TORT AS DEMOCRACY: LESSONS FROM THE FOOD WARS

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This Article develops alternative emerging theories regarding the function of tort in American civil society. Often, scholars and policymakers evaluate the tort system in terms of compensation, loss allocation, and risk management. This focus overlooks an important modern function of tort; in the context of the modern administrative state, tort is a vital player in the democratic deliberative process. Tort suits bring forth new ideas, force fact-finding, and increase communication amongst public and private institutional actors to develop sound and legitimate law and policy.

Perhaps nowhere is this more obvious today than with the current boom of food litigation. Lawsuits over whether "evaporated cane juice" should be labeled as sugar, McDonald's can use beef fat in french fries, or granola bars are actually "all natural" routinely "fail" and face scorn and disparagement as the "next big payday" for former tobacco lawyers. However, independent of whether these cases are settled, dismissed, or brought to trial, these suits alter public discourse. They spurn administrative and legislative bodies into active (or reactive) mode, and push government officials, industry titans, and public opinion to take into account new and conflicting ideas. Ultimately, this Article argues that the success of tort as a system cannot be evaluated purely by its ability to provide material recovery in any given case—or even corrective justice for the individual. Rather, tort litigation can (and does) function as a critical balancing force in the American legal system as a whole.

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"Perhaps more than any other branch of the law, the law of torts is a battleground of social theory."[1]

INTRODUCTION

Debates over the validity of the tort system are often couched in terms of the system's ability to compensate individuals for harms.[2] Widespread criticism of tort lawsuits as frivolous and ridiculous; calls for tort reform; and general assertions that tort is inefficient and cumbersome are well established and ongoing.[3] If the primary purpose of tort is efficient compensation for individual

1. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 15 (W. Page Keeton et al. eds., 5th ed. 1984).

2. Alexandra B. Klass, *Tort Experiments in the Laboratory of Democracy*, 50 WM. & MARY L. REV. 1501, 1508–09 (2009) (outlining various "camps" of tort scholars that focus on deterrence and compensation, in opposition to scholars that view tort as a means of private redress).

3. *See, e.g.*, Frank M. McClellan, MEDICAL MALPRACTICE: LAW, TACTICS, AND ETHICS 81 (1994); Robert L. Rabin, *Some Reflections on the Process of Tort Reform*, 25 SAN DIEGO L. REV. 13 (1988); *Republican Platform 2000*, N.Y. TIMES, http://partners.nytimes.com/library/politics/camp/whouse/gop-platform-text1.html (calling for legislative reform of the torts "system of jackpot justice"); Stephen D. Sugarman, *Why We Need to Readjust the Tort System*, ATLANTIC (July 3, 2012),

harms or to reallocate risk, then the efficacy of this particular system might be suspect.[4] An emerging discussion, however, looks to other factors to evaluate the value of the tort system and civil litigation generally.[5] This paper joins that discussion and argues that assessing the function and value of tort law primarily on the basis of compensation, risk management, and loss allocation may miss a crucial function of tort.

Rather, in the overall context of the modern American legal landscape, tort law may be best understood as playing a critical balancing role in supporting democratic deliberation.[6] Tort suits bring forth new ideas, create new forums for debate, force fact-finding, and increase back and forth dialogue amongst the public and private institutional actors to develop sound law and policy. The format of reviewing individual harms and compensating them (or failing to) provides a tangible indication of gaps or malfunctions in existing law.[7]

Filing a lawsuit is, in this context, an engagement in public deliberation, driving individuals and institutions to respond to one another. Many powerful institutions may not be sanctioned directly through adverse judgments. However, these same lawsuits increase public conversation about what law can and should do. This discussion itself alters the institutional structure where repeat players act. Tort has this value regardless of compensation awarded or the actual legal risk of "losing" a case. As such, the validity of tort cannot be evaluated solely by recovery or direct deterrence achieved in any given case. It also must be considered as a critical force in balancing how the public and lawmakers view legal and policy issues moving forward.

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http://www.theatlantic.com/national/archive/2012/07/why-we-need-to-readjust-the-tort-system/259208/.

4. Numerous studies of auto no-fault regimes, workers compensation systems, and various victim compensation funds have made the case that alternative compensation methods are both more efficient and fair than tort at compensating broad groups of similarly situated victims of harm equally. *See, e.g.*, Jeffrey O'Connell, *A 'Neo No-Fault' Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers*, 73 CALIF. L. REV. 898, 899 (1985); Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555 (1985).

5. *See, e.g.*, Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011) (discussing the productive function of litigation loss in social movements).

6. Tort pushes law to develop beyond its current framework, representing marginalized groups of people and presenting new arguments to the court, regulators and legislators, and to the public at large. "In a very vague general way, the law of torts reflects current ideas of morality, and when such ideas have changed, the law has tended to keep pace with them." KEETON ET AL., *supra* note 1, at 21. This is most clearly the case where juries take an active role in adjudicating disputes. Stephan Landsman, *Juries as Regulators of Last Resort*, 55 WM. & MARY L. REV. 1061 (2014).

7. Robert L. Rabin, *Reflections on Tort and the Administrative State*, 61 DEPAUL L. REV. 239, 249 (2012) ("[N]o matter how rigorous the agency process is, in the end it is a standard-setting process that does not offer compensation to the unfortunate victim suffering injury despite regulatory compliance.").

Perhaps nowhere is this more obvious today than with the current boom of food litigation.[8] Lawsuits over labeling "evaporated cane juice" as sugar or McDonald's use of beef fat in french fries or granola bars that are "all natural" often seem futile and even silly.[9] But whether these cases are litigated to a verdict or settled, these suits serve important purposes in American civil society; they inform public discourse, spurn administrative and legislative bodies into active (or reactive) action, and push public opinion and private industry to contemplate new and conflicting ideas.

Food litigation, like tobacco before it, started as a battleground for public health reform.[10] Over time, however, the vastly more complicated social and political meaning of food has come to play out in nuanced sets of lawsuits. This Article tells that story—a story about food and food policy in modern America—but also the broader story about the role tort plays in securing balanced and effective policymaking in a world increasingly dominated by administrative action.

Part I canvasses tort and deliberative democratic theory to provide an analytical framework for examining emerging considerations of the broader role tort can, does, and should play in the American legal system. Part II discusses how current food litigation is altering the substantive focus of food policy. Such litigation infuses food law with an increasingly wide-ranging agenda that includes: broadening how to legally comprehend food safety; moving beyond food safety to situate food as part of a sustainable social and ecological system; and recognizing the cultural, moral, and dignitary nature of food.[11] Part III then explores the

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8. Ray Latif, *Explosion of Consumer Fraud Lawsuits Has Industry on Its Heels*, BEVNET (June 17, 2013, 1:18 PM), http://www.bevnet.com/news/2013/explosion-of-consumer-fraud-lawsuits-has-industry-on-its-heels (noting some estimates that food related litigation has increased five-fold from 2008 to 2012); Trent Taylor, *Food Labeling Suits: An Explosive Trend in the Tort System*, LAW360 (Sept. 28, 2012, 1:36 PM), http://www.law360.com/articles/380630/food-labeling-suits-an-explosive-trend-in-tort-system.

9. These suits face ridicule and scorn as they are derided as the next "big payday" for former tobacco lawyers. *See generally* Stephanie Strom, *Lawyers from Suits Against Big Tobacco Target Food Makers*, N.Y. TIMES, Aug. 18, 2012, at A1 (claiming that tobacco lawyers have been "searching for big paydays in business" and that food manufacturers are their "next target").

10. At the Perrin Conferences in 2014, tobacco and food industry specialists met to discuss similarities between big food and big tobacco. When addressing the panel, Steven Parrish, former senior vice president of the parent company of Philip Morris, relayed this advice:

> From the first lawsuit filed against industry member[s] in 1953 to [the] mid-1990s the industry never lost or settled a smoking and health product liability suit. In the mid '90s the eggs hit the fan because the industry for all those decades had smugly thought it had a legal problem. But over time, it came to realize it had a society problem. Litigation was a symptom of the disease, not the disease itself.

Maggie Hennessy, *Is Big Food the New Tobacco?*, FOOD NAVIGATOR-USA (Apr. 15, 2014, 5:25 PM), http://www.foodnavigator-usa.com/Regulation/Is-Big-Food-the-new-tobacco.

11. I have organized cases into these three categories of food litigation because the bulk of nonfood-safety food litigation falls into one of these three categories. That said, this list is by no means mutually exclusive or exhaustive; food litigation implicates many

dialectic between legislative and administrative institutions and tort suits, drawing from current cases to show how these systems work to inform and react to one another. Finally, Part IV considers how tort actions influence private institutions to engage in forms of voluntary self-regulation. The Article concludes that regardless of its ability to achieve compensation for individuals or deter behaviors, tort litigation is valuable as it plays a critical role in developing legitimate policy through public deliberation.

I. THE TORT SYSTEM: CRITIQUES AND QUERIES

This Section briefly lays out existing discussions regarding the overall role of the tort system. It then introduces deliberative democratic theory as a way to understand and contextualize these traditional tort discussions regarding accountability and argues that litigation itself provides a necessary forum for public deliberation.

A. Compensation: Inconsistent and Inefficient

Broadly defined, a "tort" is "conduct that amounts to a legal wrong" (not in contract) "that causes harm for which courts will impose civil liability."[12] One of the primary functions of tort as traditionally understood is to compensate victims by shifting the cost of injury from the injured party to those who have failed to behave safely.[13] In his seminal book, *The Cost of Accidents*, Guido Calebresi posited that tort liability, in relation to accidents, must reduce the number of accidents and the administrative and total costs associated with them.[14] Pragmatically, there are only so many resources in society: how should the legal system ensure that parties harmed through the negligent or intentional acts of others are "made whole"?[15] One function of tort is as a system for redistributing resources in these situations and allocating "losses arising out of human activities."[16]

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other fields including unfair competition (Pom Wonderful LLC v. Coca Cola Co., 134 S. Ct. 2228 (2014)), intellectual property (Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139 (2010)), and employment (issues arising from the use of undocumented farm workers).

12. DAN B. DOBBS, THE LAW OF TORTS 1 (2000).

13. P.S. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW 59 (1980) (describing negligence law as a scheme for "decid[ing] if compensation should be paid to an innocent accident victim"); Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 715 (1965) ("Many recent writers have tended to focus on compensation as the main purpose of accident law."); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 30 (1972) ("[T]he orthodox view is that the dominant purpose of civil liability for accidents is to compensate the victim for the medical expenses, loss of earnings, suffering, and other costs of the accident.").

14. GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 24–32 (1970).

15. *See generally* KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 17–23 (3d ed. 2007); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

16. KEETON ET AL., *supra* note 1, at 6; OLIVER WENDELL HOLMES, JR., THE COMMON LAW 64 (Mark DeWolfe Howe ed., Harv. Univ. Press 1963) ("The business of the

Tort scholars struggle with the question of how the tort system can fairly reallocate costs amongst the parties. Here, consistency plays a key role. In a fair system, similarly situated plaintiffs should be similarly compensated. However, scholarly literature is rife with examples of how the tort system rarely works this way in practice.[17] Due to the vagaries of legal tests, the unpredictability of juries, and the arbitrary nature of judging, tort suits rarely lead to similarly situated plaintiffs receiving the same compensation, even when their harms are virtually identical from a legal standpoint. Little in torts literature indicates otherwise. Parties arguing that the tort system is fair point out that the arbitrary nature of a specific case is not a reflection of the aggregate system. Others argue that this flawed system is simply the best achievable system, even though it is not optimal.[18]

The compensation rationale behind torts is also inevitably intertwined with an analysis of efficiency.[19] Efficiency has long played a key role in modern understandings of how to allocate costs fairly.[20] Efficiency may be understood two ways: as speed, or as the transfer of resources with minimal loss to externalities. Efficiency as the speed by which a given plaintiff receives compensation or relief is hard to defend in the torts context, and is often used to justify tort-alternative systems.[21] Rather, tort suits can be long and taxing and therefore do not quickly provide needed redress to victims of harm.[22]

Instead, efficiency in this context asks how to best allocate finite resources. Law and economics scholars have argued that the best way to understand the complex and amorphous legal concept of "reasonableness" is to analyze whether the cost of taking precautions outweighs the cost of paying to

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law of torts is to fix the dividing lines between those cases in which a man is liable for harm which he has done, and those in which he is not.") .

17. *See, e.g.*, O'Connell, *supra* note 4, at 899 ("The inherent difficulty of proving fault leads to huge transaction costs . . . . The result is that many accident victims are left either totally or relatively unpaid for their losses, while others in similar or identical circumstances are awarded far more than their actual losses.").

18. PETER A. BELL & JEFFREY O'CONNELL, ACCIDENTAL JUSTICE: THE DILEMMAS OF TORT LAW 198-–203 (1997) (concluding that, despite the flaws of conventional tort regimes, which they enumerate in detail, in comparison to tort alternatives, tort is still likely to be the best system for adjudicating applicable harms).

19. *See* ROBERT L. GLICKSMAN & RICHARD LEVY, ADMINISTRATIVE LAW: AGENCY ACTION IN CONTEXT 15 (2015) ("By efficient, economists mean that resources will be put to their most highly valued uses because market forces will weed out less valuable uses.").

20. *See* Adams v. Bullock, 227 N.Y. 208, 211 (1919) (introducing as a factor to weigh in determining the idea of considering burden on the tortfeasor,"Considering the burden that implementing protection measures would impose on the tortfeasor to determine liability"); United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (creating a formula of weighing the burden on the tortfeasor versus two other factors: probability of loss and the scale or amount of loss).

21. *See, e.g.*, Sugarman, *supra* note 4 (arguing that tort is a highly inefficient way of compensating individuals harmed through accidents).

22. *Id.*

legally rectify a harm *ex post*.[23] Thus, specific deterrence is most efficiently accomplished by imposing the cost of accidents on the party who is best able to prevent or avoid the damages, described in shorthand as the "cheapest cost avoider."[24] When taken to an aggregate societal level, choices that would be inefficient are viewed as wrong, in a moral and legal sense. These choices are seen as morally wrong because of the waste of finite resources, and legally wrong because choosing an action that is inefficient is de facto unreasonable.

Tort also plays a role in deterring socially harmful behaviors.[25] The law and economics movement explains deterrence in terms of risk management, tying risk closely to efficiency arguments. Building on the basic formula of cost of precautions versus cost of harms, this theory holds that in order to change a pattern of behavior, one can simply change the level of economic risk a party faces.[26] Aversion to economic risk will cause people, companies, and even governments to alter their actions. In its simplest form, to motivate different patterns of behavior, one either needs to recognize a higher cost associated with a given harm or a lower cost associated with the corresponding precaution.

Realizations regarding inefficiency and unfairness in the torts system, including systemic under compensation of certain types of claims and claimants, fuel much thoughtful scholarship and calls for reform.[27] Some scholarship seeks to increase efficiency and equal compensation in the tort system by introducing additional safeguards and clearer legal standards. Other scholarship explores how the shortcomings of tort can be remedied elsewhere. In particular, this scholarship explores how alternative systems of compensation including no-fault systems and workers' compensation address harms.[28] Supporters argue that such systems can be more fair and efficient by cutting out transaction costs and increasing predictability, coverage, and transparency.[29]

Critics of no-fault systems argue that they are not substitutes for tort law, because tort serves an important moral function beyond loss of compensation and efficient allocation. Under this understanding, tort is a means of seeking and

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23. *See generally* McCarty v. Pheasant Run, Inc., 826 F. 2d 1554, 1556 (7th Cir. 1987) (distilling the Hand formula, weighing burdens versus probabilities and costs); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A 'Public Law' Vision of the Tort System*, 97 HARV. L. REV. 849, 859–60, 905–08 (1984).

24. Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972).

25. Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801 (1997).

26. HENRY N. BUTLER ET AL., ECONOMIC ANALYSIS FOR LAWYERS 291, 327–28 (2014).

27. *See, e.g.*, MARC A. FRANKLIN ET AL., TORT LAW AND ALTERNATIVES 809–11 (8th ed. 2006).

28. James M. Anderson et al., Rand Inst. For Civil Justice, *The U.S. Experience with No-Fault Automobile Insurance: A Retrospective* 23–39 (2010), http://www.rand.org/content/dam/rand/pubs/monographs/2010/RAND_MG860.pdf.

29. Nora Freeman Engstrom, *An Alternative Explanation for No-Fault's "Demise,"* 61 DEPAUL L. REV. 303, 334 (2012).

providing corrective justice and accountability through enterprise liability.[30] As such, a plaintiff may receive not only economic redress from the tortfeasor, but also legal and public acknowledgement of wrongdoing.

B. Torts, the Administrative State, and Deliberative Democratic Function

It is building on these core theories of accountability and corrective justice where the legitimizing role of the tort in the broader administrative state finds its roots.[31] Here, the insights of deliberative democratic theory are useful. Anchored in conceptions of accountability and discussion, deliberative democratic theory asserts that legitimate political order rests on "publicly articulating, explaining, and most importantly justifying public policy."[32] The goals of this process are to produce reasonable opinions and policy through taking in a variety of different viewpoints. Under deliberative democratic theories, persons are legal persons only to the extent that they are participants in authoring laws themselves.[33]

Applied most broadly in the constitutional law context, this Article argues that deliberative democratic theory also has significant insight to lend to tort theory.[34] Deliberative legal theory seeks to examine the relationship between the public and legislative authority through the idea of communicative power—essentially responsiveness and deliberation.[35] A procedural approach to a deliberative democratic model seeks to cultivate venues for selecting and developing policies. More venues for public input and the input of ideas increases democratic deliberation. This Article makes a procedural deliberative process argument as it argues that tort litigation is one such additional venue for increasing the amount of discussion and attendant responsiveness. It is through the use of this venue (tort) as an additional channel of input that American society and laws themselves can increase accountability, legitimacy, and potentially reach better policy decisions.

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30. This is "the notion that when one man harms another the victim has a moral right to demand, and the injurer a moral duty to pay to him, compensation for the harm." John Borgo, *Causal Paradigms in Tort Law*, 8 J. LEGAL STUD. 419, 419–20 (1979); Robert L. Rabin, *Some Thoughts on the Ideology of Enterprise Liability*, 55 MD. L. REV. 1190, 1194–99 (1996) (discussing how modern products liability is explained by a shift in enterprise liability theory of collective justice).

31. John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 523–24 (2003); Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501, 1510 (2009).

32. Simone Chambers, *Deliberative Democratic Theory*, 6 ANN. REV. POL. SCI. 307, 308 (2003). Deliberative democratic models are often best understood as standing as an alternative to aggregative/realist models of democracy, which focus on voting and consent.

33. *See, e.g.*, Jürgen Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?*, 29:6 POL. THEORY 766 (2001).

34. *See generally* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998) (identifying three "constitutional moments" in American history when citizens exercised constituent authority by engaging in higher lawmaking through increased informal and widespread debate over key constitutional issues); CASS SUNSTEIN, THE PARTIAL CONSTITUTION (1993).

35. CASS SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 41 (2001) (discussing how to interpret the Constitution to enhance or maintain deliberation).

