tenet of human exceptionalism is the moral obligation to respect animals, which includes treating them humanely and never causing them frivolous suffering.[225] Humans alone, Smith adds, have these duties to other species,[226] and humans alone bear this burden of moral responsibility to each other and to animals.[227] One famous philosopher even stated that only man has the capacity to be bound by obligation or duty; this is foreign to every other species.[228] This corresponds with Smith's argument that animals cannot possess morality, honor rights, or bear burdens of moral obligation.[229] Primatologist Frans de Waal states that bestowing rights is nonsensical unless it is accompanied by responsibilities; therefore, "animals cannot and will not" become rights bearing members of society.[230] Carl Cohen plainly illustrates this with the example of a lion hunting down and killing a baby zebra:

---

[220] Nicoll, *supra* note 216, at 307.

[221] SMITH, A RAT IS A PIG, *supra* note 22, at 235; *see also* ROBERT P. GEORGE & CHRISTOPHER TOLLEFSEN, EMBRYO: A DEFENSE OF HUMAN LIFE 112 (2008) ("We are members of a certain animal species—Homo sapiens. Any whole living member of that species is a human being. His or her nature is a *human* nature. Such a nature is a *rational* nature. Human beings are *rational animals*.").

[222] SMITH, A RAT IS A PIG, *supra* note 22, at 235.

[223] *Id.* at 240.

[224] *Id.* at 3; *see also id.* at 235.

[225] *Id.* at 3; *see also id.* at 235.

[226] *Id.* at 239.

[227] *See id.* at 243–44.

[228] HANS JONAS, THE PHENOMENON OF LIFE 283 (Greenwood Press, Inc. 1979) (1966).

[229] SMITH, A RAT IS A PIG, *supra* note 22, at 15; *see also* Duckler, *supra* note 1, at 192 (stating that "to have a right means also to be responsible for one's actions").

[230] Frans B. M. de Waal, Op-Ed., *We the People (and Other Animals)* . . ., N.Y. TIMES, Aug. 20, 1999, at A21; SMITH, A RAT IS A PIG, *supra* note 22, at 247.

> Do you believe the baby zebra has the right not to be slaughtered? Or that the lioness has the right to kill that baby zebra to feed her cubs? Perhaps you are inclined to say, when confronted by such natural rapacity . . . that neither is right or wrong, that neither zebra nor lioness has a right against the other. Then I am on your side. Rights are pivotal in the moral realm and must be taken seriously, yes; but zebras and lions and rats do not live in a moral realm—their lives are totally amoral. There is no morality for them; animals do no moral wrong, ever. In their world there are no wrongs and there are no rights.[231]

Do we then put the lion on trial for the merciless, inhumane killing of the innocent zebra? Of course not, because we all instinctively know animals are amoral and cannot be held accountable for their actions.[232]

Humans, Cohen states, being moral beings, have rights, and when other humans violate those rights, we say a person has been wronged.[233] We call this a crime.[234] Cohen analogizes to a basic principle of our humancentric jurisprudence system; the actor's moral state of mind determines whether a crime was committed.[235] As most law students learn and as Cohen highlights, the *actus reus* must be accompanied by a *mens rea*, a morally guilty mind.[236] Through the analogy, Cohen reasons that this knowledge of moral duties governs our actions, and no animal will ever possess the requisite moral agency to be aware of moral duties, let alone develop a *mens rea*.[237] Wesley Smith and David Oderberg reach similar conclusions, essentially stating that since an animal cannot even comprehend the concept of rights, much less make a conscious demand for its rights,[238] so-called animal rights would have to be enforced by humans.[239]

Smith admits that "animals certainly have exceptional capabilities" that are exclusive to their species.[240] A human obviously cannot run as fast as a cheetah, fly like an eagle, or swim to the depths like a whale.[241]

---

[231] COHEN & REGAN, *supra* note 114, at 30–31 (emphasis omitted).

[232] Carl Cohen, *Do Animals Have Rights?*, 7 ETHICS & BEHAV. 91, 98 (1997).

[233] *Id.*

[234] *Id.*

[235] *Id.* Smith exposes how animal rights activists further distort terms when they condemn eating meat because it is murder even though "this term is applicable only to the killing of human beings." SMITH, A RAT IS A PIG, *supra* note 22, at 203.

[236] Cohen, *supra* note 232, at 98.

[237] *Id.*

[238] Oderberg, *supra* note 219, at 42.

[239] SMITH, A RAT IS A PIG, *supra* note 22, at 232.

[240] Smith, *Bioethics Threat*, *supra* note 205, at 68.

[241] Smith presents "the bat's sonar or the gorrilla's strength" to illustrate some such capabilities. *Id.*

As he explains, however, these characteristics are merely physical distinctions, having no moral implications upon one's inherent worth.[242] Conversely, "humans are exceptional in ways that separate us morally—rather than physically."[243] Therefore, he argues that the differences between humans and animals are not only physical differences of degree, such as the extent each species uses tools or has intelligence or communicates, but also moral differences of kind, such as rationality, creativity, abstract thinking, and accountability.[244] Contrary to Singer, Smith argues that "[m]oral value should not be based on the capacities of each individual."[245] Rather, Smith holds, inherent worth should be based on the intrinsic nature of the species, and capacities such as creativity, responsibility, language, and the like that indicate moral differences in kind are all "capacities that flow from the nature of humans and are absent from the natures of all animals."[246]

Cohen describes how some refute this assertion by arguing infants and the senile do not have these moral capacities, but they have rights.[247] He responds, however, that it is not individuals who are awarded rights once they achieve some level of special capacity.[248] This argument arises out of the mistaken supposition that rights are tied to individual capabilities.[249] As he clarifies, rights exist solely in the "human moral world," and it is the fact one is a human with an inherent, moral human nature that gives the human species rights.[250] He asserts that it is beside the point that some animal resembles human intelligence or demonstrates remarkable capabilities in some obscure experiment or test.[251] He logically concludes, therefore, that capabilities are not at issue in this debate.[252] Neither intelligence, rationality, the ability to communicate or feel pain, self-consciousness, practical autonomy, nor any other capacity animal rights advocates champion as an equalizer has any bearing on the human rights equation.[253] It is humans' innate moral nature that generates rights;[254] thus, humans

---

242 *Id.*

243 *Id.* (emphasis omitted).

244 SMITH, A RAT IS A PIG, *supra* note 22, at 240–42.

245 *Id.* at 241 (emphasis omitted).

246 *Id.* (emphasis omitted).

247 Cohen, *supra* note 232, at 97.

248 *Id.*

249 *Id.*

250 *Id.*

251 *Id.*

252 *See id.*

253 *Id.*

254 *Id.* at 97–98.

possess human rights exclusively because they are human.[255]

This discussion clearly illustrates "the absurdity of the whole concept of animal rights."[256] As Smith makes clear, "the entire issue of animal rights [is not] actually about 'rights' at all,"[257] "[r]ather, it is an exclusively human debate about the nature and scope of our responsibilities toward animals—responsibilities that are *predicated solely on our being human*."[258] Ultimately, Smith concludes, animal rights activists arguing against human exceptionalism are actually calling for the very thing human exceptionalism requires of humans: that we maintain the highest level of respect for and duties toward animals.[259] Smith ironically points out, therefore, that the argument animal rights activists make actually lends "proof [to] the unique nature of the human species, or what some call 'human exceptionalism.'"[260]

V. HUMAN RESPONSIBILITY IS THE APPROPRIATE SOLUTION

A direct consequence of rejecting human exceptionalism is that the weak lose status and can be abused by the strong.[261] Judge Posner highlights that we all instinctively know a human infant is immeasurably more valuable than a chimpanzee, and no amount of philosophy will change that fact.[262] He adds that being part of the human species is a morally relevant fact, and "[i]f the moral irrelevance of humanity is what philosophy teaches, so that we have to choose between philosophy and the intuition that says that membership in the human species is morally relevant, philosophy will have to go."[263] He goes on to state the potential social value of human exceptionalism in that it may encourage people to behave better and hold all life in higher regard.[264]

---

[255] Cochrane, *supra* note 69, at 236; *see* SMITH, A RAT IS A PIG, *supra* note 22, at 253.

[256] SMITH, A RAT IS A PIG, *supra* note 22, at 234–35.

[257] *Id.* at 235.

[258] *Id.*; *see also* Duckler, *supra* note 1, at 191–92 (stating that any discussion of rights must be a humancentric one because rights adhere in a human conception of justice and "animals do not have a concept of 'justice' or of 'fair play' at all").

[259] SMITH, A RAT IS A PIG, *supra* note 22, at 232.

[260] *Id.* at 235.

[261] *See* ADLER, *supra* note 182, at 265. *See generally* W. Ross Blackburn, *Evolution, Human Dignity, and Crafting Public Policy*, CRISIS MAG. (May 3, 2012), http://www.crisismagazine.com/2012/can-public-policy-ever-reflect-human-dignity (stating that human history reveals this belief in the actions of "people who made the opposite argument—that some were sub-human due to a lack of certain characteristics"); Tom L. Beauchamp, *The Failure of Theories of Personhood*, 9 KENNEDY INST. ETHICS J. 309, 315–16 (1999).

[262] *See* Posner, *supra* note 25, at 67.

[263] *Id.* at 65 (emphasis omitted).

[264] *Id.* at 61–62.

Furthermore, he reasons, if we fail to maintain the human-animal dichotomy, "then as denizens of the jungle we [would] have no greater duties to the other animals than the lion . . . has to the [zebra],"[265] and "we may end up treating human beings as badly as we treat animals, rather than treating animals as well as we treat (or aspire to treat) human beings."[266]

Viewing animals as moral equivalents and granting them human rights, Smith adds, "would degrade the importance of rights altogether, just as wild inflation devalues money."[267] As one Darwinian stated, if we are all "the same in the eyes of nature, [then we are all] equally remarkable and equally dispensable."[268] Richard Cupp points out that the inevitable result of viewing animals more like humans would be to view humans more like animals, and the detachment of rights from human moral agency and human concerns would have deleterious effects to life as we know it.[269] Ultimately, "a world with less emphasis on human dignity and moral responsibility would not be better for it."[270]

Therefore, giving animals human rights would add "billions of potential new plaintiffs" along with billions in litigation costs to an already overburdened court system,[271] and thus it is not the correct solution for protecting animals.[272] A more sustainable and effective focus for animal advocates would be to promote the prohibition of "the most indefensible practices."[273] Posner suggests that instead of "rights mongering," the solution should include making animals property and more vigorously enforcing "laws that forbid inflicting gratuitous cruelty on animals."[274] He rightly concludes that a humancentric solution focused on human responsibility and duty is best.[275] As he points out, if enough people come to understand the suffering animals are capable of

---

265 *Id.* at 61.

266 *Id.*

267 SMITH, A RAT IS A PIG, *supra* note 22, at 243.

268 John Darnton, *Darwin Paid for the Fury He Unleashed: How a Believer Became an Iconoclast*, SF GATE (Sept. 25, 2005, 4:00 AM), http://www.sfgate.com/opinion/article/Darwin-paid-for-the-fury-he-unleashed-How-a-2567847.php#page-1.

269 Cupp, *Moving Beyond Animal Rights*, *supra* note 4, at 79.

270 *Id.*; *see also* DE WAAL, *supra* note 108, at 215 ("Human morality as we know it would unravel very rapidly indeed if it failed to place human life at its core.").

271 Cupp, *Dubious Grail*, *supra* note 9, at 52.

272 *See* Posner, *supra* note 25, at 59.

273 Cass. R. Sunstein, *Slaughterhouse Jive*, NEW REPUBLIC, Jan. 29, 2001, at 40, 42–43 (reviewing GARY L. FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG? (2000)).

274 Posner, *supra* note 25, at 59 (stating that "people tend to protect what they own" and that gratuitous is the operative word).

275 *Id.* at 66.

feeling and learn how to ease that suffering without substantially affecting human comforts or progress, then "public opinion and consumer preference [would] induce . . . change."[276]

CONCLUSION

In the end, we all instinctively know humans and animals are not equal, and making us equal is not the appropriate way to protect animals.[277] Some animals may display some seemingly human qualities or capabilities, but neither practical autonomy nor cognitive capacities warrant treating animals as humans with attendant legal rights. Seeking to promote the humane treatment of animals is important. As Richard Cupp warns, however, attempting to humanize animals in any regard "is misguided and dangerous for both humans and animals."[278] Furthermore, as Wesley Smith highlights, the appropriate solution is not granting animals human rights.[279] The solution must be some "middle ground that doesn't grant unwarranted rights to animals but does permit robust protection of their welfare."[280] This is certainly an achievable goal.[281] "Our legal system is intrinsically human,"[282] and "all law is established for men's sake."[283] Humans enjoy rights based simply upon the fact that we are moral beings of immeasurable worth. Just as Cupp concluded in *Dubious Grail*, I also conclude that "the protection and humane treatment of animals is a basic human responsibility, not a basic animal right."[284]

Nicholas H. Lee[*]

---

[276] *Id.*

[277] *See* SMITH, A RAT IS A PIG, *supra* note 22, at 246–49.

[278] Cupp, *Dubious Grail*, *supra* note 9, at 54.

[279] SMITH, A RAT IS A PIG, *supra* note 22, at 232.

[280] *Id.*

[281] *See id.*

[282] Cupp, *Dubious Grail*, *supra* note 9, at 54.

[283] DIG. 1.5.2 (Hermogenianus, Libro Primo Iuris Epitomarum 1) (THE DIGEST OF JUSTINIAN (Theodore Mommsen & Paul Krueger eds., Alan Watson trans., Univ. of Pa. Press 1985) (c. 534 B.C.)).

[284] Cupp, *Dubious Grail*, *supra* note 9, at 54.

[*] J.D. Candidate, Regent University School of Law, 2014. Special thanks to my wife, Emily, for "dancing in the minefields" with me and for her unending support and patience and to my sons, Mixon and Bishop, for their love, encouragement, and understanding throughout this entire journey. Thank you also to the *Regent University Law Review* and this Note's editing team for their diligent and outstanding work.

OPEN FOR THE WRONG KIND OF BUSINESS: AN ANALYSIS OF VIRGINIA'S LEGISLATIVE APPROACH TO COMBATING COMMERCIAL SEXUAL EXPLOITATION

INTRODUCTION

It is 2014[1] in suburban Loudoun, Virginia, the richest county in the United States.[2] You have retired for the day and settled into the couch for an evening of B-rated television cinema. In the midst of a commercial break, however, your attention span wanes, and you casually turn to MSNBC. It is here you discover a re-run of an undercover program Meredith Vieira once hosted documenting the epidemic of modern day sexual slavery in America.[3] Due to recent lobbying efforts in the local D.C. area, you are familiar with the concept of human sex trafficking and intrigued to learn it is occurring in the United States. In fact, within the first thirty seconds of the program one of the victims mentions how she was originally lured from her home country and into sexual slavery with the promise of employment in Virginia.[4] Throughout the hour, the camera cascades between shots of dilapidated street corners, risqué massage parlors, penitentiaries, and red-light districts.[5] International victims of human trafficking share their stories, and the narrator sheds light on the horrors of domestic sex trafficking in the United States.[6]

For a short time after the program, you are indignant. This feeling, however, quickly begins to fade. After all, your neighborhood is wealthy and respectable, not riddled with "massage" parlors and prostitution rings. The local schools are secure, and tonight your teenage niece is well protected within the confines of her suburban home. Perhaps human trafficking occurs in the warehouses of New York or on the streets of Vegas, but not in your backyard. Local Virginians are certainly not trafficking the "girl next door" or recruiting minors at the high school

---

[1] This introductory narrative draws from an actual criminal case, *United States v. Strom*, involving conduct occurring in 2009 and 2012. *See* Affidavit in Support of a Criminal Complaint and Arrest Warrants at ¶ 2, United States v. Strom, 2013 WL 6271932 (E.D. Va. Dec. 4, 2013) (No. 1:12cr159) [hereinafter Affidavit].

[2] Tom Van Riper, *America's Richest Counties*, FORBES.COM (Apr. 25, 2013, 10:14 AM), www.forbes.com/sites/tomvanriper/2013/04/25/americas-richest-counties/.

[3] *MSNBC Undercover: Sex Slaves in America* (MSNBC television broadcast Dec. 3, 2007), *transcript available at* http://www.nbcnews.com/id/22056066/ns/msnbc-documentaries/t/msnbc-undercover-sex-slaves-america/#.Us3dlj-eWZF.

[4] *Id.*

[5] *Id.*

[6] *Id.*

across the street. As you prepare to turn in for the night, you hear a knock on the door of your neighbor's apartment. You pay it little mind, and nestle into the safety of your bed free from any thought that Virginia is home to a modern-day slave trade.

Across the hall, Justin Strom, Donyel Dove, Michael Jefferies, Henock Ghile, and one of ten identified victims of human sex trafficking are knocking on your neighbor's door. In an attempt to solicit men to purchase sexual intercourse, Strom or one of his associates from the Fairfax "set" of the Crips is selling the body of a young girl.[7] In 2009, Victim 1 was 16 years old when Strom "approached her at a Metro station and told her that she was pretty," soliciting her to enter into prostitution and testing her sexual abilities "in the woods behind the Metro station."[8] Before prostituting herself, Victim 1 was given cocaine, ecstasy, marijuana, and alcohol.[9] When she expressed her desire to leave the lifestyle, Strom "choked her and threatened her with additional violence."[10] Is she the one knocking? Perhaps it is Victim 2. She is 17 and was approached by a juvenile associate of Strom at her local high school.[11] The associate flattered her and continued to solicit Victim 2's "friendship" over Facebook despite Victim 2's assertion she did not want to sleep with anyone.[12] After accepting an invitation to Strom's home under the pretense of this "friendship," members of the gang proceeded to take nude photographs of Victim 2, who eventually began to prostitute herself.[13]

More likely, however, it is Victim 4 knocking. She was solicited by an associate of Strom over a dating website.[14] During her *first* encounter with the gang, she was escorted from door-to-door in an Arlington apartment complex so that she might solicit men for sexual intercourse; she had over ten customers that day.[15] Hopefully, Victim 5 is not the one at your neighbor's door. Victim 5 was 17 when solicited by the gang on Facebook.[16] When she agreed to a meeting and discovered the gang desired to prostitute her, she stated "she did not wish to participate."[17] In a seeming attempt to deter Strom's continued proposition to test her

---

7 *See* Affidavit, *supra* note 1, ¶¶ 2, 4–6, 12.

8 *Id.* ¶ 12.

9 *Id.* ¶ 15.

10 *Id.* ¶ 17.

11 *Id.* ¶¶ 18, 36, 38–39.

12 *Id.* ¶ 39–40.

13 *Id.* ¶ 42–44.

14 *Id.* ¶ 61.

15 *See id.* ¶¶ 63–65.

16 *Id.* ¶ 72.

17 *Id.* ¶ 73.

sexually after her refusal, she informed him of her age.[18] Undeterred, Strom again propositioned Victim 5 for sex, telling her she needed to have intercourse with the gang members as a type of "gang initiation."[19] Strom then offered Victim 5 powder cocaine, which she rejected and slapped out of his hand.[20] Strom quickly "struck Victim 5, and slammed her head against the window of the vehicle."[21] She was then forced to ingest cocaine and pulled out of the car by Strom at knifepoint.[22] While holding the knife to her neck, Strom forced her to perform oral and then vaginal sex on him, cutting her when she initially refused.[23] Victim 5 was then taken into a local apartment where she was raped by fourteen men.[24] The gang labeled her a "whore" and "slut" who "got what she had coming," before returning her home and threatening to kill her if she spoke of the events.[25]

Victim 7 was only 16 when she received a friend request on Facebook from a member of Strom's gang.[26] This new "friend" picked up her and Victim 8 from Victim 7's home.[27] When Victim 7 discovered the nature of the enterprise, she informed Strom she was not interested in participating.[28] The girls, however, were told to simply "watch and learn."[29] They were coerced into witnessing certain women working the neighborhood for Strom enter into townhouses and apartments to perform sex acts.[30] Furthermore, Strom continued to ask Victims 7 and 8 to prostitute themselves and have sex with the men in the car as a means of "gang initiation."[31] A couple of days later, 17-year-old Victim 8 again met with Strom, who stated that he and the gang needed to try her out before utilizing her as a prostitute.[32] Victim 8 informed the men that she and Victim 7 were only minors, but "[t]he men replied that younger was better because they could make more money off young girls."[33]

---

18 *See id.*
19 *Id.* ¶ 74.
20 *Id.*
21 *Id.*
22 *Id.* ¶ 75.
23 *Id.*
24 *Id.* ¶ 76.
25 *Id.* ¶ 77.
26 *Id.* ¶ 110.
27 *Id.* ¶¶ 112, 114.
28 *Id.* ¶ 113.
29 *Id.*
30 *Id.* ¶ 114.
31 *Id.*
32 *Id.* ¶¶ 114, 118.
33 *Id.* ¶ 118.

In March of 2012, Justin Strom, Donyel Dove, Michael Jefferies, and Henock Ghile were charged in the United States District Court for the Eastern District of Virginia with "Conspiracy to Transport a Juvenile to Engage in a Commercial Sex Act," in violation of 18 U.S.C. § 1594.[34] In only the first *three months* of 2012, this marked the sixteenth case of human trafficking charged in the Eastern District of Virginia.[35] Fortunately, federal prosecutors in Virginia are taking a strong stance against human trafficking,[36] especially considering the Commonwealth of Virginia does not itself have a comprehensive human trafficking statute. Whereas, under federal law, minors coerced or solicited into prostitution are considered victims of human sex trafficking,[37] under Virginia law, victims of "human trafficking" do not legally exist.

Human trafficking, however, is occurring within the Commonwealth. As highlighted by the recent indictment of Justin Strom and his associates, *Virginians* are trafficking other *Virginians* within *Virginia*. In such situations, the Commonwealth should not have to continually rely on the federal government to manufacture jurisdiction and take legal responsibility for the prosecution of these perpetrators. It is *Virginia's* responsibility to ensure that its officials are supplied with the proper legislative and financial resources to incapacitate these offenders and rehabilitate their victims. Despite bipartisan support, efforts by legislators such as Frank Wolf (R) and Adam Ebbin (D) have failed to foster the creation of a new anti-trafficking statute.[38] Virginia legislators have instead attempted to address the issue by making smaller legislative reforms, such as amending the text of traditional common law felonies within the Virginia Code.[39] According to Delegate Ebbin, "[i]f we had a comprehensive trafficking statute, it would be

---

[34] Criminal Complaint, *Strom*, 2013 WL 6271932 (No. 1:12cr159); *see also* 18 U.S.C. §§ 1591, 1594(c) (2012) (criminalizing conspiracy to transport juveniles "to engage in a commercial sex act").

