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Transparency in the Global Food System: What Information and to What Ends?

Panel 3: Can More Transparency Help Fix a Broken Food System?

Transparency: A Necessary, But Not Sufficient Condition for Safe Food

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I. Introduction

The question for our panel is: Can More Transparency Help Fix a Broken Food System? I have for many years been a strong advocate of greater transparency in the manufacturer, distribution and sale of food and food products. I have written, for example, that the presence of greater than adventitious amounts of genetically modified ingredients should be stated on food labels. But I will argue in this paper that food safety, which is an aspect of our broken food system that has some of the most deleterious consequences, is an area for which greater transparency is likely to be of modest help. We should not be lured into the libertarian trap of accepting transparent markets in food as a preferable alternative to government intervention designed to ensure that the food that we all eat is not a threat to our health. We need government intervention to promulgate and enforce safety standards to protect consumers from foodborne disease. Recognizing that the existing food safety regulatory regime is far from perfect, however, I argue that transparency can play an important role within the regulatory regime that we establish to protect us from foodborne disease in making information about the compliance status of food producers available to the public and in ensuring that the regulatory program functions effectively.

II. Transparency and Regulation: The Libertarian Solution

A Libertarian Perspective on Food Safety.

From a purely libertarian perspective, we do not need a Food and Drug Administration (FDA) or a Food Safety Inspection Service (FSIS) to ensure that our food is safe so long as we have transparency in the food production system. All we need is for some agency like the Centers for Disease Control and Prevention (CDC) to investigate outbreaks of foodborne disease and to post information about the causes of those outbreaks on the internet and a digital tracking system that allows consumers to determine whether items of food they were planning to purchase originated at or passed through one or more of the entities that were responsible for one or more outbreaks. To provide even greater transparency, the government could conduct periodic inspections of farms, ranches, slaughterhouses and food processing establishments and post reports on the sanitation measures in effect at those establishments and the operators' compliance with those measures. It could even go a step further and mandate periodic testing of products leaving those establishments for the presence of pathogenic microorganisms and post the results of the testing on the internet.

Taking advantage of all of this transparency, consumers could inform themselves by consulting the internet and avoiding the products of companies with poor safety records or high incidences of contaminated product. Intermediary institutions like Consumers Union could collect and analyze the huge amounts of data that would be available on the internet and make that information available in a comprehensible format to consumers free of charge or for a small

fee. Anxious to avoid lost business, companies would spend the optimal amount on reducing the risk of contamination. There would still be occasional foodborne disease outbreaks, but the cost of preventing those outbreaks would exceed the benefits. At the end of the day, a smoothly functioning marketplace would ensure that consumers receive the amount of safety for which they were willing to pay. Victims of foodborne outbreaks would have no room to complain, because they knowingly purchased potentially contaminated food from a transparent marketplace.

Problems with the Libertarian Approach.

Many practical and theoretical problems afflict the libertarian transparency approach to the food safety problem. As a practical matter, it will be impossible for a consumer to ascertain whether an item of food he or she is about to purchase originated at a farm or ranch or was processed by a facility that had a history of causing foodborne illnesses. CDC cannot possibly post on the internet each one of the 48 million instances of foodborne disease that occur in this country every year. The vast majority of instances of foodborne disease never get reported because the victims do not seek medical attention, deciding instead to suffer through two or three days of diarrhea and discomfort in their beds. Even when victims seek medical help, their doctors do not always try to draw a connection between the disease and a particular food that the patient consumed. On those fairly rare occasions where the symptoms are severe enough or the connection to food obvious enough that doctors are likely to report the disease to a state health department, the state agency may or may not process that information in a way that allows epidemiologists to identify a foodborne disease outbreak. The probability of detecting an outbreak varies from state-to-state, depending on the resources available to the state and the state agency's commitment to tracking foodborne disease.

CDC manages a National Notifiable Diseases Surveillance System for collecting, analyzing and sharing data on the incidence of a wide variety of diseases, including most foodborne diseases, but the data are not displayed in a way that allows consumers to connect foodborne diseases with potential causes. Since 1995, CDC has also managed a Foodborne Disease Active Surveillance Network (FoodNet) that collects information from sites in 10 states covering 15% of the US population about diseases that are caused by any of seven bacteria and two parasites commonly transmitted through food. That system actively seeks to detect every person in the 10 states who went to a doctor's office, had a sample tested, and was diagnosed with one of the infections to provide a complete database for epidemiologists who then attempt to link disease outbreaks to the particular sources of the food that caused them. When the epidemiologists are able to identify a particular source of contamination, the agency is reluctant to make that information public for two reasons. First, CDC scientists typically needs the assistance of the companies having contact with the relevant food items in undertaking their investigations, and companies are generally unwilling to cooperate if they know that CDC will be posting the names of companies connected to the investigation on the internet. Second, if the epidemiologists are wrong, as they are on many occasions, singling out a particular company risks causing it unwarranted economic damage. Thus, even if the system incorporated all 50 states, it would be of limited usefulness to consumers because they would not always be able to link particular companies to past disease outbreaks.

CDC's Foodborne Disease Outbreak Surveillance System collects reports on foodborne disease outbreaks from state, local and territorial health agencies. CDC analyzes these reports to

improve understanding of the human health impact of foodborne outbreaks and the pathogens, foods, settings, and contributing factors involved in these outbreak. It maintains a searchable Foodborne Outbreak Online Database (FOOD) of all of the outbreaks in its surveillance system. Although the system contains a wealth of information on disease outbreaks, many outbreaks, however, are never identified and therefore never make it into the system. The data are available only about two years after they were reported, and they identify the cause only by food type (e.g. “chicken” or “hot dogs”) or contaminated ingredient (e.g. spice). The database does not provide information on the company that was responsible for the outbreak. It is therefore of limited use to consumers who do not want to avoid food types like chicken or hot dogs, but do want to avoid the products of the company that produced the food items that caused the outbreak.

CDC conducts its own sophisticated investigations into foodborne disease outbreaks, usually at the request of a state health department, but only to the extent that its limited resources allow. It turns out that it is very difficult for CDC to attribute an outbreak to food from a single source, and many of its investigations never identify a specific cause of the outbreak. We could obtain better and more complete information on the incidence of foodborne disease and disease outbreaks if we increased the resources available to CDC and state health departments, but that is not a realistic option in an atmosphere of fiscal conservatism and strong anti-tax sentiment.

The libertarian solution also requires a sophisticated tracking system to allow consumers to relate the available information on foodborne illnesses to the individual growers, ranchers, producers and distributors of the foods that they are thinking about purchasing. Farms, ranches and food production establishments, however, have historically been strongly opposed to proposals for food tracking systems that would identify the sources of food in a way that would allow consumers to know the entities that were responsible for the safety of that food as it moved from the farm or ranch to the grocery store. Their concern may be for their potential tort liability should something go wrong, and my guess is that they would not be willing to accept a tracking system even if Congress abolished FDA and FSIS as a quid pro quo.

A periodic inspection and reporting addition to the libertarian solution could put a lot more relevant information in the hands of consumers, but it also encounters practical problems in the real world. Currently, FDA posts all of its recalls and warning letters online in an easily accessible format that allows the viewer to read all of the warning letters sent to a given establishment. Thus, a consumer who is deciding whether to purchase a food product from a particular manufacturer can read any warning letters sent to that manufacturer and read about any recalls that the company had initiated. But that exercise would provide only the most bare-bones information on the degree to which the establishment varied from good manufacturing practices. FDA farms out most inspections to state agencies, and they get around to inspecting about 6 percent of domestic and less than 1 percent of foreign food production facilities annually. Furthermore, the added information about any given company’s safety precautions that is available in FDA’s inspection records is not likely to be up-to-date or especially useful. At this point, the agency’s inspection records are devoid of any information about the safety record of the farm where an item of produce is grown, though this may change as the agency implements the Food Safety Modernization Act.

The problem is not as stark in the case of FSIS inspections of meat and poultry slaughterhouses, because an FSIS inspector should be present in every establishment to ensure that it takes proper sanitation precautions. The “poke and sniff” methods that FSIS inspectors employ, however, cannot ensure that the meat leaving the facility is free of dangerous pathogens. The responsibility for ridding meat of pathogens has always been on the person or persons who

cook the meat. Still, the notices of violation that USDA inspectors issue to slaughterhouses and meat processing establishments are available on USDA's website. In deciding whether to purchase beef slaughtered at a particular establishment, consumers can search the database for the name of the establishment and read the notices, any follow-up notices and any other enforcement action that FSIS has taken with respect to that establishment.

A libertarian might argue that there is no need for government inspectors and inspection reports because consumers should be willing to pay for private entities to inspect and test at farms, ranches and food processing establishments. Indeed, to the extent that food production companies already employ private certification companies to meet the safety demands of retailers like Wal-Mart and McDonalds, consumers are already paying indirectly for such private auditors by paying higher prices for their food. They are just not getting the information. The private auditing system, however, has problems of its own, mostly due to the fact that the manufacturers, not the retailers or the consumers, pay for the auditor's services. Thus, a Georgia peanut processing facility operated by the Peanut Corporation received a clean bill of health from private auditors not long before its products caused a disease outbreak that killed 9 and sickened more than 700 people. When FDA inspectors examined the facility, they found plenty of problems that had apparently eluded the gaze of the private auditors.

The libertarian solution also encounters serious theoretical problems. To the extent that it depends upon consumers to pay for information and information gathering, it faces a collective action problem. It would be terribly inefficient for each consumer to hire his or her own auditor to comb the CDC, FDA and USDA websites for information about safety-related aspects of each of the manufacturers of the food items that he or she wants to purchase. It would make a lot more sense for consumers to pay a small amount of money to an entity that would be responsible for gathering the needed information and making it available to all of the contributors. This is essentially the function that *Consumer Reports* plays in other contexts. It collects and analyzes data and writes reports on various aspects of various products for the consumers who pay a small price to subscribe to the magazine. One could imagine companies specializing in food safety making safety-related information about individual manufacturers available to subscribers for a fee. Subscribers could then use the information to avoid or pay less for food items that they deem to be more risky, and manufacturers facing falling demand would either improve safety or lower prices for the items.

A theoretical downside to this solution is the classic "free rider" problem. Consumers who do not pay the fee will benefit from the improved safety or lower prices attributable to participating consumers' use of the safety-related information without having to pay the fee. An inefficient amount of information will be purchased and the prices for less safe foods will remain high. Another problem is the fact that without the economic leverage of a Wal-Mart or a McDonalds, private entities created solely to provide information to consumers will probably not gain access to food manufacturing establishments to conduct the necessary inspections and testing. While it is possible that a safety-conscious company would welcome outside auditors, most would probably worry that auditors would find something sufficiently serious to damage their reputations. The private entities would therefore be limited to perusing CDC records and testing samples of various products from the grocery shelves.

Another theoretical problem with the libertarian transparency solution stems from the fact that income and wealth in this country are unequally distributed. While wealthy families may be willing to pay for private information collectors, poor families will not be able to afford the service and will be left to their own information-gathering devices. For those who cannot afford

a computer with internet access, the food safety system is quite opaque. To some extent poor families will be able to free ride on whatever information-gathering arrangement their wealthier fellow consumers come up with. But they will lack the direct information necessary to make informed choices about the safety aspects of the food they purchase. And even if they were able to access the same information as their wealthier counterparts, they might not be able to afford the safer options. Parents would have to live with the knowledge that they could have purchased safer food for their children if they had more money.

FSIS provided an excellent demonstration of the libertarian transparency solution in practice in early 2013 when it addressed the discovery that chickens slaughtered at three California facilities owned by Foster Farms were contaminated by seven strains of antibiotic-resistant Salmonella. Rather than shut down the facilities or asking the company to recall chickens processed at the facility, the agency issued a “public health alert” informing consumers of the discovery, identifying the packaging numbers of the potentially contaminated meat, identifying the three facilities, and warning consumers to cook their chicken well. Despite the added transparency, 338 people became ill after eating chicken from the facilities, 40 percent of whom had to be hospitalized.

Since the libertarian transparency solution cannot deliver to consumers anything close to the degree of food safety they desire, government must play a role in regulating food production. We need government agencies like FDA, FSIS and state health departments to write regulations and standards based on reasonable scientific extrapolations from the admittedly sparse information that is available on the risk of contamination of food items as they are grown and as they move from the field or pasture to the dinner table. The agencies must enforce those standards by sending inspectors onto farms and ranches and into food production, transportation and distribution establishments to detect violations of the regulations and standards and see to it that they are corrected. And the agencies must administer sanctions of sufficient magnitude to provide a strong incentive to comply with the regulations and standards.

III. Transparency in Regulation: The GooGoo Solution.

We learn on a daily basis, however, that the current food safety regulatory regime is far from perfect. I have highlighted the serious deficiencies in that regulatory regime in my book *Freedom to Harm*, and I will not repeat that analysis here. It is difficult for resource-starved regulatory agencies to keep up with evolving manufacturing and safety technologies. The standard-setting process is extremely ponderous, and the standards that result often fail to provide adequate protection. And both FDA and FSIS manifest symptoms of agencies afflicted by regulatory capture. The basic statutory framework for regulating meat and poultry safety has not changed since 1907. The Food Safety Modernization Act of 2010, which Congress enacted to address a confluence of food safety crises during the first decade of this century, authorizes FDA to require farmers, producers and importers to take much greater precautions against foodborne diseases due to products under FDA’s jurisdiction. But the agency has yet to finalize the necessary implementing regulations, and a food industry’s lobbying blitz aimed at the proposals may ensure that they are not sufficiently stringent to provide adequate protection. Finally, the inadequacy of inspection and enforcement under the current regulatory regime was discussed above. It is therefore fair to say that we cannot rely exclusively on the regulatory agencies to ensure an adequate supply of safe and nutritious food.