At the heart of tort lies a social democratic function: "[L]iability must be based upon conduct which is socially unreasonable . . . the idea of unreasonable interference with the interests of others."[36] Tort has a traditional peacekeeping function, as a civil (in all senses of the word) forum for resolving disputes without violence. Monetary compensation is one way to achieve this, but by providing a forum for the state, and by extension civil society, to hear grievances, tort law supports citizens and residents using the justice system to right perceived wrongs deliberatively. Being heard in this context has a unique and important value. Tort adjudicates and pronounces what is socially reasonable. Tort law is well-suited for this function. The legal claims available are broad, malleable, and lend themselves to a wide array of fact patterns and arguments. The boundaries of many tort claims are, by design and history, relatively fluid and potentially tempered by equity considerations.

In contrast, avenues for democratic deliberation and redress in the administrative context are often narrower and more attenuated. The American administrative state is exceedingly complex. It includes hundreds of administrative agencies on the federal level alone, and each governed by its own organic statutes and regulations, translating into agency action that takes place in varied contexts.[37] Because of its complexity, the means by which to access agency policymaking or comprehend participation within it are obscured. Agency adjudication is individualized and does not facilitate participation with the public at large.[38] In the rulemaking context, the subject matter of responsive public comments to proposed rulemaking is focused on amendments to the statute or regulation at hand.[39] Thus, agency rulemaking dictates the subject matter of debate, whereas in a tort suit, the plaintiff's complaint sets the agenda. Moreover, agency action is always limited by the powers granted to the agency in the enabling statute delegating power to the agency.[40] As such, to the extent a party would like additional issues or policies. considered, it may be outside the ambit of delegated powers.[41] Finally, to further

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36. KEETON ET AL., *supra* note 1, at 6.

37. GLICKSMAN & LEVY, *supra* note 19, at 1–2 (including contexts such as enforcement, formal and informal adjudication, formal and informal rulemaking, as well as issuing informal guidance documents).

38. David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 307 n.158 (2010) (noting "[agency] adjudication does not provide as broad a framework for public participation as the APA's 'interested persons' standard").

39. 5 U.S.C. § 553(b)–(c) (2012) (detailing the procedural requirements of notice and comment rulemaking including the requirement that agencies state the purpose of the regulation and allow "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments").

40. Cheng v. WinCo Foods LLC, No. 14-cv-0483-JST, 2014 WL 2735796, at *7 (N.D. Cal. June 11, 2014) ("[A]dministrative agencies derive their power from their enabling statutes. An agency cannot expand the scope of its powers independent of a legislative grant of authority.").

41. *See* All. for Bio-Integrity v. Shalala, 116 F. Supp. 2d 166, 179 (D.D.C. 2000) (arguing that the FDA only has the power to regulate based on health and safety risk and, therefore, does not have the power to regulate based on consumer interest).

exacerbate the issue, avenues for public participation in the agency context increasingly occur outside of the official public process.[42]

Thus, in the context of a legal system that is increasingly statute driven and governed through agency regulation, tort plays a necessary function. It provides accountability, but such accountability need not be exacted monetarily. Tort is also individually driven and tailors to the specific facts of a given litigant. Parties are held accountable by virtue of having to appear in court or dignify a pleading with a response. In some instances, media coverage of a proceeding may well be enough to achieve the kind of accountability that plaintiffs seek.

II. ON THE FRONT LINES: HOW TORT IS CHANGING THE CONVERSATION SURROUNDING FOOD

Wars are raging in the courts over the American food system. This boom reflects, magnifies, and even animates a shift in public discourse surrounding food. While food and tort ligation is not new,[43] it has traditionally focused on food safety.[44] Food safety issues continue to be litigated;[45] however, typically conceived suits relating to poison, allergens, or other bio-hazardous contamination do not explain the current swell in food litigation.[46] Instead, much of the current food

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42. E. Donald Elliott, Comment, *Re-inventing Rulemaking*, 41 DUKE L.J. 1490, 1495 (1992) ("[R]eal public participation—the kind of back and forth dialogue in which minds (and rules) are really changed—primarily takes place in various fora well in advance of a notice of proposed rulemaking appearing in the *Federal Register*.").

43. Concern over food safety played an animating role in the emergence of strict product liability, as key cases solidified manufacturers' strict liability for defects related to food products. *See, e.g.*, Pulley v. Pac. Coca-Cola Bottling Co., 415 P.2d 636 (Wash. 1966); Escola v. Coca-Cola Bottling Co., 150 P.2d 436 (Cal. 1944) (Traynor, J., concurring) (laying out original products liability theories in relation to beverage products).

44. When the highly influential Restatement (Second) of Torts was drafted, original versions of its revolutionary products liability section were written to apply specifically to the safety of food products. Herbert W. Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713, 713 (1970) (citing RESTATEMENT (SECOND) OF TORTS § 402A (Tent. Draft No. 6, 1961)) (noting that this changed over time from applying to products for "intimate bodily use" to its current iteration "any product" at the behest of prominent tort's scholar, Dean Prosser).

45. *See, e.g.*, Ctr. for Food Safety v. Hamburg, 954 F. Supp. 2d 965, 970 (N.D. Cal. 2013) (The Center for Food Safety, a nonprofit, sued the FDA for failure to enforce food safety provisions in the Food Safety Modernization Act.); *see also* Alexia Brunet Marks, *Check Please: Using Legal Liability to Inform Food Safety Regulation*, 50 HOUS. L. REV. 723, 723 (2013) (citing 320 food safety related cases from 2000 to 2011).

46. *See* Ctr. for Disease Control, *Trends in Foodborne Illness in the United States, 1996–2010* at 2 (2011), http://www.cdc.gov/winnablebattles/FoodSafety/pdf/Trends_in_Foodborne_Illness.pdf (noting a "downward trend in foodborne illness" and a decrease in confirmed laboratory instances of disease).That is not to say that food safety in the traditional sense is a moot issue. *See* Joella Roland, Note, *The Hang-up with Hamburg: How* Center for Food Safety v. Hamburg *Will Alter the Food Industry*, 9 J. BUS. & TECH. L. 357, 357 (2014) (noting that from 2006 to 2010, six highly publicized incidents of foodborne illness occurred); *Frequently Asked Questions*, U.S. FOOD & DRUG ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm247559.htm (last visited

litigation making headlines is better understood as pushing the development of food law and policy towards new conceptions of the role of food in American society and in the lives of individuals. It does so by seeking redress for different types of harms than those contemplated by existing legal institutions—harms not grounded in concerns of conventional food safety.[47]

These nonfood safety cases are predominately: statutory tort claims that make negligent misrepresentation[48] or intentional misrepresentation (fraud) arguments,[49] nuisance suits,[50] and to a lesser extent traditional negligence or product liability claims. They fall into three basic categories, cases that: (1) reconceptualize food safety in terms of long-term health impacts (instead of isolated incidents); (2) view food as part of a broader ecologically and socially sustainable system of production and consumption; and (3) recognize the cultural, moral, and political meanings of food as a dignitary issue. This Section outlines each of these strains to show how tort litigation in these areas is substantively changing the lexicon of the food law landscape.

A. Tunnel Vision: Food Law as Public Health and Safety

The primary impetus behind the creation of laws governing the sale and production of food was to protect the public from death as a result of ingesting

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Sept. 10, 2015) ("About 48 million people (1 in 6 Americans) get sick, 128,000 are hospitalized, and 3,000 die each year from foodborne diseases, according to recent data from the Centers for Disease Control and Prevention.").

47. Food safety concerns are enshrined throughout the legal system, at times to the exclusion of other legitimate considerations regarding food. The institutional structures where food policy debates play out are so focused on food safety that nonfood safety arguments regarding food policy sound incoherent, off-topic, and collateral at best. *See* Andrea Freeman, *The Unbearable Whiteness of Milk: Food Oppression and the USDA*, 3 U.C. IRVINE L. REV. 1251 (2013); Melissa Mortazavi, *Consuming Identities: Law, School Meals, and What It Means to Be American*, 24 CORNELL J.L. & PUB. POL'Y 1 (2014).

48. Negligent misrepresentation is a tort in which a false statement of material fact may be actionable despite the absence of intent, where the alleged tortfeasor owed a duty of care to the injured party, and that party reasonably relied on the misrepresentation to his or her detriment. DOBBS, *supra* note 12, at 1344, 1349. A duty of care is often established through a special relationship between the tortfeasor and the harmed party. *Id.* Where the misrepresentation occurs as part of a warranty regarding a product, strict liability is a possibility. *Id.* at 1344.

49. Fraud, historically known as the "tort of deceit," has a long common-law tradition and is distinct from negligent misrepresentation in that it generally requires scienter. Pasley v. Freeman, 100 Eng. Rep. 450 (K.B. 1789). Fraud is generally defined as the intentional misrepresentation of a material fact made by one person to another with knowledge of its falsity and for the purpose of inducing the other person to act, and upon which the other person relies with resulting injury or damage. Derry v. Peek, 14 A.C. 337 (H.L. 1889). Fraud may also be made by an omission or purposeful failure to state material facts, when nondisclosure makes other statements misleading. DOBBS, *supra* note 12, at 1343.

50. *See, e.g.*, Wendinger v. Forst Farms, Inc., 662 N.W.2d 546, 549 (Minn. Ct. App. 2003).

contaminated or poisonous substances.[51] Modern food regulation was a brainchild of the progressive era, driven by a growing awareness of the dangers of commercially marketed medicines as well as the revelation of squalid meatpacking norms in Upton Sinclair's *The Jungle*.[52] Early national legislation created systems to minimize contamination, monitor the sale of poisonous substances, and compel accurate labeling of drug and food products.[53] These bills, written at the turn of the last century, paved the way for the eventual creation of what became the Food and Drug Administration ("FDA") in 1931. The FDA focused its early efforts on drugs rather than food.[54]

Today, food safety remains central to food-related laws at all levels of government. The FDA's general charge is to regulate "any poisonous or deleterious substance which may render [food] injurious to health."[55] While the FDA takes the lead in regulating consumer food products, 12 federal agencies play some role in policing food safety.[56] The Federal Food, Drug, and Cosmetic Act of 1938 ("FDCA") officially vested the FDA with the power to oversee the safety of domestic and imported food, drugs, and cosmetics.[57] It requires drug companies to

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51. The United States Department of Agriculture ("USDA"), which was signed into law shortly after the Civil War, housed the first food safety related agencies. *FSIS History*, U.S. DEP'T OF AGRIC., http://www.fsis.usda.gov/wps/portal/informational/aboutfsis/history (last updated Mar. 24, 2015) [hereinafter *FSIS History*] (noting that preventing sales of adulterated meat products and contaminated imports animated the creation of chemistry divisions within the USDA).

52. UPTON SINCLAIR, THE JUNGLE (1906); *Significant Dates in U.S. Food and Drug Law History*, U.S. FOOD & DRUG ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.fda.gov/aboutfda/whatwedo/history/milestones/ucm128305.htm (last updated Dec. 19, 2014) [hereinafter *Significant Dates*] ("Shocking disclosures of insanitary conditions in meat-packing plants, the use of poisonous preservatives and dyes in foods, and cure-all claims for worthless and dangerous patent medicines were the major problems leading to the enactment of these laws.").

53. *See, e.g.*, The Federal Meat Inspection Act of 1906, 21 U.S.C. § 610 (1906) (prohibiting the sale of adulterated or misbranded meat and meat products for food, and ensuring that meat and meat products were slaughtered and processed under sanitary conditions); Pure Food and Drugs Act of 1906, Pub. L. No. 59-384, ch. 3915, § 7, 34 Stat. 768 (1906) (stating that any "added poisonous or other added deleterious ingredient which may render such article injurious to health" would be deemed adulterated) (superseded by the FDCA in 1938).

54. *History*, U.S. FOOD & DRUG ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.fda.gov/aboutfda/whatwedo/history/default.htm (last updated Mar. 23, 2015).

55. Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 342(a)(1) (2012).

56. *See* CTR. FOR FOOD SAFETY & APPLIED NUTRITION, U.S. FOOD & DRUG ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., 2009 STATE OF SCIENCE 7–8 (2009), http://www.fda.gov/downloads/advisorycommittees/committeesmeetingmaterials/scienceboardtothefoodanddrugadministration/ucm222054.pdf.

57. Federal Food, Drug, and Cosmetic Act of 1938, ch. 675, 52 Stat. 1040, 21 U.S.C. §§ 301–399f (allowing the federal government to initiate food seizure action whenever the enforcement agency finds that a food in interstate commerce does not comply with federal law).

make an *ex-ante* showing that a drug is safe before putting it on the market.[58] The FDCA passed this in direct response to the deaths of over 100 people from exposure to poisonous "medicine."[59] In 1940, shortly after the FDCA was passed, the FDA moved from the Department of Agriculture to what is now the Department of Health and Human Services.[60]

The FDA's regulatory ambit was broadened further with the passage of the Food Additives Amendment of 1958, which addressed the growing use of chemicals in food production. The amendment allowed the FDA to monitor external additives to food.[61] A 1990 amendment to the FDCA, the Nutrition Labeling and Education Act of 1990 ("NLEA"), outlined in more detail nutritional content required on food labeling.[62] The NLEA exempts labeling of "incidental additives"—extracts from other food sources that contribute "no technical or functional effect," and are present in the labeled food at "insignificant levels."[63] The FDCA also monitors and penalizes misbranding; however, it does not authorize private suits, retaining nearly exclusive executive jurisdiction to enforce the provisions of the Act. [64]

The USDA and Environmental Protection Agency ("EPA") also play important roles in regulating food safety.[65] Despite the migration of the FDA departmentally, the USDA continues to oversee the production and certification of meat, poultry, and eggs.[66] The USDA also regulates genetically modified organisms through the Animal and Plant Health Inspection Service ("APHIS")

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58. *See* POM Wonderful LLC v. Coca-Cola Co., 134 S. Ct. 2228, 2234 (2014) ("The FDCA statutory regime is designed primarily to protect the health and safety of the public at large."); *see also* Wallace F. Janssen, *The Story of the Laws Behind the Labels*, FDA CONSUMER (1981), http://www.fda.gov/AboutFDA/WhatWeDo/History/Overviews/ucm056044.htm.

59. *See* Janssen, *supra* note 58.

60. *FSIS History*, *supra* note 51 (describing the FDA's departure from the USDA to the Federal Security Agency, "which in 1953 became the Department of Health, Education, and Welfare—now the Department of Health and Human Services").

61. Food Additive Amendment of 1958, Pub. L. No. 85-929, 72 Stat. 1784, 1785 (1958) (codified as amended in scattered sections of 21 U.S.C.).

62. The Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (1990).

63. *See* 21 C.F.R. § 101.100(a)(3).

64. 21 U.S.C. § 337 (2012).

65. It is worth noting that the U.S. Department of the Treasury regulates the labeling of tobacco and alcoholic beverages above 7% alcohol content. *CFSAN—What We Do*, U.S. FOOD & DRUG ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.fda.gov/AboutFDA/CentersOffices/OfficeofFoods/CFSAN/WhatWeDo/ucm2007332.htm (last updated Jun. 23, 2015).

66. *Food Safety*, U.S. DEP'T OF AGRIC., http://www.usda.gov/wps/portal/usda/usdahome?navid=food-safety (last updated Nov.19, 2015) ("USDA's Food Safety and Inspection Service (FSIS) ensures that our nation's meat, poultry and processed egg supply is wholesome, safe and properly labeled."). The Agricultural Marketing Service of the USDA also oversees the National Organic Program (NOP), which was added to its duties in the early 1990s. *Regulating Pesticides with the Food Quality Protection Act of 1996*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/pesticides/regulating/laws/fqpa/ (last updated Feb. 4, 2014).

under the Plant Protection Act.[67] The EPA's role was traditionally more limited. With the advent of the EPA in 1970, authority for designating and setting acceptable limits to herbicides and pesticides transferred from the FDA to the EPA,[68] along with regulation of nonbottled drinking water.[69]

Despite the reorganization of certain duties, today the FDA's mission is consistent: "[P]rotecting the public health by assuring the safety, efficacy and security of human and veterinary drugs, biological products, medical devices, our nation's food supply, cosmetics, and products that emit radiation."[70] The FDA has consistently interpreted its regulatory ambit as strictly limited to health and safety.[71] The FDA has argued successfully that it does not have the power to regulate the food industry based on consumer interest but only based on proven health and safety risks.[72]

For over 70 years, the FDCA remained the guiding force for food policy in the United States[73] However, 2011 saw the passage of the Food Safety Modernization Act ("FSMA"), which not only vested the FDA with new power to refuse imports and issue recalls, but also broadened the FDA's powers to withhold or detain import foods that are adulterated or misbranded.[74] Under both systems,

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67. *See* Plant Protection Act, 7 U.S.C. §§ 7701–7702 (2000); *Biotechnology Frequently Asked Questions (FAQs)*, U.S. DEP'T OF AGRIC., http://www.usda.gov/wps/portal/usda/usdahome?navid=AGRICULTURE&contentid=BiotechnologyFAQs.xml (last updated May, 14 2015) ("[T]he USDA's Animal and Plant Health Inspection Service (APHIS) and the EPA review any environmental impacts of such pest-resistant biotechnology derived crops prior to approval of field-testing and commercial release.").

68. *See* The Toxic Substances Control Act, 15 U.S.C. §§ 2601–2692 (2006); *see also* The Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136–136y (2006); 40 C.F.R. § 152.1 (2011) (regarding registration of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act).

69. *Significant Dates*, *supra* note 52. Section 408 of the FDCA authorizes the EPA to set tolerances, or maximum residue limits, for pesticide residues on foods. This power was substantially augmented with the Food Quality Protection Act ("FQPA") of 1996, which required reassessment of pesticide levels and stricter standards for infant and children tolerances.

70. *What We Do*, U.S. FOOD & DRUG ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.fda.gov/aboutfda/whatwedo/ (last updated Aug. 5, 2014).

71. Martha Dragich, *Do You Know What's on Your Plate? The Importance of Regulating the Processes of Food Production*, 28 J. ENVTL. L. & LITIG. 385, 408–09 (2013) (arguing that the FDA has refused to require premarket determinations of the safety of genetically modified foods despite the apparent statutory authority to do so).

72. *See* All. for Bio-Integrity v. Shalala, 116 F. Supp. 2d 166, 179 (D.D.C. 2000).

73. 21 U.S.C. §§ 301–399f (2012).

74. FDA Food Safety Modernization Act, Pub. L. 111–353, 124 Stat. 3885 (2011); *FDA Food Safety Modernization Act (FSMA)*, U.S. FOOD & DRUG ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.fda.gov/Food/GuidanceRegulation/FSMA/default.htm (last updated Sept. 21, 2015). Some of the biggest changes under the FSMA include: the allowance for mandatory recall under § 206 when there will be serious health effects to humans or animals (§ 206); in addition to civil penalties, commercial distribution of contaminated foods also carries with it

the administrative apparatus for recalls, fines, and potential criminal sanctions aggressively seeks to disincentivize cavalier behavior in relation to food safety risks.[75]

B. Battleground 1: Food Safety as Long-term Exposure

Current food litigation stretches the ambit of legal conceptions of health and safety in the food context. These cases hold food producers or manufacturers accountable for the long-term health impacts of their products. Some cases dispute the health benefits of certain food products.[76] Others take an inverse tact, challenging the presence of allegedly unhealthy contents.[77] These cases redefine the safety mission of food law to include the impacts of recurring consumption patterns. This shifts focus from the safety of a single, limited exposure of a food product to the public health impact of systematic exposure to food systems that are harmful in the aggregate.