[35] Pierre Thomas & Marisa Taylor, *Gang Members Arrested on Charges of Sex Trafficking Suburban Teens*, ABCNEWS.COM (Mar. 31, 2012), http://abcnews.go.com/US/gang-members-arrested-alleged-suburban-teen-prostitution-ring/story?id=16046155.

[36] *Id.* ("'The message is clear,' said U.S. Attorney [Neil] MacBride. 'Law enforcement is looking for you, charging you, and putting you behind bars for the rest of your life.'").

[37] 22 U.S.C. § 7102(8) (2012). "The term 'severe forms of trafficking in persons' means—(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age . . . ." *Id.*; *see also id.* § 7102(13) (defining "victim of a severe form of trafficking").

[38] Adam Rhew, *Human Trafficking in Virginia Part II*, NBC29.COM, http://www.nbc29.com/story/13481974/human-trafficking-in-virginia-part-ii (last updated Nov. 24, 2010).

[39] *See id.*

easier for law enforcement and local commonwealth's attorneys to prosecute and it would fill in the holes in our current laws."[40] Nonetheless, in 2010, then Virginia Attorney General Ken Cuccinelli remarked on the issue that the government was not "at a point where it warrants spending state dollars on creating essentially a new social welfare program."[41] He instead insisted that Virginia's officials are sufficiently equipped with the tools needed to combat trafficking, and that "[t]he structure of the law, to me, isn't the critical thing . . . . It's do you cover the battlefield? And we do."[42]

Is this the case? Is the Virginia legislature's preference for expanding the existing code to incorporate the elements of a human trafficking offense rather than creating a compressive anti-trafficking program effective in combating this criminal enterprise?[43] Does the Virginia legislature fully understand what the so-called battlefield is? At first glance, it would seem that in this modern era a king does not weigh down his warriors by requiring them to swing the mace, carry the battle-ax, load the crossbow, and build the siege machine when weapons of modern warfare are a vote and signature away. Nevertheless, Virginia's unique legislative approach to combating human trafficking merits further exploration. Could it, in fact, prove to be an effective model in the fight against this modern day slave trade, and are Virginia's officials utilizing the tools the Attorney General claimed were at their disposal? In attempting to answer these questions, Part I addresses the case history and current state of commercial sexual exploitation law within the Commonwealth of Virginia. Part II then specifically focuses on the recent legislative amendments made in response to the anti-trafficking lobbying effort and asks if those amendments are sufficient to accomplish their respective goals. Lastly, Part III compares Virginia's current anti-trafficking "battlefield approach" to that of a representative state's comprehensive legislative model and recommends what changes, if any, must necessarily be made so the Commonwealth might more effectively combat the modern day slave trade that is human sex trafficking.[44]

---

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] For purposes of this Note, Virginia's current legislative approach is referred to as the "battlefield approach."

[44] In 2011, Shared Hope International published an in-depth analysis of Virginia's commercial sexual exploitation laws and provided Virginia with some specific statutory recommendations for improving its legislative model. SHARED HOPE INT'L, RAPID ASSESSMENT ON DOMESTIC MINOR SEX TRAFFICKING: VIRGINIA (2011) [hereinafter RAPID ASSESSMENT: VIRGINIA], *available at* http://sharedhope.org/wp-content/uploads/2012/09/

I. COMMERCIAL SEXUAL EXPLOITATION IN VIRGINIA: LEGISLATION AND CASE LAW

Federal law defines human sex trafficking as "sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age."[45] Unlike under federal law, however, the Commonwealth of Virginia lacks an enumerated human trafficking statute, making it difficult, if not impossible, to conduct an analysis of human sex trafficking-related offenses as prosecuted under state law. Furthermore, any type of physical or sexual abuse experienced as a result of a victim's commercial sexual exploitation in Virginia is not coded or recorded separately from non-commercial abuse, making it practically impossible to distinguish the offenses for analytical purposes.[46]

A. Virginia Legislation and Commercial Sexual Exploitation

As there is no comprehensive human trafficking statute at present, the legislative foundation for this analysis will begin by utilizing the three Virginia statutes most likely to be employed by commonwealth attorneys if faced with a potential sex trafficking prosecution. These seem to be section 18.2-48 of the Virginia Code, concerning abduction for profit; section 18.2-355, concerning detaining someone for prostitution; and section 18.2-356, concerning making a profit by prostituting another. Each statute is reproduced below. In two of these three code sections, however, the provisions that might prove most useful in a human trafficking prosecution were only just approved in April of 2011.[47] These changes are italicized in the statutes below:

> § 18.2-48. Abduction with intent to extort money or for immoral purpose.
>
> Abduction (i) *of any person* with the intent to extort money or pecuniary benefit, (ii) of any person with intent to defile such person, (iii) of any child under sixteen years of age for the purpose of concubinage or *prostitution, (iv) of any person for the purpose of*

VirginiaRA.pdf; *see also* SHARED HOPE INT'L, 2013 PROTECTED INNOCENCE CHALLENGE: STATE REPORT CARDS ON THE LEGAL FRAMEWORK OF PROTECTION FOR THE NATION'S CHILDREN (2013) [hereinafter PROTECTED INNOCENCE], *available at* http://sharedhope.org/wp-content/uploads/2013/11/ProtectedInnocenceChallenge2013.pdf. This Note will not attempt to rehash Shared Hope's research, but will provide a holistic analysis of Virginia's common law and the legislative changes made following Shared Hope's report.

[45] 22 U.S.C. § 7102(8) (2012). For purposes of this Note, "human sex trafficking" is defined in accord with the federal definition of the term "severe forms of trafficking in persons." *See id.*

[46] RAPID ASSESSMENT: VIRGINIA, *supra* note 44, at i, 2.

[47] *See* Act of Apr. 6, 2011, 2011 Va. Acts, ch. 785.

prostitution, or (v) of any minor for the purpose of manufacturing child pornography shall be *punishable as* a Class 2 felony.[48]

§ 18.2-355. Taking, detaining, etc., person for prostitution, etc., or consenting thereto.

Any person who:

(1) For purposes of prostitution or unlawful sexual intercourse, takes any person into, or persuades, encourages or causes any person to enter, a bawdy place, or takes or causes such person to be taken to any place against his or her will for such purposes; or,

(2) Takes or detains a person against his or her will with the intent to compel such person, by force, threats, persuasions, menace or duress, to marry him or her or to marry any other person, or to be defiled; or,

(3) Being parent, guardian, legal custodian or one standing in loco parentis of a person, consents to such person being taken or detained by any person for the purpose of prostitution or unlawful sexual intercourse; is guilty of pandering, and shall be guilty of a Class 4 felony.[49]

§ 18.2-356. Receiving money for procuring person.

Any person who *receives* any money or other valuable thing for or on account of (i) procuring for or placing in a house of prostitution or elsewhere any person for the purpose of causing such person to engage in unlawful sexual intercourse or any act in violation of § 18.2-361 *or (ii) causing any person to engage in forced labor or services, concubinage, prostitution, or the manufacture of any obscene material or child pornography* shall be guilty of a Class 4 felony.[50]

B. Virginia Case Law and Commercial Sexual Exploitation

As Virginia does not have a specifically enumerated "human trafficking" offense, a search for reported Virginia cases utilizing the term "human trafficking" will yield no relevant results.[51] It is necessary,

---

[48] VA. CODE ANN. § 18.2-48 (LEXIS through 2013 Spec. Sess. I) (emphasis added); *see also* H.B. 1898, 2011 Gen. Assemb., Reconvened Sess. (Va. 2011) (enacted) (amending § 18.2-48).

[49] *Id.* § 18.2-355 (LEXIS).

[50] *Id.* § 18.2-356 (LEXIS) (emphasis added); *see also* Va. H.B. 1898 (enacted) (amending § 18.2-356).

[51] For purposes of this Note, common legal research techniques are utilized that parallel the research steps an average commonwealth attorney might take in searching for applicable human trafficking case law. Relevant but unreported cases, therefore, such as those that never proceed past the trial court level or those cases which never made it to trial at all, will be of little assistance to attorneys who do not have direct knowledge of such cases' existence. For example, the City of Virginia Beach reported that in May of 2013 Malachi Eric Chang was sentenced to serve 35 years in prison after being convicted, among other crimes, of "Abduction with the Intent to Prostitute and Pandering." Commonwealth v. Malachi Eric Chang; *35 Years to Serve for Abducting, Prostituting, Woman in "Human Trafficking" Case*, CITY OF VA. BEACH (May 29, 2013, 5:00 PM), http://www.vbgov.com/

therefore, to use the terms "prostitution" or "prostitute" in order to determine if any cases containing a fact patter similar to those present in federally prosecuted trafficking cases have been reported in Virginia. Beginning with a basic search for case law in which the above statutes were utilized in the context of "commercial sexual exploitation," a term relatively interchangeable with "human sex trafficking" and "forced prostitution,"[52] there is only one reported Virginia case that mentions the term "prostitute" or "prostitution" in relation to any current or previous version of the abduction statute (i.e., of section 18.2-48).[53] It is, in fact, the earliest Virginia case on record addressing the issue, having been decided in 1826.[54] According to Webster's 1828 dictionary, to "prostitute" meant bringing someone over to lewdness or wickedness in a public manner.[55] In this particular case, it did not seem the term was being used in the modern context of abducting a person for the purpose of commercially prostituting that individual. A search for cases utilizing the procurement (section 18.2-356) or detention (section 18.2-355) statutes, however, reveal a handful of decisions slightly more on point, though still not sex trafficking cases in themselves.

There are five Virginia cases, stretching from 1954 through 1988, that reference persons who were prosecuted for "procuring a person" under section 18.2-356.[56] Four of these cases were decided by the

---

news/Pages/selected.aspx?release=1457. Virginia Beach refers to *Commonwealth v. Chang* as a "'Human Trafficking' Case," *id.*, but a search for references to this case on both Westlaw and Lexis turns up no results. For an out-of-town commonwealth attorney with no direct knowledge of this case, therefore, it is as if it does not exist.

[52] For the definitions of similar terms in the U.S. Code, see 22 U.S.C. § 7102(3), (8)–(9) (2012).

[53] *See* Anderson v. Commonwealth, 26 Va. (5 Rand.) 627, 628 (1826) ("The indictment against the plaintiff in error, contained two counts, the first of which charged that he, being a married man, on the 22d November, 1825, in the said county of Chesterfield, one *Elizabeth F. Hargrove* a maiden, and unmarried, and under the age of twenty-one years, that is to say, of the age of sixteen years, two months, and nineteen days, having no father living, and being then and there under the care and custody of *Elizabeth Hargrove*, a widow, her mother, did entice, inveigle, take and carry away from the care and custody of her said mother, for the purpose of prostituting and carnally knowing her the said *Elizabeth F.* against the peace and dignity of the Commonwealth. The second count in like manner charges him with the enticing, inveigling, taking and carrying away the said infant over the age of sixteen years, and moreover charges that he did, on a subsequent day, deflour, carnally know, and prostitute her the said *Elizabeth F. Hargrove*, against the peace and dignity of the Commonwealth.").

[54] *Id.*

[55] NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, "Prostitute" (1st ed. 1828).

[56] Collins v. Commonwealth, 307 S.E.2d 884, 885 (Va. 1983); Stewart v. Commonwealth, 303 S.E.2d 877, 877 (Va. 1983); Edwards v. Commonwealth, 243 S.E.2d

Virginia Supreme Court,[57] including *Martin v. Commonwealth*, which is the only case that cites an equivalent of the detention statute (i.e., the equivalent of current section 18.2-355) with any relevance.[58] A good representative case for this group, though, is *Edwards v. Commonwealth*.[59] In *Edwards*, the defendant, Beverley Edwards, managed a Richmond operation called "Joy Girl Dating Service."[60] The operation was an escort service through which Edwards would charge girls a $15 fee in order to send them on "dates" where they could procure "tips" from customers.[61] Edward's conviction under the then-current text of section 18.2-356 was upheld by the Virginia Supreme Court, which stated that the "operation or business carried on by defendant . . . was a venture by her, for financial gain, to aid and abet and to give information and direction to persons desiring the services of a prostitute, and to procure and assist persons who were *willing to provide* such services."[62] The operative phrase distinguishing this case from that of a traditional trafficking scenario is "willing to provide." Although it cannot be said that most women[63] would choose to remain in prostitution if given the financial option,[64] the stark contrast between the Virginia cases cited and what would amount to human sex trafficking is the missing element of coercion or minority.

834, 835 (Va. 1978); Martin v. Commonwealth, 81 S.E.2d 574, 575 (Va. 1954); Stultz v. Commonwealth, 369 S.E.2d 215, 216 (Va. Ct. App. 1988).

[57] *See Collins*, 307 S.E.2d 884; *Stewart*, 303 S.E.2d 877; *Edwards*, 243 S.E.2d 834; *Martin*, 81 S.E.2d 574.

[58] *See Martin*, 81 S.E.2d at 575–76.

[59] *Edwards*, 243 S.E.2d 834.

[60] *Id.* at 835.

[61] *Id.* at 836, 838.

[62] *Id.* at 838–40 (emphasis added).

[63] This Note typically references victims of commercial sexual exploitation in the feminine because females make up the vast majority of victims. *See* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 8 (2013). This is not intended to exclude, however, males who are victims of such crimes.

[64] *See* DONNA M. HUGHES, BEST PRACTICES TO ADDRESS THE DEMAND SIDE OF SEX TRAFFICKING 4–5 (2004), *available at* http://www.uri.edu/artsci/wms/hughes/demand_sex_trafficking.pdf. In a series of studies conducted in San Francisco, eighty-eight percent of women caught in prostitution interviewed stated they wanted to leave the lifestyle. *Id.* at 5. Seventy percent of women interviewed said that, during the course of prostitution, they had been raped or sexually assaulted an average of thirty-one times, and sixty-five percent said they had been either beaten or physically assaulted an average of four times. *Id.* at 10. Furthermore, according to one widely-cited 1984 publication, two-thirds of those in prostitution were sexually abused as children, and over ninety percent of those prostituting "lost their virginity through such child sexual abuse." Mimi H. Silbert, *Treatment of Prostitute Victims of Sexual Assault*, *in* VICTIMS OF SEXUAL AGGRESSION: TREATMENT OF CHILDREN, WOMEN, AND MEN 251, 253 (Irving R. Stuart & Joanne G. Greer eds., 1984).

Unlike federal law, which recognizes that a person under the age of eighteen induced to perform a commercial sex act is a victim of human trafficking,[65] the sexual age of consent in Virginia is fifteen.[66] A fifteen-year-old prostitute in the Commonwealth, therefore, would be considered consenting, and in turn, criminally liable for any commercial sex acts performed or solicited.[67] As the Virginia prostitution statute currently stands, there is no affirmative defense for minors in a criminal action for prostitution.[68] In fact, these minors are subject to class 1 misdemeanor penalties.[69] Furthermore, the Virginia prostitution statute does not contain an affirmative defense for victims of human sex trafficking or those coerced into performing commercial sex acts.[70] The Virginia prostitution statute does, however, provide for the explicit prosecution of those soliciting the sex acts (purchasers),[71] which is an essential element to combating commercial sexual exploitation in any state.

Aside from the three statutes most likely to be utilized by commonwealth attorneys in a human trafficking prosecution (sections 18.2-48, 355, and 356), Virginia's Attorney General's Office has published a document containing what the Commonwealth considers those code sections relevant for prosecuting human trafficking violations.[72] The document was published as a resource for commonwealth attorneys to assist them should the situation arise.[73] It effectively sets forth twenty-seven individual statutes the Attorney General's office deemed could be used to prosecute the various crimes committed when an individual is trafficked for either labor or sexual purposes.[74] Included in this list are the three statutes referenced above,[75]

---

65 *See* 22 U.S.C. § 7102(8)(A) (2012).

66 *See* VA. CODE. ANN. § 18.2-370(A) (LEXIS through 2013 Spec. Sess. I).

67 *Id.* § 18.2-346(A) (LEXIS).

68 *See id.* ("Any person who, for money or its equivalent, (i) commits adultery, fornication, or any act in violation of § 18.2-361 or (ii) offers to commit adultery, fornication, or any act in violation of § 18.2-361 and thereafter does any substantial act in furtherance thereof is guilty of prostitution, which is punishable as a Class 1 misdemeanor.").

69 *See id.*

70 *See id.*

71 *Id.* § 18.2-346(B) (LEXIS).

72 OFFICE OF THE ATTORNEY GEN. OF VA., VIRGINIA ANTI-TRAFFICKING LAWS: CRIMINAL (2011) [hereinafter VIRGINIA ANTI-TRAFFICKING LAWS], *available at* http://www.dcjs.virginia.gov/victims/humantrafficking/ca/documents/VAAnti-TraffickingLaws-Criminal-2011.pdf.

73 *Human Trafficking Resources for Commonwealth's Attorneys*, VA. DEP'T CRIM. JUST. SERVS., http://www.dcjs.virginia.gov/victims/humantrafficking/ca/ (last visited Mar. 31, 2014).

74 VIRGINIA ANTI-TRAFFICKING LAWS, *supra* note 72.

felonies such as abduction,[76] extortion,[77] rape,[78] and certain major sexual crimes,[79] and various misdemeanor violations that can usually be charged, such as "frequenting a bawdy place"[80] and aiding prostitution.[81] The publication even goes so far as to break down the necessary elements of many of the offenses and provides the relevant cases and legal standards to be applied.[82] The problem is that it seems even the Commonwealth is having trouble finding relevant Virginia cases to reference should a human sex trafficking offense ever find itself on the docket. Of the nineteen cases cited in the Attorney General's publication,[83] only eight deal with subject matter relevant to commercial sexual exploitation,[84] and only one case comes even remotely close to what may have factually been prosecuted as human trafficking under federal law.[85] Unfortunately, the Commonwealth of Virginia seems to have little in the realm of stare decisis to guide commonwealth attorneys in prosecuting human trafficking violations. This may, at least in part, be attributed to the fact that federal prosecutors, often in partnership with certain state police organizations, have taken to prosecuting these violations in federal district court.[86] In order to gain a clearer

---

[75] VA. CODE ANN. §§ 18.2-48, -355, -356 (LEXIS).

[76] *Id.* §§ 18.2-47(B), -48 (LEXIS).

[77] *Id.* § 18.2-59 (LEXIS).

[78] *Id.* § 18.2-61 (LEXIS).

[79] *See id.* §§ 18.2-61, -63, -67.1, -67.3, -67.4, -67.4:2, -370, -371 (LEXIS).

[80] *Id.* § 18.2-347 (LEXIS); *see also* Lemke v. Commonwealth, 241 S.E.2d 789, 790 (Va. 1978).

[81] § 18.2-348 (LEXIS); *see also* Cogdill v. Commonwealth, 247 S.E.2d 392, 393 (Va. 1978).

[82] VIRGINIA ANTI-TRAFFICKING LAWS, *supra* note 72.

[83] *See id.*

[84] Collins v. Commonwealth, 307 S.E.2d 884, 889–90 (Va. 1983) (finding sufficient evidence of call-girl prostitution); Stewart v. Commonwealth, 303 S.E.2d 877, 879 (Va. 1983) (determining whether there was sufficient evidence of pandering); Edwards v. Commonwealth, 243 S.E.2d 834, 837 (Va. 1978) (assessing whether the defendant was properly convicted for aiding and abetting prostitution); Bakran v. Commonwealth, 700 S.E.2d 471, 472–73 (Va. Ct. App. 2010) (determining whether the evidence was sufficient to convict the defendant of using his vehicle to promote prostitution in violation of § 18.2-349); Tart v. Commonwealth, 663 S.E.2d 113, 115 (Va. Ct. App. 2008) (assessing whether the jury instructions were proper for the defendant's pandering trial); Fine v. Commonwealth, 525 S.E.2d 69, 70 (Va. Ct. App. 2000) (analyzing whether there was sufficient evidence to show that the defendant used his vehicle to promote prostitution in violation of § 18.2-349); Harrison v. City of Norfolk, 431 S.E.2d 658, 659 (Va. Ct. App. 1993) (examining whether a particular location met the Virginia Code's definition of a bawdy place); Ford v. Commonwealth, 391 S.E.2d 603, 603 (Va. Ct. App. 1990) (analyzing whether the defendant's conviction for solicitation of oral sodomy was proper).

[85] *See Tart*, 663 S.E.2d at 115.

[86] *See* Thomas & Taylor, *supra* note 35.

understanding of how Virginia has dealt with commercial sexual activities in the past, therefore, only one analytical option remains—past prosecutions under the actual Virginia prostitution and pandering statutes, sections 18.2-346 and 18.2-357, respectively.[87]

Aside from one of the Virginia Supreme Court cases previously cited,[88] there are eight reported cases that utilize the Virginia prostitution statute, section 18.2-346, or its related predecessors in relevant legal analysis.[89] In *Adams v. Commonwealth*, for example, the Supreme Court of Virginia articulated that "[a]n attempt to commit prostitution requires an offer to engage in sexual intercourse for pay *and* a substantial act performed in furtherance of the offer."[90] This two-prong analysis is seemingly still the accepted standard for analyzing the

---

[87] VA. CODE ANN. §§ 18.2-346, -357 (LEXIS through 2013 Spec. Sess. I).

> A. Any person who, for money or its equivalent, (i) commits adultery, fornication, or any act in violation of § 18.2-361, or (ii) offers to commit adultery, fornication, or any act in violation of § 18.2-361 and thereafter does any substantial act in furtherance thereof is guilty of prostitution, which is punishable as a Class 1 misdemeanor.
>
> B. Any person who offers money or its equivalent to another for the purpose of engaging in sexual acts as enumerated [above] and thereafter does any substantial act in furtherance thereof is guilty of solicitation of prostitution, which is punishable as a Class 1 misdemeanor. However, any person who solicits prostitution from a minor (i) 16 years of age or older is guilty of a Class 6 felony or (ii) younger than 16 years of age is guilty of a Class 5 felony.

