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Articles

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University of Arkansas School of Law
1045 West Maple Street
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Phone: 479-575-2754
Fax: 479-575-3540

foodlaw@uark.edu

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France's Organisme de Défense et de Gestion: A Model for Farmer Collective Action through Standard Development and Brand Management

Christopher J. Bardenhagen^{*}, Philip H. Howard^{**} & Marie-Odile Nozières-Petit^{***}

Abstract^{****}

Quality-based food production, often with a regional dimension, can provide farmers with new, value-added markets. It can also provide consumers with access to place-based high-quality products, and may benefit local economies through increased commerce. French Organismes de Défense et de Gestion (ODGs) illustrate a mode of quality-based agri-food business organization. ODGs focus on the development of production standards, as well as management of the intellectual property related to those standards. This mode, which is commonly used in Europe, has not often been used in the United States, despite its potential for regional food system development. The ODG mode may provide certain advantages, such as the ability to assemble farmers and value chain actors in a collective food product branding effort, while also remaining in compliance with anti-trust laws—an ODG does not actually buy or sell the products it certifies. Here we describe French ODGs, their legal requirements, and their institutional supports and development processes. We compare relevant French corporate law to that of the United States, using Michigan as an example, and describe how the ODG mode can be organized using existing state statutes, provided steps are taken to ensure compliance with anti-trust laws. We discuss how certain French institutional supports can be

^{*} Christopher J Bardenhagen, PhD, Esq., is a Michigan attorney and recently completed a doctorate at the Department of Community Sustainability at Michigan State University. His dissertation research focused on the legal aspects of “quality group” agri-food organizations in France.

^{**} Philip H. Howard, PhD is an Associate Professor in the Department of Community Sustainability at Michigan State University. His areas of research include industry consolidation in the food system and the role of ecolabels in providing information to consumers.

^{***} Marie-Odile Nozières-Petit, PhD is a researcher at the National Institute for Research in Agriculture, Food, and the Environment (INRAE) and UMR Mediterranean and Tropical Livestock Systems (SELMET) in Montpellier, France. She studies the changes occurring in livestock systems, their resilience, and their organization and product markets.

^{****} **Note:** The aspects of this study involving human participants were reviewed and approved by the Michigan State University Human Research Protection Program, Exempt Category 2: MSU Study ID: STUDY00001089.

replicated by adding specific provisions to organizational documents, and how others can be replicated by utilizing private institutional structures, such as a nonprofit umbrella brand. Finally, we discuss the circumstances for which the ODG mode could fit well, and conversely describe specific situations where an ODG may be less ideal. The ODG model has significant potential for branding of value-added farm and food products, but as with any mode of organization or business entity, it is not a panacea.

I. Introduction

Quality-based food production may bring a number of benefits to farmers and consumers alike. Farmers may develop alternatives to commodity markets by focusing on qualities that consumers are increasingly seeking out at a wide variety of levels.¹ One type of quality arises from using particular plant or genetic varieties that have a specific flavor.² Another type relates to products grown or raised in particular ways, such as pastured poultry or grass-fed beef, which speak to growing consumer interests in animal welfare, omega-3 nutritional profiles, and environmental concerns.³

Depending on the product, these may be marketed at the local, regional, or global level, with information about the product often communicated through food labeling.⁴ There are many place-

¹ See generally Aimé L. Aumaître, *Quality and Safety of Animal Products*, 59 LIVESTOCK PROD. SCI. 113, 113-24 (1999); Catherine Mariojouis, *Introduction to Quality: Quality Concepts, Quality Perception by Producers, Clients and Consumers; Quality Signs (Geographic Origin, Ecolabelling, etc.); Translation of Quality Concepts into Products, Procedures and Services*, 51 CAHIERS OPTIONS MÉDITERRANÉENNES 15, 15-22 (2000); Bertil Sylvander et al., *Establishing a Quality Convention, Certifying and Promoting the Quality of Animal Products: The Case of Beef*, in LIVESTOCK FARMING SYSTEMS: PRODUCT QUALITY BASED ON LOCAL RESOURCES LEADING TO IMPROVED SUSTAINABILITY 61, 61 (2006).

² See, e.g., François Casabianca & Claude Beranger, *Le Lien au terroir des viandes: Une construction originale [The Link to the Meat Terroir: An Original Construction]*, in UNE HISTOIRE DES VINS ET DES PRODUITS D'AOC : L'INAO DE 1935 À NOS JOURS 147 (2015) (Fr.) (discussing localized production and genetic factors leading to quality differences).

³ See, e.g., Kevin Romig, *Impetus for Grass-Fed Beef Production in the Beef Belt*, 103 GEOGRAPHICAL REV., 112, 112-20 (2013); Philip H. Howard & Patricia Allen, *Beyond Organic and Fair Trade? An Analysis of Ecolabel Preferences in the United States*, 75 RURAL SOCIO. 244, 244-69 (2010); Imen Oueslati et al., *Virgin Olive Oil (VOO) Production in Tunisia: The Commercial Potential of the Major Olive Varieties from the Arid Tataouine Zone*, 112 FOOD CHEMISTRY 733, 733-41 (2009).

⁴ See generally Jean-Christophe Bureau & Egizio Valceschini, *European Food-Labeling Policy: Successes and Limitations*, 34 J. FOOD DISTRIBUT. RSCH., Nov. 2003, at 70, 70-76; Danielle Ufer et al., *Information and Consumer Demand for Milk Attributes: Are Redundant Labels an Effective Marketing Strategy?*, APPLIED ECON. PERSP. POL'Y, 1, 1-2 (2021).

based foods that have a particular quality due to the localization of their production, marked by the use of local genetic material and/or traditional know-how. Geographical Indications (GIs), for example, establish an association and connection between the quality of the products and a region, such as with Champagne wine, Idaho Potatoes, and Roquefort Cheese.⁵ The production for each of these quality types usually arises from local-based efforts (at different scales: micro regional, regional or national), in contrast to commodities which may be aggregated from many points around the world. Quality-based food production may increase choice and availability of healthy food options for consumers.⁶ It may also provide farmers with a larger share of the food dollar, either through shorter supply chains or value-added premiums,⁷ thereby contributing to the agricultural economy (rural and urban) through food business development.⁸

In Europe, farmers have developed multitudes of products that incorporate production standards with the intellectual property associated with quality signs. While not exclusive to Europe, quality signs have been promoted at the European Union (EU) level for decades as a strategy for rural development and one means of cultivating and protecting the agricultural sector.⁹ Groups of farmers can use quality signs as a method for creating added value and increased sales through developing reputation. Quality signs can be

⁵ Luke Owen et al., *Place-Based Pathways to Sustainability: Exploring Alignment between Geographical Indications and the Concept of Agroecology Territories in Wales*, SUSTAINABILITY (June 15, 2020), <https://www.mdpi.com/2071-1050/12/12/4890/htm>. See also M. Julien Frayssignes, *L'ancrage territorial d'une filière fromagère d'AOC. L'exemple du système Roquefort [The Territorial Anchoring of an AOC Cheese Sector: The Example of the Roquefort System]*, 264 ÉCONOMIE RURALE 89, 90 (2001) (evaluating the relationship of Roquefort cheese production to its territory over time).

⁶ See Micaela Fischer et al., *Food Hubs: Definitions, 10 Expectations, and Realities*, J. HUNGER & ENV'T NUTRITION 92, 93-94 (2015).

⁷ See, e.g., Marko Nousiainen et al., *Are Alternative Food Systems Socially Sustainable? A Case Study from Finland*, 33 J. SUSTAINABLE AGRIC. 566, 581-82 (2009).

⁸ See Henk Renting et al., *Understanding Alternative Food Networks: Exploring the Role of Short Food Supply Chains in Rural Development*, 35 ENV'T & PLAN. A: ECON. & SPACE 393, 392-95 (2003).

⁹ Council Regulation 2081/92, art. 2, 1992 O.J. (L 208) 1, 2-3 (EC) (repealed by Council Regulation 510/2006, O.J. (L 93) 12, 12-13 (EC), and further repealed by Regulation 1151/2012 O.J. (L 343) 1, 1-2 (EU)).

an effective means of protecting against dilution of quality or co-optation by the larger industry.¹⁰

A variety of types or modes of organization are used to develop quality-based food production at the regional level in the United States. These include farmers markets, community supported agriculture arrangements, food hubs, cooperatives and other social entrepreneurship-focused business entities, standard business entities, and other governance modes such as state or federal marketing orders. Due to the many complexities to local and regional food system development, it is important for legal practitioners and other business advisors to identify the best mode to fit a particular effort that will match the specific needs of farmers and other actors involved.

Particular methods of business organization are often shared by practitioners across states or countries through research and networking. For example, the Limited Liability Company (LLC) form was created by legislation in Wyoming in 1977¹¹ and provides multiple benefits over traditional corporations, such as pass-through taxation and a high degree of organizational flexibility. LLC legislation was later adopted by the other states, and now LLCs are one of the most frequently used forms used to start a business,¹² due to their value for small business development. Although the specifics of using a particular method or mode of organization will vary from one legal system to another, the underlying purposes can usually be translated to other contexts. France has adopted a similar form called the *Société à responsabilité limitée* (SARL).¹³ New forms and methods of organization in many cases require enabling legislation to be passed, such as with the LLC. However, some new forms and

¹⁰ See Lawrence Busch, *Is Resistance Futile? How Global Agri-Food Attempts to Co-opt the Alternatives*, in *RESISTANCE TO THE NEOLIBERAL AGRIFOOD REGIME: A CRITICAL ANALYSIS* 21, 21-22 (Alessandro Bonnano & S. A. Wolf eds., 2018).

¹¹ Wyoming Limited Liability Company Act, WYO. STAT. ANN. §§17-15-107(a)(viii)-(ix), 17-15-113, 17-15-122 (Westlaw through 2021 General Session of Wyoming Legis.) (repealed 2010). See also Robert R. Keatinge et al., *The Limited Liability Company: A Study of the Emerging Entity*, 47 *BUS. LAW.* 375, 383 (1992).

¹² For example, in Michigan during January 2021, 12,148 new LLCs were created versus 1,080 new corporate entities. *FY 2020/2021 New Corporation and Limited Liability Company Monthly Totals*, MICH. DEP'T OF LICENSING & REGUL. AFFS., [HTTPS://WWW.MICHIGAN.GOV/LARA/0,4601,7-154-89334_61343_35413-544867--,00.HTML](https://www.michigan.gov/lara/0,4601,7-154-89334_61343_35413-544867--,00.html) (last visited Sept. 23, 2021). Total number of Michigan domestic LLCs in good standing as of October 1, 2020 is 623,400, versus 159,799 for-profit corporations. *Total Business Entities as of October 2020*, MICH. DEP'T OF LICENSING & REGUL. AFFS., (Oct. 2020), https://www.michigan.gov/lara/0,4601,7-154-89334_61343_35413-114907--,00.html.

¹³ See Code de Commerce [C. com.] [Commercial Code] arts. L. 223-1–223-43, R. 223-1–223-36 (Fr.).

methods of organization can be utilized in a specific jurisdiction using its existing laws.¹⁴

EU regulations require applicants seeking to use a quality sign to be a “group” made up of “mainly producers.”¹⁵ This group must develop production rules called “specifications,” oversee production controls, and manage the defense of the sign.¹⁶ However, these groups do not actually commercialize the products—their members do. Countries within the EU can have additional requirements for these collective management organizations.

France is the birthplace of quality signs from both an intellectual property and an institutional programming perspective.¹⁷ Legislation to protect place-based quality products dates back to 1919,¹⁸ and several quality sign programs have been created since then. The first official quality sign created in France was the famous appellation d’origine contrôlée (AOC), which provided intellectual property protection and brand labeling for products having a connection to *terroir*, loosely translated as a “taste of the earth” or the “taste of place” that a product was grown and produced.¹⁹ Another quality sign program France developed is the Label Rouge. Started in 1965,²⁰ Label Rouge is well-known by French consumers.²¹ The Label Rouge is held as a certification mark by the

¹⁴ For examples, worker cooperatives can often be organized using a state’s general cooperative statutes or even using other entities, depending on the state; and benefit corporations can be created on an ad-hoc basis in Michigan due to the specifics of Michigan corporate law. However, legislation creating a statutory basis for a new form provides structure and legal clarity for practitioners and regulators, which can lower the costs of organization for businesses.

¹⁵ Regulation No. 1151/2012 of the European Parliament and of the Council of 21 Nov. 2012 on Quality Schemes for Agricultural Products and Foodstuffs, 2012 O.J. (L. 343) 8.

¹⁶ *Id.* at 9-12.

¹⁷ Scholarly articles describing GIs frequently provide introduction to French legal history; for examples, see articles cited *infra* in notes 18, 19, and 24.

¹⁸ For a comprehensive legal history of French, European, and international intellectual property related to place-based quality food products, see Lilian V. Faulhaber, *Cured Meat and Idaho Potatoes: A Comparative Analysis of European and American Protection and Enforcement of Geographic Indications of Foodstuffs*, 11 COLUMBIA J. EUR. L. 623 (2005).

¹⁹ See Elizabeth Barham, *Translating Terroir: The Global Challenge of French AOC Labeling*, 19 J. RURAL STUD. 127, 131 (2003).

²⁰ See generally Randall E. Westgren, *Delivering Food Safety, Food Quality, and Sustainable Production Practices: The Label Rouge Poultry System in France*, 81 AM. J. AGRIC. ECON. 1107, 1107-1111 (1999) (describing the origins and characteristics of the Label Rouge program).

²¹ See Daniel Hassan & Sylvette Monier-Dilhan, *National Brands and Store Brands: Competition Through Public Quality Labels*, 22 AGRIBUSINESS, 21, 21-30 (2006).

French Ministry of Agriculture, and permission to use it is granted to applicants that can prove that their product is considered to be of higher quality than the standard version of a product in consumer taste tests and organoleptic lab testing.²² Label Rouge products are marketed almost exclusively domestically, with many products found only in certain French *régions*. The Label Rouge program is unique to France and has not been replicated by other countries, but it has been the subject of study by researchers in other countries.²³

The French AOC program became the model for the EU's Protected Designation of Origin (PDO) and the Protected Geographical Indication (PGI) programs created in 1992.²⁴ The PGI program requires a link between a product and the place it originates, whereas qualification for the PDO program requires that all steps of production, including processing and further transformation such as cheese ripening, occur in the designated region.²⁵

Each of the abovementioned official quality sign programs serve as “umbrella” brands, and an institutional structure for development and approval of products is provided by governments both at the member state and the EU level. However, the quality products themselves are managed within the private sector, by the groups of farmers and other agricultural businesses involved in production. Hence, in addition to the official quality sign logos, these products are marketed under specific private brands.

Often referred to as quality groups, collective organizations are used to manage quality sign projects. These quality groups must comply with certain program regulations, which have experienced

²² See *id.* at 22; Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L641-1 (Fr.); Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. R641-9 (Fr.).

²³ See, e.g., Westgren, *supra* note 19, at 1110; Myra Clarisse Ferrer & Glenn C. W. Ames, *Food Quality Certification: Is the Label Rouge Program Applicable to the U.S.?*, 43 J. FOOD DISTRIB. RSCH., 114, 114-115 (2012).

²⁴ ²⁴ Regulation 1151/2012 of the European Parliament of the Council of 21 Nov. 2012 on quality schemes for agriculture products and foodstuffs, 2012 O.J. (L 343) 1, 1-4. Council Regulation (EEC) 2081/92 of July 14, 1992 on the protection of geographical indications and designations of origin agricultural products and foodstuffs, 1992 O.J. (L 208) 1, 1-8 (repealed by Council Regulation (EC) 510/2006, and further repealed by Regulation (EU) 1151/2012). See also Delphine Marie-Vivien et al., *Are French Geographical Indications Losing Their Soul? Analyzing Recent Developments in the Governance of the Link to the Origin in France*, 98 WORLD DEV. 25, 25-27 (2017).

²⁵ *Quality Schemes Explained*, EUR. COMM'N, https://ec.europa.eu/info/food-farming-fisheries/food-safety-and-quality/certification/quality-labels/quality-schemes-explained_en (last visited Sept. 19, 2021). The European Commission has a webpage dedicated to explaining these “quality schemes” available in multiple languages. *Id.*

changes over the years. Prior to the passing of European Standard EN 45011 in 1998, quality groups could perform product controls internally, certifying their own members to be able to use the quality sign logo.²⁶ However, EN 45011 required quality groups to use independent organizations for certifying their members' products.²⁷ In France, this meant that groups managing Label Rouge and PGI signs had to begin to work with third party control organizations quickly, whereas the holders of the AOC/PDO sign were able to continue to be overseen by a special department of the French Ministry of Agriculture until 2006, after which each of the signs were required to use control organizations for certification.²⁸

A French ordinance passed in 2006 restructured the Institut National de l'Origine et de la Qualité (INAO), making it the main institutional support for each of the quality signs in France.²⁹ Groups seeking quality signs were then required to organize their collective management body as an Organisme de Défense et de Gestion (ODG) and to apply for use of a quality sign through the INAO.³⁰

For reasons described in this paper, French ODGs represent perhaps the most legally advanced, institutionally supported version of collective management body used for the quality sign mode of agri-food organization. Our comparative research addresses the question of whether this mode can be readily replicated in the United States, and furthermore, what additional mechanisms are needed to meet the standards of the French ODG.

²⁶ Christopher J. Bardenhagen, Qualitative Research Data Set Based on 42 Semi-Structured Interviews (compiled January 2021) (unpublished data set) (on file with author, available upon reasonable request). Interview data was coded and separated into 5 thematic areas for analysis (summary 1, control mechanisms; summary 2, defense, marketing supports, and other subsidies; summary 3, institutional support, development, and oversight; summary 4, law and program regulations; summary 5, missions and purposes of ODG).

²⁷ Int'l Org. for Standardization, *General Requirements for Bodies Operating Product Certification Systems*, Guide 65/1996 (April 16, 1998) (replaced more recently by Guide 17065/2012).

²⁸ Bardenhagen, *supra* note 26, summaries 1 and 4. *See also* Marie-Vivien et al., *supra* note 24, at 27.

²⁹ Marie-Vivien et al., *supra* note 24, at 27. Loi 2006-1537 du 7 décembre 2006 relative au secteur de l'énergie [Law 2006-1547 of December 7, 2006 Relating to the Energy Sector] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE] Dec. 8, 2006, p. 180.

³⁰ Loi 2006-1537 du 7 décembre 2006 relative au secteur de l'énergie [Law 2006-1547 of December 7, 2006 Relating to the Energy Sector] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE] Dec. 8, 2006, p. 180. Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-17 (Fr.).

In order to understand and consider the ODG mode and its applications, this paper will proceed in three further sections. Chapter II will describe the characteristics of ODGs—their function and purpose, unique legal requirements, and the institutional support they receive for development and oversight. Chapter III will compare the method of organizing an ODG under French corporate law with that of the United States to develop and manage a set of production standards—more specifically, organizing an ODG in Michigan.³¹ For this chapter, three levels of organization building will be considered: a) meeting base minimum purposes and requirements b) incorporation of certain aspects and benefits of the French model and c) replication of a variety of institutional supports. Chapter IV will explore the “organizational fit” for ODGs in the U.S.—under which circumstances would the ODG mode be appropriate, and in which situations would it not be a good fit?

A mixed methods approach was used for this research. Legal research of French codified law, statutes, and regulation was conducted. Among the resources used were statutory code books, online code via Legifrance,³² European Commission information,³³ programmatic informational documents, and INAO *directives* and guides. Our description of ODGs structure and functioning is also strongly informed by the perspectives gained from extensive interviews conducted in France in 2018 and 2019 with farmers, managers and value chain operators from 12 ODGs, government staff and INAO outreach agents, consultants, and researchers (42 total interviews).³⁴ We also reviewed the organizational documents (*statutes*) from the 12 ODGs researched (note: the term “operators,” which will be further defined below, refers to farmers and any other value chain actors such as processors and packers whose actions are implicated by any of the production rules of the quality sign).

II. Description of Organismes de Défense et de Gestion

Qualification as an ODG is a necessary step for collective management organizations to utilize French quality signs programs, and there are statutory requirements imposed on ODG structures. As such, ODGs have many of the characteristics of a business entity (or

³¹ Michigan was chosen as the first author is a Michigan attorney and member of the State Bar of Michigan.

³² See generally Codes, LÉGIFRANCE, https://www.legifrance.gouv.fr/liste/code?etatTexte=VIGUEUR&etatTexte=VIGUEUR_DIFF (last visited Sept. 18, 2021).

³³ See generally EUR. COMM’N, <https://ec.europa.eu/> (last visited Sept. 18, 2021).

³⁴ The aspects of this study involving human participants were reviewed and approved by the Michigan State University Human Research Protection Program, Exempt Category 2: MSU Study ID: STUDY00001089.

quasi-entity). Here we provide information regarding the basic functions and purposes of ODGs, their legal requirements, development process and oversight.

A. Functions, Purposes, and Missions

As France's chosen form for a collective management body, the main function of ODGs is to develop and manage a quality sign product or products.³⁵ France's very specific outlines for the functioning of ODGs relate to the basic purposes of its quality sign programs: rural development and farm viability (especially in remote and rugged areas), enable equitable sharing of the profits within the supply side of the value chain,³⁶ and farm competitiveness in the national and international marketplace.³⁷ There are varying requirements for each of the programs, but at the heart of each is the purpose of providing consumers information about the quality of products.³⁸ As such, ODGs create production standards and promote their brand, however, ODGs do not produce or sell the products themselves—it is their farmer, cooperative, or processor members who actually commercialize the products.³⁹

The definition of quality also varies for each of the programs. Quality for the Label Rouge program effectively means a better sensory experience based on taste tests, whereas quality for the AOP/PDO program is based on the “taste of place” or *terroir*, and quality for the PGI program relates to the fact of being raised or processed traditionally in a particular place.⁴⁰ As stated by an INAO

³⁵ See Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L-642-22(Fr.). See also Bardenhagen, *supra* note 26, summaries 4 & 5.

³⁶ See Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L-640-1 (Fr.). As one development researcher/practitioner stated, quality sign organization is intended to be “...a type of bottom-up labélisation ... that is original because it is rooted in local elements, ... it is up to the local group of stakeholders to define the contents of the code of practice [specifications] ...” See Interview by French research group with anonymous researcher performed under promise of confidentiality (April 2, 2019).

³⁷ A national strategy of increased farmer adoption of or inclusion in quality sign projects is being promoted under the current administration. There are some who have concerns, however, that such a policy could lead to a watering down of quality.

³⁸ Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L640-1(Fr.); Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L641-1– 641-13 (Fr.) (defining the details of the “signes d’identification de la qualité et de l’origine,” the Label Rouge program’s focus on “qualité supérieure,” and the AOC/PDO and PGI programs’ focus is on qualities that are specifically connected to a place).

³⁹ Bardenhagen, *supra* note 26.

⁴⁰ See Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L-641-11(Fr.). See also Regulation 1151/2012 of the European Parliament and of

agent (translated from French), “It has to be a product that is genuinely specific. You need to be careful: it doesn’t necessarily have to be a quality product in the sense... how can I put this? It must satisfy certain organoleptic specificities, but it’s not a product that will please everyone.”⁴¹ While each quality sign product might not be preferred by all consumers, one of the main public purposes behind the programs is to efficiently transmit knowledge about these high-information cost goods.⁴² For farmers and other operators of ODGs, this leads to increased product reputation, which further translates into new markets, increased sales, and/or higher prices.⁴³

The statutory missions for ODGs are clearly defined in the French Rural Code.⁴⁴ These include development of the product specifications, putting in place a control and inspection plan, and defending and promoting the name of the product as intellectual property⁴⁵ (each of these are visited in more detail below). Also included are requirements to communicate with the INAO for oversight purposes, such as to transmit a current list of operators and provide relevant budget information at INAO’s request.⁴⁶ The missions outlined in the Rural Code were normally included in the ODG’s organizational documents.

the Council of Nov. 21, 2012 on the Quality Schemes for Agricultural Products and Foodstuffs 2012 O.J. (L 343) 1; Barham, *supra* note 19.

⁴¹ Interview with anonymous regional agent performed under promise of confidentiality, Institut National de l’origine et de la qualité (Jan. 18, 2019).

⁴² See generally, Riccarda Moser et. al., *Consumer Preferences for Fruit and Vegetables with Credence-Based Attributes: A Review* 14 INT’L FOOD & AGRIBUSINESS MGMT REV. 121, 122, 126 (2011) (describing experiential goods as those that can’t fully be evaluated before purchase, and credence products as those that require trust in information provided, because consumers can’t fully determine the nature of the good before or after the purchase (e.g., the attribute of origin)); See also Interview with anonymous member of the Board of Directors performed under promise of confidentiality, French ODG (Mar. 15, 2019) (“There’s a real demand from society as a whole for us to explain how we work,” (translated from French)).

⁴³ As one small farm-market-oriented vegetable farmer described, “... it’s just the same as being organically certified, you don’t have to justify yourself.” – Interview with anonymous farmer member performed under promise of confidentiality, French Organismes de Defense et de Gestion (June 17, 2019).

⁴⁴ Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-22(Fr.).

⁴⁵ *Id.*

⁴⁶ *Id.* See also Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-23–642-25.

i. Development of Production Specifications

Creating and managing product specifications form the core of the ODG's functions.⁴⁷ Referred to as "*cahier des charges*" in French, the "specifications" are the body of agreed upon production rules for a particular product, describing all the steps needed for the manufacture of the product, from the origin of the raw materials to the packaging.⁴⁸ The specifications become the intellectual property of the ODG, and essentially are what are promoted, defended, and controlled by the control plan.⁴⁹ To meet its obligation, an ODG will provide a space for communication and negotiation between the farmers and other value chain operators. The more the product is processed, the more downstream operators will be involved in the process of developing the specifications.⁵⁰ For the cases we studied, many times the baseline of the specifications was simply the methods that farmers were already using for production, as the main idea is to include the practices and genetics that result in the typical product. However, for AOP/PDOs and PGIs, delineation of the geographical area is also part of the specification-building process, using criteria which that might include micro-climates within a territory, geological aspects, and cultural dimensions.⁵¹ While simple in concept, the specifications can become quite complex, and ultimately include requirements for sizing, shape conformation, packaging, storage box sizes, and even sucrose (brix) levels.⁵²

⁴⁷ Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-22. See also Bardenhagen, *supra* note 26, at summary 5.

⁴⁸ Westgren, *supra* note 20, at 1108; see examples of *cahier des charges* for different products by using the product search function, INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITÉ, <https://www.inao.gouv.fr> (last visited Oct. 31, 2021).

⁴⁹ Because the specifications form the rules of production that are advertised to and/or largely accessible by consumers, they are the basis of branding and reputational development.

⁵⁰ Christopher J. Bardenhagen, Data Set Comprised of 12 Organizational Statutes, Numerous cahiers des charges and Control Plan (2018-2019) (on file with author). Information obtained upon condition of confidentiality.

⁵¹ *Id.* See also Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L641-6 (Fr.); Council Regulation 1151/2012, 2012 O.J. (L 343) 1-2, 8-9 (EU); Bardenhagen, *supra* note 26.

⁵² Bardenhagen, *supra* note 50. Our qualitative research indicates that ODGs are increasingly adding specifications related to sustainability and environment, in order to boost reputation with consumers. However, some practitioners advise to keep the specifications focused on the production methods and situations that make the product unique.

ii. Control Mechanisms

Once the specifications are drafted, the control plan (“*plan de contrôle*”) can be created.⁵³ The control plan is based on the important points of the specifications. It is the basis of verification that a product is actually produced in line with the rules—enabling a consumer to trust that a product is what the label says it is. The types of items controlled for vary by product type and the particulars of the specifications. They can include checking the documentation of harvest dates, confirmation of appropriate storage and drying facilities, and visual inspection of plant and animal variety, such as the breed of cattle used for milk production for cheese products.⁵⁴ Other control points include amount of pasture per animal and the density of trees per acre to stay within agreed-upon limits.⁵⁵

There are several levels of control: self-control by the operators, consisting of checks and form filling; internal control by the ODG, which conducts control checks on operators and audits operators’ self-control forms; and external control by a third-party control organization (CO), which conducts control checks of operators in the field, and audits the ODGs’ control regularly (two to four times a year).⁵⁶ This inclusion of an independent third-party controller to help draft the control plan and provide inspection services is required by the Rural Code.⁵⁷ The CO will perform both planned and surprise visits along the value chain in order to help ensure compliance with the specification.

The INAO mandates a minimum amount of external control, the level of which can vary by sector.⁵⁸ However, the remainder of controls can be split between the ODG and the CO in a manner that fits a group’s particular circumstances.⁵⁹ A greater amount of internal control will minimize external control needs; this enables those ODGs that have the capacity and resources to manage a larger part of the control, while allowing other ODGs to delegate certain tasks

⁵³ Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-2 (Fr.). An overview of the principle or most notable control points will also be listed in the specifications documents (*cahier des charges*). *Id.*

⁵⁴ Bardenhagen, *supra* note 26; Bardenhagen, *supra* note 50.

⁵⁵ Bardenhagen, *supra* note 26; Bardenhagen, *supra* note 50.

⁵⁶ Bardenhagen, *supra* note 26, at summary 1.

⁵⁷ Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-27–L642-35 (Fr.). Additionally, the CO must be approved and overseen by INAO per Code Rural L642-34 and R642-41, and all third party-certification organizations in France are overseen and approved by the *Comité Français d’Accréditation* (COFRAC). *Id.* L642-34, R642-41.

⁵⁸ Bardenhagen, *supra* note 26, at summary 1.

⁵⁹ *Id.*

to the third-party CO. The ODG's proposed split of control duties must be approved by the INAO.⁶⁰ As an example, one ODG controls 30% of its operators each year, with the CO inspecting 10%. The ODG and CO coordinate to make sure they control different operators in a particular year, and that each operator is inspected relatively frequently.

The control plan also outlines what will be done in the case of non-conformity. There are three levels of non-conformity: minor, major, and severe (“grave”).⁶¹ Each has different consequences for a particular control point that must be answered by the operator in a different length of time (24 hours for severe, 1 week for major, etc.).⁶² For example, harvesting the crop before specified dates might be a minor charge where a warning is given, whereas utilizing an unauthorized variety would be a severe issue that, if repeated, could lead to suspension of the use of the ODG's brand for the farmer. Normally, ODG managers and the CO will work to help an operator come back into compliance with the specifications.⁶³ Sanctions can include excluding the operator from use of the ODG's branding label, but this is rare and nearly always the result of inaction on the operator's part.⁶⁴

The costs of third-party certification are usually covered by the ODG, but charged to operators via annual fees (“cotisations”) in order to spread the costs evenly over time, though in some groups the individual operators pay the CO directly when they are controlled.⁶⁵

iii. Defense of Intellectual Property and Brand Management

As the name implies, one of the main purposes for the ODG as a collective management organization is to defend the quality sign against fraud and usurpation.⁶⁶ Fraudulent use of the sign can occur at two levels—the local/regional level and the larger national or international commerce level. Locally, fraud tends to happen in the form of individual farmers who are not part of the ODG marketing their products using the quality sign name brand or logo, often at farmer's markets, local shops, or at roadside stands. Most ODGs that

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Bardenhagen, *supra* note 26, at Summary 1.

⁶⁴ *Id.*; Bardenhagen, *supra* note 50. Note that the control organizations do not inspect for food safety compliance; it is only for the specification points. However, COs are obliged to report serious food safety issues if they see them.

⁶⁵ Bardenhagen, *supra* note 26, at summary 1; Bardenhagen *supra* note 50.

⁶⁶ See Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-22 (Fr.); Bardenhagen, *supra* note 26, at summary 5.

we interviewed have these issues with some frequency,⁶⁷ and managers will talk to the farmer or send a cease-and-desist letter. Usually such action is sufficient, but if not, ODGs can get the INAO involved, or even file an action at the local court.

At the extra-regional or foreign level, the positive reputation that an ODG develops can lead outside businesses to infringe on the name. When this occurs, ODGs can work with INAO and the French consumer fraud authority, DGCCRF,⁶⁸ which can provide assistance and legal support.⁶⁹ Most ODGs do not get involved with litigation frequently, but when it does occur INAO provides substantial support, including sharing the costs of legal services.⁷⁰

ODGs carry out a variety of promotional activities for the quality sign, with some being more involved with marketing and promotion efforts than others. ODGs promote their quality sign brand in a general way, rather than particular products of their individual members.⁷¹ Managers often attend regional food fairs and *salons* where they can educate people about their production practices and hand out promotional materials. Some ODGs are involved with agri-tourism, setting up farm visit days with maps of farmer stops on a trail or around a region, as well as supermarket promotions, usually within the relevant farming region.⁷² However, some of the larger volume ODGs have initiated media campaigns,

⁶⁷ Ideally, all the farmers in a particular region will eventually begin to produce under the specifications and become official members of the ODG, especially with the regionally-oriented AOP/PDO and PGI programs. This 100% saturation can happen as an ODG develops its reputation, gains sales, and adds producers over time.

⁶⁸ *Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes*, <https://www.economie.gouv.fr/dgccrf> (last visited Sept. 20, 2021).

⁶⁹ *See Id.*; INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITÉ (INAO), <https://www.inao.gouv.fr> (last visited Sept. 20, 2021). The INAO has authority to take action/litigate based on France's intellectual property code (Code de la Propriété Intellectuelle) whereas the DGCCRF takes action based on the consumer code (Code de la Consommation). *See* Code de la propriété intellectuelle [Intellectual Property Code] art. L711-1–L731-4 (Fr.); Code de la consommation [Consumer Code] art. L511-1–L541-3 (Fr.).

⁷⁰ As stated by an INAO agent (translated from French): "If we observe that someone is doing this, we can... not necessarily take them to court straight away, it generally starts with official letters, but it can end up in court if there's no other way of finding a solution. In that case, we have lawyers who support the ODG. And the cost – because lawyers aren't free! – is shared between the ODG and the INAO." – Interview with anonymous regional agent performed under promise of confidentiality, Institut National de L'origine et de la Qualité (Jan. 18, 2019).

⁷¹ Bardenhagen, *supra* note 26, at summaries 2 and 4. ODGs do not buy, sell, or otherwise commercialize quality sign products themselves; more on this in the "Legal Requirements" section below.

⁷² Bardenhagen, *supra* note 26, at summary 2.

such as advertisements in the Paris Metro.⁷³ ODGs often receive subsidies from the EU or regional French authorities in order to promote their products, sometimes in collaboration with businesses that do the direct marketing of the products.⁷⁴

B. Legal Requirements

The definition and main legal requirements for quality sign programs and ODGs are outlined in Book Six, Title IV of the French Rural code.⁷⁵ However, multiple areas of the law apply to ODG functioning, in particular French corporate and nonprofit law, and the French Intellectual Property code related to trademarks and geographical indications.⁷⁶ This subsection *B* will focus on the specific laws and regulations that help to shape and define ODGs.⁷⁷

i. Entity Considerations and Membership Definitions

A very important aspect of ODGs is that they must not have a commercial purpose, meaning that they do not buy, sell, or themselves produce the goods they manage.⁷⁸ Because of this, only certain forms of business entities are permitted for organizing an ODG,⁷⁹ namely, “syndicates”⁸⁰ (farmer’s unions), or associations

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See generally Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L640-1–L644-15, R641-1–D646-37 (Fr.) (“*La valorization des produits agricoles, forestiers ou alimentaires et des produits de la mer.*”).

⁷⁶ Trademark laws are similar in France and the U.S., but geographical indications have a separate legal regime in France, found in the CODE DE LA PROPRIÉTÉ INTELLECTUELLE [INTELLECTUAL PROPERTY CODE] art. L721-1–L722-17, R721-1–R. 722-7.

⁷⁷ Many of the main requirements for ODGs are spelled out in Chapter II, Section III of Title IV (Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-17–L. 642-26, R642-33–R642-36), titled *Les organismes de défense et de gestion* [Defense and Management Organizations].

⁷⁸ Bardenhagen, *supra* note 26. This admonition against commercial purpose, while not found in French codes or accessible regulations, is detailed in the INAO’s guidance publication for ODGs. INSTITUT NATIONAL DE L’ORIGINE ET DE LA QUALITÉ, GUIDE DU DEMANDEUR POUR LA RECONNAISSANCE EN QUALITÉ DE DÉFENSE ET DE GESTION [APPLICANT’S GUIDE FOR RECOGNITION AS A DEFENSE AND MANAGEMENT ORGANIZATION] 16 (2017). It was also mentioned and emphasized by multiple INAO agents and other interviewees officially connected to the INAO. For this reason, it is either a de facto regulation, or, we hypothesize, a per se regulation codified in an INAO *Circulaire*, which are not publicly accessible.

⁷⁹ See *id.*

⁸⁰ Syndicates are organized under the French labor code. Code du travail [C. trav.] [Labor Code] art. L2131-1–L2131-6. Code du travail art. R2131-1 requires a syndicate to file their statutes at the local Mayor’s office.

organized under the *Loi du 1^{er} juillet 1901*,⁸¹ the main nonprofit law used in France.⁸² For-profit corporations and cooperatives are prohibited from use due to their commercial nature, though certain “interprofessions” organized prior to 2007 can be approved to act as ODGs, provided they split their ODG missions and finances from their other activities.⁸³ While a baseline business entity must be used to organize an ODG, we posit that the ODG form can be considered as a “quasi”-business entity due to the statutory and regulatory requirements that apply to the form. ODGs can manage more than one quality product,⁸⁴ for example a poultry ODG might manage different quality signs for the chicken, duck, and eggs that its farmers raise.

The flexible, if complicated, French legal platform for ODGs gives all the relevant value chain actors implicated by the production rules the power to get involved. ODGs can involve farmers, packers, processors, slaughterhouses, and potentially other upstream and downstream actors, collectively defined as “operators.” The Rural Code, in seeking to ensure that all relevant producers have a voice in decision-making about the production rules, define an operator as “... each person that actually participates in the activities of production, transformation, processing, or packing planned for in the production specifications ...”⁸⁵ In other words, any actor who is involved in a production step outlined by the production rules is an operator and has certain rights and obligations under the Rural Code.

Operators are deemed to be members of the ODG as a matter of law,⁸⁶ but membership in the underlying entity – the association or syndicate – can be further defined in their organizational

⁸¹ This association law is an important standalone law that has not been incorporated into one of the French statutory codebooks but is instead regulated by the law of contracts. *Loi du 1er juillet 1901 relative au contrat d’association* [Law of July 1, 1901 relating to the Association Contract] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 2, 1901, p. 1. Associations must file their statutes at the local Prefecture, found at the head of the department (akin to a county seat in the United States; there are 101 departments in France). *Id.* Statutes are publicly available by request, but not online.

⁸² However, ODGs are not charitable organizations.

⁸³ *See* Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-19 (Fr.).

⁸⁴ *Id.* art. L642-17.

⁸⁵ *Id.* art. L642-3. Similar to Michigan state law, “persons” can include corporations and other legal entities under French law. *See e.g.*, MICH. COMP. LAWS § 450.2108 (Westlaw through P.A. 2021, No. 81, of the 2021 Reg. Sess., 101st Legis.).

⁸⁶ Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-21 (Fr.).

documents, following laws applicable to that entity.⁸⁷ Operators can be represented by delegates, provided there is some democratic mechanism for selection of delegates and that the operators are kept informed about ODG matters.⁸⁸ In some ODGs, for example, cooperatives are the main members, but this is acceptable because the farmer operators are involved in the democratic processes at the cooperative level.⁸⁹ However, ODGs must provide a means for individual operators to become part of the ODG, for example farmers that are not members of a member cooperative.⁹⁰

ii. Financing

Regarding financing, an ODG is free to determine how to calculate a fee structure for the funding of its activities.⁹¹ Sometimes these fees (*cotisations*) will be flat, but they are often calculated on a per-unit basis. The decision to set fee levels must be decided on annually by the General Assembly, which is the whole body of the members, and the details of this vote must be provided to the INAO.⁹² This provides the operators a direct vote on the fees as a matter of law, ensuring a small board of directors cannot control the financial decisions affecting all the operators. Operators are obligated to provide the information necessary to calculate their fees to the ODG,⁹³ though in some situations not all operators in an ODG are necessarily liable to pay the fees, for example where a cooperative pays on a farmer's behalf.

iii. Organizational Documents and Structural Requirements

The basic fee structure, details on membership, and missions are all set forth in the ODGs "statutes" and "règlement intérieur," which are organizational documents similar to corporate articles of incorporation and bylaws in the United States.⁹⁴ In order to apply for

⁸⁷ For example, the groups statutes might require the annual fees to be paid as a condition or confirmation of membership.

⁸⁸ INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITÉ, *supra* note 78, at 8.

⁸⁸ *See id.*

⁸⁹ *See* Bardenhagen, *supra* note 26; Bardenhagen *supra* note 50.

⁹⁰ INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITÉ, *supra* note 78, at 8.

⁹¹ Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-24 (Fr.).

⁹² *Id.* *See id.* art. L642-25.

⁹³ *See id.* art. L642-24.

⁹⁴ An organization's *statutes* contain many of the operational rules concerning membership and the board of directors *inter alia*, that would be contained in bylaws in the U.S. However, while bylaws in the U.S. are a private document, the statutes are a semi-public document, accessible by the general public, but only upon request (not held online like articles of incorporation can be in the U.S.). As

recognition as an ODG, the group must provide their statutes (and *règlement intérieur* if they have one) to the INAO for approval.⁹⁵ Groups have a high degree of flexibility with how to structure the ODG, but among other things, INAO checks to see if the relationship between the operators passes scrutiny regarding three statutory and regulatory factors:

- representativeness of the operators (*représentativité des opérateurs*)⁹⁶
- democratic functioning (*fonctionnement démocratique*)⁹⁷
- balanced representation (*représentation équilibrée*)⁹⁸

These factors, detailed below, broadly seek to implement fairness, which is a concept that is perhaps uniquely operationalized in various areas of French law including contracts.⁹⁹ Overall, deference is given to the group organizing the ODG, but INAO outreach agents and National Committee members¹⁰⁰ check to ensure that the power relationship between actors is not too out of balance.

Representativeness of the operators. The factor of representativeness of operators relates to the basic rule that all operators potentially implicated by the ODG's product specifications

such, the statutes are somewhat of a cross between articles and bylaws. The *règlement intérieur* is a private document, however, which can add more specifics and rules to the statutes but cannot contradict the statutes on any matters. A *règlement intérieur* is optional – many ODGs do not have one. *See Guides Pratiques [Practical Guides]*, INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITÉ, <https://www.inao.gouv.fr/eng/Espace-professionnel-et-outils/Produire-sous-signes-de-qualite-comment-faire/Guides-pratiques> (last visited Sept. 15, 2021).

⁹⁵ *See* Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-33 (Fr.).

⁹⁶ *See id.* L642-18; INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITÉ, INAO-DJR-2009-03 RÉV. 1, SUIVI DES CONDITIONS DE RECONNAISSANCE ODG [MONITORING OF ODG RECOGNITION CONDITIONS] (2011).

⁹⁷ INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITÉ, *supra* note 96.

⁹⁸ *Id.*

⁹⁹ *See* Code Civil [C. Civ.] [Civil Code] art. 1171 (Fr.) (deeming certain side-clauses that create a “significant imbalance” between parties to be “unwritten” (essentially non-enforceable)); Code Civil [C. Civ.] [Civil Code] art. 1195 (Fr.) (allowing a judge to revise a contract when unforeseen circumstances make it onerously costly for a party to perform); Code Civil [C. Civ.] [Civil Code] art. 1221 (Fr.) (allowing specific performance unless it would be extraordinarily costly to the obliged). Fairness is a concept incorporated into contract law in United States as well, but the French mechanisms seem to provide stronger safeguards against greatly disadvantageous outcomes.

¹⁰⁰ The Rural Code creates several national committees to provide oversight of quality sign programs and approve applications for ODG status. *See* Code rural et de la pêche maritime [Rural Fisheries and Maritime Code] art. L642-6–L642-11 (Fr.).

must have a voice.¹⁰¹ To assess this, INAO agents work to determine how many operators are involved with the ODG relative to the total number of operators currently working in the production of that product, as well as the volume of product the group organizing the ODG produces relative to the whole.¹⁰² For example, the organizers of an ODG for a GI identifying a particular variety of pears should make sure that at least 80% of the growers of that variety in that region are represented and involved in the discussions, and similarly that most of the volume of production is represented. In this way, an ODG should mirror fairly closely the extant industry, so that the ODG does not become an exclusive club.¹⁰³ As intellectual property, the quality sign becomes a common good among the producers and operators involved, and therefore an ODG should not be created in such a way as to allow one or more firms to monopolize it.¹⁰⁴ In a practical sense, this does not mean all operators will participate in the ODGs production rules from the start. Often the membership grows once the ODG is more established and the operators involved experience more benefits, with some PGI and PDO ODGs eventually adding all the farmers from the region onto its membership list.

Some scholars, however, question the value of representativeness, noting that this requirement can duplicate already-existing inequalities or unfair situations between ODG actors.¹⁰⁵ For example, a group of smaller cheese producers might seek a quality sign for their products that requires the use of certain artisanal practices, but representativeness enables larger companies of cheese in their area to enter the ODG and water down the rules. In

¹⁰¹ See, e.g., *id.* art. L642-18. The rules, regulations, and practice surrounding ODG development provide multiple layers of assurance that any of the farmers and other value chain operators involved in production can have a place in the development of the ODG and the production rules, even if through another democratic entity such as a cooperative.

¹⁰² INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITÉ, *supra* note 78.

¹⁰³ In the case of GIs, a delineated region is created, and all growers inside that region are implicated. However, the rules of Label Rouge allow for farmers or other food producers to create a product that is different from the standard, without regional constriction and reputational history, and so some Label Rouge ODGs illustrate exceptions to this rule. For example, several producers of a new, special variety of wheat could work together, potentially span different regions, provided they create a collective (ODG) that enables other producers that comply with the product specifications to join.

¹⁰⁴ For further reading related to the concept of common ownership, see Stéphane Fournier et al., *Les indications géographiques au regard de la théorie des communs [Geographical Indications with Regard to the Theory of Commons]*, REVUE INTERNATIONALE DES ÉTUDES DU DÉVELOPPEMENT 139, 141 (2018).

¹⁰⁵ See Delpine Marie-Vivien et al., *Controversies Around Geographical Indications: Are Democracy and Representativeness the Solution?*, 121 BRIT. FOOD J. 2995, 3006 (2019).

this way, the reputation that may have been built by artisanal producers over many years can become exploited by processors working with essentially commodity milk.

Democratic functioning. The factor of democratic functioning requires there to be democratic processes underlying all important decisions for the ODG. All operators must be able to have a voice individually or to elect members through some democratic mechanism.¹⁰⁶ This means that even though farmers are operators in an ODG, cooperatives can be *per se* members and vote in the General Assembly because there is a method for electing the delegates through the cooperative.

To create a democratic form, ODGs can organize different classes of operators into colleges or sections.¹⁰⁷ This enables the different classes to have representation on the board of directors (*conseil*), which provides flexible structuring that can fit nearly any value chain situation and number of operators. Some ODGs may have hundreds of farmers, multiple processors, and a college of farmers that process on farm, whereas more simple ODGs have only farmers as members. As such, the ODG model can allow for significant complexity, as opposed to the cooperative form, which is normally more limited to one member, one vote, and single levels of membership, even for different product areas (though capital contributions can vary). Democratic functioning in an ODG is not limited to one member, one vote, and structures where the downstream actors (e.g., processors, slaughterhouses) have as many board seats as the upstream operators (e.g., farmers) are not uncommon and are found to be acceptable by INAO.¹⁰⁸

Relevant to the concept of democratic functioning, it is up to the ODG to spell out the process of creating the product specifications, and the body that is charged with developing it.¹⁰⁹ Although the structure must be approved by INAO, which presumably ensures that the voices of the operators are heard, in some cases the main process of product rule creation can be delegated to the board.¹¹⁰ While this surely adds practicality to the development of the production rules, there is a risk of decision-making being skewed towards more concentrated actors, such as

¹⁰⁶ INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITÉ, *supra* note 78.

¹⁰⁷ *See id.* at 13.

¹⁰⁸ Bardenhagen, *supra* note 50.

¹⁰⁹ INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITÉ, *supra* note 78, at 12.

¹¹⁰ Bardenhagen, *supra* note 26, at summary 3.

cooperatives and processors, even if those results are ratified at the General Assembly of operators.

Balanced representation. The factor of balanced representation relates to the different categories of the operators along the value chain that are involved.¹¹¹ While this factor is ostensibly meant to ensure that *farmers* have significant voice, this principle goes both ways, also requiring that there be representation from the processors, packers, and other downstream operators. This factor is closely tied to the representativeness and democratic functioning of an ODG. What is considered to be balanced representation can vary widely, again with deference usually given to the ODG. INAO will step in when they determine there is a significant imbalance or lopsidedness, such as a situation where a small number of downstream operators hold a clear majority of the decision-making power.¹¹²

C. Institutional Support and Oversight

Two significant areas of support for ODGs are related to support during the application process, including applications for changes to existing production rules, and to subsidies that help save resources for ODGs.

i. Application Process and Continuing Oversight

The INAO is main supporting organization for ODG development and ongoing changes with production specifications, with approximately 21 INAO regional offices serving the different French regions.¹¹³ Interested groups will come to these agents for information and guidance on the process. Three important areas for which INAO agents provide support and oversight are the development of the ODG organizational structure, the development or modification of specifications, and communications with the INAO National Committee¹¹⁴ that ultimately decides on the ODGs application.

The organizational structure is of first order importance because it is the ODG that creates the specifications via a democratic

¹¹¹ See INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITÉ, *supra* note 78, at 12.