Transparency can play a role in shoring up the food safety regulatory regime. FDA and FSIS should do what they can to make the inspection and information-gathering processes transparent so that consumers or intermediaries like Consumers Union and the Center for Science in the Public Interest can use that information to inform decisions about which food items to purchase based on the safety records of the relevant farms, ranches and manufacturers. There are things that Congress and the agencies can do to enhance the transparency of the existing system. For example, FSIS does not currently inform consumers of the names of the retail grocery stores that received recalled meat and poultry when a slaughter house sells the potentially contaminated product to a distributor who then sells it in bulk to retailers. The agency is reluctant to provide that information to consumers for fear that the responsible entity will decide against undertaking the recall. Yet it can employ considerable leverage over purveyors of contaminated meat by threatening loud public warnings if they do not voluntarily recall potentially tainted products. The value to consumers of additional information on the location of recalled meat almost certainly outweighs the threat that companies will refrain from recalling bad meat. Congress could, of course, solve the problem by giving FSIS mandatory recall authority and requiring that more information about the origins and locations of recalled items be provided directly to consumers. But Congress is not into problem solving these days.

Transparency can play a powerful role in avoiding agency capture and in otherwise ensuring that the agencies do their jobs. The transparency at issue here is transparency in the agency's operations. As discussed above, agency inspection and enforcement actions are fairly transparent. Consumers and, more likely, consumer groups like Consumers Union and CSPI can undertake statistical analyses of inspection and enforcement data to hold agencies accountable when they appear to be shirking their enforcement responsibilities. FDA and FSIS standard-setting procedures are likewise fairly transparent as both agencies have assembled rulemaking dockets that are accessible online. What are less transparent, however, are the interactions between agency staff and representatives of industry or public interest groups after the publication of the notice of proposed rulemaking. Neither agency requires the substance of such conversations to be reduced to writing and placed in the rulemaking record. Yet these interactions can have more influence on the outcome of the rulemaking than the written comments in the visible docket.

Similarly, the interaction between the agencies and the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget is less transparent than it could be. Under executive orders issued by every president since President Nixon, agencies have been required to send proposed and final major rules to OIRA for comment by OIRA economists and other federal agencies and departments with an interest in the rulemaking. This process gives OIRA the power to slow down or even quash regulatory initiatives before the public has any knowledge of the agency's positions on controversial issues and any opportunity to comment on those positions. What the public sees in the Federal Register is the agency's proposal as modified by comments from OIRA and the other agencies. This makes it difficult to hold the agency, OIRA or some other agency accountable for the policy determinations underlying their contributions to the published document.

In recent years, the submitting agencies have been permitted to place in the rulemaking docket redlined copies of their original proposals indicating what changes were made during the OIRA review process. The documents do not, however, indicate whether OIRA or some other agency was responsible for the change. What does not get revealed is the content of the conversations between OIRA officials and the representatives of regulated industries and other

groups that meet with them during the time that OIRA is reviewing rules that are of immediate interest to them. In the past, OIRA has been accused of being a conduit for regulated interests to affect the substance of agency proposals before they see the light of day. Requiring OMB officials to reduce the content of overtures by affected interest groups to writing and placing them in the rulemaking record would provide greater transparency and perhaps discourage abuse of the OIRA review process by powerful economic interests like the Grocery Manufacturers Association or the American Farm Bureau Federation. And the president could accomplish that change with the stroke of a pen by amending the executive order.

IV. Transparency, Regulation, and Obesity: An Intermediate Solution.

Regulation and transparency may both have a role to play in addressing the obesity problem. About 35 percent of the U.S. adult population and 17 percent of young people are considered to be obese by the Centers for Disease Control and Prevention. Although scientists have not drawn a direct connection between obesity and diabetes, obesity is clearly associated with diabetes and heart disease.

Obesity results from the voluntary actions of eating and drinking. We could in theory assign to a regulatory agency the responsibility for reducing the incidence of obesity and empower it to regulate what foods obese people can eat and in what amounts. The case for regulation would stress the cost to federal, state and local medical delivery programs of treating diabetes in obese people and the loss of productivity from lost workdays due to obesity-related illnesses. Yet one does not have to have libertarian proclivities to recoil at the paternalistic suggestion that the government should prescribe mandatory diets for its overweight citizens.

On the other hand, government-mandated transparency could play an important role in reducing the incidence of obesity by ensuring that food manufacturers and distributors make the caloric content of foods readily apparent to consumers. Thus, for example, FDA has apparently decided to change its nutrition labeling regulations to highlight caloric content and to ensure that the portion sizes are not misleading. The agency, however, backed down when movie theaters went ballistic over its proposal to require them to put the caloric content of movie popcorn on the buckets they sold. Greater transparency in FDA's regulatory programs might have revealed the nature of the behind-the-scenes lobbying campaigns that caused the agency to change its mind about popcorn.

New York Mayor Michael Bloomberg's ban on the sales of sugar-laden soft drinks in sizes of greater than 16 ounces. The city had already posted advertisements warning of the potential health risks presented by soft drinks in subways and required restaurant chains to post calorie counts on their menus, both of which were designed to promote transparency and greater understanding of those risks. But the effort had had little effect on obesity rates. The theory behind the large soft drink ban was that people (and especially children and young adults) were inclined to purchase large drinks to get more for their money and to consume what they purchased whether or not they were really thirsty.

Many New Yorkers protested that the ban was a paternalistic infringement on their personal liberty. But consumers could still purchase and consume as many smaller drinks as they wanted. The ban more directly affected the liberty of drink manufacturers, restaurants and convenience stores to market super-sized drinks. Some scientific research suggests that sugary drinks can affect the brain in the same way that addictive substances like cocaine and nicotine do. If that is true, then government action is clearly justified. Addictive substances deprive

people of their freedom to quit consuming those substances. Yet, if sugary drinks are addictive, limiting the size of purchasable portions seems like an odd way to address that problem. It does not reduce the availability of the addictive substance; it merely makes it marginally more expensive. The New York Court of Appeals held that the New York City Board of Health had exceeded its authority when it enacted the ban.

Until more is known about the relationship between obesity and various diseases associated with that condition and about the addictive qualities of sugary drinks, one might reasonably take the position that greater transparency regarding the caloric content of foods sold in the marketplace is the most appropriate governmental response to the obesity problem.

V. Conclusions

Transparency and traditional regulation both have roles to play in ensuring the safety of this country's food supply. We need a strong regulatory regime in place to write mandatory standards, inspect food growing and processing establishments, and administer stiff penalties to companies that violate those standards. Since no regulatory regime can be perfect and since the current regime in place in the United States is far from perfect, greater transparency in the system of growing, producing, transporting and distributing food can supplement regulation by empowering consumers to make intelligent decisions about the food they purchase. Greater transparency in the governmental processes of writing and enforcing food safety standards can render the food safety agencies more accountable, thereby encouraging the public officials responsible for food safety programs to pay closer attention to their statutory missions.

Transformation through Transparency: Human Rights and Corporate Responsibilities in the Global Food System

Erika George

I. Introduction

The production of food is more globally integrated than ever as international trade in agricultural products continues to increase.¹ The participation of transnational corporations (TNCs)² in the production, procurement and distribution of food has grown along with international trade in agricultural products.³ The concentration of corporate power in the global food production system has given rise to concerns about the consequences of present modes of agricultural production for human rights, food security, and environmental sustainability. Concerns over the adverse impacts of particular business practices used by TNCs engaged in agribusiness have resulted in calls for greater corporate responsibility and accountability. Demands for greater transparency in the processes of production have become part of the accountability advocacy.⁴

The agricultural supply chains of TNCs span the globe connecting conscious consumers with conditions of production they find unconscionable. Chiquita is alleged to have provided material support to a paramilitary organization in Colombia that tortured and killed trade unionists and banana-plantation workers.⁵ Nestle is alleged to have aided and abetted child slavery in the Ivory Coast.⁶ Coca-Cola is alleged to have been complicit in violent attacks against labor activists in Guatemala.⁷ Colombian trade union leaders have also implicated Coca-Cola in collaborating with paramilitary forces to murder union members.⁸ Del Monte is alleged to have been responsible for the arbitrary detention of members of a Guatemalan trade union of plantation workers.

Transparency is a prerequisite for protecting human rights. Often exposure of abuses ends impunity and can lead to accountability. A well-crafted transparency regime that requires reporting about the human rights impacts of the food production processes could serve to drive systemic changes by: (1) empowering consumers to make informed choices consistent with their

¹ CORPORATE POWER IN GLOBAL AGRIFOOD GOVERNANCE (Jennifer Clapp & Doris Fuchs eds., 2009).

² The term transnational corporation (TNC) is used to refer to business enterprises with commercial interests that cross national borders.

³ Stephanie Barrientos & Catherine Dolan, *Transformation of Global Food: Opportunities and Challenges for Fair and Ethical Trade* in ETHICAL SOURCING IN THE GLOBAL FOOD SYSTEM (Stephanie Barrientos & Catherine Dolan eds.) (2006).

⁴ Elizabeth Smythe, *In Whose interests? Transparency and Accountability in the Global Governance of Food: Agribusiness, the Codex Alimentarius and the World Trade Organization* in GLOBAL AGRIFOOD GOVERNANCE 93-123 (Jennifer Clapp & Doris Fuchs eds., 2009)

⁵ *In re. Chiquita Brands Intern., Inc.*, 792 F. Supp. 2d 1301 (S.D. Fla. 2011).

⁶ *Doe I v. Nestle USA, Inc.*, No. 10-56739, 2014 WL 4358453 (9th Cir. Sept. 14, 2014) (remanded for further proceeding consistent with the opinion), rev'g and vacating 748 F. Supp. 2d 1057 (C.D. Cal. 2010).

⁷ *Palacios v. Coca-Cola Co.*, 757 F. Supp. 2d 347 (S.D.N.Y. 2010) (dismissed on forum non conveniens grounds), aff'd 499 Fed. Appx. 54 (2d Cir. 2012).

⁸ *Sinaltrainal v. Coca-Cola Co.*, 570 F.3d 1252 (11th Cir. 2009), abrogated by *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702 (2012).

values; and (2) enabling commercial producers to identify and address risks in their supply chains and reverse the adverse human rights and environmental impacts discovered.

II. Human Rights and Corporate Responsibilities in Food Production

Regulatory reforms designed to ensure enhanced access to information concerning the conditions under which foods are produced would be consistent with the contemporary international understanding of the substantive right to food. Disclosure of the risks presented by particular business practices to human rights is an important constituent element of the corporate responsibility to respect human rights.

A. *The Right to Food: Cultural and Consumer Acceptability*

Among its numerous rights guarantees, the Universal Declaration of Human Rights (UDHR) recognizes that “everyone has the right to a standard of living for himself and his family, including adequate food...and to the continuous improvement of living conditions.”⁹ Since the inception of the international human rights regime, the right to food has been central.¹⁰

The International Covenant on Economic, Social and Cultural Rights (ICESCR) codifies the right to food first articulated in Article 25 of the UDHR.¹¹ The interrelated norms of access and freedom inform the food right.¹² Article 11 of the ICESCR provides, in pertinent part that State Parties “recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food...and to the continuous improvement of living conditions.”¹³

There are 162 member states to the ICESCR. Global agricultural supply chains extend across many of these member states. The United States, as a signatory to the ICESCR, “is obliged to refrain from acts which would defeat the object and purpose” of the treaty.¹⁴ The United States government has routinely recognized the importance of the right to food in congressional debates concerning foreign aid policies and development priorities.¹⁵

The Committee on Economic, Social and Cultural Rights (the ESCR Committee or the Committee), the institution that interprets and monitors State compliance with the ICESCR, has determined that the “core content” of the right to adequate food entails guaranteeing:

The availability of food in a quality and quantity sufficient to satisfy the dietary needs of individuals, free from adverse substances and *acceptable* within a given culture; [and t]he

⁹ Universal Declaration of Human Rights [UDHR] ART. 25(1), G.A. RES. 217A (III), U.N. GAOR, 3d Sess., 1st plen. Metg., U.N.Doc. A/810 (Dec. 12, 1948). The right to food can also be found in Principle 4 of the United Nations Declaration on the Rights of the Child, G.A. Res. 1386 9XIV), P4, U.N. Doc. A/4354 (Nov. 20, 1959) (“The child shall have the right to adequate nutrition...”).

¹⁰ Smith Narula, *The Right to Food: Holding Global Actors Accountable Under International Law*, 44 COLUM. J. TRANSNAT’L L. 691, 705 (2006).

¹¹ *Id.*

¹² See Philip Alston, International Law and the Human Right to Food, in *The Right to Food* 32 (Alston & Tomasevski eds., 1984).

¹³ International Covenant on Economic, Social and Cultural Rights art. 11, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] Art. 11(1).

¹⁴ Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 UNTS 331.

¹⁵ See, e.g., Title I: Reducing Global Poverty and Alleviating Human Suffering; Global Partnerships Act of 2012, H.R. 6644, 112th Congress, 2nd Session (referring to food as basic human right).

accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.¹⁶

For the Committee, not only does the food right require that a range of protective measures be put in place to ensure food safety and prevent adulteration and contamination, the right also implies the need to account for “perceived non nutrient-based values attached to food and food consumption and informed consumer concerns regarding the nature of accessible food supplies.”¹⁷ Put another way, there is a social dimension beyond basic sustenance that should be taken into account when crafting food policy. The provision of food must be sustainable and must not interfere with other human rights.