§ 18.2-346; *see also* § 18.2-357 (LEXIS) ("Any person who shall knowingly receive any money or other valuable thing from the earnings of any male or female engaged in prostitution, except for a consideration deemed good and valuable in law, shall be guilty of pandering, punishable as a Class 4 felony.").

[88] *See Edwards*, 243 S.E.2d 834.

[89] *See* Hensley v. City of Norfolk, 218 S.E.2d 735, 737, 740, 742 (Va. 1975) (upholding the conviction of a defendant who had solicited undercover officers for prostitution at a "massage" establishment); Adams v. Commonwealth, 208 S.E.2d 742, 743–44 (Va. 1974) (per curiam) (holding that an offer to engage in sexual intercourse without a substantial act in furtherance thereof is insufficient to affirm a conviction of prostitution); Chadderton v. Commonwealth, No. 0827-13-2, 2014 WL 545605, at *1 (Va. Ct. App. Feb. 11, 2014) (affirming the conviction of a defendant for sexual solicitation); *Bakran*, 700 S.E.2d at 472–73 (upholding a trial court conviction of using a vehicle to promote prostitution when soliciting oral sex from an undercover police officer and taking acts in furtherance thereof); *Fine*, 525 S.E.2d at 69–71 (overturning a conviction of using a vehicle to promote prostitution because, after soliciting oral sex from an undercover officer, appellant was arrested before engaging in "any substantial act in furtherance thereof"); Golden v. Commonwealth, 519 S.E.2d 378, 379–81 (Va. Ct. App. 1999) (analyzing the nature of an arrest for soliciting an undercover officer to purchase oral sex); McFadden v. Commonwealth, 348 S.E.2d 847, 848–49 (Va. Ct. App. 1986) (analyzing an amendment of the prostitution statute and the elements required to sustain a conviction); Dickerson v. City of Richmond, 346 S.E.2d 333, 333, 336–37 (Va. Ct. App. 1986) (reversing a conviction of loitering for the purpose of engaging in prostitution due to lack of evidence).

[90] *Adams*, 208 S.E.2d at 744 (emphasis added and omitted).

nature of an offense committed pursuant to the prostitution statute, section 18.2-346.[91] In Virginia, the mere offer to engage in sexual intercourse for consideration is not enough to sustain a conviction under the prostitution statute as either a buyer or seller.[92] The Commonwealth must prove the perpetrator committed a substantial act in furtherance thereof.[93] Acts deemed sufficient to have met this standard have included the fondling of sexual organs[94] or undressing in front of an undercover officer.[95] Acts that do not meet this threshold have included merely propositioning another to engage in a commercial sex act without the removal of clothing[96] and failure to arrive at a pre-negotiated destination where the act was set to occur.[97]

An analysis of reported cases decided under the Virginia pandering statute, section 18.2-357, concerning "[r]eceiving money from earnings of male or female prostitute,"[98] yields the most relevant Virginia case to date. Aside from four of the cases previously cited pursuant to the procurement statute,[99] there are four additional reported cases utilizing the pandering statute (or its predecessor) as related to commercial sexual activity.[100] Of these cases, *Tart v. Commonwealth* contains the only fact pattern that might have been prosecuted as a human trafficking violation under federal law.[101] The case was, in fact, prosecuted by the Virginia Attorney General's Office, at which time former Governor Robert "Bob" McDonnell authored the appellate brief as Attorney General.[102] In *Tart*, a sixteen-year-old girl, referred to only as B.H., ran away from home with defendant Joshua Tart.[103] As neither had a source of income, Tart took nude photographs of B.H. that B.H. later

---

91 *See Fine*, 525 S.E.2d at 70–71.

92 *Adams*, 208 S.E.2d at 744; *Fine*, 525 S.E.2d at 71.

93 *Adams*, 208 S.E.2d at 744.

94 *See, e.g.*, *Bakran*, 700 S.E.2d at 472, 474.

95 *See* Dorchincoz v. Commonwealth, 59 S.E.2d 863, 863–65 (Va. 1950).

96 *Adams*, 208 S.E.2d at 743.

97 Fine, 525 S.E.2d at 70–71.

98 VA. CODE ANN. § 18.2-357 (LEXIS through 2013 Spec. Sess. I).

99 Collins v. Commonwealth, 307 S.E.2d 884, 888 (Va. 1983); Stewart v. Commonwealth, 303 S.E.2d 877, 880 (Va. 1983); Edwards v. Commonwealth, 243 S.E.2d 834, 837 (Va. 1978); Martin v. Commonwealth, 81 S.E.2d 574, 575 (Va. 1954).

100 Minor v. Commonwealth, 191 S.E.2d 825, 826 (Va. 1972) (utilizing § 18.1-208 of the 1950 Code); Clinton v. Commonwealth, 130 S.E.2d 437, 438–39 (Va. 1963) (analyzing the offense under § 18.1-208 of the 1950 Code), *rev'd per curiam on Fourth Amendment grounds*, Clinton v. Virginia, 377 U.S. 158 (1964); Saunders v. Commonwealth, 45 S.E.2d 307, 309 (Va. 1947); Tart v. Commonwealth, 663 S.E.2d 113, 115 (Va. Ct. App. 2008).

101 *See Tart*, 663 S.E.2d at 114.

102 *Id.*

103 *Id.*

posted on the Internet as an invitation to those looking to engage in commercial sexual activity.[104] Clients would then arrange to meet B.H., who would rely on Tart for transportation and "protection" as related to her services.[105] After she performed various sexual acts the clients would pay B.H., who then gave the money she earned to Tart.[106] She later testified that "'a lot of the money went to drugs' and alcohol that Tart purchased for their use."[107] The defendant would also use the money to pay for hotel rooms as well as for various other expenses.[108] Tart was charged and convicted under section 18.2-357 for pandering,[109] which is punishable as a Class 4 felony carrying a minimum sentence of two years and a maximum of ten.[110] If this case had been brought in federal court, Tart probably could have been charged with violating 18 U.S.C. § 1591, and, if convicted, would have served a *minimum* of ten years.[111]

Virginia commercial sexual exploitation law is sparse to say the least. Unfortunately, commonwealth attorneys do not seem to have a single "go to" statute or strong body of case law to guide them if faced with prosecuting a human sex trafficking violation. Virginia does have a history of prosecuting those soliciting others to engage in commercial sexual activities; however, a human sex trafficking offense is certainly felonious, and there is only so much similarity between investigating and

---

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *See* VA. CODE ANN. §§ 18.2-10(d), -357 (LEXIS through 2013 Spec. Sess. I) (defining statutorily authorized punishments for each class of felony convictions and establishing pandering as a Class 4 felony).

[111] Provided federal jurisdiction had been satisfied, the relevant portion of the Code reads as follows:

> (a) Whoever knowingly—
>
> (1) . . . recruits, entices, harbors, transports, provides, obtains, or maintains by any means a person; or
>
> (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),
>
> knowing, or in reckless disregard of the fact . . . that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).
>
> (b) The punishment for an offense under subsection (a) is—
>
> (1) . . . any term of years not less than 15 or for life [if the person is under 14 years]; or
>
> (2) . . . not less than 10 years or for life [if the person is between 14 and 18 years].

18 U.S.C. § 1591(a)–(b) (2012).

prosecuting a charge for prostitution and going after the organized crime of trafficking in persons.[112] Like most high-class felonies, Virginia has recognized that the crime of human trafficking is in itself comprised of various offenses.[113] Although in this matter the Attorney General's Office is making an effort to provide an organized framework for commonwealth attorneys,[114] and former Governor McDonnell issued a 2013 Executive Directive calling for a comprehensive and coordinated state response to human trafficking,[115] the legislative fruits of this labor have not yet been realized. Following an extensive search utilizing the statutes officially recommended by the Attorney General's Office as those applicable to prosecuting a human sex trafficking violation,[116] there are *no* reported state cases that use the statutes in the context of an express sex trafficking prosecution. In fact, the only reported state case that contains a fact pattern similar to that of a domestic trafficking case was prosecuted under the pandering statute.[117] Virginia does have a history of prosecuting those aiding individuals *willing* to prostitute themselves, so why are cases involving the coercion of individuals who are *unwilling* to prostitute themselves so difficult to come by?

II. VIRGINIA'S RECENT LEGISLATIVE RESPONSE TO THE INCREASING STATEWIDE AND NATIONAL ANTI-TRAFFICKING LOBBYING EFFORT

In 2009, Shared Hope International, a non-profit organization dedicated to eradicating sex trafficking and slavery worldwide,[118] published *The National Report on Domestic Minor Sex Trafficking*[119] pursuant to a grant from the U.S. Department of Justice.[120] This report

---

[112] Human trafficking has now surpassed the weapons trade as the world's second largest criminal enterprise and is the fastest growing sector of organized crime. *What is Human Trafficking?*, UNICEF, http://www.unicefusa.org/assets/pdf/End-Child-Trafficking-One-Pager.pdf (last visited Mar. 31, 2014); *see Human Trafficking*, CAL. DEP'T JUST., http://oag.ca.gov/human-trafficking (last visited Mar. 31, 2014).

[113] *See* Rhew, *supra* note 38.

[114] VIRGINIA ANTI-TRAFFICKING LAWS, *supra* note 72; *see also* Rhew, *supra* note 38.

[115] Va. Exec. Directive No. 7, Comprehensive, Coordinated States Response to the Problem of Human Trafficking (2013).

[116] *See* VIRGINIA ANTI-TRAFFICKING LAWS, *supra* note 72.

[117] *See* Tart v. Commonwealth, 663 S.E.2d 113, 115 (Va. Ct. App. 2008).

[118] SHARED HOPE INT'L, DOMESTIC MINOR SEX TRAFFICKING IN THE U.S. (2012), *available at* http://sharedhope.org/wp-content/uploads/2012/09/Infographic_DMST_with_sources.pdf.

[119] LINDA A. SMITH ET AL., SHARED HOPE INT'L, THE NATIONAL REPORT ON DOMESTIC MINOR SEX TRAFFICKING: AMERICA'S PROSTITUTED CHILDREN (2009), *available at* http://sharedhope.org/wp-content/uploads/2012/09/SHI_National_Report_on_DMST_2009.pdf.

[120] *Id.* at iv.

was a culmination of ten field assessments conducted on child sex trafficking in America,[121] and its success led the organization to conduct fifteen additional domestic field assessments, with only three states receiving a general statewide evaluation.[122] Virginia was one of these states.[123] In October of 2011, Shared Hope published its *Rapid Assessment on Domestic Minor Sex Trafficking: Virginia.*[124] According to this detailed report, "[b]etween 2005 and 2006, more than 20 bills addressing human trafficking crimes and issues were introduced, but until 2010 only one bill . . . reached the governor's desk for enactment into law."[125] Due to increased advocacy from multiple interests, however, in May of 2011 "Governor McDonnell signed into law three bills aimed at fighting human trafficking in Virginia: HB 1898, HB 2190, and SB 1453."[126]

It might not be coincidental that the sudden passage of these bills coincided with the publication of Shared Hope's *State Report Cards on the Legal Framework of Protection for the Nation's Children.*[127] This "report card" assigned an overall grade to every state averaged from the grades each received in six individual categories: (1) Criminalization of Domestic Minor Sex Trafficking;[128] (2) Criminal Provisions Addressing Demand; (3) Criminal Provisions for Traffickers; (4) Criminal Provisions for Facilitators; (5) Protective Provisions for Child Victims; and (6) Tools for Investigation and Prosecution.[129] When this report was published in 2012, Virginia received an overall grade of "F"; in the 2013 edition, however, Virginia's overall grade increased to a "D."[130] In 2013, it was among a group of states with the lowest scores in the first[131] and second

---

[121] *Id.*

[122] For links to these assessments, see *Research*, SHAREDHOPE.ORG, http://sharedhope.org/what-we-do/prevent/research/ (last visited Mar. 31, 2014).

[123] *Id.*

[124] *See* RAPID ASSESSMENT: VIRGINIA, *supra* note 44.

[125] *Id.* at 16.

[126] *Id.* at 70.

[127] PROTECTED INNOCENCE, *supra* note 44.

[128] It should be noted that Shared Hope International specifically focuses on domestic *minor* sex trafficking. Its reports and assessments, therefore, are based on an analysis of laws related to the trafficking of and services available to *minor*, and not adult, victims of trafficking; although this does little to change the nature of the overall legal analysis.

[129] PROTECTED INNOCENCE, *supra* note 44, at 10–11, 19. Scores are calculated based on the quality of statutory provisions available to meet the necessary legal demands deemed required to effectively combat human trafficking in each categorical stage. *Id.* at 23.

[130] *Id.* at 11.

[131] *Id.* at 13.

categories,[132] and it received the seventh lowest score overall.[133] According to the rapid assessment published in 2011, Virginia prosecutors have been unwilling to participate in such studies because of a perceived lack of contact with sex trafficking cases, probably because "[c]harging a trafficker with general sex crimes, assault, and abduction . . . further perpetuates the common idea that trafficking is not occurring in Virginia."[134]

A. House Bill 1898

Since the publication of Shared Hope's Report Cards, Virginia has made some improvements in its trafficking legislation, beginning with House Bill 1898, "relating to abduction of minors for sexual purposes; penalties."[135] According to the legislative summary,

> [HB 1898] [e]xpands [the] definition of abduction to include commercial sexual activity involving minors. The bill also expands the definition of abduction for purposes of sexual activity with a minor to include not only concubinage and prostitution but also pornography and sexual performances. The bill also punishes as abduction the use of a minor in the preparation of obscenity.[136]

Enacted unanimously by the Virginia General Assembly in April of 2011,[137] this bill ultimately amended section 18.2-48 (regarding abduction) of the Virginia Code, section 18.2-67.7 (regarding the rape-shield defense), and section 18.2-356 (regarding procurement) to include language more clearly criminalizing certain elements of human trafficking.[138] The original bill, offered on January 11, 2011, proposed an

---

[132] *Id.*

[133] *Id.* at 12.

[134] RAPID ASSESSMENT: VIRGINIA, *supra* note 44, at 33.

[135] H.B. 1898, 2011 Gen. Assemb., Reconvened Sess. (Va. 2011) (enacted).

[136] *2011 Session: HB 1898 Abduction of Minors; for Sexual Purposes, Penalty*, VA.'S LEGIS. INFO. SYS., http://lis.virginia.gov/cgi-bin/legp604.exe?111+sum+HB1898S (last visited Mar. 31, 2014).

[137] Va. H.B. 1898 (enacted); *see also 2011 Session: HB 1898 Abduction of Minors; for Sexual Purposes, Penalty*, VA.'S LEGIS. INFO. SYS., http://lis.virginia.gov/cgi-bin/legp604.exe?111+sum+HB1898 (last visited Mar. 31, 2014).

[138] Va. H.B. 1898 (enacted). The amended language is indicated below by strikethroughs and italics as it appeared in the original bill.

> § 18.2-48. Abduction with intent to extort money or for immoral purpose.
>
> Abduction (i) *of any person* with the intent to extort money or pecuniary benefit, (ii) of any person with intent to defile such person, ~~or~~ (iii) of any child under sixteen years of age for the purpose of concubinage or *prostitution, (iv) of any person for the purpose of* prostitution, *or (v) of any minor for the purpose of manufacturing child pornography* shall be *punishable as* a Class 2 felony.
>
> § 18.2-67.7. Admission of evidence [extending the rape-shield defense].

amendment to section 18.2-47, regarding the definition and punishment of abduction,[139] which would have added sex trafficking as a general abduction offense and increased the list of punishable conduct elements.[140] Furthermore, the original bill proposed amendments to section 18.2-49, regarding "[t]hreatening, attempting or assisting in such abduction,"[141] and section 18.2-382, concerning obscene "[p]hotographs,

---

A. In prosecutions under this article, or under *clause (iii) or (iv) of § 18.2-48* . . . general reputation or opinion evidence of the complaining witness's unchaste character or prior sexual conduct shall not be admitted.

§ 18.2-356. Receiving money for procuring person.

Any person who ~~shall receive~~ *receives* any money or other valuable thing for or on account of *(i)* procuring for or placing in a house of prostitution or elsewhere any person for the purpose of causing such person to engage in unlawful sexual intercourse or any act in violation of § 18.2-361 *or (ii) causing any person to engage in forced labor or services, concubinage, prostitution, or the manufacture of any obscene material or child pornography* shall be guilty of a Class 4 felony.

Id.

[139] VA. CODE ANN. § 18.2-47 (LEXIS through 2013 Spec. Sess. I).

[140] Va. H.B. 1898 (as introduced in House, Jan. 12, 2011). The proposed language is indicated below by strikethroughs and italics as it appeared in the original bill.

§ 18.2-47. Abduction and kidnapping defined; punishment.

. . . .

B. Any person who~~,~~ *(i)* by force, intimidation or deception, and without legal justification or excuse, seizes, takes, transports, detains ~~or~~, secretes, *recruits, entices, harbors, transports, provides, purchases, or obtains by any means, or attempts to recruit, entice, harbor, provide, purchase, or obtain by any means* another person with the intent to subject him to forced labor or services *or (ii) seizes, takes, transports, detains, secretes, recruits, entices, harbors, provides, purchases, or obtains by any means, or attempts to recruit, entice, harbor, provide, purchase, or obtain by any means a minor for purposes of prostitution, pornography or sexual performance by the minor* shall be deemed guilty of "abduction." For purposes of this subsection, the term "intimidation" shall include destroying, concealing, confiscating, withholding, or threatening to withhold a passport, immigration document, or other governmental identification or threatening to report another as being illegally present in the United States.

Id.

[141] VA. CODE ANN. § 18.2-49 (LEXIS). For the proposed amendments, see Va. HB 1898 (as introduced in House, Jan. 12, 2011). The proposed language is indicated below by strikethroughs and italics as it appeared in the original bill.

Any person who (1) threatens, or attempts, to abduct any other person with intent to extort money, or pecuniary benefit, or (2) assists or aids in the abduction of, or threatens to abduct, any person with the intent to defile such person, or (3) assists or aids in the abduction of, or threatens to abduct, any *minor* ~~female under sixteen years of age~~ for the purpose of concubinage, ~~or~~ prostitution, ~~shall be~~ *pornography or sexual performance by the minor is* guilty of a Class 5 felony.

Id.

slides and motion pictures";[142] both amendments would have added additional protection for minors, defined as an individual under the age of eighteen,[143] and prohibited the use of an affirmative defense of consent by a minor to the production of obscene photographs or films.[144] When the bill was returned from the House Committee for the Courts of Justice on January 31, 2011, however, all three amendments were struck, and the committee returned only the proposals for section 18.2-48 and section 18.2-67.7, while moving certain proposed language from section 18.2-47 to section 18.2-356.[145]

Furthermore, when the bill was returned from the Senate Committee for the Courts of Justice on February 16, 2011, some very pertinent proposals had been struck.[146] Originally, it was proposed that the language in part (iii) of section 18.2-48 be changed from "any child under sixteen years of age," to just "any *minor*."[147] This would have provided greater protection to those under the age of eighteen, as opposed to only those under the age of sixteen. The Senate Committee also struck and agreed with the House committee's removal of the following proposed language: "*For any prosecution pursuant to clause (iii)* [of 18.2-48], *(a) a lack of knowledge of the minor victim's age shall not be a defense and (b) consent of the minor to the sexual act shall not be a defense.*"[148] It would seem in striking the aforementioned clauses along with the recommended amendments to section 18.2-49, which attempted to change the language "female under sixteen years of age" to "*minor*,"[149] and section 18.2-382, which attempted to include the clause "*a minor*

---

[142] VA. CODE ANN. § 18.2-382 (LEXIS). For the proposed amendments, see Va. H.B. 1898 (as introduced in House, Jan. 12, 2011). The proposed language is indicated below by strikethroughs and italics as it appeared in the original bill.

> Every person who knowingly:
>
> . . . .
>
> ~~(2)~~*2.* Models, poses, acts, or otherwise assists in the preparation of any obscene film, photograph, negative, slide or motion picture for purposes of sale or distribution; shall be guilty of a Class 3 misdemeanor, *except that a minor cannot consent to such act and the use of a minor in the preparation is a crime of abduction for purposes of prostitution pursuant to subsection B of § 18.2-47 and clause (iii) of § 18.2-48.*

Id.

[143] VA. CODE ANN. § 1-207 (LEXIS).

[144] Va. H.B. 1898 (as introduced in House, Jan. 12, 2011).

[145] *See* Va. H.B. 1898 (as proposed by H. Comm. for Courts of Justice, Jan. 31, 2011).

[146] *See* Va. H.B. 1898 (as proposed by S. Comm. for Courts of Justice, Feb. 16, 2011).

[147] Va. H.B. 1898 (as introduced in House, Jan. 12, 2011).

[148] *Compare id.*, *with* Va. H.B. 1898 (as proposed by S. Comm. for Courts of Justice, Feb. 16, 2011).

[149] Va. H.B. 1898 (as introduced in House, Jan. 12, 2011).

cannot consent to such [pornographic] act,"[150] the Senate was effectively stating that consent and/or lack of knowledge as to age *were* affirmative defenses to these crimes, sixteen- and seventeen-year-olds did not merit full protection, and assisting in the abduction of a male for the purpose of prostitution was apparently acceptable.[151] The final version of the text was approved on April 6, 2011, to take effect on July 1 of that year.[152] Although it succeeded in adding to section 18.2-48 the actual crime of procuring *any* person for the purpose of prostitution and increasing a victim's protection under Virginia's equivalent of the rape shield defense,[153] what the final bill purposefully did not include is somewhat concerning.

