

FOOD INGLORIOUS FOOD: FOOD SAFETY, FOOD LABEL AND FREE SPEECH

By

Rita Marie Cain*

Recently, the movie *Food, Inc.* exposed issues about the food production industry in the United States. That Oscar-nominated documentary included a scene in which a mother, whose child had died from food-borne illness, explained that she could not criticize the food industry without risk of being sued. The risk to which she alluded stems from special legislation against criticism that agriculture and food production enjoy in 13 U.S. states. In the late 20th century, Oprah Winfrey successfully defended one such case¹ under the Texas food libel law² based on a show she aired on cattle management. The other states with food libel laws are Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi, North Dakota, Ohio, Oklahoma and South Dakota.³ Of these, only Colorado criminalizes food disparagement.⁴ The rest establish civil liability and are the focus of this analysis.⁵

At the same time the foregoing states are protecting agri-business from criticism, the 21st century has seen a significant increase in health concerns related to food. According to the U.S. Centers for Disease Control and Prevention, 48 million people in the United States get sick, 128,000 are hospitalized, and 3,000 die each year from food-borne diseases.⁶ In response to these concerns, the United States adopted a new federal food safety law in January, 2011.⁷ Among other things, the law includes whistleblower protection for employees in food production who complain about food safety issues. These new whistleblower protections could directly contravene provisions of state food libel laws that stifle such complaints. Potentially, the new federal law reflects a national public policy about food safety and debate that state food libel laws contradict.

This paper analyzes the impact of food disparagement statutes in the United States. First, the paper examines the scope of liability under the twelve civil food libel laws. Further, the analysis considers the reach of the laws to determine what constitutes a violation of the law “within” each relevant state with a food libel statute. This analysis considers whether health and safety statements published in states without food libel laws can become actionable in any state with a food libel law. If so, the effect could be to elevate the laws of twelve states to national food debate policy.

Next, the paper discusses the new federal food safety law. In particular, this analysis discusses how whistleblower protections in new federal food safety law affect the enforceability of state food disparagement laws. Finally, paper concludes with analysis and recommendations for future research regarding food debate, food safety and the role of state laws.⁸

I. State Food Disparagement Laws

State food disparagement laws reflect a legislative response to perceived shortcomings in the common law when food safety comments devastate agriculture markets. The first laws were passed after the “Alar” case against CBS (broadcaster of *60 Minutes*).⁹

On February 26, 1989, *60 Minutes* aired a segment about the use of the chemical growth regulator daminozide, commonly sold as Alar, on apples. The segment focused on health risks, especially in children, of Alar and a number of pesticides used on fruit. According to the show, Alar stays on fruit despite washing. It stays in apple peels after processing so that it ends up in apple products like juice and sauce.¹⁰ It breaks down into the carcinogen unsymmetrical dimethylhydrazine (UDMH).¹¹

The *60 Minutes* segment was based largely on a report of the Natural Resources Defense Council.¹² An EPA spokesperson and a Harvard pediatrician corroborated that report.¹³ Additionally, the EPA administrator interviewed in the segment admitted the EPA had known of cancer risks associated with daminozide for 16 years.¹⁴

After the show aired, sales of apples and apple products plummeted. Washington State apple growers unsuccessfully sued CBS for product disparagement, also known as trade libel. CBS received summary judgment because plaintiffs failed to prove there was any genuine issue regarding falsity in the broadcast.¹⁵ The trial and appellate courts relied on the Restatement (2d) of Torts regarding the elements of the trade libel claim: “defendant published a knowingly false statement harmful to the interests of another and intended such publication to harm the plaintiff’s pecuniary interests.”¹⁶

The apple growers asserted that, even if the specific fact statements in the broadcast could not be proved false, a jury could still imply falsity from the overall disparaging message of the segment.¹⁷ They complained that daminozide had never been proved to cause cancer in humans, only in animals. Further, the statements about risks to children were not based on studies in children. Rather, they were extrapolated from the animal studies data and based on the fact that children eat more fruit than adults. Accordingly, they are exposed to more Alar relative to their body weights than adults. The plaintiffs wanted a jury to consider those facts and be able to decide if the overall message of the program was false and disparaging. Relying on defamation precedents, the 9th Circuit said plaintiffs’

* Professor of Business Law, Bloch School of Management, University of Missouri—Kansas City.

attempt to derive a specific, implied message from the broadcast as a whole and to prove the falsity of that overall *message* is unprecedented and inconsistent with Washington law. No Washington court has held that the analysis of falsity proceeds from an implied, disparaging message. It is the statements themselves that are of primary concern in the analysis.¹⁸ (Emphasis in original).

The negative outcome in the Alar case prompted the agriculture industry to lobby state legislatures for protection from disparagement that would be easier to prove than traditional common law trade libel.¹⁹ The results of those lobbying efforts are twelve state laws with differing standards for proving a civil claim for food disparagement. These statutory liability standards are discussed next.

A. Scope of Liability

The state food libel laws have similar but different requirements for a successful claim based on proof of falsity, disparagement and intent. Each of these concepts for liability is discussed next. Additionally, the laws differ on who has standing to sue, which is explained at the conclusion of this section.

1. Proof of Falsity

While it is often said, “truth is the best defense,” lack of truth (falsity) is something a defamation or trade libel plaintiff must prove to overcome a summary judgment, at least against a media defendant. In *Philadelphia Newspapers v. Hepps*, the U.S. Supreme Court ruled that a plaintiff suing a media outlet must prove falsity in a defamation cause of action.²⁰ Accordingly, when the apple growers could not show any genuine issue of material fact regarding falsity of any statement in the *60 Minutes* broadcast, that case was dismissed.

Several states seem to have modified the burden of proof regarding falsity in their statutory food disparagement cause of action.²¹ Nine food libel statutes define falsity based on the *speaker’s lack of scientific basis* for a statement.²² One commentator characterized these as “whatcha got” statutes.²³ Although most of the statutes do not expressly state this as a presumption of falsity, they suggest that the speaker must prove the factual basis for a statement, rather than the plaintiff proving the falsity of it. Who else can prove that a statement was or was not based on scientific evidence other than the speaker/defendant by presenting his/her scientific basis? In other words, a natural reading of these statutes is that the plaintiff simply can assert that a statement was disparaging and false and the burden shifts to the defendant to show it was not false because it was based on scientific evidence.²⁴

Only Idaho, North Dakota and South Dakota make no statements in their food disparagement statutes linking falsity to a lack of scientific evidence.²⁵ Louisiana expressly states that there is a presumption of falsity if a statement is not based on “reasonable and reliable scientific inquiry, facts, or data.”²⁶ Texas requires that the trier of fact “shall consider whether the information was based on reasonable and reliable scientific inquiry, facts, or data.” Again, only speakers (defendants) can present to the Texas trier of fact the information on which their statements were based, namely scientific inquiry, facts or data.

In the *60 Minutes* case,²⁷ one commentator described the eight competing experts of the plaintiffs and defendants and concluded that no one could ever know whether a jury would have based a conclusion on the plaintiffs’ proof or the defendants’ defense.²⁸ But how many defendants can mount a defense like CBS? Or Oprah Winfrey? Potentially, a claimant “can actually win a case even though the defamatory statement is true simply because the defendant is not evidentially or financially able to prove its truth.”²⁹

The *Hepps* rule on the burden of proof in defamation cases would likely apply to provisions in the state food libel laws since the implications to free speech are the same in defamation and food libel. The *Hepps* rule could be extended beyond “media” defendants, too.³⁰ The *Hepps* Court repeatedly stated that the alleged falsity in that case was about a matter of public concern.³¹ Further, under defamation law, the Court has equated subscriber commentary with traditional media. “[i]n the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals and organizations engaged in the same activities.”³² Accordingly, the *Hepps* decision on burden of proof would likely apply to claims under food disparagement laws, regardless of the media used by the speaker because comments about food safety are matters of public concern. Even if those comments are social media postings, or marketing by competing organic food producers, not newspaper or TV reports, the principle underlying *Hepps* – to protect commentary on a matter of public concern - would apply to alleged food libel.

The *Hepps* Court acknowledged “that requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so.”³³ Nonetheless, the Court accepted this to “provide ‘breathing space’ for true speech on matters of public concern.”³⁴ Accordingly, the subject of food safety debate suggests that *Hepps* will apply to strike several of these burden of proof statutory provisions, regardless of the “media” designation of the defendant.³⁵

2. Disparagement

The claim against Oprah Winfrey under the Texas food disparagement statute was dismissed because the subject of her show in question was cattle and cattle feeding, not “perishable food” that the statute covers.³⁶ What amounts to disparagement about what “food” under the twelve civil food label laws is discussed here.