A rights-based approach to food points to the necessity of providing consumers with information through certification systems and labels that reflect a TNCs’ commitment to reducing adverse impacts on human rights and the environment. Access to information is an implicit element of the right to adequate food as evidenced by the “acceptability” imperative the right contains. Without information, consumers cannot make educated determinations with respect to whether or not a particular food product is acceptable. For a growing segment of consumers, foods produced under abusive conditions or at the price of unmitigated environmental damage are not acceptable. The right to food finds expression in the right to know.¹⁸

There is an increasing concern over the role of agribusiness in rights violations. Campaigns by non-governmental organizations (NGOs) are working to raise awareness of the ways in which the long supply chains of large TNCs may be linked to adverse human rights and environmental impacts in certain contexts. For example, Oxfam’s Behind the Brands campaign assesses the agricultural sourcing policies of the ten largest food and beverage companies and issues a scorecard. Oxfam uses information about the sourcing of agricultural commodities from developing countries that are made publicly available by “the Big 10.” Ultimately, the Oxfam campaign seeks to empower consumers to “make choices in line with their values” through offering information about the production process.¹⁹ Foods that are produced under abusive conditions may fall far short of acceptable to many consumers, even if the food product is otherwise safe for consumption.

1. Information Rights

International human rights law also protects freedom of expression and the correlative right to access information. The UDHR recognizes that, “everyone has the right to freedom of opinion and expression.”²⁰ Article 19 of the International Covenant on Civil and Political Rights (the “ICCPR”) protects freedom of expression providing, in pertinent part: “[e]veryone shall

¹⁶ ECOSOC, U.N. Comm. on Econ. Soc., & Cultural Rights, General Comment No. 12, The Right to Adequate Food, U.N. Doc. E/C12/1999/5 (May 12, 1999) [hereinafter General Comment 12] ¶ 8

¹⁷ General Comment No. 12 ¶ 11

¹⁸ Peter H. Sand, Labeling Genetically Modified Food: The Right to Know, RECIEL 15 (1) (2006)(arguing that the controversy over GE foods appears to be shifting from risk communications towards a debate over democratic governance: “right-to-know” versus “need-to-know”)

¹⁹ See Oxfam, Behind the Brands Methodology Summary at 9. The “Big 10” include: Nestle, Pepsico, Unilever, Mondelez (Kraft), Coca-Cola, Mars, Danone, Associated British Foods (ABF), General Mills, Kellogg’s.

²⁰ Universal Declaration of Human Rights [UDHR] ART. 19, G.A. RES. 217A (III), U.N. GAOR, 3d Sess., 1st plen. Metg., U.N.Doc. A/810 (Dec. 12, 1948).

have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”²¹ Freedom of expression encompasses not only the freedom to speak and share ideas but also the right to access information.

The case of *Nike v. Kasky* is instructive on the importance of information concerning human rights conditions in the supply chains that provide products to the consuming public. Following allegations that Nike was mistreating workers in foreign facilities, Kasky sued Nike for unfair and deceptive practices stemming from the corporation’s “false statements of fact about its labor practices and about working conditions in the factories that make its products.”²² Kasky, a marathon runner and former Nike wearer explained: “Nike makes a very good product...[b]ut we all need to be accountable for our words and actions. Nike has been representing itself as a model corporate citizen, and it was disappointing and discouraging when I began to suspect otherwise.”²³

2. Labor Rights

A collection of core International Labor Organization (ILO) conventions set forth a range of protections for workers situated at every conceivable link in various global agricultural supply chains. Convention 87 on the Freedom of Association and Protection of the Right to Organize provides: “[w]orkers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.”²⁴ Convention 98 on the Right to Organize and Collective Bargaining provides: “Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.”²⁵ Convention 29 on Forced Labor obligates parties: “to suppress the use of forced or compulsory labor in all its forms within the shortest possible period.”²⁶ Convention 105 on the Abolition of Forced Labor obligates parties: “to take effective measures to secure the immediate and complete abolition of forced or compulsory labor.”²⁷ Convention 111 on Discrimination in Employment and Occupation obligates parties: “to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination.”²⁸ Convention 100 on Equal Remuneration obligates parties to: “ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.”²⁹ Convention 138 on Minimum Age urges parties to: “to pursue a national policy designed to ensure the effective abolition of child labor and to raise progressively the minimum age for

²¹ ICCPR Art. 19

²² *Kasky v. Nike*, 27 Cal. 4th 939, 945 (2003).

²³ Steve Rubenstein, *S.F. Man Changes from Customer to Nike Adversary*, SF Gate, May 3, 2002 (available at <http://www.sfgate.com/news/article/NEWSMAKER-PROFILE-Marc-Kasky-S-F-man-changes-2841885.phplast> accessed Oct. 3, 2014)

²⁴ Convention 87 on the Freedom of Association and Protection of the Right to Organize, Art. 2

²⁵ Convention 98 on the Right to Organize and Collective Bargaining, Art. 1

²⁶ Convention 29 on Forced Labor, Art. 1

²⁷ Convention 105 on the Abolition of Forced Labor, Art. 2

²⁸ Convention 111 on Discrimination in Employment and Occupation, Art. 2

²⁹ Convention 100 on Equal Remuneration, Art. 2

admission to employment or work to a level consistent with the fullest physical and mental development of young persons.”³⁰ Convention 182 on the Worst Forms of Child Labor obligates parties to: “take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labor as a matter of urgency.”³¹

While ILO conventions are widely ratified, there are varying levels of will and ability to enforce labor laws in some of the emerging market economies from which TNCs source agricultural products. Indeed, Colombia, a country where several cases against TNCs have originated, did not have a labor department until after it entered into a free trade accord with the United States as a condition of the agreement. Regulatory gaps leave room for rights abuses. In some ways, private commercial actors are filling labor regulation gaps through the use of private third party audit systems.

B. The Respective Roles and Responsibilities of Public Regulators and Private Retailers in Promoting Respect for the Right to Food

In 2011 the U.N. Human Rights Council unanimously endorsed a Framework and a set of Guiding Principles on Business and Human Rights.³² The Framework rests on three pillars: (1) the responsibility of governments to *protect* human rights; (2) the responsibility of business enterprises to *respect* human rights; and (3) access to *remedy* for victims of violations.³³ The Guiding Principles supplement the “Protect, Respect, Remedy” Framework by providing operational guidance.

In order to fulfill the responsibility to respect, business enterprises must “have in place policies and processes, appropriate to their size and circumstances.”³⁴ While only those States that are parties to the ICESCR and ICCPR are ultimately accountable for compliance with the rights guarantees contained in these international accords,³⁵ the ICESCR Committee has stated that “all members of society, individuals, families, local communities NGOs civil society organization as well as *the private business sector* have responsibilities in the realization of the right to adequate food.”³⁶

The fulfill the responsibility to respect, the Principles provide that businesses should put in place a human rights due-diligence process to identify, prevent, mitigate and account for how impacts will be addressed. In sum, “business enterprises need to know and show that they respect human rights” to properly put the Principles into practice. To that end, the Principles articulate the importance of transparency to human rights protection in that they also provide

³⁰ Convention 138 on Minimum Age, Art. 1

³¹ Convention 182 on the Worst Forms of Child Labor, Art. 1

³² *UN Human Rights Council Endorses Principles to Ensure Businesses Respect Human Rights*, UN News Centre, (June 16, 2011) <http://www.un.org/apps/news/story.asp?NewsID=38742#U-nVi1bpzwl>.

³³ Guiding Principles on Business and Human Rights: Implementing the “Protect, Respect, and Remedy” Framework (2011) HR/PUB/11/04.

³⁴ Guiding Principles on Business and Human Rights: Implementing the “Protect, Respect, and Remedy” Framework (2011) HR/PUB/11/04 ¶ 15.

³⁵ General Comment ¶ 21

³⁶ General Comment ¶ 20

that: “business enterprises should be prepared to communicate [human rights impacts] externally, particularly when concerns are raised by or on behalf of affected stakeholders.”³⁷

Consistent with the responsibility to protect a secure resource base for food, States parties to the ICESCR should “take appropriate steps to ensure that the activities of the private business sector and civil society are in conformity with the right to food.”³⁸ Promulgating laws and policies mandating disclosure would be consistent with acceptability. Protecting the right to food extends to all aspects of the food system, “including the production, processing, distribution, marketing and consumption of safe food.”³⁹ Moreover, the ESCR Committee has maintained that “care should be taken to ensure the most sustainable management and use of natural and other resources for food at the national, regional, local and household levels”⁴⁰ to protect the right to food.

The production, distribution and marketing of food products are points in the agricultural supply chain where transparency can make a difference in protecting human rights and the environment. Consistent with the obligations contained in the UN Framework and Guiding Principles to protect and respect human rights and to “know and show” human rights impacts; governments can protect human rights through ensuring greater transparency and access to information relevant to human rights risks⁴¹ and businesses can provide information about the production processes.⁴² Fair and ethical trade certification schemes and sustainability reporting efforts by commercial actors could address some rights concerns.

III. Transformation Through Transparency Initiatives

Transparency systems are increasingly becoming mainstream regulatory tools in a range of different sectors. Transparency initiatives have been used to regulate to protect investors, reduce pollution, minimize corruption and improve public health and safety. Governments require disclosure of factual information as a means to create behavioral incentives to advance specific economic or political policy objectives.⁴³ Archon Fung offer a straightforward definition of transparency: “government mandates that require corporations or other organizations to provide the public with factual information about their products and practices.”⁴⁴

With respect to human rights reporting, the situation is not as straightforward. Corporate reporting on human rights, if any, remains in its infancy and is not required by most governments. Presently, corporations voluntarily generate sustainability reports or join

³⁷ Guiding Principles on Business and Human Rights: Implementing the “Protect, Respect, and Remedy” Framework (2011) HR/PUB/11/04 ¶ 21.

³⁸ General Comment ¶ 27

³⁹ General Comment ¶ 25

⁴⁰ Id.

⁴¹ See generally, Nicola Jägers, *Will Transnational Private Regulation Close the Governance Gap?* in HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? (Surya Deva & David Bilchitz, eds.) (2013) (discussing state duties related to access to information mandated by international law and by the UN Framework and Guiding Principles);

⁴² See Douglas A. Kysar, Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice, 118 Harv. L. Rev. 525, 531-32 (2004) (offering accounts of consumer process preferences including consumer demand for process information to encourage or discourage particular production practices).

⁴³ Id.

⁴⁴ Archon Fung, David Weil, Mary Graham & Elena Fagotto, *The Political Economy of Transparency: What Makes Disclosure Policies Effective?* Ash Institute for Democratic Governance and Innovation (2004) (analyzing a diverse range of mature transparency systems to assess whether systems effectively advance their regulatory objectives).

certification schemes to demonstrate commitments to responsible conduct. Could greater transparency contribute to the transformation of a global food system characterized by complicated supply chains and competitive commercial pressures?

A. Testing Types of Transparency

Archon Fung and his colleagues at Harvard's Kennedy School of Government analyzed the efficacy of different mandatory disclosure regimes and found that transparency schemes work best where information is available at the time and place of a purchasing decision, where the information provided fits easily into existing customer routines, and when alternatives are available. Los Angeles County's restaurant hygiene grading system is offered as an example of an effective information intervention as the choices of informed consumers appear to have improved the hygiene practices of restaurants by generating economic incentives to compete for better assessments. Adopted in 1997, the system requires restaurants to display government given grades of A, B, or C. Grades reflect the scores on a 100-point checklist that deducts points off for hygiene infractions.

Policy makers posited that customers would eat at establishments with better grades which would in turn create market incentives for those with low worse grades to improve conditions and practices related to hygiene to improve and better compete. Evaluations of the grading scheme determined that restaurants with higher grades enjoyed significant revenue increases while revenues decreased for restaurants with lower grades. Evaluations also found there was better restaurant hygiene in the regulated area and fewer hospitalizations due to food borne illness.⁴⁵

Efficacy of information disclosure exists on a continuum. Transparency systems may have effects without being effective or may result in unintended effects. Consumers may change choices but may not change in the direction of achieving policy aims that motivated the demand for information. For example, nutrition labeling encouraged food companies to create additional healthy options but also led dieters to buy "low fat" but high calorie products.⁴⁶

Transparency does not work to create changes consistent with policy aims where information remains difficult to decipher or choices are limited. For example, Fung and colleagues found that state mandated disclosure systems sharing information on medical errors and disciplinary actions against doctors to improve patient safety have not worked well. Patients either do not have a broad range of options or do not pay attention to disclosures deciding instead to rely on advice about hospitals that they receive from family, friends, or their personal physician. Trust and reputation are important to decision-making, as is legitimacy.

Government transparency systems often are accorded a greater measure of legitimacy and accountability. According to Fung, government mandates an important role in protection because: (1) only government has power to compel disclosure; (2) only government can require comparable metrics, format and mode of information and the time and manner and place where information will be disclosed; and (3) government systems come with the legitimacy of emerging from deliberative democratic processes. However, even if a disclosure regime enjoys a public mandate:

⁴⁵ Fung et al, *The Political Economy of Transparency* at 2 (citing Jin & Leslie (2003))

⁴⁶ Id.