B. House Bill 2190

The second major trafficking related bill signed in 2011 was HB 2190. This bill "[r]equire[s] the Department of Social Services to develop a plan for the provision of services to victims of human trafficking," including plans to help identify victims of human trafficking in the Commonwealth (even though such victims do not legally exist), assist victims in applying for benefits and the delivery thereof, prepare and disperse training and educational resources on human trafficking, and assist willing international victims in returning abroad.[154] This bill was

---

[150] *Id.*

[151] Although the abduction of a male for the purpose of prostitution would probably be punishable under section 18.2-356 of the Virginia Code, the current language of section 18.2-49 still only applies to females under the age of sixteen. VA. CODE ANN. §§ 18.2-49, -356 (LEXIS through 2013 Spec. Sess. I). If one is planning on abducting a person for the purpose of prostitution in Virginia, therefore, it best be a male or take place the day after her Sweet 16.

[152] Va. H.B. 1898 (enacted); *see also* VA. CONST. art. IV, § 13.

[153] Va. H.B. 1898 (enacted).

[154] COMMONWEALTH OF VA. GEN. ASSEMB., DIGEST OF THE ACTS 6 (2011). For the text of the added language, see H.B. 2190, 2011 Gen. Assemb., Reg. Sess. (Va. 2011) (enacted).

> Be it enacted by the General Assembly of Virginia:
>
> 1. § 1. That the Department of Social Services shall develop a plan for the delivery of services to victims of human trafficking. Such plan shall include provisions for (i) identifying victims of human trafficking in the Commonwealth; (ii) assisting victims of human trafficking with applying for federal and state benefits and services to which they may be entitled; (iii) coordinating the delivery of health, mental health, housing, education, job training, victims' compensation, legal, and other services for victims of human trafficking; (iv) preparing and disseminating educational and training programs and materials to increase awareness of human trafficking and services available to victims of human trafficking among local departments of social services, public and private agencies and service providers, and the public; (v) developing and maintaining community-based services for victims of human trafficking; and (vi) assisting victims of human trafficking with family

important because building a strong foundation for comprehensive human trafficking legislation includes ensuring social services are readily accessible to victims and educational resources are available to prosecutors and first responders. If they are not, future victims might face the same treatment that "Kelly"[155] did, a fourteen-year-old victim of human sex trafficking who was eventually rescued.[156]

When Kelly was fourteen, she was "befriended" by an older man while shopping with her friends at the mall.[157] She admits she was naive at the time, and went alone to meet the man where she was subsequently trafficked to Atlantic City and forced into prostitution.[158] A couple days after she was trafficked, the man raped her; it was on that day she finally sought help.[159] She went to a police officer after the incident, but instead of being offered aid and comfort, she was arrested and charged with prostitution.[160] She stated in a Richmond interview, "I mean, they didn't treat me like a kid. They treated me like a criminal."[161] "The system didn't know what to do with me," she said,[162] "dealing with the system was nearly as traumatic as being trafficked, [and] forced to work as a prostitute."[163]

To illustrate the vital role the basic education of first responders can play in identifying victims of human sex trafficking, one need only examine the comments a Richmond police officer provided to Shared Hope International:

> If we have a 17-year-old prostitute, there's going to be a criminal offense there. We'll [think] "hey, you're out here; you're doing an act of prostitution; we're going to arrest you as a juvenile . . .["] Is this an individual who is in need of some help or this individual is making a

---

reunification or return to their place of origin if the person so desires. In developing its plan, the Department shall work together with such other state and federal agencies, public and private entities, and other stakeholders as the Department shall deem appropriate.

Id. (emphasis omitted).

155 "Kelly's" name and identifying details were changed for her protection when NBC's Virginia affiliate published her story. Adam Rhew, *Kelly's Story*, NBC29.COM, http://www.nbc29.com/story/13474792/kellys-story?clienttype=printable (last updated Nov. 23, 2010).

156 *Id.*

157 *Id.*

158 *Id.*

159 *Id.*

160 *Id.*

161 *Id.*

162 Rhew, *supra* note 38.

163 *Id.*

> life choice that this is what they want to do at 17 or 17 and a half years old.[164]

The problem is that, in cases such as Kelly's, prostitution is *not* what many of these girls would consider to be a valid "life choice." According to Shared Hope's Virginia assessment, representatives from various Virginia agencies "illustrated a general lack of awareness and understanding of the issue—effectively hindering accurate identification" of victims.[165] As such, the passage of HB 2190 was vital to Virginia's fight against human trafficking. The Commonwealth cannot, however, pass such a bill without proper appropriation for the implementation of these programs. According to the bill's fiscal impact statement, "[t]his statement assumes that the Department of Social Services has adequate resources and staff to develop the plan as outlined. However, additional funding (state or federal) would be needed if some of the specific provisions were to be actually implemented."[166] The bill itself is without backbone, and even executive directives reinforcing and expanding upon the subject matter have not provided the funding necessary to undertake this venture.[167]

C. Senate Bill 1453

Recognizing the issues commonwealth attorneys might face in combating human trafficking without a comprehensive statute, the last bill, SB 1453, "[r]equires the Department of Criminal Justice Services to, in conjunction with the Office of the Attorney General, advise law-enforcement agencies and attorneys for the Commonwealth regarding the identification, investigation, and prosecution of human trafficking offenses using the common law and existing Virginia criminal statutes."[168] The bill itself, enacted in March of 2011, simply adds this requirement to the text of Virginia Code section 9.1-102, regarding the "[p]owers and duties of the Board and the Department [of Criminal Justice]."[169] It seems the Virginia Department of Criminal Justice Services, in partnership with the Attorney General's Office, promptly

---

[164] RAPID ASSESSMENT: VIRGINIA, *supra* note 44, at 27 (alterations except for closing quotation mark in original).

[165] *Id.*

[166] 2011 Fiscal Impact Statement: HB 2190, DEP'T PLANNING & BUDGET (2011), http://lis.virginia.gov/cgi-bin/legp604.exe?111+oth+HB2190FER122+PDF.

[167] Va. Exec. Directive No. 7, *supra* note 115 ("Nothing in this Executive Directive should be construed as imposing an unfunded mandate on any Independent or non-Executive branch agency of the Commonwealth of Virginia.").

[168] *2011 Session: SB 1453 Human Trafficking; DCJS, etc., Regarding Identification, etc., of Offenses Using Existing Statutes*, VA.'S LEGIS. INFO. SYS., http://lis.virginia.gov/cgi-bin/legp604.exe?111+sum+SB1453 (last visited Mar. 31, 2014).

[169] S.B. 1453, 2011 Gen. Assemb., Reg. Sess. (Va. 2011) (enacted).

complied with these new requirements, adding to its website a human trafficking resource center offering criminal, federal, and non-government resources to officials seeking guidance.[170] At the time of this bill's passage, however, the Virginia General Assembly might not have fully understood how utterly lacking the Commonwealth is in common law resources. As alluded to previously,[171] the document that provides a statutory breakdown of the criminal offenses human traffickers and facilitators can be charged with is virtually devoid of factually relevant case law. Although the Department includes citations to various cases as a means of assisting in the interpretation of particular statutory elements,[172] only one case has any factual relevance,[173] and that case is cited only once—as a source to be used in determining what Virginia considers to be valuable consideration under section 18.2-357 of the Virginia Code.[174]

D. An Impact on the Ground?

In summation, the passage of HB 1898, HB 2190, and SB 1453 were somewhat reactionary. Although the bills do provide for some necessary statutory changes and reflect Virginia's understanding of the need for increased human trafficking awareness training and resources, the bills probably make more of an impact on paper than on the ground. Firstly, the amendments made to the Virginia Criminal Code as a result of HB 1898 are somewhat offset by maintaining affirmative age and consent defenses for purchasers and traffickers. Secondly, HB 2190 will have little to no impact provided the Commonwealth does not provide social services with the necessary funding to implement programs for victims of human trafficking. In the same year this bill was passed, however, the Attorney General stated the government was not "at a point where it warrants spending state dollars on creating essentially a new social welfare program."[175] Considering the blatant way in which the

---

[170] *See* VIRGINIA ANTI-TRAFFICKING LAWS, *supra* note 72; *Human Trafficking Resources for Commonwealth's Attorneys*, *supra* note 73.

[171] *See supra* Part I.

[172] VIRGINIA ANTI-TRAFFICKING LAWS, *supra* note 72.

[173] *See* Tart v. Commonwealth, 663 S.E.2d 113, 114, 116–17 (Va. Ct. App. 2008).

[174] VIRGINIA ANTI-TRAFFICKING LAWS, *supra* note 72, at 6–7.

[175] Rhew, *supra* note 38. As of January 2014, Virginia's Office of the Attorney General reported that (now former) Attorney General Ken Cuccinelli "is asking the U.S. Department of Treasury for approval to use $6 million from money his office obtained from the 2012 Abbott Laboratories Medicaid fraud settlement for creating shelters" for victims of human trafficking in Virginia. *See* Press Release, Commonwealth Va. Office Attorney Gen., Cuccinelli to Create Shelters for Human Trafficking Victims Around Virginia Using $6 Million from Criminals (Jan. 8, 2014), *available at* http://www.oag.state.va.us/Media%20and%20News%20Releases/News_Releases/Cuccinelli/010814_Human_Trafficking.html.

mere mention of funding these necessary services was cast aside, it does not seem this bill will have much of an effect until attitudes change and funds are diverted. Lastly, although SB 1453 has been complied with, a document outlining the twenty-seven various charges that can be brought against a perpetrator of human trafficking does little to educate or encourage commonwealth attorneys to divert resources to prosecuting such violations. Without the guidance of precedent of prior state-level human trafficking prosecutions at commonwealth attorneys' disposal, the Attorney General's Office must take the lead in forging such a path.

III. COVERING THE "BATTLEFIELD" BUT NOT FIGHTING THE WAR

Although Virginia lacks both applicable case law and comprehensive human trafficking legislation, the former Attorney General never claimed that precedent was abundant nor that human sex trafficking was an enumerated criminal offense. Rather, he implied Virginia law as it currently stands can adequately address any cause of action arising from a traditional trafficking violation.[176] In determining whether Virginia adequately covers the proverbial legal "battlefield" that is commercial sexual exploitation, therefore, Virginia's current legislation purporting to address the issue will be contrasted with legislation promulgated under a comprehensive alternative model; after which, the essential elements of a human trafficking offense will be outlined and equated with any applicable sections of the Virginia Code. Although federal human trafficking legislation is by far the most comprehensive and provides for an extensive body of case law, a comparative analysis between federal and state legislation would yield neither fair nor accurate results due to federal jurisdictional requirements and more abundant financial resources.[177] As such, the State of Illinois will serve as Virginia's legislative contrast. Illinois not only adheres to a comprehensive "safe harbor" model of trafficking legislation, but it also received a high score from Shared Hope

---

This request has not yet been granted, and whether such funds will be released for this purpose remains to be seen.

[176] *See* Rhew, *supra* note 38.

[177] *See* 18 U.S.C. § 1591(a)(1) (2012) (applying to actions "in or affecting interstate or foreign commerce"); ALISON SISKIN & LIANA SUN WYLER, CONG. RESEARCH SERV., RL34317, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS (2013) (stating that the Trafficking Victims Protection Reauthorization Act authorized $191.3 million for fiscal year 2011 anti-trafficking programs).

International's report card analysis,[178] and is relatively comparable to Virginia in GDP per capita.[179]

A. The "Safe Harbor" Model

Unlike in Virginia, the State of Illinois has a comprehensive human trafficking statute.[180] It begins by providing definitions for terms such as "commercial sexual activity," "services," "sexually-explicit performance," and "trafficking victim."[181] Already the Illinois statute is distinct from Virginia's model, as Virginia's Attorney General's Office acknowledges that the term "forced labor or services" is undefined in the Virginia Code, and courts must "rely on the plain and ordinary meaning of the words. (Common sense)."[182] The Illinois statute then defines "involuntary servitude," criminalizing within the definition both its attempt and conspiracy.[183] The next section of the Illinois statute, regarding "[i]nvoluntary sexual servitude of a minor,"[184] specifically mirrors federal

---

[178] PROTECTED INNOCENCE, *supra* note 44, at 12.

[179] In 2010, Illinois had a per capita real gross domestic product of about $45,300, and Virginia had a per capita real gross domestic product of around $47,600. Jonathan E. Avery et al., *Gross Domestic Product by State: Advance Statistics for 2010 and Revised Statistics for 2007–2009*, SURV. CURRENT BUS., July 2011, at 142, 153 tbl.4.

[180] 720 ILL. COMP. STAT. ANN. 5/10-9 (Westlaw through P.A. 98-623, 2013 Reg. Sess.).

[181] *See id.* § 5/10-9(a)(2), (8)–(10) (Westlaw).

[182] VIRGINIA ANTI-TRAFFICKING LAWS, *supra* note 72, at 2. More often than not, providing for and acknowledging such vague areas in the code will have defense attorneys salivating.

[183] § 5/10-9(b) (Westlaw).

> (b) Involuntary servitude. A person commits involuntary servitude when he or she knowingly subjects, attempts to subject, or engages in a conspiracy to subject another person to labor or services obtained or maintained through any of the following means, or any combination of these means:
>
> (1) causes or threatens to cause physical harm to any person;
>
> (2) physically restrains or threatens to physically restrain another person;
>
> (3) abuses or threatens to abuse the law or legal process;
>
> (4) knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person;
>
> (5) uses intimidation, or exerts financial control over any person; or
>
> (6) uses any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform the labor or services, that person or another person would suffer serious harm or physical restraint.
>
> Sentence. Except as otherwise provided in subsection (e) or (f), a violation of subsection (b)(1) is a Class X felony, (b)(2) is a Class 1 felony, (b)(3) is a Class 2 felony, (b)(4) is a Class 3 felony, (b)(5) and (b)(6) is a Class 4 felony.

Id.

[184] *Id.* § 5/10-9(c) (Westlaw).

legislation in providing that trafficking a person under the age of eighteen requires "no overt force or threat" as would be required if the victim had reached adulthood.[185] No variation of this vital statutory provision is present in the Virginia Code. Furthermore, where the Virginia model of combating human trafficking consists of prosecuting individual offenses as they fall within traditional common law categories, the Illinois human trafficking statute itself includes sections pertaining to aggravating factors,[186] separate sentencing considerations,[187] mandatory restitutionary measures for victims,[188] emergency social services,[189] certification to the federal government of an ongoing investigation so as to assist victims with immigration visas and federal benefits,[190] and a property forfeiture provision for those found to have participated in the victimization.[191] There are also separate statutory provisions allowing the court to vacate a victim's previous prostitution convictions,[192] and providing that persons under the age of eighteen are immune from prosecution for a prostitution related offense.[193]

Along with the provisions set forth in the Illinois Criminal Code, Illinois also provides victims of human trafficking with various civil remedies. According to the Illinois "Predator Accountability Act,"[194]

> (b) A victim of the sex trade has a cause of action against a person or entity who:

> (c) Involuntary sexual servitude of a minor. A person commits involuntary sexual servitude of a minor when he or she knowingly recruits, entices, harbors, transports, provides, or obtains by any means, or attempts to recruit, entice, harbor, provide, or obtain by any means, another person under 18 years of age, knowing that the minor will engage in commercial sexual activity, a sexually-explicit performance, or the production of pornography, or causes or attempts to cause a minor to engage in one or more of those activities . . . .

Id.

185 *Id.* § 5/10-9(c)(1)–(3) (Westlaw).

186 *Id.* § 5/10-9(e) (Westlaw) ("A violation of this Section involving kidnapping or an attempt to kidnap, aggravated criminal sexual assault or an attempt to commit aggravated criminal sexual assault, or an attempt to commit first degree murder is a Class X felony.").

187 *Id.* § 5/10-9(f) (Westlaw).

188 *Id.* § 5/10-9(g) (Westlaw).

189 *Id.* § 5/10-9(h) (Westlaw).

190 *Id.* § 5/10-9(i) (Westlaw).

191 *Id.* § 5/10-9(j) (Westlaw).

192 725 ILL. COMP. STAT. ANN. 5/116-2.1 (Westlaw through P.A. 98-623, 2013 Reg. Sess.).

193 720 ILL. COMP. STAT. ANN. 5/11-14(d) (Westlaw through P.A. 98-623, 2013 Reg. Sess.) (setting forth the key provision that causes Illinois' legislative model to be classified as a "safe harbor" one).

194 740 ILL. COMP. STAT. ANN. 128 (Westlaw through P.A. 98-623, 2013 Reg. Sess.).

> (1) recruits, profits from, or maintains the victim in any sex trade act;
>
> (2) intentionally abuses, as defined in Section 103 of the Illinois Domestic Violence Act of 1986, or causes bodily harm, as defined in Section 11-0.1 of the Criminal Code of 2012, to the victim in any sex trade act; or
>
> (3) knowingly advertises or publishes advertisements for purposes of recruitment into sex trade activity.[195]

Furthermore, the act provides a "prevailing victim of the sex trade shall be entitled to all relief that would make him or her whole," and includes a non-exhaustive list of recovery options.[196] This accountability act also contains a provision limiting the defenses available to defendants,[197] including, for example, that "the victim of the sex trade made no attempt to escape, flee, or otherwise terminate contact with the defendant."[198] Finally, in a seeming acknowledgement of the fact minors tend not to enter into a lifestyle of prostitution without the influence of a third-party adult, all minors attempting to engage in prostitution are immediately subject to protective custody provisions.[199] These provisions allow for the minor's temporary seclusion in order to investigate potential child abuse.[200]

The model of human trafficking legislation employed by the State of Illinois is known as the "safe harbor" model within advocacy circles.[201] Such a model is considered to be on the forefront of human trafficking advocacy, and is a structure commonly lobbied for by advocates.[202] According to Polaris Project, the implementation of the model requires the adoption of three primary provisions: (1) Prevent minor victims of sex trafficking from being prosecuted for prostitution; (2) Ensure that coercion is not required to prosecute the sex trafficking of children; and (3) Protect child victims of human sex trafficking by providing specialized services for them.[203] Illinois, Massachusetts, Minnesota, New

---

[195] *Id.* § 128/15(b) (Westlaw).

[196] *Id.* § 128/20 (Westlaw).

[197] *Id.* § 128/25 (Westlaw).

[198] *Id.* § 128/25(a)(5) (Westlaw).

[199] *See* 720 ILL. COMP. STAT. ANN. 5/11-14(d) (Westlaw through P.A. 98-623, 2013 Reg. Sess.); *see also* 705 ILL. COMP. STAT. ANN. 405/2-5 to -6 (Westlaw through P.A. 98-623, 2013 Reg. Sess.).

[200] *See* § 5/11-14(d).

[201] *See* POLARIS PROJECT, SAFE HARBOR—PROTECTING SEXUALLY EXPLOITED MINORS 1–2 (Aug. 2013), *available at* http://www.polarisproject.org/storage/2013-Analysis-Category-6-Safe-Harbor.pdf.

[202] *See id.* at 1, 4.

[203] POLARIS PROJECT, HUMAN TRAFFICKING LEGISLATIVE ISSUE BRIEF: SEX TRAFFICKING OF MINORS AND "SAFE HARBOR" (2010), *available at*

Jersey, New York, Ohio, Vermont, and Washington have implemented full "safe harbor" programs, while Connecticut, Florida, Michigan, Tennessee, and Texas have partial provisions.[204] Virginia does not provide for any of these recommendations. Although the "safe harbor" model primarily focuses on the commercial sexual exploitation of minors—those under the age of eighteen—it is a good starting point for states such as Virginia that have been slow to adopt comprehensive human trafficking legislation.

Due to the unique psychological nature of human trafficking offenses, the "safe harbor" model seeks to combat the common error law enforcement officials make when they misidentify victims of human sex trafficking.[205] In a 2006 report submitted to the U.S. Department of Justice, law enforcement officers stated that gaining victims' trust and encouraging them to come forward is difficult.[206] An officer reported that many of the victims do not trust the police because the victims fear deportation.[207] One interviewee responded that victims are accustomed to seeing corrupt law enforcement officials in their countries, so they are strongly anti-government.[208] The report further indicated that first responders do not normally "have time to conduct the detailed interview necessary to uncover the crime [of sex trafficking]."[209] One officer noted that "[i]t is difficult to determine a case without talking to the victim . . . to know if they are forced into prostitution or not. It is often easier to assume they are willing to be in prostitution."[210]

The Virginia General Assembly seemingly recognized this issue when it passed SB 1453. This bill required the Attorney General's Office to work with the Department of Criminal Justice to advise law enforcement officers "regarding the identification, investigation, and prosecution of human trafficking offenses using the common law and existing criminal statutes in the Code of Virginia."[211] However, as the fiscal impact statement submitted with the bill claimed, "[t]he

---

http://www.polarisproject.org/storage/documents/policy_documents/model%20laws/Issue_Brief_-_Safe_Harbor_7-23-2010.pdf.

[204] *See Sex Trafficking of Minors and "Safe Harbor,"* POLARIS PROJECT, http://www.polarisproject.org/what-we-do/policy-advocacy/assisting-victims/safe-harbor (last visited Mar. 31, 2014).

[205] *See* RAPID ASSESSMENT: VIRGINIA, *supra* note 44, at 2.

[206] HEATHER J. CLAWSON ET AL., LAW ENFORCEMENT RESPONSE TO HUMAN TRAFFICKING AND THE IMPLICATIONS FOR VICTIMS: CURRENT PRACTICES AND LESSONS LEARNED 33 (2006), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/216547.pdf.

[207] *Id.*

[208] *Id.*

[209] *Id.* (internal quotation marks omitted).

[210] *Id.* (alteration in original) (internal quotation marks omitted).

[211] S.B. 1453, 2011 Gen. Assemb., Reg. Sess. (Va. 2011) (enacted).

Department of Criminal Justice Services and the Office of the Attorney General report the workload associated with the bill should be minimal and if so, the fiscal impact can be absorbed."[212] If providing the entire law enforcement community of Virginia with the intricate education necessary in order to assist in the identification of trafficking victims has only a minimal workload, the General Assembly probably does not fully comprehend the training and resources necessary to assist with victim identification. According to Shared Hope International's assessment of Virginia, Child Protective Services' staff reported having no training regarding human trafficking, nor did they have formal methods of identification or a classification system for victims of commercial sexual exploitation.[213] The first improvement the Commonwealth of Virginia must make, therefore, is to increase the educational resources provided to law enforcement and social service professionals regarding the identification, protection, and rehabilitation of victims. There is little point in drafting intricate statutory provisions if the victims whom such provisions are enacted to protect are left in the shadows.