Eleven of the twelve food disparagement civil statutes have one common concept. Like the Texas statute in the cattlemen’s case against Oprah, the scope of liability is limited to alleged libel about “perishable” products. In all cases, “perishable” means that they will decay, either within a “short period of time,”³⁷ or a “reasonable period of time,”³⁸ or some “period of time.”³⁹ Only North Dakota’s statute applies to disparagement of any “agricultural producer or agricultural product.”⁴⁰ Presumably, the Texas cattlemen could have avoided dismissal under this broader North Dakota statute, at least on the grounds that the cattle is an agricultural product even though not “perishable.”

All states but North Dakota and Idaho include aquaculture food in their covered definition of perishable food.⁴¹ Alabama, Arizona, Florida and Georgia include “commodity” as part of the definition of perishable food.⁴² Only Idaho, Oklahoma and Ohio limit their statutory coverage to perishable food “intended for human consumption.”⁴³

In all cases, disparagement must be based on false statements. In most states, the alleged falsity must be about the *lack of safety* of a food product. Only North Dakota makes false statements, without any reference to food safety, actionable.⁴⁴

In the “lack of safety” states, however, the exact implications to food safety of the alleged disparaging statements differ. For example, Alabama, Arizona, Florida, Georgia and Ohio define disparagement as a false statement that the mentioned food “is not safe” for human consumption.⁴⁵ In Idaho, a disparaging falsity “clearly impugns the safety” of the food product.⁴⁶ The scope of these statutes seems to limit and define actionable statements to those in which the speaker expressly declares the perishable food to be unsafe.

By contrast, Louisiana, Mississippi, South Dakota and Texas include in their disparagement definitions any false statement that states or “implies” that food is not safe.⁴⁷ Oklahoma defines disparagement as a falsity that “casts doubt” on the safety of the food product.⁴⁸ These laws seem to be a direct response to the unsatisfactory outcome for the apple growers in the Alar case against CBS. There, the court rejected the plaintiffs’ attempts to imply falsity based on an overall negative or disparaging theme, despite no proven misstatements. In response, Idaho, Louisiana, Mississippi, Oklahoma, South Dakota and Texas created a statutory standard in which falsity could be implied, presumably without any specific misstatements. Accordingly, a defendant could show a factual, scientific basis for an allegedly disparaging statement but a plaintiff could still get a jury to imply falsity by attacking the science. Plaintiffs in the Alar case wanted a jury to consider that the defendants’ science was based on animal studies not human and was extrapolated to children, all to imply falsity of the factual statements. That court disallowed it under traditional concepts of truth and falsity in common law trade libel. The standard in these “implied” falsity statutes seemingly would allow that.

Potentially, these “implied” laws also could cover speech that does not specifically criticize the safety of a plaintiff’s product, but could be interpreted as such by hearers. For example, these “implied” laws could cover marketing statements by organic farmers who tout the health and safety of their farming methods. By implication, their statements could be deemed disparaging to the safety of any food farmed by traditional methods. South Dakota’s law, in fact, may actually target statements about alternative farming methods as disparaging. In addition to defining disparagement as a falsity that “states or implies” that a food product is not safe, it goes on to include statements “that generally accepted agricultural and management practices make agricultural food products unsafe for consumption by the public....”⁴⁹

On the other hand, Texas has attempted to limit the scope of the “implied” language in its disparagement definition. Apparently, to avoid sweeping the organic farming debate into its coverage, the Texas law expressly exempts:

- marketing or labeling any agricultural product in a manner that indicates that the product:
- (1) was grown or produced by using or not using a chemical or drug;
 - (2) was organically grown; or
 - (3) was grown without the use of any synthetic additive.⁵⁰

In other words, Texas lawmakers understood that organic farmers tout health benefits of their farming methods. To some hearers or readers, such statements might imply that traditional farming results in food that is not safe or healthy. Texas expressly permits this implication by exempting these marketing efforts from disparagement. Other states, however, especially South Dakota, seem to invite challenges to such marketing by the local and organic food producers if they tout health benefits of their farming methods, creating a false impression that other food production methods are unsafe. Some possible examples of this are described in the case study below in I.C.

3. Intent

The free speech standards for intent in defamation cases are well-established. *New York Times Co. v. Sullivan*⁵¹ articulated the rule that a speaker would escape liability unless a public figure or public official plaintiff could prove publication of defamatory falsehood “with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”⁵² The *New York Times v. Sullivan* “public figure” approach has been applied to a

corporation suing a media outlet for product disparagement.⁵³

On the other hand, “so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”⁵⁴ Additionally, *Gertz* established that a private figure plaintiff must prove actual malice to recover presumed and punitive damages (even though such a plaintiff can recover compensatory damages without proving actual malice).⁵⁵

If corporate agribusiness plaintiffs suing for disparagement are private, not public figures, these Supreme Court precedents require a minimal showing of negligence to establish liability. Corporate food producers with sufficiently high profiles could be deemed public figures,⁵⁶ mandating that they prove malice in the disparagement cases. Considering that food safety is a matter of public concern, even private figure plaintiffs would have to prove malice to recover punitive damages under *Gertz*.

The state disparagement statutes include a variety of fault standards, some of which correspond to these constitutional mandates, others of which may violate them. For example, Louisiana, Ohio and Oklahoma establish liability for a disparaging statement that the speaker “knows or should have known” was false.⁵⁷ By including “should have known” these states are accepting a negligence standard for proof.⁵⁸ Similarly, Alabama states, “It is no defense under this article that the actor did not intend, or was unaware of, the act charged.”⁵⁹ In other words, liability would attach in Alabama without knowledge or intent, presumably by negligence alone. According to *Gertz*, these are permissible standards of proof as long as a food libel plaintiff is not a public figure. But even the private figure plaintiff could not recover punitive damages under these statutes. Nevertheless, Alabama and Ohio expressly allow for punitive damages and Louisiana and Oklahoma provide for “other appropriate relief” in addition to actual damages.⁶⁰

The remaining eight civil disparagement laws all seem to establish knowledge standards that would meet the constitutional malice requirement for public figure claims and for punitive damage claims by public or private figures. The states vary in the language they use, such as “knows,”⁶¹ “malice,” “malicious,” “maliciously,”⁶² “willful”⁶³ or some combination of one or more. All these states except Idaho provide punitive or treble damages or other appropriate relief. Only Idaho precludes punitive damages despite a requirement of actual malice.⁶⁴

Finally, despite clear language articulating a high intent standard, Arizona’s law presents a potential conflict. First, it states a plaintiff can sue for damages resulting from a “malicious public dissemination of false information....”⁶⁵ Then it states that a defendant will be liable for “intentionally” disseminating false information.⁶⁶ These two statutory standards meet the *New York Times* requirement of malice. The conflict arises when the statute defines “false information” as used in both these paragraphs. False information is that which is “not based on reliable scientific facts and reliable scientific data and that the disseminator knows or *should have known* to be false.” (Emphasis added). In other words, the clear malice standards in the statute are both underpinned by a definition of falsity that can be based on negligence only (should have known). Any application of the lower standard would be unconstitutional if the plaintiff is a public figure or to impose punitive damages.

4. Standing to Sue

Most of the states establish liability to a “producer” of the allegedly disparaged perishable food who has suffered damages from the libel.⁶⁷ But a few other states either broadly define “producer,”⁶⁸ or also provide a cause of action for others in the chain of distribution including anyone who ships, transports, markets or sells the protected perishable food and can prove damages.⁶⁹ Georgia simplifies the plaintiff group to include “the entire chain from grower to consumer.”⁷⁰

At least one commentator believes that these broad standing provisions could violate Supreme Court precedents that require an alleged defamation be “of or concerning” a specific plaintiff.⁷¹ The free speech requirement from *New York Times v. Sullivan* that a defamation must be “of or concerning” a specific plaintiff has not been extended to product disparagement cases. For example, in *Emerito Estrada Riviera v. Consumers Union*,⁷² the court declined to impose “of or concerning” as a constitutional standard, only as a common law requirement, when a car dealer sued for disparagement directed at one of its car models. Accordingly, if the “of or concerning” requirement is not a constitutional mandate, the state legislatures in the food libel states would be free to eliminate it as an element of food disparagement.