No matter how accurate or relevant new information is, it cannot provide a foundation for a successful transparency system unless it is made available at a time, place, and in a form that fit in with the way consumers, investors, employees and home buyers make choices as information users and the way corporations, government agencies and other organizations make decisions as information disclosures. In cost-benefit terms, information becomes embedded when parties perceive that the benefits of its collections and use clearly outweigh the costs.⁴⁷

The cost-benefit analysis concerning whether or not respond to growing calls from consumers and investors for greater transparency increasingly must take into account an emerging set of global norms to govern corporate conduct with respect to human rights.

B. Information to Influence Choices: Certification Systems and Sustainability Reporting

Because consumers increasingly care about the social impacts of food sourcing, TNCs are under greater pressure to clean up supply chains and provide more information to the public. As a result of these pressures, in the absence of a mandatory reporting regime, a range of voluntary initiatives including—codes of conduct, certification schemes, and sustainability reporting—all emphasizing the importance of fair and ethical trade are in ascendance.

The Global Reporting Initiative (GRI), a Dutch non-profit foundation, is emerging as a leading proponent of systematic sustainability reporting and provides the most widely used comprehensive sustainability reporting standard in the world. Sustainability reporting, also often referred to as Corporate Social Responsibility (CSR) or non-financial reporting provides information about the social and environmental impacts of a company. GRI lists the benefits to businesses of producing sustainability reports to include: “increasing understanding of risks and opportunities,...influencing long term management strategy and policy, benchmarking and assessing sustainability performance with respect to laws, norms, codes, performance standards and voluntary initiatives, avoiding being implicated in publicized environmental, social and governance failures,...and improving reputation and brand loyalty” among others.⁴⁸ The most recent update to the GRI standard, the G4, now incorporates by reference the UN Framework on Business and Human Rights.

In addition to sustainability reporting, there are now a number of voluntary initiatives concerned with fair trade and ethical sourcing in agricultural production. Many of these initiatives operate through the implementation of codes of conduct in the supply chains of large food corporations and retailers or through certification schemes.⁴⁹ There are initiatives at the level of individual corporations, initiatives specific to a particular industry sector, and initiatives that operate across different industries.⁵⁰

There is a growing audience for sustainability information and certified products. According to GRI, from 2006 to 2011, the yearly increase in organizations adopting GRI’s reporting guidelines ranged from 22 to 58 percent. Results of recent studies conducted on coffee

⁴⁷ Id.

⁴⁸ <https://www.globalreporting.org/information/sustainability-reporting/Pages/default.aspx>

⁴⁹ Barrientos & Dolan, *ETHICAL SOURCING IN THE GLOBAL FOOD SYSTEM* at 5 (Stephanie Barrientos & Catherine Dolan eds., 2006).

⁵⁰ Id.

suggest that consumers are receptive to fair trade products and willing to pay higher premiums for products that are part of certain certification schemes.⁵¹

The proliferation of private voluntary codes of conduct is a response to an integrated global economic order with regulatory gaps due to the reduced capacity of states to regulate global production of goods. To prevent race to bottom where taking advantage becomes a competitive advantage, greater responsibility for social and economic welfare will come to rest with the private sector.

Transparency is an essential, if a supplemental, enforcement mechanism that can use the marketplace to punish and reward commercial actors. More must be learned about the performance and potential of the growing number of voluntary standards sustainability being adopted to address stakeholder concerns about how products are produced and to improve conditions for those engaged in production.

C. The Role of Transparency in Protecting Rights: Exposure or Disclosure

There are different types of transparency with varying levels of efficacy depending on context. While mature transparency schemes backed by public mandates have received academic scrutiny, the dynamics of the development of private systems of transparency also deserve attention. My analysis develops the idea of a risk response transparency typology an “exposure-display-disclosure cycle.” This cycle, in turn, serves to promote engagement and change. Voluntary reports or commitments to certification schemes related to human rights impacts by TNCs frequently follow public exposure of a corporation’s business practices that places human rights at risk. Exposure creates an incentive for TNCs to conduct due diligence with regard to human rights in order to be in a position to “know and show” the source of their products and the impacts of their actions. However, without a government mandate requiring disclosure of information relevant to human rights impacts businesses routinely report only what they want to report—the good, not the bad or the embarrassing. Government mandated disclosures, where crafted to be congruent with the policy aim that business enterprises respect human rights could be more likely to lead to greater accountability and accelerate efforts to bring corporate conduct into alignment with respect for human rights.

The case of the cocoa supply chain transparency efforts is instructive for considering the exposure-display-disclosure cycle. Reports of slavery and child labor occurring on West Africa cocoa plantations have captured the attention of Congress and prompted legislative action. An initial proposal by Representative Eliot Engle (D-NY) to develop a “slave free” labeling requirement for cocoa products was abandoned in favor of a voluntary accord after the industry agreed to adopt certain portions of the proposed bill as standard industry protocol.⁵² The resulting 2001 Harkin-Engle Protocol was non-binding but contained time bound phases for eradicating the worst forms of child labor and forced labor from all cocoa farms worldwide.

⁵¹ Jens Hainmueller, Michael J. Hiscox & Sandra Sequeira, Consumer Demand for the Fair Trade Label: Evidence from a Field Experiment (2011) (finding fair trade labels have “substantial positive effect on sales”) Maria L. Loureiro & Justus Lotade, *Do Fair Trade and Eco-Labels in Coffee Wake Up the Consumer Conscience?* 53 *ECOLOGICAL ECONOMICS* 129-138 (2005) (finding consumers more receptive to paying premium for fair trade coffee than organic coffee).

⁵² See, IRLF, *The Cocoa Protocol: Success or Failure* (2008) (providing a history and critique of the protocol) (available at <http://www.laborrights.org/sites/default/files/publications-and-resources/Cocoa%20Protocol%20Success%20or%20Failure%20June%202008.pdf>)

The International Cocoa Initiative, a voluntary multi-stakeholder initiative and product of the Protocol, has been operating since 2002 to eliminate the worst forms of child labor and forced labor in the growing and processing of cocoa beans and their derivative products. Yet, critics complain that years later a consumer still cannot know whether or not the chocolate he or she purchases was procured from a plantation engaging in the worst forms of child labor. In 2010, Framework of Action to Support Implementation of the Harkin-Engle Protocol set 2020 as a new target. Only recently have activists secured commitments from major brands to use only fair trade certified cocoa by 2020. We are left to wonder whether a mandatory labeling requirement would have had a more immediate effect on the market than a voluntary certification scheme.

It is perhaps no coincidence that words like “watch” and “witness” appear in the names of many international human rights campaign groups—Human Rights Watch, Global Witness, OECD Watch. An important element of human rights practice methodology is monitoring and exposing abuses. Corporate concentration in the food system has provided rights activists with opportunities to leverage the information they are able to obtain about abuses to press for change. Indeed, “[d]irect sourcing, with suppliers packing products in supermarket branded packaging at source make it easier for civil society organizations to identify and expose adverse employment practices in the supply chains of named supermarkets.”⁵³

NGOs developed the strategies and constituencies that today are advancing arguments to support improved transparency and traceability of food and other consumer products. Campaigns like Oxfam’s Beyond the Brands help to create political opportunities to promote change to production methods. The fact that fair trade certifications and sustainability reporting now feature more prominently in public discussion is testament to growing strength and efficacy of consumer advocacy movements.

TNCs appear to be adopting voluntary standards and developing a risk-mitigation oriented response to human rights issues activists have raised. For example, Nestlé is using transparency as a tool to learn about its supply chain vulnerabilities through conducting human rights impact assessments and adopting the Global Reporting Initiative G4 Standard. Along with other brands in Oxfam’s “Big 10” including Mars, the company has committed to sourcing only certified cocoa by 2020.

At the center of ethical sourcing for consumers is a desire to make choices. The acceptability element of the food right recognizes that information supports choice autonomy. To be sure, not everyone has privilege to choose a certified product that comes at a premium price product. Indeed, even privileged consumers may have less autonomy than we appreciate. Tim Lang, author of *The Unmanageable Consumer* explains:

In truth, few of us choose as much as we think we do. We select rather than choose. Our much-vaunted choices are framed by context, class, culture, family, history and the panoply of social determinants, not least the vast marketing expenditure pitched at building brand loyalty. Yet, we all learn, whatever our circumstances or cultures to distinguish between freedoms and constraints some have more, others far less. It is this aspiration that the current debate about ethical sourcing taps into.⁵⁴

⁵³ Barrientos & Dolan, *ETHICAL SOURCING IN THE GLOBAL FOOD SYSTEM* at 12.

⁵⁴ *Id.* at xv

Transparency can serve to align our aspirations. Greater transparency could address the information asymmetries that compromise the choices of conscious consumers. Greater supply chain transparency could contribute to creating incentives aligned with the global policy goal of having TNCs fulfill the responsibility to respect human rights by knowing the impacts of their business operations.

To be sure, there are risks associated with transparency. Incentives may not align with policy aims resulting in unintended consequences or conflicting information may overwhelm consumers. However, in the absence of stronger global governance to regulate the food system transparency provides a path towards greater corporate accountability.

IV. Conclusion

Whether civil society advocacy to advance fair trade can affect the commercial practices of large corporate food producers and retailers remains to be seen but I believe there is cause for optimism. We are entering an era of radical transparency characterized by diffuse sources of information that are easily disseminated widely. TNCs would do well to choose disclosure of information about rights impacts to the interested public and opt for engagement with concerned stakeholders. The alternative increasingly is exposure and embarrassment. Where there is a growing demand for socially and environmentally conscious products, systems of production driven by commercial competitive pressures could come to incorporate respect for human rights in business operations.

Transparency plays a critical role in the monitoring and enforcement of voluntary codes of conduct in supply chains presently. Transparency is perhaps the only way to transform present business practices that result in adverse human rights impacts. Without knowledge, TNCs risk complicity in rights violations. With knowledge, TNCs are better positioned to be a part of the solution. Supply chain sustainability reporting and certification schemes that assess human rights impacts should be seen as an important opportunity by TNCs that are sensitive to market pressures to incorporate respect for human rights at level in their operations. Incorporating respect for human rights may yield rewards in terms of a larger share of the growing market of conscious consumers while failure to incorporate rights may result in liability and place a brand's reputation at risk. Increasingly, consumers and investors are watching.

ERG

Transparency for Food Consumers and Food Oppression

Andrea Freeman*

Transparency in the food system is a key focal point in efforts to achieve sustainable food chains, ensure food safety and quality, and provide consumers with necessary information to make good choices.¹ Transparency is also central to United States food policy. Regulations requiring labeling on packaging and in restaurants are centerpieces of efforts to improve health outcomes and decrease obesity. Increased transparency about food ingredients has led to some changes in industry practices and allowed many middle- and upper-income consumers to make informed choices about the products they purchase and consume. Unfortunately, however, research reveals that increased information does not improve health.

Most consumers do not use nutritional labeling to improve their food choices, and those who do are already in good health. Further, low-income consumers who select foods based entirely on availability and affordability derive no benefits from transparency. Transparency may thus in fact be a decoy, providing the appearance of meaningful policy reform while instead preserving the status quo. Upholding transparency as the gold standard of United States food policy allows the government to cater both to its health-conscious, wealthier constituents, who benefit the most from access to greater information, and the food corporations, which profit from a focus on transparency instead of substantial structural reforms, such as bans of harmful food additives or stricter requirements for healthy public school lunches. Transparency's primacy in food policy thus deepens the health divide between wealthy and poor individuals, and between whites and other racial groups.²

Structural changes that expand access to healthy food and the regulation of harmful foods are necessary to eliminate or decrease socio-economic and racial health disparities. Nutritional labeling should therefore be the last, not the first, step in a transformative food policy that would raise the United States to the health standards of other nations with similar resources. This paper argues that the immediate goal of transparency should not be to provide consumers with information about food ingredients and processes, but to expose the partnerships between the food industry and the government that prioritize private profit over public health. The paper

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¹ See, e.g., Elsevier: Deiters, J., Schiefer, G. (eds) *Transparency for Sustainability in Food Chains: Challenges and Research Needs* (2013).; Laura E. Derr, *When Food is Poison, The History, Consequences and Limitations of the Food Allergen Labeling and Consumer Protection Act of 2004*, 61 *Food Drug L. J.* 65 (2006); Archon Fong, Mary Graham, & David Weil, *The Political Economy of Transparency*, 16 (2003). Groups that advocate for transparency in the food system, with a recent emphasis on GMO labeling, include Food Integrity Now <http://foodintegritynow.org/about/>, Just Label It, <http://justlabelit.org/right-to-know/>, Food Democracy Now <http://www.fooddemocracynow.org/campaigns>, Massachusetts Right to Know GMOs (GMO specific) <http://marighttoknow.com/home/>, Project Transparent Food, <http://www.transparentfood.eu/>, Center for Food Safety <http://www.centerforfoodsafety.org/#>, Project on Government Oversight <http://www.raps.org/focus-online/news/news-article-view/article/2524/consumer-advocacy-group-fires-back-at-fda-over-transparency-of-advisory-committ.aspx>, Non GMO Project nongmoproject.org, Food Integrity Campaign, <http://www.foodwhistleblower.org/issue/transparency/>, Right to Know GMO <http://www.righttoknow-gmo.org/>, and Food and Water Watch.