¹¹² Bardenhagen, *supra* note 26, at summary 3.

¹¹³ *L'INAO sur le Territoire [INAO on the Territory]*, INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITÉ, <https://www.inao.gouv.fr/eng/The-National-Institute-of-origin-and-quality-Institut-national-de-l-origine-et-de-la-qualite-INAO/L-INAO-sur-le-territoire> (last visited Oct. 29, 2021).

¹¹⁴ See Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-6–642-11 (Fr.) (establishing the INAO National Committee structure).

process; therefore, it is important to ensure that the appropriate stakeholders have a voice and a sufficient level of voting power in the ODG. To accomplish this, when working with a new group INAO will evaluate whether the appropriate stakeholders are involved in the process, per the *représentativité* or representativeness factor mentioned above. Usually, local agents already have familiarity with the sector involved, but will also go to the local Chamber of Agriculture to cross reference information given to them by the ODG organizers regarding the volume of product and percentage of the implicated operators they represent.¹¹⁵ To help institute the factors of *fonctionnement démocratique* and *représentation équilibrée*, INAO agents can provide advice to groups on the internal structure during the development of their *statutes*,¹¹⁶ with some agents being more involved in statute development than others. Groups are encouraged to connect with existing ODGs to gather experience and examples of statutes that can help them create their organizational structures. Industry groups and cooperatives also help with statutes development in some circumstances. Local INAO agents can send difficult questions regarding the statutes or internal structure on to the legal department at the central INAO office in Paris for an opinion. Overall, INAO agents guide groups in creating a structure that will pass the scrutiny of the INAO National Committee.

As the production rules or specifications are being written by the ODG, a Commission of Inquiry is created from members selected from the INAO National Committee.¹¹⁷ Both this commission and an ODG's local INAO agent will provide expertise on items that should be included (or alternatively, excluded).¹¹⁸ They also will advise groups to consider the corresponding control measure for any item that will be included in the specifications, as control measures are based on important points in the specifications. Both INAO agents and members of Commission of Inquiry can ask for help from university or government research units to provide assistance on an ad hoc basis with writing specifications, such as with drafting a comprehensive definition of the product.¹¹⁹ Additionally, agents from control organizations (COs) will advise groups on

¹¹⁵ Bardenhagen, *supra* note 26, at summary 3.

¹¹⁶ As mentioned above, the *statutes* are similar to bylaws in the U.S., setting out provisions for the governance structure for the organization (e.g., board membership and voting rules). The statutes document is the main organizational document for ODGs and many other corporate organizations.

¹¹⁷ Bardenhagen, *supra* note 26, at summary 3.

¹¹⁸ *Id.*

¹¹⁹ Marie-Odile Nozières-Petit, Comment (June 3, 2021). Dr. Nozières-Petit is a member on the Label Rouge/PGI National Committee, serving as a *personnalité qualifiée*.

specifications and items to consider for the control plan if they are able to connect early on with an ODG.¹²⁰

Where specifications involve defining areas of production, as with PDOs and PGIs, INAO will provide experts to help delimit and define the areas, including geographers.¹²¹ These definitions will eventually become part of the specifications.

Once an ODG's dossier is ready, it is sent to the appropriate INAO National Committee, which oversees and approves applications both for new quality signs and for modifications to an existing quality sign's specifications.¹²² The National Committee structure is an important institutional pillar for the French quality sign programs, providing a clear decision-making process for recognition of products and oversight to ODGs.¹²³ The appropriate committee will look at the ODG's statutes (and *règlement intérieur* if the group has one) to ensure it complies with the Rural Code requirements for structure.¹²⁴ The committee will also review and comment on the specifications or modification of the specifications. The French fraud and consumer protection agency (DGCCRF) is part of the committee process and can provide ODGs input on labelling and other items on behalf of consumers.

The INAO agents and members of the Commission of Inquiry serve as liaisons for ODGs at the National Committee meetings.¹²⁵ After helping a group to prepare their dossier for committee approval, the local agent and the members of the Commission of Inquiry will attend the meetings (held in Paris) in order to explain the ODGs case, acting both as an advocate for the ODG and as a communication messenger from the National Committee to the ODG.¹²⁶

The process of quality sign development can be quite long, with final approval taking anywhere from two years, to longer than a decade.¹²⁷ It can take four or more years to make seemingly simple modifications of the production rules.¹²⁸ This is perhaps both a

¹²⁰ Bardenhagen, *supra* note 26, at summary 1.

¹²¹ Bardenhagen, *supra* note 26, at summary 3.

¹²² Bardenhagen, *supra* note 26, at summaries 2 and 3; *See* Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-6 (Fr.)

¹²³ For more about the National Committee structure, including details about the composition of the subcommittee, see *See* Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. R642-1–642-12 (Fr.).

¹²⁴ Bardenhagen, *supra* note 26, at summary 3.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

weakness and a strength of the quality sign programs—while practical amendments related to technological advances require an onerous process, consumers are essentially provided a higher guarantee that the level of quality will not be eroded. INAO has a policy to not approve any change in specifications that will have a negative impact on the quality of the product, however it is debatable whether this has been adhered to in certain cases.¹²⁹

Once approved, local INAO agents will continue to work with and provide oversight to ODGs. They are invited to the General Assembly meetings, where they can confirm the voting process for annual fees required by law.¹³⁰ ODGs are required to annually submit to the local INAO agents the minutes of the General Assembly meetings and a current list of operators.¹³¹ Local agents are normally in frequent communication with ODGs because they regularly seek to make modifications to the production rules, including sometimes minor changes, such as storage container size.

ii. Defense and Marketing Support and Other Subsidies

While there is little direct government aid for farmers to adopt quality label production, ODGs and quality signs are supported in a numerous ways. Common agricultural subsidies and farm aid from the EU and France can help farmers to get started with quality sign production, as with other types of production.¹³² In some cases regional authorities help farmers in these systems, for example, to make equipment purchases relevant to the region's production. Regional bodies, such as the Chamber of Agriculture, sometimes provide office space and other office support for ODGs.¹³³ Cooperatives often offer programs for new farmers, who might be edged towards quality signs as viable avenues of production. However, in most cases it seems to be the price premium or

¹²⁹ For example, in one cheese group, the rules were changed to allow pasteurized milk to be used to make the cheese, enabling much larger farmers to enter the ODG and produce large volumes of cheese, but damaging the reputation of the quality sign and putting downward pressure on quality. See Marie-Vivien et al., *supra* note 105, at 3001-02.

¹³⁰ Bardenhagen, *supra* note 26, at summary 3.

¹³¹ *Id.* See also Code rural et de la pêche maritime [Rural and Maritime Fisheries Code], art. L642-25.

¹³² See *Commission Staff Working Document Evaluation of the Impact of the CAP Measures on the General Objective 'Viable Food Production,'* SWD (2021) 106 final (May 11, 2021). For example, the EU has subsidized 50% or more of the cost of tree plantings in certain areas, and for certain varieties – but these are not limited to quality sign varieties. See *Commission Staff Working Document on the 3 Billion Tree Planting Pledge for 2030,* SWD (2021) 651 final (July 16, 2021).

¹³³ Bardenhagen, *supra* note 26, at summary 3.

reputational edge of quality signs that attracts farmers to work with ODGs in their area.¹³⁴

One of the most important areas of support at the level of the ODG is assistance with defense. As mentioned above, ODGs can write cease and desist letters to people inside and outside their region based on the intellectual property they have been granted in the form of a quality sign. However, when that isn't effective, the ODG can ask INAO to send a cease-and-desist letter, which is backed up by threat of litigation—INAO will share the legal costs with groups.¹³⁵ It would be impossible to quantify the value of having a government agency backing up an ODG's intellectual property, but in addition to staff time and the sharing of lawyer's fees that occur from time to time in higher profile cases, many infringers are likely deterred by INAO's cease and desist letters at the outset.

Another area where ODGs garner a significant amount of support is promotion. The EU regularly provides funding that can be used for building reputation for an ODG's products.¹³⁶ The amounts can represent a significant percentage of an ODG's marketing budget and provide money for advertisements, such as for national radio spots. Regional authorities also provide substantial support to ODGs, for promotion of the brand, as well as products associated with the region.¹³⁷

In closing this section, it should be emphasized that one of the largest sources of support, which saves substantial ODG resources, is the INAO itself. This institutional framework provides groups a starting point and assistance that would normally have to be undertaken by an entrepreneur, and in an ad-hoc manner, which would likely be less efficient without tested models and processes to adopt. Salient to the topic of marketing supports, INAO agents help with development and oversight using programmatic rules that serve to keep a high level of quality for the products. The umbrella nature of the quality sign labels (Label Rouge, PGI, PDO/AOC) creates a framework that significantly lowers the cost of developing reputation for a group, because of the existing recognition and credibility of the label.

¹³⁴As stated by one ODG manager (translated from French): "Objectively speaking, it's not the subsidies that incite farmers to produce. ... What does encourage them is the added value of having a Label Rouge [product] in relation to standard production." – Interview with Anonymous, Business Manager, French Organisme de Défense et de Gestion (Jan. 29, 2019).

¹³⁵ Bardenhagen, *supra* note 26, at summary 2.

¹³⁶ *Id.*

¹³⁷ *Id.*

III. Legal Methods of Organization of the ODG Mode in the United States

The central aspect of this model—the development of production specifications and the management of resulting intellectual property—can be accomplished using existing state-level law. Here we use Michigan as an example state legal system and statutory regime. However, there are several important aspects of the French model that would require modifications or special provisions to be put into the organizational documents. Furthermore, there are many benefits stemming from the quality sign programs and other French institutional supports that would require the development of oversight mechanisms. This paper will visit each of these levels in turn.

A. *Establishing the Core Purpose of Development and Management of Specifications*

Creating an organization that replicated the core purpose of the ODG model in the United States would be relatively simple. However, additional steps need to be taken in order to ensure compliance with anti-trust laws.

In Michigan, the most appropriate entity to use would be a nonprofit association created under the Nonprofit Corporation Act.¹³⁸ This act can be used to create a wide range of nonprofit businesses.¹³⁹ By electing to use a non-stock membership structure, the group can create an appropriate form based on the circumstances and the value chain actors involved.¹⁴⁰ The organization can be managed on a one member, one vote basis, which is the default basis provided in the law,¹⁴¹ or different classes of members can be given different voting rights.¹⁴² This would allow for operators to be organized into colleges, each of which has a defined level of representation on the board of directors.

¹³⁸ Nonprofit Corporation Act, MICH. COMP. LAWS § 450.2101-3192 (Westlaw through P.A.2021, No. 81, of the 2021 Reg. Sess., 101st Legis.).

¹³⁹ These include nonprofit cooperatives. *See id.* § 450.2123(2)(a). However, due to the commercial nature of the cooperative form, even a nonprofit cooperative would not be appropriate for the ODG mode, particularly if value chain actors other than farmers will be involved, due to antitrust concerns. *See generally* 26 U.S.C.A. § 501; *see also* 7 U.S.C.A. §§ 291-292.

¹⁴⁰ *See* MICH. COMP. LAWS § 450.2302 (Westlaw through P.A. 2021, No. 81, of the 2021 Reg. Sess., 101st Legis.1983); *see generally id.* § 450.2304.

¹⁴¹ *Id.* § 450.2304(3).

¹⁴² *Id.* § 450.2304(2).

It is necessary to elaborate the basic purposes for the organization in the articles of incorporation.¹⁴³ While this statement can be somewhat broad (e.g., “...organized for the purpose of branding agricultural products”), it may be prudent to narrow to the main purposes of the ODG mode in order to help clarify the non-commercial nature of the organization: the purpose of the organization is to create of production standards, develop of intellectual property and branding, and promote and defend the brand.¹⁴⁴ While non-commercial, an ODG-mode business is not a charitable organization and therefore would not qualify as a 501(c)3 organization for federal income tax purposes.¹⁴⁵

A nonprofit association that has value chain actors other than farmers for members will not be exempt from anti-trust regulations under the Capper-Volstead act,¹⁴⁶ making it important to ensure that members are not using the organization to engage in any sort of price setting. Provisions should be included in the articles of incorporation that prohibit real time price fixing or quantity coordination across members. The bylaws should also have a provision that explicitly prohibits discussions regarding prices or efforts to affect quantity at all meetings of the organization. French ODGs similarly comply with antitrust laws by not engaging in commercial activities, and by not allowing members to use ODG meetings and venues to discuss price.¹⁴⁷

In regard to antitrust and competition law, however, it is sometimes argued that certain production specifications can ultimately affect quantity—directly or indirectly. A full analysis of related French and EU anti-trust jurisprudence is outside of the scope of this article,¹⁴⁸ but production rules that provide direct constraints

¹⁴³ See *id.* § 450.2202(b).

¹⁴⁴ This suggestion is made both in keeping to the French ODG model and in providing a safeguard against violation of anti-trust regulations.

¹⁴⁵ See 26 U.S.C.A. § 501(c)(3). However, an ODG-mode business organized as a Michigan nonprofit corporation might qualify as a 501(c)6 trade association. See *id.* § 501(c)(6).

¹⁴⁶ See 7 U.S.C.A. §§ 291-292. An exception lies with organizations managing federal and state marketing orders, which can include processors in addition to farmers; they are exempt as a result of the Agricultural Marketing Act of 1937. See *id.* § 608b(a).

¹⁴⁷ Bardenhagen, *supra* note 26.

¹⁴⁸ For more on this topic, see Emmanuel Raynaud & Egizio Valceschini, *Collectif ou Collusif? [Collective or Collusive?]*, 2 *Revue Internationale de Droit Économique* 165, 195 (2005); Stéphan Marette & Emmanuel Raynaud, *Applications du Droit de la Concurrence au Secteur Agroalimentaire [Applications of Competition Law to the Agri-Food Sector]*, 277 *Économie Rurale* 2, 3 (2003); Emmanuel Raynaud & Egizio Valceschini, *Competition Regulation Against Quality Policy: The «Label Rouge» in the French Poultry Industry*, in

on quality, such as limiting the amount of acreage or limitations to entry of new participants, can sometimes survive scrutiny in France and the EU. However, such product specifications should be avoided in the United States until/unless there is clear legislation and/or case law enabling them to be used, or unless there is an applicable legal exemption that a group is working under (for example, a federal marketing order).¹⁴⁹ Production rules that are established in order to develop a particular quality of product, such as geographical origin, varietal or genetic selection, or grading and uniformity rules, do not directly limit quantity and should therefore be safe from an anti-trust perspective.¹⁵⁰ Similarly, production rules that focus on conservation or other sustainable practices should be allowable, given that third-party certifications, ecolabels, and food safety rules are widely adopted across farmers without issue, even if these rules have (usually limited) indirect consequences on quantity. However, rules that are ostensibly quality-oriented, but are actually a guise for limiting quantity should not be used; the ODG mode would not protect a group or industry from anti-trust actions in such a situation.¹⁵¹

B. Incorporating Other Benefits Resulting from French law

An organization in the United States seeking to replicate the multiple aspects of fairness prescribed in French law can do so by adding specific provisions to their organizational documents. One of the central tenets of the French quality sign programs is accessibility to the ODG and the resulting brand.¹⁵² All farmers and other actors that comply with the rules should be able to join the ODG, have some level of voice in the decision-making, and utilize the brand or quality

TYPICAL AND TRADITIONAL PRODUCTS: RURAL EFFECT AND AGRO-INDUSTRIAL PROBLEMS 529, 530 (F. Arfini & C. Mora, Eds., 1997).

¹⁴⁹ Limitations to acreage have been used as a cause of action in the United States.

See John C. Monica, Jr., *Agricultural Antitrust Liability: What About the "Reasonable Farmer?"*, 22 Drake J. Agric. L. 1, 13 (2017) (discussing agricultural antitrust litigation in the United States).

¹⁵⁰ While price leads antitrust discussion, quality is also a metric that is considered in antitrust actions. See ORG. FOR ECON. COOP. & DEV., *THE ROLE AND MEASUREMENT OF QUALITY IN COMPETITION ANALYSIS 1* (2013). The United State's brief for the OECD roundtable quotes the U.S. Supreme Court: "The antitrust laws do not require manufacturers to produce generic goods that consumers do not know about or want. The manufacturer strives to improve its product quality or to promote its brand because it believes this conduct will lead to increased demand despite higher prices . . ." *Id.* at 120 (citing *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 897 (2007)).

¹⁵¹ See generally Monica, *supra* note 94.

¹⁵² See discussion *supra* Section II.B.iii; Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-18, L642-21 (Fr.); INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITÉ, *supra* note 78.

sign resulting from the work. To accomplish this using a nonprofit association in the U.S., provisions related to the concept of operators need to be included. “Operators” can be defined as all persons, natural and legal, that are involved in any step of product production that is specifically outlined by the production rules. This means that a processor that uses a specific process or ingredient outlined in the production rules would be considered an operator, whereas a distribution company that simply buys, transports, and sells the product to retailers would not. A bylaw giving operators the right to have input and voice in the organization should be included, as well as one providing the right to use the resulting brand if the operator is in compliance with the specifications.¹⁵³

Other important fairness aspects of the ODG mode include representativeness of the operators, democratic functioning, and balanced representation.¹⁵⁴ The first of these, representativeness, relates to the existing industry for a product. In France, a majority of the quality signs are related to geographic areas, so that a quality sign under the PGI or PDO/AOC programs will necessarily implicate the entire industry in that area.¹⁵⁵ This provides significant public policy justification for the ensuring that the industry is well-represented during the ODG development process. Other quality products, including some having Label Rouge status, are not necessarily from a defined region, but often arose from already existing production systems. When developing an organization following the ODG mode in the United States, however, the factor of representativeness may not be necessary nor desired in many circumstances, such as for the development of new products, or when a product is intended to be marketed for its higher quality or special production rules. For example, a farmer group that wanted to work together to grow a specific variety of potato such as fingerlings would not need to involve all of the potato farmers in the state in the development of their organization. However, for a quality product based on a geography and its existing reputation, representativeness would be

¹⁵³ Note that it is not necessarily the case that all operators need to be fee-paying members in order to enjoy these rights. A provision in French law establishes that all operators are members, but this may in fact be in opposition to certain EU public policies as well as impracticable in certain contexts. Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-21 (Fr.). See also Marie-Vivien et al, *supra* note 105, at 2996.

¹⁵⁴ See discussion *supra* at Section II.B.iii; Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-18 (Fr.); INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITÉ, *supra* note 78, at 1.

¹⁵⁵ See discussion *supra* Sections II.B.iii, II.C.i. The structural requirements for ODGs coupled with the programmatic requirements for the PGI and AOC/PDO programs result in the potential for inclusion of all operators in the industry in the delineated region, though participation is voluntary.

appropriate. Having no overarching institutional structure in the U.S., these decisions would be made in an *ad hoc* manner by the organizers.¹⁵⁶

A group can implement the factors of balanced representation and democratic functioning by creating provisions related to voting rights and board representation that seek to provide an appropriate balance of power between the actors involved. The characteristics of a fair structure will vary based on the circumstances of the operators and their production. Consideration of the amount of input by the different categories of actors should be made, for example, whether most of the work that adds value is done by farmers, processors, or other relevant actors. Representative equality can be implemented by providing decision-making weight to the different categories of actors based on the amounts of production rules and responsibility that falls on each of them, such as by allocation of board seats. However, to ascertain this, it is important for the organizers to create a process for gathering input from all of the relevant operators involved. Otherwise, operators not sufficiently included or heard can become disenfranchised, which may lead to declining quality.

C. Replicating Institutional Supports

Developing a governmental institutional framework similar to the INAO would likely be extraordinarily costly and politically infeasible, but many of the strengths of the French institutional arrangement could feasibly be replicated using private organizations, and potentially some level of public support. Three main areas of consideration are development support, quality sign programming, and defense. Each of these are detailed separately below, although they also intersect with each other.

i. Development Supports

One of the biggest strengths of the French system is the existence of INAO agents, who provide some level of assistance during the development process.¹⁵⁷ These agents work with farmers

¹⁵⁶ However, if an umbrella brand or oversight program is created to provide institutional support, representativeness could be instituted as a required factor. *See* Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L. 642-6–642-11 (Fr.).

¹⁵⁷ Interviews conducted with the French international development agency CIRAD identified this type of expertise as being one of the most desired, potentially beneficial institutional supports for work in developing countries. *See also* Delphine Marie-Vivien & Estelle Biénabe, *The Multifaceted Role of the State in the Protection of Geographical Indications: A Worldwide Review*, 98 *WORLD DEV.*

in a similar manner as university agricultural extension agents in the United States, developing expertise in the area of farm business outreach over their careers. Similarly, there are cooperative development centers that provide educational outreach, training, and business development advice in the United States.¹⁵⁸ These are often associated with land grant universities and work in partnership with university extension agents.

If similar programming around the ODG mode was developed using these existing land grant resources or via a private organization, only a handful of agents would be needed to provide significant outreach, education, and developmental assistance to groups organizing as ODGs. For example, if a government program similar to cooperative development programming were to be created, training could focus with as few staff members as one agent per business development center, or one extension agent per state.¹⁵⁹

Agents with ODG mode expertise could help groups with the organizational process, ensuring that the right actors are involved and providing assistance with developing bylaws and production rules. During the development process, agents could work to ensure the principles of balanced representation, democratic functioning, and, where appropriate, representativeness of the extant industry. Agents could also recommend adoption of the principle that all operators who comply with the rules are eligible to join the quality sign organization and use the resulting brand, if that matches the policies promoted by the agents' institutions.

ii. Quality Sign Programming

Development of a quality sign program at the state level is possible in the United States, but funding and other issues may present significant obstacles that are not feasible to overcome in most states. However, it is possible that a private organization could be developed at to create an umbrella brand for groups of producers to develop products under. While a full assessment of the topic of

1, 1-11 (2017). See Delphine Marie-Vivien & Estelle Biénabe, *Institutionalizing Geographical Indications in Southern Countries: Lessons Learned from Basmati and Rooibos*, 98 *WORLD DEV.* 58, 58-67 (2017).

¹⁵⁸ For examples, the Michigan State University Product Center's Michigan Cooperative Development Program; the Mid-America Cooperative Council; University of Wisconsin's Center for Cooperatives.

¹⁵⁹ On the private side, a relevant example can be found with Cooperative Development Services, which provides consulting services for food cooperatives around the United States. They have several experts who travel to conduct feasibility studies and other food cooperative business development work; however, these agents have developed a specialized expertise that is indispensable. See *COOP. DEV. SERVS.*, <https://www.cdsus.coop> (last visited Sept. 18, 2021).

organizing an umbrella organization is outside the scope of this study, in this subsection I will visit a few of the key structural aspects needed to replicate important benefits of the French quality sign programs.

A quality sign umbrella organization could develop rules to help shape the ODG-mode organizations and to provide ongoing oversight. It might be beneficial to create a baseline set of standards, such as minimum animal welfare and sustainability practices, that could apply across products.¹⁶⁰ The organization could limit the program to a particular geographical area, such as a region within Michigan, or a wider foodshed such as the Great Lakes. However, any umbrella brand organization would need to define what is different about its products and require groups to define the specificities of their products. In a practical sense, the success of the brand might rest on having higher intrinsic levels of quality, in addition to any other qualities such as geography or being grown with sustainable practices.

Once the main rules were developed, this umbrella organization could develop logos and apply for a certification mark or a collective mark (both marks are types of trademarks) that would become the basis for a branding program. The organization would allow ODG-type farmer groups that comply with its rules to use the resulting logo for branding.

Such an umbrella organization would want to keep its standards high in order to develop its reputation and establish credibility. A significant amount of strength and detail of control is mandated for the French quality sign programs, presumably to ensure a high level of integrity, and that the signs and products can withstand scrutiny of policymakers and the consuming public. This justifies the use of third-party certification organizations. However, the level of control needed for an umbrella label in the United States could vary. For some efforts, third-party certification might be prudent to help provide legitimacy of the brand and program, whereas for others,

¹⁶⁰ The Label Rouge program in France has baseline production rules for a variety of product types, for example, beef, poultry and lamb. Groups seeking the Label Rouge quality sign must meet these rules at a minimum, and also create their own specific standards in order to develop a unique product. *See generally Label Rouge [Red Label]*, INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITÉ, <https://www.inao.gouv.fr/eng/Official-signs-identifying-quality-and-origin/Label-Rouge-Red-Label> (last visited Sept. 18, 2021).

such as where consumer trust is high, control checks could be carried out by the umbrella brand itself.¹⁶¹

Developing financial capital for such an umbrella brand effort would present a substantial challenge. Due to the large amount of up-front funding that would be needed to help with the establishment and organization of the ODG-type production groups, as well as the resources for the promotion and advertising needed to successfully develop brand recognition in early years, the participation of an investment fund could be critical to the feasibility of the effort. The purpose of developing branding for farmers is not generally charitable (unless it is tied to another charitable purpose such as helping underserved communities), and for this reason, the involvement or creation of a community development financial institution (CDFI) to create a funding pool may be unlikely to be successful. Standard venture capital groups are unlikely to work either, because the venture capitalists will likely want some say in the programmatic rule development in order to allow flexibility to adjust to the market. However, this desire would be in direct opposition to the rigidity of standards needed for long-term brand development needed. Additionally, venture capitalists will likely demand relatively high rates of returns to their investment.

However, there are alternatives to CDFIs. One possibility is to utilize a Benefit Corporation, a burgeoning type of social-entrepreneurship entity, to garner investment from socially conscious individuals and impact investors who are interested in regional food system development. These investors may be willing to take a lower rate of return,¹⁶² and a Benefit Corporation can be used to ensure that the original purposes of the corporation (developing regional branding for farmers) are adhered to, even if it is less profitable than other ventures. However, the corporation would have to deal with securities registration and subsequent advertising of investment opportunities.

¹⁶¹ Participatory guarantee programs can provide an alternative to conventional third-party certification; see, for examples, Kornelia Kirchner, *Overview of Participatory Guarantee Systems in 2014*, in *THE WORLD OF ORGANIC AGRICULTURE: STATISTICS & EMERGING TRENDS 2015* 134, 134 (Helga Willer & Julia Lernoud eds., 2015). Patrick Mundler & Stéphane Bellon, *Les Systèmes Participatifs de Garantie : Une Alternative à la Certification par Organismes Tiers ?* [*Participatory Guarantee Systems: An Alternative to Third Party Certification?*], 5 *POUR* 57, 57-65 (2011). Paulo Niederle et al., *Social Movements and Institutional Change in Organic Food Markets: Evidence from Participatory Guarantee Systems in Brazil and France*, 78 *J. Rural Stud.* 282, 282-291 (2020).

¹⁶² See Philip Roundy et al., *Finance or Philanthropy? Exploring the Motivations and Criteria of Impact Investors*, 13 *SOC. RESP. J.* 491, 491-512 (2017).

If an umbrella organization manages to overcome these funding and brand development challenges, and eventually gets to the point where it is running smoothly with numerous member groups and products, the organization could be used to provide the expert agents mentioned in the subsection above. Per unit fees have potential as a sustainable source of funding for those agents and other operational needs, if the label results in price premiums and increased sales volumes that make these fees economically feasible to charge operators. The Label Rouge program, for example, is funded in part in this manner.¹⁶³

iii. Defense

ODGs in France enjoy a significant benefit in the form of government aid for the defense of intellectual property.¹⁶⁴ Both the sending of cease-and-desist letters, and assistance with litigation by INAO, act as deterrents to domestic and foreign usurpation, and provide support to ODGs in their defense efforts.

Similar support for intellectual property defense could be provided to some extent by an umbrella brand organization. An umbrella organization could centralize defense activities for each of its groups' products, writing cease and desist letters, and initiating the enforcement of US intellectual property laws where necessary. Template cease and desist letters could be drafted and used for different circumstances (for one example, local farmer usurpation in direct markets, in another example infringement of the logo or brand name by an outside business). If an umbrella organization is successful financially, per unit fees could be collected from groups to use for defense of the brand in courts when necessary. Such costs of litigation and/or mediation could be substantial.

State departments of agriculture (e.g., Michigan Department of Agriculture and Rural Development) provide another possibility. A single group or an umbrella organization could negotiate an arrangement to provide aid with defense efforts. Such a relationship with a state's agriculture department could be mutually beneficial, protecting the reputation of both the quality sign organization and the state's agricultural sector, especially if the umbrella organization uses state or an internal region geography as part of the label. This would likely require new legislation, which might be more feasible if it were applicable to other agricultural groups based in the state (for example, if the Michigan Apple Committee could also request

¹⁶³ Code rural et de la pêche maritime [Rural and Maritimene Fisheries Code] art. L642-13 (Fr.).

¹⁶⁴ See discussion *supra* Section II.C.ii.

state assistance when their label is being infringed upon). Cease and desist letters written by the state would be a relatively low-cost method of meeting these mutual goals,¹⁶⁵ and in a best-case scenario, assistance with funding the costs of litigation by the state could be provided.

IV. Appropriateness of the ODG Mode for Different Contexts in the United States

The utility of the ODG mode of organization will vary based on the particular circumstances of a value chain or producer group. Here we consider the “fit” of the ODG for various contexts in the United States, and conversely situations where the ODG mode would likely not be an appropriate fit.

A. More Ideal Contexts for the ODG Mode

The ODG mode has many strengths as an organizational tool and may be beneficial for groups to use in the right circumstances. First, as with any value-added food production effort, it is necessary to have a strong customer base and market for the group’s products, whether that is achieved through local proximity, shortness of supply chain, or access to a wide geography using conventional distribution channels. Additionally, the group of farmers must be amenable to cooperation. Below is a list of circumstances where the ODG model would have a more ideal fit:

i. Where groups of farmers want to work in common on branding a value-added product.

The branding could be intended to develop reputation for a specific quality of the product (region, variety, growing process), or could be used for highlighting sustainable practices, or some combination of these criteria. Take, for example, market gardener farmers in Southern Michigan, many of whom grow garlic, and use non-certified organic practices. Working with the assumption that many of these farmers have the capacity to grow more garlic, an ODG-mode organization could be formed to create rules and develop and manage a brand and logo. Farmers could use this label to signal quality attributes—the chosen variety, sustainable practices, and geography—to direct market and other types of purchasers. As consumer awareness of the label grows through, for example, regular promotion (e.g., posters or flyers) used by members during farmers

¹⁶⁵ After the initial development of a template cease and desist letter form, it may be fair to estimate about two to four hours of MDARD staff time would be needed, between communication about the issue with the stakeholder group representative and writing and sending the letter (for a simple matter.)

markets across the state, demand for the product could also grow, provided the high quality of the product is maintained.

ii. Where it would be beneficial to have other value chain actors besides farmers involved (e.g., upstream or downstream actors).

A strength of the ODG mode is that a variety of value chain actors can be organized in a manner that is not in opposition to antitrust laws. In contrast, cooperatives cannot normally have other value chain actors involved without violating antitrust laws, due in large part to their commercial nature.¹⁶⁶ One example of a product that would need downstream operators to be involved is Honeycrisp variety apples from Northwest Michigan, which are known to have a higher quality due to their coloration, taste, and other factors. In order to market a fairly uniform, high quality product, a group of farmers would need to create sizing, coloration, and sucrose content rules for apples to be sold under the label. Only a small percentage of regional farmers' Honeycrisps would make the grade, and the equipment facilities needed to do the sorting could run into the tens of millions of dollars in upfront costs. However, many or most apple farmers already work with packers that have this equipment, and have the ability to segregate and store apples for marketing over the year. The Northwest Michigan growers would want to work closely with one or more of these packers on production standards and management of ongoing operations.

iii. Where aggregation is required to meet the needs of large buyers, such as supermarkets and institutions.

Production standard development is conducive to the aggregation of farmer's products, because of the resulting consistency of quality, and the ability to create the sizing and grading uniformity rules acceptable to supermarkets.¹⁶⁷ The ability to aggregate numerous farmers' products should enable the distribution of larger product volumes and sales in wider geographical areas (statewide, nationally, internationally). Furthermore, the specific set of standards that is developed can be protected as intellectual property for purposes of branding and reputation development. This circumstance could apply to both the garlic and the Northwest Michigan Honeycrisp groups mentioned above. The Honeycrisp

¹⁶⁶ See John C. Monica, Jr., *Agricultural Anti-Trust Liability: What About the "Reasonable Farmer?"* 22 DRAKE J. AGRIC. L. 1, 1-2 (2017).

¹⁶⁷ See Getachew Abatekassa & H. Christopher Peterson, *Market Access for Local Food Through the Conventional Food Supply Chain*, 14 INT'L FOOD & AGRIBUSINESS MGMT. REV. 41, 41-60 (2011).

group likely will require a wider distribution than its growing region to make the effort feasible, so working with larger retailers in the Great Lakes region could be an ideal fit. The Southern Michigan garlic group might find that distribution around the state is feasible and within their aggregate capacity, given a sufficient price premium or net return.

iv. Where voluntary organizations are preferable to mandatory organizations (e.g., marketing orders¹⁶⁸).

Whereas marketing orders impose requirements and taxes on all the farmers in a region that are growing a particular product, the ODG mode could be used to set up an organization that is voluntary to join.¹⁶⁹ The garlic group mentioned above provides an illustrative example. The subset of garlic growers that are interested in creating a value-added product could organize without implicating all garlic growers in the delineated area, as a marketing order would. Furthermore, to ensure that the opportunity extends to all growers, ODGs are designed to have open membership for any new producers

¹⁶⁸ State and federal marketing orders in the United States impose fees (and rules in some circumstances) on all of the farmers in the area that grow the particular product. These are voted in often by a simple majority of producers, sometimes by slim margins. State marketing orders have oversight by the states (*See e.g.*, Michigan, see the Agricultural Commodities Marketing Act, MCL § 290.651-.674 (Westlaw current through P.A. 2021, No. 81, of the Reg. Sess., 101st Legis.)), and federal marketing orders are overseen by the US Department of Agriculture, who authority to approve or disapprove actions by the group or board managing the marketing order. 7 U.S.C.A. § 601. In relation to marketing orders, ODGs may be more farmer-centric and have less heavy ongoing political and government involvement once started (for example, members of the Michigan state agricultural marketing committees are appointed by the governor.)

Antitrust exemptions are made for marketing orders via the Agricultural Marketing Act of 1937, and processors are allowed to be involved (for example, the tart cherry federal marketing order is voted on by growers but creates duties for processors). 7 U.S.C.A. § 608(b). As such, one strength of marketing orders is that quantity control measures can legally be taken by the industry in an attempt to provide consistency of price, and in some cases such as tart cherries, availability of product inventory to ensure consistent supply to buyers. However, these quantity control measures require growers to ‘set aside’ or even dump product on the ground by law; and strong disagreements can occur within the industry.

ODGs are voluntary; while farmers and other operators are required to comply with the production rules and often to pay annual fees in order to market their products using the ODGs quality sign/brand name, farmers are free to sell their products in other markets, including commodities markets. Furthermore ODGs can have not only processors, but as many other upstream and downstream value chain actors as is practicable.

¹⁶⁹ This applies generally to development in the U.S., and to certain quality sign ODGs in France. However, while with PGI and PDO/AOC groups membership is not mandatory, farmers in the region cannot legally use the regional brand developed without following the specifications and joining the ODG.

willing to follow the production rules. The result is that the voluntary aspect of ODGs does not lead to an exclusive closed club.

v. Where fairness and equity between value chain actors is a need.

Fairness is an integral part of the French ODG model, due to specific requirements for a balance of power between actors in an ODG, and to an underlying focus on fairness in contracts under French law. As detailed in Section II above, these aspects could be infused into an ODG-mode organization in the United States using specific provisions in organizational documents and/or, if necessary, by creating oversight mechanisms (although these oversight mechanisms might have a significant cost). Take, for example, a product such as a type of cheese organized by Michigan milk producers, which is produced for larger-scale distribution in the Great Lakes region. Processors and/or transformers would need to be involved to process the milk, create, shape, and ripen the cheese, and then package it for distribution. Given that processors are often very concentrated in the dairy industry, farmers could use an ODG to both involve the downstream actors, and protect their decision-making voice and power within the organization.

B. Less Ideal Contexts for the ODG Mode

As with any mode or entity, the ODG mode would not be an ideal fit with every circumstance, and does not promise to be a panacea. Below are a few circumstances where the ODG mode should clearly be avoided:

1. The ODG mode would not work well for marketing a large number of individual products, because it would be difficult to create production standards for each product. An example would be a multiple-farm CSA collaboration for grouping numerous market garden products, whether through seasonal subscription or through a common online ordering system—instead, a cooperative or LLC would likely be better fit. However, a strong umbrella brand for market garden products could facilitate the creation of production standards for a large number of products over time.

2. The ODG mode would not be a good fit for the conventional version of commodity products such as corn, soybeans, or oranges. The ODG mode is mainly applicable to value-added products, because the production rules are intended to provide something different or additional in comparison to the commodity version of the product, such as varietal or regional qualities.

3. The ODG mode would not be a good fit for products that have a large variability in size, appearance, or variety, if the intent is to aggregate for larger-scope wholesale markets, such as supermarkets. This is because supermarkets normally require a significant amount of uniformity.¹⁷⁰ For example, if a group of farmers wants to work together to market a certain variety of peach, but there is great variability between size and color of peaches from each of the different farmers, an ODG mode would be less appropriate.

V. Conclusion

French ODGs provide one model for regionally-based food product organization. Geographical indications have been comprehensively studied as an intellectual property umbrella that farmers can gather under, boasting well-known products from France and around the world.¹⁷¹ However, less is known about the nature of the collective management organizations underlying those products. This research investigated the legal underpinnings as well as institutional supports that affect the structure of these collectively managed entities in France. France's statutory and regulatory regimes for ODGs have unique attributes and strengths, including a focus on fairness and balance in structure, and an ability to include not only farmers, but also packers, processors, cheese ripeners, and other value chain actors.¹⁷² Each of the relevant actors for a particular product can potentially be involved in determining the product rules that will apply to them.

Many of the strengths found in the French context can indeed be translated to the context of the United States. Some aspects of ODGs are relatively simple to replicate, given the relatively similar state background institutions, legal systems,¹⁷³ and property rights enforcement (rule of law). Other aspects of ODGs are more difficult

¹⁷⁰ Jennifer Jo Thompson & Julia Gaskin, *An Extension Specialist's Reflections from the Field: Discovering Ag of the Middle in the Shift from Direct Sale to Wholesale Vegetable Production*, 40 CULTURE, AGRIC., FOOD & ENV'T, 124, 124, 127 (2018).

¹⁷¹ See, e.g., Barham, *supra* note 19, at 127-30; Ulrike Grote, *Environmental Labeling, Protected Geographical Indications and the Interests of Developing Countries*, 10 ETSEY CENTRE J. INT'L L. & TRADE POL'Y 94, 96-100 (2009); William Van Caenegem et al., *Pride and Profit: Geographical Indications as Regional Development Tools in Australia*, 16 J. ECON. & SOC. POL'Y 1, 1, 7-10 (2014).

¹⁷² See discussion *supra* Section II.B.iii; Code R rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-3, L642-21.

¹⁷³ While France has a civil law system as opposed to the common law system used in the United States, contract, corporate, and commercial law are quite similar in each country.

to replicate due to their connection with unique institutions in France and the EU that are dedicated to quality sign products. Replicating these would therefore require the creation of oversight bodies for particular aspects, and development and funding of outreach experts for others. However, the benefits of these efforts could potentially outweigh the costs, if enough participation and volume were achieved.

A promising area of future research would be to investigate to what extent and how the strengths of ODGs could be replicated in other contexts that have weaker, or significantly different, government institutional support. In particular, it may be valuable to determine if the aspects of balanced representation and democratic functioning can effectively be replicated in order to provide farmer groups with more negotiating power vis-à-vis concentrated value chain actors such as processors.

I Want You to Panic: Leveraging the Rhetoric of Fear and Rage for the Future of Food

Iselin Gambert*

Abstract

“Humanity Is About to Kill 1 Million Species in a Globe-Spanning Murder-Suicide. Only 11 Years Left to Prevent Irreversible Damage from Climate Change.”

Doomsday headlines like these are terrifying. But are they enough to make us act? The causes of the current climate crisis are many, but the science is clear that the meat and dairy industry shoulders much of the blame. Given the role the animal agriculture industry plays in perpetuating the climate crisis, combined with the harms the industry imposes on the animals and workers within it, politicians and governments—given their degree of power and influence—should ostensibly be leaders in setting policies that might set humanity on a course-correction. Instead, we see fear prompting politicians and governments to action—action designed to slow progress and thwart change.

This article explores the role that emotion—specifically fear and rage—play in shaping the legal, political, and cultural discourse around the future of food, and offers a strategy to leverage those emotions to help people more effectively confront the impact that their dietary choices have on the environment, farm animal welfare and exploitation, and factory farm workers. Part One provides an overview of the current climate crisis. It also unpacks the role that animal-derived meat plays in perpetuating cultural norms around traditional masculinity, which the American Psychological Association has identified as harmful and which has been identified as a driving force behind climate skepticism. Part Two explores three examples of governments—state, national, and international—using fear as a primary motivating force to wage linguistic and semantic battles over the meaning of “meat” and “milk.” This section unpacks legislative efforts in Missouri, Arkansas, and other states to pass so-called “Real Meat Laws” that seek to prohibit the commercial speech of producers of plant-based and cultivated meat. It explores similar efforts in the U.S. Congress to prohibit plant milk from using the word “milk” on its labels in a thinly-veiled fear-driven attempt to protect the dairy industry. And it explores the European Union’s

recent passage of Amendment 171, which, if allowed to take effect, would introduce sweeping restrictions on plant-based food labeling. Part Three suggests that one way to facilitate the paradigm shift we need around food is to leverage the role that emotion plays in consumer decisions around food, and offers mandatory Graphic Warning Labels (GWLs) as a tool to do just that. Building on research done around the globe into the effectiveness of GWLs on cigarette packages that blend Logos and Pathos by combining data with scientifically accurate yet emotionally disturbing and fear-inducing images, this section argues that consumers need to be confronted with logical and emotional appeals to reject animal-based food each and every time they pick those items off a grocery store shelf. Ultimately, this article agrees with teenage Swedish climate activist: “I want you to panic,” she said. “I want you to feel the fear I feel every day. And then I want you to act.”

I. Introduction

*Humanity is About to Kill 1 Million Species in a Globe-Spanning Murder-Suicide.*¹

What happened just now as you read those words? Did you shift uncomfortably in your seat, perhaps, or let out a sigh of dread?

*Only 11 Years Left to Prevent Irreversible Damage from Climate Change, Speakers Warn during General Assembly High-Level Meeting.*²

* Professor of Legal Writing, The George Washington University Law School

¹ Eric Levitz, *Humanity Is About to Kill 1 Million Species in a Globe-Spanning Murder-Suicide*, INTELLIGENCER (May 6, 2019), <https://nymag.com/intelligencer/2019/05/un-report-humans-are-driving-1-million-species-extinct.html>.

² See Darryl Fears, *One Million Species Face Extinction, U.N. Report Says. And Humans Will Suffer as a Result.*, THE WASH. POST (May 6, 2019), https://www.washingtonpost.com/climate-environment/2019/05/06/one-million-species-face-extinction-un-panel-says-humans-will-suffer-result/?utm_term=.6aa898519958. See Press Release, Intergovernmental Sci.-Pol’y Platform on Biodiversity & Ecosystem Serv. (IPBES), Nature’s Dangerous Decline ‘Unprecedented’ Species Extinction Rates ‘Accelerating’, U.N. PRESS RELEASE (May 6, 2019), available at https://www.washingtonpost.com/context/ipbes-global-report-species-extinction-rate-is-accelerating/f724e478-da85-4e89-83f9-f663c496f08c/?utm_term=.2a5ef9c6cc2c; Press Release, General Assembly, Only 11 Years Left to Prevent Irreversible Damage from Climate Change, Speakers Warn During General Assembly High-Level Meeting, U.N. Press Release GA/12131 (Mar.28, 2019).

How about now? Is your heartbeat quickening a bit? Are your palms beginning to sweat? What if I told you that this headline is two years old already, so there's only nine years left? Feeling a bit stressed? Me too. But what are you doing to do about it?

As a scholar of rhetoric, I see the world through the lens of the different rhetorical narratives that are used in legal, political, and cultural contexts. Often referred to as “Aristotle’s rhetorical triangle,”³ the rhetorical tools of Logos (appeals to logic), Pathos (appeals to emotion), and Ethos (appeals leveraging the credibility of the persuader) underpin every piece of persuasion there is, from children vying to stay up past their bedtime because they did their chores (Logos), to fundraising ads depicting images of malnourished children in Africa (Pathos), to a doctor entering an exam room cloaked in a white coat (Ethos).⁴

Doomsday headlines like the ones above skillfully blend Logos—one million species; eleven years left—and Pathos—murder-suicide; irreversible damage. More often than not, when it comes to headlines like these, *fear* is the particular emotion used to get us readers to sit up and pay attention. Fear, after all, is a powerful emotion, and reading about the sixth mass extinction unfolding at the hands of human-fueled habitat destruction and climate change is, to put it mildly, very scary stuff.⁵ But is fear powerful enough to get us to act?

³ *The Rhetorical Triangle: Making Your Communications Credible and Engaging*, MIND TOOLS, <https://www.mindtools.com/pages/article/RhetoricalTriangle.htm> (last visited Aug. 28, 2021)

⁴ For an overview of Logos, Pathos, and Ethos, see *Ethos, Pathos, and Logos*, THE NATURE OF WRITING, <https://natureofwriting.com/courses/introduction-to-rhetoric/lessons/ethos-pathos-and-logos/>.

Studies have shown that patients prefer their doctors to wear white coats as compared to any other form of attire, with white-coat-clad doctors rating the highest “across all domains including how knowledgeable, trustworthy, caring and approachable the physician appeared as well as how comfortable the physician made the respondent feel.” Christopher M. Petrilli et al., *Understanding Patient Preference for Physician Attire: A Cross-Sectional Observational Study of 10 Academic Medical Centres in the USA*, *BMJ OPEN* (Apr. 19, 2018), available at <https://bmjopen.bmj.com/content/bmjopen/8/5/e021239.full.pdf>.

⁵ See, e.g., Damian Carrington, *Sixth Mass Extinction of Wildlife Accelerating, Scientists Warn*, *THE GUARDIAN* (June 1, 2020), <https://www.theguardian.com/environment/2020/jun/01/sixth-mass-extinction-of-wildlife-accelerating-scientists-warn> and Damian Carrington, *Climate Crisis: World Is at Its Hottest for at Least 12,000 Years – Study*, *THE GUARDIAN* (Jan. 27, 2021), <https://www.theguardian.com/environment/2021/jan/27/climate-crisis-world-now-at-its-hottest-for-12000-years>.

Unfortunately not, it seems—at least not when the fear is sparked by an occasional headline that we scroll past on our phone or computer screen. But emotions *can* be powerful influencers of human behavior—especially when combined with data and science and presented in the right way and at the right time.

While the human-generated causes of climate change, species extinction, and habitat destruction are many, our appetites—and the norms, customs, and traditions that drive them—are one of the most significant contributors. Humans’ seemingly insatiable appetite for animal-derived meat and milk contribute mightily to the climate crisis we are facing, with billions of animals suffering in the shadows until they wind up on our plates. Workers in the animal agriculture industry suffer too; disproportionately immigrants and people of color, factory farm and slaughterhouse workers face grueling conditions that are harmful to both body and mind, often with little pay, no job security, and, in 2020, the threat of Covid-19 exposure at rates higher than the general population.⁶

If logic carried the day, we would all go vegan tomorrow. And yet, only about 3% of us have stopped eating animals.⁷ Why doesn’t imminent climate collapse, the sixth mass extinction, and widespread suffering of billions of farm animals conjure up even a fraction of the behavior-changing panic we humans (justifiably) felt in 2020 when the Covid-19 pandemic unfolded, leading our species to rapid and widespread behavioral changes—including mass lockdowns, social distancing, and new norms around mask-wearing—took place across the globe?

Given the current climate emergency and the role the animal agriculture industry plays in perpetuating it, combined with the real harms the industry imposes on the animals and workers within it, politicians and governments—given their degree of power and influence—should ostensibly be leaders in setting policies and taking actions that might set humanity on a course-correction. But that is far from the case. Instead, we see fear prompting politicians and governments to action—action designed to slow progress and thwart change.⁸

Specifically, there are examples throughout the world of state, national, and international governments alike introducing and

⁶ See *infra* section II(c).

⁷ Sage Williams, *Vegan Statistics – New Data Investigation for 2021*, FUTURE KIND+ (Apr. 9, 2020), <https://www.futurekind.com/blogs/vegan/vegan-statistics>.

⁸ See *infra* section II.

passing legislation and regulations that amount to fear-based linguistic battles with plant-based food. Where lawmakers could be allies in developing strategies to promote climate-friendly plant-based food and discourage consumption of environmentally destructive animal-based food, they are doing just the opposite, making it *harder* for plant-based food advocates to have a level playing field with the animal agriculture industry, much less get the upper hand in the fight against climate change and species extinction.

This article explores the role that emotion—namely fear and rage—plays in the battle over the future of food and offers a strategy to leverage those emotions to help people more effectively confront the impact that their dietary choices have on the environment, farm animal welfare and exploitation, and factory farm workers. It proceeds in three parts. Part One provides an overview of the current climate crisis and role that emotions—including fear, rage, and grief—play in our responses to it. Acknowledging the significant role that the animal agriculture industry plays in contributing to the current climate crisis, this section argues that while politicians and governments should be doing (much) more to promote plant-based food, they are doing just the opposite, pursuing fear-driven legislative and regulatory efforts to protect the animal agriculture industry through linguistic and semantic battles with plant-based food. Unpacking the role that animal-derived meat plays in perpetuating deeply entrenched cultural norms around traditional masculinity, which the American Psychological Association has identified as harmful⁹ and which has been identified as a driving force behind climate skepticism, this section questions the strategy of plant-based foods striving to fit into, rather than break free from, the “real men eat meat” narrative. Finally, this section argues that despite widespread resistance to a fulsome embrace of plant-based food and fear of rejecting too enthusiastically animal-derived meat and milk, we are at the tipping point of realizing a sweeping cultural paradigm shift in our species’ relationship to food, and we have all the necessary ingredients to realize it.