Further, even if the “of or concerning” free speech test of *New York Times v. Sullivan* applies in product disparagement, that does not render the food libel laws unconstitutional. Just because the statutes “provide standing to a wide range of persons,” who can sue,⁷³ that does not automatically make them constitutionally defective. A court could examine a particular alleged disparagement being adjudicated under the statute to determine if it were “of or concerning” a specific plaintiff, as long as that plaintiff fell into one of the broad categories of parties the statute protects. Although the broad standing provisions create a large range of potential plaintiffs in some states, that should not render them automatically unconstitutional. Still, individual statements could be too generic to meet the “of or concerning” mandate. This question is addressed further in the case study in Section I.C.⁷⁴

Four of the state laws specify that an “association” may represent its members who are disparaged by alleged food libel.⁷⁵ Of these, only Ohio creates something akin to a class action for association members to be notified of the action with an opportunity to be excluded. Association members who are not excluded are bound by the outcome and any award is divided among the members.⁷⁶ By contrast, Idaho rejects this concept of association disparagement: “The disparaging factual statement must be clearly directed at a particular plaintiff’s product. A factual statement regarding a generic group of products, as opposed to a specific producer’s product, shall not serve as the basis for a cause of action.”⁷⁷ Idaho’s approach

avoids any defect if “of or concerning” is a constitutional mandate.

At the end of this text, Table 1 summarizes the cases that will likely apply to proof of food libel.

B. Long Arm of the Laws

None of the state food disparagement laws have their own long arm provisions to limit the source of actionable disparagement to speakers within their states or publications within their states. Only three states limit their definitions of disparagement to statements about food “grown in this state,” (Arizona)⁷⁸ “grown or produced in Florida,”⁷⁹ or “grown, raised, produced, distributed or sold”⁸⁰ in Ohio. The remaining laws have no limitations on their coverage.

The statutes that are not limited to disparagement about a product grown within that state potentially invite forum shopping agricultural plaintiffs from other states without a food libel law to go to Alabama, Georgia, Idaho, Louisiana, North Dakota, Oklahoma, South Dakota or Texas to sue there. This is possible because none of the statutes limit the scope of the laws to statements made within the state or to statements about plaintiffs in the state. If plaintiffs are mass distributors of allegedly disparaged food, they could potentially prove damages in any state where they distribute, thus justifying the disparagement claim in any state with a food libel law. Accordingly, the only constraint on the use of these civil food libel statutes by large agricultural distributors across the U.S. could be the limit on personal jurisdiction of courts to bring defendants into the state to defend the civil action. If an alleged disparagement were published online, or in other mass media, such a publication could establish jurisdiction over a speaker by courts anywhere in the U.S.⁸¹

Alternatively, to avoid a personal jurisdiction dismissal, agricultural plaintiffs could go to a defendant’s home state to sue there, using their own home state’s food disparagement law (or another state’s law in the case of a multi-state operator). Then the only constraint would be a court’s discretion under choice of law, to reject the case based on the other state’s food libel statute.⁸²

The various permutations of food libel actions under the twelve laws are examined next in the case of one farm co-op in a state without such a law, that may have published a few disparaging statements on its website.

At the end of this text, Table 2 summarizes these provisions of the state food libel laws.

C. Case Study: Good Natured Family Farms of Lawrence, Kansas

Good Natured Family Farms (GNFF) is a cooperative of 18 Kansas and Missouri family farms that sell in the Kansas City metropolitan area under a common brand. Co-op farms raise beef cattle under strict guidelines and the co-op processes beef and chicken. The farms also produce eggs, milk, sausage, ham, bacon, Heritage turkeys, eggnog, bison, Farmhouse cheese, and honey according to environmentally sustainable methods.⁸³ The co-op distributes its products under a “Buy Fresh Buy Local” marketing campaign through a Kansas City grocery chain. To participate in the campaign, the farms must agree to criteria including:

- minimal use of pesticides.
- no growth hormones and sub-therapeutic antibiotics in animals
- no genetically modified seed varieties or livestock breeds.
- use of traditional handcrafted artesian methods with no or minimal use of artificial ingredients or preservatives.
- main ingredients that are locally grown or produced.
- breeds and varieties best suited to produce the highest quality products for the locale.⁸⁴

The co-op publishes a website on which each of the participating farms is profiled. Two types of statements in the farm and products profiles could be characterized as disparaging to other agricultural products. Each of these statements is examined next pursuant to the liability standards discussed above under the food libel laws.

1. Bison

Bison are raised the natural way—on Midwestern land, grazing on fresh, native prairie grasses. Because of this green approach, they never use harmful steroids, hormones, or antibiotics found in mass-produced meats.⁸⁵

Would the characterization of steroids, hormones, or antibiotics in mass-produced meats as “harmful” amount to trade libel? The statement qualifies as one about the safety of a perishable agricultural product. Thus, it fits within the scope of all the state laws. The statement is factual, not opinion, since the use of steroids, hormones and antibiotics in mass-produced meats can be objectively proven. On its face, the statement would seem to be actionable under all food libel laws by any mass producer of bison who uses steroids, hormones or antibiotics.

Whether steroids, hormones, or antibiotics are “harmful” would require scientific proof in all states but Idaho, North Dakota and South Dakota, as discussed above. In other words, the co-op would be into a complex trial of dueling experts at this point. Or would it be the bison farmers only? That is relevant to the intent standard, as discussed above.⁸⁶

Additionally, if the “of or concerning” requirement is a constitutional mandate, that defense could come into play with this alleged disparagement.⁸⁷ The statement does not refer to any specific meat producer, only to the “mass-produced” product. Is the statement contrasting the GNFF bison with other “mass-produced” bison (if there are any) or to all other mass produced meats such as beef and pork? If the statement is ambiguous about what product that is allegedly harmful, it will be hard for any producer of such a product to prove disparagement damages. Only South Dakota defines disparagement to include generally accepted agricultural and management practices, the likes of which would include use of steroids, hormones and antibiotics.

As it happens, however, South Dakota is one of the few food libel states where bison herd (in captivity breeding programs or free-range).⁸⁸ All the Good Natured Family Farms are in Kansas and Missouri, neither of which has a food libel law. If the statement is contrasting the GNFF bison with other “mass-produced” bison, a potential plaintiff could likely be in South Dakota where the statute protects against the very kind of statement discussed here. If the statement is referring to any mass produced meats, such as beef and pork, then several more food libel states would likely have meat producers who could claim disparagement of their products.

The co-op website with the alleged disparagement is visible everywhere, which raises the question whether the website is sufficient to trigger jurisdiction of a court over the co-op or its members. Possibly not, since the website is not actively soliciting business anywhere outside Kansas City.⁸⁹ In fact, the Buy Fresh Buy Local criteria limit the farms’ distribution to 200 miles.⁹⁰ It could violate “traditional notions of fair play and substantial justice”⁹¹ to require these farms, that emphasize their local business model, to defend a food libel action beyond Kansas or Missouri. Nevertheless, the courts of Kansas and Missouri could apply the food libel law of another state.⁹²

Suffice it to say, the Good Natured Family Farms could be looking at some complex litigation over this one statement about bison.

2. Eggs and Turkeys

According to the website, the Good Natured Family Farms Amish egg producers around Stanberry, Missouri, keep older chickens alive and in production, in contrast to “the commercial laying houses, [where] they dispose of the older hens as soon as production drops off.”⁹³ Similarly, in an 8 ½ minute video on the website, Good Nature Family Farm turkey grower, Frank Reese, makes many factual statements about his treatment of turkeys versus “industrial” turkey farms. But the video makes no food safety claims.⁹⁴

These statements are likely not actionable under most food libel statute because they make no claims about health or safety of the eggs or turkeys, only about the humane treatment of the animals by the Good Natured Family farmers versus the commercial laying houses and industrial turkey farms. South Dakota’s law covers statements about “generally accepted agricultural and management practices.”⁹⁵ But South Dakota still requires that such statements implicate the safety of food produced under those traditional methods.

Only North Dakota’s food libel law does not restrict alleged disparagement to safety, making the foregoing statements about lack of humane treatment potentially actionable if false. Arguably, the statements could be true about the vast majority of industrial turkey farms or commercial egg farms, but would be actionable by any individual operation that could prove falsity about itself. To this point, North Dakota has attempted to circumvent the “of or concerning” defense by providing a cause of action to “each producer of the group or class and any association representing an agricultural producer,”⁹⁶ if an alleged disparagement refers to “an entire group or class of agricultural producers or products...”⁹⁷ Nevertheless, if the “of or concerning” defense is based on free speech grounds it cannot be skirted this way by a state statute.