B. The Criminal Elements of Human Trafficking

Once the Commonwealth endeavors to improve the methods used in the identification of and services provided to victims of human trafficking, the next step requires determining the nature of the crimes actually committed. Commonly, a human trafficking offense consists of the following three phases of criminality, which have been broken down here to include any potentially applicable Virginia statutes. Firstly, abduction takes place through force (physical taking), fraud (i.e., promise of lawful employment), and/or coercion (i.e., either you or your sister).[214] During the abduction (Virginia Code sections 18.2-47, 48, and 49) or "recruitment" phase of trafficking, crimes including document forgery (sections 18.2-168, 169, 171, 172, 172.2, and 178), bribery of officials (sections 18.2-439 and 444), false imprisonment (section 18.2-47), and assault and battery (sections 18.2-42 and 57) can occur.[215] Secondly, the victim enters the "transportation and entry" phase of the offense, which consists primarily of using vehicles and other means of transportation for the purpose of furthering commercial sexual exploitation (section 18.2-349), receiving money for procuring the person

---

[212] 2011 Fiscal Impact Statement: SB1453, DEPT. PLANNING AND BUDGET (2011), http://lis.virginia.gov/cgi-bin/legp604.exe?111+oth+SB1453FER122+PDF.

[213] RAPID ASSESSMENT: VIRGINIA, *supra* note 44, at 3.

[214] *See* U.N. OFFICE ON DRUGS & CRIME, TOOLKIT TO COMBAT TRAFFICKING IN PERSONS 107–09, U.N. Sales No. E.08.V.14 (2008).

[215] *Id.* at 108 (listing some aspects of the recruitment phase).

(section 18.2-356), placing that person in a bawdy place (sections 18.2-347 and 355), withholding documents (section 18.2-47), and committing additional acts of false imprisonment and violence.[216]

The third phase is known as the "exploitation" phase,[217] and consists of the most brutal offenses. Depending on the nature of the trafficking organization, this phase commonly consists of gang rape (sections 18.2-61, 63, and 67.5), sexual battery (sections 18.2-67.4, 67.1, 67.2, 67.3, 67.4:1, and 67.4:2), physical and emotional abuse, extortion (section 18.2-59), torture or sadomasochistic abuse (see section 18.2-390), forced abortion (sections 18.2-71 and 76.1), forced ingestion of controlled substances, threats to abuse the legal system (see section 18.2-59), theft of property (sections 18.2-95 and 96), and denial of medical care.[218] Furthermore, individuals participating in the enterprise at only certain intervals could be guilty of aiding and abetting (sections 18.2-18 and 348), conspiracy (section 18.2-22), solicitation (sections 18.2-29 and 346), taking indecent liberties with children (sections 18.2-370 and 371), money laundering (section 18.2-246.3), and receiving money to further prostitution (section 18.2-357).[219] An indictment for a human trafficking offense would likely include multiple counts for each criminal element.

For Virginia law enforcement officials, the time and resources it would take to investigate and prosecute all of the individual criminal elements commonly associated with a human trafficking offense would be exponential. Virginia does indeed have individual statutes to cover the majority of offenses present, but it is highly unlikely that more than a handful of charges would be brought. For example, the first statute the Attorney General's Office lists under "Sex Trafficking" in the prosecution guide for commonwealth attorneys concerns "Abduction" (section 18.2-48).[220] As a conviction under the abduction statute is good for twenty years to life in prison,[221] is it likely a prosecutor is going to take the time to prosecute misdemeanor charges such as frequenting a bawdy place?[222] Considering the magnitude of the crime, however, is the labeling of traffickers as only abductors, extortionists, or promoters of prostitution sufficient? When Virginia officials claim the Criminal Code is "covering the battlefield," it seems what they really mean to say is

---

[216] *See id.* at 107–09 (listing some aspects of the transportation and entry phase).

[217] *Id.* at 107–08.

[218] *See id.* at 108–10 (listing some aspects of the exploitation phase).

[219] *See id.* at 107–09 (describing possible crimes that can be committed by traffickers).

[220] VIRGINIA ANTI-TRAFFICKING LAWS, *supra* note 72, at 3.

[221] VA. CODE ANN. § 18.2-10(b) (LEXIS through 2013 Spec. Sess. I).

[222] *Id.* § 18.2-347 (LEXIS); Lemke v. Commonwealth, 241 S.E.2d 789, 790 (Va. 1978).

"we'll get traffickers on enough to put them away for life," not "we recognize the horrors of human trafficking and intend to use our legal resources to ensure the crime in its holistic sense is being prosecuted." Herein lies the problem with Virginia's legislative approach to combating human trafficking.

C. Fighting the War

If a man is on trial for the commission of rape and murder, one does not simply forgo prosecuting the murder charge because a conviction under the rape statute would put him away for life. When *malum in se* crimes are committed, punishing those who commit the offenses is about more than simply imprisoning someone for a decent term. Punishment is also a means of showing society that such crime, especially crime that violates the conscience, will not be tolerated. Combating human trafficking is about more than covering a single legal "battlefield"; it is about waging social, political, and spiritual war. One cannot wage war, however, until one declares it. Without the adoption of a comprehensive human trafficking statute or even a basic reporting system that would bring to light the magnitude of commercial sexual exploitation within the Commonwealth, Virginia's efforts to combat human trafficking will remain nominal.

Human trafficking is a *malum in se* crime, one unlike many others. Trafficking is more than abduction and extortion, which are crimes many associate only with personal vendettas or perverted interests. Trafficking is an active criminal enterprise, the second largest in the world.[223] It is cold, it is cruel, and it is devoid of justification and excuse. Although recognized executively, Virginia's refusal to legislatively recognize it as the unique crime it is helps the Commonwealth gloss over its horrors. Without a comprehensive, or even basic, statute that explicitly recognizes the felony of "human trafficking," the notion that human trafficking is not occurring within the Commonwealth is aided.[224] By prosecuting a human trafficking offense based only on the individual criminal elements that constitute it, the Commonwealth is effectively perpetrating the notion that *human trafficking is not a crime!* It is telling Virginians that abduction, extortion, prostitution, and running brothels are crimes. It is not telling Virginians that the Commonwealth legally recognizes and will take action specifically against the perpetrators of *human trafficking*. Furthermore, the Virginia rules of criminal procedure define the term "victim" as "a person who suffers

---

[223] *See Human Trafficking*, *supra* note 112; *What is Human Trafficking*, *supra* note 112.

[224] RAPID ASSESSMENT: VIRGINIA, *supra* note 44, at 2.

personal physical injury or death as a direct result of a crime."[225] Despite what positive, albeit legislatively toothless, executive directives and human trafficking summits might imply,[226] when there is no legal crime, there can be no legal victims. Logically, it would seem human trafficking is not occurring in Virginia, and the Commonwealth has no victims of it. What kind of trafficker would not see Virginia as open for the business of trafficking in persons?!

CONCLUSION

If the question is whether, when faced with prosecuting a human trafficking violation, a commonwealth attorney would be able to take that trafficker off the streets, the answer is "yes." If the question is whether Virginia really covers the "battlefield" of human trafficking, however, the answer is a resounding "no." The specific nature and elements of a human trafficking offense might be covered within the Virginia Code, but the average citizen will not likely come to the realization that "abduction" means "human trafficking" as well. The perpetrators of human trafficking deserve the label, and the victims of human trafficking deserve to be legally recognized as such. The Commonwealth of Virginia does not provide its law enforcement and social service professionals with the proper educational and financial resources to recognize and aid victims of trafficking. The Attorney General's Office has virtually no common law resources to provide to commonwealth attorneys, and it has not set an example for them by seeking out and prosecuting the perpetrators of human trafficking. The Virginia Code, although prehistorically workable, does not provide an efficient way for attorneys to prosecute the perpetrators of human trafficking whereby the criminal will be punished as a trafficker and the victim at least partially avenged as his or her trafficking victim.

The Virginia model, or lack thereof, for combating human trafficking is flawed to say the least. Even if commonwealth attorneys were to start vigorously seeking out and prosecuting intrastate human trafficking offenses, where would the appropriations come from? What would happen to the victims? Would seventeen-year-old girls continue to be prosecuted for prostitution? Would victims like Kelly continue to exclaim that "dealing with the system was nearly as traumatic as being trafficked"?[227] Is the Virginia General Assembly asking itself any of these questions? Even if the resources are not currently available to re-organize the entirety of Virginia's social service system, this does not

---

[225] VA. CODE ANN. § 19.2-368.2 (LEXIS).

[226] *See, e.g.*, Va. Exec. Directive No. 7, *supra* note 115.

[227] Rhew, *supra* note 38.

mean the Commonwealth should avoid recognizing the comprehensive crime of human trafficking, even solely as a means of mobilizing private society to action. If the Commonwealth is serious about combating human sex trafficking, not simply using a handful of bills and executive orders to save face in the midst of embarrassing assessments,[228] then it must begin to wage a holistic war against human trafficking's monumental physical, emotional, and spiritual effects. The Commonwealth simply cannot cover this expansive "battlefield" using old weapons that were not designed to fight the slave trade of this generation.

Nicole Tutrani[*]

[228] *See, e.g.*, PROTECTED INNOCENCE, *supra* note 44, at 11–15; SHARED HOPE INT'L, PROTECTED INNOCENCE CHALLENGE: STATE REPORT CARDS ON THE LEGAL FRAMEWORK OF PROTECTION FOR THE NATION'S CHILDREN 11–15 (2012), *available at* http://sharedhope.org/wp-content/uploads/2012/09/ProtectedInnocenceChallenge_FINAL_2012_web2.pdf; SHARED HOPE INT'L, PROTECTED INNOCENCE CHALLENGE: STATE REPORT CARDS ON THE LEGAL FRAMEWORK OF PROTECTION FOR THE NATION'S CHILDREN 11, 13–16 (2011), *available at* http://sharedhope.org/wp-content/uploads/2012/10/PIC_ChallengeReport_2011.pdf; RAPID ASSESSMENT: VIRGINIA, *supra* note 44, at 2–3.

[*] The Author would like to thank the *Regent University Law Review* and its members for their exquisite work on this Note. It is dedicated to those who have experienced the horrors of human trafficking, both known and unknown, and the abolitionists committed to eradicating this modern day slave trade.

TOP GUN: THE SECOND AMENDMENT, SELF-DEFENSE, AND PRIVATE PROPERTY EXCLUSION

INTRODUCTION

Few issues are as hotly contested in America as the Second Amendment to the Constitution.[1] Recently, the Supreme Court examined this issue in-depth due to a complete ban on handgun possession by private individuals within Washington D.C.[2] The regulation of firearms by different localities is nothing new in the United States,[3] and although there have been Supreme Court cases dealing with the Second Amendment, the Supreme Court has remained mostly silent on the issue of textual interpretation and legal meaning, touching on the Second Amendment as briefly as possible before moving on to its general analysis or holding in each case.[4] The Court never performed a detailed analysis until the recent decision and holding in *District of Columbia v. Heller*.[5] The *Heller* Court's in-depth analysis of the history of the Second Amendment and the individual right it protects is almost certain to have a ripple effect in future legislation and court cases, despite the dicta of the Court claiming that this decision will not upset years of judicial precedent.[6] That ripple effect was felt by the City of Chicago when the Court struck down its ban on firearms that was similar to the one in *Heller*.[7]

With the right of citizens to keep arms within the home upheld as a constitutional right for the first time by the Supreme Court, it begs inquiry and discussion regarding how state legislatures, Congress, and the courts will begin to examine the second phrase of that well-known Second Amendment clause, "to keep *and bear* arms."[8] Several states have gone beyond the protection of an individual's right to keep arms in the home and have begun passing laws preventing various private

---

1 U.S. CONST. amend. II.

2 District of Columbia v. Heller, 554 U.S. 570, 573–75 (2008).

3 *See id.* at 626–27 (noting that a majority of courts have upheld state-imposed firearm regulations); *State Laws*, NRA-ILA INST. FOR LEGIS. ACTION, http://www.nraila.org/gun-laws/state-laws.aspx (last visited Mar. 31, 2014).

4 *See, e.g.*, United States v. Miller, 307 U.S. 174, 178, 182 (1939); Presser v. Illinois, 116 U.S. 252, 257–58 (1886); United States v. Cruikshank, 92 U.S. 542, 553 (1875).

5 *Heller*, 554 U.S. at 576–78, 635 (holding that the Second Amendment protects an individual's right to bear arms for the purpose of self-defense).

6 *Id.* at 626–27.

7 McDonald v. City of Chicago, 130 S. Ct. 3020, 3026, 3050 (2010) (holding that the Second Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment).

8 U.S. CONST. amend. II (emphasis added).

property owners from forbidding the storage of firearms within parked cars on their property.[9] This Note will look at the possible ramifications of these laws in three parts.

Part I of this Note examines the holding of the Court in *Heller* to determine precisely what right is protected, explicitly and implicitly, by the Second Amendment. Within the examination of *Heller*, it also surveys the Supreme Court decisions that led up to *Heller*, including *United States v. Cruickshank*,[10] *Presser v. Illinois*,[11] and *United States v. Miller*.[12] The extension of *Heller* to the states in *McDonald v. City of Chicago* is also briefly examined for any nuggets that can help predict the future of legislation and judicial interpretation in this arena.

Part II briefly examines various state laws regarding the "bearing" of arms on public property in the form of concealed and open carry of handguns. The heart of this section reviews the laws of nineteen states that specifically purport to protect the ability of individuals to possess firearms through the passing of various *parking lot laws*, which allow individuals to store firearms in parked cars.

---

[9] ALASKA STAT. § 18.65.800(a) (LEXIS through 2013 Reg. Sess.); ARIZ. REV. STAT. ANN. § 12-781(A) (Westlaw through 2013 Reg. Sess. & Spec. Sess.); FLA. STAT. ANN. § 790.251(4)(a) (Westlaw through 2013 1st Reg. Sess.), *invalidated by* Fla. Retail Fed'n, Inc. v. Attorney Gen. of Fla. (*Fla. Retail Fed'n II*), 576 F. Supp. 2d 1301 (N.D. Fla. 2008) (holding that the part of the statute applying to customers' right to bear arms on private property was unconstitutional, but finding that the state could statutorily protect employees' right to keep guns in their cars); GA. CODE ANN. § 16-11-135(a) (LEXIS through 2013 Reg. Sess.) (protecting employees who keep firearms in their vehicle); 430 ILL. COMP. STAT. 66/65(b) (Westlaw through P.A. 98-627, 2014 Reg. Sess.); IND. CODE ANN. § 34-28-7-2(a) (Westlaw through 2013 Reg. Sess.); KAN. STAT. ANN. § 75-7c10(b)(1) (Westlaw through 2013 Reg. & Spec. Sess.) (protecting employees who keep firearms in their vehicle); KY. REV. STAT. ANN. § 237.106(1) (Westlaw through 2013 Reg. Sess. & 2013 Extraordinary Sess.); LA. REV. STAT. ANN. § 32:292.1(C) (LEXIS through 2013 Reg. Sess.); ME. REV. STAT. tit. 26, § 600(1) (Westlaw through 2013 1st Reg. Sess. & 1st Spec. Sess.) (protecting employees who keep firearms in their vehicle); MINN. STAT. ANN. § 624.714, Subd. 17(c) (Westlaw through 2013 1st Spec. Sess.); MISS. CODE ANN. § 45-9-55(1) (LEXIS through 2013 Reg. Sess. & 2d Extraordinary Sess.) (protecting employees who keep firearms in their vehicle); N.D. CENT. CODE § 62.1-02-13(1)(a) (LEXIS through 2013 Reg. Legis. Sess.); OKLA. STAT. tit. 21, §§ 1289.7a, 1290.22(B) (Westlaw through 2013 1st Extraordinary Sess.); TEX. LAB. CODE ANN. §§ 52.061, 52.063(a) (Westlaw through 2013 3d Called Sess.) (protecting employees who keep firearms in their vehicle); UTAH CODE ANN. § 34-45-103(1) (LEXIS through 2013 2d Spec. Sess.); *see also* N.C. GEN. STAT. § 120-32.1(c1) (LEXIS through 2013 Reg. Sess.) (granting parking facility privileges for state legislators); VA. CODE ANN. § 15.2-915(A) (LEXIS through 2013 Reg. Sess. & 2013 Spec. Sess.) (prohibiting localities from restricting employees from storing firearms in vehicles); WIS. STAT. ANN. § 175.60(16)(b)(1) (Westlaw through 2013 Wis. Act 116) (granting licensees the privilege of keeping weapons in cars parked at government buildings).

[10] 92 U.S. 542 (1875).

[11] 116 U.S. 252 (1886).

[12] 307 U.S. 174 (1939).

Lastly, Part III looks to the future of such legislation and discusses the constitutionality of preventing private property owners from excluding the possession of firearms on their property. At the time of this writing there have been few legal challenges to these laws, and none have gone to the Supreme Court. This Article, therefore, will look at how the Supreme Court has weighed other constitutionally protected rights against the rights' of property owners to exclude, specifically when dealing with freedom of speech and expression. Because most United States citizens currently live in urban areas[13] and must venture out of their homes in order to gain the basic necessities for living,[14] several questions must be asked. If the bearing of arms, not just the keeping, is a fundamental right guaranteed by the Constitution, can any one individual, corporation, or other entity effectively prevent a the public from exercising this right outside of their homes when the government cannot? It is unlikely that a right the government is unable to infringe upon can summarily be denied to individuals who merely set foot upon specific private properties. Further, though case law strongly supports the ability of states to expand constitutional rights, is it proper under the Fourteenth Amendment for the federal government to enjoin the states from enforcing private rules regarding the exclusion of firearms?

I. THE SUPREME COURT: RECOGNITION OF AN INDIVIDUAL RIGHT

A. D.C. v. Heller*: Tracing the Path of the Second Amendment Through History and the Courts*

The case that brought the Second Amendment into the limelight of the Supreme Court was *District of Columbia v. Heller*.[15] Dick Heller sued the District of Columbia to prevent the city from enforcing an administrative ban on the registration of handguns, the prohibition on carrying a firearm in the home, and the requirement that any firearm in the home must have a trigger lock to render it non-functional.[16] At that time in Washington, D.C., it was a crime to possess an unregistered handgun, and the registration of handguns was prohibited.[17] The district court dismissed his claim, but the U.S. Court of Appeals for the District of Columbia reversed, holding that the total handgun ban was

---

[13] *2010 Census Urban Area Facts*, U.S. CENSUS BUREAU, http://www.census.gov/geo/reference/ua/uafacts.html (last updated Mar. 31, 2014) (stating that 80.7% of the U.S. population lives in urban areas).

[14] *See Demographics*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/oecaagct/ag101/demographics.html (last updated Apr. 14, 2013).

[15] District of Columbia v. Heller, 554 U.S. 570 (2008).

[16] *Id.* at 575–76.

[17] *Id.* at 574–75.

unconstitutional.[18] That court also held that a prohibition on keeping an operable firearm in the home was acceptable except for instances where an individual would need to carry such a firearm about the home for necessary and imminent self-defense.[19]

The Supreme Court granted certiorari and examined the Second Amendment in extreme detail, starting with the language of the Amendment as it is split into two sections: the prefatory and the operative clauses.[20] This detailed examination of the language was important because the City and the dissenting Justices of the Court believed that the Second Amendment "protects only the right to possess and carry a firearm in connection with militia service,"[21] while Heller (and eventually the majority) maintained that "it protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home."[22] These are two very different interpretations of the Second Amendment, and as such, the majority needed to justify its holding fully. The prefatory clause does not limit the operative clause, "but rather announces a purpose."[23] Because a purpose without a command does not make sense logically or grammatically, the Court first examined the operative clause in order to determine what is actually commanded by the Second Amendment.[24]

Through a textual analysis of the words "the people" within the Constitution and other amendments, the Court determined that the "right of the people" refers specifically to individuals, not to a specific subset of the community.[25] Every other time this particular phrase appears, it is in relation to "all members of the political community, not an unspecified subset."[26] The phrase "the people" is contrasted within the Second Amendment with the term "militia" in the prefatory clause, where "the militia" speaks definitively of a particular subset, able-bodied males within a certain age range.[27] The framers could have used "the militia" to describe who the amendment applied to, but chose instead to apply it to "the people." Therefore, it does not make sense that the term "the people" would have been understood to mean "the militia" at the

---

18 *Id.* at 576.
19 *Id.*
20 *Id.* at 576–77.
21 *Id.* at 577.
22 *Id.*
23 *Id.*
24 *Id.* at 577–78.
25 *Id.* at 579–80.
26 *Id.* at 580.
27 *Id.*

time it was applied.[28] The Court then presumed that the Second Amendment was meant to apply to "the people" rather than "the militia" subset, and therefore, was an individual right.[29]

Continuing its dissection of the Amendment, the Court moved its focus onto the phrase "keep and bear arms."[30] The term "arms" applies to many weapons, not all of which are used or designed for use in the military.[31] At the time of ratification, the term "'[k]eep arms' was simply a common way of referring to possessing arms, for militiamen *and everyone else*."[32] To "'bear arms' was unambiguously used to refer to the carrying of weapons outside of an organized militia."[33] Over the next several pages of the majority opinion, Justice Scalia discussed and refuted claims that this phrase was a military term of art applying only to soldiers.[34] The Court clearly stated that the operative clause of the Second Amendment, "the right of the people to keep and bear arms shall not be infringed,"[35] is a "guarantee [of] the individual right to possess and carry weapons in case of confrontation."[36] The Court was quick to qualify that while there is "no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. . . . [T]he right was not unlimited."[37] A relatively brief examination of the prefatory clause led the Court to conclude that the "well regulated Militia"[38] clause signifies a body already in existence[39] that has proper discipline and training, not a body created by the states or Congress.[40] While this section of the Court's decision is dicta, it would certainly seem to support the contention that the bearing of arms, not just the keeping, is an individual right.