Part Two explores three examples of governments—state, national, and international—using fear as a primary motivating force to enact laws and regulations that would protect the animal agriculture industry from real or perceived threats by plant-based foods. Through linguistic and semantic battles over the meaning of “meat” and “milk,” governments hide behind baseless assertions that

⁹ Stephanie Pappas, *APA Issues First-Ever Guidelines for Practice with Men and Boys*, 50 *MONITOR PSYCH.* 35 (2019).

plant-based foods will “mislead” consumers if their labels contain “meaty” or “milky” words more commonly associated with animal-derived food. This section unpacks legislative efforts in Missouri, Arkansas, and other states to pass so-called “Real Meat Laws” that seek to prohibit—and in one case, criminalize—the commercial speech of producers of plant-based and cultivated meat. It explores similar efforts in the U.S. Congress to prohibit plant milk from using the word “milk” on its labels in a thinly veiled fear-driven attempt to protect the dairy industry. And it explores the European Union’s recent passage of Amendment 171, which, if allowed to take effect, would introduce sweeping restrictions on plant-based food labeling including prohibitions on labels declaring that those products are “Not Milk.” This section explores the role that Swedish oat milk producer Oatly has played on social media and elsewhere to bring the dangers and absurdities of Amendment 171 to light, revealing the fear that underpins the Amendment and interrogating the rationale beneath it.

Part Three suggests that one way to facilitate the sort of sweeping paradigm shift we need around the food we eat is to effectively leverage the role that emotion plays in consumer decisions around food and offers mandatory Graphic Warning Labels (GWLs) as a tool to do just that. Building on research done around the globe into the effectiveness of GWLs on cigarette packages that blend Logos and Pathos by combining data with scientifically accurate yet emotionally disturbing and fear-inducing images, this section argues that consumers need to be confronted with logical and emotional appeals to reject animal-based food each and every time they pick those items off a grocery store shelf. Building on Oxford university professor Joseph Poore’s proposal to add mandatory labeling to all food communicating each item’s environmental impact,¹⁰ this section argues that GWLs should communicate each food item’s impact not only on the environment, but also on animal well-being and exploitation and worker conditions.

Recognizing that the United States is one of the only countries in the world yet to adopt GWLs for cigarette packages and the First Amendment challenges that may follow any regulatory effort to require GWLs on food, this section looks to the March 2020 FDA Rule as a blueprint for success. Taking effect in October 2022, the Rule will, for the first time in the United States, require cigarette

¹⁰ Joseph Poore, *We Label Fridges to Show Their Environmental Impact –Why Not food?*, THE GUARDIAN (Oct. 10, 2018), <https://www.theguardian.com/environment/2018/oct/10/we-label-fridges-to-show-their-environmental-impact-why-not-food>.

packages to include one of eleven new health warnings combining text and color images “depicting the negative health consequences of cigarette smoking.”¹¹ In issuing its March 2020 Rule, the FDA provided an extensive analysis arguing that the new GWLs do not violate the First Amendment’s protections on commercial speech.¹² This section draws from the rationales offered in the FDA’s analysis to argue that GWLs on animal-based food likewise would not violate the First Amendment. Specifically, the government has a substantial interest in keeping the general public safe by reducing the wide-ranging dangers associated by climate change and mass species extinction, as well as in reducing the harms associated with mass exploitation and suffering to humans and nonhuman animals in the animal agriculture industry. Scientifically accurate GWLs on animal-based food would directly advance the government’s interest and given the enormity and time-sensitivity of the crisis, imposing mandatory GWLs on animal-derived food is a proportionate action to serve that interest.

The world is at a tipping point regarding the current climate crisis, and a sweeping paradigm shift in our species’ relationship with food is a necessary ingredient in our efforts to avert disaster. Science and data—Logos—tell us as much, but emotion—especially fear and rage—can either facilitate or thwart our efforts to make a change. Ultimately, the choice is up to us. “I don’t want your hope,” Swedish teenage climate activist—and vegan—Greta Thunberg famously admonished a room full of world leaders, her voice filled with rage and disgust. “I don’t want you to be hopeful. I want you to panic. I want you to feel the fear I feel every day. And then I want you to act.”¹³

¹¹ See U.S. FOOD & DRUG ADMIN., CIGARETTE LABELING AND HEALTH WARNING REQUIREMENTS (2021), <https://www.fda.gov/tobacco-products/labeling-and-warning-statements-tobacco-products/cigarette-labeling-and-health-warning-requirements>.

¹² See U.S. FOOD & DRUG ADMIN., FDA PROPOSES NEW REQUIRED HEALTH WARNINGS WITH COLOR IMAGES FOR CIGARETTE PACKAGES AND ADVERTISEMENTS TO PROMOTE GREATER PUBLIC UNDERSTANDING OF NEGATIVE HEALTH CONSEQUENCES (2019), <https://www.fda.gov/news-events/press-announcements/fda-proposes-new-required-health-warnings-color-images-cigarette-packages-and-advertisements-promote>.

¹³ Greta Thunberg, ‘*Our House Is on Fire*’: Greta Thunberg, 16, Urges Leaders to Act on Climate, THE GUARDIAN (Jan. 25, 2019), <https://www.theguardian.com/environment/2019/jan/25/our-house-is-on-fire-greta-thunberg16-urges-leaders-to-act-on-climate>.

II. Uses of Anger and Fear to Create or Hinder Change

A. *Facing The Death Spiral*

On May 6, 2019, the United Nations published a summary of its report warning that human behavior was threatening up to a million species with extinction with grave implications to our water supplies and overall well-being and public health.¹⁴ Robert Watson, the chairman of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services that authored the article, told *Science* in stark terms: “What’s at stake here is a livable world.”¹⁵

That same day, Prince Harry and Meagan Markle’s first baby was born. In the week that followed, ABC’s *World News Tonight* spent more than seven minutes reporting on the royal baby’s birth—more time than the program spent covering climate change during the entirety of 2018.¹⁶ The program didn’t spend a single *second* covering climate change or species extinction during the week of May 6 – 12, 2019.¹⁷ The BBC News website did a bit better, publishing a story on its front page titled “Humans threaten 1 million species with extinction.”¹⁸ But it was tucked in at the bottom of the screen beneath three splashier headline stories about the royal baby.¹⁹

Not everyone ignored or downplayed the climate story: the environmental-focused news website Grist published a story titled “The royal baby is cute and all, but hello, the planet is on fire” criticizing mainstream media’s lack of coverage on the climate crisis.²⁰ In an article cheekily titled “Who’s Going to Tell the Royal Baby That Our Planet Is Unequivocally Dying?,” Vice journalist Derek Mead captured the surreality of the moment in stark terms:

¹⁴ Press Release, Intergovernmental Sci.-Pol’y Platform on Biodiversity & Ecosystem Servs., *supra* note 2.

¹⁵ Elizabeth Kolbert, *Climate Change and the New Age of Extinction*, THE NEW YORKER (May 20, 2019), <https://www.newyorker.com/magazine/2019/05/20/climate-change-and-the-new-age-of-extinction>.

¹⁶ Lisa Hymas & Ted MacDonald, *The Royal Baby Is Cute and All, but Hello, the Planet Is on Fire*, GRIST (May 21, 2019), <https://grist.org/article/the-royal-baby-is-cute-and-all-but-hello-the-planet-is-on-fire/>.

¹⁷ *Id.*

¹⁸ Matt McGrath, *Nature Crisis: Humans ‘Threaten 1m Species with Extinction’*, BBC (May 6, 2019), <https://www.bbc.com/news/science-environment-48169783>.

¹⁹ Screenshot on file with the author.

²⁰ Hymas and Macdonald, *supra* note 16.

When we're talking about extinction, we're not just talking about losing some cute monkeys bopping about in some forest somewhere, although they are important too. We're talking about everything we rely on to survive—our air, our water, our food, our medicines, the basic underpinnings of life itself—being eroded away at such a rapid clip that without fundamentally reshaping the way we interact with our world, we face a genuine death spiral. That might sound hyperbolic, but it's not. It also might sound hyperbolic to say this is the most important story, not just of today, not of this week or year or decade, but of our lives, but it's really not. . . . [R]oyal baby aside, the most important news of the day, the decade, our lives, is this: We have pushed the planet far past its limits, and we ignore that at our existential peril.”²¹

In his Vice article, Mead is certainly ringing the alarm bells, stoking his readers with justified panic and fear for the future of our planet. The trouble is that if what we humans need to take the threat of climate change seriously is an unrelenting, consciousness-raising alarm bell, articles like Mead’s are few and far between, too easy to scroll past on our phone or computer screen. And mainstream, prime-time media, with its tendency to prioritize stories about celebrities and royal babies over what Mead argues is “the most important story, not just of today, not of this week or year or decade, but of our lives,”²² is fueling our complacency.

B. How Dare You

If small bursts of panic and fear in the form of too-easy-to-scroll-past headlines about the climate crisis aren’t enough to prompt a widescale shift in human behavior, what is? 2019—the last full year before Covid-19 hijacked the world’s attention in an unprecedented way—showed us that if fear isn’t always an effective tool to convince us humans to confront our role in climate change and species extinction, maybe anger is. That year, we saw a glimpse into the role that precision-focused anger can play in sparking social change in the form of a hoodie-clad teenage girl from Sweden.

In January 2019, 16-year-old climate activist Greta Thunberg addressed an audience of world leaders in Davos,

²¹ Derek Mead, *Who’s Going to Tell the Royal Baby That Our Planet Is Unequivocally Dying?*, VICE (May 6, 2019), <https://www.vice.com/en/article/9kxaga/whos-going-to-tell-the-royal-baby-that-our-planet-is-unequivocally-dying>.”

²² *Id.*

Switzerland.²³ “Our house is on fire,” she began. “I am here to say, our house is on fire.”²⁴ Blending a wealth of scientific data (Logos) with vivid, emotional imagery (Pathos), Thunberg captured the world’s attention.

*We are at a time in history where everyone with any insight of the climate crisis that threatens our civilization – and the entire biosphere – must speak out in clear language, no matter how uncomfortable and unprofitable that may be. We must change almost everything in our current societies. The bigger your carbon footprint, the bigger your moral duty. The bigger your platform, the bigger your responsibility. Adults keep saying: ‘We owe it to the young people to give them hope.’ But I don’t want your hope. I don’t want you to be hopeful. **I want you to panic.** I want you to feel the fear I feel every day. And then I want you to act. I want you to act as you would in a crisis. I want you to act as if our house is on fire. Because it is.*²⁵

Thunberg’s rhetoric used the language of fear but was grounded in rage. That rage, combined with rational reliance on global scientific consensus, helped catalyze millions of people to action.

On September 23, 2019, Thunberg took the stage in New York City to address the United Nations. She’d traveled across the Atlantic by sailboat, shunning air travel because of its significant carbon footprint.²⁶ *This is all wrong*, Thunberg said, a look of utter disgust on her face.²⁷ *I shouldn’t be up here. I should be back in school, on the other side of the ocean. Yet you all come to us young people for hope. How dare you!*²⁸

You have stolen my dreams and my childhood with your empty words. And yet I’m one of the lucky ones. People are

²³Thunberg, *supra* note 13.

²⁴*Id.*

²⁵*Id.*

²⁶Jeff Brady, *Teen Climate Activist Greta Thunberg Arrives in New York After Sailing the Atlantic*, NPR (Aug. 28, 2019), <https://www.npr.org/2019/08/28/754818342/teen-climate-activist-greta-thunberg-arrives-in-new-york-after-sailing-the-atlan>.

²⁷Elizabeth Weise, *‘How Dare You?’ Read Greta Thunberg’s Emotional Climate Change Speech to UN and World Leaders*, USA TODAY (Sept. 23, 2019), <https://www.usatoday.com/story/news/2019/09/23/greta-thunberg-tells-un-summit-youth-not-forgive-climate-inaction/2421335001/>.

²⁸*Id.*

suffering. People are dying. Entire ecosystems are collapsing. We are in the beginning of a mass extinction, and all you can talk about is money, and fairy tales of eternal economic growth. How dare you!

For more than 30 years the science has been crystal clear. How dare you continue to look away, and come here saying that you're doing enough when the politics and solutions needed are still nowhere in sight. . . . You are failing us. But the young people are starting to understand your betrayal. The eyes of all future generations are upon you. And if you choose to fail us, I say: We will never forgive you. . . . We will not let you get away with this. Right here, right now is where we draw the line. The world is waking up. And change is coming, whether you like it or not.²⁹

Anger is not the only emotion Thunberg displayed. She also spoke from a place of deep loss and grief. Thunberg, along with countless young people and indeed people of all ages, sees the current climate crisis as the most profound existential challenge of their lifetimes. It's no wonder that "climate grief" is being studied by researchers around the world as we scramble to make sense of the jumble of emotions we experience when confronted with the fragility of our planet and our species' role in harming it.³⁰ "Climate grief" manifests in many forms, from "bereavement-like grief and trauma" to "anticipatory grief" to "transitional grief" to "eco-anxiety," and "is related both to changes that have already happened and to changes that are coming, or are in the process of happening."³¹

Grief and rage: those seem like appropriate emotions for the times we are living in. New words and phrases are being created to describe specific types of climate grief, sometimes rooted to a specific place or ecosystem—"Reef Grief," "Snow Anxiety"—and sometimes encompassing the other emotions that are bound up with loss and grief.³² Australian philosopher Glenn Albrecht has coined the word "solastalgia" to describe "homesickness because of environmental changes," as well as "terrafurie," which means "rage because of mindless destruction of nature."³³

²⁹ *Id.*

³⁰ See Panu Pihkala, *Climate Grief: How We Mourn a Changing Planet*, BBC (Apr. 2, 2020), <https://www.bbc.com/future/article/20200402-climate-grief-mourning-loss-due-to-climate-change>.

³¹ *Id.*

³² *Id.*

³³ *Id.*

Much has been written about, as feminist scholar Audre Lorde described it, “the uses of anger.”³⁴ Anger, Lorde said, “is loaded with information and energy.”³⁵ When “[f]ocused with precision it can become a powerful source of energy serving progress and change.”³⁶

“Anger is the deepest form of compassion,” wrote poet and philosopher David Whyte.³⁷ It is “the purest form of care, the internal living flame of anger always illuminates what we belong to, what we wish to protect and what we are willing to hazard ourselves for.”³⁸ In *Rage Becomes Her: The Power of Women’s Anger*, Soraya Chemaly implores her reader to “envision[] anger as a transitional tool that helps you to change the world around you.”³⁹ “Anger has a bad rap,” Chemaly acknowledges,

but it is actually one of the most hopeful and forward thinking of all our emotions. It begets transformation, manifesting our passion *and* keeping us invested in the world. It is a rational *and* emotional response to trespass, violation, and moral disorder. It bridges the divide between what “is” and what “ought” to be, between a difficult past and an improved possibility.⁴⁰

Anger, says Chemaly, “isn’t what gets in our way - it *is* our way.”⁴¹

C. *If Cows Were a Country*

While there are many causes of the current climate crisis, “food production is the largest cause of global environmental change.”⁴² Our species’ seemingly insatiable hunger for dairy and meat shoulders much of the blame. Much has been written about the

³⁴ See AUDRE LORDE, *The Uses of Anger: Women Responding to Racism*, in *SISTER OUTSIDER* 124 (1984).

³⁵ *Id.* at 127.

³⁶ *Id.*

³⁷ DAVID WHYTE, *CONSOLATIONS: THE SOLACE, NOURISHMENT AND UNDERLYING MEANING OF EVERYDAY WORDS* 12 (2014).

³⁸ *Id.*

³⁹ SORAYA CHEMALY, *RAGE BECOMES HER: THE POWER OF WOMEN’S ANGER* xiii (2018).

⁴⁰ *Id.* at xx.

⁴¹ *Id.* at xxiii.

⁴² Walter Willet et. al., *Food in the Anthropocene: The EAT–Lancet Commission on Healthy Diets from Sustainable Food Systems*, 393 *LANCET* 447, 449 (Jan. 2019).

science underpinning the animal agriculture industry's vast contributions to the current climate crisis and habitat destruction.⁴³ Experts typically attribute about 15 percent of the world's carbon emissions to livestock, but the Worldwatch Institute audited that number in 2009 and found uncounted emissions that bring the livestock contribution to 51 percent.⁴⁴ "Humans and the animals we eat are 96% of the carbon mass of mammals in the world," explained Steven Chu, Nobel Prize winning physicist.⁴⁵ All other mammals—all the whales and elephants and lions and rats and deer and all the rest—they together make up the other 4%.⁴⁶ Chu put this into context in stark terms: "If cattle and dairy cows were a country, they would have more greenhouse gas emissions than the entire EU 28. Just something to think about."⁴⁷

There is (much) more to say about the current science around climate change and the huge role that animal agriculture is playing to perpetuate it.⁴⁸ "A vegan diet is probably the single biggest way to reduce your impact on planet Earth, not just greenhouse gases, but global acidification, eutrophication, land use and water use," said

⁴³See, e.g., Francis Vergunst & Julian Savulescu, *Five Ways the Meat on Your Plate Is Killing the Planet*, THE CONVERSATION (Apr. 26, 2017), <https://theconversation.com/five-ways-the-meat-on-your-plate-is-killing-the-planet-76128> (Laying out five ways meat is harmful: (1) The environmental impact is huge; (2) It requires masses of grain, water and land; (3) It hurts the global poor; (4) It causes unnecessary animal suffering, and (5) It is making us ill).

⁴⁴ Jeff McMahon, *Meat and Agriculture Are Worse for the Climate Than Power Generation*, Steven Chu Says, FORBES (April 4, 2019), <https://www.forbes.com/sites/jeffmcmahon/2019/04/04/meat-and-agriculture-are-worse-for-the-climate-than-dirty-energy-steven-chu-says/?sh=720217fe11f9>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ A 2018 study conducted by University of Michigan and Tulane University and published in Environmental Research Letters showed that meat and dairy are responsible for over 83% of diet-related greenhouse gas emissions in the United States. See Martin C. Heller et. al., *Greenhouse Gas Emissions and Energy Use Associated with Production of Individual Self-selected US Diets*, ENV'T RSCH. LETTERS (Mar. 2018), <https://iopscience.iop.org/article/10.1088/1748-9326/aab0ac>. See also Joe Loria, *15,000 Scientists from 184 Countries Urge People to Go Vegan to Save the Planet*, MERCY FOR ANIMALS (Nov. 17, 2017), <https://mercyforanimals.org/blog/15000-scientists-from-184-countries-urge/> ("The Alliance of World Scientists, a group of 15,000 scientists from 184 countries, met last month to discuss preventing environmental destruction and concluded that it's time for humans to change their behavior and switch to a plant-based diet.") See also Damian Carrington, *Avoiding Meat and Dairy Is 'Single Biggest Way' to Reduce Your Impact on Earth*, THE GUARDIAN (May 31, 2018), <https://www.theguardian.com/environment/2018/may/31/avoiding-meat-and-dairy-is-single-biggest-way-to-reduce-your-impact-on-earth>.

Joseph Poore, a researcher at the University of Oxford.⁴⁹ “It is far bigger than cutting down on your flights or buying an electric car.”⁵⁰

This article takes that science as a given and works from the premise that unless we do something drastic to stop the march toward irreversible climate disaster that involves our relationship to the things we consider food, the effects will be unthinkable.⁵¹ This article is concerned with the urgency of the current climate crisis, what is being done about it with respect to the food we eat and why those efforts are falling short, and what *should* be done instead.⁵²

This article also works from the premise that the animal agriculture industry is dangerous not only because of its contribution to the climate crisis and the sixth mass extinction. It also represents a global system of unimaginable suffering and cruelty that—socially acceptable and legally sanctioned—exploits, oppresses, and commodifies billions of individuals every single year.⁵³ The vast

⁴⁹ Carrington, *supra* note 48

⁵⁰ *Id.*

⁵¹ See, e.g., Fredrik Hedenus et. al, *The Importance of Reduced Meat and Dairy Consumption for Meeting Stringent Climate Change Targets*, 124 CLIMATIC CHANGE 79 (2014).

⁵² See Emily Kasriel, *Can Dairy Adapt to Climate Change?*, BBC (Dec. 8, 2020), <https://www.bbc.com/future/article/20201208-climate-change-can-dairy-farming-become-sustainable>.

⁵³ See Andrew Jacobs, *Is Dairy Farming Cruel to Cows?*, N.Y. TIMES (Dec. 29, 2020), <https://www.nytimes.com/2020/12/29/science/dairy-farming-cows-milk.html>. In the article, Jacobs acknowledges some basic truths about the lives of cows born into the dairy industry: “Dairy cows are repeatedly impregnated by artificial insemination and have their newborns taken away at birth. Female calves are confined to individual pens and have their horn buds destroyed when they are about eight weeks old. The males are not so lucky. Soon after birth, they are trucked off to veal farms or cattle ranches where they end up as hamburger meat. The typical dairy cow in the United States will spend its entire life inside a concrete-floored enclosure, and although they can live 20 years, most are sent to slaughter after four or five years when their milk production wanes.” *Id.* Confronting the plight of the animals whose lives are wholly trapped within the meat and dairy industries is an emotional thing. In his 2020 Academy Awards speech, longtime animal rights activist Joaquin Phoenix’s voice cracked and strained with emotion as he urged the audience to consider the lives of dairy cows. See Oscars, *Joaquin Phoenix Wins Best Actor*, YOUTUBE (Mar. 11, 2020), https://www.youtube.com/watch?v=qiiWdTz_MNc. “We feel entitled to artificially inseminate a cow and when she gives birth we steal her baby, even though her cries of anguish are unmistakable,” he said. “And then we take her milk that’s intended for the calf and we put it in our coffee and cereal.” *Id.* See also Kelsey Piper, *Farms Have Bred Chickens So Large That They’re in Constant Pain*, VOX (Sep. 23, 2020) <https://www.vox.com/future-perfect/21437054/chickens-factory-farming-animal-cruelty-welfare>. See also Eric Schlosser, *America’s Slaughterhouses Aren’t Just Killing Animals*, THE ATLANTIC (May 12, 2020),

majority of those individuals are nonhuman animals whose entire lived experience from birth to death is regulated and controlled according to a complex web of market forces, but the rest are human workers—disproportionately immigrants and people of color—who spend day after day plucking, debeaking, milking, and killing—all for low wages and at great risk to their own physical and mental health.⁵⁴

The logical conclusion of this grim reality? Eating animals is an outdated practice that causes more harm than good according to virtually every conceivable metric.⁵⁵ If ever there was a moment where science supported a coordinated global effort to bring forth a drastic change to our consumption habits, this is it. If this sounds like a stretch, we have in 2020 proof of the fact that when faced with a serious imminent threat to our well-being, our species is in fact capable of widespread, life-altering changes to our behavior.⁵⁶ What makes imminent climate collapse, the sixth mass extinction, and widespread suffering of billions of farm animals and millions of workers feel less urgently threatening to us than Covid-19?

<https://www.theatlantic.com/ideas/archive/2020/05/essentials-meatpacking-coronavirus/611437/>.

⁵⁴ See, e.g., Dylan Matthews & Byrd Pinkerton, *How Chicken Plants Became More Dangerous Places to Work than Coal Mines*, VOX (Oct. 7, 2020),

<https://www.vox.com/future-perfect/21502225/chicken-meatpacking-plant-future-perfect-podcast>. See also Schlosser, *supra* note 53. See also Amy J. Fitzgerald et al, *Slaughterhouses and Increased Crime Rates: An Empirical Analysis of the Spillover from “The Jungle” into the Surrounding Community*, ORG. & ENV’T 1, 8, 10 (2009),

http://www.animalstudies.msu.edu/Slaughterhouses_and_Increased_Crime_Rates.pdf. See also Tom Philpott, *Refugees Make Your Dinner. Literally*. MOTHER JONES (Jan. 31, 2017), <https://www.motherjones.com/environment/2017/01/meat-industry-refugees-trump/>. John Oliver did a segment called Meatpacking in February 2021 in which he heighted the many harms facing workers in the animal agriculture industry. See *Last Week Tonight with John Oliver: Meatpacking* (HBO Feb. 22, 2021),

<https://www.youtube.com/watch?v=IhO1FcjDMV4&feature=share>.

⁵⁵ It may even contribute to and future pandemics and public health crises. See, e.g., Danush Parvaneh, *The Next Pandemic Could Come from Factory Farms*, VOX (Aug. 18, 2020), <https://www.vox.com/videos/2020/8/18/21374061/factory-farming-meat-coronavirus-pandemic>.

⁵⁶ See Lydia Denworth, *Masks Reveal New Social Norms: What a Difference a Plague Makes*, SCI. AM. (May 14, 2020),

<https://www.scientificamerican.com/article/masks-reveal-new-social-norms-what-a-difference-a-plague-makes/>.

D. “Real Meat” and #SoyBoys

People are hardwired to resist change and cling to the safety of the past.⁵⁷ And in exploring our species’ appetite for animal-derived meat and dairy, it’s important to consider the significant role that traditional gender roles, masculinity ideals, and speciesism play in dominant food culture.⁵⁸ A close look reveals a narrative of fear perpetuating our current food culture. Meat and meat-eating occupies a very specific cultural space in that not only signifies “the good old days” and tradition, but also serves as a long-standing symbol of traditional—and white—masculinity, dominance, and power.⁵⁹ Meat-eating is central aspect in our patriarchal world, one that literally exploits female bodies and reproductive lives for human consumption, one that figuratively views women as nothing more than pieces of meat.

In her landmark work *The Sexual Politics of Meat: A Feminist-Vegetarian Critical Theory*, feminist scholar Carol J. Adams explored the relationship between patriarchal values and meat eating and argues that “male dominance and animals’ oppression are linked by the way that both women and animals function as absent referents in meat eating and dairy production, and that feminist theory logically contains a vegan critique . . . just as veganism covertly challenges patriarchal society.”⁶⁰ She describes as a “racialized politics of meat” that worked to split the “world into intellectually superior meat eaters and inferior plant eaters”⁶¹

⁵⁷ Eleanor Bruce, *Resisting Change*, MINDTOOLS (May 30, 2019), <https://www.mindtools.com/blog/resisting-change/>.

⁵⁸ For an examination of the historical and contemporary connections between attitudes around plant- and animal-eating, gender, and race, see Iselin Gambert & Tobias Linné, *From Rice Eaters to Soy Boys: Race, Gender, and Tropes of ‘Plant Food Masculinity,’* 7 ANIMAL STUD. J., 129, 133 (2018)

⁵⁹ Juliana Roth, *The Meat Industry’s Exploitation of Toxic Masculinity Hurts Us All*, THE ESTABLISHMENT (Mar. 29, 2016), <https://medium.com/the-establishment/how-the-meat-industry-exploits-toxic-masculinity-868f10989e> (“Eating meat, after all, has long been associated with masculinity; since pretty much the dawn of advertising, commercials have explicitly linked meat-eating to desirable manliness. To name but a few of the most egregious examples from the last few years, there was the Carl’s Jr.’s ad depicting X-Men’s Mystique morphing into a ripped manly man after consuming a bacon cheeseburger (with the tagline “Man Up”); Burger King’s “I Am Man” commercial, in which a guy sings about not settling for “chick food”; and the Taco Bell “Guys Love Bacon” campaign.”)

⁶⁰ See CAROL J. ADAMS, *THE SEXUAL POLITICS OF MEAT: A FEMINIST-VEGETARIAN CRITICAL THEORY* (20th Anniversary ed. Continuum, 2010). See also Carol J. Adams, *The Sexual Politics of Meat: The Book*, <https://caroljadams.com/spom-the-book> (last visited Sept. 8, 2021).

⁶¹ See ADAMS, *supra* note 60 at 54.

In the late 19th century, the confluence of institutionalized racism, sexism, and colonialism “led to widespread sentiments connecting animal-eating (ie, meat and dairy) to intellectual superiority and virile masculinity exemplified by the white western man.”⁶² Plant-eating, meanwhile, “was associated with Asian and other non-white cultures, and was thought to represent emasculation and to confer weakness of both mind and body.”⁶³

The colonial-era tropes around plant- and animal-eating are alive and well in today’s culture. Mainstream TV shows and movies increasingly include references to plant-based meat, often in disparaging ways that imply that plant-based meat could never taste as good as animal-derived meat,⁶⁴ or as a not-so-subtle attack on traditional norms of masculinity.⁶⁵ The tropes extend beyond the screen: “In France, they take offence if you don’t eat meat, like you are rejecting their culture,” said Lori Chen, member of a 2016 delegation from the Buddhist Tzu Chi Foundation promoting “a Day of Meatlessness.”⁶⁶ Added delegation member Hanford Lin, “In China, you are emasculated if you only eat plants.”⁶⁷

The culture wars of the Trump Era included various attacks on vegan advocates and plant-based food. The alt-right slur and viral social media hashtag “Soy Boy,” which references the idea of men who consume soy products, is used to attack men who are perceived to be feminine in appearance and in ideology.⁶⁸

Needless to say, the trope of “real men eat meat” is a powerful one in today’s society.⁶⁹ Scholar Laura Wright has explored

⁶² Gambert & Linné, *supra* note 58, at 133 (citing Melanie DuPuis, Angels and Vegetables: A Brief History of Food Advice in America, 7 *GASTRONOMICA: THE J. FOOD & CULTURE* 34-44 (2007)).

⁶³ *Id.* (“the racial rhetoric of the day ... portrayed Asians as effeminate and enfeebled and the Chinese ‘leaf diet’ as a cause of degeneracy”).

⁶⁴ See, e.g., the opening scenes of *COMING TO AMERICA 2* (Paramount Pictures 2021), where plant-based meat is humorously dismissed as sustainable yet inedible.

⁶⁵ See, e.g., *The Crew* (Netflix 2021) (featuring a woman-owned NASCAR team sponsored by the fictional plant-based meat brand “Fake Steak”).

⁶⁶ *Paris Climate Change Summit and the Taboo of Meat-Eating*, EURONEWS (Sept. 12, 2015), <https://www.euronews.com/2015/12/09/paris-climate-change-summit-and-the-taboo-of-meat-eating>.

⁶⁷ *Id.*

⁶⁸ See Gambert & Linné, *supra* note 58, at 133.

⁶⁹ See Victoria Gagliardo-Silver, *Fragile Masculinity Says Meat Is Manly. If We Don’t Challenge That, People Will Die and the Earth Will Be Irreversibly Damaged*, INDEPENDENT (Apr. 4, 2019), <https://www.independent.co.uk/voices/fragile-masculinity-mean-eaters-death->

veganism and the threatening space that it occupies in today's culture.⁷⁰ The vegan body, she argues, "threatens the status quo in terms of what we eat, wear, and purchase—and also in how vegans choose not to participate in many aspects of the mechanisms undergirding mainstream culture."⁷¹ These threats," she argues, "are acutely felt in light of post-9/11 anxieties over American strength and virility."⁷² A discourse has emerged that seeks, among other things, to bully veganism out of existence as it is poised to alter the dominant cultural mindset."⁷³

In considering meat's long-standing association with norms of traditional masculinity, it's important to recognize that those norms are harmful in a much broader sense. In January 2019, the American Psychological Association published a report concluding that "traditional masculinity—marked by stoicism, competitiveness, dominance and aggression—is, on the whole, harmful."⁷⁴

The idea that people, and especially men, might be shamed for embracing vegan food is a real one, with recent research indicating that one of the biggest barriers to veganism for men is shame, fear, social stigma, and traditional masculinity ideals. A study from the University of Southampton found that young men "are afraid to choose the vegetarian option in a restaurant for fear of being socially shunned," even if they dislike animal-derived meat.⁷⁵ The yearlong research study found that men "experienced 'social isolation' among friends after admitting to reducing their consumption of meat."⁷⁶ In a Twitter poll directed at men, 45% of respondents reported their biggest barrier to leading a vegan diet was social stigma. 39% said their biggest barrier was masculinity.⁷⁷

Given the deep-seeded and deeply enmeshed fears around plant-eating being linked to emasculation and weakness, it makes

vegan-vegetarian-earth-a8855331.html (citing Tweet declaring "'real men eat red meat and punch nerds in the face'").

⁷⁰ See LAURA WRIGHT, *THE VEGAN STUDIES PROJECT: FOOD, ANIMALS, AND GENDER IN THE AGE OF TERROR* (2015), available at <https://ugapress.org/book/9780820348568/the-vegan-studies-project/>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Pappas, *supra* note 9, at 34.

⁷⁵ *Men Fear Social Shame of Ordering Vegetarian Dishes, Study Finds*, THE TELEGRAPH, (Aug. 26, 2018), https://www.telegraph.co.uk/news/2018/08/26/men-fear-social-shame-orderingvegetarian-dishes-study-finds/?WT.mc_id=tmg_share_fb.

⁷⁶ *See id.*

⁷⁷ Gagliardo-Silver, *supra* note 69.

sense that vegan food advocates and producers have recently been playing into dominant masculinity narratives, offering burgers that “bleed” and using marketing designed to appeal to men who are afraid that vegan eating may make them weak or effeminate.⁷⁸ Darlene Juschka, a professor in Religious and Women’s Studies at the University of Regina, argues that “the raw and bloody beef burger is associated with a kind of robust masculinity,” and she perceives the “simulated bleeding [of some vegan burgers] as a way of perhaps making permissible an otherwise ‘soft’ and ‘feminine’ vegan food.”⁷⁹ Apart from bleeding burgers, brands like Beyond Meat have branded their vegan burgers with masculine ideas like “Beast,” and used traditionally masculine, muscular men to promote their products.⁸⁰

The current trend of plant-based food brands marketing “bleeding” or “beast” burgers amounts to an approach of assimilation, of trying to shed previous associations of vegan food being coded as “feminine” or a sign of weakness or emasculation and reframing these products so that they occupy the same cultural space of strength and traditional masculinity as animal-based food. Journalist Sarah Todd summed it up this way: “The strategy is a practical one: Rather than trying to push men to eat less meat and embrace plant-based diets, Beyond Meat and Impossible Foods want to expand the definition of what meat is.”⁸¹ In other words, vegan meat is “real meat” too.

While the notion of men who adhere to traditional masculinity norms embracing vegan diets is a good one, it’s less clear whether the strategy of perpetuating those norms in a plant-based package is sound. Marketing vegan food to exist rhetorically within traditional norms of masculinity may succeed in getting more people to eat incrementally more vegan food—and that is surely a good thing for animals and for the planet. But is it enough to create the sort

⁷⁸ See Lara Williams, *Why Even Vegans Crave Burgers That “Bleed,”* VICE, (Nov. 15, 2018), <https://www.vice.com/en/article/nepbad/why-even-vegans-crave-burgers-that-bleed>.

⁷⁹ *Id.*

⁸⁰ Roth, *supra* note 59 (“One vegan meat company, Beyond Meat, even offers a “Beast Burger” that is packaged in colors that may appeal to men, along with a photograph of the burger sizzling on a grill. The use of the masculine word “beast” might attract meat-eating men who identify with traditional masculine norms looking to switch over.)

⁸¹ Sarah Todd, *Beyond Meat and Impossible Foods Burgers Could Change the Way We Think About Masculinity*, QUARTZ (Apr. 27, 2019), <https://qz.com/quartz/1603993/beyond-meats-vegan-burgers-could-change-the-way-we-think-about-masculinity/>.

of fundamental paradigm shift we need in the way we think about food, and the way we think about ourselves?

Max Elder, the research director at the Institute for the Future, a nonprofit research center in Silicon Valley, is skeptical, saying that “If Beyond Meat and Impossible Foods succeed in instilling this new idea of meat, the cultural link between meat and masculinity may well remain intact. . . . We can’t just eat our way out of toxic masculinity.”⁸² He argues that “because these companies emphasize how similar their products are to meat in taste and texture, they may be less likely to make people question their meat-eating habits and engage in deeper reflections about the relationship between food and gender.”⁸³

There is arguably an even bigger danger inherent in promoting vegan food within the rhetoric of traditional masculinity, and it has to do with fear and rage. Given the known harms inherent in norms of traditional masculinity both to individuals and society more broadly,⁸⁴ perpetuating rhetoric that binds vegan food to those norms may make it more difficult for people to break free from the effects of those harms.

E. The Misogyny of Climate Deniers and Greta Haters

Given the degree to which veganism threatens to disrupt long-held norms around masculinity and food, it’s no wonder that plant-based foods are being met with resistance everywhere from social media to the halls of Congress. Because of the role that animal-derived food plays in exacerbating the current climate crisis and threat of mass species extinction, it’s also necessary to understand the role that traditional masculinity norms play in perpetuating skepticism among some people around the effects—or even existence of—climate change, as well as a resistance to take meaningful action to prevent it.

After Greta Thunberg’s speech at the UN in 2019, she faced an outpouring of misogynistic rage. This was perhaps unsurprising: a 2014 study analyzing the language of a focus group of climate skeptics revealed that “for climate skeptics . . . it was not the environment that was threatened, [but rather] a certain kind of modern industrial society built and dominated by their form of

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See Pappas, *supra* note 34.

masculinity.”⁸⁵ In an article published about the misogynistic response to Thunberg’s activism, scholars expanded on previous research that demonstrates a link between climate change denial and misogyny.⁸⁶ “At a deep level,” they wrote, “the language of climate denialism is tied up with a form of masculine identity predicated on modern industrial capitalism – specifically, the Promethean idea of the conquest of nature by man, in a world especially made for men. By attacking industrial capitalism, and its ethos of politics as usual, Thunberg is not only attacking the core beliefs and world view of certain sorts of men, but also their sense of masculine self-worth. Male rage is their knee-jerk response.”⁸⁷ The authors noted that while her attackers want to frame her as nothing more than a hysterical child, “in reality, Thunberg is cutting through - rather than displaying - emotionalism. What certain kinds of men do not wish to acknowledge is that asking for action on climate change is entirely rational.”⁸⁸

Given this tendency towards “male rage” as a fear response to rational discussions around the broad changes we need to make in our dominant food culture in response to impending climate disaster, where do we go from here? Is promoting vegan food within the framework of traditional masculinity really the path to the cultural shift we need in this moment? Given what we know about misogyny and the harms of the rhetoric of so-called traditional masculinity, a better approach would be for veganism to embrace an explicit rejection of that rhetoric rather than assimilate into it.

F. Change is Coming, Whether You Like It or Not

Politicians on the right and the left are fearful of disrupting the status quo when it comes to our cultural obsession with animal-derived meat and milk. At the 2019 Conservative Political Action Conference (or C-PAC), former Trump White House adviser Sebastian Gorka infamously denounced Rep. Alexandria Ocasio-Cortez and the Green New Deal with the pithy admonishment, “They want to take away your hamburgers.”⁸⁹ The irony of Gorka attacking

⁸⁵ Martin Gelin, *The Misogyny of Climate Deniers*, THE NEW REPUBLIC (Aug. 28, 2019), <https://newrepublic.com/article/154879/misogyny-climate-deniers>.

⁸⁶ See Camilla Nelson & Meg Vertigan, *Misogyny, Male Rage and the Words Men Use to Describe Greta Thunberg*, THE CONVERSATION (Sept. 30, 2019), <https://theconversation.com/misogyny-male-rage-and-the-words-men-use-to-describe-greta-thunberg-124347>.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Antonia Noori Farzan, *The Latest Right-Wing Attack on Democrats: ‘They Want to Take Away Your Hamburgers,’* THE WASH. POST, (Mar. 1, 2019),

Ocasio-Cortez and the Green New Deal is that none of the politicians supporting the Deal, which endeavors to tackle the climate crisis in sweeping ways,⁹⁰ have actually suggested outlawing beef or other animal meat consumption.⁹¹ Ocasio-Cortez herself isn't even vegetarian, much less vegan (though she allegedly went vegetarian for lent in 2021).⁹²

With respect to the Green New Deal, Ocasio-Cortez appears keenly aware of the prevailing fear-driven rhetoric around the threat that plant-based foods pose to the animal agriculture industry. Not only is she reluctant to try to challenge it, but in some cases, she has even perpetuated it:

In the [Green New] Deal, what we talk about, and it's true, is that we need to take a look at factory farming, you know? Period. It's wild. And so, it's not to say you get rid of agriculture, it's not to say we're gonna force everybody to go vegan or anything crazy like that. But it's to say, 'Listen, we gotta address factory farming. Maybe we shouldn't be eating a hamburger for breakfast, lunch, and dinner. Like, let's keep it real.'⁹³

By invoking the trope of the “crazy vegan”—a common rebuke of vegan and plant-based advocacy—Ocasio-Cortez's rhetoric reinforces and perpetuates the idea that it would be “crazy” for large numbers of people to go vegan, and implies that all that is needed to tackle the current climate crisis is a small incremental change amounting to not eating a hamburger three times a day (query whether twice a day would be good enough). The problem with this rhetoric is that given the science around animal meat and dairy's contributions to climate change and the exploitation bound up in the

<https://www.washingtonpost.com/nation/2019/03/01/latest-right-wing-attack-democrats-they-want-to-take-away-your-hamburgers/>.

⁹⁰ Lisa Friedman, *What Is the Green New Deal? A Climate Proposal, Explained*, N.Y. TIMES (Feb. 21, 2019), <https://www.nytimes.com/2019/02/21/climate/green-new-deal-questions-answers.html>.

⁹¹ Farzan, *supra* note 89.

⁹² Chelsea Ritschel, *Alexandria Ocasio-Cortez Goes Vegetarian in Memory of Colleague's Son*, THE INDEPENDENT, (Feb. 19, 2021), <https://www.independent.co.uk/life-style/aoc-vegetarian-lent-jamie-raskin-tommy-vegan-b1804888.html>.

⁹³ Kat Smith, *How the Green New Deal Will Affect the Way We Eat*, LIVE KINDLY, <https://www.livekindly.co/how-will-the-green-new-deal-affect-agriculture/> (last visited Sept. 9, 2021).

animal agriculture industry, small incremental changes are not enough.⁹⁴

As Greta Thunberg—herself a vegan—told a room full of leaders several times her age, “[t]he world is waking up. And change is coming, whether you like it or not.”⁹⁵ We ignore that fact at our peril. What’s needed is a total paradigm shift around the idea of, and our relationship to, food. And the best news is that it appears that the moment we are living in contains all the necessary ingredients that social scientists say is necessary to create meaningful behavioral change.

Building on work done by David Gleicher in the 1960s, organizational development consultant and community activist Kathie Dannemiller developed a “Formula for Change” that provides a model to assess the capacity for individual or collective change.⁹⁶ Dannemiller’s formula, $C = D \times V \times F > R$, represents the notion that three factors must be present for meaningful change to occur.⁹⁷ These factors are: (1) **D**issatisfaction with how things currently are; (2) a **V**ision of what alternative is possible; and (3) the **F**irst concrete steps that can be taken towards that Vision.⁹⁸ If the sum of these three factors is greater than any existing **R**esistance to change, then **C**hange is possible.⁹⁹ So, $C = D \times V \times F > R$. As this paper will show, we have all of Dannemiller’s ingredients for change at our fingertips: the question is whether they are greater than the current resistance to it.

That the Covid-19 crisis normalized in a matter of months drastic behavioral changes throughout the globe including significant reductions in travel, social distancing, and mask-wearing shows us that rapid, widespread behavioral change is in fact possible for us change-resistant humans. “Social norms can change rapidly,”

⁹⁴ See Dylan Moon, *Why Do Some Green Activists Eat Meat?*, SCI. AM. (May 21, 2019), <https://blogs.scientificamerican.com/observations/why-do-some-green-activists-eat-meat/> (discussing the fact that multinational organizations and gatherings like the UN and Amnesty International gather to discuss ways to reverse the negative effects of climate change, they serve meat and dairy at their catered events).

⁹⁵ Weise, *supra* note 27.

⁹⁶ Kathleen D. Dannemiller & Robert W. Jacobs, *Changing the Way Organizations Change: A Revolution of Common Sense*, J. APPLIED BEHAV. SCI., 480, 498 (1992). See also Al Blixt, *Kathie Dannemiller on the DVF Formula for Change*, YOUTUBE (Dec. 31, 2018), <https://www.youtube.com/watch?v=ysNuM2oVqBU>.

⁹⁷ Dannemiller, *supra* note 96, at 480.

⁹⁸ *Id.* at 483.

⁹⁹ *Id.*

explained social psychologist Catherine Sanderson, “and it doesn’t take everybody. . . . The tipping point for achieving enough critical mass to initiate social change proved to be just 25 percent of participants. They become the social influencers, the trendsetters. You get this sweep.”¹⁰⁰ Science writer Lydia Denworth notes that even “weird behaviors can become standard, and long-standing customs can change,” citing indoor smoking as one example.¹⁰¹ “To bring about such change,” she writes, “a new behavior must first ascend to the status of a social norm. Norms include both the perception of how a group behaves and a sense of social approval or censure for violating that conduct.”¹⁰²

This article explores the “uses of anger” and other emotions—in particular, fear and grief—as tools of, or hindrances to, change. Specifically, this article is interested in “change” as it relates to humans’ relationship to food insofar as our animal-laden diets are a key contributor to climate change and other harms. It examines the roles that fear, rage, and other emotions play in shaping the legal and cultural discourse around the food we eat, the words we use to describe that food, and what we even consider to be “food” in the first place. It argues that fear is a powerful rhetorical tool leveraged by policymakers and legislators to hold on to the status quo, to preserve outdated norms and customs, to cling to the past. The future, with its technologically innovative milks and meats made from plants or grown from cultured cells, is frightening to those who feel comforted by tradition, by things staying the same as they’ve always been, by those who don’t want to change.¹⁰³ This is why fear-driven rhetoric works well when used by animal agriculture industry advocates and not nearly as well when it’s been used in doomsday news headlines as a means to persuade consumers to take a different path.

Maybe there’s a smarter way to leverage the power of fear—and rage—to inspire consumer change. This article offers mandatory

¹⁰⁰ Denworth, *supra* note 56.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See Brief of State of Missouri at 4-6, *Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694 (8th Cir. 2021) (No. 19-3154) (quoting Gillian Tett, *Can You Swallow the Idea of Lab-Grown Meat?*, FIN. AM. (Feb. 4, 2020), <https://channels.ft.com/en/rethink/lab-grown-meat/>) (“Artificial meat alternatives are moving from science fiction to supermarket shelves” and “Today, science fiction is soon approaching reality, at least for artificial or lab-grown meat alternatives As one food writer put it, ‘When I originally heard about lab-grown meat, my first thought was ‘yuck.’ The idea of ‘growing’ a steak or chicken leg in a test tube sounds like a scene from science fiction, not haute cuisine.”).

Graphic Warning Labels (GWLs) on animal-derived food as one way to blend scientific data with emotionally provocative imagery to change human behavior. Whatever the tactics, change is coming, and it can't come soon enough. In her essay "The Uses of Anger," feminist scholar Audre Lorde wrote of the need for change to be sweeping, to draw a boundary between what used to be and what comes next.¹⁰⁴ "And when I speak of change," she said, "I do not mean a simple switch of positions or a temporary lessening of tensions, nor the ability to smile or feel good. I am speaking of a basic and radical alteration in those assumptions underlying our lives."¹⁰⁵ The change we need in our relationship to food is of the sort Lorde envisions. It is a line in the sand. It says loudly and clearly, this behavior ends now. A new world is waiting, if we would only create it.

III. Uses of Fear to Protect the Animal Agriculture Industry

Before sweeping paradigm-shifting change can take place, we humans need to want to change, and be encouraged to change. Given the current climate emergency and the role the animal agriculture industry plays in perpetuating it, combined with the real harms the industry imposes on the animals and workers within it, politicians and governments—given their degree of power and influence—should be leading the charge. Instead, we see fear driving them to action designed to protect the animal agriculture industry, slowing progress and thwarting change.

Specifically, there are examples throughout the world of state, national, and international governments alike introducing and passing legislation that amount to fear-based linguistic battles with plant-based food. Where lawmakers could be allies in developing strategies to promote climate-friendly plant-based food and discourage consumption of environmentally destructive animal-based food, they are doing just the opposite, making it harder for plant-based food advocates to have a level playing field with the animal agriculture industry, much less get the upper hand in the fight against climate change and species extinction. This section explores three examples of lawmakers trying to do just that.

¹⁰⁴ LORDE, *supra* note 34, at 122.

¹⁰⁵ *Id.* at 122.

In each example explored below, lawmakers have attempted (often successfully) to pass laws that would make it difficult if not impossible for plant-based foods to use words like “meat” and “milk” on their packages. The proposed laws, while distinct in their specific wording, share a common theme in their attempt to justify their own existence: they claim that the laws are necessary to prevent plant-based foods from “misleading” or “confusing” consumers who may mistake them for animal-derived meat and dairy.¹⁰⁶ As this paper will illustrate, these arguments are disingenuous at best and themselves misleading at worst. At bottom, they mask the real motivation behind lawmakers’ interest in passing these laws: fear. Namely, fear about the possible decline of the animal agriculture industry in light of the rise in popularity of plant-based food and cultured meat.

A. “*Real Meat*” Acts: Misleading Arguments about Meaty Words for Plant-Based Foods

Since 2018 at least 18 states in the United States have either introduced or passed legislation restricting use of the word “meat.”¹⁰⁷

¹⁰⁶ See Real MEAT Act of 2019, H.R. 4881, 116th Cong. § 2(5) (2019) (“Both USDA and FDA are responsible for enforcing a universal standard that labels are truthful and not misleading.”) See also MO. REV. STAT. § 265.494 (2018) (“No person advertising, offering for sale or selling all or part of a carcass or food plan shall engage in any misleading or deceptive practices, including, but not limited to, any one or more of the following: . . . (7) Misrepresenting the cut, grade, brand or trade name, or weight or measure of any product, or misrepresenting a product as meat that is not derived from harvested production livestock or poultry . . .”)