² See Takehiro Sugiyami & Martin Shapiro, *The Growing Socioeconomic Disparity in Dietary Quality, Mind the Gap*, *JAMA Internal Medicine*, (2014), <http://archinte.jamanetwork.com.eres.library.manoa.hawaii.edu/article.aspx?articleid=1899550>.

begins by situating the United States in relation to other countries with regard to health rankings. It then explores how partnerships between the government and food corporations lead to poor health outcomes generally, as well as socio-economic and racial health disparities, or food oppression. Food oppression is food policy that appears neutral but disproportionately harms socially subordinated groups. The paper explains why transparency in the form of nutrition labeling does not improve health outcomes across racial and socioeconomic lines, and concludes by proposing an alternative approach to United States food policy.

The existence of three federal agencies devoted to food and health suggests that the promotion of good health and nutrition is central to United States government policy.³ International health rankings, however, indicate otherwise. The United States health care system is the most expensive in the world.⁴ Nonetheless, according to a 2013 Commonwealth Fund report studying eleven nations, it ranks lowest in terms of quality of care, efficiency, access to care, equity and health outcomes,⁵ lagging significantly behind other countries in similar stages of development.⁶ A 2013 report commissioned by the National Research Council and Institute of Medicine also situated the United States last on a list of seventeen ‘developed’ nations.⁷ Ranking the United States forty-sixth out of forty-eight countries, a 2013 Bloomberg study reported that, among nations with advanced economies, the United States spends the most on health care on a relative cost basis with the worst outcomes.⁸

Within the United States, African Americans, Latina/os, Native Americans, Pacific Islanders, Native Hawaiians and other racialized groups⁹ experience greater health problems than

³ These agencies are the Food and Drug Administration (FDA), the Department of Health and Human Services (DHHS or DHS), and the Department of Agriculture (USDA).

⁴ *Mirror Mirror on the Wall 2014 Update: How the US Health Care System Compares Internationally*, <http://www.commonwealthfund.org/publications/fund-reports/2014/jun/mirror-mirror>. The Commonwealth Fund has issued a series of reports studying health outcomes in Australia, Canada, France, Germany, the Netherlands, New Zealand, Norway, Sweden, Switzerland, the United Kingdom, and the United States.

⁵ *Id.*

⁶ In 2000, the World Health Organization ranked the United States thirty-eighth in health systems, between Costa Rica and Slovenia. *The World Health Report 2000 Health Systems: Improving Performance*, World Health Organization, <http://www.who.int/whr/2000/en/>. Due to intense criticism of the methodology used to create these rankings, the WHO no longer provides international rankings, so the studies mentioned provide the most recent analyses of the US’ relative positioning.

⁷ Steven H. Woolf and Laudan Aron, Eds; Panel on Understanding Cross-National Health Differences Among High-Income Countries; Committee on Population (CPOP); Division of Behavioral and Social Sciences and Education (DBASSE); National Research Council; Board on Population Health and Public Health Practice (BPH); Institute of Medicine (IOM), *U.S. Health in International Perspective: Shorter Lives, Poorer Health*, THE NATIONAL ACADEMIES PRESS, (2013), http://www.nap.edu/catalog.php?record_id=13497; Grace Rubenstein, *New Health Rankings: Of 17 Nations, U.S. Is Dead Last*, THE ATLANTIC, January 10, 2013, <http://www.theatlantic.com/health/archive/2013/01/new-health-rankings-of-17-nations-us-is-dead-last/267045/>.

⁸ *Most Efficient Health Care: Countries*, Bloomberg.com, August 19, 2013, <http://www.bloomberg.com/visual-data/best-and-worst/most-efficient-health-care-countries>. See also, *The State of US Health 1990-2010*, JOURNAL OF AMERICAN MEDICINE, August 14, 2013, <http://jama.jamanetwork.com/article.aspx?articleid=1710486> (comparing measurements of the burden of diseases, injuries and risk factors between the United States and the thirty-four member countries of the Organization for Economic Co-operation and Development).

⁹ When grouping people by race in the context of health disparities, I do so with an awareness that these disparities arise from social factors, not to suggest that there is any biological basis for racial grouping. See, e.g., DOROTHY ROBERTS, *FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY* 64–66 (2011) (noting that among multiple genetic studies, “none support dividing the species into discrete, genetically determined racial categories”); Duana Fullwiley, *Race and Genetics: Attempts to Define the Relationship*, 2 BIOSOCIETIES 221, 224 (2007) (describing the “myriad problems” that arise when “racial generalizations” are drawn from genetic data); Ian F. Haney López, *The Social Construction of*

whites.¹⁰ Many factors contribute to these disparities, including access to care, racial bias in treatment, environmental harms prevalent in segregated neighborhoods, mass incarceration, medical research priorities, colonialism, and correlation with poverty.¹¹ There are pronounced racial disparities in diseases and deaths related to food and nutrition, including obesity diagnoses,¹² high blood pressure,¹³ diabetes,¹⁴ high cholesterol,¹⁵ and cancers.¹⁶ These disparities arise in great part from food law and policy choices that result from partnerships between the government and the food industry. Campaign contributions,¹⁷ lobbying,¹⁸ and a

Race: Some Observations on Illusion, Fabrication, and Choice, 29 HARV. C.R.-C.L. L. REV. 1, 13–14 (1994); William M. Richman, *Genetic Residues of Ancient Migrations: An End to Biological Essentialism and the Reification of Race*, 68 U. PITT. L. REV. 387, 388 n.3 (2006).

¹⁰ See, e.g., *Disparities in Health Care Quality Among Racial and Ethnic Minority Groups: Selected Findings from the AHRQ 2010 NHQR and NHDR*, Agency for Healthcare Research and Quality, April 2011, <http://www.ahrq.gov/qual/nhqdr10/nhqdrminority10.htm>; Race, Ethnicity, and the Health of Americans, American Sociological Association, July 2005,

http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCkQFjAB&url=http%3A%2F%2Fwww2.asanet.org%2Fcentennial%2Frace_ethnicity_health.pdf&ei=DbPaU7zWNMTtigK4nIHQA&usq=AFQjCNE_w5ikxoW_ODA-58JHqdasO36ZZg&sig2=foMfZRvQUTjk_v4Q21w2wA&bvm=bv.72185853,d.cGE.

¹¹ See, e.g., Barbara A. Noah, *Racial Disparities in the Delivery of Health Care*, 35 SAN DIEGO L. REV. 135 (1998); Sidney D. Watson, *Race, Ethnicity and Hospital Care: The Need for Racial and Ethnic Data*, 30 Journal of American Health Law Volume 2 page 125 (1997); Robert D. Bullard, Paul Mohai, Robin Saha, & Beverly Wright, *Toxic Wastes and Race at Twenty: Why Race Still Matters After All These Years*, 38 Env'tl. L. 371 (2008); LAURIE KAYE ABRAHAM, *MAMA MIGHT BE BETTER OFF DEAD: THE FAILURE OF HEALTH CARE IN URBAN AMERICA* 179-97 (1993); Michael Massoglia, *Incarceration, Health, and Racial Disparities in Health*, 42 Law & Soc'y Rev. 275, 285 n.6 (2008); Mark B. Weneker & Arnold M. Epstein, *Racial Inequalities in the Use of Procedures for Patients with Ischemic Heart Disease in Massachusetts*, 261 JAMA 253 (1989); Kevin Fiscella et al., *Inequality in Quality: Addressing Socioeconomic, Racial, and Ethnic Disparities in Health Care*, 283 JAMA 2579 (2000); David R. Williams & Toni D. Rucker, *Understanding and Addressing Racial Disparities in Health Care*, 20 Health Care Financing Rev., Summer 2000; Glenn Flores, *The Role of Clinical Practice Guidelines in Enhancing Quality and Reducing Racial/Ethnic Disparities in Paediatrics*, 3 PAEDIATRIC RESPIRATORY REVIEWS 52 (2002); Glenn Flores et al., *The Impact of Ethnicity, Family Income, and Parental Education on Children's Health and Use of Health Services*, 89 AM. J. PUB. HEALTH 1066 (1999); Michael Weitzman et al., *Black and White Middle Class Children Who Have Private Health Insurance in the United States*, 104 PEDIATRICS 151 (1999); David MKI Liu & Christian K Alameda, *Social Determinants of Health for Native Hawaiian Children and Adolescents*, 70 HAWAII MEDICAL JOURNAL 11 Supp. 2 (2011).

¹² See, e.g., *Adult Obesity Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/obesity/data/adult.html> (last updated Aug. 13, 2012).

¹³ See, e.g., Alvaro Alonso et al., *Dairy Intake and Changes in Blood Pressure Over 9 Years: The ARIC Study*, 63 EUR. J. CLINICAL NUTRITION 1272, 1274 (2009);

¹⁴ See, e.g., Edward A. Chow et al., *The Disparate Impact of Diabetes on Racial/Ethnic Minority Populations*, 30 CLINICAL DIABETES 130, 130 (2012); Rafael Pérez-Escamilla & Predrag Putnik, *The Role of Acculturation in Nutrition, Lifestyle, and Incidence of Type 2 Diabetes Among Latinos*, 137 J. NUTRITION 860, 862 (2007).

¹⁵ See, e.g., *Who Gets Angina?*, SPEAK FROM THE HEART, <http://www.speakfromtheheart.com/who-gets-angina.aspx> (last visited Feb. 27, 2013).

¹⁶ See, e.g., *Cancer Facts & Figures for African Americans 2011–2012*, AM. CANCER SOC'Y 15 (2011), http://www.cancer.org/acs/groups/content/@epidemiologysurveillance/documents/document/acs_pc-027765.pdf; *Cervical Cancer Rates by Race and Ethnicity*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/cancer/cervical/statistics/race.htm> (last visited Feb. 27, 2013).

¹⁷ In the 2008 campaign cycle, food and beverage companies donated over sixteen million dollars to political candidates. In 2013-13, the top campaign contributors in these industries were the National Restaurant Association, Coca-Cola, McDonald's, Darden Restaurants (including the Olive Garden), Pepsi, Bloomin' Brands (including Outback Steakhouse), CKE restaurants (including Carl's Jr and Hardee's), Wendy's and the American Beverage Association. Center for Responsive Politics, *Influence & Lobbying: Food & Beverage*, <http://www.opensecrets.org/industries/indus.php?ind=N01>.

revolving door between corporate and administrative positions¹⁹ facilitate these close relationships. These alliances cause the most harm to the communities with the least political leverage and individuals who experience oppression along multiple axes, such as race, gender, age, sexuality, ability, and immigration status. The cooperation between government and industry that creates food policy that disproportionately harms socially subordinated groups is food oppression.²⁰ Racial stereotypes and the cultural focus on personal choice and responsibility obscure the role that policy plays in determining health outcomes.

The following examples of corporate-friendly policy choices that favor socially privileged groups illustrate how food oppression creates and perpetuates health disparities. The Food and Drug Administration (FDA) compromised with processed and fast food companies to count pizza as a vegetable in the 2014 standards for public school lunches.²¹ Many of the students who eat in school cafeterias cannot afford private education or home-packed lunches. Food companies are particularly eager to maintain a presence in schools because early consumption of unhealthy foods creates a taste for them that usually lasts through adulthood.²² To dispose of the government surplus of high fat milk created by warnings about saturated fats in the federal Dietary Guidelines and the Farm Bill's mandate to the government to purchase unsold milk, the United States Department of Agriculture (USDA) covertly partnered with fast food corporations to sell the milk back to consumers in products such as Dominos' seven cheese pizzas.²³ Individuals living in low-income, Black and Latino urban communities, or in colonized territories such as Hawai'i and Puerto Rico, have the highest percentage of fast food products in their diets²⁴ and suffer disproportionately from the conditions linked to saturated fat consumption.²⁵ Food companies also influence local law and production. On the Hawaiian island of Kaua'i, the mayor vetoed an ordinance requiring disclosure of pesticides by the major agricultural corporations housed on the island and the creation of buffer zones for schools, dwellings, and medical facilities.²⁶ Kaua'i's population is two thirds Hawaiian, mixed race, or of Asian or Pacific Island origin.²⁷

¹⁸ In 2014 the industry spent over \$15,700,00 on lobbying. The top lobbyists were Coca-Cola, Pepsi, the National Restaurant Association, McDonald's and Mars. *Id.*

¹⁹ See Center for Responsive Politics, Influence & Lobbying: Revolving Door Overview, <https://www.opensecrets.org/revolving/index.php>.

²⁰ For a more detailed description of the theory of food oppression, see Andrea Freeman, *The Unbearable Whiteness of Milk: Food Oppression and the USDA*, U.C. Irvine L. Rev. 1251 (2013).

²¹ See Mary Clare Jalonick, *Pizza is a Vegetable? Congress Says Yes*, NBC News, November 15, 2011, http://www.nbcnews.com/id/45306416/ns/health-diet_and_nutrition/t/pizza-vegetable-congress-says-yes/#.VCn3AxbpdrU.

²² See Jennifer S. Savage, Jennifer Orlet Fisher, & Leann L. Birch, *Parental Influence on Eating Behavior*, *J Law Med Ethics*, 35(1): 22–34 (2007).

²³ Michael Moss, *While Warning About Fat, U.S. Pushes Cheese Sales*, N.Y. TIMES, Nov. 7, 2010, at A1.

²⁴ Sahasporn Paeratakul et al., *Fast-Food Consumption Among U.S. Adults and Children: Dietary and Nutrient Intake Profile*, 103 J. AM. DIETETIC ASS'N 1332, 1334 (2003).

²⁵ See Freeman, *Unbearable Whiteness*, at 1261–62.