Such suits first gained notoriety with the McDonald's obesity lawsuits of the early 2000s.[78] Initially, they were dismissed for failure to state a claim and lack of causation.[79] On appeal, the principal case was partially restated and remanded, but after more than eight years of litigation, class certification was denied.[80] Although the plaintiffs did not prevail, the case sparked a media blitzkrieg and

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potential criminal felony penalties (§ 206); withholding and detaining foods that are adulterated or misbranded (§ 207); required entry into foreign facilities within 24 hours of request and places penalties on refusal of inspection (§§ 301, 302, 306); and restricted applicability of FSMA whistleblower protections abroad (§ 402).

75. 21 U.S.C. §§ 333(a), 337 (imposing criminal sanctions); Alexia Brunet Marks, *Check Please: Using Legal Liability to Inform Food Safety Regulation*, 50 HOUS. L. REV. 723, 723–24 (2013).

76. *See, e.g.*, Salazar v. Honest Tea, Inc., No. 2:13-cv-02318-KJM-EFB, 2015 WL 75223 (E.D. Cal. Jan. 5, 2015) (disputing the presence of antioxidants in tea); Volz v. Coca-Cola Co., No. 1:10-cv-00879-MRB-SKB, 2015 WL 1474958 (S.D. Ohio Mar. 31, 2015) (a case questioning Vitamin Water's health value as a high-sugar drink); Ogden v. Bumble Bee Foods LLC, No. 5:12-CV-01828-LHK, 2014 WL 27527 (N.D. Cal. Jan. 2, 2014) (disputing the alleged health benefits of omega three fats in canned tuna).

77. Gustavson v. Mars, Inc., No. 13-cv-04537-LHK, 2014 WL 6986421, at *1 (N.D. Cal. Dec. 10, 2014) (claiming chocolate producers deliberately mislead on calorie counts); Gitson v. Trader Joe's Co., 63 F. Supp. 3d 1114 (N.D. Cal. 2014) (arguing that the term "evaporated cane juice" wrongly attempts to hide the presence of sugar in products).

78. *See* Reyes v. McDonald's Corp., Nos. 06 C 1604, 06 C 2813, 2006 WL 3253579 (N.D. Ill. Nov. 8, 2006) (alleging McDonald's misrepresented the fat content of french fries); Pelman v. McDonald's Rests. of N.Y., Inc., 237 F. Supp. 2d 512, 532–36 (S.D.N.Y. 2003), *vacated on other grounds*, 396 F.3d 508 (2d Cir. 2005); Complaint, Caesar Barber v. McDonald's Corporation, (N.Y. Sup. Ct. July 24, 2002) (No. 23145/2002) (seeking damages from McDonald's, Burger King, Wendy's, and Kentucky Fried Chicken for the medical conditions brought on by consuming products from these corporations) (case dismissed without prejudice and not refiled).

79. Pelman v. McDonald's Corp., No. 02 Civ. 7821(RWS), 2003 WL 22052778 (S.D.N.Y. Sept. 3, 2003) (granting McDonald's motion to dismiss the claim); *McDonald's Obesity Suit Thrown Out*, CNN (Sept. 4, 2003, 9:25 PM), http://www.cnn.com/2003/LAW/09/04/mcdonalds.suit/index.html?eref=sitesearch.

80. Pelman v. McDonald's Corp., 272 F.R.D. 82 (S.D.N.Y. 2010).

scattered additional lawsuits that continued to raise the issue of accountability.[81] Over 6,000 popular news articles were written in the span of the last ten years regarding the links between fast food and obesity.[82] A vehement rhetoric of individual responsibility was, and remains, pitted against sentiments favoring corporate responsibility for exposing the public—and particularly children—to fattening foods.[83] On the most basic level, the McDonald's obesity litigation ignited a national debate over whether food producers, rather than individual consumers, are responsible for the United States' mounting obesity problems.[84]

Likewise, suits challenging the use of terms like "evaporated cane juice" or "healthy" on various food products do not allege any immediate physical harm. Instead, these suits implicate a different idea of safety: Food products can hurt individuals, not today—and not tomorrow—but over time, and misrepresenting foods has a long-term impact on the consumer. The idea that individuals are responsible for those long-term harms, such as obesity and various other health issues, is competing against arguments that such choices are undermined by corporate actors who obscure meaningful consumer choices by creating information deficiencies or exploiting differences in bargaining power.[85]

Currently, these cases tend to be brought under consumer protection statutes that often require more than a pure showing of misrepresentation, but rather misrepresentation coupled with proof of economic harm. Thus, many cases fail in terms of providing redress to individual plaintiffs. However, when assessed in terms of shifting the national conversation surrounding food, such cases have merit.[86] Lawsuits focused on the long-term health impact of food question not only

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81. Parham v. McDonald's Corp., No. CGC-10-506178, 2012 WL 1129911 (Cal. Super. Ct. Apr. 4, 2012) (alleging that McDonald's enticed children to eat unhealthy foods by including toys in Happy Meals) (dismissed on class certification grounds).

82. A search for articles related to fast food and obesity on WestlawNext's popular news database revealed 6,401 hits from 2004 to August 2014, compared to only 873 news articles in the preceding 20 years (1983–2003). Query for News Articles on Fast Food Obesity, WestlawNext, http://next.westlaw.com (follow "News" hyperlink; then search "'fast food w/10 obesity'").

83. Indeed, congressional attempts to bar such suits were couched in precisely these terms. *See* Personal Responsibility in Food Consumption Act of 2005, H.R. 554, 109th Cong. (2005); Personal Responsibility in Food Consumption Act, H.R. 339, 108th Cong. (2004). *See also* Kelly D. Brownell, *The Environment and Obesity*, *in* EATING DISORDERS AND OBESITY: A COMPREHENSIVE HANDBOOK 433, 433 (Christopher G. Fairburn & Kelly D. Brownel eds., 2d ed. 2002) (arguing that a "toxic" food environment is responsible for systemic obesity issues); Erica Goode, *The Gorge-Yourself Environment*, N.Y. TIMES (July 22, 2003), http://www.nytimes.com/2003/07/22/science/the-gorge-yourself-environment.html?pagewanted=all (reporting that environmental factors such as portion sizes, advertising, price, and availability of food greatly influence consumer eating habits). *But see* Jason A. Smith, *Setting the Stage for Public Health: The Role of Litigation in Controlling Obesity*, 28 U. ARK. LITTLE ROCK. L. REV. 443, 443 (2006).

84. As one congressman pointed out, "McDonald's does not force anyone to eat at its restaurants." 151 Cong. Rec. H8929 (daily ed. Oct. 19, 2005) (statement of Rep. Paul).

85. MARION NESTLE, FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH 1–2 (2002).

86. Stephanie Tai, *The Rise of U.S. Food Sustainability Litigation*, 85 S. CAL. L. REV. 1069, 1073 (2012) ("[W]hile these lawsuits are not always successful, their rise

whether immediate safety should be the goal of food law, but also what parties are accountable for systemic public health challenges.

C. Battleground 2: Food as Process Not Product

Another strand of food litigation fundamentally challenges the legal construction of food as a product, rather than a process.[87] These suits consider sustainability as a central value in making food-related choices.[88] They are focused on creating and supporting ongoing agrarian societies and ecological systems. Because litigants often believe that sustainable food production is both a free-standing good and integral to human health, sustainability-driven suits bridge the gap between typical food-related claims grounded in human physical safety and dignitary harms protecting autonomy or a set of moral beliefs.[89] Undeniably, there is an aspect of human health that makes up a salient portion of the sustainability-related litigation.[90] However, these suits also shift thinking about food from an outcome-focused standpoint (what is the final product/is it safe?) to a system-of-production standpoint (how is the food grown/what are the ecological and human impacts of such production?).[91] Thus, tort litigation provides another catalyst in developing the public's growing interest in food-sustainability issues.[92]

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highlights new avenues through which food activists are attempting to pursue goals of legal and policy reform.").

87. Some would argue that turning legal focus away from product outcomes and toward process is a misstep in fighting obesity-related problems. *See* Stephen D. Sugarman, *Enticing Business to Create a Healthier American Diet: Performance-Based Regulation of Food and Beverage Retailers*, 36 LAW & POL'Y 91 (2014) (arguing that the most effective way to increase healthy food supply in the United States is to place outcome-based standards on calories, sodium, and sugar and allow companies to devise ways to meet these standards).

88. SUSAN A. SCHNEIDER, FOOD, FARMING, AND SUSTAINABILITY: READINGS IN AGRICULTURAL LAW (2010) (including readings on environmental law, discrimination in agriculture, agricultural labor law, and food security issues).

89. Pamela R. D. Williams & James K. Hammitt, *Perceived Risks of Conventional and Organic Produce: Pesticides, Pathogens, and Natural Toxins*, 21 RISK ANALYSIS 319, 319 (2001).

90. *Id.* (arguing organic produce is safer for human consumption); Michael J. Brewer & Marcia Ishii-Eiteman, *Integrated Pest Management, Sustainability, and Risk: Linking Principles, Policy, and Practice*, *in* CRITICAL FOOD ISSUES: PROBLEMS AND STATE OF THE ART SOLUTIONS WORLDWIDE 33, 33–52 (Laurel E. Phoenix & Lynn Walter eds., 2009) (describing how industrial agriculture's use of pesticides and certain farming techniques degrades soil and contaminates water supplies).

91. Jason J. Czarnezki, *The Future of Food Eco-Labeling: Organic, Carbon Footprint, and Environmental Life-Cycle Analysis*, 30 STAN. ENVLT. L.J. 3, 5–6 (2011) ("The objective of any new food eco-label program would be to achieve a broader objective of 'sustainable food' that combines many interests—lowering the carbon footprint of food at all stages (agriculture, distribution, and packaging), reducing consumption, supplying healthier food, promoting sustainable agriculture (less resource intensive and less polluting agriculture), and encouraging water and land use efficiency. Food would have to be environmentally evaluated at all stages of its life cycle from creation to disposal."); Noah Zerbe, *Moving from Bread and Water to Milk and Honey: Framing the Emergent Alternative Food Systems*, 33 HUMBOLDT J. SOC. REL. 4, 6 (2010) (explaining that some in

Just as the sustainability movement encompasses many interrelated sub-issues,[93] sustainability litigation covers a broad ambit of cases. This Section hones in on two highly visible areas of litigation where sustainability matters drive modern food litigation and have a broad industrial impact.[94] Specifically, this Article focuses on two examples: (1) challenges to the use of Concentrated Animal Feeding Operations ("CAFOs") in animal production;[95] and (2) attempts to define "natural" foods, particularly given the presence of genetically modified organisms ("GMOs").[96] Regardless of whether one believes in the goals of the sustainability movement or is skeptical of them,[97] this Section makes clear that tort litigation plays an important role in increasing the dialogue surrounding these controversial topics.

1. CAFO Litigation: Placing Food in a Food System

The CAFO paradigm of raising animals has fundamentally changed how people farm; some argue that the change places smaller farms and traditional animal husbandry techniques at peril.[98] The use of CAFOs also leads to more

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the food sustainability movements focus on "the perceived failure of conventional food systems to provide safe, quality food" while others focus on "concerns of social justice and community empowerment"). However, the sustainable foods movement has been roundly criticized as working in opposition to hunger or food security issues and exacerbating food inequality. *See* Laura Hughes, *Conceptualizing Just Food in Alternative Agrifood Initiatives*, 33 HUMBOLDT J. SOC. REL. 30, 43 (2010).

92. Andrew Martin, *Is a Food Revolution Now in Season?*, N.Y. TIMES, Mar. 21, 2009, at BU1; *All We Can Eat Archive: Sustainable Food*, WASH. POST, http://voices.washingtonpost.com/all-we-can-eat/sustainable_food/ (last visited Dec. 2, 2014).

93. Tai, *supra* note 86, at 1072 (providing a list of sustainable food movements: the organic movement, focused on agricultural production without the use of synthetic chemicals; the local food movement, focused on consuming food grown and produced in close proximity to the consumer; the slow food movement, focused on ideals of pleasure derived from sustainably grown, produced, and prepared food; and what some call the "new American" food movement, focused on "ideals of fresh, local, seasonal, and organic cuisine").

94. For these reasons, these two areas are also the focus of scholarly attention. *Id.* at 1080.

95. The EPA defines CAFOs as those facilities containing 700 or more mature dairy cows, 2,500 swine of 55 pounds or more, and, under certain conditions, 30,000 chickens. 40 C.F.R. § 122.23(b)(2), (4)–(6) (2012).

96. GMOs are those that have "been genetically engineered to develop desirable traits sourced from other organisms." MARY JANE ANGELO ET AL., FOOD, AGRICULTURE AND ENVIRONMENTAL LAW 94 (2013).

97. John S. Applegate, *The Prometheus Principle: Using the Precautionary Principle to Harmonize the Regulation of Genetically Modified Organisms*, 9 IND. J. GLOBAL LEGAL STUD. 207, 209 (2001) (stating that opposition to GMO food products is unfounded); David Daniel, Note, *Seeds of Hope: How New Genetic Technologies May Increase Value to Farmers, Seed Companies, and the Developing World*, 36 RUTGERS COMPUTER & TECH. L.J. 250, 287–88 (2010) (arguing that GMOs will have lasting positive impacts on society).

98. The use of large industrial feedlots as a method to raise livestock is increasing in the United States. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-944,

concentrated animal waste materials.[99] Impacts on the land, water,[100] and air supplies surrounding feedlots are also more pronounced.[101] This, in turn, impacts the surrounding ecosystems, with some studies by the General Accounting Office indicating clear impacts on human health and quality of life.[102]

Suits seeking to challenge CAFOs, brought pursuant to specific environmental laws, have been limited in their ability to encompass the scope of issues that the sustainability movement seeks to address. Such environmental suits are, by definition, more outcome focused on particular types of pollution that are recognized[103] or protected[104] pursuant to statutory law.[105] These suits highlight and support the ecological-sustainability values of the sustainable-food movement, but do not address issues regarding economic and social sustainability for farmers and

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CONCENTRATED ANIMAL FEEDING OPERATIONS: EPA NEEDS MORE INFORMATION AND A CLEARLY DEFINED STRATEGY TO PROTECT AIR AND WATER QUALITY FROM POLLUTANTS OF CONCERN 15 tbl.2 (2008) [hereinafter CAFOs REPORT], http://www.gao.gov/new.items/d08944.pdf (estimating that hog CAFOs and egg-laying-chicken CAFOs increased by 37% between 1982 and 2002).

99. *See* Robert W. Adler, *Water Quality and Agriculture: Assessing Alternative Futures*, 25-SPG ENVIRONS ENVTL. L. & POL'Y J. 77, 77–83 (2002) (describing effects of agriculture on water quality); Terence J. Centner, *Establishing a Rational Basis for Regulating Animal Feeding Operations: A View of the Evidence*, 27 VT. L. REV. 115, 117–18 (2002) (citing Paul J.A. Withers & S.C. Jarvis, *Mitigation Options for Diffuse Phosphorus Loss to Water*, 14 SOIL USE & MGMT. 186, 187 (1988)).

100. Paul Stokstad, *Enforcing Environmental Law in an Unequal Market: The Case of Concentrated Animal Feeding Operations*, 15 MO. ENVTL. L. & POL'Y REV. 229, 231 (2008).

101. C. M. Williams, *CAFOs: Issues and Development of New Waste Treatment Technology*, 10 PENN ST. ENVTL. L. REV. 217, 220–33 (2002) (addressing water and air pollution issues related to CAFOs).

102. CAFOs REPORT, *supra* note 98, at 23 (noting that 27 out of 68 government-sponsored, peer-reviewed studies indicated direct and indirect adverse impacts on human health versus 7 that found no impact).

103. CAFO claims pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") require that a regulated hazardous substance (usually ammonia in these cases) has not adequately been reported or contained. 42 U.S.C. §§ 9601–9675 (2012); *see also id.* § 9603(a) (CERCLA hazardous waste reporting requirements); Sierra Club v. Seaboard Farms, Inc., 387 F.3d 1167, 1168–69 (10th Cir. 2004) (challenging CAFO on the basis of unreported ammonia emissions); Sierra Club, Inc. v. Tyson Foods, Inc., 299 F. Supp. 2d 693, 699 (W.D. Ky. 2003) (same).

104. For example, claims brought pursuant to the Clean Water Act must allege pollution to protected waters or failure to comply with mandated agency procedures and licensing issues. 33 U.S.C. §§ 1251–1387 (2012); *see, e.g.*, Waterkeeper All., Inc. v. EPA, 399 F.3d 486 (2d Cir. 2005); Ky. Waterways All. v. Johnson, 426 F. Supp. 2d 612 (W.D. Ky. 2006), *aff'd in part*, *rev'd in part*, 540 F.3d 466 (6th Cir. 2008); Minn. Ctr. for Envtl. Advocacy v. EPA, No. CIV03-5450(DWF/SRN), 2005 WL 1490331, at *1 (D. Minn. June 23, 2005).

105. Similarly, Clean Air Act claims are limited to situations where air pollution and emissions exceed authorized limits. 42 U.S.C. §§ 7401–7671q (2012); *see, e.g.*, Ass'n of Irritated Residents v. San Joaquin Valley Unified Air Pollution Control Dist., 85 Cal. Rptr. 3d 590, 594 (Ct. App. 2008); Sierra Club v. Miss. Envtl. Quality Permit Bd., 943 So. 2d 673 (Miss. 2006).

consumers, or issues regarding the ethics of animal treatment.[106] The same limitations are at play when dealing with the challenges permitted by state agencies.[107]

Tort cases have more flexibility because they grant plaintiffs the ability to define the terms of harm and redress in a more fluid and flexible context.[108] As a result, much of CAFO related common-law litigation is permeated by the idea that food is indivisible from a broader system and vision of agrarian life. Such suits move beyond statutory concerns with safety or toxicity by calling into play tort doctrines such as trespass, nuisance, and negligence.[109] These lawsuits do more than protect people or the environment from exposure to physical harm. They also support a view that traditional, smaller scale farming plays a vital role in food production.[110] Whether asserting environmental values, social sustainability arguments, or human health claims, such lawsuits push the boundaries of conventional legal understandings of food beyond thinking of food as a product. These suits are not just about unsafe meat or pollution; rather, they could challenge the broader ramifications of the CAFO system of raising livestock in massive feedlots.