The stated legislative purpose of Arkansas’ Act 501 is “to protect consumers from being misled or confused by false or misleading labeling of agricultural products that are edible by humans. ARK. CODE ANN. § 2-1-301 (2019). *Report of the Committee on Agriculture and Rural Development on the Proposal for a Regulation of the European Parliament and of the Council Amending Regulations Establishing a Common Organisation of the Markets in Agricultural Products*, at 172, COM (1308/2013) (July 5, 2019) A8-0198. Amendment 171 seeks to protect the dairy industry by prohibiting “any [] commercial indication or practice likely to mislead the consumer as to the product’s true nature or composition.

The “misleading” consumer argument has also been pursued—so far unsuccessfully—in the courts in the context of plant milk. For an overview of cases where courts rejected the “misleading consumers” argument as it relates to plant milk products using the word “milk,” see Iselin Gambert, *Got Mylk?: The Disruptive Possibilities of Plant Milk*, 84 BROOKLYN L. REV. 801, 812–17 (2019).¹⁰⁷ Elaine Watson, *Plant-Based and Cell-Cultured ‘Meat’ Labeling Under Attack in 25 States*, FOOD NAVIGATOR-USA (May 29, 2019), <https://www.foodnavigator-usa.com/Article/2019/05/29/Plant-based-and-cell-cultured-meat-labeling-under-attack-in-25-states>.

See also Brief of State of Missouri, *supra* note 103, at 12 (“In 2019, 60 bills were introduced in 31 states, and more than 12 were enacted.”). The following states have introduced legislation: Arizona, Arkansas, Colorado, Georgia, Illinois,

The states have taken a range of approaches, but they all seek to define the word “meat” as the substance that comes from slaughtered animals. The goal is virtually always to prohibit cultured meat—sometimes referred to as “cellular meat” or “clean meat”—from using the term “meat” on its packaging or advertising, but some states have also sought to prohibit plant-based meat from using the term—even when those products use qualifiers like “plant-based” before the word.¹⁰⁸

The rhetoric around these new laws is almost always that meat from a slaughtered animal is “real,” discrediting other types of meat—plant meat and cultured meat—by implying that they are “fake” or the “stuff of futurism and science fiction.”¹⁰⁹ Governments aren’t subtle about it, either: Mississippi introduced its “Fake Meat Bill” in January 2019, and Montana enacted its “Real Meat Act” in April of that year.¹¹⁰ In October 2019, the “Real Marketing Edible Artificials Truthfully Act of 2019”—or “Real MEAT Act”—was introduced to Congress.¹¹¹ Montana’s Real Meat Act characterizes cultivated meat as “Cell-cultured edible product” and defines it as “the concept of meat.”¹¹² In justifying the need for Montana’s Real

Indiana, Kentucky, Mississippi, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South Dakota, Virginia, Washington, Wyoming. *Id.* See also Dan Flynn, *The Ban Against Lab-Grown Food Using ‘Meat’ on the Label Grows to 7 States*, FOOD SAFETY NEWS (Apr. 5, 2019), <https://www.foodsafetynews.com/2019/04/the-ban-against-lab-grown-food-using-meat-on-the-label-grows-to-7-states/>; Ed Maxiner, *Alternative Protein Labeling Battle Hits States*, AGRI-PULSE (Apr. 3, 2019), <https://www.agri-pulse.com/articles/12053-alternative-protein-labeling-battle-hits-states>.

¹⁰⁸ See § 265.494.

¹⁰⁹ Brief of State of Missouri, *supra* note 103 at 4.

¹¹⁰ Alex Lowery, *Fake Meat Bill Passes House, Heads to Senate*, FARM BUREAU MISS. (Jan. 25, 2019), <https://msfb.org/2019/01/25/fake-meat-bill-passes-house-heads-to-senate/>. See also Real Meat Act, ch. 186, 2019 Mont. Laws.

¹¹¹ Real MEAT Act of 2019, H.R. 4881, 116th Cong. § 1 (2019). H.R. 4881 § 1, *supra* note 106; See also Real MEAT Act of 2019, S. 3016, 116th Cong. § 1 (2019). As of the time of this writing, the Real Meat Act of 2019 has not become law.

¹¹² Real Meat Act, ch. 186, sec. 1, § 50-31-103(4), 2019 Mont. Laws 1. Montana’s Act defines “Meat” as “the edible flesh of livestock or poultry and includes livestock and poultry products” and states that “[t]his term does not include cell-cultured edible products as defined in this section.” *Id.* at sec. 6, § 81-9-217(7), 2019 Mont. Laws 12. It defines “Cell-cultured edible product” as “the concept of meat, including but not limited to muscle cells, fat cells, connective tissue, blood, and other components produced via cell culture, rather than from a whole slaughtered animal.” *Id.* at sec. 1, § 50-31-103(4), 2019 Mont. Laws 1. The Act states that “cell-cultured edible product derived from meat muscle cells, fat cells, connective tissue, blood, or other meat components must contain labeling indicating it is derived from those cells, tissues, blood, or components.” *Id.* at sec. 1, § 50-31-103(4), 2019 Mont. Laws 1.

Meat Act, Rep. Alan Redfield, sought to conjure up images to make consumers queasy. “Picture, if you will, on the grill a nice, juicy burger,” he said. “Then picture another thing on the grill that came from a petri dish.”¹¹³

The truth is that there is nothing fake or contrived, radical or even remarkable about referring to plant-based food as “meat.” That word—both in the dictionary and in our vernacular—is not and has never been limited to animal flesh. The Oxford English Dictionary has a multitude of definitions for the word; the definition of plant-based meat appears right below the one for animal-based meat.¹¹⁴ The earliest reference of the centuries-old linguistic tradition of using the word “meat” to refer to plant-based food dates back to 1425.¹¹⁵ There is a reference to plant-based meat in the King James Bible.¹¹⁶

What *is* remarkable is the degree to which lawmakers have been so transparent about the fact that fear is one of, if not *the* primary motivating force behind the laws and regulations seeking to restrict the use of words “meat” to describe plant-based or cultivated meat. Namely, fear that the market for animal-based meat may suffer a significant decline as these products offer consumers alternatives that are less environmentally destructive and avoid the suffering and exploitation involved in the animal agriculture industry. “I don’t make laws for me,” said Claire Blood, the Nebraska Democratic State Senator—and vegetarian! —who introduced a bill to exclude

¹¹³ Tim Pierce, ‘Real Meat Act’ Passes Legislature, MONT. PUB. RADIO (Mar. 27, 2019), <https://www.mtpr.org/post/real-meat-act-passes-legislature#:~:text=House%20Bill%20327%20adds%20a,flesh%20of%20a%20slaughtered%20animal>.

¹¹⁴ See *Meat*, OXFORD ENGLISH DICTIONARY, (3d ed. 2021).

(Meat, noun

- I. Senses relating to food generally.
- II. Senses relating specifically to flesh.
 4. a. The flesh of animals used as food, esp. excluding fish and sometimes poultry, and usually in contrast to the bones and other inedible parts[.]
 5. The flesh of a fruit, nut, egg, etc., likened in texture to the flesh of animals; the edible pulp, kernel, yolk or white, etc., as opposed to the rind, peel, or shell.)

¹¹⁵ See *id.* The dictionary also includes this sentence, from 1613, showing the longstanding use of the word “meat” to refer to plant-based food: “*Of the meat of the Nut dried, they make oyle.*” Samuel Purchas · *Purchas his pilgrimage; or, Relations of the world and the religions obserued in all ages and places discovered* · 1st edition, 1613 (1 vol.).

¹¹⁶ Genesis 1:29 (King James) (“And God said, Behold I have given you every herb bearing seed, which is upon the face of all the earth, and every tree, in which is the fruit of a tree yielding seed; to you it shall be for meat.”).

plant- and cell-based products from the term ‘meat.’¹¹⁷ “I make laws for Nebraskans. Part of what I have to do is protect our No. 1 industry, and that’s cattle in Nebraska.”¹¹⁸

A pair of cases brought by well-known plant-based food brand Tofurky highlight the extent to which the narrative offered by legislators in introducing their versions of “Real Meat Acts”—that these laws are necessary to protect unwitting consumers seeking to consume animal-derived meat from the threat of confusion and deception wrought by companies selling products devoid of slaughtered animals—is a guise concealing the truth: that legislators’ interest in protecting the profits of the animal agriculture industry is greater than their interest in meaningfully tackling the root causes of the current climate crisis and facilitating consumers’ access to greener and less exploitative alternatives.

1. Missouri’s fear of “the stuff of futurism and science fiction”

In August 2018, Missouri enacted Mo. Rev. Stat. § 265.494, becoming the first state in the nation to take aim at plant-based and cultivated meat products’ use of “meaty” words.¹¹⁹ Specifically, the statute provides that:

*No person advertising, offering for sale or selling all or part of a carcass or food plan shall engage in any misleading or deceptive practices, including, but not limited to, any one or more of the following: . . . (7) Misrepresenting the cut, grade, brand or trade name, or weight or measure of any product, or misrepresenting a product as meat that is not derived from harvested production livestock or poultry.*¹²⁰

Unlike other similar state statutes that carry only civil penalties, Missouri’s statute criminalizes the speech it seeks to prohibit, with violations of the statute constituting a Class A misdemeanor, punishable by incarceration up to one year and a fine up to \$1,000.¹²¹

¹¹⁷ Elaine Povich, ‘Fake Meat’ Battle Spreads to More States, PEW (Jan. 25, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/01/25/fake-meat-battle-spreads-to-more-states>.

¹¹⁸ *Id.*

¹¹⁹ See MO. REV. STAT. § 265.494 (West 2018).

¹²⁰ *Id.*

¹²¹ See MO. REV. STAT. § 265.496 (West 2018). See also Turtle Island Foods, SPC v. Richardson, 425 F.Supp.3d 1131, 1134 (W.D. Mo. 2019).

Missouri's statute defines "meat" as: "any edible portion of livestock, poultry, or captive cervid carcass or part thereof."¹²² The law does not define the term "misleading," but its broad definition of the term "misrepresent" includes "any untrue, misleading or deceptive oral or written statement, advertisement, label, display, picture, illustration or sample."¹²³ Further, "misrepresenting a product as meat that is not derived from harvested production livestock or poultry" is classified as a prohibited "misleading or deceptive" practice.¹²⁴

While § 265.494's focuses on "misleading or deceptive practices," Missouri has not received a single consumer complaint about plant-based products being mistaken for animal-derived meat.¹²⁵ Indeed, "[w]hen it enacted the new law, Missouri did not rely on any evidence that . . . any plant-based meat producer's marketing materials [] are misleading."¹²⁶

The legislators who supported the passage of § 265.494 were rather more transparent than the statute itself in articulating the real motivation behind the statute, which is to protect the animal agriculture industry from the threat of plant-based and cultivated meat.¹²⁷ "We want to protect our cattlemen in Missouri and protect our beef brand," said Senator Crawford.¹²⁸ "[A]ll we're trying to do is basically just protect our meat industry," said Rep. Razer.¹²⁹ "We have to protect our cattle industry, our hog farmers, our chicken industry," said Rep. Knight, who also said, "This bill is basically just trying to protect the integrity of the meat industry."¹³⁰

What are those statements describing if not fear? In August 2018, the well-known plant-based meat producer Tofurky (formally known as Turtle Island Foods) filed suit together with the advocacy organization The Good Food Institute (GFI) challenging § 265.494.¹³¹ The plaintiffs (hereinafter "Tofurky") argued that the

¹²² MO. REV. STAT. § 265.300(7) (West 2018).

¹²³ MO. REV. STAT. § 265.490(6) (West 2018).

¹²⁴ MO. REV. STAT. § 265.494(7) (West 2018).

¹²⁵ See Appellants' Brief at 14, *Turtle Island Foods, SPC v. Thompson* (8th Cir. 2020) (No. 19-3154).

¹²⁶ *Id.*

¹²⁷ *Id.* at 15.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Tofurky's formal business name is Turtle Island Foods SPC, d/b/a The Tofurky Company. *Turtle Island Foods, SPC v. Richardson*, 425 F. Supp. 3d 1131 (W.D. Mo. 2019). See also Appellants' Brief, *supra* note 125, at 1.

statute violates their First Amendment rights, their due process rights, and violates the Dormant Commerce Clause.¹³² The suit was filed against the Cole County prosecuting attorney, on behalf of a putative defendant class of prosecutors.¹³³ Tofurky gave notice to the Missouri Attorney General that they were challenging the constitutionality of a state statute, and the State intervened.¹³⁴ In October 2018, Tofurky filed a motion for preliminary injunction based on its First Amendment claim, which the court denied on September 30, 2019.¹³⁵ Tofurky filed a notice of appeal to the U.S. Court of Appeals for the Eighth Circuit that same day.¹³⁶

In its order denying Tofurky’s motion for preliminary injunction, the district court focused heavily on non-binding guidance issued by the Missouri Department of Agriculture (MDA) two days after § 265.494 took effect that recommend that plant-based products using a “qualifier” and a disclaimer should be exempt from prosecution.¹³⁷ That guidance stated that:

MDA will not refer products whose labels contain the following:

- Prominent statement on the front of the package, immediately before or immediately after the product name, that the product is “plant-based,” “veggie,” “lab-grown,” “lab-created,” or a comparable qualifier; and
- Prominent statement on the package that the product is “made from plants,” “grown in a lab,” or a comparable disclosure.¹³⁸

¹³² See *Turtle Island Foods*, 425 F. Supp. 3d at 1134-35. See also Complaint for Declaratory and Injunctive Relief at 2, *Turtle Island Foods, SPC v. Richardson* (W.D. Mo. 2018) (No. 18-4173).

¹³³ See *Turtle Island Foods*, 425 F. Supp. 3d at 1134.

¹³⁴ Appellants’ Brief, *supra* note 125, at 18–19.

¹³⁵ *Turtle Island Foods, SPC*, 425 F. Supp. 3d at 1142. See also Appellants’ Brief, *supra* note 125, at 19–20 (“[T]he court concluded that the balance-of-harms and public-interest factors weighed against a preliminary injunction and it therefore denied the motion.”).

¹³⁶ Appellants’ Brief, *supra* note 125, at 20.

¹³⁷ See *Turtle Island Foods*, 425 F. Supp. 3d at 1140–41. See *Turtle Island Foods*, 425 F. Supp. 3d at 1140–41. The district court noted that “The State argues that plaintiffs will not suffer irreparable harm without an injunction because the statute does not prohibit their labels and they face no realistic threat of enforcement of a contrary reading of the statute. The State argues that there is no risk of irreparable harm to plaintiffs because the statute does not do what plaintiffs say it does.” *Turtle Island Foods, SPC*, 425 F.Supp.3d at 1140.

¹³⁸ Memorandum from the Mo. Dept. of Agric. Dir.’s Off. to the Mo. Dept. of Agric. Meat Inspection Program (Aug. 8, 2018).

MDA further stated that “[i]n MDA’s opinion, products that contain these statements do not misrepresent themselves as meat and thus do not violate Section 265.494(7).”¹³⁹

Referencing MDA’s non-binding guidelines and the fact that “[t]he labels and marketing materials of Tofurky, as well as the plant-based meat companies that GFI advocates for, all clearly indicate their products are plant based, meatless, vegetarian or vegan,”¹⁴⁰ the district court dismissed Tofurky’s claim that “because its labels include terms which are also applied to conventional meat like ‘kielbasa’ ‘hot dogs’ ‘ham roast’ ‘burgers’ and ‘bologna,’ it reasonably fears prosecution under the statute.”¹⁴¹ The court ultimately held that “plaintiffs have shown no risk of irreparable harm because their labels truthfully disclose that their products are plant-based or lab-grown and the Missouri Department of Agriculture has advised that products with these types of statements on their labels do not misrepresent themselves.”¹⁴²

In its appeal to the Eighth Circuit, Tofurky argues that the district court “rewrote the statute in a manner not supported by its text,”¹⁴³ and “did not consider, as it was required to do, what the law actually says as opposed to what the government now argues it would like the law to say.”¹⁴⁴ In its brief, Tofurky makes clear that it “does not want consumers to believe its plant-based meats are animal products; to the contrary, it wants to make clear that its products are not made from animals.”¹⁴⁵ Tofurky claims that it “fears prosecution” because § 265.494 “provides no exception for plant-based meat producers that use descriptors or qualifiers to identify their products as being vegetarian, vegan, or made from plants.”¹⁴⁶ As for the guidelines issued by MDA that seem to protect Tofurky from prosecution for its existing plant-based meat products, Tofurky emphasizes that the MDA guidelines actually do “nothing” to prohibit country prosecutors from filing charges against the company.¹⁴⁷ “Indeed,” notes Tofurky, “the MDA lacks the power to protect a plant-based meat producer from prosecution under the law.

¹³⁹ *Id.*

¹⁴⁰ *Turtle Island Foods*, 425 F. Supp. 3d at 1135.

¹⁴¹ *See id.* at 1135, 1141.

¹⁴² *Id.* at 1141.

¹⁴³ Appellants’ Brief, *supra* note 125, at 1.

¹⁴⁴ *Id.* at 11.

¹⁴⁵ *Id.* at 13.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 16.

Even if a producer follows the memorandum’s guidelines, a prosecutor may still bring charges against the producer.”¹⁴⁸

Tofurky also underscores the idea that “references to meat are crucial to Tofurky’s business model” and that “avoid[ing] references to meat,” as the plain language of the statute suggests it needs to do, “will gravely and irreparably harm” the brand.¹⁴⁹ Tofurky asserts that its business model “requires Tofurky to convey to consumers, many of whom are looking for ways to replace animal-based meat, that Tofurky products may be used” as main-dish alternatives to animal meat.¹⁵⁰ “[B]y using terms such as ‘vegetarian ham roast,’” explains Tofurky, the brand “is conveying its firmly held ideological view that Americans don’t need to slaughter animals for a meal. Tofurky conveys this view by using language which presents its products as plant-based alternatives to animal-based meat—rather than just side dishes.”¹⁵¹

In its reply brief, the state of Missouri argued that “because the law does not apply to [Tofurky’s] apparently truthful labels for their plant-based products, the district court correctly refused to enjoin Missouri’s law.”¹⁵² The government’s brief takes issue with Tofurky’s fear of prosecution under § 265.494, arguing that “the behavior with which the statute is concerned is not the use any particular word or words, but the result of whatever words are on the label.”¹⁵³ In other words, the government claims that the statute allows plant-based and cultivated meat products to identify themselves as “meat” as long as those products’ labels do not “suggest that plant-based or lab-grown meat alternatives are conventional meat from an animal carcass.”¹⁵⁴ The government does not directly respond to Tofurky’s argument that the statute, on its face, makes no mention of the use of “qualifiers,” and that Missouri’s reliance on MDA’s non-binding guidelines do not guarantee safety from prosecution for Tofurky or related brands.¹⁵⁵ “If the law were truly intended to require plant-based meat products only to include appropriate disclosures,” argued Tofurky in its reply brief, “then it

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 18.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Brief of State of Missouri, *supra* note 103, at 3.

¹⁵³ *Id.* at 40.

¹⁵⁴ *Id.* at 39-40.

¹⁵⁵ Appellants’ Reply Brief at 5–9, *Turtle Island Foods v. Thompson*, 992 F.3d 694 (8th Cir. 2020).

would simply say so using plain language. The State would not need to graft a nonbinding memo onto the law.”¹⁵⁶

Missouri’s brief also attempts to conjure up an emotional response, namely one of skepticism and disdain for plant-based and cultivated meat. Casting it as “the stuff of futurism and science fiction” and citing *Star Trek*’s Captain Kirk,¹⁵⁷ Missouri cautioned that “not every consumer may be eager right away to chow down on a vat-created muscle tissue entrée at the breakfast table or work cafeteria.”¹⁵⁸ Underscoring the fact that its “science fiction” rhetoric was intended to unsettle rather than excite its readers, Missouri’s brief cited a food writer who said this: “When I originally heard about lab-grown meat, my first thought was ‘yuck.’ The idea of ‘growing’ a steak or chicken leg in a test tube sounds like a scene from science fiction, not haute cuisine.”¹⁵⁹

The government’s brief goes on to cite “safety concerns” and “competing environmental concerns” as reasons consumers may be wary of cultivated meat.¹⁶⁰ “The growing trend against processed food and genetically modified food means that many consumers want food that is more natural and more organic—the opposite of food that was made in a factory, sold in a box, and created by chemical processes never found in nature.”¹⁶¹ Referencing “early reports”—but not citing those reports directly—Missouri goes on to suggest that “however well-intentioned or humanitarian may be the concept of mass producing lab-grown animal-cell meat alternatives . . . the industry may impose a greater environmental impact than traditional ranching and farming, increasing carbon dioxide emissions, which are of concern to many who worry about climate change.”¹⁶² A close look at the single study referenced in the news article that the government cites reveals that its key takeaway is that “cultured meat is not *prima facie* climatically superior to cattle; its relative impact

¹⁵⁶ *Id.* at 7.

¹⁵⁷ Brief of State of Missouri, *supra* note 103, at 4 (quoting *Star Trek: Charlie X* (CBS broadcast Sept. 15, 1966) (“On Earth today, it’s Thanksgiving. If the crew has to eat synthetic meat loaf, I want it to look like turkey.”)).

¹⁵⁸ *Id.* at 6.

¹⁵⁹ Brief of State of Missouri, *supra* note 103, at 6 (citing Gillian Tett, *Can You Swallow the Idea of Lab-Grown Meat?*, *FIN. TIMES* (Feb. 4, 2020), <https://www.ft.com/content/903beb2e-3cb0-11eab232-000f4477fbca>).

¹⁶⁰ *Id.* at 6-7.

¹⁶¹ *Id.*

¹⁶² *Id.* at 7. The “report” that the government references is apparently *Climate Impacts of Cultured Meat and Beef Cattle*. John Lynch & Raymond Pierrehumbert, *Climate Impacts of Cultured Meat and Beef Cattle*, *FRONTIERS SUSTAINABLE FOOD SYS.* (2019), <https://www.frontiersin.org/articles/10.3389/fsufs.2019.00005/full>.

instead depends on the availability of decarbonized energy generation and the specific production systems that are realized.”¹⁶³ The brief makes no mention of species extinction, habitat loss, or other aspects of the climate crisis. There is no data about the treatment of animals in the animal agriculture industry.¹⁶⁴

On March 29, 2021, the United States Court of Appeals for the Eighth Circuit issued an order affirming the district court’s denial of Tofurky’s motion for preliminary injunction.¹⁶⁵ Noting that it “find[s] no reason to disturb the district court’s ruling as to Plaintiffs’ likelihood of success on the merits,” the Eighth Circuit held that “the district court did not abuse its discretion in determining Plaintiffs failed to show irreparable harm.”¹⁶⁶ The Court noted that because “the evidentiary record is scant and the scope of [its] review is limited . . . we emphasize that our analysis here may provide little guidance as to the appropriate disposition on the merits.”¹⁶⁷

A similar case Tofurky filed in Arkansas reveals that states seeking to justify their “Real Meat Acts” by claiming that consumers may be misled by plant-based meat products are likely to find that courts aren’t buying that argument.

2. Arkansas’ misplaced insistence that meaty words mislead consumers

¹⁶³ Lynch & Pierrehumbert, *supra* note 162. (“The scale of cattle production required for the very high levels of beef consumption modeled here would result in significant global warming, but it is not yet clear whether cultured meat production would provide a more climatically sustainable alternative. The climate impacts of cultured meat production will depend on what level of decarbonized energy generation can be achieved, and the specific environmental footprints of production. There is a need for detailed and transparent LCA of real cultured meat production systems. Based on currently available data, cultured production does not necessarily give license for unrestrained meat consumption.”)

¹⁶⁴ The government argues that some consumers may prefer animal meat to “any of these processed vegetarian products because they enjoy meat more or because these plant-based products can still produce as many carbon emissions as producing meats like chicken.” Brief of State of Missouri, *supra* note 103, at 8. *See also* Olivia Roos, *Is Fake Meat Better for You, or the Environment?*, NBC NEWS (Oct. 13, 2019), <https://www.nbcnews.com/news/us-news/fake-meat-better-you-or-environment-n1065231> (stating without citation the claim that “[c]ellular-based meat alternatives release five times the emissions as chicken, putting their emissions just under beef. Plant-based meat alternatives produce the same amount of emissions as chicken — which are about five times the emissions of legumes and vegetables.”).

¹⁶⁵ *Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694 (8th Cir. 2021).

¹⁶⁶ *Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694, 701-02 (8th Cir. 2021).

¹⁶⁷ *Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694, 702 (8th Cir. 2021).

In March 2019, Arkansas enacted Act 501, titled “An Act to Require Truth in Labeling of Agricultural Products that are Edible by Humans; and for Other Purposes” (“Act 501”).¹⁶⁸ Act 501, like Missouri’s § 265.494, takes aim at plant-based and cultivated meat products’ use of “meaty” words. Not only that, but certain provisions of the Act can be interpreted as prohibiting the use of “milky” words for foods not derived from animal-based milk.

The stated legislative purpose of Act 501 is “to protect consumers from being misled or confused by false or misleading labeling of agricultural products that are edible by humans.”¹⁶⁹ The Act defines “agricultural product” broadly as “a horticultural, viticultural, forestry, dairy, livestock, poultry, or bee product or any other farm, ranch, plantation, or range product[.]”¹⁷⁰ It defines “meat” as “a portion of a livestock, poultry, or cervid carcass that is edible by humans” and specifies that “meat” “does not include a: (i) Synthetic product derived from a plant, insect, or other source; or (ii) Product grown in a laboratory from animal cells[.]”¹⁷¹ It defines “misrepresent” as “to use any untrue, misleading, or deceptive oral or written statement, advertising, label, display, picture, 28 illustration, or sample[.]”¹⁷² The Act does not provide a definition for the terms “misled” or “confused.”

Act 501 prohibits a broad range of activities, including, amongst other things, “[r]epresenting the agricultural product as meat or a meat product when the agricultural product is not derived from harvested livestock, poultry, or cervids” and “[u]tilizing a term that is the same as or similar to a term that has been used or defined historically in reference to a specific agricultural product[.]”¹⁷³ The breadth of the activities prohibited in the Act, combined with the Act’s silence on whether “qualifiers” such as “plant-based” may be used by plant-based foods alongside “meaty” or “milky” words, casts a wide net that seemingly encompasses not just plant-based and cultivated meat but plant milk and related plant-based dairy products as well.

¹⁶⁸ ARK. CODE ANN. § 2-1-301 (2019).

¹⁶⁹ *Id.*

¹⁷⁰ ARK. CODE ANN. § 2-1-302(1) (2021).

¹⁷¹ § 2-1-302(7).

¹⁷² § 2-1-302(10).

¹⁷³ ARK. CODE ANN. § 2-1-305(6), (10) (2019).

Act 501 imposes civil penalties for violation of its provisions, with each violation of Act 501 punishable by a civil penalty of up to \$1,000.¹⁷⁴

Tofurky filed suit against the state of Arkansas in July 2019 at the U.S. District Court for the Eastern District of Arkansas, Central Division, seeking declaratory and injunctive relief under 42 U.S.C. § 1983 to challenge the constitutionality of Arkansas Act 501.¹⁷⁵ In August 2019 Tofurky filed a motion for preliminary injunction, focusing on its first amendment claims and the claim that “Act 501 also violates the Fourteenth Amendment Due Process Clause’s prohibition against vague statutes.”¹⁷⁶ On December 11, 2019, Judge Kristine G. Baker granted Tofurky’s motion for a preliminary injunction “enjoining enforcement of the six provisions of Act 501 challenged by Tofurky and as applied to Tofurky[.]”¹⁷⁷

In its Motion for Preliminary Injunction, Tofurky stated that “[t]he question in this case is whether the government can prohibit companies from using terms like ‘veggie burger’ or ‘tofu hot dog’ to describe their products.”¹⁷⁸ Asserting that Act 501 was passed “[i]n response to vigorous lobbying from the agriculture industry,”¹⁷⁹ Tofurky attacked the Act’s purported purpose of preventing consumer confusion, arguing that:

The law’s stated purpose is to prevent consumer confusion, but there is no evidence in the legislative record that consumers are confused about whether a veggie burger comes from a cow. To the contrary, people buy plant-based meats precisely because they are *not* made from slaughtered animals. Far from preventing consumer deception, the law is more likely to create consumer confusion by prohibiting companies from continuing to use self-evident terms like ‘vegan sausage’ to accurately describe the taste, appearance, and texture of their products. The law’s tendency to confuse, rather than inform, is no accident; the legislative history

¹⁷⁴ ARK. CODE ANN. § 2-1-306(a)(1) (2019).

¹⁷⁵ *Turtle Island Foods, SPC v. Soman*, 424 F. Supp. 3d 552, 561 (E.D. Ark. 2019).

¹⁷⁶ Memorandum of Law in Support of Plaintiff’s Motion for Preliminary Injunction at 13, *Turtle Island Foods, SPC v. Soman*, 424 F. Supp. 552 (No. 4:19-cv-514-KGB).

¹⁷⁷ *Turtle Island Foods, SPC*, 424 F. Supp. 3d at 579.

¹⁷⁸ Memorandum of Law in Support of Plaintiff’s Motion for Preliminary Injunction, *supra* note 173, at 1.

¹⁷⁹ *Id.* at 2.

reveals that the law's true purpose is to benefit the meat industry by censoring the competition.¹⁸⁰

Tofurky defines "plant-based meats" as "foods that approximate the texture, flavor, and appearance of meat derived from slaughtered animals."¹⁸¹ Tofurky argues that "[s]imilar to other plant-based meat producers, Tofurky's packaging and marketing materials—which use terms like 'chorizo,' 'hot dogs,' and 'ham roast' to effectively describe its products—all clearly indicate that these products are plant based, meatless, vegetarian, or vegan."¹⁸² Tofurky argues that its products "already comply with federal food labeling regulations and numerous state and federal consumer protection laws, which prohibit the deceptive labeling and marketing of food products and consumer products more generally."¹⁸³ Tofurky argues that in the face of Act 501, it must "either completely overhaul its labeling and marketing practices to comply with the Act's restrictions on truthful and non-misleading commercial speech, or face the threat of ruinous civil penalties."¹⁸⁴

Tofurky goes on to argue that "Act 501 unconstitutionally restricts Tofurky's truthful and non-misleading commercial speech in violation of the First Amendment," and proceeds to offer an analysis of its labels as commercial speech under the framework provided in the landmark Supreme Court case *Central Hudson Gas & Electric Corp. v. Public Service Commission*.¹⁸⁵

¹⁸⁰ *Id.* at 1-2.

¹⁸¹ *Id.* at 3.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Memorandum of Law in Support of Plaintiff's Motion for Preliminary Injunction, *supra* note 173, at 3-4.

¹⁸⁵ *Id.* at 4-13 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563-64 (1980)).

On p. 19 of its order granting Tofurky's motion for preliminary injunction, the court set out the four-part Central Hudson test: "In analyzing restrictions on commercial speech, the Supreme Court articulated an intermediate scrutiny framework for commercial speech in Central Hudson resulting in a four-part test. 447 U.S. at 765. Under the Central Hudson test, courts "test the constitutionality of laws burdening commercial speech" by considering: "(1) whether the commercial speech at issue concerns unlawful activity or is misleading; (2) whether the governmental interest is substantial; (3) whether the challenged regulation directly advances the government's asserted interest; and (4) whether the regulation is no more extensive than necessary to further the government's interest." Preliminary Injunction Order at 19, *Turtle Island Foods, SPC v. Soman*, 424 F. Supp. 3d 552 (No. 4:19-cv-514-KGB) (citing *Cent. Hudson*, 447 U.S. at 566). *See also* 1-800-411-Pain Referral Serv., LLC v. Otto, 744 F.3d 1045, 1055 (citing *Cent. Hudson*, 447 U.S. at 566). Provided that the speech is not false or inherently misleading, "[e]ach of these latter three inquiries must be answered in the affirmative for the

Noting that “the Court must determine whether the commercial speech restricted by Act 501 is protected under the First Amendment” and recognizing that this inquiry requires the court to determine “whether the commercial speech regulated by the Act is false or inherently misleading,” Tofurky attacks the notion that its labels may be at all “misleading” to consumers.¹⁸⁶ Pointing out the long history of plant-based foods using “meaty” words, Tofurky asserts that “the State cannot plausibly maintain that any use of words like ‘meat,’ ‘burger,’ or ‘steak’ on plant-based food labels is inherently misleading.”¹⁸⁷ Citing a passage from Genesis 1:29 from the King James Bible, Tofurky noted that “[f]or decades—and in some cases centuries—these words have been used to describe foods that are not made from slaughtered animals, such as coconut meat, veggie burgers, and beefsteak tomatoes.”¹⁸⁸

In arguing that Act 501 does not advance a substantial governmental interest, Tofurky notes that “there is no evidence in the legislative record demonstrating that consumers are confused or deceived by labeling or marketing materials for plant-based meats” and that there is no evidence “that prohibiting Tofurky and other plant-based meat purveyors from using meat-based terms will in fact alleviate consumer confusion to a material degree.”¹⁸⁹

Tofurky goes a step further, arguing not only that “meaty” words on plant-based food labels are not confusing to consumers, but that “Act 501 is likely to create consumer confusion where, for decades, none has existed.”¹⁹⁰ Tofurky argues that

[t]he Act’s restriction on the use of these terms will make it much more difficult for consumers to identify the plant-based meats they want to consume in lieu of meat from slaughtered animals. For example, Tofurky’s ‘Plant-Based Original Italian Sausage’ communicates that the product is

regulation to be found constitutional.”” *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002); *See also Missouri. ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649, 653 (8th Cir. 2003).

¹⁸⁶ Memorandum of Law in Support of Plaintiff’s Motion for Preliminary Injunction, *supra* note 173, at 6-7.

¹⁸⁷ *Id.* at 7.

¹⁸⁸ *Id.* (citing *Genesis 1:29 (King James)* (“And God said, Behold I have given you every herb bearing seed, which is upon the face of all the earth, and every tree, in which is the fruit of a tree yielding seed; to you it shall be for meat.”)).

¹⁸⁹ Memorandum of Law in Support of Plaintiff’s Motion for Preliminary Injunction, *supra* note 173, at 8-9.

¹⁹⁰ *Id.* at 9.

made from plants and has the shape and seasonings commonly associated with sausage made from animal meat. The Act requires Tofurky to replace ‘sausage’ with less descriptive terms like ‘roll’ or ‘tube.’ Consumers who confront a package that reads ‘plant-based protein’ or ‘veggie tube’ in the grocery store will have no idea what they are buying.¹⁹¹

Tofurky elaborates on its argument that its labels are not misleading to consumers in its analysis of its due process claim. Arguing that Act 501 “also violates the Fourteenth Amendment Due Process Clause’s prohibition against vague statutes,” the company points out that while the Arkansas statute defines “meat” as being derived from animal flesh, the word has been used “to refer to the flesh of fruits or nuts” in documents as wide-ranging as the King James Bible and FDA documents.¹⁹² Further, notes Tofurky, words like “patty,” “burger,” and “steak” have long been associated with “non-animalian food,” such as nut burgers and peppermint patties.¹⁹³

“[E]ven more confusing,” argues Tofurky, is the Act’s prohibition against terms “similar” to those “historically used in reference to specific agricultural products. Does the Act prohibit ‘beetballs’ because it is similar to ‘meatballs;? Is Tofurky prohibited from using its own registered trademark in Arkansas because it is ‘similar’ to the word ‘turkey’?”¹⁹⁴

Tofurky also attacks the very premise that Act 501 was enacted to protect consumers from being confused or misled, identifying the true purpose as one grounded in fear. Citing a comment from the Arkansas Cattlemen’s Association that “the Act is necessary to protect the industry’s ‘brand I.D.’ from ‘[c]ounterfeit products,’ Tofurky asserts that “[t]he Act’s true purpose is not to protect consumers, but to stoke confusion in order to benefit the economic interests of the meat industry. It is no secret that agriculture industry advocates lobbied for the Act because they fear a decline in sales ‘as shoppers choose from a growing pantry of alternatives.’”¹⁹⁵

Arkansas’ response to Tofurky’s motion for preliminary injunction argues that “Tofurky’s misleading commercial speech is

¹⁹¹ *Id.*

¹⁹² *Id.* at 13-14.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 14.

¹⁹⁵ Memorandum of Law in Support of Plaintiff’s Motion for Preliminary Injunction, *supra* note 173, at 9.

not protected by the First Amendment.”¹⁹⁶ Arkansas argues that “Tofurky’s labels for its ‘plant-based’ products are inherently misleading because they use the names and descriptors of traditional meat items but do not actually include the product they invoke.”¹⁹⁷ Unlike Missouri, who argued that Tofurky’s labels were not misleading because they contained “qualifiers,” Arkansas dismisses Tofurky’s qualifiers, asserting that its labels “rarely identify the components of its products. Instead, many of its labels bury the term ‘plant-based’ somewhere on its packaging or otherwise resorts to fine print to identify some of the components of its product.”¹⁹⁸ Taking issue with Tofurky’s label for “slow roasted chick’n,” the state argues that the label “does not dispel the notion that it is an actual poultry product until the consumer finds the term ‘plant-based’ buried in the bottom corner of the label.”¹⁹⁹ Arkansas provides no evidence that even a single consumer has actually been confused or misled by these labels.

Dismissing Tofurky’s argument that “meaty” words have been used for centuries to refer to plant-based foods—and seemingly discrediting the language invoked in the King James Bible—Arkansas argues that “[t]he fact that such words have been misapplied in the past does not categorically mean they are no longer misleading to consumers.”²⁰⁰ The state also argues that Tofurky is unlikely to succeed on its Fourteenth Amendment Due Process claim because “the Company only identifies one subsection of Act 501 that it claims is impermissibly vague” and “[c]onsidering the Act as a whole, it is plain what Act 501 regulates.”²⁰¹ Seeming to acknowledge that the provision Tofurky identified, Ark. Code Ann. § 2-1-305(10), may be unconstitutionally vague, the state argues that even if the court finds that provision to be impermissibly vague, “the Court should sever the provision it determines is unconstitutionally vague and allow the remainder of the statute to remain in effect.”²⁰²

Arkansas also rejects Tofurky’s assertion that Act 501’s “true purpose” is “to stoke confusion in order to benefit the economic

¹⁹⁶ Defendant’s Response to Plaintiff’s Motion for Preliminary Injunction, at 13, *Turtle Island Foods, SPC v. Soman*, 424 F. Supp. 3d 552 (E.D. Ark. 2019) (No. 4:19-cv-00514-KGB).

¹⁹⁷ *Id.* at 15.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 16.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 24.

²⁰² Defendant’s Response to Plaintiff’s Motion for Preliminary Injunction, *supra* note 193, at 24.

interests of the meat industry.”²⁰³ Arguing that “Tofurky’s unfounded fear of an industry-wide conspiracy is dispelled by its own evidence,” Arkansas ignores the quote Tofurky provided by the Arkansas Cattlemen’s Association and focuses instead on the fact that the same spokesperson also cited concern for the consumer in supporting the Act.²⁰⁴

In its order granting Tofurky’s motion for preliminary injunction, the Court determined that “Tofurky has demonstrated it is likely to prevail on the merits of its First Amendment claim as applied,” and therefore did not reach Tofurky’s Fourteenth Amendment claim.²⁰⁵ The Court found that “[a]s applied, Act 501 prohibits Tofurky from using words like ‘meat,’ ‘beef,’ ‘chorizo,’ ‘sausage,’ and ‘roast’ to describe its plant-based meat products,” and notes “[t]he statute provides no exception for plant-based meat producers that clearly identify their products as being vegetarian, vegan, or made from plants[.]”²⁰⁶

The Court then proceeds to conduct a First Amendment analysis using the Central Hudson test, beginning with an inquiry into whether Tofurky’s commercial speech—in the form of its product labels—is “inherently misleading.”²⁰⁷ The Court identifies seven labels—“Veggie Burger,” “Deli Slices,” “Chorizo Style Sausage,” “Slow Roasted Chick’n,” “Original Sausage Kielbasa,” “Hot Dogs,” and “Vegetarian Ham Roast”—and “finds the speech at issue not inherently misleading.”²⁰⁸ “It is true,” the Court acknowledges, “that these labels use some words traditionally associated with animal-based meat. However, the simple use of a word frequently used in relation to animal-based meats does not make use of that word in a different context inherently misleading.”²⁰⁹ Noting the labels’ use of “qualifier” words like “veggie,” “all vegan,” and “plant-based,” the Court emphasized that its finding that the labels are not inherently misleading “rings particularly true since the labels also make disclosures to inform consumers as to the plant-based nature of the products contained therein.”²¹⁰ “[T]his is not a case of key information in minuscule type buried deep among many ingredients,” said the Court, in apparent

²⁰³ *Id.* at 18.

²⁰⁴ *Id.*

²⁰⁵ *Turtle Island Foods, SPC v. Soman*, 424 F. Supp. 3d 552, 571 (E.D. Ark. 2019).

²⁰⁶ *Id.* at 563.

²⁰⁷ *Id.* at 573-75.

²⁰⁸ *Id.* at 573-74.

²⁰⁹ Preliminary Injunction Order at 23, *Turtle Island Foods, SPC v. Soman* 424 F. Supp. 3d 552 (E.D. Ark. 2019) (No. 4:19-CV-00514).

²¹⁰ *Id.*

response to the state's argument that the Tofurky labels' qualifiers appeared in "fine print" or were "buried" in a corner of the label.²¹¹

The Court calls "unwarranted" Arkansas' assertion "that the simple use of the word 'burger,' 'ham,' or 'sausage' leaves the typical consumer confused," and finds that Tofurky's labels "include ample terminology to indicate the vegan or vegetarian nature of the products."²¹² The Court also notes that there is no evidence of any consumer confusion by Tofurky's "packaging, labeling, or marketing."²¹³ Noting that Tofurky "identifies several in-effect federal and state laws directed at prohibiting deceptive labeling and marketing of food products, and consumer products more generally, with which Tofurky contends its food labeling complies," the Court also held that there is "no convincing argument as to why each of these laws is ineffective at policing the alleged deceptive or confusing practices the State purports to target."²¹⁴ The Court offered that, instead of the prohibition in Act 501, the state could "create a symbol to go on the labeling and packaging of plant-based products indicating their vegan composition, or require a disclaimer that the products do not contain meat if further laws are deemed necessary to advance its stated purpose."²¹⁵ Because it found that Tofurky "is likely to prevail in demonstrating that Act 501 does not advance the stated governmental interest of protecting consumers from being misled or confused," it declined to reach the question of "whether the stated interests the Court identifies are not the actual interests served by Act 501."²¹⁶

The district court's grant of Tofurky's motion for preliminary injunction in Arkansas was a win for advocates of plant-based foods who believe that "Real Meat" laws claiming to protect consumers from being misled or confused are really thinly-veiled and fear-driven attempts at protecting the animal agriculture industry's bottom line. Lawsuits in other states against similar laws echo the same refrain.

²¹¹ *Id.* at 24. See also Defendant's Response to Plaintiff's Motion for Preliminary Injunction, *supra* note 193, at 13.

²¹² Preliminary Injunction Order, *supra* note 206, at 24 (citing *Ang v. Whitewave Foods Co.*, No. 13-CV-1953, 2013 WL 6492353, at *4 (N.D. Cal. 2013)).

²¹³ Preliminary Injunction Order, *supra* note 209, at 24.

²¹⁴ *Id.* at 27.

²¹⁵ *Id.*

²¹⁶ *Id.* at 27-28.

3. Mississippi, Louisiana, and Oklahoma pursue statutory “clear losers”

A spate of other states have pursued legislation to prohibit plant-based food from using meaty words on their packaging. Time and time again, proponents of those laws reveal that it isn't consumer confusion they are afraid of, but rather the threat that plant-based products may hurt the animal agriculture industry's bottom line.

“This bill will protect our cattle farmers from having to compete with products not harvested from an animal,” said Mississippi Farm Bureau Federation president Mike McCormick in January 2019 when Mississippi's “Fake Meat Bill” passed in the Mississippi state House.²¹⁷ The law went into effect in July 2019, and was immediately challenged in court by vegan food company Upton's Naturals in a suit joined by the Plant Based Foods Association (PBFA) and the Institute for Justice (IJ).²¹⁸ In September 2019 Mississippi proposed new regulations allowing for plant-based foods to use meaty words so long as they are accompanied by a “qualifier” like “plant-based” that is “prominently displayed on the front of the package[.]”²¹⁹

In October 2020 Tofurky—together with GFI and the Animal Legal Defense Fund sued the Louisiana Department of Agriculture and Forestry, challenging its new law that seeks to prohibit meaty words for plant-based foods.²²⁰ The law “prohibits companies from ‘[u]tilizing a term that is the same as or deceptively similar to a term that has been used or defined historically in

²¹⁷ Lowery, *supra* note 110.

²¹⁸ Andrew Wimer, *New Lawsuit Challenges Mississippi Labeling Law That Makes Selling “Veggie Burgers” a Crime*, INST. FOR JUSTICE (July 2, 2019), <https://ij.org/press-release/new-lawsuit-challenges-mississippi-labeling-law-that-makes-selling-veggie-burgers-a-crime/>.

²¹⁹ See Complaint for Declaratory and Injunctive Relief at 1-2, *Turtle Island Foods SPC v. Strain*, No. 20CV00674, 2020 U.S. Dist. (M.D. La. 2021).

See also Kelsey Piper, *Mississippi Will No Longer Ban Calling Veggie Burgers “Veggie Burgers,”* VOX (Sept. 6, 2019), <https://www.vox.com/future-perfect/2019/9/6/20853246/mississippi-veggie-burger-ban-laws-plant-based>.

See also 02-001-407 MISS. CODE R. § 112.01 (LexisNexis 2021).

²²⁰ Nigel Barrella, *How Plant-Based Companies Are Fighting Back Against Label Censorship*, GOOD FOOD INST. (Nov. 5, 2020), <https://gfi.org/blog/label-censorship-lawsuits/>. The complaint for the case is available here: Complaint at <https://nationalaglawcenter.org/wp-content/uploads/2020/12/LA-Complaint-Tofurky.pdf>.

reference to a specific agricultural product.”²²¹ Supporters of the law argued in testimony in the Louisiana state legislature that it “was necessary to ‘protect our industries’ in the face of ‘a growing trend’ of consumers deciding to purchase different products. ‘We must protect our industry in this state: agriculture. It’s the number one industry in the state of Louisiana,’ the bill’s Senate sponsor, Francis Thompson (D-Delhi) argued during legislative hearings.”²²²

“It’s bemusing that these laws keep getting passed,” says Amanda Howell, an ALDF attorney co-counsel on the Louisiana case.²²³ “It’s bemusing that given the win in Arkansas the states don’t see these laws as clear losers. It’s a waste of state resources and it’s insulting to all consumers. Passing laws to protect one industry over another is not the job of our government.”²²⁴

And yet, the laws keep coming. In October 2020, Upton’s Naturals filed suit in Oklahoma in 2020 against a “strange new type of labeling law that tries to micromanage font sizes for disclosures on plant-based products.”²²⁵ Other laws—and legal challenges to them—may well be on the horizon.

Journalist Kelsey Piper notes that states’ “backlash” against plant-based food companies “might seem premature. While plant-based meat is certainly rising in popularity, all plant-based meat products still account for only a tiny fraction of the demand for meat. And plant-based alternatives aren’t changing the meat industry yet: Demand for meat actually grew last year.”²²⁶

²²¹ Kelsey Piper, *Tofurky Is Suing Louisiana for the Right to Label Its Veggie Burgers* “Veggie Burgers,” VOX (Oct. 8, 2020), <https://www.vox.com/future-perfect/21507907/louisiana-veggie-burger-ban-tofurky-lawsuit>.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Barrella, *supra* note 220. See also *Truth in Labeling Laws(uits)—Update*, The National Agricultural Law Center, at <https://nationalaglawcenter.org/truth-in-labeling-lawsuits-update/>.

²²⁶ Kelsey Piper, *Mississippi Is Forbidding Grocery Stores from Calling Veggie Burgers* “Veggie Burgers,” VOX (July 3, 2019), <https://www.vox.com/future-perfect/2019/7/3/20680731/mississippi-veggie-burgers-illegal-meatless-meat>. See also Eliza Barclay, *Americans Should Eat Less Meat, but They’re Eating More and More*, VOX (Oct. 1, 2016), <https://www.vox.com/2016/8/18/12248226/eat-less-meat-campaign-fail> (“consumption of meat in the United States rose by 5 percent in 2015 — the biggest increase in 40 years”).

But, notes Piper, fear is a powerful driving force behind this spate of laws seeking to cling to the animal-meat-laden status quo.²²⁷ “It’s past time for meat companies to move past trying to outlaw their competition,” argues Piper in a different article, “and toward addressing the problems that are driving consumers toward plant-based meat: environmental concerns, the mistreatment of slaughterhouse workers, animal cruelty, and public health.”²²⁸

B. Fear and Dairy PRIDE

Milk occupies a sacred space in human culture; it’s so bound up with human civilization that the ancient Greeks named our galaxy after it, and at least fourteen languages do the same today.²²⁹ Dairy milk in particular is a central fixture of Western culture, a fact of life many take for granted, but not a particularly logical one given that a majority of people of color are unable able to digest it.²³⁰

Despite the firm hold that dairy milk has in the cultural landscape of the United States and Europe, dairy milk consumption has fallen by forty percent since 1975.²³¹ In the U.S., 20,000 dairy farms have shuttered over the last decade—a 30 percent decline.²³² Meanwhile, sales in plant milk have skyrocketed in recent years, threatening to further disrupt the once-ironclad hold that dairy milk had in the milk industry.²³³

²²⁷ See Piper, *supra* note 226. “[P]lant-based meat advocates hope — and sellers of conventional meat fear — that someday, that might change. A more climate-conscious population is increasingly bothered by the carbon footprint and land use problems associated with conventional meat production, and economies of scale may enable plant-based meat alternatives to be more competitive on price. While that day is far off, and still quite speculative, the possibility has clearly spurred lobbyists to action.” *Id.*

²²⁸ Piper, *supra* note 221.