²⁶ The veto came after the city council passed the controversial bill by a vote of 6 to 1, despite substantial lobbying efforts by the affected corporations, Syngenta Hawaii, DuPont Pioneer, Dow AgroSciences and BASF. The Kaua'i ordinance also sought to protect its residents from potential health hazards from genetically modified (GMO) crops. Large agricultural corporations have been very successful at blocking local and federal regulation of GMOs. In March 2013, President Obama signed into law the Farmer Assurance Provision, also deemed the 'Monsanto Protection Act' as section 735 of HR 933, the Consolidated and Further Continuing Appropriations Act, 2013. The provision allows major agricultural corporations to bypass standard regulatory requirements regarding new GMO crops by instructing the Secretary of Agriculture to "immediately grant temporary permit(s) or temporary

More generally, the USDA artificially lowers the price of fast food through agricultural and farm subsidies.²⁸ The FDA also supports the processed and ‘junk’ food industries by failing to impose restrictions on food additives and ingredients considered too dangerous for consumption in other countries.²⁹ These additives consist mainly of preservatives that allow corner stores in low income neighborhoods to stock their shelves with products that will not quickly expire.³⁰ These stores also impose a ‘ghetto tax’ on their customers, selling items at higher prices than larger grocery stores do because urban residents often lack the time or money to shop elsewhere.³¹ Food industry lobbyists determine the wording of the federal Dietary Guidelines, resulting in confusing messages about what is and is not good food.³² These Guidelines form the basis for all government nutrition programs, including the Special Supplemental Nutrition Program for Women, Infants and Children (WIC), and Child Nutrition Programs.³³ The beneficiaries of these programs are all low-income, and many come from racially marginalized communities.³⁴

Each of these examples provides guidance for major, structural food policy reform that would benefit most individuals in addition to reducing racial and socio-economic health disparities. Nonetheless, attempts to improve health outcomes focus almost entirely on consumer-oriented strategies such as behavioral economics and transparency through nutrition labeling. These methods shift the focus away from corporate power over government agencies and on to individuals. Consequently, they are unlikely to result in significant change and, for a number of reasons, have very limited impact.³⁵

deregulation” upon a farmer, grower, farm operator or producer’s request. The provision eliminates judicial review, even upon a finding that a crop poses health harms. See Michelle McGuinness, ‘Monsanto Protection Act’ Called Outrageous, Dangerous, MSN News (Mar. 28, 2013), <http://news.msn.com/us/monsanto-protection-act-called-outrageous-dangerous>.

²⁷ United States Census Bureau, State & County QuickFacts: Kaua‘i County, Hawai‘i, <http://quickfacts.census.gov/qfd/states/15/15007.html>.

²⁸ See Andrea Freeman, *Fast Food: Oppression Through Poor Nutrition*, 95 CALIF. L. REV. 2221, 2242 (2007); The Real Price of a Big Mac; The Little Food Book.

²⁹ See Andrea Freeman, *Behavioral Economics and Food Policy: The Limits of Nudging*, in BEHAVIORAL ECONOMICS, LAW, AND HEALTH POLICY, Johns Hopkins University Press (forthcoming Fall 2016). Ingredients banned in other countries but still legal and commonly used here include petroleum-based artificial dyes, olestra, brominated vegetable oil, potassium bromate, azodicarbonimide, butylated hydroxyanisole (BHA) and butylated hydroxytoluene (BHT), synthetic growth hormones rBGH and rBST, and arsenic.

³⁰ The side effects of these preservatives include nerve cell deterioration, brain cancer, hyperactivity, and asthma. RICH FOOD, POOR FOOD.

³¹ Brookings Institute Report; see Erik Eckholm, *Study Documents Ghetto Tax Being Paid by the Urban Poor*, NY Times, July 19, 2006, http://www.nytimes.com/2006/07/19/us/19poor.html?_r=0.

³² Marion Nestle, FOOD POLITICS (2007).

³³ These programs provide eligible participants with supplemental food and nutrition education, among other things. United States Department of Agriculture Food and Nutrition Service, Women, Infants, and Children, <http://www.fns.usda.gov/wic/women-infants-and-children-wic>.

³⁴ For WIC, in 2012, 58.2 percent of all WIC participants reported their race as White Only, 19.8 percent reported as Black or African American Only, 12.2 percent reported as American Indian or Alaska Native Only, and 3.9 percent of participants reported as either Asian or Native Hawaiian or Other Pacific Islander Only. Two or more races were reported for 5.1 percent of WIC participants. For ethnicity, 41.5 percent of participants reported as Hispanic/Latino. Women, Infants, and Children, *WIC Participants and Program Characteristics: 2012 Final Report*, December 2013, iv-v, <http://www.fns.usda.gov/sites/default/files/WICPC2012.pdf>.

³⁵ For an in-depth of analysis of the role of behavioral economics in food policy, see Freeman, *The Limits of Nudging*, *supra* n.27.

Transparency, in the context of food and health, is the provision of information to consumers about the food they purchase and consume through labels on food packaging and in restaurants. This type of transparency has many proponents, including Michelle Obama, who incorporated it into her Let's Move campaign against obesity,³⁶ and prominent food advocacy groups, such as the Center for Science in the Public Interest.³⁷ Transparency, they assert, arms the consumer with the knowledge necessary to make food choices that will promote good health. If she fails to make these choices, the fault is her own. Under this paradigm, lack of information is the only obstacle to healthy food consumption leading to better health outcomes. This theory, described as 'healthism'³⁸ or biomedical interventionism,³⁹ absolves the government of responsibility for structural factors leading to poor food choices such as lack of access to healthy food based on unemployment, zoning laws, inadequate access to child care, unaffordable or inaccessible public transportation, and poverty. Transparency is also problematic as a policy choice, however, because studies have not proven that it works.

Section 4205 of the Patient Protection and Affordable Care Act requires chain restaurants to list the calorie content of their standard food and drink items on menus and menu boards.⁴⁰ A chain restaurant is one that has twenty or more locations.⁴¹ This provision emerged from research showing that dining out, particularly in fast food establishments, correlates with obesity and other indicators of poor health.⁴² Americans consume one third of their calories in the form of food prepared outside the home and spend half of their food budget on it.⁴³ Accordingly, the

³⁶ See A.J. Pearlman, *Helping Families Make Healthier Choices: FDA To Update Nutrition Facts Label*, Let's Move blog, February 27, 2014, <http://www.letsmove.gov/blog/2014/02/27/helping-families-make-healthier-choices-fda-update-nutrition-facts-label>.

³⁷ Lydia Zuraw, *Food Industry Association Plans to Make GRAS More Transparent*, August 29, 2014, <http://www.foodsafetynews.com/2014/08/gma-plans-to-make-gras-more-transparent/#.VFPpS8npdrV>.

³⁸ See JULIE GUTHMAN, *WEIGHING IN: OBESITY, FOOD JUSTICE, AND THE LIMITS OF CAPITALISM*, 52–55 (2011).

³⁹ See Elizabeth Fee & Nancy Krieger, *Understanding AIDS: Historical Interpretations and the Limits of Biomedical Individualism*, 83 AM. J. PUB. HEALTH 1477, 1481 (1993).

⁴⁰ National Conference of State Legislatures, *Trans Fat and Menu Labeling Legislation*, <http://www.ncsl.org/research/health/trans-fat-and-menu-labeling-legislation.aspx>.

⁴¹ United States Food and Drug Administration, *Menu and Vending Machines Labeling Requirements*, <http://www.fda.gov/Food/IngredientsPackagingLabeling/LabelingNutrition/ucm217762.htm>. The requirements also apply to vending machines operators with more than 20 machines and allows for restaurants or vendors with fewer than twenty locations to register for voluntary regulation. Other nutrient information must be provided to consumers upon written request.

⁴² See, e.g., Satia J, Galanko J and Siega-Riz A., *Eating at Fast-Food Restaurants Is Associated with Dietary Intake, Demographic, Psychosocial and Behavioural Factors among African Americans in North Carolina*, *Public Health Nutrition*, 7(8): 1089–1096, December 2004; Bowman S and Vinyard B. *Fast Food Consumption of U.S. Adults: Impact on Energy and Nutrient Intakes and Overweight Status*, *Journal of the American College of Nutrition*, 23(2): 163–168, April 2004; French S, Harnack L and Jeffery R., *Fast Food Restaurant Use among Women in the Pound of Prevention Study: Dietary, Behavioral and Demographic Correlates*, *International Journal of Obesity*, 24(10): 1353–1359, October 2000; Pereira M, Kartashov A, Ebbeling C, et al., *Fast-Food Habits, Weight Gain, and Insulin Resistance (the CARDIA Study): 15-Year Prospective Analysis*, *Lancet*, 365(9453): 36–42, January 2005; Thompson O, Ballew C, Resnicow K, et al., *Food Purchased Away from Home as a Predictor of Change in BMI Z-Score among Girls*, *International Journal of Obesity and Related Metabolic Disorders*, 28(2): 282–289, February 2004; McCrory M, Fuss P, Hays N, et al., *Overeating in America: Association between Restaurant Food Consumption and Body Fatness in Healthy Adult Men and Women Ages 19 to 80*, *Obesity Research*, 7(6): 564–571, November 1999; Duffey K, Gordon-Larsen P, Jacobs D, et al., *Differential Associations of Fast Food and Restaurant Food Consumption with 3-y Change in Body Mass Index: The Coronary Artery Risk Development in Young Adults Study*, *American Journal of Clinical Nutrition*, 85(1): 201–208, January 2007.

⁴³ *Id.* n. 40.

provision ensures that restaurant patrons receive information about menu items that overlaps with what manufacturers must display on store-bought products.⁴⁴ The FDA, which created the guidance documents to implement this provision, acknowledges that, “because comprehensive data for the effects of menu labeling do not exist,” it cannot be certain that consumers will benefit from these requirements, but identifies the objective of the rules as an attempt to “help mitigate the trend of increasing obesity in America.”⁴⁵

Food manufacturers, under the Nutrition Labeling and Education Act, must include more extensive information on pre-packaged food items than restaurants provide.⁴⁶ A label titled Nutrition Facts must display calories, sugars, fat, saturated fat, vitamins A and C, calcium, iron, fiber, and carbohydrates.⁴⁷ Manufacturers may also voluntarily post other nutritional content.⁴⁸ In 2014, the FDA proposed amendments to the Act that would create a new line for added sugars (which previously were not separated from natural sugars, such as from fruit), adjust the serving size to reflect realistic portions, and make the calorie count more visible.⁴⁹ Many food and health advocates view these amendments as an important victory for consumers.⁵⁰

Research reveals, however, that nutritional packaging and restaurant labels have little or no impact on consumer choice and health.⁵¹ Although teenagers and adults notice calorie counts when restaurants provide them, neither group alters their food selection in response.⁵² Behavioral economics provides two possible explanations for this. Information acquisition simply may not have the power to increase self-control.⁵³ Individuals tend toward impulsivity in food selection,

⁴⁴ *Id.*

⁴⁵ *Id.* n. 40.

⁴⁶ U.S. Food and Drug Administration, Investigations, Compliance, Enforcement and Criminal Investigations, Nutritional Labeling and Education Act (NLEA) Requirements (8/94 – 2/95), August 1994, <http://www.fda.gov/iceci/inspections/inspectionguides/ucm074948.htm>.

⁴⁷ Guidance for Industry: A Food Labeling Guide, United States Food and Drug Administration, <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm064894.htm>.

⁴⁸ *Id.*

⁴⁹ Sabrina Tavernise, *New F.D.A. Nutrition Labels Would Make “Serving Sizes” Reflect Actual Servings*, NEW YORK TIMES, February 27, 2014, <http://www.nytimes.com/2014/02/27/health/new-fda-nutrition-labels-would-make-serving-sizes-reflect-actual-servings.html>.

⁵⁰ *Id.*

⁵¹ See, e.g., B Elbel, J Gyamfi, R Kersh, *Child and adolescent fast-food choice and the influence of calorie labeling: a natural experiment*, International Journal of Obesity, (2011) 35, 493–500; doi:10.1038/ijo.2011.4, <http://www.nature.com/ijo/journal/v35/n4/abs/ijo20114a.html>; Brian Elbel, Rogan Kersh, Victoria L. Brescoll, and L. Beth Dixon, *Calorie Labeling and Food Choices: A First Look at the Effects on Low-Income People in New York City*, Health Affairs, January 2010, 28(6): w1110-1121, <http://www.ncbi.nlm.nih.gov/pubmed/19808705>; Rosanna Mentzer Morrison, Lisa Mancino, and Jayachandran Variyam, *Will calorie labeling in restaurants make a Difference?*, USDA, March 14, 2011, <http://www.ers.usda.gov/amber-waves/2011-march/will-calorie-labeling.aspx#.UyN6d4XpdrW>; Bryan Bollinger, Phillip Leslie, and Alan Sorensen, *Calorie Posting in Chain Restaurants*, National Bureau of Economic Research Working Paper Series, January 2010, Vol. w15648 (observing a 6% percent drop in calories per transaction at Starbucks locations that posted nutritional information, but suggesting this would only have a small impact on obesity, although it may encourage restaurants to offer more low calorie options or accustom consumers to calorie counting); Lisa Mancino and Jean Kinsey, *Is Dietary Knowledge Enough? Hunger, Stress, and other Roadblocks to Healthy Eating*, USDA Economic Research Service, August 2008, <http://www.ers.usda.gov/publications/err-economic-research-report/err62.aspx#.UyON3YXpdrU> (finding that eating away from home and with long period between meals reduces the influence of cognitive dietary information).