The Court next examined the purpose for the individual right to bear arms by analyzing how the prefatory clause fit with the operative clause, having determined that the Second Amendment was not intended to create a military body as the prefatory clause could

---

28 *Id.* at 580–81.
29 *Id.* at 581.
30 *Id.*
31 *Id.*
32 *Id.* at 582–83.
33 *Id.* at 584.
34 *Id.* at 585–92.
35 U.S. CONST. amend. II.
36 *Heller*, 554 U.S. at 592.
37 *Id.* at 595.
38 U.S. CONST. amend. II.
39 *See Heller*, 554 U.S. at 595–96.
40 *Id.* at 596–97.

insinuate.[41] To determine this purpose, the Court looked to the history and political climate that shaped the founders' writings.[42] The founders had a historical fear of a standing army, or "select militia" made up solely of men hand-picked by a tyrant.[43] Such a ruler would impose his will, not by eliminating the "militia" (the subset of society consisting of all able-bodied males), but by denying the general populace the right to bear arms, thereby allowing his special militia, or standing army, to carry out his will.[44] Therefore, the prefatory clause merely states "the *purpose* for which the [Second Amendment] right was *codified*: to prevent elimination of the militia."[45] While this preventive measure was the reason for the right's codification, the "*central component* of the right itself" is self-defense.[46] Many states, such as Pennsylvania and Vermont, had adopted provisions stating unequivocally that the people had a right to bear arms "*for the defence of themselves*."[47] Along with such provisions, post-ratification commentary on the Second Amendment further explicates that the purpose of bearing arms is found in the right to self-defense. St. George Tucker, in a commentary on the Constitution, wrote:

> This may be considered as the true palladium of liberty . . . . The right to self defence is the first law of nature: in most governments it has been the study of rulers to confine the right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.[48]

The Court noted, furthermore, that this was not the only commentary to hold that the right to bear arms has a close connection with the right to self-defense.[49] In fact, the Court found only one early nineteenth-century commentator who limited this right to service within a militia.[50] For the next several pages, the Court produced multiple cases and pre- and post-civil war commentaries affirming that the Second Amendment applied to

---

41 *See id.* at 598.

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.* at 599 (emphasis added).

46 *Id.*

47 *Id.* at 601.

48 *Id.* at 606 (alteration in original) (quoting St. George Tucker, *View of the Constitution of the United States*, *in* 1 BLACKSTONE'S COMMENTARIES at ed. app. D, 300 (St. George Tucker ed., Rothman Reprints, Inc. 1969) (1803)).

49 *Id.* at 607–10.

50 *Id.* at 610.

individuals and that the right to self-defense is intrinsically found within this Amendment.[51]

1. Supreme Court Precedents

The Supreme Court next examined the Second Amendment precedent it set over the last two hundred years by looking at *United States v. Cruikshank*, *Presser v. Illinois*, and *United States v. Miller*.[52]

(a) Cruikshank*: No Right Guaranteed by the Constitution?*

The first case to come before the Supreme Court on the grounds of a possible violation of Second Amendment rights was brought in 1875.[53] The background facts of the case are not clearly laid out within the case and only appear sporadically to allow the Court to dismiss charges associated with them.[54] The *Heller* decision concisely states that the case involved "members of a white mob . . . depriving blacks of their right to keep and bear arms."[55] The case rises out of the Colfax Massacre, where a number of free blacks violently clashed with a group of armed white men following a contested election.[56] "Dozens of blacks, many unarmed, were slaughtered by a rival band of armed white men," and many prisoners were marched through the streets and then summarily executed.[57] Following the massacre, ninety-seven men were indicted, and three of the nine who went to trial were convicted of depriving these black men of their rights.[58] The Supreme Court reversed the convictions, holding that the right to bear arms was neither "a right granted by the Constitution" nor "in any manner dependent upon that instrument for its existence."[59] Rather, the Second Amendment "has no other effect than to restrict the powers of the national government."[60] The *Heller* Court expounded that *Cruikshank* supports the claim that the Second Amendment was describing an individual right by stating "'the people [must] look for their protection against any violation by their fellow-citizens of the rights it recognizes' to the States' police power," and that

---

51 *Id.* at 610–19.

52 *Id.* at 619–25.

53 United States v. Cruikshank, 92 U.S. 542, 545 (1875).

54 *Id.* at 544–45, 548, 551, 553–54.

55 *Heller*, 554 U.S. at 619.

56 Pratheepan Gulasekaram, *"The People" of the Second Amendment: Citizenship and the Right to Bear Arms*, 85 N.Y.U. L. REV. 1521, 1555 (2010).

57 McDonald v. City of Chicago, 130 S. Ct. 3020, 3030 (2010).

58 *Id.*

59 *Cruikshank*, 92 U.S. at 553.

60 *Id.*

such a conclusion would not make sense if the right applied only to a state militia.[61]

(b) Presser: *Prohibiting Private Paramilitary Parades*

Next, the Court looked to the precedent set in the case of *Presser v. Illinois*.[62] The State of Illinois had passed a law prohibiting private militias from "drill[ing] or parad[ing] with arms in any city, or town, of [the] State, without the license of the Governor."[63] The plaintiff in error was convicted of drilling and parading in public with a "body of men with arms" in the City of Chicago,[64] and he challenged the constitutionality of the law that prohibited this conduct.[65] The primary focus, both of the plaintiff's case and the Court's decision, was whether the State of Illinois could, by law, limit the Illinois State Militia to a certain group of individuals and prevent everyone else in the state from being a part of the "militia."[66] The Court held that the Second Amendment does not prohibit states from restricting the militia in such a way.[67] Because the *Presser* Court was concerned only with a contention regarding the context of the militia, it did not say anything about the Second Amendment's "meaning or scope, beyond the fact that it does not prevent the prohibition of private paramilitary organizations."[68]

(c) Miller: *Only Military Weapons Allowed?*

Lastly, the *Heller* Court examined the most recent Supreme Court decision that concerned the Second Amendment, *United States v. Miller*, decided in 1939.[69] In *Miller*, two men were charged with possession of a "shotgun having a barrel less than [eighteen] inches in length" in violation of the National Firearms Act of 1934.[70] In its nine-page opinion, the Court briefly and succinctly stated that the Second Amendment does not "guarantee[] the right to keep and bear such an instrument" because it is "not within judicial notice that this weapon is any part of the

---

61 District of Columbia v. Heller, 554 U.S. 570, 620 (2008) (alteration in original) (quoting *Cruikshank*, 92 U.S. at 553).

62 116 U.S. 252 (1886).

63 *Id.* at 253.

64 *Id.* at 254.

65 *Id.* at 256–57.

66 *Id.* at 262–64.

67 *Id.* at 265.

68 District of Columbia v. Heller, 554 U.S. 570, 621 (2008).

69 307 U.S. 174, 175 (1939).

70 *Id.*

ordinary military equipment or that its use could contribute to the common defense."[71]

The Court in *Heller* correctly concludes that this ruling was purely in relation to a certain type of weapon being possessed and not the possession itself.[72] The majority points out that "[h]ad the Court believed that the Second Amendment protects only those serving in the militia, it would have been odd to examine the character of the weapon rather than simply note that the two crooks were not militiamen."[73] The *Heller* Court is then quick to point out that, contrary to asserting that only military weapons are protected (which would be a "startling reading of the opinion, since it would mean that the National Firearms Act's restrictions on machineguns . . . might be unconstitutional, machineguns being useful in warfare in 1939"),[74] the *Miller* Court's cursory examination of the Second Amendment supported the idea that the members of a traditional militia were armed with weapons "'in common use at the time' for lawful purposes like self-defense."[75] *Miller* only concluded that the Second Amendment does not protect weapons "not typically possessed by law-abiding citizens for lawful purposes."[76] However, it is interesting to note that the *Miller* Court did not seem to have a foundation or source for determining precisely what a military weapon was or what types of weapons would be in common use by citizens.[77]

2. The *Heller* Court's Conclusion

Following this exhaustive review of the Second Amendment's words, meaning, history, and legislative intent, the *Heller* Court proceeded to examine the question the case brought before it, namely, whether an absolute ban on handguns is constitutional.[78] The Court found that the "American people have considered the handgun to be the quintessential self-defense weapon" for many reasons, including ease of storage, ease of use, and the ability to manipulate other instruments (like a phone) while using it.[79] Thus, a complete ban on the possession of a handgun within the home is unconstitutional.[80] Further, the District of Columbia's

---

71 *Id.* at 178.

72 *Heller*, 554 U.S. at 622–23.

73 *Id.* at 622.

74 *Id.* at 624.

75 *Id.* at 624 (quoting *Miller*, 307 U.S. at 179).

76 *Id.* at 625.

77 *See* United States v. Miller, 307 U.S. 174 (1939).

78 *Heller*, 554 U.S. at 628.

79 *Id.* at 629.

80 *Id.* at 635.

requirement that any firearms in the home must be inoperable is also unconstitutional insofar as it prevents the use of a legally possessed firearm for self-defense.[81] The Court refused to apply an interest-balancing test to determine whether a prohibition on the possession of handguns might be constitutional in certain areas of the country because no other Constitutional right is subjected to such a test.[82]

In doing so, the Court clearly established that the Second Amendment applies to individuals for the primary purpose of self-defense.[83] The government is forbidden by the Second Amendment from removing the right of people to defend themselves with firearms.[84] If a duly elected body, made up of representatives of the people, is unable to quash this individual right, does it logically follow that private entities can do what is forbidden to the government? This would seem to be an incongruous result.

B. McDonald v. City of Chicago*: The Second Amendment Applies to the States*

Following the Court's decision in *Heller*, the petitioners in *McDonald* brought an action challenging Chicago's decades-old ban on handguns, similar to the unconstitutional ban in *Heller*.[85] *McDonald* came before the Supreme Court on appeal from the Seventh Circuit, which had upheld the ban and refused to predict whether the Supreme Court would consider the Second Amendment to be incorporated.[86]

This case is primarily one of incorporation; therefore, it is necessary to examine the portions of the majority opinion that further describe the right protected under the Second Amendment.[87] Incorporation is the determination of whether rights guaranteed by the Federal Constitution are protected against state infringement by the Fourteenth Amendment's Due Process Clause.[88] Through the process of "selective incorporation," the Supreme Court examines particular rights individually to determine whether a "Bill of Rights guarantee is fundamental to [the American] scheme of ordered liberty and system of

---

81 *Id.*

82 *Id.* at 634–35.

83 *Id.* at 635.

84 *See id.*

85 McDonald v. City of Chicago, 130 S. Ct. 3020, 3026 (2010).

86 *Id.* at 3027.

87 *See id.* at 3028, 3030–31, 3036–48.

88 *See id.* at 3030–31.

justice."[89] If the guarantee is found to be fundamental, it is protected under the Due Process Clause.[90]

In making this determination the Court, once again, examined the history of the Second Amendment, and came to the same conclusions as the *Heller* Court, namely that "[s]elf-defense is a basic right" and "that individual self-defense is 'the *central component*' of the Second Amendment right."[91] That this right presents "controversial public safety implications" does not indicate that it is not incorporated by the Fourteenth Amendment.[92] Several other rights, like the exclusionary rule, that "impose restrictions on law enforcement and on the prosecution of crimes" do not find their constitutionality within a narrow framework of public safety implications.[93] Further, the incorporation of this right limits, but does not eliminate, the ability of the states to experiment with "reasonable firearms regulations."[94] Last, the Court again explicitly held that the right's incorporation is not subject to an interest-balancing test, but protects the right of an individual to possess a handgun in the home for self-defense.[95]

II. STATE APPROACHES TO THE SECOND AMENDMENT

A. Parking Lot Laws: Private Property Owners Cannot Forbid What the Constitution Protects?

As of 2013, all states have some provision for permitting citizens to carry concealed firearms legally for self-defense.[96] Five states allow the lawful carrying of a concealed handgun without any permit required.[97] Thirty-five states grant *shall issue* permits to citizens that meet certain criteria such as passing a background check and taking a safety course.[98] *Shall issue* states require that the permit be granted to individuals who

---

89 *Id.* at 3034.

90 *Id.* at 3034, 3036.

91 *Id.* at 3036 (quoting District of Columbia v. Heller, 554 U.S. 570, 599 (2008)).

92 *Id.* at 3045.

93 *Id.*

94 *Id.* at 3046.

95 *Id.* at 3050.

96 *See Illinois: Veto of Gun Provisions Fails*, N.Y. TIMES, July 9, 2013, http://www.nytimes.com/2013/07/10/us/illinois-veto-of-gun-provisions-fails.html (stating that "Illinois became the last state to allow public possession of concealed guns").

97 NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 21 (2012).

98 *Id.*

meet the enumerated criteria.[99] In response to Illinois' ban on concealed carry being found unconstitutional,[100] Illinois passed a law to become a *shall issue* state.[101] Nine states have a *may issue* system of permit licensing, whereby the licensing authority has broad discretion in issuing permits, even to individuals with clean records.[102] Further, many states allow individuals to openly carry a non-concealed handgun either in conjunction with a concealed weapons permit or with no permit required.[103] Forty-four of the fifty states have a state constitutional right to arms, with thirty-seven states explicitly guaranteeing the right to self-defense, though it is often enumerated separately from the right to arms.[104] The large majority of states with constitutions protecting the bearing of firearms indicate a strong state interest in the preservation of this right.

Several states that have *concealed carry* laws giving people the right to carry a concealed firearm for self-defense[105] do not expand that right into the right to carry onto another's private property if the owner decides to prohibit the carrying of firearms.[106] In some states this prohibition can automatically have the effect of law,[107] whereas in others it ripens into a common trespass if an individual carrying a firearm refuses to leave after being told to leave by the owner or the owner's agent.[108] This is where a difficulty arises. The Second Amendment clearly protects the right of individuals to possess firearms, against government intrusion, within their homes for the purpose of self-defense,[109] but what about when people must leave their homes? While

---

[99] *Id.*; *see also* ALA. CODE § 13A-11-75 (Westlaw through Act 2014-137, 2014 Reg. Sess.) (granting law enforcement great discretion in the issuing of permits because of a "justifiable concern for public safety").

[100] Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012).

[101] H. 0183, 98th Gen. Assemb., Reg. Sess. (Ill. 2013) (enacted).

[102] JOHNSON ET AL., *supra* note 97, at 21 (stating that Connecticut, a *may issue* state, functions as a *shall issue* state because law enforcement applies guidelines similar to those of *shall issue* states).

[103] *See id.* at 260–61.

[104] *Id.* at 26; *see also id.* at 27–36 (reprinting the state constitutional provisions relating to the right to arms and self-defense).

[105] *See id.* at 260–61. The term *concealed carry* typically refers to the carrying of a concealed firearm for the purposes of self-defense or the defense of others. *See id.* Laws permitting such conduct are referred to in this Note as *concealed carry* laws.

[106] *See, e.g.*, OHIO REV. CODE ANN. § 2923.126(C)(3) (LEXIS through File 47, 130th Gen. Assemb.).

[107] *Id.* (knowingly carrying a firearm onto property with the appropriately placed and sized sign is a criminal trespass).

[108] *See, e.g.*, N.J. STAT. ANN. § 2A:63-1 (Westlaw through L. 2013, Ch. 181).

[109] District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

the focus of the *Heller* Court was on a government prohibition of handguns within the home, the Court's far-reaching historical analysis did not neglect to touch on the ever important concept of "bearing" arms, as part of the key phrase "to keep and bear arms."[110] While the Court's decision focused on the "keep" portion of the Amendment, the rationale surrounding the "to bear arms" argument is also enlightening.[111]

The majority opinion devotes four pages to a dissection of the word "bear": discussing what it meant at the time of ratification and what it means now.[112] Looking at the time of the drafting of the Second Amendment, the Court finds that, "as now, to 'bear', meant to 'carry.'"[113] When the words "to bear" were combined with the term "arms," the "meaning [then] refers to carrying for a particular purpose—confrontation."[114] The majority opinion quotes and affirms Justice Ginsberg's definition, where she quotes from Black's Law Dictionary: "[s]urely a most familiar meaning is, as the Constitution's Second Amendment . . . indicate[s]: 'wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.'"[115] The majority opinion goes on to elaborate that in neither the historical context, nor the modern one, does the concept of "bearing arms" refer to carrying weapons only within a militia context.[116] "Although the phrase implies that the carrying of the weapon is for the purpose of 'offensive or defensive action,' it in no way connotes participation in a structured military organization."[117] The Supreme Court has held that the Second Amendment's words "to keep" indicate that an individual has a right to self-defense with a firearm, so perhaps this right continues on to the right "[to] bear" a firearm for the purpose of self-defense.[118] While the Supreme Court has not explicitly addressed the right of individuals to carry firearms outside of the home, the Seventh Circuit has recently done just that.[119] In *Moore v. Madigan*, the Seventh Circuit struck down an Illinois state law that, for all intents and purposes, created an effective ban on the carrying of firearms by the

---

[110] *Id.* at 582–87; *see also* U.S. CONST. amend. II.

[111] *Heller*, 554 U.S. at 582–88.

[112] *Id.* at 584–87.

[113] *Id.* at 584.

[114] *Id.*

[115] *Id.* at 584 (alteration in original) (quoting Muscarello v. United States, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)).

[116] *Id.* at 584–85.

[117] *Id.* at 584.

[118] *Supra* text accompanying notes 110–11.

[119] Moore v. Madigan, 702 F.3d 933, 935, 939 (7th Cir. 2012).

majority of citizens in Illinois.[120] The court relied heavily on the *Heller* analysis, stating that, while "'the need for defense of self, family, and property is *most* acute' in the home, . . . that doesn't mean it is not acute outside the home."[121] The court states that an individual

> is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the [thirty-fifth] floor of the Park Tower. A woman who is being stalked or has obtained a protective order against a violent ex-husband is more vulnerable to being attacked while walking to or from her home than when inside.[122]

Finally, the court states that "[t]o confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*."[123] If this is the case, the stage is set for a likely confrontation between the traditional rights of property owners to exclude from their property and the right of individuals to protect themselves with firearms. Enter the relatively new form of legislation adopted by several states typically known as *parking lot laws*.

B. Overview of Parking Lot Laws

At the time of this writing there are nineteen states that currently have a law relating to the possession or storage of firearms in motor vehicles on property belonging to another.[124] These laws differ greatly in their construction and application, ranging from an absolute prohibition on *anyone* creating rules that might limit the ability of people to store firearms in their vehicles,[125] to the most convoluted morass of prohibitions and exceptions applying only to certain people and certain government-possessed property.[126] While not every state has described the purpose for such laws, Florida provides a very clear and definitive answer: "to codify the long-standing legislative policy of the state that individual citizens have a constitutional right to keep and bear arms," and that "these rights are not abrogated by virtue of a citizen becoming a customer, employee, or invitee of a business entity."[127] Further, "[t]he Legislature . . . [found] that no citizen *can or should* be required to waive or abrogate his or her right."[128] The Florida legislature clearly passed

---

[120] *Id.* at 934, 942.

[121] *Id.* at 935 (quoting *Heller*, 554 U.S. at 628).

[122] *Id.* at 937.

[123] *Id.*

[124] *See supra* note 9 and accompanying text.

[125] ALASKA STAT. § 18.65.800(a) (LEXIS through 2013 Reg. Sess.).

[126] N.C. GEN. STAT. § 120-32.1(c1) (LEXIS through 2013 Reg. Sess.).

[127] FLA. STAT. ANN. § 790.251(3) (Westlaw through 2013 1st Reg. Sess.), *invalidated by Fla. Retail Fed'n II*, 576 F. Supp. 2d 1301, 1302 (N.D. Fla. 2008).

[128] *Id.* (emphasis added).

this law in an effort to protect the rights of individuals in the bearing of arms for the purpose of self-defense, and recognized that allowing a private entity to strip individuals of this right should not be tolerated.[129] In the conflict between a citizen's right to self-defense with a firearm and a property owner's right to exclude, it seems that the right to self-defense is gaining ground in these nineteen states.[130] Currently, there are four general categories that these statutes fall into: (1) No person may prohibit, (2) no employer may prohibit, (3) no employer may prohibit employees with permits, and (4) miscellaneous laws.

1. No Person May Prohibit

The first category is the most expansive in protecting the right of an individual to keep a firearm in a car on private property. Currently, seven states have a variation of the *no person may prohibit* legislation protecting this right.[131] These states prohibit by law the ability of *anyone* to forbid firearms in cars legally parked on his or her property.[132] In some states the legislature has specifically removed any liability for the misuse of such firearms from the property owner,[133] though others neglect to add this important feature.[134] Protecting the ability of individuals to defend themselves is very important, but by overriding the rights of property owners to exclude certain conduct (the storing of firearms in a vehicle), it is necessary that the legislature recognize and clarify that property owners bear no responsibility for this conduct. It would be unfair to hold a property owner liable for anything resulting from state-mandated activity.

---

[129] *Id.*

[130] As there are still thirty-one states with no such provisions, and some of the current state provisions are quite restrictive, it is clear that the right of citizens to defend themselves with a firearm outside their homes still has a long way to go before it is recognized by a majority of the states.

[131] ALASKA STAT. § 18.65.800(a) (LEXIS through 2013 Reg. Sess.); ARIZ. REV. STAT. ANN. § 12-781(A) (Westlaw through 2013 Reg. Sess. & Spec. Sess.); 430 ILL. COMP. STAT. ANN. 66/65 (Westlaw through P.A. 98-627, 2014 Reg. Sess.) (allowing prohibition of firearms in parking lots of nuclear energy, storage, weapons or development sites and federally prohibited areas); KY. REV. STAT. ANN. § 237.106(1) (Westlaw through 2013 Reg. Sess. & 2013 Extraordinary Sess.); LA. REV. STAT. ANN. § 32:292.1(C) (LEXIS through 2013 Reg. Sess.); OKLA. STAT. tit. 21, §§ 1289.7a(A), 1290.22(B) (Westlaw through 2013 1st Extraordinary Sess.); UTAH CODE ANN. § 34-45-103(1) (LEXIS through 2013 2d Spec. Sess.).

[132] *See* statutes cited *supra* note 131.

[133] ALASKA STAT. § 18.65.800(c) (LEXIS); OKLA. STAT. tit. 21, §§ 1289.7a(B), 1290.22(E) (Westlaw); UTAH CODE ANN. §§ 34-45-104 (LEXIS).

[134] ARIZ. REV. STAT. ANN. § 12-781 (Westlaw); KY. REV. STAT. ANN. § 237.106 (Westlaw); LA. REV. STAT. ANN. § 32:292.1 (LEXIS).