²²⁹ See Robinson Meyer, *How to Refer to the Milky Way Across the Globe*, THE ATLANTIC (Aug. 8, 2013), <https://www.theatlantic.com/technology/archive/2013/08/how-to-refer-to-the-milky-way-across-the-globe/278506/>.

²³⁰ See Andrew Curry, *The Milk Revolution*, 500 NATURE 20, 20-21 (2013). See also Andrea Freeman, *The Unbearable Whiteness of Milk: Food Oppression and the USDA*, 3 U.C. IRVINE L. REV. 1251, 1269-73 (2013) (discussing the concept of “food oppression” and the role dairy plays in perpetuating it); Mathilde Cohen, *Animal Colonialism: The Case of Milk*, 111 AM. J. INT’L L. UNBOUND 267, 268-69 (2017) (discussing the role dairy milk and “lactating animals became integral parts of colonial and neocolonial projects).

²³¹ Jacobs, *supra* note 53.

²³² *Id.*

²³³ See Oliver Franklin-Wallis, *White Gold: The Unstoppable Rise of Alternative Milks*, THE GUARDIAN (Jan. 29, 2019), <https://www.theguardian.com/news/2019/jan/29/white-gold-the-unstoppable-rise->

Over the last decade a series of lawsuits and legislative efforts on both sides of the Atlantic reveal the great lengths dairy milk advocates will go to in order to protect the dairy industry from the perceived threat of plant-based milk. Like the linguistic and semantic battles over the word “meat,” these “milk wars” are typically fought under the guise of needing to protect the “misled” consumer, but at bottom are really about something entirely different: fear.

In the United States, a trio of federal cases out of California brought by plaintiffs claiming consumers may be “misled” or confused by plant milk using the word “milk”; in each case, the court dismissed the notion that anyone may mistake plant milk for the stuff that comes from cows.²³⁴ “[I]t is simply implausible that a reasonable consumer would mistake a product like soymilk or almond milk with dairy milk from a cow,” the Northern District of California stated in the 2013 case *Ang v. WhiteWave Foods Co.*²³⁵ “The first words in the products’ names should be obvious enough to even the least discerning of consumers,” said the Court.²³⁶ Dismissing the notion that a reasonable consumer may view a term like “soymilk” and “assume that the [drink] came from cows” as one that “stretches the bounds of credulity,” the Court concluded that under that logic, “a reasonable consumer might also believe that veggie bacon contains pork, that flourless chocolate cake contains flour, or that e-books are made out of paper.”²³⁷

The “milk wars” entered the halls of Congress in the United States in 2017, when a bipartisan group of lawmakers introduced the DAIRY PRIDE Act to Congress.²³⁸ If passed, the Act—which was re-introduced in 2019 and is formally known as the Defending

of-alternative-milks-oat-soy-rice-coconut-plant (discussing the rise in popularity of plant milks in Europe and the United States).

²³⁴ *Ang v. Whitewave Foods Co.*, No. 13-cv-1953, 2013 WL 6492353, at *4 (N.D. Cal. Dec. 10, 2013); *Gitson v. Trader Joe’s Co.*, No. 13-cv-01333-VC, 2015 WL 9121232, at *1 (N.D. Cal. Dec. 1, 2015); *Painter v. Blue Diamond Growers*, 757 Fed. Appx. 517, 519 (9th Cir. 2018).

For a detailed discussion of these cases, see Gambert, *supra* note 106, at 812-17.

²³⁵ *Whitewave*, 2013 WL 6492353 at *4. See Gambert, *supra* note 106, at 812-17, for an in-depth discussion of the case.

²³⁶ *Whitewave*, 2013 WL 6492353 at *4.

²³⁷ *Id.*

²³⁸ See Dairy PRIDE Act, S. 130, 115th Cong. (2017).

It’s probably no coincidence that the lawmakers who introduced the bill were democrats from Vermont and Wisconsin – big dairy states where increasingly plant milk sales may be an especially big threat. *Id.*

Against Imitations and Replacements of Yogurt, Milk, and Cheese To Promote Regular Intake of Dairy Everyday Act—would prohibit plant-based milk from using the word “milk” on its packaging.²³⁹ This sort of prohibition is already in place in the EU and Canada.²⁴⁰

A narrative of fear runs through the rhetoric surrounding the efforts of lawmakers to make it harder for plant-based products to compete with dairy. Specifically, fear that plant milk and related plant-based products may threaten the economic bottom line of the dairy industry. Shortly before the DAIRY PRIDE Act was introduced, 32 congressmen sent a letter to the FDA filled with fear-driven rhetoric about the dangers facing “hard-working Americans.”²⁴¹ The congressmen’s letter unapologetically framed its arguments around a pathos-driven narrative designed to conjure sympathy for the plight of American dairy farmers. “[D]airy farmers are facing a serious financial crisis,” the letter reads.²⁴² “These hard working Americans have experienced deep cuts in income as milk prices have plunged 40% since 2014. . . . Unless more is done, many more farmers will be forced to sell their herds.”²⁴³

What’s misleading about this rhetoric about “hard working Americans” is that in the US, a majority of workers in the dairy industry are immigrants, many of them noncitizens.²⁴⁴ The farms themselves are often owned by huge dairy conglomerates.²⁴⁵ In a

²³⁹ See DAIRY PRIDE Act, S. 792, 116th Cong. (2019). The Act would also prohibit other products, such as plant-based yogurt and cheese, from using the words “yogurt” or “cheese” on their packaging. *Id.*

²⁴⁰ See Council Regulation 1898/87, 1987 O.J. (L182) 36, 36, 38 (EC); Food and Drug Regulations, C.R.C., c 870, s B.08.003 (Can.).

²⁴¹ See Letter from Rep. Peter Welch, Mike Simpson & Members of Congress to Hon. Robert M. Califf, Comm’r, Food & Drug Admin. (Dec. 16, 2016) [hereinafter “Welch-Simpson Letter”], available at <http://www.nmpf.org/files/Welch-Simpson%20Letter.pdf>.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ FLYNN ADCKOCK ET AL, CTR. FOR N. AM. STUD., THE ECONOMIC IMPACTS OF IMMIGRANT LABOR ON U.S. DAIRY FARMS (2015), <https://1yoo7k3mjej72y4ffj396xcv-wpengine.netdna-ssl.com/wp-content/uploads/2021/02/CNAS-pub-Immigrant-Labor-Impacts-on-Dairy-Final.pdf>. See also Memorandum from Farmworker Justice on Selected Statistics on Farmworkers, available at <https://www.farmworkerjustice.org/sites/default/files/NAWS%20data%20factsht%201-13-15FINAL.pdf>.

In 2014, immigrant labor accounted for 51% of all dairy labor, and dairies that employ immigrant labor produced 79% percent of the US milk supply. *Id.*

²⁴⁵ See Debbie Weingarten, ‘There Are Ghosts in the Land’: How US Mega-Dairies Are Killing Off Small Farms, THE GUARDIAN (June 1, 2021),

2019 story about the crisis President Trump’s immigration policies were having on the dairy industry, the New York Times noted that “[i]t has long been an open secret in upstate New York that the dairy industry has been able to survive only by relying on undocumented immigrants for its work force.”²⁴⁶

The U.S. is not the only place where fears of harming the animal agriculture industry prompt politicians to pursue laws that hinder the ability of plant-based meat and milk to play an even more meaningful role in our species’ fight against climate change. A recent amendment passed by the European parliament is the latest battle in the European “milk wars” that began in 2014 when the Swedish dairy lobby sued a small (and at the time relatively obscure) Swedish oat milk company called Oatly, accusing it of misleading consumers.²⁴⁷ Oatly lost that particular battle, but has in recent years boomed in popularity across the globe and, as one of the key players in the latest scourge of the “milk wars,” seems intent on winning the war.

C. Amendment 171: “A wacko, incomprehensible direction to take in the middle of a climate crisis”

“Not milk.”

“Milk alternative.”

“Does NOT contain milk.”²⁴⁸

In late 2020 and early 2021, it appeared that phrases such as these commonly found on cartons of soy, almond, and oat milk were poised to become illegal in the European Union. In October 2020, under the guise of protecting customers from being “misled,” the European parliament passed Amendment 171 by a narrow 54% majority that, if allowed to become law,²⁴⁹ would have introduced

<https://www.theguardian.com/environment/2021/jun/01/there-are-ghosts-in-the-land-how-us-mega-dairies-are-killing-off-small-farms>.

²⁴⁶ Christina Goldbaum, *Trump Crackdown Unnerves Immigrants, and the Farmers Who Rely on Them*, N.Y. TIMES (Mar. 18, 2019), <https://www.nytimes.com/2019/03/18/nyregion/ny-farmers-undocumented-workers-trumpimmigration.html>.

²⁴⁷ See Marknadsdomstolen [MD] ([Market Court]) 2015 case no. C 23/14, available at

http://avgoranden.domstol.se/Files/MD_Public/Avgoranden/Domar/Dom2015-18.pdf (Swed.).

²⁴⁸ See Liam Giliver, *Oatly Slams EU over ‘Incomprehensible’ Decision to Support ‘Dairy Ban,’* PLANT BASED NEWS (Oct. 25, 2020), <https://plantbasednews.org/lifestyle/food/oatly-slams-eu-over-dairy-ban/>.

²⁴⁹ “It now needs approval from the EU Council of Ministers, which will consider the proposal at the trilogue meetings with the parliament and European Commission on January 27-28. If it’s agreed by the council and the commission, it

sweeping changes that would ban these and related labels on plant-based food products throughout the EU.²⁵⁰

In targeting plant milk and other non-dairy food alternatives, Amendment 171 sought to protect the dairy industry by invoking familiar fear-driven rhetoric, aiming to prohibit “any [] commercial indication or practice likely to mislead the consumer as to the product’s true nature or composition.”²⁵¹ Despite the persistence of dairy advocates in perpetuating the fear-driven narrative that a consumer may mistakenly purchase a container of oat milk containing the label “Not Milk” thinking that she is buying dairy milk, no evidence has been presented that a consumer might ever actually make that mistake.

If allowed to become law, Amendment 171 would have explicitly prohibited words such as “milk,” “butter,” and “yogurt” from appearing on plant-based food labels in any way that amounts to “any direct or indirect commercial use of [those words]” by “comparable products or products presented as capable of being substituted not complying with the corresponding definition” of those words, or “in so far as such use exploits the reputation associated with [those words.]”²⁵² Also prohibited is “any misuse, imitation or evocation, even if the composition or true nature of the product or service is indicated or accompanied by an expression such as ‘style’, ‘type’, ‘method’, ‘as produced in’, ‘imitation’, ‘flavour’, ‘substitute’, ‘like’ or similar[.]”²⁵³

The European Alliance for Plant-based Foods called the Amendment’s broad language “worrying,” noting that “[i]n its most

will become law.” Enrico Bonadio & Andrea Borghini, *Vegan ‘Dairy’ Products Face EU Ban from Using Milk Cartons and Yoghurt Pots – and the UK Could Be Next*, THE CONVERSATION (Jan. 26, 2021), <https://theconversation.com/vegan-dairy-products-face-eu-ban-from-using-milk-cartons-and-yoghurt-pots-and-uk-could-be-next-153564>.

²⁵⁰ *Id.* See also Tiffany Duong, *New EU Laws Could Censor Vegan ‘Dairy’ Products*, ECOWATCH (Jan. 28, 2021), <https://www.ecowatch.com/eu-vegan-dairy-law-2650162992.html?rebellitem=1#rebellitem1>; Flora Southey, ‘Plant-Based Dairy Censorship’: Oatly, Upfield and ProVeg Petition to Overthrow Amendment 171, FOOD NAVIGATOR (Jan. 14, 2021), <https://www.foodnavigator.com/Article/2021/01/14/How-Oatly-Upfield-and-ProVeg-plan-to-overthrow-Amendment-171>; Gilliver, *supra* note 245.

²⁵¹ See *Report of the Committee on Agriculture and Rural Development on the Proposal for a Regulation of the European Parliament and of the Council Amending Regulations Establishing a Common Organization of the Markets in Agricultural Products*, *supra* note 106, at 172.

²⁵² *Id.*

²⁵³ *Id.*

restrictive interpretation, [the Amendment] could result in bans on plant-based food packaging that looks visually similar to dairy foods. For example, a ban on packaging for plant-based desserts that resembles a yoghurt pot.”²⁵⁴

In a characteristically cheeky media campaign titled “Are you stupid?,” Swedish oat milk producer Oatly took aim at Amendment 171.²⁵⁵ No stranger to the cultural or legal “milk wars,” Oatly is well known for using humor, wit, and social media savvy to attack the rhetoric of its significantly more deep-pocketed competitors in the dairy industry.²⁵⁶ Its January 2021 YouTube ads began with the premise that “the milk lobby seems to think that when plant-based products use descriptions like ‘alternative to yogurt’ or ‘not milk’ or ‘creamy texture’, it’s hard for consumers to tell the difference between them and dairy.”²⁵⁷ Oatly’s stated goal was to “find out if the people of Europe really are that stupid.”²⁵⁸ In the ads, Oatly gathered people around a table for “focus groups” and were asked to point to the dairy milk container after being presented with a bottle of dairy and a bottle of Oatly oat milk.²⁵⁹ Needless to say, everyone pointed immediately to the carton emblazoned with an image of a cow, providing that no one was “that stupid.”²⁶⁰

Oatly and other plant-based food advocates were vocal not only about the absurdity of the claim that consumers may be “misled” by plant milk using phrases like “milk alternative” on its packaging, but also about the bigger and more consequential impact that Amendment 171 would have on existing efforts to promote plant-based foods as meaningful alternatives to meat and dairy in the global

²⁵⁴ European Alliance for Plant-Based Foods, *What Is Amendment 171 and How Could It Affect Plant-Based Foods?*, POLITICO (Oct. 5, 2020), <https://www.politico.eu/sponsored-content/what-is-amendment-171-and-how-could-it-affect-plant-based-foods/>. Oatly presented a visual of a spray bottle of oat milk shaped like household cleaner to prove the same point. *See Are You Stupid?*, OATLY, <https://www.oatly.com/int/stop-plant-based-censorship> (last visited Sept. 7, 2021).

²⁵⁵ *See Are You Stupid?*, *supra* note 251; *see also* Oatly, *A Quick & Colorful Guide to AM 171 | Stop AM 171 | Oatly*, YOUTUBE (Jan. 19, 2021), <https://www.youtube.com/watch?v=1rCc8-uGAj0>; *Stop Plant-Based Dairy Censorship*, PROVEG INT’L, <https://stopam171.com/> (last visited Sept. 7, 2021).

²⁵⁶ For a detailed overview of Oatly’s legal and cultural battles against the Swedish dairy lobby, *see See Gambert, supra* note 106, at 832-37.

²⁵⁷ *See* Oatly, *Where’s the Milk? | Stop AM 171 | Oatly*, YOUTUBE (Jan. 18, 2021), https://www.youtube.com/watch?v=_WMGDldA9pw&t=1s.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

fight against climate change and species extinction.²⁶¹ In a section called “And what about the climate?,” Oatly’s webpage about Amendment 171 said this:

The EU seems confused there, too. Amendment 171 will contradict the EU’s own sustainability ambitions. As part of the European Green Deal (with the goal to make the EU climate neutral by 2050), the Farm to Fork Strategy highlights the fact that current EU food consumption patterns are unsustainable, calling for a shift to more plant-based diets, both for reasons of public health and for environmental protection. Amendment 171 is a move in the opposite direction, creating a huge road block for both consumers and the European plant-based food sector.²⁶²

Oatly’s Director of Public Affairs and Sustainable Eating, Cecilia McAleavey, had harsh words about the advocates pursuing the passage of Amendment 171. “Given the climate crisis, it’s irresponsible to try and prevent us from encouraging people to make the switch to plant-based and help protect the planet in the process,” she said.²⁶³ “People are not stupid—everyone understands that this is an attempt by the dairy lobby to hinder the shift towards sustainable plant-based eating.”²⁶⁴

Jasmijn de Boo, Vice President of ProVeg International, agreed. “It is baffling to once again be forced to justify sustainability. We would be sabotage innovation? Who will benefit?”²⁶⁵ “We need to adapt across every part of our food chain if we’re to tackle the climate crisis,” she continued.²⁶⁶ “Genuinely sustainable food production must be enabled. How will we reach our climate goals if we allow the influence of powerful but unsustainable industries to determine our collective fate?”²⁶⁷

Oatly characteristically leveraged social media to spread the word about the dangers of Amendment 171 to efforts to combat climate change. “This past Friday the EU Parliament voted Yes to Amendment 171 which will make it illegal for plant-based foods to be compared to dairy products in the future,” said Oatly in an

²⁶¹ See *Are You Stupid?*, *supra* note 254.

²⁶² *Id.*

²⁶³ Southey, *supra* note 250.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

Instagram post on Oct. 24, 2020, alongside an image of an Oatly container emblazoned with the words “Not Milk.”²⁶⁸

*This means we can no longer call our products milk-free or talk about any of the health and environmental advantages they offer. It’s a wacko, incomprehensible direction to take in the middle of a climate crisis. Especially since this amendment runs contrary to the EU’s own climate goals and their ambition to encourage the consumption of plant-based foods. Actually though, it isn’t so surprising considering there are more milk lobbyists in Brussels than actual cows in pasture during the summer months.*²⁶⁹

Specifically targeting Amendment 171’s prohibition on comparisons made between dairy and plant milk and other vegan foods, Oatly took aim at the dairy lobby:

*Consider this. If a liter of cow’s milk generates 293% more greenhouse gas emissions than a liter of oat drink²⁷⁰, doesn’t it make perfect sense that the number one priority of all those milk lobbyists is to forbid this weakness from being exposed? And when the Milk Lobby decides to flex its protein-rich muscles we all know what happens—the public loses out. How will consumers now be able to easily compare different food products in order to make more informed decisions about what they eat?*²⁷¹

To be clear: Amendment 171 was not about whether plant milk should be allowed to use the word “milk” on its packaging: the European Union already has regulations dating back to 1987 that narrowly define “milk” as animal in nature, save for a few carefully delineated exceptions.²⁷² As a result, soy, almond, rice, oat, and other plant-based milks and dairy substitutes are already required to use

²⁶⁸ See Oatly (@oatly), INSTAGRAM (Oct. 24, 2020), https://www.instagram.com/p/CGuedRNM2aK/?utm_source=ig_embed.

²⁶⁹ *Id.*

²⁷⁰ *Id.* (“This comparison specifically refers to Swedish cow’s milk 1.5% and Oatly Oat Drink 1.5%.”)

²⁷¹ *Id.*

²⁷² See Council Regulation 1898/87, art. 2, 1987 O.J. (L 182) 36, 36 (EC). For exceptions, see Commission Decision 2010/791/EU, annex I, 2010 O.J. (L 336) 55, 56 (citing Council Regulation 1234/2007, annex XII, 2010 O.J. (L 299) 1, 105 (EC)). The regulations also allow for the legal description of nondairy products such as “peanut butter,” “cream crackers,” and “shea butter.” *Id.* Note that use of the word “milk” by plant milk companies in the U.S. remains contested. See Gambert, *supra* note 106, at 812-17.

terms like “soy beverage” or “oat drink” on their packaging.²⁷³ When Amendment 171 was first passed, the European Dairy Association (EDA) said that it was a “good day” for the “EU lactosphere,” adding that “non-dairy products cannot hijack our dairy terms and the well-deserved reputation of excellence in milk and dairy.”²⁷⁴

Amendment 171 was grounded not in logic, but fear. But logic—and public pressure—won out in the end: in May 2021—after Oatly and other plant milk advocates gathered over 450,000 citizen signatures on a petition to oust Amendment 171—the European Parliament voted to withdraw the Amendment by a vote of 124–37.²⁷⁵

IV. Want You To Panic: Embracing Fear And Rage As A Catalyst To Action

When it comes to confronting the idea that we humans may need to drastically reduce our meat consumption in the name of averting the current climate crisis, Jo Leinen, an omnivorous German member of the European Parliament, was cautious: “This is one of the most delicate issues with climate protection, because we all have our habits and diet is something quite holy for some people, not to be meddled with.”²⁷⁶

Federal dietary guidelines have been reluctant to unequivocally recommend against animal meat consumption for environmental purposes. In 2016, new federal dietary guidelines urged Americans to cut sugar intake and for the first time suggested that teenage boys and men cut down on their consumption of protein in the form of meat, chicken and eggs.²⁷⁷ Draft recommendations “had suggested all Americans adopt more environmentally-

²⁷³ See Council Regulation 1898/87, art. 2, 1987 O.J. (L182) 36, 36. Gambert, *supra* note 106, at 806.

²⁷⁴ Southey, *supra* note 250.

²⁷⁵ Flora Southey, *Amendment 171 off the table: Europe allows for ‘creamy’ and ‘buttery’ plant-based dairy*, Food Navigator (May 26, 2021), <https://www.foodnavigator.com/Article/2021/05/26/Europe-drops-Amendment-171-allowing-for-creamy-and-buttery-plant-based-dairy>. See also *Stop Plant Based Censorship*, Oatly, <https://www.oatly.com/en-us/things-we-do/initiatives/stop-plant-based-censorship> (last visited Dec. 9, 2021).

²⁷⁶ *Paris Climate Change Summit and the Taboo of Meat-Eating*, *supra* note 67.

²⁷⁷ Anahad O’Connor, *New Dietary Guidelines Urge Less Sugar for All and Less Protein for Boys and Men*, N.Y. TIMES, (Jan. 7, 2016), <https://well.blogs.nytimes.com/2016/01/07/new-diet-guidelines-urge-less-sugar-for-all-and-less-meat-for-boys-and-men/>.

sustainable eating habits by cutting back on meat,” but that advice was removed from the final published guidelines.²⁷⁸ In 2015, a government-assembled committee of nutrition experts “recommended that the dietary guidelines encourage all Americans to consume more plant-based foods and less meat to help promote environmentally sustainable eating habits.”²⁷⁹ The suggestion was met with “intense lobbying and criticism from the food and meat industries” that led to a congressional hearing.²⁸⁰ That December, congress called for a review of the dietary guidelines by the National Academy of Medicine and limited the scope of those guidelines to nutrition, “which essentially eliminated the advice about following an environmentally-sustainable diet.”²⁸¹ “That was the most controversial thing,” said Dr. Michael F. Jacobson, executive director of the Center for Science in the Public Interest, “and now it’s on the cutting-room floor.”²⁸²

And yet, the science is clear: our collective appetite for meat and dairy is a massive contributor to the current climate crisis and species extinction. It’s also an undeniable fact that the animal agriculture industry perpetuates animal exploitation and suffering on a grand scale. It’s no exaggeration to say that the harms caused by the animal agriculture industry should be taken every bit as seriously as other threats to our collective health and well-being, from cigarette smoking to Covid-19.

If Logos carried the day, we would all go vegan tomorrow. But despite The Economist dubbing 2019 “The Year of the Vegan,”²⁸³ it’s estimated that only about 3% of the world’s population actually eats a strictly plant-based diet.²⁸⁴ “Everyone I spoke with agreed that customers aren’t going to buy [plant-based foods] to save the planet,” reflected Washington Post journalist Tamar Haspel in an article about how unlikely it is for plant-based meat to significantly transform and disrupt the animal meat

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ Davide Banis, *Everything Is Ready to Make 2019 the "Year of the Vegan". Are you?*, FORBES (Dec. 31, 2018),

<https://www.forbes.com/sites/davidebanis/2018/12/31/everything-is-ready-to-make-2019-the-year-of-the-vegan-are-you/?sh=561d5b3a57df>.

²⁸⁴ Williams, *supra* note 7.

industry.²⁸⁵ “[W]e’re not rational when it comes to food.”²⁸⁶

Despite acknowledging that rice and beans is “a nutritionally perfect food and it basically costs nothing,” journalist Joel Stein admitted that “I care about animals and the environment and, even more, virtue signaling about how much I care about animals and the environment. I just don’t want to make any effort or sacrifice any pleasure.”²⁸⁷ Emotions played a significant role in Stein’s experiment of hosting a vegan dinner party “filled with bleeding edge products that don’t bleed.”²⁸⁸ “I felt vaguely superior,” he said about his meal—which featured exotic plant-based ingredients like fake bacon made from a mycelium called kogi and ravioli stuffed with cheese from beta-lactoglobulin and coconut oil—“as if we were leaving the Animal Age. I know it isn’t all that hard to be vegan where I live in Southern California. . . . But it seemed more possible when I replaced meat with this fun futuristic world than a simple gatherer past.”²⁸⁹

In the article, Stein asked Moby, musician and longtime vegan and animal rights activist, why he bothered producing a documentary about cultivated based meat when he himself was content to eat rice and beans.²⁹⁰ Moby reflected on what appears to be true about human nature. “We live in a broken world filled with irrational institutions,” he said.²⁹¹ “If you want to change the world, you have to work inside those irrational institutions.”²⁹² “That made sense,” acknowledged Stein, “especially later that night when I was knuckle-deep in a pint of plant-based Hazelnut Chocolate Chunk ice cream. I realized where those institutions were. They were in my head.”²⁹³

If logic and rational thinking—Logos—isn’t enough to inspire us to change our behavior, it’s worth considering whether

²⁸⁵ Tamar Haspel, *One Thing Might Keep the Impossible Burger from Saving the Planet: Steak*, WASH. POST (May 28, 2019), https://www.washingtonpost.com/lifestyle/food/one-thing-might-keep-the-impossible-burger-from-saving-the-planet-steak/2019/05/23/729836b0-7d69-11e9-a5b3-34f3edf1351e_story.html.

²⁸⁶ *Id.*

²⁸⁷ Joel Stein, *Could This Be the Lab-Made Dinner Party of Our Future?*, N.Y. TIMES (Feb. 23, 2021), <https://www.nytimes.com/2021/02/21/business/fake-meat-eggs-dairy-products.html?referringSource=articleShare>.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

emotion—Pathos—will.²⁹⁴ Specifically, by taking cues from other initiatives to change human behavior—namely the use of Graphic Warning Labels to curb cigarette consumption—it appears that a blend of Logos and Pathos that taps into the power of emotional fear-based narratives may help people radically reshape their relationship to—and choices about—food.

A. *Leveraging Fear Through Mandatory Graphic Warning Labels*

In order to create policies that are likely to result in people choosing to significantly change their diets in response to the threat of the climate crisis, it's helpful to consider what we already know about getting people to respond to an urgent threat: they need information and a feeling that that are part of the solution. In the early days of the Covid-19 pandemic, medical anthropologist Monica Schoch-Spana at the Johns Hopkins Center for Health Security explained that it's important to “inform and involve people in crafting solutions to the threat. . . You respect the public's autonomy, and you give them the information they need.”²⁹⁵ “I firmly believe we will manage this task if really all citizens see it as *their* task,” German Chancellor Angela Merkel remarked in March 2020.²⁹⁶ “Nobody is expendable. Everybody counts. It requires effort by all of us.”²⁹⁷

To get people to see themselves as part of the solution to the crisis fueled by meat and dairy, they need information. One way to convey that information is through mandatory labeling of all food products to show each item's impact on the environment and its relationship to worker and animal exploitation and suffering.²⁹⁸

²⁹⁴ In an article honoring Dennis Mileti, one of the world's leading experts on how humans behave in disasters and who died of Covid-19 in January 2021, it was noted that “Mileti did serious quantitative research, but he also knew how to talk so people would listen. He understood that emotion, social networks and group identity matter more than most things in disaster planning.” See Amanda Ripley, *Opinion: A disaster Expert Died Two Days Before He Was Set to Be Vaccinated. Here's How to Honor Him.*, WASH. POST (Feb. 17, 2021), <https://www.washingtonpost.com/opinions/2021/02/17/dennis-mileti-death-pandemic-psychology/>.

²⁹⁵ Amanda Ripley, *We Know How to Prepare the Public for a Crisis. Why Aren't We Doing it?*, WASH. POST (March 25, 2020), <https://www.washingtonpost.com/opinions/2020/03/25/we-know-how-prepare-public-crisis-why-arent-we-doing-it/>.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ The internet is full of sites like the BBC's “Follow the Food” quiz that allows consumers to get a rough estimate of their diet's climate footprint, but such sites

Oxford university professor Joseph Poore, who researches agriculture and the environment, has already proposed mandatory labeling of all food to show each item's environmental impact.²⁹⁹ Poore argues that these labels “would change how we produce and consume in three far-reaching ways.”³⁰⁰ First, “producers would have to measure their impacts in a uniform way and be accountable for the results.”³⁰¹ Second, “mandatory labels support sustainable consumption” because they would allow consumers to meaningfully compare otherwise-similar products, such as locally-produced and imported varieties of the same product.³⁰² Finally, mandatory environmental labels “would create information about the food system, and today this information is scarce. This could underpin better policy, particularly taxes or subsidies linked to actual environmental harm.”³⁰³

Poore is clear that such labels must be mandatory, because voluntary labeling has not been successful in changing consumer behavior.³⁰⁴ “[V]oluntary labelling doesn't leverage consumer behavior because shoppers are more likely to stop buying brands they perceive as unethical than to start buying those they perceive to be ethical,” he says.³⁰⁵ “Mandatory labels would highlight both high- and low-impact producers, in the same way, across multiple products. This would encourage more people to think about their choices by exposing them to the facts every time they are in the shops.”³⁰⁶

are limited in utility both because they rely on generalities and because they are entirely voluntary, failing to provide critical information at the moment a consumer is holding a product in her hands in the grocery store aisle. *See, e.g., Follow the Food*, BBC, <https://www.bbc.com/future/bespoke/follow-the-food/calculate-the-environmental-footprint-of-your-food.html> (last visited Sep. 5, 2021).

²⁹⁹ Poore, *supra* note 10.

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *See Id.* Oatly has also envisioned mandatory warning labels for food. In an October 24, 2020 Instagram post criticizing the implications of Amendment 171, it reasoned that “[o]ne way forward is to make it mandatory for dairy companies to state the climate impact of their products on their cartons so that consumers can make their own comparisons.” Oatly (@Oatly), *supra* note 268

³⁰⁵ Poore, *supra* note 10.

³⁰⁶ *Id.* Mandatory labels will have the effect of confronting consumers in the grocery store aisles every single time they are making purchasing decisions. This is very different than websites like the “Follow the Food” one the BBC offers, which allows people to select from a variety of generic food choices to see the

Poore's vision of mandatory labels on food is a simple yet visionary way to put critical information into the hands of consumers right at the moment it matters most—when they are in the grocery aisles scanning the aisles to decide what to put in their cart.³⁰⁷ But would Poore's labels be enough to dissuade vast numbers of people from selecting burgers and milk derived from a cow over their plant-based alternatives?

The mandatory labels that Poore envisions focus exclusively on the food product's environmental impact and are “emotionally neutral” in appearance, making use of red, orange, and green shapes to indicate how well a product scores on a variety of metrics such as water consumption, emissions, pesticide toxicity, and impact on biodiversity.³⁰⁸ The danger of Poore's bright, emotionally neutral labels is that they're too Logos-driven and don't pack enough of a Pathos-punch. To leverage the power of emotion-driven persuasion, mandatory food labels should leverage what we already know about using fear to change people's behavior. Taking a cue from anti-smoking initiatives, graphic imagery should appear on the labels of all animal-based food. The labels should communicate each food's impact not only on the environment, but also on animal well-being and exploitation and worker conditions.³⁰⁹

Research indicates that in the cigarette realm, Graphic Warning Labels (GWLs) “generally leads to a continuous drop in smoking rates.”³¹⁰ GWLs on cigarette packages have been shown to be significantly more effective than simple text-based warning labels because they create a fear and anger response that led to a stronger

environmental “foodprint” of their selected diet across a variety of metrics. *See Follow the Food, supra* note 298.

³⁰⁷ Proponents of Graphic Warning Labels on cigarette packages recognize that “People are more likely to see an anti-smoking message if it is present in the form of a label right on the outside of the cigarette box they are holding,” which is why they are particularly effective. See https://tobacco.stanford.edu/ad_tags/artries/.

³⁰⁸ Poore, *supra* note 10.

³⁰⁹ Ideally all food items—plant-based and animal-derived alike—would come with these mandatory labels, but given the particularized harms caused by animal-derived meat and dairy, it's absolutely essential that all animal-derived food be labeled.

³¹⁰ *See, e.g.,* Minsoo Jung, *Implications of Graphic Cigarette Warning Labels on Smoking Behavior: An International Perspective*, 21 J. CANCER PREV. 21 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4819662/>. *See also* Christophe Haubursin, *Those Gross, Graphic Warnings on Cigarette Labels? This Study Shows They Actually Work.*, VOX (April 8, 2015), <https://www.vox.com/2015/4/8/8371613/graphic-warnings-on-cigarette-packs-are-changing-the-smoking>.

intention to quit smoking.³¹¹ A 2018 report from Australia titled *Evaluation of effectiveness of graphic health warnings on tobacco product packaging* showed that GWLs were good at “attracting attention and being noticed,” with the most common descriptions of the labels being that they contained “gross/ ugly/ disgusting/ bad/ confronting/ graphic pictures.”³¹² The report found that GWLs “are remembered and encoded in memory,” with roughly 70% of people being able to “describe one of the graphics or messages when asked what pictures they could recall on packaging.”³¹³ Some images proved more memorable than others, but on the whole people’s “[r]ecall of written health warnings was considerably lower than recall of the graphics,” with only 39% of people being able to recall a written warning.³¹⁴ Graphic images have the added benefit of communicating effectively to people with low literacy, as well as to immigrants who are not yet able to read the national language(s).³¹⁵ Further, research also shows that health information on cigarette labels is conveyed better when that information is were combined with GWLs.³¹⁶ Thus, combining written messages with a graphic image that evokes negative emotions is likely to elicit the strongest response among consumers.

Research also indicates that label size matters: the Framework Convention on Tobacco Control (FCTC) recommends that GWLs extend across at least 50% of the cigarette package cover.³¹⁷ Larger GWLs have the create more space to provide information mixed with graphic imagery, and do a better job of competing for the consumer’s attention than smaller labels do on a

³¹¹ Jung, *Supra*, note 310. “When functional magnetic resonance imaging of neural responses generated after exposing smokers to GWLs were analyzed, the images aroused strong emotional reactions, which increase cognitive efforts that accompany information processing. This increases the memory of the images and reduces the desire to smoke. In other words, smokers exposed to GWLs exhibited more fear and a stronger intention to quit smoking than did smokers exposed to simple warning messages.” *Id.*

³¹² See ESSENCE COMMUNICATIONS, *EVALUATION OF EFFECTIVENESS OF GRAPHIC HEALTH WARNINGS ON TOBACCO PRODUCT PACKAGING 7* (2018). The Australian report found that when smokers and recent smokers see GWLs on cigarette packaging, 57% felt “some emotional response,” with the most common emotions being: “disgusted (14%), worry/concern (6%), guilty, fearful/scared (6%), thinking they should stop (5%) and relief they aren’t smoking (7% non-smokers).” *Id.* at 9. Nearly a third (31%) claimed to feel nothing or reported that they ignored or were desensitized to the GWLs. *Id.* at 9.

³¹³ *Id.* at 7.

³¹⁴ *Id.*

³¹⁵ CANADIAN CANCER SOCIETY, *CIGARETTE PACKAGE HEALTH WARNINGS: INTERNATIONAL STATUS REPORT 7* (6th ed. 2018).

³¹⁶ Jung, *supra* note 310.

³¹⁷ *Id.*

package.³¹⁸ As of 2018, 107 countries required warnings covering at least 50% of the package, up from 24 countries in 2008.³¹⁹ Some countries go bigger: mandatory GWLs must cover 90% of the cigarette pack in Nepal, 87.5% of the pack in New Zealand, 85% in India, and 82.5% in Australia.³²⁰

In Canada, masculinity itself is an explicit target of the fear-driven rhetoric leveraged by GWLs, with some cigarette packages containing warnings that “tobacco use can make you impotent” paired with a humorous image of a limp, dropping cigarette.³²¹ As of 2018, 118 countries (or jurisdictions) worldwide require “picture warnings” on cigarette packages, reaching 58% of the world’s population.³²² This is up from 18 countries in 2008.³²³ Meanwhile, 107 countries require warning labels to cover at least 50% of the package front and back, up from 24 countries in 2008.³²⁴ The United States, meanwhile, is not a party to the FCTC and until very recently had no requirement that graphic images or “picture warnings” be used on cigarette packages at all.³²⁵

Given the longstanding resistance in the United States to embracing GWLs on cigarette packages—at odds with most of the rest of the world—it stands to reason that efforts to implement mandatory food labeling for environmental and animal impact would face similar resistance. A recent FDA rule—issued in March 2020 and going into effect in January 2022—offers a framework for success.³²⁶

³¹⁸ CANADIAN CANCER SOCIETY, *supra* note 315, at 7.

³¹⁹ *Id.* at 2.

³²⁰ *Id.* at 8.

³²¹ See *Yucky but Effective*, SOUTH FLORIDA SUN SENTINEL (Feb. 24, 2001), <https://www.sun-sentinel.com/news/fl-xpm-2001-02-24-0102231047-story.html>. See also James Brooke, *Canada Seeks to Jolt Smokers with a Picture on Each Pack*, N.Y. TIMES (Jan. 20, 2000), <https://www.nytimes.com/2000/01/20/world/canada-seeks-to-jolt-smokers-with-a-picture-on-each-pack.html>. (“[T]o illustrate a link between cigarette smoking and male impotence, Canadian health authorities chose a photograph of a symbolically limp cigarette. Trying to blunt smoking’s sex appeal, the warning would read: “Cigarettes may cause sexual impotence due to decreased blood flow to the penis. This can prevent you from having an erection.””).

³²² CANADIAN CANCER SOCIETY, *supra* note 315, at 7.

³²³ *Id.* at 7.

³²⁴ *Id.* at 2.

³²⁵ *Id.* at 11.

³²⁶ *Cigarette Labeling and Health Warning Requirements*, U.S. FOOD & DRUG ADMIN. (Aug. 25, 2021), <https://www.fda.gov/tobacco-products/labeling-and-warning-statements-tobacco-products/cigarette-labeling-and-health-warning-requirements>.

B. *The 2020 FDA Rule: a Blueprint for Mandatory Graphic Labeling Success*

Any regulatory effort to impose GWLs on animal-derived food would do well to understand the long and controversial history that attempts to impose GWLs on cigarette packages have faced in the United States. A recent development in the form of a yet-to-be implemented FDA rule provides a blueprint that advocates of GWLs for food can follow.

In March 2020, the Food and Drug Administration (FDA) in the United States issued “a final rule to establish new cigarette health warnings for cigarette packages and advertisements” that “amends the Federal Cigarette Labeling and Advertising Act (FCLAA) of 1965 to require each cigarette package and advertisement to bear one of the new required warnings. The final rule specifies the 11 new textual warning label statements and accompanying color graphics.”³²⁷ The FDA stated that it is “taking this action to promote greater public understanding of the negative health consequences of cigarette smoking,”³²⁸ noting that current written warnings, “which have not changed in 35 years, have been described as ‘invisible’ . . . and fail to convey relevant information in an effective way[.]”³²⁹ The rule was supposed to go into effect on June 18, 2021,³³⁰ but the date has been pushed back to January 14, 2022.³³¹

Once implemented, the new FDA rule will bring the United States in line with the 118 countries that already require GWLs on cigarette packages. The rule states that the new warnings will “consist of textual warning statements accompanied by color graphics, in the form of concordant photorealistic images, depicting the negative health consequences of cigarette smoking.”³³² Further, the warnings “warnings must appear prominently on packages and in advertisements, occupying the top 50 percent of the area of the front and rear panels of cigarette packages and at least 20 percent of the area at the top of cigarette advertisements.”³³³

³²⁷ Tobacco Products; Required Warnings for Cigarette Packages and Advertisements, 85 Fed. Reg. 15,638 (June 18, 2021) (codified at 21 C.F.R. 1141).

³²⁸ *Id.*

³²⁹ *Id.* at 15,639.

³³⁰ *Id.* at 15,638.

³³¹ *Cigarette Labeling and Health Warning Requirements*, *supra* note 322.

³³² Tobacco Products; Required Warnings for Cigarette Packages and Advertisements, 85 Fed. Reg. at 15,638.

³³³ *Id.*

In issuing its rule, the FDA noted that it received comments from a number of constituencies arguing that the new required warnings “violate the First Amendment of the United States Constitution under a variety of legal standards” and that “the Government's interest in promoting greater public understanding of the negative health consequences of cigarette smoking is not substantial.”³³⁴ The FDA rejected those arguments. It asserted that *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) governs this matter, and that under the *Zauderer* framework, a government interest supporting factual disclosures need not be substantial—but emphasized that “even if a substantial interest were required, that standard is easily met for these required warnings.”³³⁵ It also discussed the First Amendment argument at great length.³³⁶

The FDA rejected the argument that images that intend to “evoke an emotional response, shock the viewer into retaining information, or convey an ideological message about how consumers should behave” cannot qualify as factual and accurate “based on their assertion that they are designed to evoke an emotional response, such as disgust.”³³⁷ The FDA argues that the planned warning images “illustrate the factual and accurate textual statements with which they are paired,” and emphasized that the FDA developed the images via a “a science-based, iterative research process” that created images

that were factually accurate; that depicted common visual presentations of the health conditions and/or showed disease states and symptoms as they are typically experienced; that presented the health conditions in a realistic and objective format devoid of non-essential elements; and that study participants found were concordant with the statements on the same health conditions. To do this, FDA staff, including internal medical experts from a range of specialties, worked closely with a certified medical illustrator to develop high quality, factually accurate photorealistic images[.]³³⁸

Food labeling in the United States is regulated by a combination of the Food & Drug Administration (FDA) and the U.S. Department of Agriculture (USDA), with the FDA governing dairy and plant-based foods and USDA being responsible for meat and poultry labeling (both agencies regulate eggs, but in distinct

³³⁴ *Id.* at 15,643.

³³⁵ *Id.* at 15,644.

³³⁶ *Id.* at 15,643.

³³⁷ *Id.* at 15,646.

³³⁸ *Id.*

forms).³³⁹ The FDA and USDA are “in close coordination” on labeling matters, and “intend to work together to reach a common goal that will best assist consumers in making healthy dietary choices.”³⁴⁰

Advocates of GWLs for animal-derived food should have no problem showing that the government has a significant interest in keeping the general public safe by reducing the wide-ranging dangers associated by climate change and mass species extinction, as well as in reducing the harms associated with mass exploitation and suffering to humans and nonhuman animals in the animal agriculture industry. To the extent the FDA (or USDA) faced First Amendment challenges in any effort to impose mandatory GWLs on animal-derived food, it could turn to the rationale it presented in the FDA’s March 2020 rule as a blueprint. Specifically, so long as food labels contained “factual and accurate textual statements” paired with graphic images that are accurate and developed via “a science-based, iterative research process,” they should withstand any challenge that images intended to evoke an emotional response cannot qualify as “factual and accurate.”³⁴¹

GWLs for animal-derived food may be met with challenges based on the D.C. Circuit’s 2012 decision *R.J. Reynolds Tobacco Co. v. FDA*, which struck down GWLs the FDA issued in 2011.³⁴² In that case, the D.C. Circuit emphasized that “[n]o one doubts the government can promote smoking cessation programs; can use

³³⁹ *Guidance for Industry: Letter Regarding Point of Purchase Food Labeling*, U.S. FOOD & DRUG ADMIN. (October 21, 2009), <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-letter-regarding-point-purchase-food-labeling>. For an overview of what food labeling is governed by the FDA and what is governed by the USDA, see Ralph Meer, *Understanding Key USDA and FDA Food Labeling Differences: Part One*, MERIEUX NUTRISCIENCES (June 28, 2018), <http://foodsafety.merieuxnutrisciences.com/2018/06/28/understanding-key-usda-fda-food-labeling-differences-part-one/> and Ralph Meer, *Understanding Key USDA and FDA Food Labeling Differences: Part Two*, MERIEUX NUTRISCIENCES (July 19, 2018), <http://foodsafety.merieuxnutrisciences.com/2018/07/19/understanding-key-usda-fda-food-labeling-differences-part-two/>. For a discussion on mandatory vs. voluntary GMO labeling, see *Food Labeling – An Overview*, THE NAT’L AGRIC. L. CTR., <https://nationalaglawcenter.org/overview/food-labeling/> (last visited Sept. 6, 2021).

³⁴⁰ *Guidance for Industry: Letter Regarding Point of Purchase Food Labeling*, *supra* note 339.

³⁴¹ Tobacco Products; Required Warnings for Cigarette Packages and Advertisements, 85 Fed. Reg. at 15,646.

³⁴² *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1222 (D.C. Cir. 2012).

shock, shame, and moral opprobrium to discourage people from becoming smokers; and can use its taxing and regulatory authority to make smoking economically prohibitive and socially onerous. And the government can certainly require that consumers be fully informed about the dangers of hazardous products.”³⁴³ The issue in *R.J. Reynolds*, the Court, said, was about the “scope of the government’s authority to force the manufacturer of a product to go beyond making purely factual and accurate commercial disclosures and undermine its own economic interest—in this case, by making ‘every single pack of cigarettes in the country [a] mini billboard’ for the government’s anti-smoking message.”³⁴⁴ In other words, said the Court, “how much leeway should this Court grant the government when it seeks to compel a product’s manufacturer to convey the state’s subjective—and perhaps even ideological—view that consumers should reject this otherwise legal, but disfavored, product?”³⁴⁵

These are critical questions to be sure. The D.C. Circuit ultimately held that the FDA’s 2011 GWLs “do not constitute the type of ‘purely factual and uncontroversial’ information, or ‘accurate statement[s],’ to which the *Zauderer* standard may be applied.”³⁴⁶ Noting that the FDA “concedes that the images are not meant to be interpreted literally,” the *R.J. Reynolds* court held that the 2011 GWLs were not “purely” factual because “they are primarily intended to evoke an emotional response, or, at most, shock the viewer into retaining the information in the text warning.”³⁴⁷ “These inflammatory images,” reasoned the *R.J. Reynolds* court, cannot rationally be viewed as pure attempts to convey information to consumers. They are unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting.”³⁴⁸ The Court acknowledged that “none of these images are patently false,” but held that “they certainly do not impart purely factual, accurate, or uncontroversial information to consumers” and that “[c]onsequently, the images fall outside the ambit of *Zauderer*.”³⁴⁹

³⁴³ *Id.* at 1212.

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.* at 1216.

³⁴⁷ *Id.* (citing Brief for Appellants at 33, *R.J. Reynolds Tobacco Co. V. Food & Drug Admin.*, 696 F.3d 1205 (D.C. Cir. 2012) (No.11-5332) (quoting S. David (citing research showing that “pictures are easier to remember than words”); *id.* at 38 (citing FDA’s finding that a substantial body of scientific literature shows that emotional responses, such as worry and disgust, “reliably predict the likelihood that consumers will understand and appreciate the substance of the warnings”)).

³⁴⁸ *Id.* at 1216-17.

³⁴⁹ *Id.* at 1217.

Proponents of GWLs for animal-derived food will have to contend with the D.C. Circuit's holdings in *R.J. Reynolds*, but that case alone should not bar their efforts. First, it is likely that other circuits may see the issue differently, and until the U.S. Supreme Court rules on these issues, they remain unsettled. Second, the FDA's 2020 Rule provides important updates to its 2011 GWL strategy, including developing the images via a "a science-based, iterative research process" that focuses on presenting images in "a realistic and objective format devoid of non-essential element[.]"³⁵⁰ The FDA rejects the argument that when GWLs evoke an emotional response they cannot also be factual, reasoning that with regard to its 2020 GWLs, "an emotional reaction on the part of some individuals would not render the warnings or the health information they convey 'controversial' or 'inflammatory.'"³⁵¹ The same arguments could be made in with respect to GWLs for animal-derived food.

C. *Envisioning GWLs for Animal-derived Food*

Images of clear-cut rainforests, veal calves separated from their mothers, or pregnant pigs in cramped gestation crates may be disturbing to look at but do not render them "controversial" or any less "accurate" than less emotionally laden images might be.

We humans are loathe to consider—really pause and reflect—on the lived experience of the billions of cows, pigs, chicken, and sheep whose lives from birth to death are wholly controlled the animal agriculture industry. Before their flesh and bodily fluids ended up in yogurt tins, cartons of milk, pints of ice cream, or packages of shrink-wrapped bacon, ground beef, or chicken breasts, what lives did they live? What social relationships did they have? Were they allowed to bond with their young? Did they suffer injuries from overcrowding, or overmilking? How much of their natural lifespan was left on the day they were corralled into the slaughterhouse, their bodies worth more to the humans who owned them dead than alive? Did they ever see the light of day, feel sunshine on their faces, or grass under their feet?

In a telling moment that underscores how uncomfortable we humans are with the fact that we breed and kill other animals for the pleasure of our own appetites, the D.C. Circuit in *American Meat*

³⁵⁰ Tobacco Products; Required Warnings for Cigarette Packaging and Advertisements, 85 Fed. Reg. 15,638, 15,646 (Mar. 18, 2020) (codified at 21 C.F.R. pt. 1141).