⁵² B Elbel, J Gyamfi, R Kersh, *supra* n. 51.

⁵³ See, e.g., Nicole Larson & Mary Story, *Menu Labeling: Does Providing Nutrition Information at the Point of Purchase Affect Consumer Behavior?*, 3 (2009) (“Although consumers want nutrition information to be available, several other factors, aside from nutrition concerns, influence their menu selections. Most notably, food prices, taste

and environmental factors at the point of purchase, such as colors, smells, and positioning of products often exert greater influence than rational thinking about diet and health.⁵⁴ People also have a limited capacity to process new information – they simply do not have room for it in their heads at the moment that they confront it.⁵⁵

Even when restaurants employ behavioral economics to encourage healthy selections, making certain products more accessible and prominent, these tactics do not appear to affect overall caloric consumption.⁵⁶ Many consumers compensate for making one healthy choice, like a sandwich instead of a burger, by adding unhealthy choices, such as fries or a milkshake, to their meal.⁵⁷ Ironically, offering a healthy option, like a salad, on an otherwise unhealthy fast food menu serves to increase selections of unhealthy products because the mere existence of the healthy option satisfies the eater's need for good health practices.⁵⁸

Nutrition labels on packaged foods also do not appear to reduce consumers' intake of calories, saturated fats, or sodium.⁵⁹ The evidence suggests that labeling only allows consumers who already engage in healthy eating habits to improve their choices, thus creating no overall change in consumer health.⁶⁰ Gender also may determine the efficacy of labeling, as studies show that women are more likely than men to use nutrition labels.⁶¹ Also, while women use label information to attempt to lose weight, men employ it to increase their caloric intake.⁶²

and convenience are frequently reported as important influences on menu selections, and these factors are often at odds with healthful eating.”); see also Melissa A. Z. Knoll, *The Role of Behavioral Economics and Behavioral Decision Making in Americans' Retirement Savings Decisions*, Social Security Bulletin, Vol. 70 No. 4 (2010), <http://www.ssa.gov/policy/docs/ssb/v70n4/v70n4p1.html> (in the context of retirement savings) (“Even if decision makers had complete and accurate information, however, empirical findings suggest that they would still make suboptimal savings decisions as a result of issues related to the second category, heuristics and biases.”).

⁵⁴ See Nanette Stroebele & John M. DeCastro, *Effect of Ambience on Food Choice and Food Intake*, 20 Nutrition 821, 821 (2004); David R Just, Lisa Mancino, and Brian Wansink, *Could Behavioral Economics Help Improve Diet Quality for Nutrition Assistance Participants?*, USDA, <http://www.ers.usda.gov/publications/err-economic-research-report/err43.aspx#.UyNeyoXpdrV>.

⁵⁵ Julie S. Downs, George Loewenstein, and Jessica Wisdom, *Strategies for Promoting Healthier Food Choices*, American Economic Review: Papers and Proceedings, May 2009, 99(2): 159-164, http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CC0QFjAA&url=http%3A%2F%2Fwww.cl.cam.ac.uk%2F~rja14%2Fshb09%2Fdowns3.pdf&ei=g5IjU7OVLsadqAGs9YG4Bw&usg=AFQjCNGA_xPU3V3bJHUASxTTAsfHkMtH3A&sig2=F9vhwgWt_TfK3lDXQ-KMNA&bvm=bv.62922401,d.aWM.

⁵⁶ See, e.g., Jessica Wisdom, et al., *Promoting Healthy Choices: Information Versus Convenience*, American Economic Journal: Applied Economics, April 2010, 2(2): 164-178. Keith Wilcox, et al., *Vicarious Goal Fulfillment: When the Mere Presence of a Healthy Option Leads to an Ironically Indulgent Decision*, Journal of Consumer Research, available at https://faculty.fuqua.duke.edu/~gavan/bio/GJF_articles/vicarious_goal_fulfillment_jcr-inpress.pdf.

⁵⁷ Wisdom, *supra* n. 56.

⁵⁸ Wilcox, *supra* n. 56.

⁵⁹ See Rosanna Mentzer Morrison, Lisa Mancino, and Jayachandran Variyam, *Will calorie labeling in restaurants make A Difference?*, USDA, March 14, 2011, <http://www.ers.usda.gov/amber-waves/2011-march/will-calorie-labeling.aspx#.UyN6d4XpdrW>; Jayachandran N. Variyam, *Do Nutrition Labels Improve Dietary Outcomes?*, Health Economics, 17, 695-708, 2008.

⁶⁰ See Jayachandran N. Variyam, *Nutrition Labeling in the Food-Away-From-Home Sector, An Economic Assessment*, ERR-4, USDA, Economic Research Service, April 2005, <http://webarchives.cdlib.org/sw1tx36512/http://www.ers.usda.gov/Publications/ERR4/>; Jessica Wisdom, Julie S. Downs, and George Loewenstein, *Promoting Healthy Choices: Information Versus Convenience*, American Economic Journal: Applied Economics, April 2010, 2(2): 164-178

⁶¹ Driskell J, Schake M and Detter H., *Using Nutrition Labeling as a Potential Tool for Changing Eating Habits of University Dining Hall Patrons*, Journal of the American Dietetic Association, 108(12): 2071–2076, December

Labeling laws do, however, affect manufacturers, who sometimes reformulate products in anticipation of new rules to gain a competitive advantage. Several large food companies, for example, altered their products in reaction to the 2005 Dietary Guidelines' new recommendations of a specific daily intake of whole grains⁶³ and to trans-fat labeling requirements.⁶⁴ Responding to labeling requirements proved to be a good investment for some companies: package labeling increased the market share of fat-modified cheese products and cookies.⁶⁵ Chain restaurants have also reacted to labeling requirements by reducing the calories in many of their non-core menu items.⁶⁶ It is not clear, however, that changes by manufacturers and restaurants result in better health outcomes for consumers, as healthier products may only appeal to already health-conscious consumers.⁶⁷

Labeling might have a greater effect on consumer behavior if its messages were clearer. Former head of the USDA, David Kessler, proposed a radical change to product labeling which would list the three top ingredients, the number of calories per serving, and the amount of additional ingredients on a clearly visible label on the front of each product.⁶⁸ This design might increase consumers' comprehension of the nutrition label and lead to healthier choices. Also, using plain language about the actual effects on the body of consuming the product appears to alter behavior. For example, when convenience stores in Baltimore posted large, brightly-colored signs on refrigerators containing sweetened beverages stating how long it would take to walk off the calories in the drink, there was a corresponding drop in the amount of calories purchased.⁶⁹ Despite the significant decrease in unhealthy drink selections, however, from 98% of adolescent

2008; Misra R., *Knowledge, Attitudes, and Label Use Among College Students*, Journal of the American Dietetic Association, 107(12): 2130–2134, December 2007.

⁶² J. Aaron, et al., *Paradoxical Effect of a Nutrition Labeling Scheme in a Student Cafeteria*, Nutrition Research, 15(9): 1251–1261, September 1995; L. Harnack, et al. *Effects of Calorie Labeling and Value Size Pricing on Fast Food Meal Choices: From an Experimental Trial*, International Journal of Behavioral Nutrition and Physical Activity, December 2008;5:63, www.ijbnpa.org/contents/5/1/63; M. Conklin, et al, *College Students' Use of Point of Selection Nutrition Information*, Topics in Clinical Nutrition, 20(2): 97–108, April-June 2005.

⁶³ Lisa Mancino, et al., *Getting Consumers to Eat More Whole-Grains: The Role of Policy, Information, and Food Manufacturers*, Food Policy, December 2008, Vol. 33, No. 6, 489-496, <http://www.sciencedirect.com/science/article/pii/S0306919208000535>.

⁶⁴ Elise Golan, et al., *Food Policy: Check the List of Ingredients*, USDA Economic Research Service, June 2009, Amber Waves, Vol. 7, Issue 2, <http://webarchives.cdlib.org/sw1tx36512/http://www.ers.usda.gov/AmberWaves/June09/Features/FoodPolicy.htm>.

⁶⁵ A. Levy & B. Derby, *The Impact of the Nutrition Labeling and Education Act on Consumers: Recent Findings from the Food and Drug Administration's Food Label and Nutrition Tracking System*, Washington, DC: FDA Office of the Commissioner; 1996.

⁶⁶ Sara N. Bleich, Julia A. Wolfson, Marian P. Jarlenski, *Calorie Changes in Chain Restaurant Menu Items*, American Journal of Preventive Medicine, October 7, 2014, <http://www.ajpmonline.org/article/S0749-3797%2814%2900493-0/fulltext>.

⁶⁷ *Id.*

⁶⁸ David A. Kessler, *Toward More Comprehensive Food Labeling*, The New England Journal of Medicine, 371:193-195, July 17, 2014, <http://www.nejm.org/doi/full/10.1056/NEJMp1402971>.

⁶⁹ Sara N. Bleich, Colleen L. Barry, Tiffany L. Gary-Webb, and Bradley J. Herring, *Reducing Sugar-Sweetened Beverage Consumption by Providing Caloric Information: How Black Adolescents Alter Their Purchases and Are the Effects Persistent*, cited in Sara N. Bleich, Julia A. Wolfson, Seanna Vine, and Y. Claire Wang, *Diet-Beverage Consumption and Caloric Intake Among US Adults, Overall and by Body Weight*, American Journal of Public Health, Vol. 104, No. 3, pp. e72-e78 (March 2014). See also, *I Have To Walk How Many Miles to Burn Off This Soda?*, Johns Hopkins Bloomberg School of Public Health, October 16, 2014, <http://www.jhsph.edu/news/news-releases/2014/i-have%20to-walk-how-many-miles%20to-burn-off-this-soda.html>.

shoppers choosing sugary beverages to 89%,⁷⁰ the fact that almost ninety percent of these adolescents still choose sweetened drinks represents a serious health problem that labeling appears unable to solve.

Taste, price, and convenience are more prevalent than nutritional content to many consumers.⁷¹ Food preferences are also sticky because the industry has invested millions in perfecting the exact amount of sugar, salt, and fat that will render a food addictive.⁷² Further, companies devote extensive resources to studying how to increase consumption once hunger is satiated.⁷³ Most importantly, while price and convenience are significant for all consumers, they are determinative for those who lack access to a range of foods. Nutrition information becomes irrelevant when the sole conveyor of grocery items in a neighborhood does not offer any products with healthful ingredients. A child who cannot afford home-packed lunches must eat what the cafeteria provides. If fast food is the only type of restaurant within walking distance, working families who rely on public transportation and have limited time to cook will eat it.

Transparency's ability to improve United States health outcomes therefore depends on its use in conjunction with broader strategies to improve access to healthy food and stronger regulation of harmful foods. The successful implementation of these reforms would require a clear delineation between corporate and government interests. For example, the subsidies the USDA provides to corn growers go primarily to large agricultural operations.⁷⁴ These large-scale farms use growing techniques that render the corn they produce unpalatable for direct consumption.⁷⁵ The farmers must therefore sell this corn to other industries, primarily sweetened beverage manufacturers, who use high fructose corn syrup in soft, energy, and sports drinks.⁷⁶ This interdependent relationship gives the USDA a high stake in the sales of these unhealthy beverages. Moreover, the subsidies lower the costs of these drinks, making them less expensive than nutritious drinks, such as juice or coconut water.⁷⁷ The sweetened beverages therefore

⁷⁰ *Id.*

⁷¹ M. O'Dougherty, et al., *Nutrition Labeling and Value Size Pricing at Fast-Food Restaurants: A Consumer Perspective*, *American Journal of Health Promotion*, 20(4): 247–250, March-April 2006; A. Lando & J. Labiner-Wolfe, *Helping Consumers Make More Healthful Food Choices: Consumer Views on Modifying Food Labels and Providing Point-of-Purchase Nutrition Information at Quick-Service Restaurants*, *Journal of Nutrition Education and Behavior*, 39(3): 157–163, May-June 2007; J. Kolodinsky, et al., *The Use of Nutritional Labels by College Students in a Food-Court Setting*, *Journal of American College Health*, 57(3): 297–301, November-December 2008; Albright C, Flora J and Fortmann S., *Restaurant Menu Labeling: Impact of Nutrition Information on Entree Sales and Patron Attitudes*, *Health Education Quarterly*, 17(2): 157–167, Summer 1990; L. Harnack, et al., *Effects of Calorie Labeling and Value Size Pricing on Fast Food Meal Choices: From an Experimental Trial*, *International Journal of Behavioral Nutrition and Physical Activity*, December 2008;5:63, www.ijbnpa.org/contents/5/1/63.

⁷² Michael Moss, *SALT SUGAR FAT* (2013).

⁷³ See, e.g., Kelly Gurley Lambert, et al., *Food-related stimuli increase desire to eat in satiated and hungry human subjects*, *Current Psychology*, <http://link.springer.com/article/10.1007%2F02686902#page-1>. An example of this is the McCormick Crave It! study, Moss *supra* note 60 at PDF 60.

⁷⁴ From 1995 to 2012, the top 10 percent of corn subsidy recipients were paid 72 percent of corn subsidies. <http://farm.ewg.org/progdetail.php?fips=00000&progcode=corn&page=conc®ionname=theUnitedStates>

⁷⁵ See King Corn (2007).

⁷⁶ See *For A Healthier Country, Overhaul Farm Subsidies*, *SCIENTIFIC AMERICAN*, May 1, 2012, <http://www.scientificamerican.com/article/fresh-fruit-hold-the-insulin/>.