Some states, such as Utah and Arizona, have certain exceptions to these laws.[135] For example, in Arizona the statute does not apply if property owners provide

> a parking lot, parking garage or other area designated for parking motor vehicles, that:
>
> a) Is secured by a fence or other physical barrier[,]
>
> b) Limits access by a guard or other security measure[, and]
>
> c) Provides temporary and secure firearm storage. The storage shall be monitored and readily accessible on entry into the premises and allow for the immediate retrieval of the firearm on exit from the premises.[136]

In Utah, certain specific entities and properties are exempted, including "[o]wner-occupied single family detached residential units and tenant-occupied single family detached residential units."[137]

Last, several of these states specifically grant the right to a civil remedy for anyone who was prevented from storing a firearm in his or her car by any such rules or regulations.[138] While these states adequately facilitate the possession of firearms by individuals, these laws can be overbroad in scope. Prohibiting the owner of a house or other inherently private land put to purely private use from forbidding firearms is going too far, much a like a law preventing such property owners from excluding certain types of speech on their property.

2. No Employer Generally May Prohibit

The second category of these laws applies only to those who employ workers. Currently, seven states have *parking lot laws* that apply only to the property rights of employers rather than all individuals throughout the state.[139] These laws are less expansive than those that prohibit anyone from preventing the storage of firearms on his or her private property, but they still can be effective at protecting the rights of

---

[135] ARIZ. REV. STAT. ANN. § 12-781(C) (Westlaw); UTAH CODE ANN. § 34-45-107 (LEXIS).

[136] ARIZ. REV. STAT. ANN. § 12-781(C)(3) (Westlaw).

[137] UTAH CODE ANN. § 34-45-107(4) (LEXIS).

[138] KY. REV. STAT. ANN. § 237.106(4) (Westlaw) (employers liable to employees); OKLA. STAT. tit. 21, §§ 1289.7a(C) (Westlaw); UTAH CODE ANN. § 34-45-105 (LEXIS).

[139] FLA. STAT. ANN. § 790.251(4) (Westlaw through 2013 1st Reg. Sess.), *invalidated by Fla. Retail Fed'n II*, 576 F. Supp. 2d 1301 (N.D. Fla. 2008); IND. CODE ANN. § 34-28-7-2(a) (Westlaw through 2013 Reg. Sess.); KAN. STAT. ANN. § 75-7c10(b)(1) (Westlaw through 2013 Reg. Sess.); ME. REV. STAT. tit. 26, § 600(1) (Westlaw through 2013 1st Reg. Sess. & 1st Spec. Sess.); MINN. STAT. ANN. § 624.714, Subd. 18(c) (Westlaw through 2013 1st Spec. Sess.); MISS. CODE ANN. § 45-9-55 (LEXIS through 2013 Reg. Sess. & 2d Extraordinary Sess.); N.D. CENT. CODE § 62.1-02-13(1)(a) (LEXIS through 2013 Reg. Legis. Sess.).

individuals to bear arms in their defense, though in most cases these protections only apply to employees of such employers.[140]

The Florida law mentioned above[141] is one of the more expansive and carefully crafted of the *no employer* statutes because it prevents any "public or private employer" from prohibiting either employees or customers from lawfully storing a firearm in a vehicle.[142] This is a very well-conceived and well-drafted law because it protects the "Second Amendment right"[143] of both customers and employees from infringement while at work or frequenting a business establishment, but significantly does *not* prevent strictly private individuals from excluding firearms, and those who carry them, from bringing them onto their private property.[144] This statute, however, was found to be partially unconstitutional to the extent that it required some, but not all, businesses to allow customers to be armed on their property.[145]

Any attempt to protect the right of citizens to defend themselves through the use of a firearm should be carefully tailored to avoid restrictions on *purely* private property, as opposed to private property put to public use. The Court has correctly recognized that there is a significant difference between private property put to private use and private property opened to the public.[146] The Florida law automatically "exempts" private residences and dwellings without needing to resort to listing specific exemptions, qualifications, and definitions like those provided in the Utah law.[147] The Florida law, as altered by the federal injunction, protects employees by forbidding employers from making inquiries regarding whether an individual has a legally possessed firearm within his or her vehicle,[148] thus avoiding any possible repercussions that an employer might take against an employee who possess a firearm within his or her vehicle. North Dakota has followed

---

[140] IND. CODE ANN. § 34-28-7-2(a) (Westlaw); KAN. STAT. ANN. § 75-7c10(b)(1) (Westlaw); ME. REV. STAT. tit. 26, § 600(1) (Westlaw); MISS. CODE ANN. § 45-9-55 (LEXIS).

[141] *See supra* notes 127–29 and accompanying text.

[142] FLA. STAT. ANN. § 790.251(4)(a) (Westlaw).

[143] While the Second Amendment right to keep arms is only guaranteed against the government, the purpose of this Note is to examine whether individuals can abrogate a right where the government cannot. The passage of these *parking lot laws* indicates that several states do not believe this is appropriate and have taken steps to insure individuals cannot abrogate this right. The concept of such a right that cannot be nullified by the government or individuals is referred to in this Note as a "Second Amendment right."

[144] FLA. STAT. ANN. § 790.251(4)(a) (Westlaw), *invalidated by Fla. Retail Fed'n II*, 576 F. Supp. 2d 1301 (N.D. Fla. 2008).

[145] *Fla. Retail Fed'n II*, 576 F. Supp. 2d 1301, 1303 (N.D. Fla. 2008).

[146] *See infra* Part III.B.2.

[147] UTAH CODE ANN. §§ 34-45-103 to -105, -107 (LEXIS through 2013 2d Spec. Sess.).

[148] FLA. STAT. ANN. § 790.251(4)(b) (Westlaw).

Florida's lead in crafting its *parking lot law* by preventing public and private employers from prohibiting "customer[s], employee[s], or invitee[s]" from keeping a lawfully possessed firearm in their cars.[149] The North Dakota law also has similar "do not ask" language forbidding employers from seeking to determine if there are legally possessed and stored firearms in the parking lot.[150] North Dakota law goes a bit further than the Florida law by specifically permitting a civil remedy to be sought by anyone who was adversely affected by an employer in this regard.[151] Both Florida and North Dakota have liability clauses that protect employers in case of mishap or misuse of such firearms on their property.[152]

While Florida and North Dakota laws are shining examples of expansive laws protecting the rights of all individuals that come onto a business's property, the majority of *no employer* laws are much more tightly constrained.[153] These laws focus only on the employees by protecting their right to keep a firearm in the car while neglecting to protect the rights of any customers or guests who come onto the employer's property.[154] Focusing only on employees leads to inconsistencies regarding how the "Second Amendment rights"[155] of individuals interact with the property rights of employers in these states. For example, a mall cannot prevent an employee from legally storing a firearm in the parking lot, but it *can* prevent the hundreds or thousands of customers who stop there every day from doing the same. Of the *no employer* states, only Maine and Mississippi have included language removing liability from employers who are in compliance with the law.[156] Once again, it is important to remove the liability of property owners for any abuses or accidents on their property pursuant to these laws, so it would be advisable for those states without such provisions to add them to their laws. Finally, each state has its own exceptions, such

---

[149] N.D. CENT. CODE § 62.1-02-13(1)(a) (LEXIS through 2013 Reg. Legis. Sess.).

[150] *Id.* § 62.1-02-13(1)(b) (LEXIS).

[151] *Id.* § 62.1-02-13(5) (LEXIS).

[152] FLA. STAT. ANN. § 790.251(5)(b) (Westlaw); N.D. CENT. CODE § 62.1-02-13(3) (LEXIS).

[153] *See* IND. CODE ANN. § 34-28-7-2(a)(2) (Westlaw through 2013 Reg. Sess.); KAN. STAT. ANN. § 75-7c10(b)(1) (Westlaw through 2013 Reg. Sess.); ME. REV. STAT. tit. 26, § 600(1) (Westlaw through 2013 1st Reg. Sess. & 1st Spec. Sess.); MINN. STAT. ANN. § 624.714, Subd. 18(c) (Westlaw through 2013 1st Spec. Sess.); MISS. CODE ANN. § 45-9-55(1) (LEXIS through 2013 Reg. Sess. & 2d Extraordinary Sess.).

[154] IND. CODE ANN. § 34-28-7-2(a)(2) (Westlaw); KAN. STAT. ANN. § 75-7c10(b)(1), (d) (Westlaw); ME. REV. STAT. tit. 26, § 600(1) (Westlaw); MINN. STAT. ANN. § 624.714, Subd. 18(c) (Westlaw).

[155] *See supra* note 143 and accompanying text.

[156] ME. REV. STAT. tit. 26, § 600(2) (Westlaw); MISS. CODE ANN. § 45-9-55(5) (LEXIS).

as in Mississippi where an "employer may prohibit an employee from . . . storing a firearm in a vehicle" if the employer provides a limited access parking lot to the employees.[157]

3. No Employer May Prohibit Employee with Permit

Moving down into the more limited *parking lot laws*, there are some states that will allow an employer to forbid any employee who does not have a state concealed weapons permit from storing firearms in their locked vehicles.[158] The language of these states' statues is similar to that found in the *no employer generally* states, and these laws offer the same unequal protection of rights that those states do, with the notable difference being that even more people lose their "Second Amendment rights" when they conflict with the exclusionary rights of private property owners. A distinction is drawn between individuals who possess state-issued concealed weapons permits and those who do not, and might bring up the possible issue of bearing arms absent specific state legislation.[159] All three of these states limit the employer's liability regarding the misuse of these firearms.[160] Georgia and Wisconsin remove all liability,[161] while Texas removes liability in all cases except those of gross negligence.[162]

4. Miscellaneous Laws

North Carolina and Virginia fall into a general "miscellaneous" category as their laws do not really reflect any other state laws. Both states have laws that only apply to state and local governments, so they do not apply to private employers at all.[163] Virginia's law is the simpler of the two, and prevents any local government from implementing a rule that prevents government employees from storing lawfully-owned firearms and ammunition in their cars on state property.[164]

The North Carolina laws, by contrast, seem to be designed more to get people thrown into jail than to be an effective protection of their

---

[157] MISS. CODE ANN. § 45-9-55(2) (LEXIS).

[158] GA. CODE ANN. § 16-11-135(b) (LEXIS through 2013 Reg. Sess.); TEX. LAB. CODE ANN. § 52.061 (Westlaw through 2013 3d Called Sess.); WIS. STAT. ANN. § 175.60(15m)(a)–(b) (Westlaw through 2013 Wis. Act 116).

[159] *See* statutes cited *supra* note 158 and accompanying text.

[160] GA. CODE ANN. § 16-11-135(e) (LEXIS); TEX. LAB. CODE ANN. § 52.063(a) (Westlaw); WIS. STAT. ANN. § 175.60(21) (Westlaw).

[161] GA. CODE ANN. § 16-11-135(e) (LEXIS); WIS. STAT. ANN. § 175.60(21) (Westlaw).

[162] TEX. LAB. CODE ANN. § 52.063(a) (Westlaw).

[163] N.C. GEN. STAT. § 120-32.1(c1) (LEXIS through 2013 Reg. Sess.); VA. CODE ANN. § 15.2-915(A) (LEXIS through 2013 Reg. Sess. & Spec. Sess. I).

[164] VA. CODE ANN. § 15.2-915(A) (LEXIS).

"Second Amendment rights."[165] The law is far from clear and, even after many readings, it is unlikely that an individual will know precisely where he can and cannot keep a firearm in his vehicle. The law starts by stating that no rule can be adopted that would prevent the transportation or storage of a firearm in a locked vehicle on "State legislative buildings and grounds."[166] This law is apparently particularly protective of legislators and legislative employees, as they are specifically mentioned, though the protection of their right to store a firearm does not seem to be any more expansive than the general provision initially granted.[167] The law then goes on to describe, in excruciating and confusing detail, what precisely is meant by "State legislative buildings and grounds" including such places as "[t]he bridge between the State Legislative Building and the Halifax Street Mall."[168] Thanks to these descriptions and qualifications, it is highly likely that no individual, at any given time, will be 100% certain that he is following the law.

The law in a separate section makes a special parking lot exception for "[d]etention personnel or correctional officers" to store firearms in their cars while in the course of their duties.[169] In yet another section, the law forbids the possession of firearms on the grounds of the "State Capitol Building, the Executive Mansion, the Western Residence of the Governor" or "in any building housing any court of the General Court of Justice."[170] It would appear, then, that the *parking lot laws* of North Carolina are more of an afterthought in legislation that do not protect the "Second Amendment rights" of individuals—even on "legislative building" grounds.

---

[165] *See* N.C. GEN. STAT. § 120-32.1(b) (LEXIS through 2013 Reg. Sess.).

[166] *Id.* § 120-32.1(a)(1), (c1) (LEXIS).

[167] *Id.* § 120-32.1(c1) (LEXIS).

[168] *Id.* § 120-32.1(d)(1)(d)–(e) (LEXIS).

> A portion of the brick sidewalk surface area of the Halifax Street Mall, described as follows: beginning at the northeast corner of the Legislative Office Building, thence east across the brick sidewalk to the inner edge of the sidewalk adjacent to the grassy area of the Mall, thence south along the inner edge of the sidewalk to the southwest outer corner of the grassy area of the Mall, thence east along the inner edge of the sidewalk adjacent to the southern outer edge of the grassy area of the Mall to a point north of the northeast corner of the pedestrian surface of the Lane Street pedestrian bridge, thence south from that point to the northeast corner of the pedestrian surface of the bridge, thence west along the southern edge of the brick sidewalk area of the Mall to the southeast corner of the Legislative Office Building, thence north along the east wall of the Legislative Office Building . . . .

Id. § 120-32.1(d)(1)(e) (LEXIS).

[169] N.C. GEN. STAT. § 14-269(4c) (LEXIS through 2013 Reg. Sess.).

[170] *Id.* § 14-269.4 (LEXIS).

C. The Parking Lot and Beyond

The *parking lot laws* are certainly a big step in protecting the "Second Amendment right" to self-defense that the Federal Constitution implicates.[171] With the relatively recent decision in *Heller* explicitly confirming that the Second Amendment protects the right to self-defense with a firearm, it is likely that this right will face significant challenges as it expands out of the home and begins butting up against the property rights of others. While the *Heller* Court only explicitly held that the right of individuals to possess a working handgun in their homes for self-defense was protected,[172] it is clear from the Court's examination and discussion of the "keep and bear arms" clause that it is unlikely that the right extends *only* to the ability to keep a firearm at home.[173] Logically, if the Second Amendment's "*central component*" is self-defense,[174] then this right will follow individuals outside of their homes into the areas where they are more likely to need protection.

III. JUDICIAL RESPONSE: CHALLENGING THESE LAWS AND SUPREME COURT PRECEDENT

Unsurprisingly, due to the contested nature of the Second Amendment and the fact that this right has only recently been expounded and held to be incorporated by the Supreme Court, there have been challenges to some of the *parking lot laws*.[175] As of this writing there have been two cases (under three names) challenging this legislation.[176] The first case came out of Oklahoma and initially struck down the *parking lot legislation*,[177] but on appeal to the Tenth Circuit, the legislation was upheld.[178] The second case came out of Florida, where the district court struck out a very specific portion of the legislation allowing the vast majority of the law to survive.[179]

---

[171] *See supra* Part I.A.

[172] District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

[173] *Id.* at 632–33; *see supra* Part II.C.

[174] *Heller*, 554 U.S. at 599.

[175] ConocoPhillips Co. v. Henry, 520 F. Supp. 2d 1282 (N.D. Okla. 2007), *rev'd sub nom.* Ramsey Winch Inc. v. Henry, 555 F.3d 1199 (10th Cir. 2009); *Fla. Retail Fed'n II*, 576 F. Supp. 2d 1301 (N.D. Fla. 2008).

[176] *Ramsey Winch Inc.*, 555 F.3d 1199; *ConocoPhillips Co.*, 520 F. Supp. 2d 1282; *Fla. Retail Fed'n II*, 576 F. Supp. 2d 1301.

[177] *ConocoPhillips Co.*, 520 F. Supp. 2d at 1340.

[178] *Ramsey Winch Inc.*, 555 F.3d at 1202, 1211.

[179] *Fla. Retail Fed'n II*, 576 F. Supp. 2d at 1302.

A. Recent Challenges

In Oklahoma, several corporations with policies banning their employees or guests from bringing firearms onto their property brought a pre-enforcement challenge against the law, seeking an injunction to prevent the enforcement of the legislation.[180] In *ConocoPhillips Co. v. Henry*, the district court examined all of the relevant history of the legislation, and determined that the legislation was criminal in nature and that the plaintiffs had standing to bring the case.[181] The court then proceeded to examine the case brought before it in regard to the injury to property rights caused by the parking lot statutes and the due process challenges that might arise under a government takings analysis and concluded, despite the court's misgivings, that these laws did not constitute a taking under the frameworks laid out by the Supreme Court in *Lucas v. South Carolina Coastal Council*, *Loretto v. Teleprompter Manhattan CATV Corp.*, or *Penn Central Transportation Co. v. City of New York*.[182] While the court was extremely skeptical of the State's argument that allowing individuals to keep firearms within their cars on private property might deter crime, it did not conclude that these laws, passed with this purpose in mind fail the "rational basis standard" the court is required to apply.[183]

The court instead struck down the law under the federally promoted and passed Occupational Safety and Health Act ("OSHA").[184] OSHA was passed to "promote safe and healthful working conditions, to preserve human resources, and to encourage employers to institute programs and policies aimed at increasing workplace safety."[185] While there is not a specific firearms provision, the court finds it in the general duty clause, which states that an "employer owes a duty of reasonable care to protect his employees from recognized hazards that are likely to cause death or serious bodily injury."[186] Claiming that violence with firearms in the workplace is such a recognized hazard, the court concludes that these laws will prevent employers from complying with OSHA and therefore,

---

[180] *ConocoPhillips Co.*, 520 F. Supp. 2d at 1286–87.

[181] *Id.* at 1287–97.

[182] *Id.* at 1307–22 (citing *Lucas*, 505 U.S. 1003 (1992); *Loretto*, 458 U.S. 419 (1982); *Penn Cent. Transp. Co.*, 438 U.S. 104 (1978)).

[183] *Id.* at 1322.

[184] *Id.* at 1340.

[185] *Id.* at 1323.

[186] *Id.* at 1324 (quoting Teal v. E.I. DuPont de Nemours & Co., 728 F.2d 799, 804 (6th Cir. 1984)).

under the Supremacy Clause, they are preempted and must be struck down.[187]

However, on appeal the Tenth Circuit reversed this decision in *Ramsey Winch Inc. v. Henry*.[188] Ramsey Winch was one of the coplaintiffs along with CoconoPhillips.[189] The appeals court first examined the district court's ruling on OSHA preemption and found it lacking.[190] This *parking lot law* was clearly an exercise of state police powers, and such powers are not to be superseded by federal laws "unless that was the clear and manifest purpose of Congress."[191] Therefore, it was necessary to examine the purpose of OSHA and specifically the purpose of the general duty clause.[192] OSHA was passed to protect workers from the "danger surrounding traditional work-related hazards."[193] Significantly, absent from this Act is "*any* specific OSHA standard on workplace violence."[194] Further, in finding preemption, the district court had "held that gun-related workplace-violence was a 'recognized hazard' under the general duty clause" which indicates that any employer that *allows* firearms on their property may violate OSHA.[195] The Occupational Safety and Health Administration has specifically declined to promulgate a standard banning firearms, so a ban cannot be found under the general duty clause because this clause was designed to cover "unanticipated hazard[s]."[196] In a very brief re-examination of whether such laws constitute a taking, the court held unequivocally that this law does not,[197] thereby soundly refuting and reversing the district court that had struck down the law.[198]

Following the passage of the Florida "guns-at-work" law, the plaintiffs in *Florida Retail Federation, Inc. v. Attorney General of Florida* moved for an injunction to prevent its enforcement.[199] The court held

---

[187] *Id.* at 1340.

[188] Ramsey Winch Inc. v. Henry, 555 F.3d 1199, 1202 (10th Cir. 2009), *rev'g sub nom. ConocoPhillips Co.*, 520 F. Supp. 2d 1282.

[189] *Id.* at 1199.

[190] *Id.* at 1204–08.

[191] *Id.* at 1204 (quoting Altria Group, Inc. v. Good, 120 S. Ct. 538, 543 (2008)).

[192] *Id.* at 1205–08.

[193] *Id.* at 1205.

[194] *Id.*

[195] *Id.* 1205–06.

[196] *Id.* at 1206 (citing Teal v. E.I. DuPont de Nemours & Co., 728 F.2d 799, 804 (6th Cir. 1984)).

[197] *Id.* at 1208–10.

[198] *Id.* at 1211.

[199] Fla. Retail Fed'n, Inc. v. Attorney Gen. of Fla. (*Fla. Retail Fed'n I*), 576 F. Supp. 2d 1281, 1284–85 (N.D. Fla.), *converted to perm. injunction by Fla. Retail Fed'n II*, 576 F. Supp. 2d 1301 (N.D. Fla. 2008).

that the state could compel a business to allow a worker to store a firearm in his vehicle, but struck down the portion of the law that compelled "some businesses but not others—with no rational basis for the distinction—to allow a *customer* to secure a gun in a vehicle."[200] It is quite possible that, were this law to be amended in such a way as to eliminate such distinctions or to provide a rational framework for determining exempt businesses, this portion of the law could be reinstated.

B. "He is Exercising His Right on My Property!"—The Supreme Court Weighs in

Any first or second year law student can see that there have been hundreds of cases decided by the Supreme Court examining and defining the various rights protected in the Bill of Rights. The question brought about by these *parking lot laws* is this: "What right trumps the other when the two are in conflict?" The Fifth Amendment clearly protects property and prevents the uncompensated taking of property by the government.[201] And now it is clear that the Second Amendment protects the right of possession of handguns within the home for the purpose of self-defense.[202] Several states have recognized the logical expansion of this right into carrying a firearm for self-defense outside of the home.[203] Thus, is it constitutionally proper, under current jurisprudence, for states to pass laws that will prevent property owners from forbidding the possession of firearms on their property? The Supreme Court has not yet heard a case on these *parking lot laws*, but there have been several cases in the last half-century where the Court examined the tension between property owners' rights and the First Amendment right to freedom of expression.[204] While not directly on point, the handling of these cases by the Court illuminates the manner in which property rights have historically been examined against other constitutionally protected rights.