³⁵¹ *Id.*

Institute v. U.S. Department of Agriculture failed to unequivocally reject the American Meat Institute’s (AMI) objection to the word “slaughter” being used on meat labels.³⁵² “Though it seems a plain, blunt word for a plain, blunt action, we can understand a claim that ‘slaughter,’ used on a product of any origin, might convey a certain innuendo,” the Court said, ultimately concluding that it need not address AMI’s objection because AMI did not object to “the truth of the facts required to be disclosed, so there is no claim that they are controversial in that sense,” and furthermore the more benign word “harvested” was permitted under the regulations as an alternative to “slaughtered,” and AMI did not object to use of that word.³⁵³

As for the “certain innuendo” that the word “slaughter” may convey, the D.C. Circuit did not elaborate, but in tacitly agreeing with AMI that it is a word that the meat industry may want to avoid on its packaging, the court acknowledged the cognitive dissonance that the animal agriculture industry seeks to perpetuate to keep its consumers from thinking too deeply about the lives—and deaths—of the animals whose bodies they are selling.

A closer look at the arguments offered against use of the word “slaughter” on meat labels reveals a deep discomfort within the meat industry of the idea of confronting consumers with factually accurate information about the death of the animals they are selling. The word “slaughtering” is “not accurate” and “offensive,” said one AMI member.³⁵⁴ “Consumers will have to think about slaughter every time they buy or prepare meat,” said another.³⁵⁵ “[R]equiring labels to declare ‘Born, Raised, and Slaughtered in the U.S.’ could adversely affect demand by bringing front and center the issue of slaughtering livestock,” said a third.³⁵⁶

That the word “slaughter” or other words that may force consumers to confront the fact that animals are killed for their meat and may evoke an emotional reaction does not make those words factually inaccurate. To the contrary. Proponents of GWLs for animal-derived food should not be deterred from using factually accurate words precisely *because* they are likely to elicit an

³⁵² *Am. Meat Inst. v. U.S. Dept. of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc).

³⁵³ *Id.*

³⁵⁴ Reply Brief for Appellants, at 8 n.2, *Am. Meat Inst. v. U.S. Dept. of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc) (No. 13-5281).

³⁵⁵ *Id.*

³⁵⁶ *Id.*

emotional reaction. The truth has been sanitized for consumers for too long, and it does not serve the crisis we now face.

In envisioning what GWLs for animal-based food should look like, advocates should lean on the rhetorical tool Logos, partnering closely with scientists and experts to ensure the data information communicated is accurate. But they should also lean on the rhetorical tool Pathos, casting a vivid and emotionally provocative spotlight on the environmental harms, suffering, and exploitation inherent in the animal agriculture industry that has, for far too long, been too easy to ignore.

V. CONCLUSION

Our food culture is broken. Not only does “[f]ood in the Anthropocene represents one of the greatest health and environmental challenges of the 21st century,”³⁵⁷ but our relationship to food—in particular animal-derived meat, eggs, and dairy—is harmful in other ways as well. Our tendency to associate meat-eating with masculinity and strength and plant-eating with femininity and weakness is grounded in deeply-entrenched gender norms that perpetuate a form of idealized “traditional masculinity” that is itself harmful.³⁵⁸ Our seemingly insatiable appetite for meat and milk is harmful to the workers of the animal agriculture industry—a cohort that is disproportionately comprised of immigrants and people of color whose working conditions expose them to large-scale suffering and death for low wages, few benefits, and, more recently, perilous exposure to Covid-19.³⁵⁹ As if this multitude of harms were not enough, the greatest harms are borne by the billions of animals bred into existence each year for the sole purpose of commodification and consumption, with little regard for the quality of their lived experience, their social bonds, or their desire to live a life free from interventions like artificial insemination, cramped quarters, limited to no exposure to sunlight and grass, separation between mother and young, and an untimely death.³⁶⁰

This needs to stop. A 2019 report published by the Lancet Commission titled *Food in the Anthropocene: the EAT–Lancet Commission on healthy diets from sustainable food systems* urged that “global efforts are urgently needed to collectively transform

³⁵⁷ Willet et al., *supra* note 42, at 449.

³⁵⁸ See Gambert & Linné, *supra* note 58, at 133.

³⁵⁹ See Matthews & Pinkerton, *supra* note 54.

³⁶⁰ See Jacobs, *supra* note 53.

diets and food production.”³⁶¹ What is needed, argued Lancet, is “rapid adoption of numerous changes and unprecedented global collaboration and commitment: nothing less than a Great Food Transformation.”³⁶²

How, then, do we achieve a Great Food Transformation? Do plant based foods need to occupy the same rhetorical space as animal-derived food, reinforcing tropes of traditional masculinity, strength, and bleeding burgers, to create a meaningful paradigm shift? Or is something more disruptive, more norm-shattering, necessary to fundamentally change the way we humans think about food? Can an environmentally sustainable and animal-and-worker friendly plant-based food culture become dominant without the fear-based narratives that have so far kept animal meat in the center of our plates for generations?

As this article suggests, perhaps advocates of plant-based food should lean into fear and other emotion-driven narratives to achieve a paradigm shift in the way we think about food. Kathie Dannemiller’s “Formula for Change” ($C = D \times V \times F > R$) argues that change occurs when there is Dissatisfaction with how things currently are combined with a Vision of what alternative is possible, and the First concrete steps for realizing that vision.³⁶³ This article argues that we have these three ingredients in spades.

Of course, mandatory GWLs for animal-derived food won’t single-handedly solve the climate crisis or change our attitudes and cultural norms around food overnight. But, they could be an important component of a multi-faceted strategy that would need to include bold local, national, and international action and coordination undertaken by governments, industry, and civil society.³⁶⁴

³⁶¹ Willet et al., *supra* note 42, at 447.

³⁶² *Id.* at 448.

³⁶³ See Dannemiller & Jacobs, *supra* note 96, at 483.

³⁶⁴ See Willet et al., *supra* note 42, at 478 tbl.6 (illustrating “the Nuffield Ladder of Policy Intervention to Health Diets from Sustainable Food Systems” depicting potential action taken by government, industry, and civil society including a range of policy interventions: eliminate choice, restrict choice, guide choices through disincentives, guide choices through incentives, guide choice by changing default policy, enable choice, provide information, and do nothing).

See also Eliza Barclay, *The Way We Eat Could Doom Us as a Species. Here’s a New Diet Designed to Save Us.*, VOX (Jan. 24, 2019), <https://www.vox.com/2019/1/23/18185446/climate-change-planet-based-diet-lancet-eat-commission>.

Again, we have in our grasp all the ingredients for change in Dannemiller's formula. But for them to be successful, they must be greater than any existing resistance to change.³⁶⁵ As the Lancet Report says, there will be no Great Food Transformation "without people changing how they view and engage with food systems."³⁶⁶ And to do that, what's really needed is a change in how we view and engage with ourselves, who we are, and who we want to be.

Like any great transformation, the one before us will be messy, and it will be emotional. Change always is, even when we know logically that it is the right thing to do. But as Audre Lorde and other feminist scholars have so poignantly pointed out, there are uses for our anger, our rage, our pain, and our grief.³⁶⁷ Powerful emotions can be catalysts for powerful, sweeping, paradigm-shifting change. As we gather the science and data necessary to support policy decisions that may change our relationship to food forever, we should also expand our willingness to recognize those powerful and complicated emotions, and our vocabulary to describe them.³⁶⁸

Ultimately, Greta Thunberg is right: we need to panic. Not about the loss of our old ways of life, or about the decline of powerful and exploitative industries. We need a new narrative around food, one that rejects both the inherent injustices and climate-related harms bound up in animal-derived meat and dairy and the harms inherent in linking dominant food culture to the rhetoric of traditional masculinity. And we can leverage the rhetoric of fear, and panic, and rage as one tool among many that can combine to create a fundamental paradigm shift in our relationship to food. "I want you to panic," Thunberg said. "I want you to feel the fear I feel every day. And then I want you to act."³⁶⁹

³⁶⁵ See Dannemiller & Jacobs, *supra* note 96, at 483.

³⁶⁶ Willet et al., *supra* note 42, at 450.

³⁶⁷ See LORDE, *supra* note 34, at 127.

³⁶⁸ See, e.g., Pihkala, *supra* note 30 ("We need more vocabulary of the various forms of climate grief, and we need more thinking about the tasks and stages of grief in relation to them. We also need more thinking about the various other emotions that are connected with grief and anxiety, such as anger, frustration, and guilt. Study on "eco-anger" or "climate rage" has only just begun, as has research on "climate burnout" and "climate depression". Trauma dynamics is another area that needs more attention.").

³⁶⁹ Thunberg, *supra* note 13.

The Right to Food Comes to America

Wendy Heipt*

Abstract

The people of Maine recently exercised an opportunity no citizen of this country has ever had before: the ability to vote on whether to enshrine a right to food in their state constitution. This Essay provides an overview of Maine's experience with food rights in order to explain how the state came to occupy this unique position.

I. Introduction

The Right to Food ("RtF") movement holds that hunger is a human rights violation and not an inevitable systematic by-product.¹ Although many people assume the RtF confers an affirmative obligation on the government to provide sufficient food directly to each person, rarely is this the case.² The RtF movement looks at food

* Wendy Heipt is a human rights attorney and a member of the board of WhyHunger, a nonprofit founded in 1975 by the late musician Harry Chapin and Radio DJ Bill Ayres.

¹ While the term 'right to food' most correctly describes the state constitutional push this article focuses on, 'food sovereignty' is an aligned movement whose definition often overlaps with RtF principles. The term 'food sovereignty' was introduced at the 1996 World Food Summit by Via Campesina, an international movement founded in 1993 working on behalf of peasant agriculture. Although the term is now in widespread use with numerous definitions, as forwarded by Via Campesina it includes free access to seeds and the right of consumers to be able to decide what they consume and by whom it is produced. See LA VIA CAMPESINA, <https://viacampesina.org/en> (last visited Oct. 3, 2021); Tina D. Beuchelt & Detlef Virchow, *Food Sovereignty or the Human Right to Adequate Food: Which Concept Serves Better as International Development Policy for Global Hunger and Poverty Reduction*, 29 AGRIC. & HUM. VALUES 259, 259-261 (2012); *Declaration of Nyéléni*, NYÉLÉNI (Feb. 27, 2007), <https://nyeleni.org/IMG/pdf/DeclNyeleni-en.pdf>; Jessica Clendenning et al., *Food Justice or Food Sovereignty? Understanding the Rise of Urban Food Movements in the USA*, 33 AGRIC. & HUM. VALUES 165, 169 (2016). The term 'food security' is also distinguishable from the RtF, as it is not a legal concept and does not confer legal obligations.

² Certain events and subpopulations, such as prisoners, do confer such an obligation, as the state is the only source of food for people who are incarcerated. Prisoners have a right to safely receive nutritionally adequate food that must comport with the 1st and 8th Amendments to the Constitution. Lawsuits over prison food have focused on religious dietary needs, food safety, and food discipline, most notoriously over 'nutraloaf,' a composite food made up of rotating ingredients fed to inmates as punishment. See Complaint at 14, *Estate of Thomas v. Milwaukee County*, No. 2:17-cv-01128 (E.D. Wis. dismissed May 13, 2019) (alleging that the nutraloaf served at the Milwaukee County Jail was so dry that the

determination as a human right and seeks to ensure that conditions allow for citizens to access adequate amounts of appropriate and available food themselves. In other words, the right to food is a person's right to feed themselves, through their own efforts, with dignity. In order to fulfill this right, governments must afford the conditions that allow full realization of the right. There is no internationally agreed-upon model language for the RtF,³ and assorted treaties, constitutions and international bodies have used different definitions in explaining the right.⁴ I employ what I have termed the '4As' to most clearly define the RtF. The '4As' are: (1) Availability, (2) Accessibility, (3) Adequacy, and (4) Appropriateness. Availability means that individuals are able to produce, procure, and/or purchase the amount and types of food they need and desire. Accessibility means that there is sufficient infrastructure, both physical and economic, in a nation and a community, to allow individuals physical proximity to the food they need and desire and the resources to purchase that food without sacrificing other basic needs. Adequacy means that individuals are getting and will continue to get, enough calories, nutrients and micronutrients to lead healthy and safe lives. Appropriateness means that individuals are able to access food relating to their cultural preferences in a dignified manner and that food systems are environmentally sustainable over time.

The 4As emphasize that the RtF is one part of the human rights framework – an interdependent element whose achievement rests on the realization of other rights.⁵ This is because human rights

dust from the loaf set off the fire alarm); *Prude v. Clarke*, 675 F.3d 732, 733 (7th Cir. 2012).

³ See DUBRAVKA BOJIC BULTRINI, FOOD & AGRIC. ORG. OF THE UNITED NATIONS, GUIDE ON LEGISLATING FOR THE RIGHT TO FOOD 1, 3 (2009) (noting no model can account for each state's context, history or systems, but discussing key elements).

⁴ For example, the UN Special Rapporteur on the right to food defines it as the right to have regular, permanent, and unrestricted access — directly or by means of financial purchases — to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions to which the consumer belongs, and which ensure a physical and mental, individual and collective, fulfilling, and dignified life free of fear. The Committee on Economic, Social and Social Rights, general comment No. 12, determined that the right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement. U.N., Off. of the High Comm'r, About the Right to Food and Human Rights, <https://www.ohchr.org/EN/Issues/Food/Pages/AboutHRFood.aspx> (last visited Oct. 3, 2021).

⁵ Many international instruments recognize that using a human rights framework when discussing the RtF implicates multiple other rights. For example, the ICESCR recognizes the RtF is connected to the rights to health, housing and social security. See International Covenant on Economic, Social and Cultural Rights art.

are integrally intertwined and the full realization of any one of them depends on the progress of others.⁶ To illustrate at its extreme, starvation will essentially nullify the fulfillment of all other rights. Less dramatically, a lack of sufficient food hinders the full realization of other rights. To ensure that human beings can fully realize all their fundamental human rights, they must be able to feed themselves amid conditions allowing for adequate realization of this right. The RtF asks that the government refrain from actions that stymie its realization and act in a manner that will facilitate realization of the right. It also means that the government will step in to ensure that third-party actors are not permitted to undermine the right.⁷ RtF amendments including the 4As provides future courts with a structure for interpretation and pushes recognition of the fact that hunger is a human rights and social access issue that effects marginalized communities most acutely.⁸

While the Rtf is recognized under international law and by governments around the globe, the United States has no such right in its federal constitution and has not signed onto any documents that would give that right to its citizens.⁹ Until Maine made history with

9, 11, 12, Dec. 16, 1966, U.N.T.S.14531. The UN 2030 Agenda for Sustainable Development is built around seventeen Sustainable Development Goals (SDGs) which recognize that ending hunger is inextricably linked with ending other deprivations and with strategies promoting economic growth and justice. *See* U.N., Dep't of Econ. & Social Affs., *The Sustainable Development Goals Report* (2018), <https://unstats.un.org/sdgs/report/2018/interlinkages/> (last visited Oct. 4, 2021).

⁶ *See* K. Heather Devine, *Vermont Food Access and the "Right to Food": Using the Human Right to Food to Address Hunger in Vermont*, 41 VERMONT L. REV. 177, 181-82 (2016).

⁷ As one example, this is thought to include proactive measures to eliminate harmful pesticides and the adoption of policies addressing climate change. *See* Hum. Rgts. Council, Rep. of the Special Rapporteur on the Right to Food, U.N. Doc. A/HRC/34/48 (2017); Hilal Elver (Special Rapporteur on the Right to Food), *Right to Food*, U.N. Doc. A/70/287 (2015).

⁸ That said, not every nation with an explicit or implicit right to food incorporates the 4As. This is not only because this is an evolving right but also because incorporating all of the 4As makes it more difficult to pass amendments when there is opposition. As explained below, this holds true for the experience in Maine, where drafters had to hone their proposed language to garner the votes necessary for passage. *See* H.R. 95, 130th Leg., Reg. Sess. (Me. 2021).

⁹ U.N. Food & Agric. Org., *The Right to Food Around the Globe*, <http://www.fao.org/right-to-food-around-the-globe/countries/usa/en/> (last visited Oct. 1, 2021). The most comprehensive RtF language is found in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Other relevant documents include the Universal Declaration on Human Rights, International Covenant on Civil and Political Rights, Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of the Child, 1996 World Food Summit and Convention on the Rights of Persons with Disabilities. *See generally* Margaret E. McGuinness, *Exploring the Limits of*

their RtF amendment, concerns over food regulations, availability and equity in the United States have focused on only two areas: the food regulatory system and programs to feed the hungry. Efforts to challenge the food regulatory system have resulted in ‘cottage food’ or ‘food freedom’ laws, both of which provide small-scale producers with the ability to sell or donate certain food products. Efforts to address issues of food availability and equity have resulted in anti-hunger efforts such as federal nutrition programs and charitable food banks,¹⁰ both of which received increased attention during the Covid-19 pandemic.¹¹ All of these efforts to address problems with the food system actually further entrench the current structure, allow the monetization of food waste, and depend on the populace embracing temporary charity as a solution to the structural problem of hunger.¹²

International Human Rights Law, 34 GA. J. INT’L & COMP. L. 393 (2006) (discussing state behavior and international human rights). The existence of the RtF on the world stage provides two things to advocates in this country: a framework for pursuing the right and proof of an evolving standard.

¹⁰ The largest food nutrition entitlement program is the Supplemental Nutrition Assistance Program (SNAP), which actually provides significantly more food than food banks. See Dan Charles, *Food Banks Say SNAP is a Better Way to Get Food to People*, NAT’L PUB. RADIO (May 21, 2020), <https://www.npr.org/2020/05/21/860475302/food-banks-say-snap-is-a-better-way-to-get-food-to-people>. In order to qualify for SNAP in Maine, a family of four must have a before-tax annual household income below \$49,025. *Maine Supplemental Nutrition Assistance Program*, BENEFITS.GOV, <https://www.benefits.gov/benefit/1272> (last visited Oct. 2, 2021).

¹¹ Covid-19 exposed the depths of food insecurity in the country. The term food insecurity, as officially monitored by the USDA, describes households that do not have sufficient access at all times to enough food for an active, healthy life. *Food Security in the U.S*, ECON. RSCH. SERV., U.S. DEP’T AGRIC., <https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/> (Sept. 8, 2021). Many others have written about the exposure of food insecurity during the pandemic. *ee generally*, Lauren Bauer, *The Covid-19 Crisis Has Already Left Too Many Children Hungry in America*, BROOKINGS (May 6, 2020), <https://www.brookings.edu/blog/up-front/2020/05/06/the-covid-19-crisis-has-already-left-too-many-children-hungry-in-america/> (noting April 2020 survey finding a 400% increase in hunger rates); John Burnett, *Thousands of Cars Line Up at One Texas Food Bank as Job Losses Hit Hard*, NAT’L PUB. RADIO (Apr. 17, 2020), <https://www.npr.org/2020/04/17/837141457/thousands-of-cars-line-up-at-one-texas-food-bank-as-job-losses-hit-hard> (showing aerial footage of Texans lining up outside a San Antonio food bank); and Helena Bottemiller Evich, *There’s Only so Much We Can Do: Food Banks Plead for Help*, POLITICO (June, 8, 2020), <https://www.politico.com/news/2020/06/08/food-banks-plead-for-help-306492> (discussing the choice to increase public food dispersal rather than increase benefits).

¹² One way the current system has monetized waste is by reframing it as “charity” and distributing it to marginalized communities via programs such as the government’s pandemic Farmers to Families Food Box Program. Jocelyn Meyer, *Burdening Food Banks with the Charity of Waste*, ME. J. CONSERVATION & SUSTAINABILITY (2021), https://umaine.edu/spire/2021/04/08/meyer/#_edn4. See also Andrew Coe, *Free Produce, With a Side of Shaming*, N.Y. TIMES (June 25,

Unlike the RtF, none of these avenues use a human rights lens, and none provide a whole-scale transformation of a system where hungry people exist while there is sufficient food to feed everyone.¹³ But the realization that there are issues with the current system and efforts to address these problems provided a foundation of food-rights work that the RtF movement in Maine built on.

How a RtF will explicitly play out in Maine, or in any other locale, depends on what the people do with the right once it is ratified. While international human rights language provides a RtF framework, once the right is a part of the Maine constitution, the meaning it holds will be shaped by the way in which those adopting it adapt it to fit their local concerns.¹⁴ At the least, the people of Maine will be able to rely on this amendment if they believe that an existing or proposed law, regulation, or ordinance infringes on their RtF. But the means of its implementation will no doubt build on the food independence work Mainers have been doing for decades.¹⁵

II. Maine's History of Food Advocacy

Maine's RtF work rests on a recognition of food insecurity and a foundation of local food advocacy and independent local government action that has been particularly strong for the last three decades.¹⁶ Historically, the relationship between the state of Maine

2020), <https://www.nytimes.com/2020/06/25/opinion/snap-food-pantry-aid.html>. Food is often rejected after reaching grocery stores, as it is often easier for stores to discard and write-off what they do not want, even if hungry people are geographically close.

¹³ See Eric Holt-Giménez et al., *We Already Grow Enough Food for 10 Billion People...and Still Can't End Hunger*, 36 JOURNAL OF SUSTAINABLE AGRICULTURE 595, 595 (2012). See also Victor Rodriguez, *How to Feed 10 Billion People*, UNITED NATIONS ENVIRONMENT PROGRAMME (2020), <https://www.unep.org/news-and-stories/story/how-feed-10-billion-people>; Bridget Shirvell, *Should Emergency Food Be the Long-Term Solution to Hunger?*, HUNTER COLL. FOOD POL'Y CENTER. (Oct. 29, 2019), <https://www.nycfoodpolicy.org/should-emergency-food-be-the-long-term-solution-to-hunger/>; Olivier de Schutter et al., *Food Banks Are No Solution to Poverty*, THE GUARDIAN (Mar. 24, 2019), <https://www.theguardian.com/society/2019/mar/24/food-banks-are-no-solution-to-poverty>.

¹⁴ The manner in which localities adopt human rights claims to their particular needs is termed 'vernacularization.' See Peggy Levitt & Sally Merry, *Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States*, 9 GLOB. NETWORKS 441, 441 (2009).

¹⁵ Naomi Hossain & Dolf te Lintelo, *A Common Sense Approach to the Right to Food*, 10 J. HUM. RTS. PRAC. 367 (2019).

¹⁶ According to the U.S. Department of Agriculture's Economic Research Service, Maine has a food insecurity rate above the national average. See *State Fact Sheets: Maine*, ECON. RSCH. SERV., U.S. DEP'T AGRIC.,

and its localities held that municipalities were subdivisions of the state without independence.¹⁷ Over time it became clear that local issues required individualized solutions and having to procure state approval for each problem was a burden to both the municipality involved and to the state. In response, Maine added a home rule constitutional amendment in 1969, which has been accorded liberal construction and gives a presumption of authority to local enactments.¹⁸ Home rule began to flourish in the 1990s when judicial interpretation gave the amendment more teeth.¹⁹ At about the same time, Maine began a “farm renaissance,” with the number of farms, new farmers, farm production, farm size, and the percent of principal farm operators all increasing, and giving Maine the largest number of farms in New England.²⁰ Maine is also particularly supportive of community-supported agriculture and farmers’ markets – the state ranked fifth in the most recent Locavore Index and second in direct sales per capita, meaning that it has one of the nation’s strongest communities of producers and consumers of local food.²¹ Finally, Maine has also shown a willingness to innovate, resulting in its being first in the nation in a number of areas of food systems and access. For example, Maine has one of the earliest cottage food laws in the

<https://data.ers.usda.gov/reports.aspx?StateFIPS=23&StateName=Maine&ID=17854> (Sept. 9, 2021). The rate of food insecurity in Maine is higher in BIPOC communities than in white communities. See James Myall, *Issue Brief: Food Insecurity in Maine*, ME. CTR. FOR ECON. POL’Y (Dec. 23, 2019), <https://www.mecep.org/wp-content/uploads/2019/12/MECEP-Hunger-Issue-Brief-2019.pdf>.

¹⁷ Sarah Schindler, *Food Federalism: States, Local Governments, and the Fight for Food Sovereignty*, 79 OHIO ST. L. J. 772, 773, 776 (2018).

¹⁸ This amendment came out of a 1967 commission set up to study the issue, which forwarded their recommendations in 1968. A Home Rule Enabling Act was passed in 1970. In the U.S., ‘home rule’ definitions vary but generally mean that localities have the ability to exercise some governing power without express state delegation, generally resulting in a decrease in state influence over pockets of the state and a rejection of Dillon’s Rule. See ME. CONST. art. VIII, pt. 2, § 1.

¹⁹ Shane Wright, *Smith v. Town of Pittston: Municipal Home Rule’s Narrow Escape from the Morass of Implicit Preemption*, 57 ME. L. REV. 613, 614 (2005). This builds on a tradition of new England farmers who bucked authority in favor of autonomy, going back as far as the American Revolution.

²⁰ Gary Keough, *Maine Agriculture is “Up” in More Ways than One*, U.S. DEP’T. OF AGRIC. BLOG (Feb. 21, 2017), <http://blogs.usda.gov/2014/07/10/maine-agriculture-is-up-in-moreways-than-one/>; Timothy B. Clark, *Can Maine Lead New England to a Farming Renaissance?*, ROUTE FIFTY (Aug. 11, 2015), <https://www.route-fifty.com/management/2015/08/maine-farming-new-england-agriculture/119025/>.

²¹ For the most recent results, see Locavore Index 2019, STROLLING OF THE HEIFERS (May 31, 2019), <https://www.strollingoftheheifers.com/locavore/>.

country, a ‘home manufacturing’ law that has been in place since 1980.²²

Against this backdrop, the modern story of Maine and food advocacy began in 2011, with the passage of the Food Safety Modernization Act.²³ The legislation represented an overhaul of food-handling regulations aimed at increasing safety. Still, opponents worried it would negatively impact small farmers by, among other things, imposing expensive regulations, reducing access to local food, increasing chemical use, decreasing natural fertilizers, and making it harder for farms to diversify.²⁴ This law was seen as the latest affront to small farmers and food advocates in Maine, who had been battling what they saw as overly onerous regulations relating to issues such as poultry and milk since at least 2009.²⁵ Relying on the tradition of town meetings and the state’s strong home

²² On the other side, Maine was one of the first states to begin limiting SNAP, reducing the number of childless adults receiving aid by 80% but increasing reliance on food banks and the percentage of food-insecure people in the state. Aimee Picchi, *Must Work for Food Stamps: A Modest Proposal or Recipe for Hunger?*, CBS News (May 18, 2018), <https://www.cbsnews.com/news/must-work-for-food-stamps-a-modest-proposal-or-recipe-for-hunger/>.

²³ Prior to passage of the Food Safety Modernization Act, Maine advocates had formed GE Free Maine, an organization that worked with Maine communities to pass resolutions against genetically engineered foods. In 2006 GE Free Maine merged with the Independent Food Project, a local organization working on food sovereignty issues, to form Food for Maine’s Future. Food for Maine’s Future continued the work of both these organizations, and supported the town of Montville when, in 2008, they became the first Maine town to pass a binding ordinance banning the cultivation of genetically engineered crops in their community. *About*, FOOD FOR MAINE’S FUTURE, <https://savingseeds.wordpress.com/about/> (last visited Jan. 20, 2022).

²⁴ *Top 10 Problems with the Food and Drug Administration’s Proposed Food Safety Regulations for Farmers and Local Food Businesses*, NAT’L SUSTAINABLE AGRIC. COAL. (Oct. 11, 2013), <https://sustainableagriculture.net/blog/food-safety-comments-top-10/>.

²⁵ HILDA E. KURTZ ET AL., *SCALING BIOPOLITICS: ENACTING FOOD SOVEREIGNTY IN MAINE (USA)* 8, 10-12 (2013), available at https://www.tni.org/files/download/40_kurtz_2013.pdf. During this time period, Maine farmers and food advocates also had to contend with state officials encouraging compliance with the National Animal Identification System (NAIS), a program that sought to identify and track most livestock. Small farmers across the country opposed the system, and in 2006 Maine agriculture officials were assaulted with manure at a meeting discussing the system. Matthew E. Rohrbaugh, *It’s Eleven O’Clock, Do You Know Where Your Chicken Is? The Controversy Surrounding the National Animal Identification System and Its Application to Small and Organic Farmers*, 32 *Vt. L. Rev.* 407, ? (2007). In 2010, the USDA ended the NAIS program, giving a victory to farmers and their allies in Maine. *Animal Identification & Tracing: An Overview*, THE NAT’L AGRIC. L. CTR., <https://nationalaglawcenter.org/overview/animalid/> (last visited Jan. 20, 2022).

rule, a group of farmers and their allies met, consulted various community organizations, surveyed the food freedom laws being discussed and researched rights based ordinances enacted in Maine relating to water extraction. Before the Food Safety Modernization Act Passed through Congress, the group had drafted the “Local Food and Community Self-Governance Ordinance,” in order to exempt small local producers selling products for home consumption from state license and inspection regulations.²⁶ This ordinance was passed by four towns in Maine’s Hancock County,²⁶ one of which, Blue Hill, passed it by an overwhelming voice vote margin at their annual town meeting.²⁷ While there was no official state support for these ordinances, the legislature did pass a joint resolution expressing their support for food sovereignty and specifically their opposition to “any federal statute, law or regulation that attempts to threaten our basic human right to save seed and grow, process, consume and exchange food and farm products within the State of Maine.”²⁸

It was within this context – the passage of the Food Safety Modernization Act and the Blue Hill Self-Governance Ordinance – that farmer Dan Brown literally stepped in. Brown, a raw milk producer, had been selling his product without a license and without labels notifying consumers the milk was unpasteurized. Brown had been offering his wares since 2006 at his farm stand and at local farmers’ markets in the town of Blue Hill. In 2011, state officials ordered him to cease selling his product without proper licensing and labeling. Citing the local ordinance, Brown continued his operation, and on November 3, 2011 the state of Maine filed a lawsuit against Brown.²⁹

²⁶ These advocates were Heather and Phil Retberg, Deborah Evans, Bob St. Peter, and Larissa Curlik, and were supported by Kevin Ross and Liz Solet. The Ordinance caught the attention of the Community Environmental Legal Defense Fund, who brought farmer and advocate Heather Retberg to a Democracy School they sponsored.

²⁶ The other Hancock Country towns were Sedgwick, Penobscot, and Trenton, joined by a fifth town (Hope) in Knox County. Subsequently, other self-governance food ordinances were passed in and outside of Maine.

²⁷ Blue Hill, Me, Local Food and Community Self-Governance Ordinance of 2011 (Apr. 1, 2011), available at <https://www.animallaw.info/sites/default/files/lousmebluehillfarmingandfoodproduction.pdf>.

²⁸ H.P. 1176, 125th Leg., 1st Reg. Sess. (Me. 2011). Two state bills along the same lines were also introduced although neither passed, LD 366 and LD 330, both of which were proposed by Representative Walter Kumiega.

²⁹ Summons at 1, *State v. Brown*, ELLSC-CV-11-70 (Me. Super. Ct., Han. Cty., Nov. 3, 2011).

While the state claimed that a sample of Brown's raw milk had levels of bacteria high above the state's standard, they also acknowledged that the case was part of a regulatory turf war.³⁰ In response, Brown declared that he would rely on the Blue Hill ordinance and continue to sell his milk. Brown became a cause célèbre, and support for his position grew.³¹ On November 18, 2011 the Blue Hill Board of Selectmen unanimously voted to request that the state drop the charges against Brown. Despite the support, the charges remained and in April 2013, the Hancock County Superior Court granted summary judgment to the state of Maine and imposed civil penalties and costs on Brown.³² The court also enjoined Brown from selling milk without a license, selling unpasteurized milk without labeling it as such, and operating a food establishment without a license.³³ Support for Brown's position remained strong in the state, and Brown appealed his loss.³⁴ In June 2014, the Maine Supreme Judicial Court, relying on statutory construction, upheld the lower court's decision that Brown had broken the law.³⁵

Maine's food independence fight continued after Brown's loss, and by the following year seventeen towns had passed local food ordinances. At this point, activists in Maine decided to pursue a RtF at the state constitutional level. They viewed the RtF as a human right demanding forward-thinking unlike litigation, which most often looks backward to address wrongs already committed. A constitutional amendment would establish a RtF beyond the reach of

³⁰ Kevin Miller, *State Sues Blue Hill Farmer for Selling Unpasteurized Milk at Farmers' Markets*, BANGOR DAILY NEWS (Nov. 16, 2011), <https://bangordailynews.com/2011/11/16/news/hancock/blue-hill-farmer-cited-for-violating-state-law/?ref=inline>. See Press Release, Food for Maine's Future, Internal Dept. of Ag Emails Raise Questions About Motivation in Farmer Brown Case (Apr. 4, 2012) (on file with author).

³¹ See We Are All Farmer Brown, *Farmer Brown Tells His Story*, YOUTUBE (Nov. 14, 2011), <https://www.youtube.com/watch?v=NeS4RZ50uWU> (explaining that his behavior hadn't changed but the Department of Agriculture rules had).

³² *State v. Brown*, ELLSC-CV-11-70 at 1 (Me. Super. Ct., Han. Cty., Apr. 27, 2013) (Murray, J.).

³³ *Id.* at 9. Brown has since become a medical marijuana grower. Jennifer Osborn, *Marijuana Growing Supply Shop Opening in Blue Hill*, ELSWORTH AM. (Feb. 21, 2017), <https://www.ellsworthamerican.com/maine-news/business-news/marijuana-growing-supply-shop-opening-blue-hill/>.

³⁴ In the midst of Farmer Brown's fight state legislator Craig Hickman introduced concept draft HP 325. Entitled "An Act to Increase Food Sovereignty in Local Communities," it sought to "preserve the ability of local communities to produce, process, sell, purchase and consume local foods." On April 11, 2013, it received a 10-2 vote of "ought not to pass." H.P. 325, 126th Leg., 1st Reg. Sess. (Me. 2013).

³⁵ The court did not address the ordinance or Brown's claim that the ordinance exempted him from state licensing requirements and from their health and sanitation regulations. *State v. Brown*, 95 A.3d 82, 90 (Me 2014).

changing legislatures and would transform the conversation from one about marginalized individuals seeking special handouts to one about empowered communities demanding accountability.³⁶ They also recognized that a RtF embraces both positive and negative rights and that state constitutions are historically disposed to recognize positive social and economic rights.³⁷

Rep. Craig Hickman introduced the first of what would be several attempts to pass a RtF constitutional amendment in the 2015-2016 session.³⁸ The language for the proposed amendment was based on work done by food sovereignty advocates in the state, who had surveyed RtF language used internationally and also assessed food sovereignty issues nationwide in an effort to construct a proposal that reflected both human rights concerns and practical applications.³⁹ While the first attempts to pass the amendment did not have the necessary support to pass, they did receive notable backing from within the state and individuals outside Maine's borders.⁴⁰

³⁶ In addition, state constitutions are also largely flexible documents amenable to modification, offering fifty opportunities to try out different solutions. They also provide a forum for evolving standards that go beyond federal constitutional mandates. *State v. Caouette*, 446 A.2d 1120, 1122 (Me. 1982). This flexibility provides an opportunity to more accurately represent human rights values reflecting community standards particular to a single state. The close relationship between the voice of the community and their state representatives is reflected in Maine's constitutional process, where the voting public will ultimately get to vote on the RtF Amendment 384.

³⁷ Because our federal constitution is commonly believed to be an exceptional and negative document lacking positive rights, the idea of amending it to include a positive social right is generally dismissed at the outset. Negative rights are constraints on the government to prevent it from intruding on citizens' lives, and positive rights obligate the government to provide something for its citizens. While not completely accurate, it is true that for the most part, and as compared to other countries, the U.S. Constitution is more a document of negative than positive rights. EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS* 4, 8 (2013). The creation of both negative and positive rights attached to the RtF has been recognized even when those specific terms are not used. *See* U.N. FOOD & AGRIC. ORG., *VOLUNTARY GUIDELINES TO SUPPORT THE PROGRESSIVE REALIZATION OF THE RIGHT TO ADEQUATE FOOD IN THE CONTEXT OF NATIONAL FOOD SECURITY* 3, 5 (2004).

³⁸ H.P. 532, 127th Leg., 2d Reg. Sess. (Me 2015).

³⁹ These advocates include Heather Retberg and Craig Hickman, who consulted with legislative committee members, farmworkers, and members of the Maine Farm Bureau."

⁴⁰ For example, these RtF proposals were supported by Food for Maine's Future, the Farm-to-Consumer-Legal-Defense-Fund, the Maine State Grange, Local Food Rules, the Maine Organic Farmers and Gardeners Association, the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe, and numerous local food co-operatives.

In 2017, Maine again made food news history when it passed LD 725, “An Act to Recognize Local Control Regarding Food Systems,” a bill that gave Maine towns and cities the right to pass local ordinances allowing food products to be exempt from state and federal regulation or inspection.⁴¹ This exemption included but was not limited to, meat, poultry, milk, dairy products, processed foods, canned foods, juice, eggs, fish, and seafood. The governor signed the bill, and the Maine Food Sovereignty Act was set to take effect November 1, 2017, by which point twenty Maine towns had passed these ordinances.⁴² The USDA reacted quickly, sending a letter that questioned whether the state would be able to maintain sufficient food safety standards to enable it to retain its inspection authority.⁴³ If Maine lost that authority, it would no longer be legal to sell meat processed at state facilities. Practically, this would mean fewer facilities for processing, increased and more expensive transportation for farmers, longer waits for products, and, ironically, increased federal involvement. Maine farmers, faced with a shutdown of the meat inspection program during their fall season – a shutdown that would likely close the doors of small-scale livestock and poultry farmers and slaughterhouses – began to support a proposed fix to the bill.⁴⁴ In response to the USDA’s warning and the farmers’ concerns, the state legislature held a special session and voted to amend LD 725 to, among other things, exempt meat and poultry processing from the food sovereignty law so that the state-inspected meat processing facilities would be able to continue operating.⁴⁵ The amendment was signed by the governor on October 31, 2017.⁴⁶

Each of these skirmishes: the local ordinances, Brown’s legal fight, and the Maine Food Sovereignty Act, generated increased awareness around issues of food independence and brought new

⁴¹ S.P. 242, 128th Leg., 1st Reg. Sess. (Me. 2017).

⁴² Suzanne Dunham, *New Local Food Ordinances Important for Maine Farmers*, SUN J. (Aug. 20, 2017), <https://www.sunjournal.com/2017/08/20/new-local-food-ordinances-important-for-maine-farmers/>.

⁴³ Letter from Alfred V. Almanza, Acting Deputy Under Sec’y, Off. of Food Safety, to Walter Whitcomb, Maine Dept. of Agric. Comm’r (July 6, 2017), https://drive.google.com/file/d/0B3PYp5sROj_1NkxMa3BRMHNVOXdkTDDvawjNZN245VDA0Vzdj/view?usp%3Dsharing

⁴⁴ *Legislative Alert*, ME. FARMERS MARKETS, <http://www.maine farmers markets.org/wp-content/uploads/2017/10/Legislative-Update-re-Food-Sovereignty-Law.pdf>. (last visited Oct. 7, 2021).

⁴⁵ Letter from Governor Paul R. LePage to the Legislature (Aug. 29, 2017), https://drive.google.com/file/d/0B3PYp5sROj_1QTEzTWZaZWtBV05NUFhnVmZudGItYlp3aFJJ/view?usp%3Dsharing.

⁴⁶ SP 242, 128th Leg., 1st Reg. Sess. (Me. 2017).

allies into the push for a state constitutional RtF. In January 2021, Representative Billy Bob Faulkingham introduced H.P. 61 (L.D. 95) in the Maine House of Representatives, again seeking to add a RtF amendment to the Maine Constitution.⁴⁷

In order to move forward, both the House and the Senate had to approve the amendment by a two-thirds majority. The proposal first went before the Committee on Agriculture, Conservation and, Forestry, which considered testimony and input and, in April 2021, gave the resolution a unanimous ought-to-pass report.⁴⁸ On May 18, 2021, the Maine House of Representatives voted 104 to 41 in favor of passage, exceeding the two-thirds threshold.⁴⁹ The resolution then went to the Senate, and on June 14, 2021, was placed on the Special appropriations table pending final passage before the session adjourned.⁵⁰ On July 2, 2021 the proposal passed the Maine Senate with a bipartisan two-thirds majority of 23-10.⁵¹ The amendment was placed on the statewide ballot in November of 2021 and passed with over 60% of the popular vote, making the RtF an official part of the Maine constitution.⁵² The state of Maine now has the only constitutionally enshrined RtF in the country.⁵³

III. Analyzing Maine's Work

While advocates recognize that the interests of those working for independence, food security, and farmers are

⁴⁷ The only other state to introduce legislation seeking to establish a constitutional RtF is West Virginia. On March 15, 2021, Delegate Danielle Walker introduced House Joint Resolution 30, the "Right to food, food sovereignty and freedom from hunger," a proposed addition to article three, section twenty-three of the West Virginia Constitution. H.R.J. Res. 30, 85th Leg., 2021 Reg. Sess. (W. Va. 2021). The state of Washington has also begun the process, inaugurating an advisory council in 2021 with the intention of introducing RtF legislation by 2023.

⁴⁸ Proposing an Amendment to the Constitution of Maine to Establish a Right to Food, H.R. Res. 61, 130th Leg., 1st Spec. Sess. (Me. 2021), https://legislature.maine.gov/legis/bills/display_ps.asp?LD=95&snum=13.

⁴⁹ *Maine LD95*, TRACK BILL, <https://trackbill.com/bill/maine-legislative-document-95-resolution-proposing-an-amendment-to-the-constitution-of-maine-to-establish-a-right-to-food/1975008/>.

⁵⁰ *Id.* Note that this year Maine also considered a piece of concept draft legislation that sought to end hunger by 2030, in line with the SDG recommendations. See H.P. 127, 130th Leg., 1st Spec. Sess. (Me. 2021).

⁵¹ See *LD 95*, FASTDEMOCRACY, <https://fastdemocracy.com/bill-search/me/130/bills/MEB00008554/#votes> (last visited Oct. 7, 2021).

⁵² Patrick Whittle, *Maine Voters Pass the Nation's First 'Right to Food' Amendment*, PRESS HERALD,

<https://www.pressherald.com/2021/11/02/supporters-of-right-to-food-amendment-lead-in-early-returns/> (Nov. 3, 2021).

⁵³ *Id.*

interconnected, in my view, Maine's RtF work is grounded in a farmer/producer, independent locality, and libertarian perspective.⁵⁴ Specifically in Maine, most of the work in the food sovereignty arena was initiated by towns seeking autonomy.⁵⁵ This work garnered support across the political spectrum. Maine's experience, viewed with an understanding of the unique characteristics of the state and the origination perspective of its RtF work, can inform other localities seeking to incorporate a RtF in their state constitutions that encompasses the 4As.

The proposed amendment that passed both houses of the Maine legislature this summer reads as follows:

All individuals have a natural, inherent and unalienable right to food, including the right to save and exchange seeds and the right to grow, raise, harvest, produce and consume the food of their own choosing for their own nourishment, sustenance, bodily health and well-being, as long as an individual does not commit trespassing, theft, poaching or other abuses of private property rights, public lands or natural resources in the harvesting, production or acquisition of food.⁵⁶

It is enlightening to contrast this language with that of the first RtF constitutional amendment drafted in Maine. As further explained below, the differences between the two proposals are, first and

⁵⁴ In my view, West Virginia's decision to seek a constitutional amendment on the RtF originated with advocates working on anti-hunger and anti-poverty projects, and the decision to forward the proposed amendment came from a legislator with a personal history of food insecurity. This differing origination point may influence allies, approaches, and the language used as the work proceeds.

⁵⁵ Joao Fonseca, *Empowering the People to Nourish: Right to Food in the State of Maine*, WHYHUNGER, (June 17, 2019), <https://whyhunger.org/category/blog/empowering-the-people-to-nourish-right-to-food-in-the-state-of-maine/>. While Maine's largest food bank has most recently hesitated in supporting the RtF, see they testified in support of a previous iteration of the bill. Austin Bryniarski, *How Food Banks Are Advancing the Right to Food Movement*, FOOD BANK NEWS (Jan. 27, 2021), <https://foodbanknews.org/how-food-banks-are-advancing-the-right-to-food/>.

⁵⁶ H.P. 61, 130th Leg., 1st Spec. Sess. (Me. 2021). When the proposed amendment went to the voters, it read: "Do you favor amending the Constitution of Maine to declare that all individuals have a natural, inherent and unalienable right to grow, raise, harvest, produce and consume the food of their own choosing for their own nourishment, sustenance, bodily health, and well-being?" *Maine Question 3, Right to Produce, Harvest, and Consume Food Amendment (2021)*, BALLOTPEDIA, [https://ballotpedia.org/Maine_Question_3,_Right_to_Produce,_Harvest,_and_Consume_Food_Amendment_\(2021\)](https://ballotpedia.org/Maine_Question_3,_Right_to_Produce,_Harvest,_and_Consume_Food_Amendment_(2021))(last visited Oct. 7, 2021).

foremost, the result of the fact that Maine has been honing their proposal through multiple legislative sessions, gathering input, and engaging in compromise. Deletions made were in response to concerns about the language as written, as opponents assumed that the foundational principle contained in the proposal would mandate specific future actions they would take issue with. While proposal advocates were committed to retaining language they deemed essential, they were willing to compromise.⁵⁷ The original resolution, as amended by the House and forwarded to the Senate, read as follows:

All individuals have a natural, inherent and unalienable right to food, including the right to acquire, produce, process, prepare, preserve and consume the food of their own choosing by hunting, gathering, foraging, farming, fishing, gardening and saving and exchanging seeds or by barter, trade or purchase from sources of their own choosing for their nourishment, sustenance, bodily health and well-being, as long as an individual does not commit trespassing, theft, poaching or other abuses of private property rights, public lands or natural resources in the acquisition of food; furthermore, all people have a fundamental right to be free from hunger, malnutrition, starvation and the endangerment of life from the scarcity of or lack of access to nourishing food. Every individual is fully responsible for the exercise of these rights, which may not be infringed.⁵⁸

Most striking in the 2021 version of the proposal is the omission of the final sentence, “all people have a fundamental right to be free from hunger, malnutrition, starvation and the endangerment of life from the scarcity of or lack of access to nourishing food.” Contextual setting pronouncements such as this one are often used to guide future implementation and interpretation by making the purpose of the proposal clear.⁵⁹ In this case, the sentence was amended out of

⁵⁷ BULTRINI, *supra* note 3, at 6 (noting no model can account for each state’s context, history or systems, but discussing key elements).

⁵⁸ H.P. 583, 129th Leg., 2d Spec. Sess. (Me. 2019). Note that when first submitted, the proposal read as follows: “Every individual has a natural and unalienable right to food and to acquire food for that individual’s own nourishment and sustenance by hunting, gathering, foraging, farming, fishing or gardening, or by barter, trade or purchase from sources of that individual’s own choosing, and every individual is fully responsible for the exercise of this right, which may not be infringed.” H.P. 532, 127th Leg., 2d Reg. Sess. (Me. 2015).

⁵⁹ See generally, ANN SEIDMAN ET AL., LEGISLATIVE DRAFTING FOR DEMOCRATIC SOCIAL CHANGE: A MANUAL FOR DRAFTERS (1st ed. 2000); OPEN SOC’Y JUST.

the bill on the floor of the House, when legislators expressed concern that this language would require the Maine government to literally provide food to each Maine resident.

There is also the elimination of the phrase “purchase from sources of their own choosing.” Opposition to this phrase was epitomized the second time this proposed amendment was introduced. While the Maine Department of Agriculture supported the RtF ‘in concept’ this round, they expressed concern over the intent of the language and its possible conflict with existing law.⁶⁰ Also eliminated are the words “hunting, gathering, foraging, farming, fishing, gardening.” These were struck when the Maine Department of Inland Fisheries and Wildlife and the Department of Agriculture expressed apprehension that these words would be interpreted as meaning that people would not have to adhere to existing regulations.⁶¹ Interestingly, the last sentence of the version that passed this summer does include the words “harvesting, production or acquisition of food” while the original language spoke only of the “acquisition of food.” While implementation is yet to come, it stands to reason that these words may in fact cover much of the activity originally sought to be contained when the proposal was first drafted. Finally, the language of the passed proposal enumerates specific examples of the rights it is bestowing, using words most associated with farming, such as ‘grow,’ ‘raise,’ and ‘harvest,’ as opposed to ‘acquire,’ ‘process,’ ‘prepare,’ and ‘preserve.’⁶²

INITIATIVE, LEGAL WRITING FOR HUMAN RIGHTS CLAIMS PRACTICE NOTES 3 (2018); LEGIS. COUNCIL, ME. STATE LEGIS., MAINE LEGISLATIVE DRAFTING MANUAL (6th rev. 2016), available at <https://legislature.maine.gov/doc/1353>.

⁶⁰ *Proposing an Amendment to the Constitution of Maine to Establish a Right to Food: Hearing on L.D. 795 before the J. Comm. on Agric., Conservation & Forestry*, 129th Leg. (2019) (statement of Emily Horton, Director of Policy and Community Engagement for the Department of Agriculture, Conservation and Forestry).