Because they make no food safety claims, the statements by the co-op egg and turkey farmers are not obvious disparagement under most food libel laws. But the co-op could still be subject to a suit under the North Dakota law.⁹⁸

The legislatures that adopted food libel laws aim to protect a segment of their economies that can be harmed by false safety claims. But food safety and commerce are national concerns, first and foremost. The latest federal approach to food safety policy is discussed next.

II. New Federal Protection Regarding Food Safety and Speech

The FDA Food Safety Modernization Act⁹⁹ (FSMA) amends the Federal Food, Drug, and Cosmetic Act (FFDCA), which established the Food and Drug Administration (FDA) in 1938.¹⁰⁰ Accordingly, this section will discuss the general parameters of the FDA’s food safety authority and the main revisions in the new law.

A. General Scope

The FFDCA authorized the FDA to issue standards for food, and conduct factory inspections. The FDA's food safety authority, however, does not include meat, poultry and eggs, which are regulated by the United States Department of Agriculture.¹⁰¹ In fact, the new federal food safety law specifically states that nothing in it shall alter the respective authorities of the Secretaries of Agriculture and Health and Human Services¹⁰² or limit the authority of the Secretary of Agriculture under the Federal Meat Inspection Act,¹⁰³ the Poultry Products Inspection Act,¹⁰⁴ or the Egg Products Inspection Act.¹⁰⁵ Accordingly, fruits, nuts, dairy, seafood and vegetables are within the scope of the new federal food safety law but not meat, poultry or eggs. All these foods fall within the state "perishable" food label laws discussed above.

The FSMA tackles food safety with several new authorities for the FDA. For example, for the first time, the FDA is authorized to require comprehensive, science-based preventive controls by food producers under its jurisdiction. Also for the first time, food importers will have to verify that foreign suppliers have adequate preventive controls in place to ensure safety. The statute gives the FDA new mandatory recall authority for food under its jurisdiction, rather than limiting it to voluntary recalls as in the past.¹⁰⁶

In its implementing regulations, the new law calls for the FDA to exempt very small businesses. The law includes in this exemption farmers selling directly to restaurants or consumers at farmers' markets or through community supported agriculture programs, as well as facilities whose annual sales are less than \$500,000, and within 275 miles of their facility.¹⁰⁷ Senator John Tester (D-Mt) the sponsor of the small farm exemption contrasted these small businesses with vendors that "can send bags of lettuce to 40 different states in a matter of hours."¹⁰⁸ Tester proposed the amendment because, "[T]he real problem was never with the folks who take their goods to the farmer's market in a wheelbarrow. The real problem was with our centralized food system-- the factories that churn out hundreds of jars of peanut butter every day - and ship them to every corner of the country."¹⁰⁹

The statute requires the FDA to establish "science-based" minimum standards for risk analysis, prevention controls, safe harvesting, containment and other issues.¹¹⁰ As of May, 2011, none of the administrative proceedings initiated by the FDA under the FSMA have addressed the issue of "science-based" decision-making about food safety. Eventually, however, the regulations enforcing this new law should have something to say to plaintiffs, defendants and jurors in state food disparagement claims regarding the use of science to support the alleged truth or falsity of food safety statements.

Presumably, these science-based standards will also become the standard for measuring the validity of employee claims under the law's new whistleblower protection. These provisions are discussed next.

B. Whistleblower Protections

On its face, the employee protection in the new federal Food Modernization Safety Act (FMSA) will not protect a whistleblowing employee if an employer attempted to sue the whistleblower under a state food disparagement statute. The reach of the FMSA employee protection is compared and contrasted to the threat of action under the state food label laws next.

1. FMSA Employee Protections

If an employee engages in the protected behaviors of reporting a potential statutory violation, testifying about it, or refusing to participate in it on the job,¹¹¹ the FMSA prohibits any employer "engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food,"¹¹² from firing or otherwise discriminating against a whistleblower "with respect to compensation, terms, conditions, or privileges of employment..."¹¹³

The FMSA provides a process for the employee to file a complaint of alleged discrimination with the Secretary of Labor within 180 days after the discharge or discrimination.¹¹⁴ That initiates a process by which the Secretary of Labor acts as arbitrator. The Secretary of Labor investigates the complaints, makes findings and orders relief, including reinstatement in the case of discharge, back pay, other compensatory damages, attorneys' fees and other costs.¹¹⁵ Alternatively, if the Secretary finds the employee claim was frivolous or in bad faith, the employee can be ordered to pay fees to the employer up to \$1000.¹¹⁶ Either order of relief is final and can be enforced in federal district court¹¹⁷ or can be appealed in federal circuit court.¹¹⁸

The FSMA expressly states that nothing in its employee protections preempts any other employment protection provided in federal or state law, nor limits rights under law or collective bargaining agreements.¹¹⁹ At the same time, however, it does not expressly preempt a food producer from pursuing any "retaliation" that does not affect employment rights or benefits, such as a civil action for food disparagement. This possibility is discussed next.

2. Food Label Actions Against Whistleblowers Protected by FSMA

The whistleblower protection in the FSMA is limited to employment-related retaliation.¹²⁰ Therefore, on its face, the FSMA would not seem to affect other forms of "retaliation" against an employee who disparages the safety of food produced by his/her employer, including a civil action under a state food label law. The question remains whether such an action would be impliedly preempted by the whistleblower protection in FSMA.

If employees protected by FSMA get a final determination from the Secretary of Labor, that conclusion is subject only to

appeal in a federal circuit, not to *de novo* review.¹²¹ Arguably, an action under a food label statute would be a new fact finding proceeding about the same facts as the whistleblowing/disparagement. That food label case could contravene the “finality” of the Secretary’s order and be impliedly preempted by the FSMA whistleblower protection.

In most states, a food label action would impose a different standard of proof than that articulated by the FSMA. As discussed above, food label statutes require the alleged disparager to verify food safety statements with scientific support. No such requirement is imposed on employees claiming whistleblower protection under FSMA. The federal law only requires that the employee had a “reasonable belief” that the employer was violating the law.

On this last point, an employee could argue that the FSMA establishes a new *per se* federal standard for food safety. If the food producer is violating the FSMA and its corresponding regulations, its product is not safe. Any statement to that effect, based on a reasonable belief by a whistleblowing employee, is presumptively *true* under the federal law. Such an interpretation would effectively preempt any state food label law that required proof of the truth or falsity of a food safety statement based on scientific data.

At the same time, arguments mitigate against a conclusion that the FSMA preempts state food label actions. First, the FSMA does not cover a large portion of perishable food (meat, poultry and eggs) that is protected by the state food label laws. To preempt the disparagement claims of some food producers but not others would seem to be an unintended consequence of federal bureaucratic history (FDA vs. USDA) rather than any real federal policy about food safety debate.

Further, the implied preemption arguments above would only apply to whistleblowing employees who successfully prove retaliatory discrimination. By contrast, the universe of conversation about food that could lead to claims of disparagement is much larger than those employees protected in the new law. If FSMA reflects preemptive federal policy about food safety debate, it would prove to be a narrow policy with weak impact.

Any meaningful preemptive policy to stem from the FSMA will have to come from the FDA in its rulemaking processes, which will be discussed in Conclusions and Recommendations below. That policy would be based on the free speech concerns that food label laws represent, which are discussed next.