Nuisance claims are particularly salient here. Unlike negligence suits that require a showing of injury traditionally conceived as physical harm, the injury in common law nuisance is typically defined as an interference with the "use and enjoyment" of property.[111] For example, in *Wendinger v. Forst Farms, Inc.*,

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106. In order to raise claims pursuant to the Clean Water Act, organizations, such as the Humane Society, have had to overcome standing claims made on the grounds that these environmental concerns were too ancillary to the animal welfare issues central to the Humane Society. Humane Soc'y v. HVFG, LLC, No. 06 CV 6829(HB), 2010 WL 1837785, at *4 (S.D.N.Y. May 18, 2010) (disagreeing and granting standing on the basis that an environmentally driven suit "further the general interests that individual members sought to vindicate in joining the association and . . . bears a reasonable connection to the association's knowledge and experience").

107. Tai, *supra* note 86, at 1113–15.

108. *Id.* at 1122 ("[T]he success of some lawsuits against CAFOs brought under common law theories demonstrates their potential to reach a broader range of values emphasized by the sustainable food movement.").

109. Lindsey v. DeGroot, 898 N.E.2d 1251, 1255–56 (Ind. Ct. App. 2009) (holding that neighbors of dairy farm had not proven criminal trespass); Simpson v. Kollasch, 749 N.W.2d 671, 672 (Iowa 2008) (holding that neighbors of two proposed hog confinement facilities did not meet the burden of proof for anticipated nuisance); Gacke v. Pork Xtra, LLC, 684 N.W.2d 168, 170–71 (Iowa 2004) (remanding for new trial to determine if neighbors of hog confinement facilities could prove nuisance); Johnson v. Knox Cnty. P'ship, 728 N.W.2d 101, 104 (Neb. 2007) (remanding to determine if nuisance to neighbors of cattle confinement facility); Barrera v. Hondo Creek Cattle Co., 132 S.W.3d 544 (Tex. Ct. App. 2004) (holding that neighbors of cattle feedlot were statutorily barred from bringing a nuisance claim against the feedlot because it was legally operated without change for more than a year before the action was brought).

110. Wendinger v. Forst Farms, Inc., 662 N.W.2d 546, 552 (Minn. Ct. App. 2003) (reviewing small family farmer's claims against their longtime neighbor who recently entered into a contract to adopt and implement large commercial feedlot practices).

111. JOHN C.P. GOLDBERG ET AL., TORT LAW RESPONSIBILITIES AND REDRESS 844 (3d ed. 2012).

plaintiffs sought injunctive and compensatory relief for odors emanating from a nearby CAFO.[112] Here, trespass claims were denied because the CAFO did not interfere with exclusive use of land; however, nuisance and negligence claims survived pretrial motions and were remanded.[113] The court reiterated that "a plaintiff who presents evidence that the defendant intentionally maintains a condition that is injurious to health, or indecent or offensive to the senses, or which obstructs free use of property, states an actionable claim in nuisance."[114]

Even where such nuisance cases are settled, the format of a tort suit versus a challenge to agency action allows for increased fluidity in subject matter and focus. In the context of a settlement, parties may balance and negotiate creative and thoughtful solutions that are not available in the federal or state agency system.[115]

2. All-Natural Food Litigation & GMOs

The presence of GMO food in the American consumer diet is pervasive.[116] Like CAFO litigation, pure GMO litigation found its initial hook by focusing on the environmental sustainability aspect of its agenda through the use of statutory law. Successful examples include challenges for failure to comply with agency procedures, such as those pursuant to the National Environmental Policy Act,[117] and requiring an environmental impact statement for "major federal actions significantly affecting the quality of the human environment."[118] Other cases have stalled the use of GMO seeds on the basis that agencies improperly failed to

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112. 662 N.W.2d at 549.

113. *Id.* at 554–55.

114. *Id.* at 552. It is worth noting that in Minnesota the common law standard for nuisance has been codified as "[a]nything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." MINN. STAT. § 561.01 (2002).

115. Sierra Club v. Wayne Weber LLC, 689 N.W.2d 696, 699 (Iowa 2004) (concluding in a mediated settlement agreement between Sierra Club and hog CAFO to create filtration systems and buffers around CAFO land). Although they did not ultimately include food justice or animal welfare concerns in the settlement, they were free to do so. Neuse River Found., Inc. v. Smithfield Foods, Inc., 574 S.E.2d 48, 50–51 (N.C. Ct. App. 2002) (dismissing claims brought by local river nonprofits against CAFOs for failure to articulate an individualized claim).

116. Some have estimated that over 70% of food sold on grocery store shelves in the United States contains GMO components. Gregory N. Mandel, *Gaps, Inexperience, Inconsistencies, and Overlaps: Crisis in the Regulation of Genetically Modified Plants and Animals*, 45 WM. & MARY L. REV. 2167, 2177 (2004).

117. But note they have had more success challenging the agency action of APHIS than the FDA. Ctr. for Food Safety v. Johanns, 451 F. Supp. 2d 1165, 1181–83 (D. Haw. 2006) (finding a NEPA violation in APHIS action); *see also* Ctr. for Food Safety v. Vilsack, No. C 08-00484 JSW, 2009 WL 3047227, at *9 (N.D. Cal. Sept. 21, 2009), *partially overruled by* 734 F. Supp. 2d 948, 954–55 (N.D. Cal. 2010) (holding that the injunction issued by the district court in 2009 could not be sustained in light of the Supreme Court's decision in Monsanto v. Geertson Seed Farms, 130 S. Ct. 2743 (2010)). *But see* All. for Bio-Integrity v. Shalala, 116 F. Supp. 2d 166, 170 (D.D.C. 2000) (refusing to recognize as a NEPA violation the FDA's unwillingness to label GMO foods as food additives).

118. 42 U.S.C. § 4332(2)(C) (2012).

conduct studies mandated under the Endangered Species or the Plant Protection Act.[119]

The food wars have moved beyond these statute-based claims. By articulating tort claims of misrepresentation and fraud, numerous cases contesting the use of GMOs and their labeling have been filed and adjudicated.[120] These suits are not safety based[121] but take the view that consumers have a right to know if GMO products are in their foods so that they can make informed choices about what type of foods and food systems they are supporting.[122] The issue of dignitary harm has also arisen in the GMO context.[123] Often GMO disputes arise in the context of "natural" food litigation. Lawsuits challenging the use of the term "all natural" focus on a consumer's right to choose natural foods, and the harm that is articulated in these claims is predominately dignitary and economic, not physical.[124] The concern that GMO seed will eliminate genetic variety is not one grounded not in concerns over human safety in any immediate sense;[125] rather, it is

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119. Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012); *Johanns*, 451 F. Supp. 2d at 1181–83.

120. *See, e.g.*, Ault v. J.M. Smucker Co., No. 13 CIV. 3409(PAC), 2014 WL 1998235 (S.D.N.Y. May 15, 2014) (alleging that Crisco Oil derived from GMO soybeans, rapeseeds, and corn is not accurately described as "all natural"); Bohac v. General Mills, Inc., No. 12-cv-05280-WHO, 2014 WL 1266848 (N.D. Cal. Mar. 26, 2014) (concluding that the presence of GMO ingredients amongst others negates accurate "all natural" labeling); Rojas v. General Mills, Inc., No. 12-cv-05099-WHO, 2013 WL 5568389 (N.D. Cal. Oct. 9, 2013) (alleging General Mills deceptively and misleadingly marketed their products as "all natural" because they contain GMOs); In re Frito-Lay, No. 12-MD-2413 (RRM)(RLM), 2013 WL 4647512 (E.D.N.Y. Aug. 29, 2013) (alleging Frito-Lay fraudulently marketed products as "all natural" when the products contained GMOs); Cox v. Gruma Corp., No. 12-CV-6502 YGR, 2013 WL 3828800 (N.D. Cal. July 11, 2013) (referring decision to the FDA to determine if plaintiff's argument that because defendant's products contain GMOs, the labels indicating that the products are "all natural" are misleading and false).

121. That said, some studies indicate that GMO products may have direct adverse impact to human health. WORLD HEALTH ORG., MODERN FOOD BIOTECHNOLOGY, HUMAN HEALTH AND DEVELOPMENT: AN EVIDENCE-BASED STUDY 12–19 (2005) [hereinafter WHO STUDY], http://www.who.int/foodsafety/publications/biotech/biotech_en.pdf (discussing potential allergen issues, gene instability, and toxicity).

122. Like CAFOs, the impact of GMOs is somewhat unclear and contested. Scott D. Deatherage, *Scientific Uncertainty in Regulating Deliberate Release of Genetically Engineered Organisms: Substantive Judicial Review and Institutional Alternatives*, 11 HARV. ENVTL. L. REV. 203, 210–11 (1987) (describing how the complexity of ecosystems creates difficulties for evaluating the effects of GMOs prior to their release into the environment).

123. In *Alliance for Bio-Integrity v. Shalala*, the court rejected the plaintiffs' argument that the FDA's policy statement, which failed to label GMOs as food additives, violated the Religious Freedom Restoration Act by burdening a person's exercise of free religion to avoid such foods. 116 F. Supp. 2d 166, 180–81 (D.D.C. 2000).

124. "All natural" claims are often intimately tied to suits directly seeking GMO labeling since many of these cases argue that the presence of GMOs in a product render it not "natural." *See supra* note 120 and accompanying text.

125. Due in part to market-driven incentives to adopt GMO seed, but also because of the natural cross-pollination that occurs amongst plants, there is a genuine concern over

one grounded in how food is produced:[126] a concern over altering ecosystems moving forward[127] and altering the process of growing food.[128]

D. Battleground 3: Food as Self, Person, and Personhood

Food litigation also seeks to acknowledge food's relevance beyond its nutritional or chemical value. These cases seek redress based on the cultural, dignitary, and political meaning of food. Food may be tainted, abhorrent, or offensive because it conflicts with religious beliefs or because of the political or ethical ramifications that its consumption entails. Cases involving the moral and spiritual value of food reveal a gap in the legal redress for harms grounded in claims to personal autonomy rather than physical violence to the body. They posit the question: As a society, are we comfortable with the idea that individuals have no redress when a food producer/manufacturer exposes them to foods that they find ethically, religiously, culturally, or politically repugnant? Litigation of these claims reveals a new and different plane where food has powerful meaning, but the law does not currently provide corresponding redress.[129]

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biodiversity and the ability to maintain non-GMO seed varieties. Currently, studies have shown gene flow to be relatively limited, but as GMO products include more crops, particularly those known to propagate well in conjunction with wild varieties, this is likely to change. Miguel Altieri, *The Ecological Impacts of Transgenic Crops on Ecosystem Health*, 6 ECOSYSTEM HEALTH 13, 15 (2000) (noting that increased vulnerability to pests and pathogens and thus an increased risk of crop failure are a byproduct of the monoculture of certain crops); COMM. ON THE IMPACT OF BIOTECHNOLOGY ON FARM-LEVEL ECON. AND SUSTAINABILITY ET AL., THE IMPACT OF GENETICALLY ENGINEERED CROPS ON FARM SUSTAINABILITY IN THE UNITED STATES 3 (2010).

126. *See* Tai, *supra* note 86, at 1090 ("GMO-related lawsuits also present a window into the interface between the sustainable food movement's values and the ability of litigation to interject these values into legal decisions.").

127. Given that GMO seeds are often engineered to produce infertile plants and that climate variability would indicate a need for the flexibility that accompanies biodiversity, there is a concern that the prevalence of GMO seeds on a systemic level will undermine nontargeted species of plants and animals and potentially alter seed and food production moving forward. Such GMOs are colloquially known as "terminator" seeds. *See* Richard Caplan, Note, *The Ongoing Debate over Terminator Technology*, 19 GEO. INT'L ENVTL. L. REV. 751 (2007) (discussing attempts to commercialize the use of sterile seed technology); *see also*, George Van Cleve, *Regulating Environmental and Safety Hazards of Agricultural Biotechnology for a Sustainable World*, 9 WASH. U. J.L. & POL'Y 245, 259–67 (2002) (describing a range of concerns raised by the use of GMOs in agriculture).

128. ANGELO ET AL., *supra* note 96, at 98–99 (outlining various concerns, ranging from increased insect and plant resistance, to decreases in genetic diversity and adverse impacts on nontarget living things, such as insects and animals).

129. One significant exception to this general rule is in the prison context where under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") prisoners have a cause of action against the state for failure to provide religiously appropriate food. Pub. L. 106–274, 114 Stat. 803 (codified as amended at 42 U.S.C. §§ 2000cc to –5) ("No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of

1. Food Choice and Individual Identity

One strand of cases that pushes beyond existing conceptions of food law are cases asserting an expressive quality to food choice. Arguably, all cases regarding misrepresentation seek to vindicate dignitary rights and protect the ability to make informed, autonomous decisions. However, these cases tease out in more detail the religious and moral implications of food consumption for personal identity.[130] The "raw foods" movement in particular voices its concern predominately as a liberty interest.[131] Religious food cases point out how the currently heavy focus of the legal system on safety overlooks the spiritual meaning behind food systems and products.[132]

For example, in a recent case, Syeda F. Lateef, a Muslim woman, purchased "Nature Made" vitamins after carefully reading the label to check for pork products.[133] Finding no indication on the label of the use of any animal

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the burden on that person (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").

130. While this Article focuses on how this issue is brought to light in common law and statutory tort cases, such claims also manifest in constitutional terms as well. For example, although government involvement in oversight of the commercial use of terms like "kosher" has been upheld by the Supreme Court since the 1920s, many lawsuits since have challenged such state statutes on First and Fourteenth Amendment grounds with little lasting success. Hygrade Provision Co. v. Sherman, 266 U.S. 497, 502 (1925) (upholding a New York statute allowing criminal prosecution for false representation of meats as kosher after finding it did not violate Due Process and Equal Protection under the Fourteenth Amendment); Commack Self-Serv. Kosher Meats, Inc. v. Hooker, 680 F.3d 194, 214 (2d Cir. 2012) (dismissing claims that a New York statute imposed vague requirements for food labeled as kosher, violating the Establishment Clause, Free Exercise, and Due Process); Erlich v. Mun. Court of Beverly Hills Judicial Dist., 360 P.2d 334 (Cal. 1961) (rejecting criminal defendant's appeal of conviction, reasoning that the statute prohibiting false representation of meat as kosher is not unconstitutional); Sossin Sys., Inc. v. City of Miami Beach, 262 So. 2d 28, 29–30 (Fla. Dist. Ct. App. 1972) (rejecting the argument that criminal laws regarding misrepresentation of kosher foods interfered with Free Exercise).

131. Farm-to-Consumer Legal Def. Fund v. Sebelius, 734 F. Supp. 2d 668, 678 (N.D. Iowa 2010) (arguing that prohibition of transporting raw milk across state lines deprives citizens of the "fundamental and inalienable rights . . . ; to travel . . . ; provide for the care and well-being of themselves and their families . . . ; [and] to produce, obtain, and consume the foods of choice for themselves and their families."); Peter Smith, *Mythology and the Raw Milk Movement*, SMITHSONIAN.COM (May 9, 2012), http://www.smithsonianmag.com/arts-culture/mythology-and-the-raw-milk-movement-84299903/?no-ist (explaining that some libertarians view the consumption of raw milk and the broader fight against food regulation as "a symbol of freedom").

132. Lopez v. Wendy's Int'l, Inc., No. 5:12 CV 1412, 2012 WL 5271747 (N.D. Ohio Oct. 23, 2012) (alleging misrepresentation when a Muslim ate a chicken sandwich containing bacon after a Wendy's employee neglected to recite bacon among the ingredients); Cofield v. McDonald's Corp., 514 So. 2d 953 (Ala. 1987) (dismissing claims by a Muslim plaintiff who alleged negligence, wantonness, and fraud where McDonald's failed to disclose its use of animals fats in frying); *Erlich*, 360 P.2d at 553 (alleging the sale of a nonkosher chicken as kosher).

133. Lateef v. Pharmavite LLC, No. 12 C 5611, 2013 WL 1499029 (N.D. Ill. Apr. 10, 2013).

byproducts, she purchased the vitamin tablets with the understanding that they would not clash with her religious beliefs.[134] After learning that the vitamins she purchased were cased in gelatin—an animal byproduct—Ms. Lateef alleged fraud, misrepresentation under state tort statutes, breach of express warranty, and unjust enrichment.[135]

In this case, "Nature Made" made specific representations to consumers regarding the "transparency" of the contents of their products.[136] The court initially dismissed the case on standing grounds and as preempted by the Nutritional Labeling and Education Act ("NLEA"), which exempts ingredients that have "no technical or functional effect" from labeling.[137] Because this legal structure did not adequately account for the cultural meaning of food, the plaintiff's choices were limited. Upon rehearing of the amended complaint, the court again dismissed pursuant to 12(b)(6). In doing so, it interpreted statements made by the vitamin supplier regarding: transparency, the importance that consumers can "trust what they are putting into their body," and the vegetarian nature of their vitamins, as "not actionable because they contain[ed] no assertion of fact concerning the presence or absence of gelatin in its dietary supplements."[138]

Recent cases challenging the purity of meat in terms of meeting kosher rules or containing pork[139] did not focus their claims on religious meaning.[140] Instead, a 2007 class action complaint against Vienna Beef for representing that their products as "all beef" when they included a pork casing alleged misrepresentation and fraud, unjust enrichment, and contractual breach of warranty.[141] This case never addressed religion directly or why pork casings were a source of particular concern for these plaintiffs.[142]

In the most recent iteration of such challenges, the plaintiffs made an explicitly secular argument to uphold a previously identity-driven designation: the labeling of a food as "kosher."[143] In *Wallace*, a class of plaintiffs representing all buyers of Hebrew National franks in the United States claimed that Hebrew

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134. *Id.* at *1.

135. *Id.* at *2.

136. *Id.* at *1–2 (noting that the pharmaceutical company made the following statement on their website: "We make sure consumers can trust what they're putting into their body. . . . We are making a new commitment to you on the transparency and openness of our decisions . . . . We know that the first key step is communicating more of our choices and actions regarding our products publicly, including potentially complex but important details of our products").

137. 21 C.F.R. § 101.100; *Lateef*, 2013 WL 1499029, at *4.

138. *Lateef*, 2013 WL 1499029, at *4–5.

139. Pork is a particularly problematic meat in religious terms for observant Jews and Muslims. PAMELA G KITTLER ET AL., FOOD & CULTURE 74–75, 85–86 (6th ed. 2012) (listing pork amongst the prohibited foods in the Jewish and Muslim faiths).

140. Wallace v. ConAgra Foods, Inc., 747 F.3d 1025 (8th Cir. 2014); Gershengorin v. Vienna Beef, Ltd., 06 C 6820, 2007 WL 2840476 (N.D. Ill. Sept. 28, 2007), *dismissed without prejudice*, 2008 WL 751636 (N.D. Ill. Feb. 27, 2008).

141. *Gershengorin*, 2007 WL 2840476.

142. *Id.*; *Gershengorin*, 2008 WL 751636.

143. *Wallace*, 747 F.3d at 1027.