1. *Marsh v. Alabama*: Property Interests Alone Do Not Settle the Question

---

[200] *Id.* at 1285.

[201] U.S. CONST. amend. V.

[202] U.S. CONST. amend. II.; *see also supra* Part I.A.

[203] *See supra* Part II.A–B.

[204] *See generally* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980); Hudgens v. NLRB, 424 U.S. 507 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Marsh v. Alabama, 326 U.S. 501 (1946).

In *Marsh v. Alabama*, the entire town of Chickasaw, Alabama, was owned by a private corporation.[205] The appellant, a Jehovah's Witness, stood on a sidewalk and distributed "religious literature" despite a complete prohibition on such activity without a permit.[206] Further, the appellant was made aware of the fact that no such permit would be given to her.[207] The appellant was arrested, charged with "remain[ing] on the premises of another after having been warned not to do so," and was convicted.[208] An appeal to the Supreme Court followed after certiorari was denied by the state supreme court.[209]

In examining the issue, the Court first noted that had Chickasaw belonged to a municipal corporation and had the appellant been distributing such material on a municipal public street or sidewalk in violation of a municipal ordinance, the conviction would have to be reversed.[210] The people of a town could not set up a municipal government with the authority to bar the distribution of religious material on sidewalks.[211] The question then arose: can a company do what an elected municipal government cannot?[212] "Can those people who live in or come to Chickasaw be denied freedom of press and religion simply because a single company has legal title to all the town?"[213] The Court emphatically disagreed with this proposition and stated clearly that "property interests [do not] settle the question" regarding the "abridge[ment] [of] these freedoms."[214] The right of property owners to regulate conduct is not always equivalent to that of a homeowner regulating his guests.[215] "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[216] Privately owned property, used for commercial gain as a

---

[205] *Marsh*, 326 U.S. at 502–04.

[206] *Id.* at 503.

[207] *Id.*

[208] *Id.* at 503–04.

[209] *Id.*

[210] *Id.*

[211] *Id.* at 505.

[212] *Id.* If the government is forbidden from completely banning the carrying of firearms for the purpose of self-defense, as indicated by the Seventh Circuit in *Moore v. Madison*, 702 F.3d 933, 942 (7th Cir. 2012), can a company or private property owner do what an elected government cannot? A policy forbidding the storage of firearms in vehicles effectively bans individuals from carrying a firearm to or from such property. *See supra* notes 119–23 and accompanying text.

[213] *Marsh*, 326 U.S. at 505.

[214] *Id.*

[215] *Id.* at 506.

[216] *Id.*

benefit to the public, cannot be as freely regulated as other private properties.[217] The Court finally held that "the right to exercise the liberties safeguarded by the First Amendment 'lies at the foundation of free government by free men,'"[218] and a state cannot use state power to "permit[] a corporation to govern a community of citizens so as to restrict their fundamental liberties."[219] Therefore, it is possible for the state to restrict the property rights of a corporation in certain situations when such rights are used to deprive citizens of other rights. A few years after this opinion, the Supreme Court held, in *Shelley v. Kraemer*, that state enforcement of private covenants was prohibited if those covenants deprived individuals of rights guaranteed under the Fourteenth Amendment.[220] Perhaps the decision in *Shelley* can be seen as one which reinforces the *Marsh* Court's conclusion that the state is forbidden from enforcing private regulations that abridge rights guaranteed under the Fourteenth Amendment.

2. *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*: Private Property Owners Can Be Required to Allow Even Adversarial Speech on Their Property

The next case dealing with the rights of property owners to suppress the freedom of expression involved the members of a union picketing a supermarket that was part of a shopping center.[221] The union picketed the supermarket because the store did not employ union workers, and it carried on the picketing "within the confines of the shopping center."[222] The supermarket and the shopping center sought, and were granted, an injunction against the union requiring any picketing to take place on public roads, off shopping plaza property.[223] The Union appealed and the Pennsylvania Supreme Court affirmed the injunction.[224]

The Supreme Court first made clear that peaceful picketing is a protected activity under the First Amendment.[225] In examining *Marsh*, the Court was careful to tailor the holding by stating "that under some circumstances property that is privately owned may, at least for First

---

[217] *Id.*

[218] *Id.* at 509 (quoting Schneider v. State, 308 U.S. 147, 161 (1939)).

[219] *Id.*

[220] Shelley v. Kraemer, 334 U.S. 1, 4, 23 (1948).

[221] Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 311–12 (1968).

[222] *Id.* at 311–13.

[223] *Id.* at 312.

[224] *Id.* at 313.

[225] *Id.*

Amendment purposes, be treated as though it were publicly held."[226] The Court then placed special importance on the fact that the issue in *Marsh* arose within the "business district of Chickasaw."[227] Since picketing was not forbidden on the roads surrounding the shopping center (unlike the broad, all-encompassing prohibition power in *Marsh*), it was necessary to examine whether this fact alone would allow a property owner to forbid the picketing.

The *Logan Valley* Court found the shopping center to be the "functional equivalent of the business district of Chickasaw" because both were open to the public, much like the "commercial center of a normal town."[228] The Court acknowledged that the exercise of First Amendment rights "may be regulated where such exercise will unduly interfere with the normal use of the public property by other members of the public with an equal right of access."[229] In this case, there was no indication that the picketing was "significantly interfering with the use to which the mall property was being put," so there was no basis for analogizing the injunction with public property First Amendment regulation.[230] While stating that "where property is not ordinarily open to the public, . . . access to it for the purpose of exercising First Amendment rights may be denied altogether,"[231] the Court held that the *Marsh* analysis between purely private property and "'property for use by the public in general'" was sound and that the owners of property used for this public purpose could not forbid citizens from using their freedom of speech on such property.[232]

3. *Lloyd* and *Hudgens*: "We Made a Mistake in *Logan Valley*"

The next two cases in the freedom-of-expression saga are *Lloyd Corporation v. Tanner*[233] and *Hudgens v. NLRB*.[234] These cases are joined for the purposes of this review because the legally significant facts are similar and, together, the Court uses them to overrule *Logan Valley*, decided just a few years earlier.

In *Lloyd*, several individuals entered an enclosed shopping mall and proceeded to distribute handbills within the mall, in violation of a

---

[226] *Id.* at 316.
[227] *Id.*
[228] *Id.* at 318–19.
[229] *Id.* at 320–21.
[230] *Id.* at 323.
[231] *Id.* at 320.
[232] *Id.* at 325 (quoting Marsh v. Alabama, 326 U.S. 501, 506 (1946)).
[233] 407 U.S. 551 (1972).
[234] 424 U.S. 507 (1976).

general policy prohibiting the distribution of handbills.[235] Security guards in the employ of the Center (the Lloyd Corporation shopping center) confronted these individuals and informed them that they could not distribute handbills within the mall, and, if they persisted in doing so, they would be arrested.[236] They subsequently left the mall, presumably to avoid arrest, and instituted a legal action seeking an injunction against the Center's policy.[237] The district court found the policy forbidding handbilling to violate the First Amendment rights of the petitioners, and this decision was upheld by the court of appeals, citing the cases previously described: *Marsh* and *Logan Valley*.[238]

Through a bit of legal contortion the Court in this case held that the instant circumstances were distinguishable from those of *Logan Valley* because in that case "the First Amendment activity was related to the shopping center's operations."[239] Because the handbilling in the instant case was not related to the shopping Center, the Court stated that this was a different manner of free speech than that upheld in *Logan Valley* and that the *Logan Valley* decision did not apply.[240] While the Court spent most of the decision analyzing how to distinguish the present case from *Logan Valley*, practically no time was spent distinguishing it from *Marsh*.[241] Further, nowhere does the Court explain why the First Amendment right of free speech on private property must be related to the operations of the property.[242] The *Marsh* decision had nothing to do with the use of the property, and focused instead on the fact that private property owners who have opened up their land to the public in some regard cannot strip the First Amendment rights from all who come onto that land.[243] In fact, the individual in *Marsh* was distributing religious literature, and it would be hard to find that this activity was in any way connected to the purpose of the company in running the town of Chickasaw.[244]

Despite holding that the petitioners had no First Amendment right to distribute handbills in the Center, there is some important dictum in the *Lloyd* decision. The Court mentions that, in cases where private property rights conflict with other rights, "[t]here may be situations

---

235 *Lloyd*, 407 U.S. at 552, 556.

236 *Id.*

237 *Id.*

238 *Id.* at 556–57.

239 *Id.* at 562.

240 *Id.* at 562–64.

241 *See Lloyd*, 407 U.S. 551.

242 *Id.*

243 Marsh v. Alabama, 326 U.S. 501, 506–09 (1946).

244 *Id.* at 503.

where [there will be] accommodations between them, and the drawing of lines to assure due protection of both."[245] In other words, property rights do not always trump other constitutionally granted rights. The Court also mentioned, in attempting to square this decision with *Logan Valley*, that "[i]t would be an unwarranted infringement of property rights to require [the Center] to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist."[246] The Court here was speaking of the fact that, in *Logan Valley*, the forcible removal of the picketers would have "deprived [them] of all reasonable opportunity to convey their message."[247] Read logically, this would seem to indicate that property rights yield to other constitutionally protected rights when failure to do so would render those other rights completely ineffective. In comparing property rights to "Second Amendment rights," a complete prohibition of firearms on a property would render the right of self-defense with a firearm completely ineffective. *Parking lot laws*, in allowing people to have a firearm with them at least on the way to and from such properties, provide the minimum protection for such a right.

Hudgens involved a similarly enclosed shopping center where a union attempted to picket a store within the center.[248] In that case, the Court was unable to square its reasoning in *Lloyd* (in attempting to square with *Logan Valley*), distinguishing speech that directly related to the purpose of the property and soundly overturning its decision in *Logan Valley* after just six years.[249] The *Hudgens* Court approached this decision from the jurisprudential standpoint of previous union and labor relations cases, so their holding had more to do with various labor legislation than the conflict directly between the First Amendment and property rights.[250] It is important to note within the Court's First Amendment analysis, the Court holds that the Constitution guarantees rights "against abridgement by government, federal or state," not against private entities.[251] However, the Court goes on to say that there might be situations where "statutory or common law may . . . extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others."[252] So, a statutory or even

---

[245] *Lloyd*, 407 U.S. at 570.

[246] *Id.* at 567.

[247] *Id.* at 566.

[248] Hudgens v. NLRB, 424 U.S. 507, 509 (1976).

[249] *Id.* at 518.

[250] *See id.* at 521–23.

[251] *Id.* at 513.

[252] *Id.*

common law, extension of the right of free expression could be found, again, to trump the property rights of private corporations. This logic applied to the current *parking lot legislation* indicates that these laws would certainly survive constitutional judicial scrutiny.

4. *PruneYard*: The Constitution Might Not Protect It, but States Can Make That Happen

Despite the apparent set-backs to the freedom of expression found in the *Lloyd* and *Hudgens* decisions, the saga ends on a more positive note in *PruneYard Shopping Center v. Robbins*.[253] Very much like the situation in *Lloyd*, the facts in this case revolve around a large, self-contained shopping mall with a strict policy against any "publicly expressive activity . . . not directly related to its commercial purposes."[254] In this case, students were soliciting signatures for a petition within the mall when security guards informed them they were violating the Center's (the PruneYard Shopping Center) policy and would have to leave.[255] The students then sued to enjoin the Center from denying them the ability to circulate petitions within the mall.[256] The California Superior Court denied the injunction and the California Court of Appeals upheld that denial, but the California Supreme Court reversed holding that speech, "reasonably exercised," is protected by the California constitution even on property that is privately owned.[257] The Supreme Court then affirmed the decision of the California Supreme Court.[258] The Court examined its prior holdings in *Lloyd* and *Hudgens* briefly, affirmed that those decisions were still applicable, and then immediately proceeded to hold that while the First Amendment of the United States Constitution does not protect the free speech rights of the public on such private property, individual states have the "right to adopt in [their] own Constitution[s] individual liberties more expansive than those conferred by the Federal Constitution."[259] The Court further expounded that requiring the Center to allow such expression on their property does not amount to a constitutional taking as "[t]here is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a

---

[253] 447 U.S. 74 (1980).

[254] *Id.* at 77.

[255] *Id.*

[256] *Id.*

[257] *Id.* at 78.

[258] *Id.* at 78–79.

[259] *Id.* at 80–81 (citing Cooper v. California, 386 U.S. 58, 62 (1967)).

shopping center."[260] The Court further pointed out that it is important to note that the owners of the shopping center purposely did not limit it to the "personal use of [the owners]"[261] and that "'[i]t bears repeated emphasis that . . . the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment'" are not those being considered.[262] The Court, like the California Supreme Court, apparently found it persuasive that the property rights of larger commercial corporations might be limited more readily than those of individuals. This line of reasoning squares perfectly with the *Marsh* Court, which held that "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[263] It would seem that the Court allows for the property rights of large corporations, to the extent that property is open to the public, to be limited when they conflict with certain individual rights, whether granted by the United States Constitution or a single state's constitution.

5. How Will the Supreme Court Rule?

Despite the fact that there have been few litigation challenges to these laws, it is important to look at what the Supreme Court might say if such a case ever were raised to that level.[264] In examining the previous Supreme Court cases, it is important to note that the Court does *not* hold property rights to be an automatic trump over any other constitutionally protected rights.[265] While *Lloyd* and *Hudgens* would indicate that the Court is not willing to extend First Amendment protections to those exercising their freedom of expression on private commercial property under the First Amendment alone,[266] the Court never overruled the original decision in *Marsh*, so there still is precedent indicating that property rights can be forced to accommodate other protected rights by the federal government. The *Marsh* Court obviously tailored their decision specifically to the First Amendment, but the broader dicta would indicate that the Court might consider other constitutionally guaranteed rights to hold a preferred position over the rights of property

---

[260] *Id.* at 83.

[261] *Id.* at 87.

[262] *Id.* at 78 (quoting the California Supreme Court in Robins v. PruneYard Shopping Ctr., 592 P.2d 341, 347 (1979)).

[263] Marsh v. Alabama, 326 U.S. 501, 506 (1946).

[264] *See supra* Part III.

[265] *See supra* Part III.B.1.

[266] *See supra* Part III.B.3.

owners. This holds especially true regarding property open to the general public for the benefit of the owner.[267] It is further worth noting that the Court in the recent *Heller* decision, in its brief examination of the term "bear" in the Second Amendment, compared proper limitations on the Second Amendment to proper limitations on the First.[268] Therefore, it might be likely that the Court would properly use the aforementioned cases as a measure for laws, such as these *parking lot laws*, which extend a preferential position to the Second Amendment over private property rights.

If the Court were to take this route, how would it hold in a case involving a conflict between *parking lot laws* and the right to exclude under the Federal Constitution? The *Lloyd* and *Hudgens* decisions seem to indicate that the Court would hold property rights to be supreme over "Second Amendment rights," but a conflict between the peaceful and covert storage of firearms in a car, for the purpose of self-defense, can be significantly distinguished from actively passing out pamphlets or picketing and would comport with the reasoning behind the *Marsh* decision. In *Logan Valley*, *Lloyd*, and *Hudgens*, the various shopping centers had policies in place to avoid actively disturbing customers that came on the property for the purpose of shopping there. In *Logan Valley* and *Hudgens*, the individuals picketing were actually there to discourage people from utilizing the property as the owner purposed.[269] While in *Lloyd* the Center simply had a "no-handbilling" policy, ostensibly to avoid bothering customers and creating litter which the Center would need to clean up.[270] In all three cases, the property owners were looking to avoid deterring customers through disturbing conduct. Individuals storing firearms in vehicles would in no way be disturbing other customers or seeking to prevent the property owner from realizing the benefits of his property. Due to the fact that this activity has almost no impact on an owner's use of property, it is difficult to imagine the Supreme Court would favor property rights so lopsidedly in the "drawing of lines to assure due protection of both"[271] as to hold a total ban to be appropriate.

Even if the Supreme Court would be more likely to favor property rights under a bare examination of the Second Amendment, there would necessarily be an analysis of whether the state in question had extended a statutory or constitutional protection to the bearing of arms beyond the

---

[267] *See Marsh*, 326 U.S. at 506.

[268] District of Columbia v. Heller, 554 U.S. 570, 595 (2008).

[269] *See supra* Part III.B.3.

[270] Lloyd Corp. v. Tanner, 407 U.S. 551, 581–82 (1972) (Marshall, J., dissenting).

[271] *Id.* at 570.

Second Amendment. The *Hudgens* Court clearly acknowledged that "statutory or common law may in some situations extend protection or provide redress against a private corporation."[272] A plain reading of this phrase indicates that these *parking lot laws* could be seen as a state seeking to extend protection of "Second Amendment rights" through statute. The Court in *PruneYard* clearly acknowledged the right of the State of California to extend its constitutional protection of free speech such that the right could not be suppressed on certain private property open to the public.[273] If states extend protections of the Second Amendment, either statutorily or through their separate constitutions, to include the right to store a firearm in a personal vehicle on private property, it is unlikely that the Court will hold property rights to be supreme and trump firearm rights under the *Marsh*, *Hudgens*, and *PruneYard* precedents.

While it is clear under a constitutional analysis of First Amendment jurisprudence that states have the right to extend constitutional protections through statutory law, such as the *parking lot legislation*. What is not clear is precisely what standard the Court might follow in approaching the development of Second Amendment issues regarding the bearing of arms. The standard laid down by *Marsh* has not been explicitly overruled, though the *Marsh* Court's reasoning was riddled with holes by the *Hudgens* holding that invalidated *Logan Valley*. Therefore, it is more likely that the Court will rely on decisions, such as *PruneYard*, that allow states to extend protections not found directly in the Federal Constitution. Perhaps a more interesting question for another time would be whether the Constitution might *prevent* the State from enforcing property laws allowing property owners to exclude the bearing of firearms.

The iconic case of *Shelley v. Kramer*[274] held that state action "in enforcing a substantive common-law rule formulated by [state] courts[] may result in the denial of rights guaranteed by the Fourteenth Amendment."[275] When state courts enforce a private right, they make "the full coercive power of government" available to these private individuals and if that action "den[ies] rights subject to the protection of the Fourteenth Amendment," then such state action can be forbidden.[276] The state enforcement of a private right to exclude the carrying of firearms on private property might be improper under a *Shelley*

---

[272] Hudgens v. NLRB, 424 U.S. 507, 513 (1976).

[273] PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980).

[274] 334 U.S. 1 (1948).

[275] *Id.* at 17.

[276] *Id.* at 19–20.

analysis, even absent any specific state laws prohibiting such exclusion. It would seem that, under the combined precedents of *Marsh* and *Shelley*, a state government would be prevented from enforcing a private property restriction that would be unenforceable on government owned public property. Unfortunately, a thorough examination of this possibility cannot be approached in this Note.

CONCLUSION

Violent crime continues to be a problem in the United States. According to a National Crime Victimization Survey, there were an estimated 4.3 million violent crimes in 2009.[277] According to a Center for Disease Control report, there were 18,361 homicides in 2007.[278] There have also been numerous high-profile attacks injuring or killing many people, such as that in Aurora, Colorado, on July 20, 2012. Twelve people were killed and fifty-eight were injured.[279] Notable about many of these events, including the Aurora shooting, is the fact that the property owners forbade the carrying of firearms (even by individuals who had state issued permits to do so) on their properties, effectively depriving all employees and customers of their ability to protect themselves with a firearm.[280] In modern American society, it is not easy for people to live on self-sustaining ranches. An Environmental Protection Agency Agricultural Census Report puts the number of farmers at less than 1% of the American population.[281] According to the United States Census Bureau's American Community Survey, only 4.3% of workers in 2010 worked from home on a regular basis.[282] It would seem clear that average Americans must leave the protection of their property in order to survive and often their jobs and food are found on the private property of others. If the owners of such properties decide to exclude firearms,

---

[277] JENNIFER L. TRUMAN & MICHAEL R. RAND, U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY, 2009, at 1 (2010), *available at* http://www.bjs.gov/content/pub/pdf/cv09.pdf.

[278] Joseph E. Logan, et al., *Homicides—United States, 2007 and 2009*, MORBIDITY & MORTALITY WKLY. REP., Nov. 22, 2013, at 164, 165, *available at* http://www.cdc.gov/mmwr/pdf/other/su6203.pdf.

[279] Aimee Kaloyares, Note, *Annie, Get Your Gun? An Analysis of Reactionary Gun Control Laws and Their Utter Failure to Protect Americans from Violent Gun Crimes*, 40 S.U. L. REV. 319, 357 (2013).

[280] William Perry Pendley, *'Gun Free Zones' Never Gun Free*, USA TODAY (July 21, 2012, 6:06 PM), http://usatoday30.usatoday.com/news/opinion/forum/story/2012-07-21/Aurora-shooting-Batman-Pendley-mountain-states-concealed-carry/56394526/1.

[281] *Demographics*, *supra* note 14.

[282] PETER J. MATEYKA ET AL., HOME-BASED WORKERS IN THE UNITED STATES: 2010, at 4 tbl.1 (2012), *available at* http://www.census.gov/hhes/commuting/files/2012/Home-based%20Workers%20in%20the%20United%20States-Paper.pdf.

they can effectively remove the right of citizens to bear arms outside their homes. *Concealed carry* laws and *parking lot laws* show that several states have taken steps to allow people to possess firearms outside of their homes, even while visiting places that would otherwise prohibit the carrying of firearms on their properties. This is clearly constitutional, and perhaps states should consider taking the further step of preventing the owners of such "public" private property, as was found in *PruneYard*, from depriving citizens of the right to defend themselves with a firearm concealed on their person. Such legislation could take the form of "public place" legislation following the rationale of the Court in *Marsh*: "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[283] Such legislation would prevent the owners of "public" private property from doing what the government is forbidden to do: disarm citizens without cause.

Ethan T. Stowell[*]

[283] Marsh v. Alabama, 326 U.S. 501, 506 (1946).

[*] Special thanks to my always supportive family and to the tireless efforts of the staff and board of the Regent University Law Review.