III. Food label versus Free Speech.

When Oprah Winfrey was sued under the Texas food label law, commentators uniformly agreed that these state food label laws all represented an unconstitutional restraint on free speech.¹²² As discussed above, some provisions of some of the laws support those conclusions.¹²³ Other constitutional concerns would require a case-by-case analysis, including whether the alleged disparagement is sufficiently factual to be proved true or false.¹²⁴ Nevertheless, no court has ever declared one of the laws unconstitutional or found that its application violated free speech in a particular case. All still remain the law of their states (with potential for use by agricultural plaintiffs from other states too). At the same time, however, no plaintiff has ever won a food label judgment pursuant to one of the laws.¹²⁵

So what difference do food label laws make if no one gets successfully sued under them and they are potentially unconstitutional anyway? The Supreme Court has answered that question:

Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech – harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.¹²⁶

This is characterized as the chilling effect on protected speech and it has been documented as a real by-product of the food label laws, most recently in the example described above from the acclaimed movie *Food, Inc.*

Similarly, J. Robert Hatherill author of *Eat to Beat Cancer* disclosed that his publisher:

stripped lengthy passages from my new book. I was not allowed to disclose dangers inherent in some common foods like . . . meat products. The problem had nothing to do with whether there was sufficient evidence to support the claims — there is — it came down to fear of litigation. I was told, ‘We could win the lawsuit, but it would cost us millions, and it is just not worth it.’¹²⁷

Other examples of the chilling effect of food label laws are editorialized online. According to authors Marc Lappé and Britt Bailey, their book contract to publish *Against the Grain: Biotechnology and the Corporate Takeover of Your Food*, was canceled after the publisher received a threatening letter from Monsanto in March 1998. The unnamed original publisher destroyed copies that had already been printed. Eventually Common Courage Press published the book.¹²⁸ According to another commentator, “had these laws been in force in earlier decades, Upton Sinclair’s *The Jungle* (1906) and Rachel Carson’s *Silent Spring* (1962) would never have been published.”¹²⁹

Other authors note that a handful of states with these food label laws can affect publishing decisions nationwide:

Although these laws exist in a minority of states, they exert a nationwide effect because national publishers and electronic media purveyors fear they might be sued in any such state where their publications or broadcasts are available to the public.¹³⁰

Apparently, the chilling effect is not just a by-product of the food libel laws passed in the 1990s, but actually was a goal, at least for one lobbyist. Steve Kopperud, Senior Vice President of the American Feed Industry Association stated: “I think that to the degree that the mere presence of these laws has caused activists to think twice, then these laws have already accomplished what we set out to do.”¹³¹ Similarly, Bill Fritz, a Washington State Food Processors Council spokesperson, said that a food libel law would “send a big message to the people that start these things I would hope this would have a chilling effect on the sometimes very irresponsible journalism and reporting.”¹³²

IV. Conclusions and Recommendations

“Fearing suits arising from the new statute,”¹³³ two environmental groups attempted to obtain a declaratory judgment that the Georgia food libel law was unconstitutional. The case was dismissed because no present controversy existed between the environmental groups and the state of Georgia.¹³⁴ This is the likely result of any case that attempts to strike down the various state food libel laws on the abstract ground that they violate free speech. On the other hand, a publisher or author who is threatened with food libel litigation could use such a threat as the basis to ask a court to declare a food libel law unconstitutional.¹³⁵ An actual litigated case of food libel that survives dismissal on all other grounds, will be necessary for an opinion on the constitutionality of these laws.

The FDA could lessen some of the chilling effect of the state laws by preempting any actions against whistleblowing employees.¹³⁶ This express preemption would be a defensible interpretation of the language in the FSMA that the Labor Secretary’s determination in a whistleblower claim is final.¹³⁷ Unfortunately, this preemption would have limited impact because it would be restricted to employees who have successful discrimination claims. Further, it would not cover anyone speaking about meat, poultry or egg production because of the FDA’s jurisdictional constraints.

The FDA’s rulemakings to implement various provisions of the FSMA that require science-based decision making also could impose those standards on the states, for all food safety issues, including disparagement cases. Again, this kind of express preemption could be supported by the general policy of the FSMA to protect national food safety using science-based standards, as well as by the provisions of the law that deal with local, state and federal cooperation.¹³⁸

Lawmakers from agricultural states without food libel laws should encourage their peers to repeal their food libel statutes on the books. States and regions have shown considerable creativity and foresight in promoting local agricultural interests, not with protectionist laws like the disparagement statutes, but with food policy programs that promote sustainable agriculture, direct farm marketing and farmer-owned processing facilities, to name a few.¹³⁹

Finally, parties that are protected by food libel laws today should learn from McDonald’s experience in a protracted disparagement case in England. Under England’s easier libel standards, McDonald’s won a disparagement case against two Greenpeace activists who had distributed leaflets called, “What’s Wrong with McDonald’s – Everything They Don’t Want You to Know.” Nevertheless, the case generated tremendous negative publicity for McDonald’s, including an 85-minute documentary.¹⁴⁰ In the longest trial in English history, McDonald’s recovered £60,000 because the defendants had not proved (since English libel law requires defendants to prove truth) “allegations against McDonald’s on rainforest destruction, heart disease and cancer, food poisoning, starvation in the Third World and bad working conditions.”¹⁴¹ On the other hand, “they had proved that McDonald’s ‘exploits children’ with their advertising, falsely advertise their food as nutritious, risk the health of their most regular, long-term customers, are ‘culpably responsible’ for cruelty to animals, are ‘strongly antipathetic’ to unions and pay their workers low wages.”¹⁴² Obviously, this was a limited legal victory and a major PR loss for the burger giant.

The defendants appealed and sought changes in the English libel law (now under discussion).¹⁴³ The result was upheld, so the “McLibel Two” initiated an action against the Great Britain in the European Court of Human Rights. The ECHR found the action had violated their rights to a fair trial because they were not provided legal aid and had denied their rights of free expression.¹⁴⁴ At all phases of the proceeding, the alleged harms caused by McDonald’s were rehashed and reexamined on the merits, bringing more attention to them than the original leaflets ever possibly could have spawned.

The moral of the story for potential food libel plaintiffs in the U.S. should be to think twice before initiating or even threatening disparagement claims. The law may look favorable, but many more issues lurk beneath the black letter on the books.

Table 1: Free Speech Precedents regarding Defamation or Product Disparagement

	Public Figure/Public Official Plaintiff	Private Figure Plaintiff	“Of or Concerning” the plaintiff	Punitive Damages, presumed damages	Product Disparagement

<i>New York Times v. Sullivan</i> (1964).	1 st Amendment Requires Proof of Actual Malice by Clear and Convincing evidence for Defamation	Not applicable	Required by 1 st Amendment in Public Figure/Official defamation action	Public Figure/Official must prove Malice to recover	See <i>Bose v. Consumers' Union</i>
<i>Gertz v. Robert Welch</i> , (1974).	Not applicable	1 st Amendment permits states to establish fault standard for proof of defamation (negligence minimum, not strict liability).	Not applicable	Private figure must prove malice	Not Applicable
<i>Bose v. Consumers' Union</i> (1984).	CORPORATION was treated as a Public Figure.	Not applicable	Not applicable		1 st Amendment Requires proof of Actual Malice by Clear and Convincing evidence
<i>Dun & Bradstreet v. Greenmoss Builders</i> (1985).	Not applicable	Applied <i>Gertz</i> (i.e. CORPORATION that was subject of false credit report was treated as a private plaintiff).	Not applicable	1 st Amendment permits states to establish fault standard for punitive damage award when a private plaintiff is suing over a matter that is NOT a public concern	Not applicable
<i>Hepps v. Philadelphia Inquirer</i> (1986).	Not applicable	1 st Amendment requires burden of proving falsity on plaintiff. No presumed falsity when suing media defendant on a matter of public concern.	Not applicable	Not applicable	Not applicable
<i>Emerito Estrada Rivera v. Consumers' Union</i> (1 st Cir. 2000)	Not applicable	Car dealer suing over disparagement targeted at car manufacturer's product	Not a 1 st Amendment requirement for Product Disparagement	Not applicable	1 st Amendment does NOT require alleged disparagement to be "over or concerning" plaintiff. (Common law did require it).

Table 2: Food Disparagement Statutory Provisions

	What's protected?	Proof of Falsity	Definition of Disparagement	Intent	Standing to Sue	Statute of Limitations
Alabama	Agricultural or aquaculture perishable	Shall be deemed to be false if not based upon	Not safe for human consumption	Lack of intent, or awareness ≠ defense	Anyone who produces, markets, or sells	1 year

	food or commodity	reasonable and reliable scientific inquiry, facts, or data.				
Arizona	Perishable agricultural or aquacultural food product or commodity grown or produced in this state.	Information not based on reliable scientific facts and reliable scientific data ... disseminator knows or should have known to be false.	Not safe for human consumption	Malicious public dissemination; intentionally disseminates	Producer, shipper, or association that represents same	2 years
Florida	Perishable agricultural or aquacultural food product or commodity grown or produced within the State of Florida	Information not based on reliable, scientific facts and reliable, scientific data ... disseminator knows or should have known to be false.	Not safe for human consumption	Willful or malicious	Person who actually grows or produces or any association representing same	2 years
Georgia	Perishable agricultural or aquacultural food	Deemed to be false if not based upon reasonable and reliable scientific inquiry, facts, or data	Not safe for human consumption.	Willful or malicious	Entire chain from grower to consumer	2 years
Idaho	Perishable agricultural intended for human consumption	Plaintiff shall bear the burden of proof and persuasion by clear and convincing evidence	Clearly impugns the safety of the product	Actual malice	Clearly directed at a particular plaintiff's product	2 years
Louisiana	Perishable agricultural or aquacultural food product	Presumed to be false when not based upon reasonable and reliable scientific inquiry, facts, or data.	States or implies not safe for consumption by the consuming public.	Knows or should have known to be false	Producer	1 year
Mississippi	Perishable agricultural or aquacultural food product	Presumed to be false when not based upon reasonable and reliable scientific inquiry, facts or data.	States or implies not safe for consumption by the consuming public.	Knows to be false	Producer	1 year
North Dakota	Agricultural producer or an agricultural product AND an entire	False and defamatory ... may be reasonably expected to be	Producer is damaged	Willfully or purposefully ... knowing the statement to be false.	Agricultural producer and any association representing an agricultural	2 years