National franks were not "100% Kosher" as indicated on their label. The plaintiffs did so without claiming a religious injury.[144] Instead, the class action made negligence and fraud claims—as well as other contract claims—based on the idea that consumers who seek purer food use "Kosher" as a demarcation for "a promise of food purity amid other products full of artificial ingredients."[145]

Other cases are less equivocating about the identity component of the suit. Class actions that were filed and then settled against McDonald's alleged fraud in the sale of french fries that contained beef fat.[146] They were articulated in terms of a religious and spiritual commitment to being vegetarian or not eating beef.[147] The master settlement in these cases reflects this ideological motivation by class representatives, as it consisted of a public apology, a donation of $10 million to vegetarian and religious groups, as well as small payments to class representatives and lawyer's fees.[148]

In *Karian v. Fajitas and 'Ritas Restaurant*, the plaintiff spends a fourth of the complaint outlining his identity as an American Hindu and vegan—an identity that, as the plaintiff declared, served "an integral part of my personality, at the center of my life."[149] In the complaint, Karian explains that the restaurant assured him that his meal was vegan.[150] However, later he learned that it contained meat products.[151] The complaint goes on to ask:

> Are we veggies so marginal that we can be lied to . . . with immunity . . . are we so little regarded that our sensibilities can be so routinely trivialized and trampled? I seek damages so that no other restaurant customer is treated in this sort of shabby manner ever again in our city or state.[152]

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144. *Id.* at 1030 (while this formulation artfully includes religious objectors, it also includes a broader swath of people who seek additive-free foods.).

145. *Id.* at 1027. Although this is not a claim of religious identity, these can still be interpreted as claims about interest in not just food as a product, or in terms of safety, but as a process—at minimum a sustainability argument. *See id.* at 1028–30.

146. *McDonald's to Settle Suits on Beef Tallow in French Fries*, N.Y. TIMES, Mar. 9, 2002, at A11 [hereinafter *McDonald's to Settle*] (reporting lawsuits in Washington, Illinois, California, New Jersey, and Texas).

147. *Id.*; *Vegetarians' Suit Hits McDonald's French Fries*, CHI. TRIB., May 4, 2001, at 3 (reporting on a class action filed in Kings County, Seattle by a Hindu and vegetarian plaintiff).

148. *McDonald's to Settle*, *supra* note 146 (reporting that McDonald's master settlement agreement included $10 million to vegetarian, Hindu, and Sikh organizations; lawyer's fees; $4,000 to each class representative; and a public apology); *Beefing up Its Fries Will Cost Fast-Food Giant $12.4M: A Victory for Veggies*, EDMONTON J., Mar. 10, 2002, at A3.

149. Complaint at ¶ (b), Karian v. Fajitas & 'Ritas Rest., Civ. No. 140857G (Sup. Ct. Ma. Mar. 13, 2014).

150. *Id.* at ¶ (c).

151. *Id.* at ¶ (d).

152. *Id.* at ¶ (e).

2. Ethical Food Production: Free Trade, Animal Husbandry, and Sustainability

Food lawsuits also draw attention to other ethical and political implications of food production.[153] Developing the idea that food is part of a system that can either be sustainable or not, some lawsuits draw specific attention to the moral aspects involved in how livestock is raised.[154] While there are public health and environmental concerns implicated in mass farming techniques,[155] these suits are equally about having the right as individuals to exercise moral judgment in the consumer arena.[156] Here, the suits over misrepresentation are not grounded in vindication of a physical harm or a violation of personal safety, but in defending a set of core beliefs about how to ethically and sustainably raise food.

III. A PLACE AT THE TABLE: TORT LITIGATION AND INTERCHANGE WITH AGENCIES & LAWMAKERS

One of the most critical roles that tort claims play, particularly in food regulation, is as an adversary and companion to the regulatory state. Tort and the administrative state have long coexisted in a mutually reinforcing dialectic—where one system moves and the other system often reacts.[157] As such, tort litigation functions as an additional input into the administrative legal apparatus, thereby increasing public influence over and access to delegated power. The previous Section of this Article illustrated how food litigation expands substantive legal conceptions of food. This Section examines how such broadened understandings interact with government institutions and existing law to alter policy.

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153. Humane Methods of Slaughter Act (HMSA) of 1958 required that the government purchase only livestock that had been slaughtered humanely, but did not directly require it of the industry. By the late 1970s this was amended in the Food Meat Inspection Act to require that all meat for human consumption satisfy these basic slaughter requirements. 7 U.S.C. §§ 1901–1907 (2012); FLA. STAT. ANN. §§ 828.22, 24 (West 2006); 510 ILL. COMP. STAT. ANN. 75/3 (West 2004). These acts do not set conditions for confinement.

154. Animal Legal Def. Fund v. Hudson Valley Foie Gras LLC, 939 F. Supp. 2d 992 (N.D. Cal. 2013) (alleging defendant falsely advertised its foie gras as "the humane choice"); Hemy v. Perdue Farms, Inc., No. 11-888 (FLW), 2011 WL 6002463, at *2 (D. N.J. Nov. 30, 2011) (alleging defendants used meaningless and misleading "cage free" labels given the conditions of confinement).

155. *See supra*, Section II.C.2 (discussing CAFOs).

156. *Hemy*, 2011 WL 6002463, at *2 (alleging defendants used meaningless and misleading "cage free" labels given the conditions of confinement).

157. A classic example of this is the rise of workers' compensations systems which emerged in the Progressive Era in response to tort's failure to provide redress for industrial injuries; the rise of auto no-fault is another example. *See* Rabin, *supra* note 7, at 245–47 (noting that "much of the regulatory legislation in both periods can be viewed as either complementing or responding to the inadequacies of tort litigation); Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 65–67 (1967).

A. Preemption: An Administrative Shield

The legal symbiosis between lawsuits, legislators, and administrative agencies is made dynamic by regulatory preemption.[158] Currently, preemption is a key battleground where federal agencies have sought to control the legal conversation by preempting state law causes of action, particularly common law and statutory torts.[159] Regulatory preemption, in its most simplified encapsulation, uses the Supremacy Clause to limit tort claims that conflict with federal statutory or regulatory authority.[160] Most preemption cases involve express preemption provisions in regulatory legislation.[161] However, courts increasingly recognize implied preemption in light of recent Supreme Court opinions indicating a growing deference to agency interpretation of the preemptive nature of statutes.[162]

In the area of food litigation, preemption is often invoked successfully as a defense to misrepresentation claims, particularly those involving labeling.[163] The FDCA prohibits the misbranding of food and drink.[164] In 1990, Congress added an express preemption provision to the FDCA—through the NLEA—that states that a "State or political subdivision of a State" is barred from establishing requirements that are of the type but "not identical to" the requirements in a significant subset of the misbranding provisions of the FDCA.[165] The FDCA bans the distribution of misbranded foods and provides that a food is misbranded when its labeling is

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158. Preemption is whether state law is invalidated by the presence of a conflicting federal statute, or in some instances, federal agency action. *See* Wyeth v. Levine, 555 U.S. 555, 563 (2009); Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 228–29 (2007).

159. *See generally* Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 523–26 (2012).

160. *See, e.g.*, Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008) ("[T]he scope of a statute's preemptive effect is guided by the rule that '[t]he purpose of Congress is the ultimate touchstone' in every preemption case.'").

161. Rabin, *supra* note 7, at 250.

162. *See* Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000).

163. Carrea v. Dreyer's Grand Ice Cream, Inc., 475 F. App'x 113, 115 (9th Cir. 2012) (claims regarding the "0g Trans Fat" statement located on the front of the packaging are expressly preempted because "the Nutrition Facts panel must express [the trans fat] amount as zero," and "the same rule applies to the statement on the front of [the] packaging"); Barnes v. Campbell Soup Co., No. C 12-05185, 2013 WL 5530017, at *5 (N.D. Cal. July 25, 2013) ("100% Natural" chicken soup claims preempted where label was pre-approved by USDA and FSIS); Astiana v. Hain Celestial Grp., Inc., 905 F. Supp. 2d 1013 (N.D. Cal. 2012) (dismissing UCL, FAL, and CLRA claims challenging "natural" labeling on cosmetics based on primary jurisdiction) *rev'd*, 783 F.3d 753 (9th Cir. 2015); Lam v. Gen. Mills, Inc., 859 F. Supp. 2d 1097, 1101–03 (N.D. Cal. 2012) (preempting claims arising from labeling of ingredients); Young v. Johnson & Johnson, No. 11-4580, 2012 WL 1372286, at *5 n.6 (D. N.J. Apr. 19, 2012) (claims challenging "No Trans Fat" and "No Trans Fatty Acids" are expressly preempted, even though they appeared outside the Nutrition Fact box because "FDA regulations provide that the same nutritional content claims authorized in the Nutrition Fact box can be repeated outside of that box and are subject to the same rules"), *aff'd*, 525 F. App'x 179 (3d Cir. 2013).

164. 21 U.S.C. §§ 321(f), 331(b), 343.

165. *Id.* § 343–1(a).

"false or misleading in any particular . . . or material respect."[166] The FDCA also bars private-party enforcement of the Act itself.[167]

Courts have similarly shown increased willingness to recognize implied preemption through agency action. Thus far, where the FDA has promulgated specific rules regarding labeling requirements, such as when and how trans fats[168] or fiber must appear on a label,[169] preemption arguments have been successful at limiting suits seeking additional disclosure or the inclusion of additional information.[170]

However, preemption arguments are not without limits. The strength of broad, generalizable claims of preemption to bar the availability of common law torts claims was successfully challenged in *Wyeth v. Levine*.[171] In that case, the plaintiff brought common law negligence and strict liability claims against a drug manufacturer for failure to warn her of adverse side effects.[172] The Supreme Court refused to preempt the common law tort claims, despite detailed regulations regarding the required contents of a drug label.[173] Instead, the Court held that Congress did not expressly intend for the FDCA to preempt all state common law tort claims.[174] The Court elaborated that, with respect to prescription drugs, state

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166. *Id.* § 343(a).

167. *Id.* § 337; Brinkman v. Shiley, Inc., 732 F. Supp. 33 (M.D. Pa. 1989), *aff'd*, 902 F.2d 1558 (3d Cir.1989).

168. The FDA has required products entering interstate commerce on or after January 1, 2006, to label their trans-fat content. *Trans Fat Now Listed With Saturated Fat and Cholesterol*, U.S. FOOD & DRUG ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.fda.gov/food/ingredientspackaginglabeling/labelingnutrition/ucm274590.htm (last updated Dec. 17, 2013). Finalizing preliminary 2013 regulations on June 16, 2015, the FDA indicated that it no longer considers trans fats a "generally recognized as safe" food and will require it to be phased out of the general domestic food supply by 2018. *See FDA Cuts Trans Fat in Processed Foods*, U.S. FOOD & DRUG ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm372915.htm (last updated June 16, 2015).

169. Trek v. Gen. Mills, Inc., 662 F.3d 423, 426–27 (7th Cir. 2011) (dismissing on preemption grounds the argument that the fiber content of snack bars was misleading because it failed to differentiate between natural and non-natural sources of fiber); Bronson v. Johnson & Johnson, Inc., No. C 12-04184 CRB, 2013 WL 1629191, at *3 (N.D. Cal. Apr. 16, 2013) (dismissing claims that an artificial sweetener was misbranded when it failed to designate that fiber and antioxidant content was synthetically derived, reasoning that the FDCA did not require such labeling).

170. Suits regarding the disclosure of fats or trans fats have often fallen to preemption arguments, as the FDA has explicitly stated that foods containing less than half a gram of trans fats per serving may be labeled as "zero trans-fat" despite some trans fat content. *See, e.g.*, Young v. Johnson & Johnson, 525 Fed. App'x 179, 182–83 (3d Cir. 2013) (upholding dismissal of a proposed class action on basis of preemption); Carrea v. Dreyer's Grand Ice Cream, Inc., 475 Fed. App'x 113 (9th Cir. 2012) (dismissing claims that labels indicating no trans fats were misleading, because they complied with FDA trans fat labeling requirements).

171. 555 U.S. 555, 559 (2009).

172. *Id.*

173. *Id.* at 595.

174. *Id.* at 574–75

tort law claims offer an additional, important layer of consumer protection that complements, and does not obstruct, FDA regulation. [175]

The judicial arena responded accordingly by limiting the scope of preemption arguments. Realizing that federal regulation of the food and drug industry can provide a floor rather than a ceiling to consumer protection, courts considering food-related claims have been willing to construe state laws in such a way to avoid conflict with federal law.[176] Likewise, where FDA guidance is vague or generally defined, preemption arguments have held less sway.[177] For example, the FDA has promulgated no formal regulations regarding the term "natural," and old guidance from the early 1990's only states that in order to qualify as natural: "nothing artificial or synthetic [may be] included in, or . . . added to, a food that would not normally be expected to be in the food."[178] Predictably, courts have been less willing to preempt other causes of action in relation to these terms.[179]

Some tort scholars argue persuasively that tort law owes no preemptive deference to rules and regulations promulgated before evidence of a new risk came to light because those rules clearly did not contemplate the risk now being assessed by the court.[180] Under this understanding, cases that reject mislabeling claims for non-safety related reasons could be immune from preemption arguments because the risks and harms that they articulate were outside of the ambit of what the law considered relevant. This interpretation has not been honored consistently by the courts.[181] Rather, the use of preemption has often been a successful defense.[182]

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175. *Id.* at 579.

176. Brazil v. Dole Food Co., 935 F. Supp. 2d 947, 956–57 (N.D. Cal. 2013) (noting that California's Sherman Food, Drug, and Cosmetic Act does not preempt federal law because it has adopted identical requirements); In re Simply Orange Juice Mktg. & Sales Practice Litig., No. 4:12-MD-02361, 2013 WL 781785, at *2 (W.D. Mo. Mar. 1, 2013) (finding that "the provisions and legislative history of [the Act] contradict any suggestion of congressional intent to broadly preempt consumer protection laws"); Stewart v. Smart Balance, No. 11-6167 (JLL) , 2012 WL 4168584, at *6 (D. N.J. June 25, 2012) (involving the "fat free" labeling on dairy products, and finding that claims brought under New Jersey consumer fraud statutes that barred "fraudulent" or "deceptive" practices were not preempted).

177. *E.g.*, Holk v. Snapple Beverage Corp., 575 F.3d 329, 340 (3d Cir. 2009) (holding that FDA regulations do not preempt certain claims based on "natural" marketing).

178. Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. 2302–01, 2407 (Jan. 6, 1993) (to be codified at 21 C.F.R. pts. 5, 101). There is no direct guidance on what constitutes artificial or synthetic food.

179. *See* Ham v. Hain Celestial Grp., Inc., 70 F. Supp. 3d 1188 (N.D. Cal. 2014) (rejecting preemption arguments in relation to "all-natural" claims); Dye v. Bodacious Food Co., No. 14-cv-80627, 2014 U.S. Dist. LEXIS 180826 (S.D. Fla. Sept. 9, 2014) (same).

180. Rabin, *supra* note 7, at 252.

181. *See* Guerrero v. Target Corp., 889 F. Supp. 2d 1348, 1361–62 (S.D. Fla. 2012) (stating federal law does not preempt Florida "honey standard" because there is no federal standard for honey). *But see* Pere v. Walgreen Co., 939 F. Supp. 2d 1026, 1040 (C.D. Cal. Sept. 11, 2013) (holding that the California honey standard is expressly preempted by federal legislation despite the fact that the NELA details no federal standard for honey).

B. Battleground 1 Revisited: Food Litigation, Health, and Safety

Health related cases have fared best in galvanizing local government's, legislative and administrative bodies into policy reform. Because food law has a long history of being health and safety oriented, examining long-term health issues dovetail with existing institutional structures more easily allow them to gain traction.

For example, after the fast food obesity litigation of the early 2000s, a rash of municipal and state level legislation and rulemaking followed. Local governments began by requiring visibly displayed calorie counts on menus.[183] New York City passed soda regulations that limited the sale of extra-large caloric beverages.[184] These "soda bans," in turn, were challenged in the courts.[185] On the federal level, statutory law mirrored these local trends by adopting menu-labeling requirements.at chain restaurants, and implementing the statute through FDA regulations.[186] Most recently, the FDA has taken the step of modifying general nutrition labeling to highlight total calories and serving sizes to mirror consumer consumption norms.[187] Similarly, state legislators considered banning the use of trans fats.[188] Increased discussions surrounding trans fats led to the labeling of

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182. Lateef v. Pharmavite LLC, No. 12 C 5611, 2013 WL 1499029, at *4 (N.D. Ill. Apr. 10, 2013) (rejecting as preempted plaintiff's claims that the omission of gelatin (pork product) from vitamin labels was misleading, despite no evidence that the FDA or Congress considered this issue when creating labeling regulations).

183. Alana Sivin, *Striking the Soda Ban: The Judicial Paralysis on the Department of Health*, 28 J.L. & HEALTH 247, 249 (2015).

184. The New York City Board of Health "approved a ban on the sale of large sodas and other sugary drinks at restaurants, street carts and movie theaters." N.Y.C. Dep't of Health & Mental Hygiene, Bd. of Health, Notice of Adoption of an Amendment (§ 81.53) to Article 81 of the New York City Health Code (July 24, 2012), http://www.nyc.gov/html/doh/downloads/pdf/notice/2012/amend-food-establishments.pdf.

185. *E.g.*, N.Y. Statewide Coal. of Hispanic Chamber of Commerce v. N.Y.C Dep't of Health & Mental Hygiene, 23 N.Y.3d 681 (2014) (challenging "soda bans" on state constitutional grounds).

186. Section 4205 of the Patient Protection and Affordable Care Act of 2010 ("Affordable Care Act"), which was signed into law on March 23, 2010, establishes requirements for nutrition labeling of standard menu items for chain restaurants, similar retail food establishments, and chain vending machine operators which includes calories counts. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4205(b)(H)(ii), 124 Stat. 119, 573 (2010) (codified at 21 U.S.C. § 343(q)(5) (2012)), http://www.gpo.gov/fdsys/pkg/BILLS-111hr3590enr/pdf/BILLS-111hr3590enr.pdf; *see also* 21 C.F.R. §§ 11, 101 (2015) (Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments; Final Rule).

187. For the first time in 20 years, the FDA is significantly overhauling required federal nutrition labels. *Proposed Changes to the Nutrition Facts Label*, U.S. FOOD & DRUG ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.fda.gov/food/guidanceregulation/guidancedocumentsregulatoryinformation/labelingnutrition/ucm385663.htm#Summary (last updated Sept. 14, 2015) (displaying mock new calories labels with clearly demarcated total calories along with revised portion sizes).