⁶¹ *Id.*

⁶² Each of the changes detailed above were made in an effort to strike a compromise that would mollify detractors while also preserving a RtF. For future drafters seeking to fully incorporate the 4As ‘food’ could be replaced with ‘adequate, available, accessible, and adequate food’ to more perfectly incorporate human rights language. Similarly, ‘right’ can be replaced with ‘human right’ to make that intention clearer. These words hold import, as they reinforce underlying human rights principles. ‘Adequacy’ in this context means individuals are now getting, and will continue to get, enough calories and nutrients to lead healthy and safe lives. ‘Available’ references an intent to ensure all people have the capacity to buy or produce what they need. ‘Accessible’ interlocks this right with others, not just by ensuring that people have the physical means to reach food but also that they have the means to purchase whatever food is not otherwise secured. ‘Appropriate’ ties in environmental sustainability concerns and ensures that the RtF is delivered in a respectful manner. Additionally, from a human rights

In addition to disagreements over specific language, the RtF also encountered opposition from parties asserting that the amendment was unnecessary and simultaneously expressing concerns about the effects it might have. While opponents were ultimately unsuccessful in preventing the proposal from effectively passing both chambers, the issues raised throughout the process are instructive for both Maine's future debate around public approval of the amendment and for RtF advocates in other jurisdictions. For the most part, these concerns focused on the lack of a need for the amendment, on seeds, animal welfare, excessive litigation, zoning, and general unintended consequences.

The supposed superfluosity of the proposal had been raised since its initial introduction. Even opponents contesting specific aspects of the legislation usually began their testimony by averring that it was unnecessary, as the right already existed both practically and in varying fragments of existing Maine law.⁶³ This difficulty in conceptualizing the need for a RtF is a common one, as many people believe that the right is both abstract and a natural one, belonging to everyone by virtue of their being human. Proponents were able to successfully explain that passing a RtF ensures that this right has a responsibility attached to it, and that responsibility includes respecting the rights of individuals to feed themselves, protecting that right against those whose actions would encroach upon it, and helping to facilitate realization of that right through connected concerns.

Other objections were more specific than a general worry about natural law. The Maine Veterinary Association feared a right to access food might lead to individuals raising food animals in unhealthy conditions, such as a cow in an apartment or hens in a

perspective, including limiting language such as "commit trespassing, theft, poaching or other abuses of private property rights, public lands or natural resources" shifts the perspective from the traditional goal of respecting, protecting, and fulfilling a right to one of constraint. This language of limitation was added at the very start of Maine's fight for a constitutional amendment, when in initial discussions legislators raised concerns that not having such limitations would be a green light for stealing and other crimes, despite the fact that even though those crimes would still be valid. In states where it is feasible to do so, another way to approach the goal of ensuring respect for all rights while embracing a human rights point of view could be: *No limitation to the exercise of the right to food is permitted unless it is compatible with the right to food and is required by law.*

⁶³ *Proposing an Amendment to the Constitution of Maine to Establish a Right to Food: Hearing on L.D. 783 before the J. Comm. on Agric., Conservation & Forestry*, 127th Leg. (2015) (statement of Ellis Addition, Director of the Bureau of Agriculture, Food and Rural Resources).

basement.⁶⁴ Animal Rights Maine testified about concerns over the effect the amendment might have on the ability to enact animal management and gun safety laws.⁶⁵ Other parties testified about future unintended consequences in general,⁶⁶ with some labeling these “severe” for “agriculture and food safety” across the state.⁶⁷ The Maine Municipal Association, while agreeing “that the right to food is inherent,” testified against the bill because they also believed it might create problematic case law in the future.⁶⁸ One legislator testifying in opposition to the proposed amendment asserted that she and the Municipal Association had concerns about having to litigate ordinances already in place in areas such as Lewiston, Auburn, and Portland, congested areas where raising farm life would be problematic.⁶⁹ There was also deliberation over whether the language pertaining to seeds posed any conflict with Maine’s certified seed/seed potato program.⁷⁰ At an Agriculture, Conservation and

⁶⁴ *Proposing an Amendment to the Constitution of Maine to Establish a Right to Food: Hearing on L.D. 95 before the J. Comm. on Agric, Conservation & Forestry*, 130th Leg. (2021) (statement of Janelle D. Tirrell, Legislative Committee Chair, Maine Veterinary Medical Association); *see also Id.* (statement of Katie Hansberry, Maine State Director, Humane Society).

⁶⁵ *Id.* (statement of Melissa Gates, Founding Director, Animal Rights Maine).

⁶⁶ *Id.* (statement of Susanna Richer); *Id.* (statement of Emily Horton, Director of Policy and Community Engagement, Maine Department of Agriculture, Conservation & Forestry).

⁶⁷ *Action Alert: Contact Your Legislators Today to OPPOSE LD 795!*, ME. FARM BUREAU (June 18, 2019), <https://www.mainefarmbureau.us/action-alert-contact-your-legislators-today-to-oppose-ld-795/>.

⁶⁸ *See Hearing on L.D. 95, supra* note 65 (statement of Janelle D. Tirrell, Legislative Committee Chair, Maine Veterinary Medical Association); *see also Id.* (statement of Rebecca Graham, Legislative Advocate, Maine Municipal Association).

⁶⁹ *Proposing an Amendment to the Constitution of Maine to Establish a Right to Food: Hearing on L.D. 95 before the House of Representatives*, 130th Leg. (2021) (statement of Kathleen Dillingham). Note that Lewiston, Auburn and Portland are the immigrant centers of Maine, and Lewiston has one of the highest per capita Muslim populations in the United States. Kathryn Skelton, *Stronger Than Barriers: Lewiston-Auburn’s Immigrant Community Hustles, Thrives with the Help of Local Groups*, SUN J. (Apr. 26, 2021), <https://www.sunjournal.com/2021/04/25/new-mainers-new-jobs/> (Apr. 26, 2021). Maine also has the highest per capita number of anti-Muslim incidents per person. *See Anti-Muslim Activities in the United States 2012-2018*, NEW AM. MUSLIM DIASPORA INITIATIVE, <https://www.newamerica.org/in-depth/anti-muslim-activity/> (last visited Oct. 7, 2021).

⁷⁰ Although for most of human history, seeds were sold or exchanged freely, a rash of laws in the 1980s transformed the seed market, exponentially increasing the number of plant patents from less than 120 in 1990 to over 12,000 today. Four companies currently own over 60% of the world’s seeds, contributing to a constriction of biodiversity and an increase in biopiracy. *See Dan Barber, Save our Food. Free the Seed*, N.Y. TIMES (June 7, 2019),

Forestry committee work session, the committee's legislative analyst reported on two opinions advising that the language revealed an intent to limit the application to individuals, who could save and reuse seeds for their own use but could not sell them commercially, and a distinction between certified seed potatoes and seeds.⁷¹ In the end, the language on seeds was accepted as written, but the dispute highlights the need for utilization of a common human rights language, as struggles over seeds have been a consistent factor in RtF work across the globe.⁷²

For each of the concerns raised above, advocates of the bill engaged in discussions, with those raising objections and sought to clarify both their intent and the purpose of the bill. In response to these explanations and the compromise language laid out above, some opponents changed their positions. For example, the Maine Department of Agriculture stated that they were neither for nor against the bill, based on conversations with Sen. Hickman and his openness to their concerns.⁷³ This year's long dialogue relied on the relationships between legislators and neighbors and the willingness of those forwarding the amendment to explain themselves and to compromise.

Advocates of the proposed amendment also relied on themes that resonated in the state to bring people on board. Those included an argument that the RtF is the 'second amendment for food' and distinguishing between protecting and providing, a distinction Rep. Hickman had been asserting since he began submitting these proposals and one that continued through the current submission.⁷⁴

<https://www.nytimes.com/interactive/2019/06/07/opinion/sunday/dan-barber-seed-companies.html>.

⁷¹ Note that the opinions of the state assistant attorney general and the University of Miami law clinic related only to what the plain language suggests at this juncture and did not purport to predict future judicial interpretations. See Maine Agriculture, Conservation and Forestry Committee, *ACF Work Session 4/15/2021*, YOUTUBE (Apr. 15, 2021), <https://youtu.be/PdyY8LU20EA?t=5443>.

⁷² Controversies over seeds often ignore the contributions of farmers and indigenous communities. Recognition of this omission gave rise to a 2001 treaty that, inter alia, seeks to protect farmers' rights to participate in decision making and benefits. See International Treaty on Plant Genetic Resources for Food and Agriculture art. 9, Mar. 11, 2001, Exec. Rep. 111-7, 2400 U.N.T.C. I-43345.

⁷³ *Proposing an Amendment to the Constitution of Maine to Establish a Right to Food: Hearing on L.D. 95 Before the J. Comm. on Agric., Conservation & Forestry*, 130th Leg. (2021) (statement of Emily Horton, Director of Policy and Community Engagement, Maine Department of Agriculture, Conservation and Forestry).

⁷⁴ See *Proposing an Amendment to the Constitution of Maine to Establish a Right to Food: Hearing on L.D. 795 Before the J. Comm. on Agric., Conservation &*

Proponents repeatedly explained the difference between a constitutional statement and the fulfillment of that right, making it clear through the years that a RtF does not automatically obligate the government to provide food.⁷⁵ Finally, they addressed the concern that the amendment was not needed. In the words of Rep. Faulkingham, “if we needed this Amendment now, then it would already be too late. Rarely are amendments adopted when they are needed. They are adopted many years before, by legislators who had the foresight to pass them for the benefit of future generations.”⁷⁶

Despite the objections raised by detractors, backers of Maine’s RtF amendment were able to successfully explain the proposal to the people, and again give Maine the distinction of being first in the nation in an area of food advocacy.

IV. Conclusion

As we can see, individuals with negative experiences around the food system started the push for a constitutional right to food in Maine. That experience primarily came from local farmers facing restrictions on their ability to sell their products and was forwarded for six years before passing. As the nation becomes increasingly aware of the prevalence of food insecurity, the push for a right to food will only increase. Maine’s experience will continue to provide guidance for activists across the country.

Forestry, 129th Leg. (2019) (statement of Rep. Craig Hickman); *Proposing an Amendment to the Constitution of Maine to Establish a Right to Food: Hearing on L.D. 95 Before the J. Comm. on Agric., Conservation & Forestry*, 130th Leg. (2021) (statement of Rep. Billy Bob Faulkingham).

⁷⁵ See *Proposing an Amendment to the Constitution of Maine to Establish a Right to Food: Hearing on L.D. 795 Before the J. Comm. on Agric., Conservation & Forestry*, 129th Leg. (2019) (statement of Rep. Craig Hickman).

⁷⁶ *Proposing an Amendment to the Constitution of Maine to Establish a Right to Food: Hearing on L.D. 95 Before the J. Comm. on Agric., Conservation & Forestry*, 130th Leg. (2021) (statement of Rep. Billy Bob Faulkingham).

China's Food Pagodas: Looking Forward by Looking Back?

Yifei Li and Dale Jamieson*

Abstract

In this Article we provide a close analysis of the Chinese Dietary Guidelines – the Food Pagoda. Our focus on the dietary guidelines is motivated by two main considerations. First, the guidelines represent the most comprehensive, nationwide, state-sponsored effort to educate the people of China about food. Like citizens in most countries, Chinese people are presented with numerous, often competing, messages from scientists, food gurus and online influencers. The dietary guidelines are different in that they are backed by an entire suite of governmental resources for nationwide dissemination through hospitals, schools, public billboards, TV and radio ads, among others. Among all the food advices and recommendations in China, it is the official dietary guidelines that have the greatest potential for changing dietary preferences. Second, understanding the Chinese dietary guidelines provides a useful basis for international comparison, since more than 100 countries around the world have dietary guidelines. Whether in the form of a pyramid or a plate, visualizations of the “ideal” national diet have become a common vector for official food advice. Examining the dietary guidelines therefore helps situate China in the broader context of government-proffered food advice. In this Article, we examine the historical evolution of China's Dietary Guidelines and their implications for environment, health, and animal welfare. Comparing the guidelines to longitudinal survey data about actual consumption provides a unique window on these issues, and in this Article we discuss what this glimpse may suggest for climate, health, and animal welfare going forward.

I. Introduction

At the height of COVID-19's initial outbreak in China, alongside lockdowns, contact tracing, and medical resource mobilization, an integral part of China's national pandemic response

* Yifei Li is Assistant Professor of Environmental Studies at New York University Shanghai, and Global Network Assistant Professor at New York University. Dale Jamieson is Professor of Environmental Studies and Philosophy, and Affiliated Professor of Law at New York University. The authors would like to thank the participants in the inaugural Brooks Annual Workshop for Scholars and Sonali McDermid for excellent comments on an earlier draft, Michelle Huang, Haley Sadoff, and Reid Melton for research assistance, and NYU's Center for Environmental and Animal Protection for supporting this project.

strategy was the Dietary Guidelines for the Prevention and Treatment of COVID-19.¹ Consistent with health practices since Chinese antiquity,² the Guidelines stress the importance of a balanced diet in fending off diseases.³ The ancient Chinese adage that “food is the absolute to the people,” or “*min yi shi wei tian*,” still rings true.

Despite the centrality of food in Chinese culture and the weight of the nation's food economy, it is glaringly absent when it comes to broader conversations about China's environmental protection and responses to climate change. China's national food policies have largely been driven by nutritional and health considerations, to the neglect of the myriad connections of the food economy to wider issues of climate resilience, ecological sustainability, and animal welfare.

China is not alone in this respect. In April, 2021, in response to a claim circulating in right-wing media outlets, the U.S. Secretary of Agriculture declared that “there is no effort designed to limit people's intake of beef coming out of President Biden's White House or USDA.”⁴ The sheer political power of animal agriculture is enough to ensure that in most countries, taking beef off the table, is not on the table for discussion.⁵

It was thus both surprising and striking when a widely circulated news story in *The Guardian* praised China for displaying “massive leadership” in planning to “cut meat consumption in half,”

¹ See Xinxing Guanzhuang Bingdu Ganran de Feiyan Fangzhi Yingyang Shanshi Zhidao (新型冠状病毒感染的肺炎防治营养膳食指导) [Nutritional Dietary Guidance for the Prevention and Treatment of Pneumonia Caused by New Coronavirus Infection], GUOJIA WEISHENG JIANKANG WEIYUANHUI (国家卫生健康委员会) [NATIONAL HEALTH COMMISSION] (Feb. 8, 2020), <http://www.nhc.gov.cn/sps/s7886/202002/a69fd36d54514c5a9a3f456188cbc428.shtml>.

² See RUTH ROGASKI, *HYGIENIC MODERNITY: MEANINGS OF HEALTH AND DISEASE IN TREATY-PORT CHINA* 23-25 (2014).

³ Xinxing Guanzhuang Bingdu Ganran de Feiyan Fangzhi Yingyang Shanshi Zhidao (新型冠状病毒感染的肺炎防治营养膳食指导) [Nutritional Dietary Guidance for the Prevention and Treatment of Pneumonia Caused by New Coronavirus Infection], *supra* note 1.

⁴ Ryan McCrimmon, *Biden Isn't Banning Meat, USDA Chief Says*, POLITICO (Apr. 26, 2021), <https://www.politico.com/news/2021/04/26/biden-not-banning-meat-usda-484609>.

⁵ See Oliver Lazarus et al., *The Climate Responsibilities of Industrial Meat and Dairy Producers*, 165 CLIMATIC CHANGE 1, 2, 10, 15, 17-18 (2021), <https://link.springer.com/content/pdf/10.1007/s10584-021-03047-7.pdf>.

a policy move that was said to be “cheered by climate campaigners.”⁶ The main reference of the *Guardian* story was the 2016 update to China’s national dietary guidelines, also known as the “Food Pagoda,” which recommended daily consumption of forty to seventy-five grams of meat for the average Chinese adult.⁷ The prospect of China’s diet going green brings excitement and hope to a country that is troubled by environmental crises from “airpocalypse” to “aporcalypse,” and to a world that is deep in planetary climate catastrophe.

There are many reasons for environmental and animal welfare groups to be concerned about China’s food trajectory. Globally, food system-related greenhouse gas (GHG) emissions – at 18 Gt CO₂ equivalent in 2015 – amount to more than a third of the world’s total emissions.⁸ The most substantial share of food-related GHG is generated by animal-sourced food production.⁹ According to OECD data, China accounted for 26.3 percent of the world’s total meat consumption in 2018, up from 14.6 percent in 1990.¹⁰ In per capita terms, the average Chinese person consumed 49.3 kilograms of meat in 2018, more than tripling the 1990 figure of 15.6 kilograms.¹¹ In 2018, the per capita consumption level in China exceeded the global average of 34.8 kilograms by 41.7 percent, quickly approaching the OECD average of 69.5 kilograms.¹² In 2016 alone, China slaughtered more than 14 billion terrestrial animals for food, or about 448 animals per second.¹³

The rapid transformation of China’s food economy is a clear testament to the success with which the most populous country on the planet has managed to alleviate poverty, but it is also a source of

⁶ Oliver Milman & Stuart Leavenworth, *China’s Plan to Cut Meat Consumption by 50% Cheered by Climate Campaigners*, THE GUARDIAN (June 20, 2016), <https://www.theguardian.com/world/2016/jun/20/chinas-meat-consumption-climate-change>.

⁷ Yiban Renqun Shanshi Zhinan (一般人群膳食指南) [Dietary Guidelines for the General Population], ZHONGGUO YINGYANG XUEHUI (中国营养学会) [CHINESE NUTRITION SOCIETY], <http://dg.cnsoc.org/article/2016b.html> (last visited Oct. 20, 2021).

⁸ M. Crippa, et al., *Food Systems Are Responsible for a Third of Global Anthropogenic GHG Emissions*, 2 NATURE FOOD, 198, 198–209 (2021).

⁹ Matthew N. Hayek et al., *The Carbon Opportunity Cost of Animal-Sourced Food Production on Land*, 4 NATURE SUSTAINABILITY 21, 21 (2021).

¹⁰ Meat Consumption, ORGANISATION FOR ECON. COOP. & DEV., <https://data.oecd.org/agroutput/meat-consumption.htm> (last visited Oct. 20, 2021).

¹¹ *Id.*

¹² *Id.*

¹³ *Animal Slaughter and Meat Production – China*, TERRASTENDO (Jan. 26, 2018), <https://terrastendo.net/infographics/animal-slaughter-and-meat-production-china/> (last visited Oct. 20, 2021).

growing concern for Chinese policymakers. With obesity – and especially child obesity – on the rise, and a host of diet-related diseases becoming more prevalent than ever, the public health implications of high-energy and protein-rich food consumption are becoming harder to overlook.¹⁴ At the same time, rapid urbanization puts unprecedented strains on rural agricultural productivity in a country where per capita arable land is a less than half of the global average, thus posing a serious challenge to self-sufficiency.¹⁵ Improving access to food has morphed from an overwhelming social, political, and economic success, to a salient health, and even security risk for China.

It is in this context that the environmental implications of the Chinese food economy have gained renewed importance. From phosphorus, nitrogen, and GHG emissions to water and land uses, China's diet has an outsized impact on all aspects of global sustainability, health, and wellbeing.¹⁶ The need to address the climate-agriculture nexus is further accentuated by the Chinese leadership's ambitious goal to peak carbon emissions before 2030 and to reach carbon neutrality by 2060.¹⁷ A greener diet has the potential to help achieve environmental goals, and also contribute to population health, enhance food security, and improve animal welfare.¹⁸ Greening China's diet is therefore a truly monumental task for China and the world.

In this spirit, we provide a close analysis of the Chinese Dietary Guidelines – the Food Pagoda. Our focus on the dietary guidelines is motivated by two main considerations. First, the guidelines represent the most comprehensive, nationwide, state-

¹⁴ See H. Charles Godfray et al., *Meat Consumption, Health, and the Environment*, 361 *SCIENCE* 1, 2-3 (2018), <http://yacoby.physics.harvard.edu/Publications/eaam5324.full.pdf>. See also Y. Li et al., *Determinants of Childhood Overweight and Obesity in China*, 97 *BRIT. J. NUTRITION* 210, 211-12 (2007); Jiguo Zhang et al., *Dietary Patterns and Their Associations with Childhood Obesity in China*, 113 *BRIT. J. NUTRITION* 1978, 1978 (2015).

¹⁵ Chunyang He et al., *Urban Expansion Brought Stress to Food Security in China: Evidence from Decreased Cropland Net Primary Productivity*, 576 *SCI. TOTAL ENV'T* 660, 661 (2016).

¹⁶ See Yuanchao Hu et al., *Food Production in China Requires Intensified Measures to Be Consistent with National and Provincial Environmental Boundaries*, 1 *NATURE FOOD* 572, 572 (2020).

¹⁷ Steven Lee Myers, *China's Pledge to Be Carbon Neutral by 2060: What It Means*, *N.Y. TIMES* (Sept. 23, 2020), <https://www.nytimes.com/2020/09/23/world/asia/china-climate-change.html>.

¹⁸ See *ACAD. OF GLOB. FOOD ECONS. & POL'Y, CHINA AGRIC. UNIV. [AGFEP] ET AL., 2021 CHINA AND GLOBAL FOOD POLICY REPORT: RETHINKING AGRIFOOD SYSTEMS FOR THE POST-COVID WORLD* 41-42 (2021).

sponsored effort to educate the people of China about food. Like citizens in most countries, Chinese people are presented with numerous, often competing, messages from scientists, food gurus and online influencers. The dietary guidelines are different in that they are backed by an entire suite of governmental resources for nationwide dissemination through hospitals, schools, public billboards, TV and radio ads, among others. Among all the food advices and recommendations in China, it is the official dietary guidelines that in China have the greatest potential for changing dietary preferences. Second, understanding the Chinese dietary guidelines provides a useful basis for international comparison, since more than 100 countries around the world have dietary guidelines.¹⁹ Whether in the form of a pyramid or a plate, visualizations of the “ideal” national diet have become a common vector for official food advice.²⁰ Examining the dietary guidelines therefore helps situate China in the broader context of government-proffered food advice. In this Article, we examine the historical evolution of China’s Dietary Guidelines and their implications for environment, health, and animal welfare. Comparing the guidelines to longitudinal survey data about actual consumption provides a unique window on these issues, and in this Article we discuss what this glimpse may suggest for climate, health, and animal welfare going forward.

We want to emphasize at the outset the tentative nature of our conclusions. In principle, a more sophisticated modeling approach could provide stronger evidence for our claims, but the sporadic and potentially unreliable nature of the data, and the way that it is aggregated, make it difficult to implement such an approach with any confidence. In any case, we believe that the methods that we employ in this paper provide new insights and suggest productive lines of further research.²¹

II. China’s Dietary Guidelines

From the early nineteenth century until the end of the Great Leap Forward in 1961, famines were an every-generational

¹⁹ FOOD & AGRIC. ORG. OF THE UNITED NATIONS [FAO], FOOD-BASED DIETARY GUIDELINES, <http://www.fao.org/nutrition/nutrition-education/food-dietary-guidelines/en/> (last visited Oct. 20, 2021).

²⁰ Xinxing Guanzhuang Bingdu Ganran de Feiyan Fangzhi Yingyang Shanshi Zhidao (新型冠状病毒感染的肺炎防治营养膳食指导) [Nutritional Dietary Guidance for the Prevention and Treatment of Pneumonia Caused by New Coronavirus Infection], *supra* note 1.

²¹ Similar points about methodology are made by Hu. See Hu, *infra* note 83.

occurrence in China.²² When the People's Republic of China was declared in 1949, life expectancy at birth was 35 years.²³ It increased gradually over the next decade, but not dramatically until after the Great Leap Forward.²⁴ Since then, there has been an astounding improvement in food accessibility with dramatic results. For example, 9-year old boys in China in 2019 were 8 cm taller than in 1985, the largest increase of any country in the world over that period of time.²⁵

China's first national dietary guidelines were produced in 1989 when the memory of famine was still fresh and about 200 million people remained undernourished.²⁶ The guidelines took the form of eight qualitative recommendations: (1) Eat a variety of foods; (2) Do not be hungry, and do not eat until too full; (3) Eat moderate amounts of oils and fats; (4) Balance coarse and refined grains; (5) Use a limited amount of salt; (6) Eat fewer sweets; (7) Moderate alcoholic drinks; and (8) Balance the three daily meals (Standing Board of Chinese Nutrition Society 1990).²⁷ In its original publication, each entry was followed by a paragraph of brief explanation.²⁸ A set of eight posters were designed and widely distributed, each corresponding to one of the recommendations.²⁹

In 1997, the guidelines were revised by a broad group of nutritionists, and for the first time took the visual form of the pagoda and provided specific quantitative recommendations for daily food consumption (Figure 1).³⁰

²² See S.F. Du et al., *China in the Period of Transition from Scarcity and Extensive Undernutrition to Emerging Nutrition-Related Non-Communicable Diseases, 1949–1992*, 15 *OBESITY REVS.* 8, 8(2013).

²³ *Id.* at 13-14.

²⁴ *Id.*

²⁵ Andrea Rodriguez-Martinez et al., *Height and Body-Mass Index Trajectories of School-Aged Children and Adolescents from 1985 to 2019 in 200 Countries and Territories: A Pooled Analysis of 2181 Population-Based Studies with 65 Million Participants*, 396 *LANCET* 1511, 1515 (2020).

²⁶ FOOD & AGRIC. ORG. OF THE UNITED NATIONS [FAO], *THE STATE OF FOOD INSECURITY IN THE WORLD 2006: ERADICATING WORLD HUNGER* (2006).

²⁷ *Zhongguo Jumin Shanshi Zhinan* "1989 Nian Banben" (《中国居民膳食指南》1989 年版本) ["Dietary Guidelines for Chinese Residents" 1989 Edition],

ZHONGGUO YINGYANG XUEHUI (中国营养学会) [CHINESE NUTRITION SOCIETY], <http://dg.cnsoc.org/article/1989b.html> (last visited Oct. 20, 2021).

²⁸ Keyou Ge, *The Transition of Chinese Dietary Guidelines and the Food Guide Pagoda*, 20 *ASIA PAC. J. CLINICAL NUTRITION* 439, 439-40 (2011), <https://www.airitilibrary.com/Publication/alDetailedMesh?DocID=09647058-201109-201306100025-201306100025-439-446>.

²⁹ *Id.*

³⁰ *Zhongguo Jumin Shanshi Zhinan* "1997 Nian Banben" (《中国居民膳食指南》1997 年版本) ["Dietary Guidelines for Chinese Residents" 1997 Edition],



Figure 1. The Food Pagoda (1997)

In 2007, the guidelines were revised by the Chinese Nutrition Society and endorsed by the Chinese Ministry of Health (Figure 2).³¹

ZHONGGUO YINGYANG XUEHUI (中国营养学会) [CHINESE NUTRITION SOCIETY], <http://dg.cnsoc.org/article/1997b.html> (last visited Oct. 20, 2021).

³¹ “Zhongguo Jumin Shanshi Zhinan” 2007 Nian Banben (《中国居民膳食指南》2007 年版本) [“Chinese Resident Dietary Guidelines” 2007 Edition],

ZHONGGUO YINGYANG XUEHUI (中国营养学会) [CHINESE NUTRITION SOCIETY], <http://dg.cnsoc.org/article/2007b.html> (last visited Oct. 20, 2021).

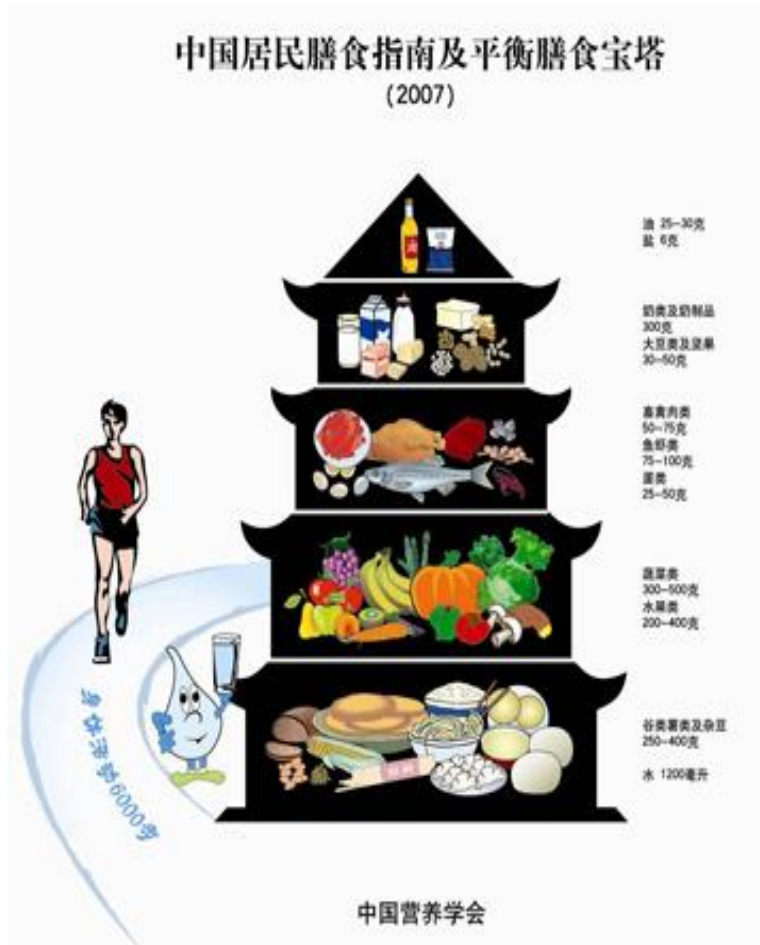


Figure 2. The Food Pagoda (2007)

In 2016 the pagoda was revised again (Figure 3) on orders from the National Health Commission of China (what had previously been the Ministry of Health).³²

³² Yiban Renqun Shanshi Zhinan (一般人群膳食指南) [Dietary Guidelines for the General Population], *supra* note 7.



Figure 3. The Food Pagoda (2016)

The primary function of the guidelines is public education. Through information campaigns, propaganda posters, dedicated media programming, school curricula, and other means, health authorities all over China regularly sponsor events that prominently feature the food pagoda.³³ The express purposes of these events are to call attention to the most pressing diet-related health concerns of the nation and to encourage citizens to follow the latest consensus among Chinese nutritionists.³⁴ Since the guidelines' most recent update in 2016, provincial and local governments across the country have rallied up comprehensive support mechanisms to raise public awareness of the guidelines, in compliance with top-level mandates

³³ Ge, *supra* note 28, at 439-40.

³⁴ See YueXin Yang et al., *New Chinese Dietary Guidelines: Healthy Eating Patterns and Food-Based Dietary Recommendations*, ASIA PAC. J. CLINICAL NUTRITION 908, 908-13 (2018), <https://apjcn.nhri.org.tw/server/APJCN/27/4/908.pdf>.

from Beijing.³⁵ For example, the hallways of hospitals are decorated with propaganda posters that feature the food pagoda, reminding pregnant women to have plenty of dairy and meat.³⁶ These efforts have paid off. Survey data show that incrementally larger shares of the Chinese population – from 7.5 percent in 2004 to 21.1 in 2015 – have been made aware of the guidelines.³⁷

Each iteration of the guidelines has been issued in a country that has undergone serious change since the previous guidelines. In 1989 per capita income was \$311 per year and three-quarters of the population was rural.³⁸ In 2016 per capita income was more than \$8,000 per year and only 43% of the population was rural.³⁹ Today, with 11% of the population malnourished and 25% overweight, China's nutritional profile resembles that of a western nation.⁴⁰ The authors of the guidelines emphasize that, in addition to being based on the evolving science of nutrition, they are responsive to changing Chinese dietary habits.⁴¹ According to China's top nutritionist Keyou

³⁵ See Xiaoyuan Xing et al., *Analysis on the Publicity and Education Effect of Urban Community Middle-Aged and Elderly People Nutrition and Dietary*, 101 *ADVANCES SOC. SCI., EDUC. & HUMS. RSCH.* 467, 467-472 (2017), <https://www.atlantispress.com/article/25874418.pdf>.

³⁶ See *id.* at 470.

³⁷ Xiaofang Jia (贾小芳) et al., *2004—2015 Nian Zhongguo Chengnian Jumin Shanshi Yingyang Zhishi Zhixiao Lu de Bianhua Qushi (2004—2015 年中国成年居民膳食营养知识知晓率的变化趋势) [Changes in the Awareness Rate of Dietary Nutrition Knowledge Among Chinese Adult Residents from 2004-2015]*, 49 *WEI SHENG YAN JIU (卫生研究) [J. HYGIENE RSCH.]* 345, 345–56 (2020).

³⁸ *GDP Per Capita (Current US\$) —China*, THE WORLD BANK (2021), <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=CN> (last visited Oct. 16, 2021); *Rural Population (% of Total Population) —China*, THE WORLD BANK (2021), <https://data.worldbank.org/indicator/SP.RUR.TOTL.ZS?locations=CN> (last visited Oct. 16, 2021).

³⁹ *GDP Per Capita (Current US\$) —China*, *supra* note 38; *RURAL POPULATION (% OF TOTAL POPULATION) Rural Population (% of Total Population) —China*, *supra* note 38.

⁴⁰ See *China*, WORLD FOOD PROGRAMME, <https://www.wfp.org/countries/china> (last visited Oct. 20, 2021). By way of comparison, more than 10% of US households are considered food insecure while more than 70% of Americans are overweight or obese. See *Security Status of U.S. Households in 2020*, U.S. DEPT OF AGRIC., ECON. RSCH. SERV., <https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/key-statistics-graphics.aspx> (Sept. 8, 2021); *Overweight & Obesity Statistics*, NAT'L INST. OF DIABETES & DIGESTIVE & KIDNEY DISEASES, <https://www.niddk.nih.gov/health-information/health-statistics/overweight-obesity> (Aug. 2017).

⁴¹ See *Zhongguo Jumin Shanshi Zhinan de Fa Zhan Zhuangkuang (中国居民膳食指南的发展状况) [The Development Status of Chinese Residents' Dietary*

Ge, each iteration of the food pagoda was formulated after extensive deliberation among the nation's nutritionists on the basis of empirical evidence from the once-every-decade national nutrition surveys.⁴² In 1959, the Chinese government conducted a nutritional survey, and since 1982 it has conducted a nutritional survey every ten years.⁴³ By closely examining the relationship between the recommendations and the survey data, we can reconstruct some underlying patterns in China's food policies.⁴⁴

III. The Humble Pagoda

When comparing the recommendations to actual behavior, the most striking feature is the gap between the two.

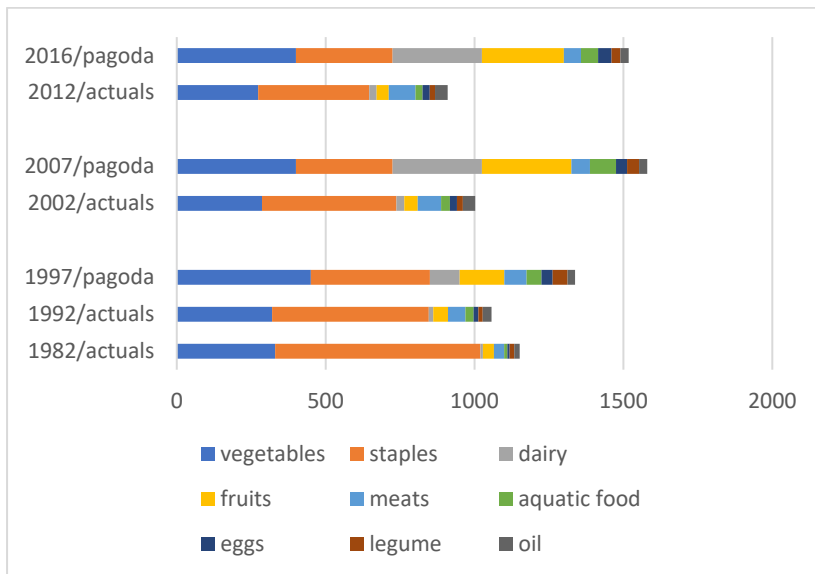


Figure 4. China's Diet, Surveyed Trends (1982, 1992, 2002, 2012) and Pagoda Goals (1997, 2007, 2016) (grams/day)⁴⁵

Guidelines], ZHONGGUO YINGYANG XUEHUI (中国营养学会) [CHINESE NUTRITION SOCIETY], <http://dg.cnsoc.org/article/lsqy.html> (last visited Oct. 20, 2021).

⁴² See Ge, *supra* note 28, at 439.

⁴³ Yuna He et al., *Data Resource Profile: China National Nutrition Surveys*, 48 INT'L J. EPIDEMIOLOGY 368, 368-368f (2019).

⁴⁴ There are no computer files for the 1959 survey so, like most scholars, we begin our investigation with the 1982 survey.

⁴⁵ See "2006 Zhongguo Weisheng Tongji Nianjian" (《2006 中国卫生统计年鉴》) ["2006 China Health Statistics Yearbook"], GUOJIA WEISHENG JIANKANG WEIYUANHUI (国家卫生健康委员会) [NATIONAL HEALTH COMMISSION], <http://www.nhc.gov.cn/htmlfiles/zwgkzt/ptjnj/year2006/index.html> (last visited

In every case the recommendations call for significantly greater food consumption by weight than is actually consumed.⁴⁶ Even more striking is the fact that actual consumption has been declining since the first survey in 1982, and the gap between actual consumption and the recommendations has been growing.⁴⁷ Food consumption by weight does not convert easily into calories, especially when multiple food groups are involved.⁴⁸ However, all the dietary recommendations are based on an intake of 2,400 calories per day, and the text that accompanies them indicates that anything between 1,600 and 2,400 calories per day is acceptable, depending on individual health conditions.⁴⁹ Roughly speaking, the actual Chinese diet is moving towards calorically dense food consumed in low quantities, while the recommendations would move the diet towards less calorically dense foods consumed in greater quantities.⁵⁰

The feature of the 2016 food pagoda that caught the attention of the world was its ambition for drastically reducing China's meat consumption.⁵¹

Nov. 28, 2021); *China Statistical Yearbook 2019*, NATIONAL BUREAU OF STATISTICS OF CHINA, <http://www.stats.gov.cn/tjsj/ndsj/2019/indexeh.htm> (last visited Nov. 29, 2021).

⁴⁶ See “*Zhongguo Jumin Shanshi Zhinan*” 1989 Nian Banben (《中国居民膳食指南》1989 年版本) [“*Dietary Guidelines for Chinese Residents*” 1989 Edition], *supra* note 27; *Zhongguo Jumin Shanshi Zhinan*” 1997 Nian Banben (《中国居民膳食指南》1997 年版本) [“*Dietary Guidelines for Chinese Residents*” 1997 Edition], *supra* note 30; “*Zhongguo Jumin Shanshi Zhinan*” 2007 Nian Banben (《中国居民膳食指南》2007 年版本) [“*Chinese Resident Dietary Guidelines*” 2007 Edition], *supra* note 31; *Yiban Renqun Shanshi Zhinan* (一般人群膳食指南) [Dietary Guidelines for the General Population], *supra* note 7.

⁴⁷ *Ge*, *supra* note 28.

⁴⁸ *Id.*

⁴⁹ He et al., *supra* note 43.

⁵⁰ *Id.*

⁵¹ Milman & Leavenworth, *supra* note 6.

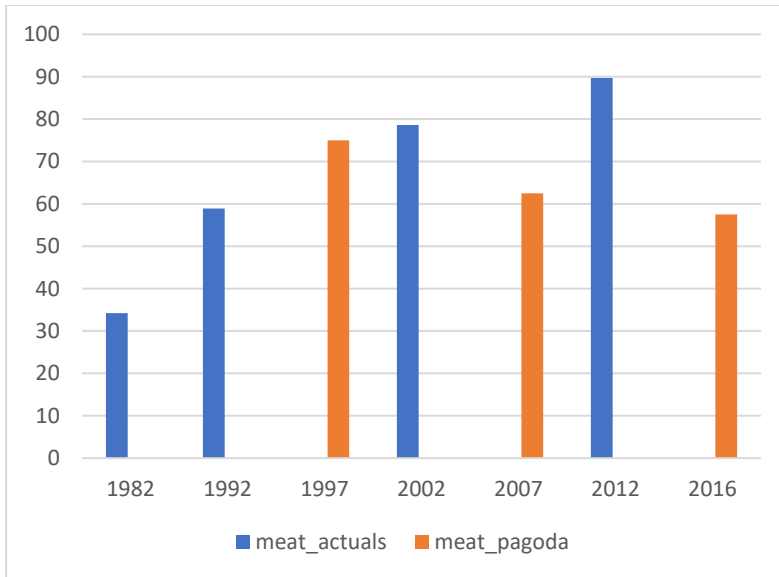


Figure 5. Meat in China's Diet, Observed Trends and Pagoda Goals (grams/day)⁵²

What was less noticed is that the 2007 food pagoda had called for an even larger reduction in meat consumption from actual consumption levels.⁵³ In the face of the steady growth in meat consumption since 1982 (Figure 5), the 2016 recommendations doubled down and recommended even further reductions.⁵⁴

It appears that in its 2016 recommendations, Chinese state nutritionists were acting against the rising tide, advocating for omnivorous moderation even when the country of 1.4 billion was exhibiting a growing appetite for meat.⁵⁵ However, in many areas, the pagoda recommendations reinforce, rather than challenge, existing dietary trends. As Figure 4 shows, this is most evidently the case for staples,⁵⁶ the observed consumption level of which has declined steadily at the rate of at least 15 percent per decennial interval.⁵⁷ The 2007 pagoda has followed suit in shedding its

⁵² See “2006 Zhongguo Weisheng Tongji Nianjian” (《2006 中国卫生统计年鉴》) [“2006 China Health Statistics Yearbook”], *supra* note 45; *China Statistical Yearbook 2019*, *supra* note 45.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Our tabulation for the category of staples includes rice, flour, cereals, tubers, and their products, in keeping with the convention in Chinese nutrition surveys.

⁵⁷ Ge, *supra* note 28 at 443.

recommended level of staples.⁵⁸ A similar pattern applies to vegetables.⁵⁹ Conversely, in the case of oil, observed consumption has gone up, and the pagoda recommendation has risen in synchrony.⁶⁰ Perhaps more salient are the cases of fruits and aquatic food, where the growth of consumption in early decades was followed by a moderate decline in recent periods in urban areas.⁶¹ As if on cue, the pagoda recommendations initially went up before slipping downward.⁶² In general, the food pagoda serves to reproduce existing trajectories, rather than contradicting them. Meat is an exception, rather than the norm, in the food pagoda.

The food pagodas' tendency to follow consumption is most evident in how the pagoda changes over time. In other words, the evolution of the food pagoda mimics the changing trajectory of food consumption in China. Steady growth in consumption predicts a continuous increase in the recommendation, whereas u-shaped consumption corresponds to u-shaped recommendation changes. Even though the absolute values of food recommendations are by no means close to the empirical trends, the decade-to-decade changes most certainly are.

This humble quality of the pagoda is consistent with the fact that the Chinese authorities do not appear to endorse the interpretation of the food pagoda as either a sign of, or vehicle for, Chinese environmental leadership. Indeed, the Chinese media routinely dismiss discussions about the global environmental implications of China's meat consumption. For example, a *Time* magazine cover story entitled "How China Could Change the World by Taking Meat Off the Menu" received a withering response in the official propaganda tabloid, *Global Times*.⁶³ According to the author,

"Chinese netizens slammed Western media as being hypocritical after an article boasted the popularity of meat substitutes in China while accusing China of overconsumption of meat which harms the

⁵⁸ *Id.*

⁵⁹ *See id.* at 440-41.

⁶⁰ *See id.* at 442-44.

⁶¹ *Id.* at 440.

⁶² *Id.* at 442-43. Yiban Renqun Shanshi Zhinan (一般人群膳食指南) [Dietary Guidelines for the General Population], *supra* note 7.

⁶³ *See* Lu Yuanzhi, *West Should Cut Its Own Meat Consumption if It's Serious About the Climate*, *GLOB. TIMES* (Jan. 24, 2021), <https://www.globaltimes.cn/page/202101/1213792.shtml>; Charlie Campbell, *How China Could Change the World by Taking Meat off the Menu*, *TIME* (Jan. 22, 2021), <https://time.com/5930095/china-plant-based-meat/>.

environment, which, Chinese readers said not only looks like it is hinting that Chinese people are eating more meat substitutes as they feel guilty for eating too much meat and hurting the environment, but, more importantly, glossed over much higher levels of Western meat consumption.”⁶⁴

Seen from the perspective of the humble pagoda, China’s “massive leadership” is more imagined than real.

IV. The Aspirational Pagoda

In the previous section, we suggested that the food pagoda is humbler than it might seem—that it tends to follow consumption trends rather than guide them. Even so, as Figure 6 makes clear the pagoda’s recommendations for fruits, aquatic foods, eggs seem perplexingly high (most puzzling of all is dairy which will be discussed in Section 5).

⁶⁴ Xu Keyue, *Western Media Double Standard in Accusing China of Meat Overconsumption: Expert*, GLOB. TIMES (Jan. 24, 2021), <https://www.globaltimes.cn/page/202101/1213791.shtml>.

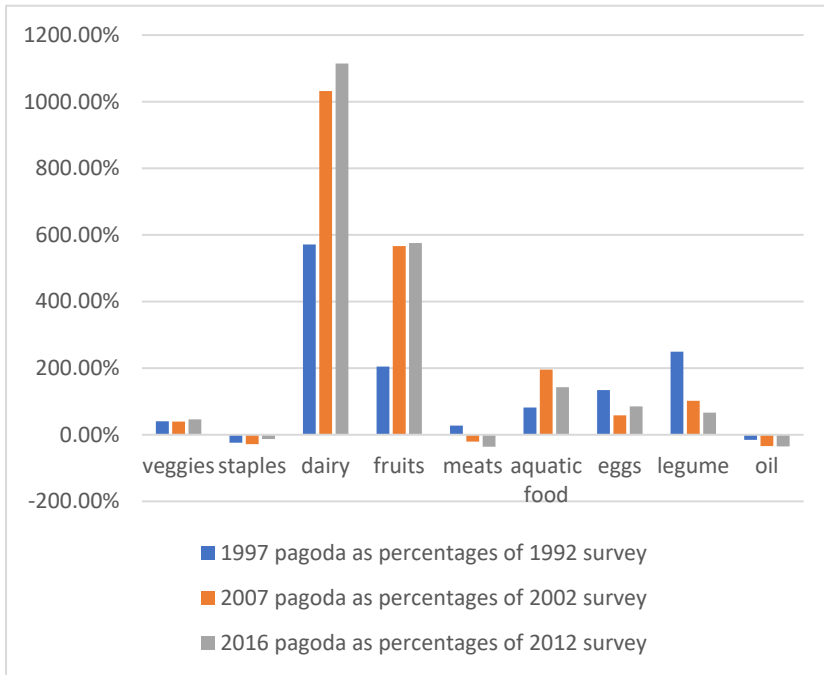


Figure 6. Pagoda Recommendations as Percentages of Corresponding Consumption Levels in the Prior Survey⁶⁵

However, these recommendations take on a different meaning in the context of urban-rural disparity in China. In Figure 7 below, the horizontal axis shows the ratio of urban to rural consumption of foods. For example, urban dairy consumption is, on average, 5.12 times the rural figure, whereas urban staple consumption is only 0.77 of the rural statistic. The vertical axis, on the other hand, tracks the pagodas' recommended change from surveyed consumption levels. For example, the pagodas recommend taking, on average, 9.06 times more dairy than what Chinese residents consume in reality. The recommendation for staples, on the other hand, is to consume 0.21 times less than the status quo. After tabulating the correlation between these two statistics, we derive an R^2 of 0.853, suggesting that 85.3% of the variation in the pagodas' recommended changes is explained by urban-rural differences in China.

⁶⁵ See "2006 Zhongguo Weisheng Tongji Nianjian" (《2006 中国卫生统计年鉴》) ["2006 China Health Statistics Yearbook"], *supra* note 45; China Statistical Yearbook 2019, *supra* note 45.

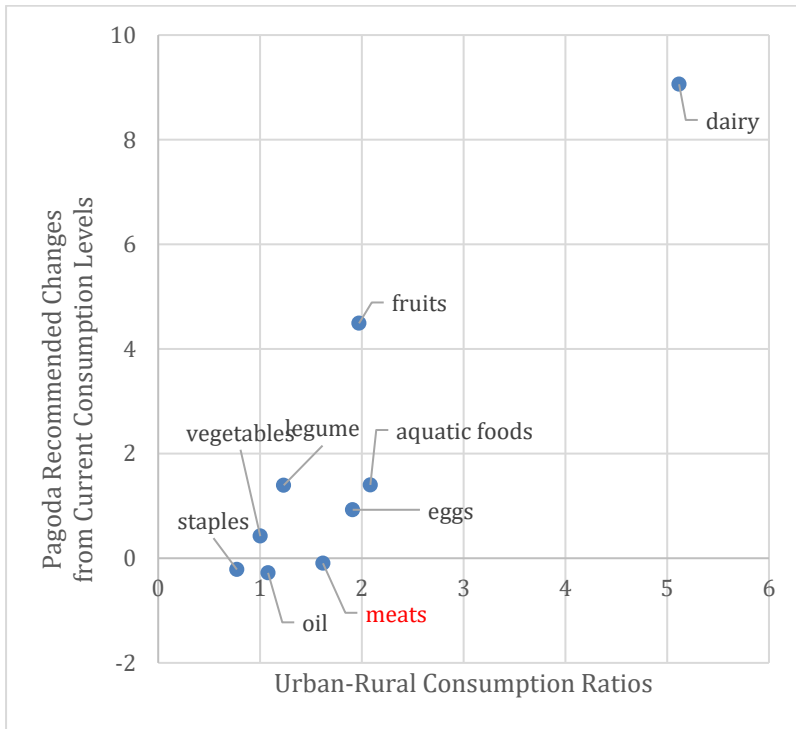


Figure 7. Scatterplot of Urban-Rural Consumption Ratios (x) and Pagoda Recommended Changes (y)⁶⁶

This strong correlation suggests that a specter is haunting the food pagoda – the specter of the city. In other words, the food pagoda tends to liberally recommend foods that are favored by urbanites, while at the same time discouraging foods that rural residents disproportionately consume. As a result, what appear as quintessentially Chinese urban foods such as dairy, fruits, and aquatic foods, are further valorized by the pagoda, whereas foods that are characteristically rural, e.g. staples, are presented as undesirable in the pagoda. As such, the food pagoda signals the people of rural China to look up to their urban counterparts for the ideal diet and encourages the people of urban China to continue in their current dietary trajectory. Perhaps inadvertently, the food pagoda may leave rural residents of China in a constant struggle to catch up with their urban counterparts, while neglecting—if not annihilating—the cultures and contexts of rural livelihoods, whatever the consequences

⁶⁶ See “2006 Zhongguo Weisheng Tongji Nianjian” (《2006 中国卫生统计年鉴》) [“2006 China Health Statistics Yearbook”], *supra* note 45; *China Statistical Yearbook 2019*, *supra* note 45.

for environment, health, and animal welfare. The health implications are especially significant, since the diet-related problems of urban China are precisely those due to the overconsumption of high-calorie fruits, high-protein aquatic foods, and high-fat dairy products.⁶⁷

Our findings both confirm and challenge previous work on the subject. Past research has suggested that Chinese urbanites tend to better adhere to food pagoda recommendations than their rural counterparts.⁶⁸ Our results show similar correlational strength between urban status and the food pagoda's recommended dietary structure. However, our analysis leads us to consider the possibility that if there are causal relationships here of any sort, they may go both ways. In other words, in addition to urbanites adhering to the food pagoda more closely, the Chinese nutritionists who construct the food pagoda (themselves urbanites) may have encoded Chinese urban dweller preferences in the recommendations.