	group or class of agricultural producers or products	believed		Maliciously = treble damages	producer	
Ohio	Perishable agricultural or aquacultural food product or commodity that is grown, raised, produced, distributed, or sold within this state	Not based upon reasonable and reliable scientific inquiry, facts, or data	Not safe for human consumption	Knew or should have known	Producers or any association representing producers	2 years
Oklahoma	Perishable agricultural food product intended for human consumption	Not based on reliable scientific facts and scientific data	Casts doubt on the safety	Knows or should have known to be false	Producer	Not stated
South Dakota	Perishable food product of agriculture or aquaculture	Not stated	States or implies that an agricultural food product is not safe for consumption by the public OR that generally accepted agricultural and management practices make agricultural food products unsafe for consumption by the public	Knows to be false; with intent to harm = treble damages	Producer	1 year
Texas	Perishable food product of agriculture or aquaculture	Trier of fact shall consider whether the information was based on reasonable and reliable scientific inquiry, facts, or data.	States or implies not safe for consumption by the public	Knows the information is false	Producer	Not stated.

Footnotes

¹ Engler v. Winfrey, 201 F.3d 680 (5th Cir. 2000).

² Tex. Civ. Prac. & Rem. Code Ann. §§ 96.001 - 96.004 (2010).

³ ALA. CODE §§6-5-620 - 6-5-625 (2011); ARIZ. REV. STAT.§ 3-113 (2011); COLO. REV. STAT. § 35-31-101 (2010); FLA. STAT. §865.065 (2011); GA. CODE ANN. §§2-16-1 - 2-16-4 (2011); IDAHO CODE §§ 6-2001 to 6-2003 (Michie 2011); LA.

REV. STAT. ANN. §§ 4501 – 4504 West 2011); MISS. CODE ANN. 69-1-251, 69-1-253, 69-1-255, 69-1-257 (2010); N.D. CENT. CODE §§ 32-44-01 to 32-44-04 (2011); OHIO REV. CODE ANN. § 2307.81 (Anderson 2011); OKLA. STAT. ANN. tit. 2, §§ 5-100-102 (2011); S.D. CODIFIED LAWS §20-10A-1 to §20-10A-4 (2011).

⁴ As a criminal law, the Colorado law differs in numerous respects from the other twelve state laws. It targets restraints of trade, and does not seem to be motivated to protect agribusiness from criticism, as the other states' statements of legislative purposes reveal. For this reason, this paper only focuses on the state creating civil liability, not Colorado.

⁵ See *supra* notes 20 through 80 and accompanying text.

⁶ Food and Drug Administration, *Questions and Answers on the Food Safety Modernization Act*, (Apr. 20, 2011), at <http://www.fda.gov/NewsEvents/PublicHealthFocus/ucm238506.htm>.

⁷ 21 U.S.C. §301 (2011).

⁸ Free speech issues under state food disparagement laws received significant attention in the late 20th century when Oprah Winfrey was sued under the Texas statute. Several law review articles were published at that time, most of which concluded the state laws would not withstand constitutional scrutiny if challenged under the first amendment. See, Ronald K.L. Collins, *Free Speech, Food Libel, & the First Amendment . . . in Ohio*, 26 OHIO N.U.L. REV. 1 (2000); Eric Jan Hansum, *Where's the Beef? A Reconciliation of Commercial Speech and Defamation Cases in the Context of Texas's Agricultural Disparagement Law*, 19 REV. LITIG. 261(2000); Julie K. Harders, *Note, The Unconstitutionality of Iowa's Proposed Agricultural Food Products Act and Similar Veggie Libel Laws*, 3 DRAKE J. AGRIC. L. 251 (1998). This paper does not repeat the free speech analysis except where it overlaps with the analysis of liability under the statutes, such as burdens of proof.

⁹ *Auvil v. CBS 60 Minutes*, 67 F.3d 816 (1995), *cert. denied* 517 U.S. 1167 (1996).

¹⁰ 67 F. 3d at note 2.

¹¹ *Id.* at 818.

¹² *Id.*

¹³ *Id.* at 819.

¹⁴ *Id.*

¹⁵ *Auvil v. CBS 60 Minutes*, 836 F. Supp. 740 (E.D. Wash. 1993).

¹⁶ Restatement (Second) of Torts §623A.

¹⁷ *Auvil v. CBS 60 Minutes*, 67 F. 3d at 822.

¹⁸ *Id.*

¹⁹ Ellen Gay Jones, *Forbidden Fruit: Talking About Pesticides and Food Safety in the Era of Agricultural Product Disparagement Laws*, 66 BROOKLYN L. REV. 823 (2000/2001); Ronald K.L. Collins, *Veggie Libel – Agribusiness Seeks to Stifle Speech*, MULTINATIONAL MONITOR MAGAZINE (May, 1998), http://www.thirdworldtraveler.com/Environment/Veggie_Libel.html. See also, Marianne Lavelle, *Food Abuse Basis for Suits*, NATIONAL LAW JOURNAL A01 (May 5, 1997), <http://www.organicconsumers.org/displaw.html>.

²⁰ *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986). “To ensure that true speech on matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern. *Id.* at 793.

²¹ Because Colorado’s food libel law is a criminal statute, the burden of proof imposed on prosecutors is not part of this discussion of the burden of proof in civil actions.

²² See, e.g., ALA. CODE § 6-5-621 (1) (2011) which defines “disparagement” as, “The dissemination to the public in any manner of false information that a perishable food product or commodity is not safe for human consumption. The information shall be deemed to be false if it is not based upon reasonable and reliable scientific inquiry, facts, or data.”

²³ Jones, *supra* note 19 at 839.

²⁴ None of the state food libel laws explain what qualifies as “scientific” facts, data or inquiry. This issue will be discussed further under the new federal food safety law, which addresses the use of science to defend food production tactics. See *supra* notes 110 through 120 and accompanying text.

²⁵ IDAHO CODE § 6-2002(1) (2011); N.D. CENT. CODE § 32-44-02 (2011); S.D. CODIFIED LAWS §20-10A-1 to §20-10A-4 (2011).

²⁶ LA. REV. STAT. ANN. § 4502(1) (West 2011).

²⁷ See *supra* notes 106 through 110 and accompanying text.

²⁸ Roundtable: *First Amendment on Trial - The Libel Lawyer's Perspective*,” 23 SEATTLE U. L. REV. 849, 870 (2000).

²⁹ David Allen Green, *Understanding the Reverse Burden of Proof in Libel*, JACK OF KENT, A LIBERAL AND CRITICAL BLOG (Nov. 12, 2009) (commenting on English libel law in which a defendant must prove the truth of the alleged libelous statement), at <http://jackofkent.blogspot.com/2009/11/understanding-reverse-burden-of-proof.html>. The English approach is under debate for reform. *Id.*

³⁰ 475 U.S. 767, 777 (1986).

³¹ *Id.* at 775, 776, 777.

³² *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 784 (1985) (Brennan, J., dissenting). In this quote in the dissenting opinion, Justice Brennan was characterizing the decision of the majority, which upheld liability and punitive damages against Dun & Bradstreet, as a *private* speaker, to a limited audience, about a *private matter*. Justice Brennan dissented on the decision to treat Dun & Bradstreet's false credit report as a private matter.

³³ 475 U.S. at 778.

³⁴ *Id.* quoting *New York Times v. Sullivan*, 376 U.S. 254, 272 (1964).

³⁵ The paper examines these food libel statutory burden of proof provisions again in Part II regarding the new federal whistleblower protection for food industry employees. See *supra* notes 120 through 121 and accompanying text.

³⁶ 11 F. Supp 2d 858, 863 (N.D. Tex. 1998) For the same reason, the court held that the cattle ranchers had no standing to sue under the Texas law. *Id.*

³⁷ ALA. CODE §§6-5-621(2) (2011).