188. Legislatures have also responded to trans-fat litigation by enacting laws that outlaw trans fats in various contexts. Michael Booth, *Colorado Trans-fat Bill Jumps on Anti-Obesity Bandwagon*, DENVER POST: DAILY DOSE (June 7, 2012),

trans fats and preliminary rules regarding their safety in 2013.[189] Recently, these findings were finalized as federal agency action eliminated trans fats from the lists of foods "generally recognized as safe" for public consumption.[190]

Legislatures also respond to cases like the McDonald's suits (but at the opposite end of the political spectrum). Colloquially known as "cheeseburger laws," this legislation limits the availability of tort remedies for obesity and health-related lawsuits against food producers and fast food restaurants.[191] Federal attempts to pass such laws failed.[192] However, over 20 states in the United States have adopted such legislation since the obesity lawsuits of the early 2000s.[193] A form of targeted tort reform, cheeseburger laws bar tort causes of action arising from the consumption of prepared food manufacturers.[194] Despite the fact that no lawsuit has been successful in extracting an adverse judgment from a fast food company for obesity-related claims, state legislatures remain active in passing such bills in response to shifting public opinion and ongoing obesity concerns.[195]

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http://blogs.denverpost.com/health/2012/06/07/colorado-trans-fat-bill-jumps-antiobesity-bandwagon/993/ (reporting that Colorado narrowly passed a law banning trans fats in schools).

189. News Release, *FDA Takes Step to Further Reduce Tran Fat in Processed Food*, U.S. FOOD & DRUG ADMIN., (Nov. 7, 2013), http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm373939.htm.

190. *FDA Cuts Trans Fat in Processed Foods*, U.S. FOOD & DRUG ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS. (June 6, 2015), http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm372915.htm.

191. Carl Hulse, *Vote in House Offers a Shield in Obesity Suits*, N.Y. TIMES, Mar. 11, 2004, at A1 (explaining that the Personal Responsibility in Food Consumption Act "has become known on Capitol Hill as the cheeseburger bill").

192. Personal Responsibility in Food Consumption Act of 2005, H.R. REP. NO. 554, 109th Cong. (2005); Personal Responsibility in Food Consumption Act, H.R. REP. NO. 339, 108th Cong. (2004).

193. Matthew Deluca, *NC Gov Signs Bill to Protect Fast Food from Lawsuits & Soda Bans*, DIGITAL J. (Aug. 1, 2013), http://www.digitaljournal.com/article/355677 (discussing the governor of North Carolina signing the Common Sense Consumption Act into law in 2013).

194. Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501, 1510 (2009) (noting that "between 2000 and 2005, at least thirteen states—including Arizona, Colorado, Georgia, Florida, Idaho, Illinois, Louisiana, Michigan, Missouri, South Dakota, Tennessee, Utah, and Washington—enacted statutes that exempt completely from civil liability manufacturers, marketers, distributors, advertisers, sellers, and suppliers of food and beverages for claims based on obesity, weight gain, or health conditions relating to consumption of these products").

195. For example, in 2012, the Alabama State Legislature passed the Commonsense Consumption Act, which prohibits lawsuits "based on claims arising out of weight gain, obesity, a health condition associated with weight gain or obesity, or other generally known condition allegedly caused by or allegedly likely to result from long-term consumption of food," brought against "packers, distributors, carriers, holders, sellers, marketers, or advertisers of food products that comply with applicable statutory and regulatory requirements." Commonsense Consumption Act, H.B. 242, 2012 Reg. Sess. (Ala. 2012) (codified as amended at Ala. Code §§ 6-5-730–736); *see also* Greg Ryan, *Wary of Litigation, States Keep Cheeseburger Bills on Menu*, LAW360 (Aug. 5, 2013),

Suits arising from the use and misrepresentation of "evaporated cane juice" also illustrate how the interaction between the tort and regulatory processes has moved food policy towards long-term health issues and away from single-incident safety. Evaporated cane juice is not a toxin or additive—rather, it is a form of sugar. In 2009, the FDA issued draft guidance on the term, stating: "the term 'evaporated cane juice' is not the common or usual name of any type of sweetener, including dried cane syrup."[196] The draft guidance document went on to state that, "sweeteners derived from sugar cane syrup should not be declared as 'evaporated cane juice' because that term falsely suggests that the sweeteners are juice."[197]

Between 2009 and 2014, numerous lawsuits have been filed disputing the use of the term "evaporated cane juice."[198] In several of these cases, courts have been unwilling to rule on whether evaporated cane juice is a misrepresentation because of pending regulatory action by the FDA. Despite repeated urging by public interest groups and industry participants to issue clearer binding guidance, the FDA took little action until courts, in response to pending litigation, demanded administrative action before proceeding with legal claims.[199] Finally, on March 4, 2014, almost five years after issuing the draft guidance on evaporated cane juice, the FDA reopened comment.[200] The FDA also issued warning letters against producers using the term.[201] Although final guidance has yet to be promulgated, several courts have stayed legal proceedings related to evaporated cane juice claims pending agency action.[202] Such developments create a sense of urgency for agencies to complete the execution of their rulemaking process.

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http://www.law360.com/articles/462197/wary-of-litigation-states-keep-cheeseburger-bills-on-menu (reporting that North Carolina cheeseburger law passed).

196. *Draft Guidance for Industry: Ingredients Declared as Evaporated Cane Juice*, U.S. FOOD & DRUG ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.fda.gov/food/guidanceregulation/guidancedocumentsregulatoryinformation/labellingnutrition/ucm181491.htm (last updated Apr. 30, 2015).

197. *Id.*

198. A search of WestlawNext pulls up over 50 federal opinions and orders regarding the use of the term "evaporated cane juice" from 2009 to 2014, as of September 2014. Query for Federal Opinions on Evaporated Cane Juice, WESTLAWNEXT, http://next.westlaw.com (searching for the terms "evaporated cane juice" in WestlawNext Federal opinions all state and all Federal).

199. The FDA did issue letters to producers warning them not to list evaporated cane juice as an ingredient. *See*, *e.g.*, Swearingen v. Yucatan Foods, LP, 59 F. Supp. 3d 961 (N.D. Cal. 2014).

200. *FDA Reopens Comment Period on Draft Industry Guidance on Evaporated Cane Juice as a Food-Labeling Term*, U.S. FOOD & DRUG ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.fda.gov/Food/NewsEvents/ConstituentUpdates/ucm387849.htm (last updated June 6, 2014); Reopening of Comment Period on Draft Guidance for Industry on Ingredients Declared as Evaporative Cane Juice, 79 Fed. Reg. 12507-01 (Mar. 4, 2014).

201. *Swearingen*, 59 F. Supp. 3d at 963.

202. *See, e.g.*, Morgan v. Wallaby Yogurt Co., Inc., No. 13-cv-00296, 2012 WL 1017879 (N.D. Cal. Nov. 5, 2014) (granting defendant's motion for reconsideration and staying action); Gitson v. Trader Joe's Co., 63 F. Supp. 3d 1114, 1117 (N.D. Cal. 2014) (staying action to see whether FDA revises Draft Guidance); Figy v. Amy's Kitchen, Inc., No. 13-cv-03816, 2014 WL 3362178 (N.D. Cal. July 7, 2014) (reopening and staying the

C. Battleground 2: Agency Responses to Sustainability Cases

Sustainability cases have also played a key role in prodding legislative and regulatory developments in food policy. Sustainability cases can be reconciled with public health goals. One could argue that at the heart of sustainability arguments is a broad stance regarding public health. Long-term public health is about humans having an overall balanced community with a clean, safe environment that can provide sustenance in terms of social stability, food, water, and air into perpetuity.

Particularly in relation to the term "natural," tort lawsuits have played a key role in encouraging agency action. Historically, the FDA as an agency has been reticent to take a clear stance on terms like "natural," which implicate the use of GMO food products.[203] In 1991, the FDA issued an advisory opinion that defined natural as follows: "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."[204] Because the FDA's definition of "natural" is general in language, and fails to set an enforceable legal requirement, consumers have pushed for a clearer definition through a spate of "natural" food misrepresentation claims. In these suits, plaintiffs argue that products state they are natural yet contain ingredients that do not occur in nature.[205] Despite attempts by some industry players to urge the FDA to promulgate formal guidance on the term,

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action pending FDA determination); Gitson v. Clover Stornetta Farms, No. C-13-01517, 2014 WL 2638203 (N.D. Cal. June 9, 2014) (granting defendant's motion for reconsideration and staying action because "the FDA is currently involved in creating a new regulation concerning the subject of this lawsuit," and thus "the FDA's position on the lawfulness of the use of ECJ on food labels is 'under active consideration by the FDA'"); Reese v. Odwalla, Inc., 30 F. Supp. 3d 935, 940 (N.D. Cal. 2014) (staying action because FDA reopened comment period on Draft ECJ Guidance).

203. As recently as two years ago, the FDA reiterated that it did not intend to define the term "natural": "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." *What Is the Meaning of "Natural" on the Label of Food?*, U.S. FOOD & DRUG ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.fda.gov/AboutFDA/Transparency/Basics/ucm214868.htm (last updated Sept. 16, 2015).

204. Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms, 56 Fed. Reg. 60421-01 (Nov. 27, 1991) (to be codified at 21 C.F.R. pts. 5, 101, 105).

205. Holk v. Snapple Beverage Corp., 575 F.3d 329, 335 (3d Cir. 2009) (claiming that the use of "All Natural" labeling was deceptive because of the presence of high fructose corn syrup); Astiana v. Ben & Jerry's Homemade, Inc., No. C 10-4387 PJH, 2014 WL 60097 (N.D. Cal. Jan. 7, 2014) (alleging that the packaging and advertising for the defendant's products were deceptive and misleading because the products were labeled as "all natural" but contained alkalized cocoa; the court denied the plaintiff's motion for class certification); Weiner v. Snapple Beverage Corp., No. 07 Civ. 8742(DLC), 2010 WL 3119452 (S.D.N.Y. Aug. 5, 2010) (same, class certification denied).

the FDA has not done so.[206] This is in keeping with the FDA's assertions that food safety and nutritional content, not consumer demand or concern, is the only sufficient justification for labeling food.[207]

Here, litigation and prodding from the court, may force the FDA to take a position on key unresolved issues, such as the term "natural." For example, in *Cox v. Gruma Corp.,* the court refused to rule on whether products containing GMO ingredients were natural and referred the matter to the FDA for administrative determination.[208] In the interim, the action was stayed. Other courts considering the same issue have refused to request an administrative determination or any other agency input, citing the potential time delay as being too great.[209] While the FDA currently maintains that it has not provided official guidance on the terms,[210] the *Cox* case, amongst a growing number of cases, remains stayed pending agency guidance.[211]

Legislative bodies have also joined in the discussion about what is a "natural" food. On the federal level, a bill currently pending entitled the Food Labeling Modernization Act of 2013, would define a food as natural if it did not contain 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

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206. *See* Letter from Andrew C. Briscoe, III, President and CEO, Sugar Association, to FDA Docket Mgmt. Branch (Feb. 28, 2006), http://www.cspinet.org/new/pdf/sugar_fda_petition.pdf (petitioning 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."); *see also* Robert G. Reinhard, *Citizen Petition 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*, SARA LEE CORP. (Apr. 9, 2007), http://www.fda.gov/ohrms/dockets/dockets/07p0147/07p-0147-cp00001-02-vol1.pdf. *But see* Letter from Audrae Erickson, President, The Corn Refiners Ass'n, to FDA Dockets Mgmt. Branch (Nov. 14, 2006), http://www.fda.gov/ohrms/dockets/dockets/06p0094/06p-0094-c000004-vol1.pdf (urging the FDA not to issue additional guidance).

207. Doug Farquhar & Liz Meyer, *State Authority to Regulate Biotechnology Under the Federal Coordinated Framework*, 12 DRAKE J. AGRIC. L. 439, 452 (2007).

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

209. *See generally* Complaint, Gengo v. Frito-Lay N. Am., Inc., Case No. 1:12-cv-00854 (C.D. Cal. 2011); Elaine Watson, *NY Judge in Frito-Lay Lawsuit Refuses to Refer GMO-Natural Issue to FDA: "Agency Would Need Far More than Six Months to Define 'Natural,'"* FOOD NAVIGATOR (Aug. 30, 2013), http://www.foodnavigator-usa.com/Regulation/NY-judge-in-Frito-Lay-lawsuit-refuses-to-refer-GMO-natural-issue-to-FDA-Agency-would-need-far-more-than-six-months-to-define-natural.

210. *What is the Meaning of 'Natural' on the Label of Food?*, U.S. FOOD & DRUG ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.fda.gov/aboutfda/transparency/basics/ucm214868.htm (last updated Sept. 16, 2015).

211. *Cox*, 2013 WL 3828800, at *2. *See also* cases cited *supra* note 202 (evaporated cane juice cases).

processed with alkali.[212] The Connecticut legislature has proposed a similar definition, defining "natural food" as food "which has not been treated with preservatives, antibiotics, synthetic additives, artificial flavoring or artificial coloring; and which has not been processed in a manner that makes such food significantly less nutritive; and which has not been genetically engineered."[213]

Active challenges to the lack of GMO labeling, and their subsequent defeats in the courts, have also encouraged direct state action. Attempts by states to pass GMO labeling laws have been mixed,[214] although over half of the states have considered, or are currently considering such limitations.[215] However, even where such measures were defeated, widespread and costly campaigns discussing the issue forced private players, NGOs, and the public to engage in a dialogue and defense of existing labeling practices and the pros and cons of the underlying genetic technology.[216] Vermont's recently passed GMO labeling law is already under fire for violating the dormant Commerce Clause, and so the debate rages on.[217]

Another example of the interplay between litigation and legislation is the evolution of "right to farm" legislation. All 50 states have enacted some version of "right to farm" legislation.[218] "Right to farm" laws limit potential nuisance suits by modifying and curtailing access to common law nuisance claims in the rural context.[219] Originally, these laws were conceived to protect preexisting farmland

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212. H.R. REP. NO. 3147, 113th Cong. (1st Sess. 2013); *see generally* 21 U.S.C. § 343 (2013).

213. H.B. 6519, Gen. Assemb., Reg. Sess. (Conn. 2013).

214. *See* Niraj Chokshi, *Vermont Just Passed the Nation's First GMO Food Labeling Law. Now It Prepares to Get Sued*, WASH. POST (May 9, 2014), http://www.washingtonpost.com/blogs/govbeat/wp/2014/04/29/how-vermont-plans-to-defend-the-nations-first-gmo-law/ (reporting that Vermont passed law requiring GMO food be labeled); Cal. Proposition 37 (2012), http://vig.cdn.sos.ca.gov/2012/general/pdf/37-title-summ-analysis.pdf.

215. Chokshi, *supra* note 214; Alison Van Eenennaam et al., *The Potential Impacts of Mandatory Labeling for Genetically Engineered Food in the United States*, CAST ISSUE PAPER 54 (2014), http://www.cast-science.org/download.cfm?PublicationID=282271&File=1e30b9edc325bd7238e06b551e4a73f4b712TR.

216. Michele Simon, *Lies, Dirty Tricks, and $45 Million Kill GMO Labeling in California*, EAT DRINK POLITICS (Nov. 7, 2012), http://www.eatdrinkpolitics.com/2012/11/07/lies-dirty-tricks-and-45-million-kill-gmo-labeling-in-california/ (discussing the campaign against Proposition 37, California's proposed GMO labeling referendum).

217. *See* Complaint, Grocery Mfr.'s Ass'n v. Sorrell, No. 5:14-CV-117, 2014 WL 2965321 (D. Vt. June 12, 2014); *see also* Michelle Gillette, *The Food Fight Continues: Vermont AG Seeks to Dismiss Lawsuit Against GMO Labeling Law*, NAT'L L. REV. (Aug. 18, 2014), http://www.natlawreview.com/article/food-fight-continues-vermont-ag-seeks-to-dismiss-lawsuit-against-gmo-labeling-law.

218. Elizabeth R. Rumley, *States' Right-to-Farm Statutes*, NAT'L AGRIC. L. CTR., http://nationalaglawcenter.org/state-compilations/right-to-farm/ (last visited Nov. 28, 2014).

219. *See, e.g.*, ALA. CODE § 6-5-127 (1975); ALASKA STAT. § 09.45.235 (2001); ARIZ. REV. STAT. ANN. § 3-112 (1990); ARK. CODE ANN. § 2-4-107 (West 2005); CAL. CIV. CODE § 3482.5 (West 1992); COLO. REV. STAT. § 35-3.5-102 (2000); CONN. GEN. STAT.

from nuisance claims by encroaching nonagricultural development.[220] These laws protected preexisting farming by codifying the common law version of "coming to the nuisance" arguments.[221] Under such statutes, some courts found "right to farm" laws do not bar action against farms that shift from traditional livestock raising techniques to CAFOs.[222]

However, these cases are in the dwindling minority, as "right to farm" legislation has adapted to provide a shield against CAFO-related litigation, even from neighboring farmers. Broadening the traditional ambit of "right to farm" law, the recent renaissance of changes in "right to farm" legislation removes the preexisting condition requirements. Instead, these laws create a rebuttable

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§ 19A-341 (2011); DEL. CODE ANN. tit. 3, § 910 (1991); DEL. CODE ANN. tit. 3,§ 1401 (2010); FLA. STAT. § 823.14 (2012); GA. CODE ANN. § 41-1-7 (2007); HAW. REV. STAT. § 165-4 (2001); IDAHO CODE ANN. §§ 22-4503–4505 (2011); 740 ILL. COMP. STAT. ANN. 70/3 (1981); IND. CODE § 32-30-6-9 (2005); IOWA CODE § 172D.2 (1976); IOWA CODE § 352.11 (1993); IOWA CODE § 657.11 (2014); KAN. STAT. ANN. § 47-1505 (1967); KAN. STAT. ANN. § 2-3202 (2013); KY. REV. STAT. ANN. § 413.072 (West 2010); LA. REV. STAT. ANN. §§ 3:3603-3612 (2008); ME. REV. STAT. tit. 7, § 153 (2007); MD. CODE ANN. CTS. & JUD. PROC. § 5-403 (2014); MASS. GEN. LAWS ch. 243, § 6 (1989); MASS. GEN. LAWS ch. 111, § 125A (1985); MICH. COMP. LAWS § 286.473 (1995); MINN. STAT. § 561.19 (2004); MISS. CODE ANN. § 95-3-29 (2009); MO. REV. STAT. § 537.295 (1990); MONT. CODE ANN. § 45-8-111 (2009); MONT. CODE. ANN. § 27-30-101 (2011); NEB. REV. STAT. § 81-1506 (2004); NEV. REV. STAT. § 40.140 (2009); N.H. REV. STAT. ANN. §§ 432:33-35 (2015); N.J. REV. STAT. § 4:1C-10 (1998); N.M. STAT. ANN. § 47-9-3 (2014); N.Y. AGRIC. & MKTS. LAW § 308 (McKinney 2011); N.Y. PUB. HEALTH LAW § 1300-c (McKinney 1981); N.C. GEN. STAT. § 106-701 (2013); N.D. CENT. CODE, § 42-04-02 (1981); OHIO REV. CODE ANN. § 3767.13 (West 1982); OHIO REV. CODE ANN. § 929.04 (West 1982); OKLA. STAT. tit. 50, § 1.1 (2009); OR. REV. STAT. § 467.120 (2005); OR. REV. STAT. §§ 30.935-943 (1993); 3 PA. CONS. STAT. § 911 (1988); 3 PA. CONS. STAT. §§ 951-57 (1982); R.I. GEN. LAWS §§ 2-23-5, 2-23-7 (1982); S.C. CODE ANN. §§ 46-45-50, 46-45-80 (2006); S.D. CODIFIED LAWS § 21-10-25.2 (1994); TENN. CODE ANN. § 43-26-103 (2014); TENN. CODE ANN. § 44-18-102 (2002); TEX. AGRIC. CODE ANN. § 251.004 (West 1981); UTAH CODE ANN. § 17-41-403 (West 2009); UTAH CODE ANN. § 76-10-803 (West 2009); UTAH CODE ANN. § 78B-6-1104 (West 2009); VT. STAT. ANN. tit. 12, § 5753 (2015); VA. CODE ANN. § 3.2-302 (2008); WASH. REV. CODE § 7.48.305 (2009); W. VA. CODE §§ 19-19-3, 19-19-6 (1982); WIS. STAT. § 823.08 (2009); WYO. STAT. ANN. §§ 11-39-102, 11-39-104 (1978); WYO. STAT. ANN. § 11-44-103 (1991).

220. Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 97.

221. "Coming to the nuisance" is a limited defense in tort that allows parties engaged in nuisance activities to curtail or avoid liability in certain situations where the tortious conduct arises from preexisting industrial or agricultural use. *See generally* 58 Am. Jur. 2d Nuisances §§ 372–73 (2015); Neil D. Hamilton, *Right-to-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May Be Ineffective*, 3 DRAKE J. AGRIC. L. 103, 103–06 (1998); Ferdinand S. Tinio, *"Coming to Nuisance" as a Defense or Estoppel*, 42 A.L.R.3d 344 (1972).

222. Payne v. Skaar, 900 P.2d 1352, 1355 (Idaho 1995) (ruling that the state "right to farm" law was inapplicable when the surrounding area had stayed constant during the time in question and the feedlot operations being challenged as a nuisance had substantially changed how they cared for livestock).

presumption that animal-feeding operations are not public or private nuisances.[223] Under such laws, CAFOs are de facto exempt from nuisance suits regardless of when they went into operation.[224] Wary of statutes or voter referenda that would ban GMOs, increase environmental requirements, or control animal treatment, some states also enacted state constitutional amendments granting broad rights to "engage in farming and ranching practices."[225] These amendments "help shield large industrial dairies, feedlots, and slaughterhouses from environmental and food safety regulations—and curb lawsuits from people who get sick from the rivers of noxious animal waste they produce."[226] As such, they are clearly reactions to the issues and views raised in the litigation context.

D. Battleground 3: Legislatures React to Cultural and Ethical Views of Food Production

In addition to "right to farm" statutes and amendments that limit new lawsuits and legislation on animal treatment issues, the moral elements of food have also been limited by laws that curtail access to information. Scholars increasingly point out how tort acts as a formal and informal way to compel information gathering and potential dissemination.[227] One way to effectively shift

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223. *See, e.g.*, IOWA CODE § 657.11(2)–(5) (1997) (revising traditional "right to farm" exclusions to create rebuttable presumption that any animal feeding operation that has obtained all the necessary federal and state permits "is not a public or private nuisance under this chapter or under principles of common law, and that the animal feeding operation does not unreasonably and continuously interfere with another person's comfortable use and enjoyment of the person's life or property under any other cause of action").

224. Some states require that the feedlot be in operation for over a year to receive protection, or that they comply with registration requirements, but they do not require a showing that the complained-of use predates the neighboring property owner's holdings. *See, e.g.*, ALA. CODE § 6-5-127 (2004); ARK. CODE ANN. § 2-4-107 (2005); CONN. GEN. STAT. § 19a-341 (2011); DEL. CODE ANN. tit. 3, § 1401 (2010); FLA. STAT.§ 823.14 (2012); GA. CODE ANN. § 41-1-7 (2007); IDAHO CODE § 22-4503 (2011); 740 ILL COMP. STAT. 70/3 (1991); IND. CODE § 32-30-6-9 (2005); KY. REV. STAT. ANN. § 413.072 (West 2010); MASS. GEN. LAWS ch. 243, § 6 (1989); MISS. CODE ANN. § 95-3-29 (2009); MO. REV. STAT. § 537.295 (1990); N.H. REV. STAT. ANN. § 432:33 (1985); N.M. STAT. ANN. § 47-9-3 (2014); N.C. GEN. STAT. § 106-701 (2013); N.D. CENT. CODE, § 42-04-02 (West 1981); 3 PA. CONS. STAT. § 954 (1998); S.D. CODIFIED LAWS § 21-10-25.2 (1994); TEX. AGRIC. CODE ANN. § 251.004 (West 1981).

225. Julie Bosman, *Missourians Approve Amendment on Farming*, N.Y. TIMES, Aug. 6, 2014, at A16 (quoting language of Missouri bill and noting that "supporters of the amendment said the measure was needed to preserve Missouri's agricultural heritage, which some farmers believe is under attack from national groups like the Humane Society"); Julie Bosman, *Missouri Weighs Unusual Addition to Its Constitution: Right to Farm*, N.Y. TIMES, Aug. 2, 2014, at A14 (discussing the recent passage of "right to farm" amendments in North Dakota and a pending "right to farm" amendment in Missouri).

226. Brooke Jarvis, *A Constitutional Right to Industrial Farming?*, BLOOMBERG BUS. WK. (Jan. 9, 2014), http://www.bloomberg.com/bw/articles/2014-01-09/industrial-farming-state-constitutional-amendments-may-give-legal-shield.

227. Eugene Volokh, *Tort Law v. Privacy*, 114 COLUM. L. REV. 879, 879 (2014) (arguing that tort law pressures "defendants to gather sensitive information about people, to install comprehensive surveillance, and to disclose information").

policy conversations is through the revelation of influential facts.[228] Aware of the visceral nature of images related to animal cruelty arising from the mass-farming context,[229] livestock producers have taken affirmative defensive action to prevent the dissemination of information that might influence the public to think of food, particularly meat production, in ethical terms.[230] These laws, known colloquially as "ag-gag" laws,[231] often levy fines and criminal penalties against parties who film or report on the conditions of livestock or crop production without the owner's consent.[232] Just as food litigation has intensified in recent years, so too has the push for increased ag-gag legislation, with nine states proposing such changes in

228. For example, the revelation of the high number of documents indicating the tobacco industry's failure to disclose known risks of both tobacco use and nicotine addiction revitalized tobacco litigation and debates on tobacco policy. Robert L. Rabin, *The Third Wave of Tobacco Tort Litigation*, *in* REGULATING TOBACCO 183–85 (Robert L. Rabin & Stephen D. Sugarman eds., 2001); ALLAN M. BRANDT, THE CIGARETTE CENTURY: THE RISE, FALL, AND DEADLY PERSISTENCE OF THE PRODUCT THAT DEFINED AMERICA 369–70 (2007).

229. Lester Aldrich, *Texas Sheriff Investigates Animal-Cruelty Video Rattling Cattle Market*, WALL STREET. J. (Apr. 20, 2011, 1:51 PM), http://online.wsj.com/articles/SB10001424052748704658704576275091620222926 (smashing cow's heads with pickaxes); John Curran, *2 Vt. Slaughterhouse Workers Charged with Cruelty*, BOS. GLOBE (June 4, 2010), http://www.boston.com/business/articles/2010/06/04/2_vt_slaughterhouse_workers_charged_with_cruelty/ (reporting on the repeated electrocution of calves).

230. GLYNN T. TONSOR & NICOLE J. OLYNK, U.S. MEAT DEMAND: THE INFLUENCE OF ANIMAL WELFARE MEDIA COVERAGE, KAN. STATE UNIV. (Sept. 2010), http://www.agmanager.info/livestock/marketing/animalwelfare/MF2951.pdf (finding that media reports significantly reduce demand for pork and poultry products).

231. Mark Bittman, Opinion, *Who Protects the Animals?*, N.Y. TIMES, Apr. 27, 2011, at A27 (coining the term "ag gag").

232. *See, e.g.*, KAN. STAT. ANN. § 47-1827 (2006); MONT. CODE ANN. § 81-30-103 (2011); N.D. CENT. CODE § 12.1-21.1-02 (2011). These bills are not necessarily limited to livestock facilities but can include crop production as well. *See* H.R. 589, 84th Gen. Assemb. (Iowa 2012) (defining "agricultural production facility" to include "an animal facility . . . and a crop production facility").

the past two years.[233] This has led to rebuttal litigation challenging such laws, some of which has been successful.[234]

These laws are a reaction to the discursive power of tort. Tort litigation can act as a fact finder and play an important direct or indirect role in exposing facts that otherwise would remain unknown to the public and even regulatory authorities.[235] Such information can strongly influence the direction of public opinion.[236] As such, food litigation can play a role in revealing important information to spur the development of sound public-health policy and institutional change.[237] Torts potential to uncover facts that could inform public discourse is heightened in the context of food policy where state laws have limited other means of obtaining information.[238]

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233. Three states passed ag-gag laws in the 1990s. *See* KAN. STAT. ANN. § 47-1827 (2006); MONT. CODE ANN. § 81-30-103 (2011); N.D. CENT. CODE § 12.1-21.1-02 (2011). Nine states have introduced ag-gag bills in the last two years. *See* H.R. 0110, 2013 Leg., Reg. Sess. (N.H. 2013); H.R. 0126, 2013 Gen. Sess. (Wyo. 2013); S. 373, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013); S. 391, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013); Leg. 204, 103d Leg., 1st Sess. (Neb. 2013); S. 13, 89th Gen. Assemb., Reg. Sess. (Ark. 2013); S. 14, 89th Gen. Assemb., Reg. Sess. (Ark. 2013); H.R. 683, 2013–2014 Gen. Assemb., Reg. Sess. (Pa. 2013); S. 1248, 108th Gen. Assemb. (Tenn. 2013); S. 552, 51st Leg., 1st Sess. (N.M. 2013); Assemb. 343, 2013–14 Reg. Sess. (Cal. 2013). Florida, Illinois, Indiana, Iowa, Minnesota, Missouri, Nebraska, New York, and Utah all considered ag-gag laws in 2011 and 2012. *See* S. 1184, 2012 Gen. Assemb., Reg. Sess. (Fla. 2012); H.R. 5143, 97th Gen. Assemb. (Ill. 2012); S. 184, 117th Gen. Assemb., 2d Reg. Sess. (Ind. 2012); H.R. 589 (Iowa 2012); H.R. 1369, 87th Sess. (Minn. 2011); S. 695, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012); Leg. 915, 102d Leg., 2d Sess. (Neb. 2012); S. 5172, 235th Gen. Assemb., Reg. Sess. (N.Y. 2011); H.R. 187, 2012 Gen. Sess. (Utah 2012).

234. Animal Legal Def. Fund v. Otter, No. 1:14-cv-00104-BLW, 2015 WL 4623943, at *13–14 (D. Idaho Aug. 3, 2015) (successfully challenging Idaho's ag-gag law).

235. *See, e.g.*, BRANDT, *supra* note 228, at 369–70 (recounting how a former paralegal for Brown & Williamson's law firm stole and released more than 4,000 pages of documents); Rabin, *supra* note 228, at 183–85; *see also* BRANDT, *supra* note 228, at 375–84 (discussing how a Brown & Williamson research analyst released information to the media detailing how the company deliberately manipulated nicotine levels in cigarettes to make them addictive).

236. For example, after the public disclosure of information regarding the treatment of downer cows at a California facility led to public outcry, the USDA instigated an investigation in which two years of production were recalled (143 million pounds of beef) and criminal charges brought. David Brown, *USDA Orders Largest Meat Recall in U.S. History*, WASH. POST, Feb. 18, 2008, at A1.

237. Some sources indicate that early GMO litigation led to discovery of internal FDA research reports indicating internal scientists disfavored the classification of GMOs with other more traditional forms of plant husbandry. *Lawsuit Exposes FDA Deception About the Hazards of Genetically Modified Foods*, SAFE FOOD CAMPAIGN (Mar. 2001), http://www.safefood.org.nz/gepress.php; Steven M. Druker, *Key FDA Documents Revealing Hazards of Genetically Engineered Foods*, ALL. FOR BIO-INTEGRITY, http://3dd.816.myftpupload.com/24-fda-documents/ (last visited Nov. 28, 2014).

238. However, not all information discovered through litigation immediately makes its way into public discourse. How cases are covered in the media plays a key role in disseminating important information. For example, the notorious McDonald's coffee lawsuit of the mid-90s actually revealed systemic undetected choices on the part of

IV. TORT AND VOLUNTARY ACTION IN THE PRIVATE SECTOR

Tort litigation also causes private institutional actors to alter their activities, and not purely in relation to perceived liability. This Section briefly explores examples of industry responses to tort suits. It argues that such responses go beyond straightforward deterrence of litigation risk. Rather, they improve information sharing, product features, and informally "preempt" the need for regulatory action. Such voluntary regulation can undercut the political capital that would mobilize public and political opposition and more formal regulation, and therefore plays a critical role in deliberative action.

A. Voluntary Labeling, Altering Product Content, or Appearance

In areas where there has been significant litigation and a subsequent swell in consumer consciousness, companies have voluntarily labeled and defined with specificity their use of certain terms regarding the contents of their products and their production. One example in recent years is the bevy of misrepresentation claims surrounding the term "natural."[239] In addition to the administrative dialogue this spawned, the food industry took action independent from immediate regulatory compliance considerations.[240] For instance, some companies dropped the use of the term "natural" in direct response to tort litigation,[241] while others

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McDonald's to endanger consumers by serving unusually hot coffee. *See* Liebeck v. McDonald's Rests., P.T.S., Inc., CV-93-2419, 1995 WL 360309 (D. N.M. Aug. 18, 1994). In that case, 81 year-old Stella Liebeck received third degree burns on a substantial portion of her body when she spilled McDonald's coffee on herself. Discovery and testimony in the litigation revealed that McDonald's knew its coffee was hotter than competitors', that it was very dangerous at such temperatures, and had caused severe burns over 700 times. Nonetheless, McDonald's executives chose not to provide warnings of the extreme heat of their coffee or to lower the coffee's temperature. Until the 2011 documentary, "Hot Coffee," most of these facts were obscured by reporting that portrayed the plaintiff as a greedy, foolhardy person and highlighted the allegedly irrational size of the verdict.

239. Maxwell v. Unilever U.S., Inc., No. 5:12-CV-01736-EJD, 2013 WL 1435232 (N.D. Cal. Apr. 9, 2013) (alleging Lipton Tea was mislabeled and misbranded when marked "100 percent natural"; motion to dismiss granted); Koehler v. Pepperidge Farm, No. 13-cv-02644-YGR, 2013 WL 4806895 (N.D. Cal. Sept. 9, 2013) (alleging that labeling Goldfish crackers as "natural" is deceptive); Letter from Stephen Gardner, Dir. of Litig., Ctr. for Sci. in the Pub. Interest, to Gilbert M. Cassagne, President and CEO, Cadbury Schweppes Ams. Beverages, and Todd Stitzer, CEO, Cadbury Schweppes Ams. Beverages, & Todd Slitzer, CEO, Cadbury Schweppes Plc. (May 10, 2006), http://www.cspinet.org/new/pdf/cadbury_notice.pdf (challenging use of the term "all natural" on 7up products); *Kraft Is Sued for Falsely Calling Capri Sun Drink "All Natural*," CTR. FOR SCI. IN THE PUB. INTEREST (Jan. 8, 2007), http://cspinet.org/new/200701081.html (reporting that lawsuit against Kraft is dropped after Kraft abandoned "all natural claims" on Capri Sun containers).

240. FDA regulations are not a ceiling but a floor in terms of required conduct, as they have expressly urged industries to voluntarily adopt additional restraints. *See, e.g.*, Diluted Juice Beverages, 58 Fed. Reg. 2897, 2919 (Jan. 6, 1993) (FDA explicitly encouraged manufacturers to include material on their labels that was not required by the regulations).

241. Astiana v. Kashi Co., 291 F.R.D. 493, 499 (S.D. Cal. 2013) (alleging products labeled as "all natural" or "nothing artificial" contained artificial and synthetic

have done so preemptively;[242] others modified their products to exclude offensive additives;[243] and certain retailers have stopped carrying products that contain GMOs and refuse to stock products that use GMO sourcing.[244]

Perhaps more interestingly are the actions taken by corporations that have not been sued. Several companies voluntarily defined their use of the term "natural" for consumers despite the fact that they themselves have not been sued.[245] As a group, the National Natural Products Association, a private business group, has declared defining "natural" a top priority for 2014.[246] Defining these

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ingredients; class certification granted in part and denied in part). Ultimately, the *Kashi* cases settled by agreeing to stop using the term "all natural" and "nothing artificial" on products. *Kashi to Drop "All Natural" Label from Some Products to Settle Lawsuit*," CBS NEWS (May 9, 2014, 6:49 PM), http://www.cbsnews.com/news/kashi-to-drop-all-natural-label-from-some-products-to-settle-lawsuit/. *See also* Kelly v. Popchips, Inc., Case No. 1316-cv11037 (2013), https://www.truthinadvertising.org/wp-content/uploads/2014/02/Kelly-v.-Popchips-Inc.-settlement-agreement-.pdf (settling for $2.4 million, and agreeing to modify the marketing and labeling of PopChips by eliminating "natural" or "healthy" references); Pappas v. Naked Juice Co. of Glendora, No. LA CV11-08276 JAK (PLAx), 2012 WL 1925598 (C.D. Cal. May 14, 2012) (settling for $9 million and an agreement to remove "natural" labels); Letter from Jostein Solheim, CEO, Ben & Jerry's, to Michael F. Jacobson, Exec. Dir., Ctr. for Sci. in the Pub. Interest (Sept. 21, 2010), http://cspinet.org/new/pdf/ben_jerry_ceo_letter.pdf (responding to threatened litigation regarding "all-natural" labeling by dropping term from their labels).

242. Mike Esterl, *Some Food Companies Ditch 'Natural' Label*, WALL ST. J. (Nov. 6, 2013, 12:07 AM), http://online.wsj.com/news/articles/SB10001424052702304470504579163933732367084.

243. Snapple, for example, stopped using high fructose corn syrup in its drinks after two unsuccessful lawsuits challenging the use of the term "all natural" on this basis. Jennifer Lee, *Reading the Tea Leaves, Snapple Refreshes Itself*, N.Y. TIMES: CITY ROOM BLOG (Feb. 19, 2009, 1:45 PM), http://cityroom.blogs.nytimes.com/2009/02/19/reading-the-tea-leaves-snapple-refreshes-itself/?_php=true&_type=blogs&_r=0.

244. Whole Foods commits to GMO labeling. *See* A.C. Gallo & Walter Robb, *GMO Labeling Coming to Whole Foods Market*, WHOLE FOODS (Mar. 8, 2013), http://www.wholefoodsmarket.com/blog/gmo-labeling-coming-whole-foods-market. Whole Foods Market dropped Chobani because the yogurt maker uses milk from cows whose feed is derived from GMOs as part of its effort to stop selling genetically engineered products. Stephanie Strom, *Whole Foods Won't Sell Chobani Greek Yogurt as of Early Next Year*, N.Y. TIMES, Dec. 19, 2013, at B3.