⁷⁷ Safeway's online delivery system sells two liters (67.6 ounces) of Coca Cola, which contains high fructose corn syrup, for \$2.19 (as of October 27, 2014). Conversely, a 59 oz carton of Florida Natural Orange Juice costs \$4.99. A 16 oz can of Amp Mountain Dew Energy Drink sells for \$1.50. A 17.5 oz can of Zola Coconut Water sells for \$2.79. See safeway.com, Shop by Aisle (last visited Oct. 27, 2014).

dominate the diets of low-income consumers, leading to health problems and contributing to socio-economic and racial health disparities.

The regulation of harmful food ingredients, such as trans fats, provides another example of the need to separate corporate from government interests. Although other countries responded immediately to the 1999 discovery that trans fats,⁷⁸ or partially hydrogenated oils, led to a significant number of deaths from heart disease, the United States did not propose to classify these fats as a dangerous food item until 2013.⁷⁹ Both restaurants and manufacturers resisted regulation of trans fats because they are less expensive than other oils and significantly increase shelf life.⁸⁰ The harm of trans fats falls disproportionately on individuals who primarily eat store-bought baked goods and dine in lower priced restaurants. Instead of framing the trans fats issue as one of health, opponents of regulation focused on libertarian ideals, criticizing the notion of the ‘nanny state.’⁸¹ Libertarians, however, are selective about their critiques of food policy, generally favoring food safety regulation, but not food assistance programs.⁸²

The concepts of personal choice and responsibility embodied in the ‘nanny state’ rhetoric deny the financial and social realities of most United States consumers. In 2013, over forty-five million people, representing one in seven Americans, lived under the poverty line.⁸³ In 2012, over twenty percent of the population, or one in five Americans, was food insecure or had very low food security.⁸⁴ Over fifteen percent of the population receives federal food assistance⁸⁵ and approximately sixty percent of children attending public schools eat school lunches.⁸⁶ For low-income students, school meals represent half of their daily caloric intake.⁸⁷ Also, more than half of the infants born in the United States receive government assistance through the WIC program.⁸⁸

Low-income and food insecure individuals select food from an extremely limited range of options that may not include any healthy items. These constraints belie the assertions that information can boost health, and that poor health reflects bad choices. Food policy that makes

⁷⁸ <http://www.news-medical.net/health/Trans-Fat-Regulation.aspx>

<http://www.nejm.org/doi/full/10.1056/NEJMp1314072>

⁷⁹ Department of Health and Human Services, Tentative determination regarding partially hydrogenated oils; request for comments and for scientific data and information, 78 Fed. Register 67169-67175 (2013).

⁸⁰ Major manufacturers ConAgra Foods Nestle, General Mills, and the National Restaurant Association are among those who opposed an outright ban of trans fats. Barbara Solderlin, ConAgra among firms urging limit, not ban, on trans fats, Omaha.com, Mar. 27, 2014, available at http://www.omaha.com/money/conagra-among-firms-urging-limit-not-ban-on-trans-fats/article_7cad8380-3e3e-5a80-9fed-c2d84d50faf1.html.

⁸¹ See Nadine Henley, *Free to be Obese in a “Super Nanny State?”* M/C Journal, available at <http://journal.media-culture.org.au/0609/6-henley.php>.

⁸² Steve Holt, *Food Activism’s Libertarian Streak*, takepart.com, available at <http://www.takepart.com/article/2012/05/22/food-activisms-libertarian-streak>.

⁸³ United States Census Bureau, *Poverty, 2013 Highlights*, <https://www.census.gov/hhes/www/poverty/about/overview/>.

⁸⁴ World Hunger Education Service 2014, *Hunger In America: 2014 United States Hunger and Poverty Facts*, 2014. http://www.worldhunger.org/articles/Learn/us_hunger_facts.htm.

⁸⁵ Food Research and Action Center, *2012 SNAP Data: SNAP Participation Increases in December 2012*, <http://frac.org/reports-and-resources/snapfood-stamp-monthly-participation-data/2012-snap-data/>.

⁸⁶ Mary Story, Karen Kaphingst, and Simone French, *The Role of Schools in Obesity Prevention*, *Childhood Obesity* 16:111 (Spring 2006).

⁸⁷ Juliana Cohen, et al., *Impact of the New U.S. Department of Agriculture School Meal Standards on Food Selection, Consumption, and Waste*, *American Journal of Preventive Medicine* 46:388-394 (April 2014).

⁸⁸ United States Department of Agriculture, Food and Nutrition Service, *Women, Infants, and Children (WIC): About WIC: WIC At a Glance*, <http://www.fns.usda.gov/wic/about-wic-wic-glance>.

only unhealthy food available to lower-income consumers results in greater health care costs, in addition to the social and financial costs to communities who lose the contributions of many of their members due to food-related illnesses, such as diabetes and high blood pressure, and deaths.⁸⁹

In addition to burdening lower-income individuals with significant limits on food choice, food policy that focuses on transparency disproportionately harms racially marginalized communities. People of color are disproportionately represented among the poor and food insecure, and in federal food programs.⁹⁰ These communities also suffer disproportionately from food-related illnesses and deaths.⁹¹

Popular racial stereotypes allow this manifestation of food oppression, the disproportionate harm to communities of color from purportedly neutral laws and policies, to appear natural, deserved, and unproblematic. These stereotypes also support the idea that structural reform would be futile in the face of persistent poor decision-making. The racial trope of the welfare queen serves to illustrate this point.⁹² Although initially created as a federal

⁸⁹ Almost one third of Americans (31%) have high blood pressure. Centers for Disease Control and Prevention, *High Blood Pressure Facts*, <http://www.cdc.gov/bloodpressure/facts.htm>. Almost one in ten (9.3%) have diabetes. Centers for Disease Control and Prevention, *CDC Features: Diabetes*

Latest, <http://www.cdc.gov/features/diabetesfactsheet/>. One third of Americans suffer from some sort of cardiovascular disease. Office of Disease Prevention and Health Promotion, *Heart Disease and Stroke*, Healthy People 2020, <https://www.healthypeople.gov/2020/topics-objectives/topic/heart-disease-and-stroke>. Lifestyle and environment account for 90-95% of chronic illnesses. Preetha Anand, et. al., *Cancer is a Preventable Disease that Requires Major Lifestyle Changes*, *Pharmaceutical Research* 25(9): 2097–2116 (September 2008).

⁹⁰ While only 9.7% of whites lived below the poverty line in 2012, 27.2% of Blacks, 25.6% of Latinos, and 11.7% of Asian Americans did. World Hunger Education Service 2014, *Hunger In America: 2014 United States Hunger and Poverty Facts*, 2014. http://www.worldhunger.org/articles/Learn/us_hunger_facts.htm. In 2013, 26% of Black households and 24% of Latino households had higher rates of food insecurity than the national average.⁹⁰ Feeding America, *Poverty and Hunger Fact Sheet*, <http://www.feedingamerica.org/hunger-in-america/impact-of-hunger/hunger-and-poverty/hunger-and-poverty-fact-sheet.html>. Recipients of food stamps through the Supplemental Nutrition Assistance Program are Black 31%, Latinos 22%, other 18% and White 15%. Rich Morin. "The Politics and Demographics of Food Stamp Recipients." *Pew Research Center*. July 12, 2013. <http://www.pewresearch.org/fact-tank/2013/07/12/the-politics-and-demographics-of-food-stamp-recipients>. Black women and children make up 19.8% of WIC participants and only 12.6% of the population; Latinas represent 41.5% of WIC recipients but only 16.3% of the population. U. S. Department of Agriculture. "WIC Participant and Program Characteristics 2012 Final Report." December 2013. 27. <http://www.fns.usda.gov/sites/default/files/WICPC2012.pdf>

⁹¹ African Americans have higher rates of high blood pressure than whites (43% for men and 45.7% for women), Centers for Disease Control and Prevention, *High Blood Pressure Facts*, <http://www.cdc.gov/bloodpressure/facts.htm>; Blacks, Latinos and Native Americans are twice as likely to be diagnosed with diabetes, American Diabetes Association, *Statistics About Diabetes 2014*, <http://www.diabetes.org/diabetes-basics/statistics/>; Blacks have the highest age-adjusted rates of obesity (47.8%) followed by Latinos (42.5%), whites (32.6%), and Asians (10.8%), Centers for Disease Control and Prevention, *Overweight and Obesity: Adult Obesity Facts*, <http://www.cdc.gov/obesity/data/adult.html>;

⁹² See Michele Estrin Gilman, *Gender Matters: Women, Social Policy, and the 2012 Election: The Return of the Welfare Queen*, 22 AM. U.J. GENDER SOC. POL'Y & L. 247 (2014) ; Catherine R. Albiston & Laura Beth Nielson, *Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls*, 38 How. L.J. 473 (1995); Bridgette Baldwin, *Stratification of the Welfare Poor: Intersections of Gender, Race, & "Worthiness" in Poverty Discourse and Policy*, 6 Am U. Modern Am. 4 (2010); Laurel Parker West, *Soccer Moms, Welfare Queens, Waitress Moms, and Super Moms: Myths of Motherhood in State Media Coverage of Child Care*, 14, Atlanta: Emory University (April 2002), http://www.marial.emory.edu/pdfs/wp016_02.pdf; Rose Weitz and Leonard Gordon, *Images of Black Women Among Anglo College Students*, *Sex Roles*, January 1993, Volume 28, Issue 1-2, pp 19-34, 20; Franklin Gilliam, Jr., The "Welfare Queen" Experiment: How Viewers React to Images of

program to assist needy white families, welfare evolved into a benefit primarily for people of color, and the amount provided became insufficient to support a family.⁹³ Attempts to reduce spending on social assistance programs led to the invention of the ‘welfare queen,’ a single black mother who has children only to collect ‘free’ welfare checks to support her life of luxury.⁹⁴ Other common stereotypes of black women, such as the jezebel, who is highly sexual and lacks maternal instincts, and the sapphire,⁹⁵ who fails to respect societal norms, combined with the common stereotype of blacks as lazy,⁹⁶ bolster the illusion of the existence of the freeloading welfare queen.

This trope provides moral justification for decreased governmental aid by portraying the receipt of welfare as a lifestyle choice instead of a grim necessity. It positions personal characteristics as determinative of social and financial status instead of complex historical structural inequalities that perpetuate privilege for the white upper and middle classes.⁹⁷ By framing government assistance as a windfall for the greedy and indolent, it supports the idea that changes in individual behavior, not government policy, will lead to more prosperity and better health. Under this paradigm, tools designed to alter consumer behavior, such as nutrition labeling, are best suited to the task of improving consumer health.

This type of transparency, while ill-equipped to dismantle structural obstacles to good health, has the potential to result in better health outcomes where choice is available. It is a relatively inexpensive approach to engaging companies in health reform without posing any real threats to the long-established, mutually beneficial relationship between the government and the food industry. To achieve significant improvements in health outcomes and reduce health disparities, however, the industry’s influence over the priorities and methods of food system reform must end. Advocates for meaningful structural reform should begin with promoting transparency regarding which entities dictate and benefit from current food policy and designing realistic guidelines for new directions in food policy that would place individuals at its center.

African-American Mothers on Welfare, University of California (1999), available at <https://escholarship.org/uc/item/17m7r1rq#page-1>.

⁹³ For a history of the welfare system, see KAARYN GUSTAFSON, CHEATING WELFARE. In 2010, 31.9 percent of TANF recipients were African American, <http://www.acf.hhs.gov/programs/ofa/resource/character/fy2010/fy2010-chap10-ys-final>, and ninety percent were women. http://www.socwomen.org/wp-content/uploads/2010/05/fact_00-2009-welfare.pdf. African Americans are only 13.2% of the US population. United States Census Bureau, <http://quickfacts.census.gov/qfd/states/00000.html>.

⁹⁴ *Id.* n. 92.

⁹⁵ See, e.g., BELL HOOKS, AIN’T I A WOMAN? BLACK WOMEN & FEMINISM (1981); Cheryl I. Harris, *Finding Sojourner’s Truth: Race, Gender and the Institution of Property*, 18 CARDOZO L. REV. 309 (1999); Joan Tarpley, *Black Women, Sexual Myth & Jurisprudence*, 69 TEMP. L. REV. 1343, 1365 (1996); Lori A. Tribbett-Williams, *Saying Nothing, Talking Loud: Lil’ Kim and Foxy Brown, Caricatures of African-American Womanhood*, 10 S. CAL. REV. L. & WOMEN’S STUD. 167, 173-175 (2000); MELISSA V. HARRIS-PERRY, SISTER CITIZEN: SHAME, STEREOTYPES, AND BLACK WOMEN IN AMERICA 33, 71 (2011); Regina Austin, *Sapphire Bound*, 1989 WISC. L. REV. 539 (1989).

⁹⁶ See, e.g., Marilyn Yarbrough with Crystal Bennett, *Cassandra and the “Sistahs”: The Peculiar Treatment of African American Women in the Myth of Women as Liars*, 3 J. Gender Race, & Just. 625 (2000); K. Sue Jewell, *From Mammy to Miss America and Beyond: Cultural Images and the Shaping of the U.S. Social Policy* 37-47 (1993); Linda L. Ammons, *Mules, Madonnas, Babies, Bath Water, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 Wis. L. Rev. 1003, 1006; Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 Colum. J. Gender & L. 1 (1998)

⁹⁷ See, e.g., Cheryl Harris, *Whiteness as Property*, 106 HARVARD L. REV. 8 (1993); Daria Roithmayr, REPRODUCING RACISM (2014).