³⁸ ARIZ. REV. STAT. § 3-113(E)(2) (2011); FLA. STAT. §865.065(2)(b) (2011); OHIO REV. CODE ANN. § 2307.81(B)(3) (Anderson 2011).

³⁹ GA. CODE ANN. §2-16-2(2) (2011); IDAHO CODE § 6-2002(2) (Michie 2011); LA. REV. STAT. ANN. § 4502(1) (West 2011); MISS. CODE ANN. §69-1-253(b) (2010); OKLA. STAT. ANN. tit. 2, §§ 5-101.2 (2011); S.D. CODIFIED LAWS §20-10A-1(1) (2011); Tex. Civ. Prac. & Rem. Code Ann. § 96.001 (2010).

⁴⁰ N.D. CENT. CODE § 32-44-02 (2011);

⁴¹ ALA. CODE §§6-5-620 - 6-5-625 (2011); ARIZ. REV. STAT. § 3-113 (2011); COLO. REV. STAT. § 35-31-101 (2010); FLA. STAT. §865.065 (2011); GA. CODE ANN. §§2-16-1 - 2-16-4 (2011); LA. REV. STAT. ANN. §§ 4501 – 4504 West 2011); MISS. CODE ANN. 69-1-251, 69-1-253, 69-1-255, 69-1-257 (2010); OHIO REV. CODE ANN. § 2307.81 (Anderson 2011); OKLA. STAT. ANN. tit. 2, §§ 5-100-102 (2011); S.D. CODIFIED LAWS §20-10A-1 to §20-10A-4 (2011). Tex. Civ. Prac. & Rem. Code Ann. §§ 96.001 - 96.004 (2010).

⁴² ALA. CODE §6-5-620 (2011); ARIZ. REV. STAT. § 3-113(E)(2) (2011); FLA. STAT. §865.065(2)(b) (2011); GA. CODE ANN. §2-16-2(2) (2011).

⁴³ IDAHO CODE §§ 6-2002 (Michie 2011); OHIO REV. CODE ANN. § 2307.81(B)(2) (Anderson 2011); OKLA. STAT. ANN. tit. 2, §§ 5-101.2 (2011).

⁴⁴ N.D. CENT. CODE §§ 32-44-01 to 32-44-04 (2011).

⁴⁵ ALA. CODE §§6-5-621(1) (2011); ARIZ. REV. STAT. § 3-113 (2011); FLA. STAT. §865.065 (2011); GA. CODE ANN. §§2-16-1 - 2-16-4 (2011); OHIO REV. CODE ANN. § 2307.81 (Anderson 2011).

⁴⁶ IDAHO CODE § 6-2002(1)(b) (2011).

⁴⁷ LA. REV. STAT. ANN. § 4502(1)(West 2011); MISS. CODE ANN. §69-1-253(a) (2010); S.D. CODIFIED LAWS §20-10A-1(2) (2011); Tex. Civ. Prac. & Rem. Code Ann. §§ 96.002(a)(3) (2010).

⁴⁸ OKLA. STAT. ANN. tit. 2, §§ 5-101.1 (2011).

⁴⁹ S.D. CODIFIED LAWS §20-10A-1(2) (2011).

⁵⁰ Tex. Civ. Prac. & Rem. Code § 96.004 (2010).

⁵¹ 376 U. S. 254 (1964).

⁵² *Id.* at 280.

⁵³ *Bose Corporation v. Consumers' Union*, 466 U.S. 485(1984).

⁵⁴ *Gertz v. Robert Welch*, 418 U.S. 323, 347-48 (1974).

⁵⁵ *Id.* at 350. As noted above, *Dun & Bradstreet* refined this second *Gertz* rule to permit a private plaintiff to recover punitive damages without showing malice, when the falsity was not about a public concern. See *supra* note 32 and accompanying text.

⁵⁶ See *Bose*, *supra* note 53. Who has standing to sue under these statutes is discussed *supra* notes 67 through 77 and accompanying text.

⁵⁷ LA. REV. STAT. ANN. § 4502(1) (West 2011); OKLA. STAT. ANN. tit. 2, §§ 5-101.2 (2011).

⁵⁸ The Locke Institute, *Alternative Rules for Determining Tort Liability*, in COKE'S INSTITUTES OF THE LAW, No. 2, (Amanda J. Owens and Charles K. Rowley, eds.) (last visited May 30, 2011).

⁵⁹ ALA. CODE §6-5-623 (2011).

⁶⁰ ALA. CODE §6-5-622 (2011); LA. REV. STAT. ANN. § 4503 (West 2011); OHIO REV. CODE ANN. § 2307.81(C) (Anderson 2011); OKLA. STAT. ANN. tit. 2, §§ 5-101.2 (2011).

⁶¹ MISS. CODE ANN. §69-1-253(a) (2010); S.D. CODIFIED LAWS §20-10A-1(2) (2011); Tex. Civ. Prac. & Rem. Code Ann. §§ 96.002(a)(1) (2010).

⁶² FLA. STAT. §865.065(2)(a) (2011); GA. CODE ANN. §2-16-2(1) (2011); IDAHO CODE § 6-2002(1)(d) (Michie 2011).

⁶³ N.D. CENT. CODE § 32-44-02 (2011).

⁶⁴ IDAHO CODE § 6-2003(3) (Michie 2011).

⁶⁵ ARIZ. REV. STAT. § 3-113(A) (2011).

⁶⁶ ARIZ. REV. STAT. § 3-113(B) (2011).

⁶⁷ IDAHO CODE § 6-2003(1) (2011); LA. REV. STAT. ANN. § 4503 (West 2011); MISS. CODE ANN. §69-1-255 (2010); OKLA. STAT. ANN. tit. 2, § 5-102(A) (2011); S.D. CODIFIED LAWS §20-10A-2 (2011). Tex. Civ. Prac. & Rem. Code Ann. §§ 96.002(b) (2010).

⁶⁸ ARIZ. REV. STAT. § 3-113(E)(3) (2011).

⁶⁹ ALA. CODE §6-5-622 (2011); ARIZ. REV. STAT. § 3-113(A) (2011); OHIO REV. CODE ANN. § 2307.81(B)(4) (Anderson 2011).

⁷⁰ GA. CODE ANN. §2-16-2(3) (2011).

⁷¹ Jones, *supra* note 19 at 836.

⁷² 233 F.3d 24 (1st Cir. 2000).

⁷³ Jones, *supra* note 19 at 836.

⁷⁴ See *supra* notes 87 through 97 and accompanying text.

⁷⁵ ARIZ. REV. STAT. § 3-113(A) (2011); FLA. STAT. §865.065(3) (2011); N.D. CENT. CODE § 32-44-03 (2011); OHIO REV. CODE ANN. § 2307.81(C) (Anderson 2011).

⁷⁶ OHIO REV. CODE ANN. § 2307.81(C)-(D) (Anderson 2011).

⁷⁷ IDAHO CODE § 6-2003(4) (2011).

⁷⁸ ARIZ. REV. STAT. § 3-113(E)(2) (2011).

⁷⁹ FLA. STAT. §865.065(2)(b) (2011).

⁸⁰ OHIO REV. CODE ANN. § 2307.81(B)(3) (Anderson 2011).

⁸¹ See generally, Allison MacDonald, *YouTubing Down the Stream of Commerce: Eliminating the Express Aiming Requirement for Personal Jurisdiction in User-Generated Internet Content Cases*, 19 ALB. L.J. SCI. & TECH. 519 (2009); C. Douglas Floyd and Shima Baradaran-Robison, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 IND. L.J. 601(2006).

⁸² See generally, *Limitation as to Statutory Rights*, 16 Am. Jur. 2d CONFLICT OF LAWS §§7-10 (2011).

⁸³ http://www.goodnature.net/our_story/story.html (last visited May 30, 2011).

⁸⁴ Buy Fresh Buy Local Kansas City, *Credibility and Integrity Assurance Handbook*, 2. Found at http://www.goodnature.net/our_story/support/BFBL_Quality_Assurance_Manual.pdf (last visited May 30, 2011).

⁸⁵ http://www.goodnature.net/producers/producers_bison.php (last visited May 30, 2011).

⁸⁶ See *supra* notes 51 through 66 and accompanying text.

⁸⁷ See *supra* notes 71 through 77 and accompanying text.

⁸⁸ The other two food label states with active bison herding are North Dakota and Arizona. http://en.wikipedia.org/wiki/File:Bison_bison_2003_map.svg (Nov. 2, 2010).