245. The Kroger Co., *Free From 101*, SIMPLE TRUTH, http://www.simpletruth.com/about-simple-truth/101-free/ (last visited Aug. 7, 2014) (defining natural in terms of labeling on their products); Joe Dickson, '*Natural' Means . . . What?*, WHOLE FOODS (Mar. 20, 2009), http://www.wholefoodsmarket.com/blog/whole-story/natural-meanswhat (defining the use of the term natural on Whole Foods' products as products that are free of "artificial preservatives, colors, flavors, sweeteners, and hydrogenated fats").

246. John Shaw, *Defining 'Natural' Is a Priority for NPA in 2014*, NUTRA INGREDIENTS-USA (Dec. 18, 2013, 4:50 PM), http://www.nutraingredients-usa.com/Regulation/Defining-natural-is-a-priority-for-NPA-in-2014; *see also* Elaine Watson, *CSPI Attorney on 'Natural' Lawsuits: 'All that Matters Is What Consumers Think Natural Means. And Consumers Are Entitled to Be Incorrect'*, NUTRA INGREDIENTS-USA (Apr. 15, 2013), http://www.nutraingredients-usa.com/Markets/CSPI-attorney-on-natural-

terms, independent of changes in the content of the products, informs democratic policy by expanding access to information: People know more about the food they are eating when companies define the terms they use. [247] Without litigation, such voluntary affirmative steps to clarify provisions would likely not have occurred.[248]

No fast food case has yet required modification of menus or increased labeling of fast food. The fast food industry as a whole has responded to the concerns raised in food litigation, and the subsequent local and administrative dialogue regarding restaurants' roles in the nation's obesity crisis, by taking preemptive voluntary action. For example, the industry has made calorie and other nutrition information more readily available, even where not required by law.[249] Moreover, most major fast food vendors now offer "healthy" options on their menus. Similarly, many have specifically altered children's meals to reflect more whole food options and removed soda as the default choice in a kid's meal.[250] Aware that the shift in the success of tobacco litigation was due in large part to a shift in public opinion,[251] the fast food industry is keenly conscious of the need to alter its public image regardless of the availability of tort remedies. Here, tort lawsuits, despite disappointing outcomes in court, are successes because of the firestorm of public discourse they ignited.

The food industry's response to public outcry regarding Recombinant Bovine growth hormone ("RBst") has also exceeded agency action or potential liability. In 1993, the FDA chose not to regulate RBst and to this day maintains that there is no evidence of any safety issues with its use.[252] This regulation has

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lawsuits-All-that-matters-is-what-consumers-think-natural-means.-And-consumers-are-entitled-to-be-incorrect.

247. Other companies have gone so far as to directly engage in public dialogue regarding hot topics in the food area, from ice cream maker Ben and Jerry's urging the public to push for GMO-labeling requirements, to the Disney Channel publicly refusing to run "junk food" advertisements. Dawn C. Chmielewski, *Disney Bans Junk-Food Advertising on Programs for Children*, L.A. TIMES (June 6, 2012), http://articles.latimes.com/2012/jun/06/business/la-fi-ct-disney-food-ads-20120606; *Support GMO Labeling*, BEN & JERRY'S, http://www.benjerry.com/GMO (last visited Aug. 7, 2014) (introducing GMOs and providing space for consumers to "tell the FDA that [they]have a right to know what is in [their] food, and support national mandatory GMO labeling").

248. Cage-free eggs are another example of an area where the industry has voluntarily labeled their products and used cage-free eggs in response to consumer concerns.

249. Even in jurisdictions where nutritional content is not required to be available as a matter of law, many chain retailers have made the nutritional content and calorie information of their food readily available.

250. Jennifer O'Neill, *Wendy's is Latest Fast-Food Joint to Pull Soda from Kids' Menu*, YAHOO NEWS (Jan. 16, 2015), https://www.yahoo.com/parenting/wendys-is-latest-fast-food-joint-to-pull-soda-108284903887.html (noting that Wendy's joins Subway, Arby's, and Chipotle in this change and that McDonald's agreed to omit soda as of 2015).

251. *See supra* note 10 and accompanying text.

252. U.S. FOOD & DRUG ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., REPORT ON THE FOOD AND DRUG ADMINISTRATION'S REVIEW OF THE SAFETY OF RECOMBINANT BOVINE SOMATOTROPIN, http://www.fda.gov/animalveterinary/safetyhealth/productsafetyinformation/ucm130321.ht

withstood additional scientific testing and legal challenges.[253] Indeed, no legal claims have been successful at extracting monetary damages from companies for the use of RBst; some companies have even successfully prevented efforts to require such labeling.[254] Nonetheless, many major U.S. dairy suppliers continue to label products prominently with "no RBst" labels.[255]

The impact of public opinion is potent. Where there is increased consciousness of the cultural, social, and religious meanings of food, industry is likely to respond—regardless of legally enforceable claims. A recent example of the industry's voluntary abstention from the use of a product and acknowledgement of the social meaning of food was made clear in the "pink slime" scandals of 2011-2013.[256] Pink slime is not associated with any health or safety issues.[257] This finely processed meat product was USDA approved for human consumption in 2001, and was commonly used to drive down costs in lean,

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m (last updated Apr. 23, 2009); Janet Raloff, *Hormones in Your Milk*, SCI. NEWS (Oct. 28, 2003), https://www.sciencenews.org/blog/food-thought/hormones-your-milk.

253. *See* Stauber v. Shalala, 895 F. Supp. 1178 (W.D. Wis. 1995) (denying the argument that the FDA's approval of the use of BGH was arbitrary, capricious, and ignored health risks to cows and humans).

254. *See, e.g.*, Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67 (2d Cir. 1996) (sustaining dairy manufacturers' challenge to the constitutionality of a 1994 Vermont law requiring products from cows treated with BGH to be labeled as such). Vermont defended the law solely based on consumers' right to know, not health or safety reasons. The court held the Vermont law infringed on the manufacturers' right not to speak. *Id.*

255. *Food Scares*, CTR. FOR CONSUMER FREEDOM, http://www.consumerfreedom.com/issues/food-scares/ (last visited Nov. 28, 2014); Kristen Philipkoski, *Does Monsanto Corporation Have the Right to Keep You from Knowing the Contents of Your Food?*, RECLAIM DEMOCRACY!, http://reclaimdemocracy.org/monsanto-v-oakhurst-dairy/ (last updated Apr. 3, 2007).

256. "Pink slime," is a colloquial term used to refer to a common beef binder used in processed food products made of processed beef shards. *BPI and Pink Slime: An Updated Timeline*, FOOD SAFETY NEWS (Sept. 17, 2012), http://www.foodsafetynews.com/2012/09/bpi-and-pink-slime-an-updated-timeline/. It is also known as "lean finely textured beef" ("LFTB") to the meat industry. Elisabeth Hagen, *Setting the Record Straight on Beef*, U.S. DEP'T OF AGRIC. BLOG (Mar. 22, 2012, 11:42 AM), http://blogs.usda.gov/2012/03/22/setting-the-record-straight-on-beef/.

257. Beef Prods., Inc. v. ABC, Inc., No. 4:12-cv-04183, 2012 WL 6888678 (D.S.D. Nov. 28, 2012); P.J. Huffstutter, *Beef Products Inc. Reopens Plant as 'Pink Slime' Lawsuit Proceeds*, REUTERS (Aug. 12, 2014), http://www.reuters.com/article/2014/08/12/us-usa-beef-bpi-reopening-idUSKBN0GC26220140812 (discussing ongoing lawsuits against American Broadcasting Company, amongst others); Ryan J. Foley, *Pink Slime Data Collected by Iowa State Must Remain Behind Curtain: Judge*, HUFFINGTON POST (Apr. 10, 2013, 5:14 PM), http://www.huffingtonpost.com/2013/04/10/pink-slime-data-iowa-state_n_3054843.html (relaying that an Iowa judge refused to release studies on the basis that they contained "trade secrets"). Interestingly enough, using litigation as a shield in the ongoing debate over the issue, Beef Products Inc. has countered by successfully limiting public access to Iowa state studies on the byproduct, and has ongoing defamation lawsuits against various media sources claiming they misled the public into thinking the product was unsafe.

processed meat.[258] However, the "ick factor" of pink slime was considerable, as the public realized that this unappealing gelatinous substance was widely used.[259]

In response to a public outcry, major processed food producers as well as supermarkets and restaurants pledged to label[260] or even eliminate the use of this controversial beef by product.[261] Although the USDA allowed schools to opt out of purchasing beef that contained these products,[262] schools overwhelmingly responded by dropping it from school menus.[263] Such discussions have also prompted the principal manufacturer of "pink slime" to voluntarily disclose more information about the product and manufacturing process itself.[264]

B. Third Parties & Auditing

Another industry response to litigation and subsequent shifts in public dialogue surrounding food has been to set up internal third-party auditing systems.

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258. Letter from Philip S. Derfler, Deputy Adm'r, Office of Policy, Program Dev. and Evaluation, FSIS, to Dennis R. Johnson, Att'y (BPI representative), Olsson, Frank and Weeda, P.C. (May 11, 2001), http://documents.nytimes.com/meat-industry-and-government-records#document/p26/a2 (discussing USDA approval of LFTB); Jim Avila, *70 Percent of Ground Beef at Supermarkets Contains 'Pink Slime*,*'* ABC NEWS (Mar. 7, 2012, 7:52 PM), http://abcnews.go.com/blogs/headlines/2012/03/70-percent-of-ground-beef-at-supermarkets-contains-pink-slime/ (reporting 70% of ground beef contains LFTB).

259. JOEL L. GREENE, LEAN FINELY TEXTURED BEEF: THE "PINK SLIME" CONTROVERSY, CONG. RES. SERV. 1 (2012), https://www.fas.org/sgp/crs/misc/R42473.pdf.

260. The USDA officially allowed labeling on the issue of LFTB in 2012, despite stating publicly that it felt it posed no health threat. Rita Jane Gabbett, *Exclusive: USDA Will Approve LFTB Label Requests*, MEATINGPLACE (Apr. 2, 2012), http://www.meatingplace.com/Industry/News/Details/31955?allowguest=true.

261. GREENE, *supra* note 259, at 4–5 (noting that McDonald's, Taco Bell, and Burger King all pledged to stop using the product in 2011); Lisa Baertlein & Martinne Geller, *Wendy's Jumps into "Pink Slime" Public Relations War*, REUTERS (Mar. 30, 2012, 7:06 PM), http://www.reuters.com/article/2012/03/30/us-food-slime-idUSBRE82T1F120120330 (noting that Kroger, Safeway, and Wendy's refuse to stock LFTB meat products); *Meijer Says Meat Will Be Free of "Pink Slime" in April*, WZZM 13 NEWS (Mar. 23, 2012, 1:58 PM), http://www.wzzm13.com/story/news/investigations/13-on-your-side/2014/02/01/5110759/; Stephanie Strom, *After Public Outcry, Cargill Says It Will Label Products Made with a Beef Binder*, N.Y. TIMES, Nov. 6, 2013, at B3 (noting that Cargill foods agreed to label products containing LFTB).

262. News Release, U.S. DEP'T OF AGRIC., *USDA Announces Additional Choices for Beef Products in the Upcoming School Year* (Mar. 15, 2012), (http://www.usda.gov/wps/portal/usda/usdahome?contentid=2012/03/0094.xml&navid=NEWS_RELEASE&navtype=RT&parentnav=LATEST_RELEASES&edeployment_action=retrievecontent).

263. Helena Bottemiller, *Nearly Every State Opts Out of 'Pink Slime' for School Lunch*, FOOD SAFETY NEWS (June 6, 2012), http://www.foodsafetynews.com/2012/06/nearly-every-state-opts-out-of-pink-slime-for-school-lunch/ (noting initially all but a handful of states chose to buy non-LFTB meat). *But see* Joe Satran, *'Pink Slime' Ground Beef Product Returns to School Lunches in 4 States: Report*, HUFFINGTON POST (Sept. 10, 2013, 2:29 PM), http://www.huffingtonpost.com/2013/09/10/pink-slime_n_3900851.html (indicating that some schools started buying LFTB meat after only one year of abstention).

264. BEEF IS BEEF, http://www.beefisbeef.com/ (last visited Aug. 24, 2014).

Notably, these organizations specifically address what much of the current legal system excludes: nonfood safety concerns about food production. This understanding of food as part of a broader environmental, social, and value-driven system, derives its themes from outside the ambit of traditional legal structures. Some would argue that by engaging in self-regulation, industries are able to undermine political support for direct regulation.

Third-party auditors are particularly active policing nonsafety concerns. In doing so, industry players can attempt to keep regulation of such elements of food outside of the sphere of formal governmental oversight. For example, although the term "cage-free" is only loosely defined by the USDA and not monitored outside of the certified organic program,[265] multiple third-party auditors certify the term "cage-free" on egg products independent from organic certification.[266] Similar third-party certifications exist for sustainable fisheries,[267] meat,[268] and kosher foods.[269] Despite direct FDA guidance indicating no intention on the part of the FDA to limit GMOs or require labeling, the Non-GMO Project provides certification to product manufacturers who guarantee that their products are virtually GMO-free.[270] These third-party certification and auditing providers are generally for-profit organizations. This suggests that the industry is willing to take on expenses in order to address the nonsafety related concerns of consumers. The use of such auditors also provides a buffer in case of litigation: to the extent GMO products enter the product inadvertently and therefore would be subject to negligence suits, potential liability would most likely be apportioned to the third-party certifier as well.

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265. USDA defined the "organic livestock" label as indicating that the flock was provided shelter in a building, room, or area with unlimited access to food, fresh water, and continuous access to the outdoors during their production cycle. The outdoor area may or may not be fenced and/or covered with netting-like material. The producer must demonstrate that the poultry has been allowed access to the outside. *See Organic Livestock Requirements*, U.S. DEP'T OF AGRIC., U.S. DEP'T OF HEALTH & HUMAN SERVS. (2013), http://www.ams.usda.gov/sites/default/files/media/Organic%20Livestock%20Requirements.pdf.

266. *E.g.*, ANIMAL WELFARE APPROVED, http://animalwelfareapproved.org/about/ (last visited Nov. 28, 2014); CERTIFIED HUMANE, http://certifiedhumane.org/ (last visited Nov. 28, 2014); FOOD ALLIANCE, http://foodalliance.org/certification (last visited Nov. 28, 2014); UNITED EGG PRODUCERS, http://www.uepcertified.com/about-us.php (last visited Nov. 28, 2014).

267. *See* MARINE STEWARDSHIP COUNSEL, http://www.msc.org/ (last visited Sept. 24, 2015).

268. *See* NIMAN RANCH ANIMAL HUSBANDRY COUNSEL, https://www.nimanranch.com/about-us/ (last visited Sept. 24, 2015).

269. *See generally* TIMOTHY LYTTON, KOSHER: PRIVATE REGULATION IN THE AGE OF INDUSTRIAL FOOD (2013) (discussing in detail the emergence of a private regulatory apparatus for regulating kosher food distribution).

270. Founded in 2007 by natural food retailers interested in providing consumers with more information regarding GMOs, the Non-GMO Project is a 501(c)(3) non-profit organization. By the fall of 2008, the Non-GMO Project began enrolling products in its verification program. It remains North America's only third-party verification and labeling for non-GMO food and products. *History of the Non-GMO Project*, NON-GMO PROJECT, http://www.nongmoproject.org/about/history/ (last visited Aug. 11, 2014).

CONCLUSION

"The notion of 'public policy' involved in private cases is not by any means new to tort law."[271] However, the deliberative function of tort law has increased in importance as the regulatory state has grown. Tort is more than an outlet for conflict or a means to allocate resources in society. Tort is an important procedural mechanism for deliberative democratic accountability and governmental legitimacy as well as a catalyst for institutional reform. It is a venue to develop and raise new understandings of the legal implications that fall outside of the ambit of existing institutional structures. Food litigation grounded in common law and statutory tort plays a unique and important balancing role in the development of domestic food policy. Because it is driven by individual claimants, it is fundamentally different from policy originating from the administrative state or direct legislation.[272] When compared against administrative and even legislative processes, tort litigation is more democratized as it provides an access point to policy debates for groups and individuals that are unable to wield state–or national–level power.

Suits against food producers and manufacturers engage the courts, administrative agencies, and the public to interrogate policy choices about food.[273] Tort litigation forces lawmakers and administrative bodies to consider other ramifications and facets of food as a product, process, and a reflection of self. These lawsuits give voices to ideas that would otherwise be silent, a place at the table, and a significant platform to discuss and influence public discourse and policy.

This Article outlined ways in which current litigation is substantively shifting the public debate over food policy and revealing gaps in the longstanding conception of food law as exclusively safety oriented. These cases reveal pockets of harms that are not currently receiving adequate redress by either traditional interpretations of the common law or statutory law. In doing so, these cases are pushing for a broader conception of food policy, one that contemplates food safety on one axis of consideration in tandem with other concerns, including personal dignity, and situates food in a system of production that is sustainable over time.

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271. KEETON ET AL., *supra* note 1, at 15.

272. Access to administrative inputs for opinions can be unwieldy and unclear. Douglas R. Williams, *When Voluntary, Incentive-Based Controls Fail: Structuring a Regulatory Response to Agricultural Nonpoint Source Water Pollution*, 9 WASH. U. J.L. & POL'Y 21, 55 (2002) (noting the difficulties of raising the administrative-context challenges to state-permitting regimes); Terence J. Centner, *Courts and the EPA Interpret NPDES General Permit Requirements for CAFOs*, 38 ENVTL. L. 1215, 1228–29 (2008) (noting the vast differences between states in notice requirements and how much information must be made public prior to a hearing).

273. USDA Undersecretary for Food Safety, Dr. Elisabeth Hagen has publically commented that "it is important to distinguish people's concerns about how their food is made from their concerns about food safety . . . certainly understand that there are processes and methods in food production that may be troublesome to some, regardless of their impacts on food safety." Hagen, *supra* note 256.

The primary goals of modern tort center on individual compensation manifested in "making a person whole" and risk reallocation to create better incentives for actors to avoid unreasonable behaviors.[274] Current court battles over food reveal that in the context of the modern regulatory apparatus, tort serves additional purposes: regardless of the economic success of the underlying claim, tort exposes facts, increases policy dialogue, and provides access to public discourse for individuals and minority or fringe groups. In arenas dominated by administrative oversight and industry players, litigation is a unique way for private actors to join or control the conversation. The acknowledgement that tort has deliberative value to our democratic process, regardless of whether compensation is achieved, makes clear the repercussions of attempts to limit access to tort. Tort can no longer be brushed aside as a vehicle primarily for recalibrating societal resources or vindicating individual harms. Instead, it is a catalyst for debate, an essential democratic player, a forum to restore dignitary status, and a keystone for the formation of sound, just, and representative law.

274. Engstrom, *supra* note 29, at 353.