⁸⁹ See *supra* notes 78 through 82 and accompanying text.

⁹⁰ See *supra* note.

⁹¹ *International Shoe v. Washington*, 326 U.S. 310, 316 (1945).

⁹² See *supra* note 82.

⁹³ http://www.goodnature.net/producers/producers_eggs.php (last visited May 30, 2011).

⁹⁴ http://www.goodnature.net/producers/producers_turkey.php (last visited May 30, 2011).

⁹⁵ South Dakota's law covers statements about "generally accepted agricultural and management practices." S.D. CODIFIED LAWS §20-10A-1(3) (2011).

⁹⁶ N.D. CENT. CODE §§ 32-44-03 (2011);

⁹⁷ *Id.*

⁹⁸ The same issues about jurisdiction as discussed above would apply in this potential action.

⁹⁹ Pub. L. No. 111-353, 124 Stat. 3947 (codified in scattered sections of 21 U.S.C.). The FDA is an agency within the Department of Health and Human Services (HHS). Accordingly, all the mandates of the new law are directed at the HHS Secretary.

¹⁰⁰ 21 U.S.C. § 301 (2010).

¹⁰¹ The Food Safety and Inspection Service is the body within the USDA that carries out the Department's food safety authority under multiple enabling statutes. See generally United States Department of Agriculture, *Food Safety and Inspection Service, Regulations and Policies, Acts and Authorizing Statutes* at http://www.fsis.usda.gov/regulations_&_policies/Acts_&_Authorizing_Statutes/index.asp (July 20, 2010).

¹⁰² 21 U.S.C. § 2251 (2011).

¹⁰³ 21 U.S.C. §§ 601-680 (2011).

¹⁰⁴ 21 U.S.C. §§ 451-472 (2011).

¹⁰⁵ 21 U.S.C. §§ 1031-1056 (2011).

¹⁰⁶ See U.S. Food and Drug Administration, *Food Safety Modernization Act (FSMA), Frequently Asked Questions, General*, <http://www.fda.gov/Food/FoodSafety/FSMA/ucm247559.htm#general7> (May 12, 2011).

¹⁰⁷ 21 U.S.C. §350g(l) (2001).

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- ¹⁰⁸ Helen Bottemiller, *Tester: Small Farms Won with Food Safety Exemption*, FOOD SAFETY NEWS at <http://www.foodsafetynews.com/2011/05/tester-tours-fsma-victory-at-sustainable-food-conference> (May 5, 2011).
- ¹⁰⁹ *Id.* Has Senator Tester just committed food libel against Skippy, Jif and other mass producers of peanut butter or large growers of lettuce that ship their produce nationwide?
- ¹¹⁰ See 21 U.S.C. §§ 350d, 350g, 350h, 350i (2011).
- ¹¹¹ 21 U.S.C. § 399d(a)(1)-(4) (2011).
- ¹¹² 21 U.S.C. § 399d(a) (2011).
- ¹¹³ *Id.*
- ¹¹⁴ 21 U.S.C. § 399d(b) (2011).
- ¹¹⁵ 21 U.S.C. § 399d(b)(3)(B)-(C) (2011).
- ¹¹⁶ 21 U.S.C. § 399d(b)(3)(D) (2011).
- ¹¹⁷ 21 U.S.C. § 399d(b)(7) (2011).
- ¹¹⁸ 21 U.S.C. § 399d(b)(5)(A) (2011).
- ¹¹⁹ 21 U.S.C. § 399d (c) (2011).
- ¹²⁰ 21 U.S.C. § 399d (a) (2011).
- ¹²¹ 21 U.S.C. § 399d (b)(5)(B) (2011).
- ¹²² See *supra* note 8.
- ¹²³ See *supra* notes 20 through 66 and accompanying text.
- ¹²⁴ *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).
- ¹²⁵ Of the five known cases initiated under food libel laws, none has “reached the agricultural product disparagement claim on the merits, but were instead dismissed or withdrawn prior to full adjudication of the disparagement claim.” Jones, *supra* note 19 at 842.
- ¹²⁶ *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) citing *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965).
- ¹²⁷ Ronald K.L. Collins, *Congress Must Address Food Disparagement Laws*, BALTIMORE SUN, Op-Ed, (June 10, 1999) (quoting LOS ANGELES TIMES, OpEd (Apr. 12, 1999) <http://www.cspinet.org/foodspeak/oped/baltsun2.htm>).
- ¹²⁸ Andy Zimmerman, *Monsanto’s Public Relations Boomerang*, 18 SYNTHESIS/REGENERATION (Winter, 1999), <http://www.greens.org/s-r/18/18-11.html>. *Against the Grain* is in its second printing and widely available online. Zimmerman does not describe this history as a chilling effect of food libel legislation. Rather, it is cited as such an example elsewhere. See Brian Duignan, *Burger Bashing and Sirloin Slander, Food Disparagement Laws in the United States*, ENCYCLOPEDIA BRITANNICA ADVOCACY FOR ANIMALS, (Nov. 16, 2009), at <http://advocacy.britannica.com/blog/advocacy/2009/11/burger-bashing-and-sirloin-slander-food-disparagement-laws-in-the-united-states/>.
- ¹²⁹ Duignan, *supra* note 128. The Ninth Circuit invoked Sinclair and Carson in upholding a book author’s privilege against revealing notes and sources. *Schoen v. Schoen*, 5 F. 3rd 1289 (9th Cir. 1993).
- ¹³⁰ Leslie Kux, Jeremy Sobel, Kevin M. Fain, *Control of Food Borne Diseases*, in LAW IN PUBLIC HEALTH PRACTICE, 377-78 (Richard Alan Goodman, ed.) (2007). The authors are also describing the nationwide long arm impact of such laws that can make a publisher subject to personal jurisdiction anywhere their media is available to the public.
- ¹³¹ Kenneth Smith, *Food-Disparagement Laws May not Reduce Food Safety Scares*, in FOOD SAFETY, 104-107 (Laura Engendorf ed.) (2000) (quoting Aaron Epstein, *Court Case to Test Food Defamation Laws*, THE DENVER POST, Dec. 29, 1997, at A-01) http://www.dikseo.teimes.gr/spoudastirio/E-NOTES/F/Food_Safety_Viewpoints.pdf). Smith, however, concluded that a “long-term chill on the press from food-disparagement laws seems unlikely” He characterized the food producers burden of proof in the laws “extremely high...” Smith at 106.
- ¹³² Jones, *supra* note 19 at 857-58 (quoting Michael Paulson, *Belittling Farm Crops Could Cost Big Bucks Under Senate Bill*, SEATTLE POST-INTELLIGENCER, Jan. 28, 1994, at A1). Jones cites other chilling effects “anecdotes” and concludes they will “disproportionately affect the speech of smaller, less well-financed groups and non-affluent individuals” who cannot afford a food libel legal defense the way Oprah Winfrey or CBS can. Jones, *supra* note 19 at 858.
- ¹³³ *Action for a Clean Environment v. Georgia*, 457 S.E.2d 273 (1995).
- ¹³⁴ *Id.* at 274 (1995).
- ¹³⁵ In *Medimmune v. Genentech*, 549 U.S. 118 (2007), the Supreme Court noted that numerous federal and state courts had applied “the Declaratory Judgment Act to situations in which the plaintiff’s self-avoidance of imminent injury is coerced by threatened enforcement action of a private party...” *Id.* at 130.
- ¹³⁶ For a general discussion of the increased use of preemption by federal administrative agencies, see Rita Marie Cain, *The Politics of Preemption*, 24 J. Leg. Studies Educ. 165 (2007).
- ¹³⁷ See *supra* notes 111 through 117 and accompanying text.
- ¹³⁸ See generally, *supra* note 106.
- ¹³⁹ Neil D. Hamilton, *Putting a Face on our Food: How State and Local Food Policies Can Promote the New Agriculture*, 7 DRAKE J. AGRIC. L. 407 (2002).

¹⁴⁰ Fifteen minutes of the film can be viewed on YouTube at <http://www.youtube.com/watch?v=olnMFHFcOyU>. (Last visited May 30, 2011).

¹⁴¹ The McLibel Trial Story, at <http://www.mcspotlight.org/case/trial/story.html>. (Last visited May 30, 2011).

¹⁴² *Id.*

¹⁴³ *See supra* note 59.

¹⁴⁴ Case of Steel and Morris v. The United Kingdom, *Application no. 68416/01*, Judgment, Strasbourg, (Feb. 15, 2005).