Yet, even when Chinese urban meat consumption is 162 percent of the rural amount, state nutritionists have prescribed reductions.⁶⁹ The fact that it is an exception to the general pattern of the food pagodas endorsing urban dietary trends is important. The public health implications of China's growing appetite for meat have become hard to ignore, especially in cities.⁷⁰ By 2007 the epidemiological evidence had convinced China's top nutritionists of the need to reverse course and limit meat intake.⁷¹ Yet, as recently as 1997, the pagoda was telling people to consume more meat – 27.3 percent more to be exact—even though much of the increase in overweight began between 1989 and 1991 or even before.⁷² It is easy for people to become confused when there are such rapid changes in recommendations, especially when they are made against the background of a food pagoda that overall still asks people to eat more of nearly everything.

V. The Strange Case of Dairy

The most glaring feature of the food pagodas is their unrealistically high recommendations for the consumption of dairy products. The 1997 pagoda recommendation of 100 grams/day was

⁶⁷ See Li et al., *supra* note 14, at 212-13.

⁶⁸ Xiaoyue Xu et al., *Do Older Chinese People's Diets Meet the Chinese Food Pagoda Guidelines? Results from the China Health and Nutrition Survey 2009*, 18 PUB. HEALTH NUTRITION, 3020, 3025-26 (2015).

⁶⁹ *Id.*

⁷⁰ Zhang et al., *supra* note 14, at 1983.

⁷¹ *Id.*

⁷² *Id.* The broader context of this meat anomaly warrants further discussion that we hope to pursue elsewhere.

nearly seven times the actual consumption level of 14.9 in 1992.⁷³ When the 2002 consumption figure went up to 26.5, Chinese nutritionists doubled down on their dairy recommendation, increasing the prescribed level to 300 grams/day.⁷⁴ Then, even after actual consumption declined to 24.7 in 2012, state nutritionists remain adamant in recommending 300 grams/day, or more than 12 times the average amount consumed (Figure 4).⁷⁵

The food pagoda's fixation with dairy could seem improbable, especially since, historically, dairy has never been an integral part of the Chinese diet, with the exception of a small contingent of ethnic minority populations.⁷⁶ "Barbarian" nomadic groups such as Mongols and Tibetans are known to have depended on certain cattle breeds for meat and milk, giving substance to the general cultural association of dairy products with the "lack of civilization," as seen from the perspective of the Chinese Han ethnic majority.⁷⁷ But even for nomads, dairy consumption was commonly reserved for the brisk winters.⁷⁸ This historical experience with dairy, or lack thereof, is closely related to the common association between East Asia and the idea of "lactose intolerance." Medical scientists have been debating for decades the questions of whether "lactose intolerance" is biologically determined or culturally constructed, and of whether "lactose intolerance" is a misnomer to begin with.⁷⁹

⁷³ "Zhongguo Jumin Shanshi Zhinan" 1997 Nian Banben (《中国居民膳食指南》1997年版本) ["Dietary Guidelines for Chinese Residents" 1997 Edition], *supra* note 30.

⁷⁴ "Zhongguo Jumin Shanshi Zhinan" 2007 Nian Banben (《中国居民膳食指南》2007年版本) ["Chinese Resident Dietary Guidelines" 2007 Edition], *supra* note 31.

⁷⁵ Yiban Renqun Shanshi Zhinan (一般人群膳食指南) [Dietary Guidelines for the General Population], *supra* note 7.

⁷⁶ Mark Elvin, *The Technology of Farming in Late-Traditional China*, in THE CHINESE AGRICULTURAL ECONOMY 13-35 (R. Barker et al. eds., 1982); Jia-Chen Fu, *Confronting the Cow: Soybean Milk and the Fashioning of a Chinese Dairy Alternative*, in MORAL FOODS: THE CONSTRUCTION OF NUTRITION AND HEALTH IN MODERN ASIA 47, 47-65 (Angela Ki Che Leung et al. eds., 2019); Susan Glosser, *Milk for Health, Milk for Profit: Shanghai's Chinese Dairy Industry Under Japanese Occupation*, in INVENTING NANJING ROAD: COMMERCIAL CULTURE IN SHANGHAI, 1900-1945, 207-36 (S. Cochran ed., 1999).

⁷⁷ See Megan Tracy, *Pasteurizing China's Grasslands and Sealing in Terroir*, 115 AM. ANTHROPOLOGIST 437, 442 (2013).

⁷⁸ See Elvin, *supra* note 76.

⁷⁹ See Frederick J. Simoons, *Primary Adult Lactose Intolerance and the Milking Habit: A Problem in Biologic and Cultural Interrelations*, 15 AM. J. DIGESTIVE DISEASES 695, 695-710 (1970); Claude Fischler, *Food Habits, Social Change and the Nature/Culture Dilemma*, 19 SOC. SCI. INFO. 937, 937 (1980); Widjaja Lukito et al., *From 'Lactose Intolerance' to 'Lactose Nutrition'*, 24 ASIA PAC. J. CLINICAL NUTRITION 1, 1-8 (2015).

While the identification of lactose intolerance as a “medical deficiency” should be avoided, an estimated 95 percent of ethnic Han Chinese people are not genetically predisposed to digest milk.⁸⁰ Dairy marketing and recommendation in China, therefore, are up against the entire cultural and biophysical histories of the Middle Kingdom.

However, the peculiarity of the dairy recommendation begins to make sense, when it is situated in the context of China's experience with European modernity. The *en masse* arrival of European settlers and missionaries in the late 1800s and early 1900s gave dairy an unprecedented boost in China.⁸¹ They brought with them, among other things, an entire suite of dairy technologies, regulations, and cultural values. As early as 1911, Chinese Customs official were predicting “enormous sale” of imported condensed milk to customers in China.⁸² Dairy consumables took on fresh political and even ideological meanings in China, especially as their arrival coincided with the nation's search for its place in the colonial world order.⁸³ Frustrated by military defeats, territorial concessions, and declining cultural prominence, Chinese intellectuals debated heatedly about the underlying reasons for apparent Western superiority.⁸⁴ Shepherded by the commercial interests of the traders and compradors, who wielded enormous political influence, the intellectual crisis morphed into a wholesale obsession with Western science, commodities, health, and nutrition.⁸⁵ In this context, the line was blurred between national strength and personal health. A foreign, but nevertheless enviable, symbol of the Western diet, milk came to be seen as an essential ingredient in China's belated entry into modernity.⁸⁶ This led to the creation of a small Chinese dairy

⁸⁰ Nissim Silanikove et al., *The Interrelationships Between Lactose Intolerance and the Modern Dairy Industry: Global Perspectives in Evolutional and Historical Backgrounds*, 7 *NUTRIENTS* 7312, 73161 (2015).

⁸¹ See Thomas David DuBois, *Branding and Retail Strategy in the Condensed Milk Trade: Borden and Nestlé in East Asia, 1870-1929*, *BUSINESS HISTORY* (2019), <https://www.tandfonline.com/doi/abs/10.1080/00076791.2019.1688302>.

⁸² See Thomas David DuBois, *China's Dairy Century: Making, Drinking and Dreaming of Milk*, in *ANIMALS AND HUMAN SOCIETY IN ASIA: HISTORICAL, CULTURAL AND ETHICAL PERSPECTIVES*, 179, 179–211 (Rotem. Kowner et al. eds., 2019).

⁸³ See LO SHUK YING (盧淑櫻), Muru Yu Niunai: Jindai Zhongguo Muqin Juse de Chong Su, 1895-1937 (母乳與牛奶: 近代中國母親角色的重塑, 1895-1937) [*MOTHER'S MILK AND COW'S MILK: REINVENTION OF MOTHERHOOD IN MODERN CHINA, 1895-1937*] (2018).

⁸⁴ See ROGASKI, *supra* note 4

⁸⁵ See Fu, *supra* note 76, at 47.

⁸⁶ See Xiaoqian Hu, “A Glass of Milk Strengthens a Nation.” *Law Development, and China's Dairy Tale*, 16 *J. FOOD L. & POL'Y* 78, 78 (2020).

industry, centered in the coastal cities and, more importantly, in the Northeast, an area greatly influenced by Russian refugees, first from the Great War, and then from the Bolshevik Revolution, who in some cases brought entire dairy herds with them.⁸⁷ Since then, China has continued to integrate dairy into its diet, gradually internalizing a form of “animal colonialism”⁸⁸ into the culinary map of the nation.

The political turmoil of the twentieth century notwithstanding, there was remarkable continuity in the promotion of dairy in China. In Republican and Communist periods alike, despite radically shifting winds in almost all other aspects of social life, dairy production and consumption were consistently celebrated as evidence of progress and prosperity.⁸⁹ Even under Japanese occupation in the 1930s and 40s, Chinese dairy entrepreneurs managed to enlist the support of authorities in expanding their businesses, owing to the successful framing of milk-drinking “as the key to China’s success in the evolutionary struggle to survive.”⁹⁰ The immediate post World War II period brought a flood of cheap milk powder from the United States, and dairy modernization was part of the first Five Year Plan after the birth of the “new China” in 1949.⁹¹ Throughout the 1960s and 1970s the status of dairy remained high, though supply was limited.⁹² Milk was classified as a “special commodity” and allocated primarily to soldiers, cadres, and to the young and old in urban areas.⁹³

As the Chinese economy began to liberalize in the 1980s, the dairy industry received yet another boost with its association with western modernity, which has continued unabated.⁹⁴ A sign of milk’s current status can be seen in this advertisement from early 2020 which appeared on Shanghai television, featuring Princess Anne’s son, Peter Phillips, advertising milk from Jersey cows.⁹⁵

⁸⁷ See *The Dairy Market in China Will Be the World’s Largest by 2022*, DAXUE CONSULTING (June 1, 2020), <https://daxueconsulting.com/china-dairy-market/>.

⁸⁸ See Mathilde Cohen, *Animal Colonialism: The Case of Milk*, 111 AM. J. INT’L L. UNBOUND 267, 267–71 (2017).

⁸⁹ See Silankiove et al., *supra* note 80, at 7313-15.

⁹⁰ Glosser, *supra* note 76, at 209.

⁹¹ See *A Look Through Time: Transformation of China’s Dairy Sector*, DAIRY GLOB. (Apr. 26, 2021), <https://www.dairyglobal.net/Market-trends/Articles/2021/4/A-look-through-time-Transformation-of-Chinas-dairy-sector-739294E/>.

⁹² See *id.*

⁹³ See *id.*

⁹⁴ See *id.*

⁹⁵ Rebecca Taylor, *Queen’s Grandson Peter Phillips Flogs Royal Connections in Chinese Milk Ad*, SKY NEWS (Jan. 21, 2020), <https://news.sky.com/story/queens-grandson-peter-phillips-flogs-royal-connections-in-chinese-milk-ad-11913938>.



Figure 8. Chinese milk advertisement featuring Peter Phillips⁹⁶

Nestle, which arrived in Shanghai in 1907, built its first factory in Shuangcheng in 1987, which opened in 1990.⁹⁷ The Swiss dairy giant has not only brought wholesale transformations to the local economy wherever it went, but also made rapid gains in market share. Advertisements for Nestle's infant formula was common in Chinese hospitals from the late 1990s into the first decade of this century.⁹⁸ By 1999, Nestle's total revenue of 13.3 billion US dollars was 74 times that of Shanghai Bright, one of the largest Chinese dairy

⁹⁶ Geroge Bowden, *Does a Milk Advert Show Harry and Meghan's Future?*, BBC NEWS (Jan. 22, 2020), <https://www.bbc.com/news/uk-51188894>.

⁹⁷ See NESTLÉ, *NESTLÉ IN CHINA CREATING SHARED VALUE 4* (2012), available at https://www.nestle.com/sites/default/files/assetlibrary/documents/library/document%20s/corporate_social_responsibility/nestle_china_csv_report_2012_english%20version.pdf.

⁹⁸ Personal communication from Chun-mei Li to authors (March 2021). The government now encourages breast feeding but the law is relatively permissive with respect to advertising substitutes for breast milk. See Fang Jin, *Marketing of Infant Formula Must be Regulated*, CHINA DAILY, <http://global.chinadaily.com.cn/a/201905/09/WS5cd35d4fa3104842260ba9a5.html> (May 9, 2019).

firms.⁹⁹ Nestle is now the largest food and beverage company in the Chinese market.¹⁰⁰

While firms like Nestlé are at the forefront of Chinese dairy development, their success would not have been possible without the systematic backing of the Chinese state at all levels. The most significant piece of China's governmental push for dairy is the school milk program. It began piloting in five of China's most populated cities in 1999, promoting the centralized sales and distribution of ultra-pasteurized liquid milk to schoolchildren at the prescribed daily consumption level of 200 ml.¹⁰¹ By 2020, the program covered a total of 26 million schoolchildren in more than 63 thousand schools all over the country, becoming a stable sales channel for 123 dairy firms that are enrolled as program suppliers.¹⁰²

In numerous public reports and policy documents, the Chinese Dairy Association identifies rural China's low consumption of liquid cow milk as a sure sign of backwardness, hence targeted marketing in rural areas.¹⁰³ In school milk promotional materials, liquid cow milk is commonly depicted as a desirable way of life, an essential ingredient for student health, and a symbol of the modern economy.¹⁰⁴ The program is promoted through officially-endorsed press conferences, required health courses, student quizzes, radio programs, parent meetings, and even an annual School Milk Day.¹⁰⁵

⁹⁹ Huijun Zhang (张辉军), *Xibu Nai Ye Mianlin de Tiaozhan He Zhanlue Xuanze Challenges and Strategic Choices Faced by Western Dairy Industry* (西部奶业面临的挑战和战略选择) [*Challenges and Strategic Choices Faced by Western Dairy Industry*], GANSU NONGYE (1 甘肃农业) [GANU AGRICULTURE], no. 1 2001 at 59, 59-63.

¹⁰⁰ NESTLÉ, *supra* note 97, at 2.

¹⁰¹ See *School Milk Programme Under Way*, CHINA DAILY (Nov. 21, 2001), <http://www.china.org.cn/english/SO-e/22455.htm>.

¹⁰² Guoija "Xuesheng Yinyong Nai Jihua" Shishi 20 Nian Ji Xiandai Nai Ye Pingjia Tixi Jianshe Tuijin Hui Zai Beijing Longzhong Zhaokai (国家“学生饮用奶计划”实施20年暨现代奶业评价体系建设推进会在北京隆重召开) [*The 20th Year of the Implementation of the National “Student Milk Drinking Plan” and the Promotion Meeting for the Construction of a Modern Dairy Evaluation System Were Held in Beijing*], ZHONGGUO NAI YE XIEHUI (中国奶业协会) [DAIRY ASS'N OF CHINA] (Jan. 14, 2021), <https://www.dac.org.cn/read/newgndt-21011414300550910155.jhtm>.

¹⁰³ See *School Milk Programme Under Way*, *supra* note 101.

¹⁰⁴ Michaela Böhme, 'Milk from the Purest Place on Earth': Examining Chinese Investments in the Australian Dairy Sector, 38 AGRIC. & HUM. VALUES, 327, 330 (2020).

¹⁰⁵ See *School Milk Programme Under Way*, *supra* note 101.

In its push for uniformity and safety, the program only allows for packaged, ultra-pasteurized liquid cow milk with long shelf lives.¹⁰⁶ The government's promotion of this single product type has raised many controversies, especially in western regions where ethnic minority children are accustomed to drinking fresh dairy milk from local – if not their own – cattle farms.¹⁰⁷ Despite such pushback, the school milk program's nationwide endorsement has successfully enabled ultra-pasteurized milk to grow from obscurity to monopoly in China – commanding 77.3 percent of the market, according to a randomized household survey in 2014.¹⁰⁸ This figure can be corroborated by dairy firm earnings data, where sales of ultra-pasteurized milk contributed 64.2 billion RMB (approximately 10 billion USD) or 71 percent of the total revenue for Yili, the largest dairy conglomerate in China.¹⁰⁹ In the span of only two decades, China moved from localized, smallholder dairy operations to concentrated, industrial production of dairy by a handful of conglomerates.¹¹⁰ When the industrialized model so easily takes over and becomes the norm of dairy-making, the entire dairy economy is built around the self-fulfilling prophecy of scale, quantity, and efficiency, leaving aside questions of animal welfare, sustainability, and well-being.¹¹¹

The stunning growth of China's domestic dairy economy has provided the impetus and capital for global expansion. In recent years, as the Chinese economy grows beyond China, the dairy sector is at the forefront of global China's expansive reach. Under the rubric of the "Dairy Belt and Road," for example, Chinese state capital has been aggressively mobilizing domestic demand in order for state-backed dairy conglomerates to establish a truly global supply chain

¹⁰⁶ *Id.*

¹⁰⁷ See Qiaoqiao Guan (关俏俏) & Jie Liu (刘杰), Xinjiang Xuesheng Nai Jihua Tuixing Shu Nian Zaoyu Ganga (疆'学生奶'计划推行数年遭遇尴尬) [*School Milk Programs Go Awry in Xinjiang*] (新疆'学生奶'计划推行数年遭遇尴尬), XXINHUA DIAO (新华调) INHUA (July 19, 2011), <https://news.qq.com/a/20110719/000959.htm>.

¹⁰⁸ Zhai Shixian (翟世贤) et al., *Shouru Zengzhang He Chengshi Hua Dui Yetai Nai XiaofeiJiegou de Yingxiang* (收入增长和城市化对液态奶消费结构的影响) [*The Impact of Income Growth and Urbanization on Liquid Milk Consumption Structure*], 8 ZHONGGUO NONGCUN JINGJI (中国农村经济) [CHINESE RURAL ECON.] 45, 50 (2017).

¹⁰⁹ See Dairy Global, *The Dairy Market in China Will Be the World's Largest by 2022*, *supra* note 83.

¹¹⁰ *See id.*

¹¹¹ CHRISTOPHER SCHLOTTMANN & JEFF SEBO, *FOOD, ANIMALS, AND THE ENVIRONMENT: AN ETHICAL APPROACH* (2018).

from New Zealand to the Netherlands.¹¹² Today the largest dairy farm in the world is the Mudanjiang City Mega Farm, located on the China-Russia border, which mainly supplies the Russian market.¹¹³ It is an almost total confinement system in which its 100,000 dairy cows almost never see grass or experience daylight.¹¹⁴ Outside China, in Chinese conglomerate Mengniu's "flagship" plant in New Zealand's Pōkeno Village, which has a population of approximately 400, the idyllic landscape has been forever transformed.¹¹⁵ The plant's Chinese manager boasted that "when we came here in 2013, it was all pasture here. Within just six years, the population of Pōkeno has doubled, and the employment and infrastructure construction in town have also improved a lot".¹¹⁶

And yet, things are not so simple. According to China's official statistical yearbooks, since China's opening in the 1980s, meat and dairy production have increased enormously, still dairy follows its own distinctive course.¹¹⁷ In the early 2000s, Chinese dairy output grew at a pace that exceeded that of all other animal protein sources. Yet, circa 2006, dairy output reached an inflection point and has since remained stable.¹¹⁸

¹¹² See Yifei Li & Judith Shapiro, *Rethinking Extractivism on China's Belt and Road: Food, Tourism, and Talent*, in *OUR EXTRACTIVE AGE: EXPRESSIONS OF VIOLENCE AND RESISTANCE* 135, 138-42 (Judith Shapiro & John-Andrew McNeish eds., 2021).

¹¹³ Amber Pariona, *Biggest Farms in the World*, *WORLD ATLAS* (Apr. 25, 2017), <https://www.worldatlas.com/articles/biggest-farms-in-the-world.html>.

¹¹⁴ Qingcai Liu (刘清才) & Xin Qi (齐欣), "Yidai Yilu" *Kuangjia Xia Zhongguo Dongbei Diqu Yu Eluosi Yuandong Diqu Fazhan Zhanlue Duijie Yu Hezuo* ('一带一路' 框架下中国东北地区与俄罗斯远东地区发展战略对接与合作) [*Development Strategy Docking and Cooperation Between Northeast China and Russia's Far East Within the Framework of the Belt and Road Initiative*], 27 *DONG BEI YA LUN TAN* (东北亚论坛) [*NE. ASIA F.*], no. 2 (2018).

¹¹⁵ See Jamie Gray, *Chinese Dairy Giant Mengniu Eyes Formula Expansion at Pokeno*, *N.Z. HERALD* (July 7, 2018), <https://www.nzherald.co.nz/business/chinese-dairy-giant-mengniu-eyes-formula-expansion-at-pokeno/Q6NFFTDCCDF4OBMZGW6RCH7HJ2Y/>.

¹¹⁶ *Yashili Factory Helps Reshaping Pokeno, a Small Town of New Zealand*, *XINHUA* (Oct. 14, 2019), http://www.xinhuanet.com/english/2019-10/14/c_138470996.htm.

¹¹⁷ See *The Dairy Market in China Will Be the World's Largest by 2022*, *supra* note 87.

¹¹⁸ See PWC, *THE ONGOING MODERNISATION OF CHINA'S DAIRY SECTOR* 4, 4 (2019), <https://www.pwccn.com/en/food-supply/publications/modernization-of-china-dairy-industry.pdf>.

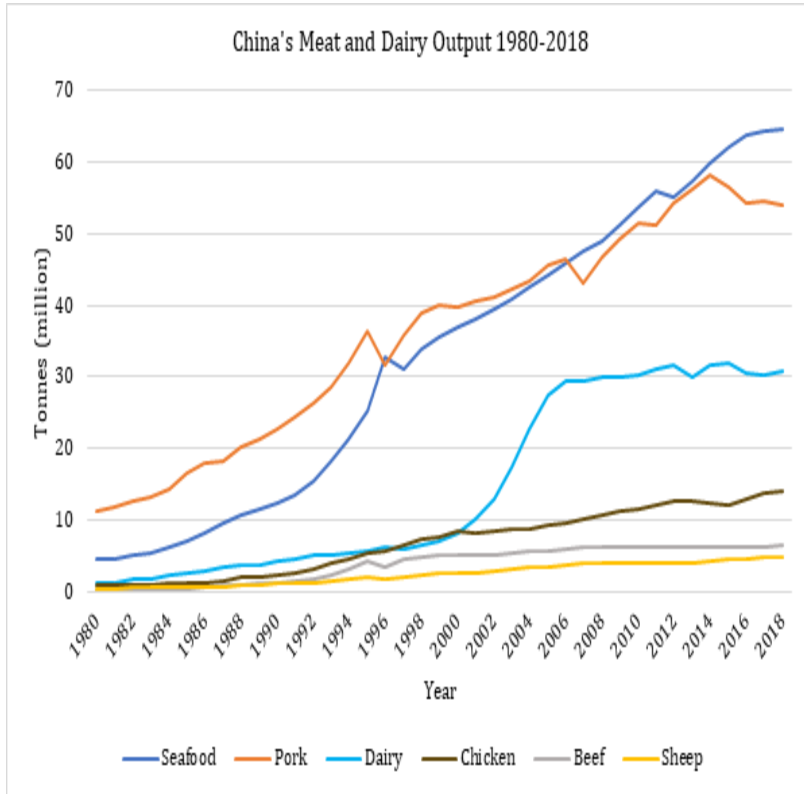


Figure 9. China's Meat and Dairy Output (1980-2018)¹¹⁹

Part of the explanation for this apparent anomaly is the dairy scandals of the first decade of this century and the resulting growth of dairy imports. The best known of these scandals came to light in 2008, and concerns the Sanlu Group, a state-owned Chinese dairy products company that produced one of the oldest and most popular brands of infant formula in China.¹²⁰ The company adulterated milk and infant formula with melamine in order to increase the nitrogen content of diluted milk, thus giving it the appearance of higher protein content, allowing it to pass quality control tests.¹²¹ This

¹¹⁹ *China Statistical Yearbook 2019*, *supra* note 45.

¹²⁰ See Echo Huang, *Ten Years After China's Infant Milk Tragedy, Parents Still Won't Trust Their Babies to Local Formula*, QUARTZ (July 16, 2018), <https://qz.com/1323471/ten-years-after-chinas-melamine-laced-infant-milk-tragedy-deep-distrust-remains/>.

¹²¹ *See id.*

resulted in 300,000 illnesses, 54,000 hospitalizations, and 6 deaths.¹²²

A consequence of these scandals was a massive increase in dairy imports, as Chinese consumer confidence in domestic products tanked.¹²³

China dairy imports, 1995-2013

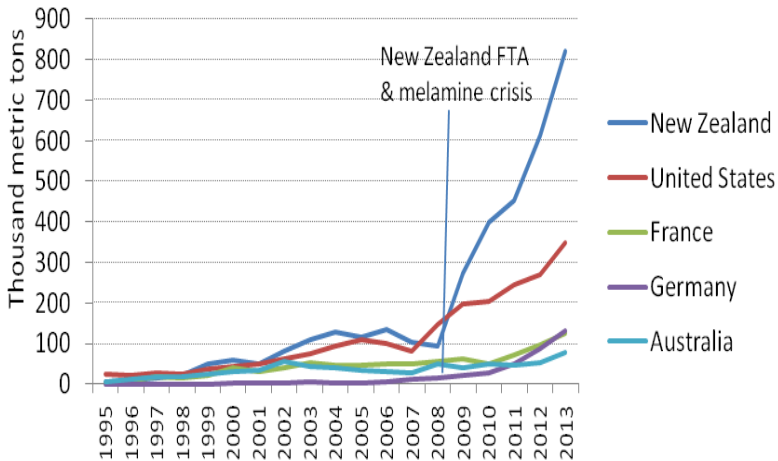


Figure 10. China's dairy imports (1995-2013)¹²⁴

New Zealand has been the major beneficiary of this market shift, yet, ironically, a New Zealand company, Fonterra, owned 43% of Sanlu at the time of the scandal.¹²⁵ Fonterra's CEO was criticized both in the business press and by New Zealand's prime minister for his ethical failings, yet he went on to continue to have a distinguished

¹²² See Xuli Wu et al., *Challenges to Improve the Safety of Dairy Products in China*, 76 TRENDS FOOD SCI. & TECH. 6, 8 (2018).

¹²³ See Yuting Wang et al., *Dynamic Analysis of China's Imported Raw Milk Powder Consumption*, 12 SUSTAINABILITY 1542, 1543-44 (2020).

¹²⁴ *Aussie FTA and Chinese Dairy Imports*, DIM SUMS BLOG (Dec. 26, 2014), <http://dimsums.blogspot.com/2014/12/aussie-fta-and-chinese-dairy-imports.html> (analyzing China customs data).

¹²⁵ See Edward Wong, *Company at Core of China's Milk Scandal Is Declared Bankrupt*, N.Y. TIMES (Dec. 24, 2008), <https://www.nytimes.com/2008/12/25/world/asia/25milk.html>.

career.¹²⁶ Sanlu executives were not so fortunate: two were executed and four others were imprisoned.¹²⁷

Despite the long history of promoting dairy both by foreign companies and the Chinese state, the overall result is surprising. Dairy consumption has increased, but there has been nothing like the spike that has occurred with respect to meat. Moreover, in relative terms, China's per capita dairy consumption remains a fraction of that in industrialized economies. As the following figure shows, Chinese per capita consumption in whole milk equivalent is about 1/10 of that of the United States.

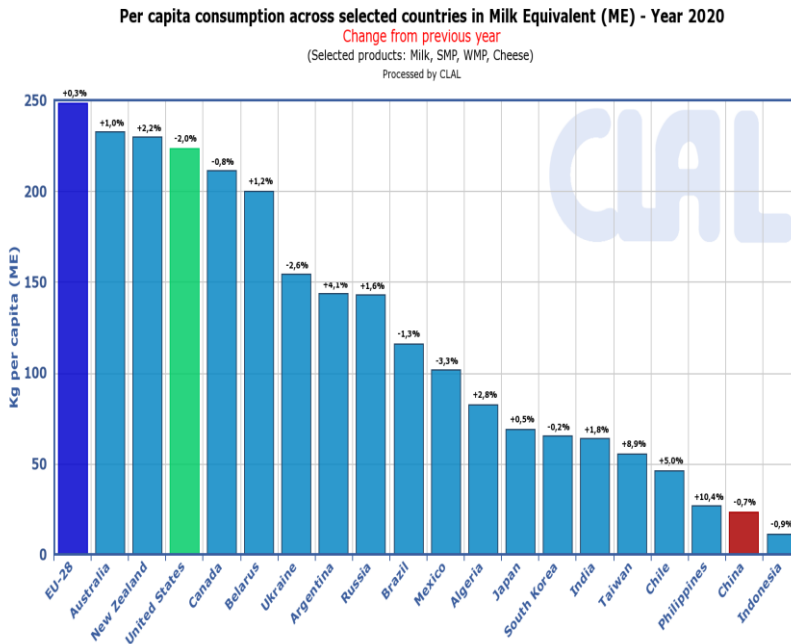


Figure 11. Per capita consumption across selected countries in Milk Equivalent (ME)

¹²⁶ See Van der Heyden to Step Down as Fonterra Chair, Norris Tapped, N. Z. HERALD (Nov. 16, 2011), <https://www.nzherald.co.nz/business/van-der-heyden-to-step-down-as-fonterra-chair-norris-tapped/IMO64UD6BDVNCG3IFVTQ634WDA/>.

¹²⁷ See Tania Branigan, China Executes Two for Tainted Milk Scandal, THE GUARDIAN (Nov. 24, 2009), <https://www.theguardian.com/world/2009/nov/24/china-executes-milk-scandal-pair>.

NOTE: Per capita consumptions of each country are obtained dividing total consumption (*Source FAS-USDA*) by the population (*Source FAO, Eurostat*).¹²⁸

This makes it all the more puzzling why the food pagodas recommend such unrealistically high levels of dairy consumption, especially since, as we have suggested, they largely follow consumption rather than leading it. This becomes easier to understand when we see that the food pagodas are just one element of what we might call the “Chinese food/nutrition policy complex,” which consists of overlapping layers of authority that represent the internal checks and balances of the Chinese policymaking process.

The food pagodas overlap with several other guidance documents and policy instruments, including most notably the National Outline for Food and Nutritional Development (2014 to 2020)¹²⁹, the National Nutritional Plan (2017 to 2030, with qualitative goals only; not included in Figure 12)¹³⁰, and the Healthy China Action Plan (2019 to 2030, reiterating the goals in the national outline), as well as countless provincial and local mandates and directives on the same subjects.¹³¹ Unlike the food pagoda, which is a public-facing document, these other elements in the policy-

¹²⁸ *Per Capita Consumption*,

CLAL, https://www.clal.it/en/index.php?section=tabs_consumi_procapite (Sept. 11, 2021).

¹²⁹ See generally Guowuyuan Bangong Ting (国务院办公厅) [Office of the State Council], *Zhong Guo Shi Wu Yu Yingyang Fazhan Gangyao (2014-2020 Nian)* (《中国食物与营养发展纲要 (2014—2020 年)》) [*China Food and Nutrition Development Program (2014-2020)*], ZHONGUA RENMIN GONGHEGUO ZHONGYANG RENMIN ZHENGFU (中華人民共和國中央人民政府) [THE CENT. PEOPLE’S GOV’T OF THE PEOPLE’S REPUBLIC OF CHINA] (Jan. 28, 2014), http://www.gov.cn/zwgk/2014-02/10/content_2581766.htm.

¹³⁰ See generally Guowuyuan Bangong Ting (国务院办公厅) [Office of the State Council], *Guomin Yingyang Jihua (2017-2030 Nian)* (《国民营养计划 (2017—2030 年) de Tongzhi》) [*National Nutrition Plan (2017-2030)*], ZHONGUA RENMIN GONGHEGUO ZHONGYANG RENMIN ZHENGFU (中華人民共和國中央人民政府) [THE CENT. PEOPLE’S GOV’T OF THE PEOPLE’S REPUBLIC OF CHINA] (July 13, 2017), http://ww.gov.cn/zhengce/content/2017-07/13/content_5210134.htm.

¹³¹ See Jiankang Zhongguo Xingdong Tuijin Weiyuanhui (健康中国行动推进委员会) [Health China Action Promotion Committee], *Jiankang Zhongguo Xingdong (2019-2030 Nian)* (《健康中国行动 (2019—2030 年)》) [*Healthy China Action (2019-2030)*], ZHONGUA RENMIN GONGHEGUO ZHONGYANG RENMIN ZHENGFU (中華人民共和國中央人民政府) [THE CENT. PEOPLE’S GOV’T OF THE PEOPLE’S REPUBLIC OF CHINA] (July 15, 2019), http://www.gov.cn/xinwen/2019-07/15/content_5409694.htm.

complex serve as the media by which government agencies communicate with each other internally.¹³²

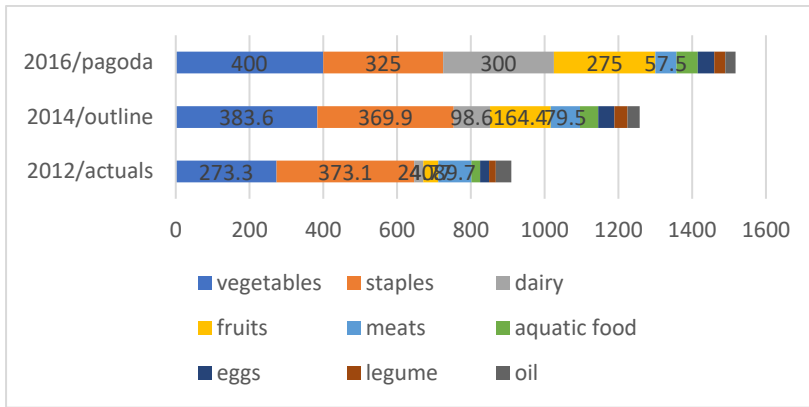


Figure 12. *Pagoda Recommendations, National Outlines, and Actual Consumption Levels of Foods in China (grams/day)*¹³³

The national outline goals (Figure 12) are closer to actual consumption levels than those of the pagoda. In the case of dairy, for example, in contrast to the public-facing pagoda recommendation of 300 grams a day, the internal government target was only 98.6 grams for the years 2014 to 2020.¹³⁴ The pattern holds for other categories as well. Unlike public-facing goals in the pagoda, which are intended to be educational and aspirational, internal goals in the national outline are meant to be practical and actionable.¹³⁵ They represent an internal consensus across multiple government agencies from local to central levels. Moreover, unlike the food pagoda, the outline targets are binding, in the sense that officials are evaluated based on how their jurisdiction satisfies them.¹³⁶

¹³² See Guowuyuan Bangong Ting (国务院办公厅) [Office of the State Council], *supra* note 129; Guowuyuan Bangong Ting (国务院办公厅) [Office of the State Council], *supra* note 130; Jiankang Zhongguo Xingdong Tuijin Weiyuanhui (健康中国行动推进委员会) [Health China Action Promotion Committee], *supra* note 131.

¹³³ *China Statistical Yearbook 2019*, *supra* note 45.

¹³⁴ CHINESE NUTRITION SOCIETY, CHINESE DIETARY GUIDELINES 20 (2016).

¹³⁵ Pierre F. Landry et al., *Does Performance Matter? Evaluating Political Selection Along the Chinese Administrative Ladder*, 51 COMPAR. POL. STUD. 1074, 1075 (2017), <https://journals.sagepub.com/doi/10.1177/0010414017730078>.

¹³⁶ *See id.*

The discrepancy between these inward and outward-facing documents is an indication of the complex policy process at work in today's China, in which policy advisors strategically put forward an intentionally unrealistic "ask" in anticipation of an inevitable compromise down the road.¹³⁷ From this perspective, the dairy recommendations in the Food Pagoda can be seen as the nutritionists' "ask" in a complex policy-making environment. While nutritionists play an important role in advising policymakers, they do not themselves make policies. As such, their advice is juxtaposed and compared with advice from medical doctors, agriculturalists, statisticians, economic development specialists, and even trade advocates. This fragmented structure helps the Chinese state collect a wide range of inputs, but also means that the resulting policy is the product of compromises and trade-offs among different groups. In this context, advancing an unrealistically big "ask" in the public-facing food pagoda gives state nutritionists much-needed bargaining power in the policy process. Moreover, Chinese top nutrition scholars, like other policy actors, are influenced by their own values and interests, and the changing landscape of research funding, especially as dairy firms such as Danone and Nestlé fulfill their corporate social responsibility goals through dedicated streams of research spending.¹³⁸ The industrial advocacy group, Dairy Association of China, is housed in an office just one floor under the nation's top dairy research unit in the prestigious Chinese Academy of Agricultural Science in building #3 of the complex on 2 Yuan Ming Yuan West Road in Beijing.¹³⁹

The apparent disconnect of the food pagoda is thus a consequence of the layering of different interest groups and bureaucratic actors in Chinese politics. In other words, what is often dubbed the "policy implementation gap" is an inherent feature of the

¹³⁷ See Xufeng Zhu, *Strategy of Chinese Policy Entrepreneurs in the Third Sector: Challenges of "Technical Infeasibility"*, 41 POL'Y SCI. 315, 319 (2008), <https://link.springer.com/article/10.1007%2Fs11077-008-9070-2>.

¹³⁸ Yang et al., *supra* note 34, at 909.

¹³⁹ See *Nai Chanpin Zhi Liang Yu Pinggu Keji Chuangxin Tuandui (奶产品质量与风险评估科技创新团队) [Dairy Product Quality and Risk Assessment Technology Innovation Team]*, ZHONGGUO KEXUEYUAN DONGWU KEXUE YANJIU SUO (中国科学院动物科学研究所) [INSTITUTE OF ANIMAL SCIENCES OF CAAS], <http://wztest0821.caas.cn/rctd/kytd/217524.htm> (last visited Oct. 16, 2021); *Zhongguo Nai Ye Xiehui Jiben Gaikuang (中国奶业协会基本概况) [Basic Overview of Dairy Association of China]*, ZHONGGUO NAI YE XIEHUI (中国奶业协会) [DAIRY ASSOCIATION OF CHINA], <https://www.dac.org.cn/normal/newxhjj.jhtm> (last visited Oct. 16, 2021).

central government's policy process, where the public-facing pledges and commitments run parallel to the government's internal action plans and strategies.¹⁴⁰ Outward-facing policies, such as the Food Pagoda, sketch out an aspirational image of the nation, whereas inward-facing documents define the day-to-day governance of China. The food pagoda, and its unrealistically high dairy recommendation is intended not as a set of rules for citizens to abide by on a daily basis, but as an aspirational statement that paints the picture of the ideal national diet in the eyes of China's modernization-driven policymakers. While the discrepancy in policy targets reflects the internal complexity of China's sprawling governing apparatus, they are in many ways disconnected from the social experience of food in China. This disconnect is most striking in the fact that, when it comes to actual dairy consumption, the Chinese people have thus far, largely ignored the efforts of both international marketers and the domestic food/nutrition policy complex.

VI. Climate, Health and Animal Welfare

Thus far, we have shown that the goals, roles, and consequences of the Chinese dietary recommendations are more complex than might have been imagined. As we noted in Section III, what caught the world's attention in the 2016 food pagoda was its meat reduction recommendation and its potential impact on climate change. However, when the pagoda's recommendations are taken as a whole, their impact on climate change is much less positive than might have been thought.

The per capita emission reduction potential (0.386 kg CO₂e/day) of China's proposed cut in meat consumption in 2016, for example, is more than wiped out by the additional emission (0.465 kg CO₂e/day) of the proposed dairy increase alone. As Figure 13 shows, the CO₂ emissions of the food pagoda's recommended diet totals at 2.895 kg CO₂e/day, reflecting a 31.3 percent increase from the observed emissions level of 2.204 kg CO₂e/day in 2012. Taken together, the CO₂ implication of the food pagoda is net-positive: it increases emissions from the current dietary baseline. However, on a more optimistic note, compliance with the 2016 pagoda would decrease emissions relative to the 2007 pagoda.¹⁴¹

¹⁴⁰ R. Ran, *Perverse Incentive Structure and Policy Implementation Gap in China's Local Environmental Politics*, 15 J. ENV'T POL'Y & PLAN. 17, 17 (2013), <https://www.tandfonline.com/doi/abs/10.1080/1523908X.2012.752186>.

¹⁴¹ The GHG implications for different food categories are interpolated on the basis of prior research, which accounts for emissions associated with production, consumption, and waste of the average U.S. diet (Heller and Keoleian 2015), and

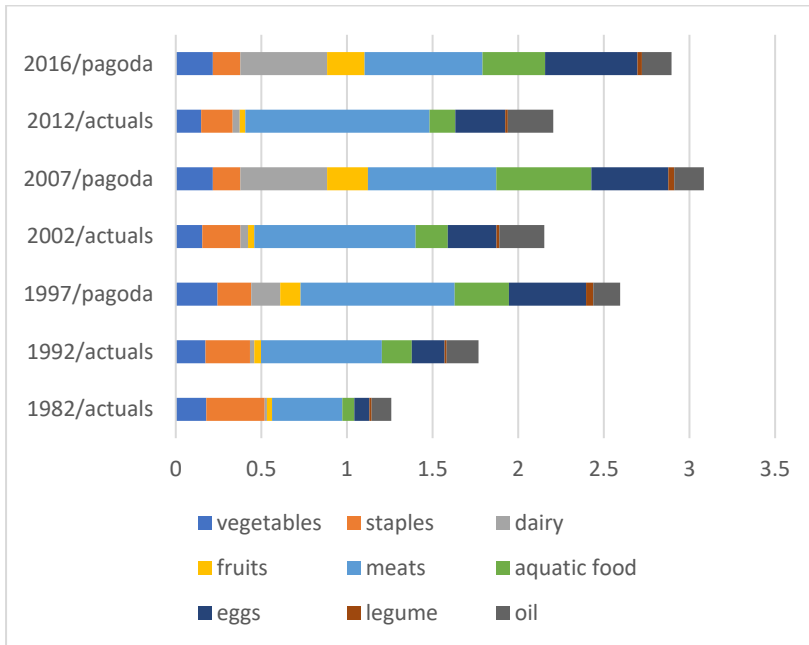


Figure 13. CO₂ Emissions of China's Diet, Observed Trends (1982, 1992, 2002, 2012) and Pagoda Goals (1997, 2007, 2016) (kg CO₂e/day)¹⁴²

As the actual Chinese diet has become lighter by weight (Figure 4), its CO₂ emissions have increased (Figure 13), due in large part to the shift toward carbon-intensive foods such as meats, aquatic foods, and eggs. Still, the actual consumption behavior of the Chinese people is more climate-friendly than what is recommended by the state.

adapted to the Chinese context in accordance with the Chinese Nutrition Society's (2021) recommendations. Martin C. Heller & Gregory A. Keoleian, *Greenhouse Gas Emission Estimates of U.S. Dietary Choices and Food Loss*, 19 J. INDUS. ECOLOGY 391, 391–401 (2014), <https://onlinelibrary.wiley.com/doi/10.1111/jiec.12174>; *Zhongguo Jumin Shanshi Zhinan 2021 Ban* (中国居民膳食指南 2021 版) [Chinese Residents' Dietary Guidelines 2021 Edition], ZHONGGUO YINGYANG XUEHUI (中国营养学会) [CHINESE NUTRITION SOCIETY], <http://dg.cnsoc.org/article/2021b.html> (last visited Oct. 21, 2021). The GHG coefficients and their derivative functions are recorded in Appendix A.

¹⁴²See "2006 Zhongguo Weisheng Tongji Nianjian" (《2006 中国卫生统计年鉴》) ["2006 China Health Statistics Yearbook"], *supra* note 45; *China Statistical Yearbook 2019*, *supra* note 45.

While climate concerns do not figure into the construction of the pagodas, health is an important consideration. Exactly what conformity to the pagoda would mean in this regard is too complicated for us to address here. However, in a society with a growing obesity rate,¹⁴³ radically increasing dairy consumption while decreasing the consumption of staples would appear to be moving in the wrong direction. In addition to such direct health effects, animal agriculture produces indirect health effects that are often unnoticed. A paper currently under review shows that by driving increases in PPM2.5 pollution, there were about 66,000 premature deaths in 2010 alone as a result of the intensification of animal agriculture from 1990-2010.¹⁴⁴

It is even more difficult to assess the full impact on animal welfare of the dietary recommendations, especially since consumption can drive production offshore as well as in country. Since becoming Brazil's largest trade partner in 2009, a position that had been long held by the United States, China has become the destination for increasing volumes of Brazilian shipments of soy and beef products, thus driving Amazonian deforestation in Brazil.¹⁴⁵ Current estimates suggest that the size of China's dairy herd will continue to decrease over the next few years but, due to imports, the impact on dairy cows globally may increase.¹⁴⁶ Even if the pagoda's recommended decreases in beef consumption were achieved, in terms of the total number of animals killed for food, it would be more than offset by increases in the consumption of aquatic animals. What is more likely to happen, in any case, is that the consumption of aquatic animals will increase and be added to further increases in meat consumption.¹⁴⁷ Already, as of 2018 China slaughtered more pigs, chickens, sheep, and fish than any other country, and was poised to surpass the United States with respect to cows.¹⁴⁸ In

¹⁴³ See Sintia Radu, *China's Obesity Rate Triples in 10 Years*, U.S. NEWS & WORLD REP. (Oct. 28, 2019), <https://www.usnews.com/news/best-countries/articles/2019-10-28/obesity-rates-in-china-have-tripled-over-the-past-10-years>.

¹⁴⁴ See Xueying Liu et al., *Dietary Shifts Can Reduce Premature Deaths Related to Particulate Matter Pollution in China*, 2 NATURE FOOD 997 (2021), <https://doi.org/10.1038/s43016-021-00430-6>.

¹⁴⁵ Philip M. Fearnside, *Amazonian Forest Loss and the Long Reach of China's Influence*, 15 ENV'T, DEV. & SUSTAINABILITY 325, 325 (2012), <https://link.springer.com/article/10.1007%2Fs10668-012-9412-2>.

¹⁴⁶ See Heller & Keoleian, *supra* note 141.

¹⁴⁷ Richard York, *Poultry and Fish and Aquatic Invertebrates Have Not Displaced Other Meat Sources*, 4 NATURE SUSTAINABILITY 766, 766-68 (2021), <https://www.nature.com/articles/s41893-021-00714-6>.

¹⁴⁸ Bas Sanders, *Global Animal Slaughter Statistics & Charts: 2020 Update*, FAUNALYTICS (July 29, 2020), <https://faunalytics.org/global-animal-slaughter-statistics-and-charts-2020-update/>.

addition to concerns about the number of animals killed, Chinese law provides virtually no legal protection for animals used in agriculture.¹⁴⁹

VII. Concluding Remarks

In the opening chapter of his three-volume treatise entitled *General Plan for Nation Building*, the founding president of the Republic of China, Sun Yat-Sun, proudly proclaimed:

“All of China is culturally accustomed to vegetarianism. . . . By contrast, Europeans and Americans are in the fashion of carnivorousness and alcoholism, in spite of scientific advocacy on the one hand and regulatory prohibition on the other. . . . Chinese cultural customs of eating and drinking are assuredly superior to that of all other nations.”¹⁵⁰

Sun arrived at this sweeping conclusion of national gastronomical superiority based on one single foodstuff—tofu. “Tofu is a must for the Chinese vegetarian diet; it is the plant-based equivalent of meat. It has all the benefits of meat, but none of its toxins,” Sun asserted.¹⁵¹ To the “founding father” of modern China, tofu was the anchor of national identity.

China has no responsibility to “save the world,” but a nation that resists dairy, finds tofu as an anchor of its national identity, and whose dietary regulations call for a level of meat consumption that is 1/5th of that of North America and Australia, and about 1/4th of that of Europe, can provide important lessons to the world; and for China, this can be an important source of “soft power.” For this to occur, the food pagoda would have to become more coherent with respect to its impacts on climate, health, and animal welfare and also more efficacious with respect to behavior, at least with its recommendation to reduce meat consumption. Recommendations are not self-enforcing and it is the job of a government that organizes and administers a complex set of policies and negotiates competing interests to make recommendations real in everyday life. There is a widely held assumption—sometimes even hope—that China’s top-down political system can compel citizens and firms to adopt

¹⁴⁹ See DEBORAH CAO, ANIMALS IN CHINA: LAW AND SOCIETY (2015); PETER J. LI, ANIMAL WELFARE IN CHINA 10-11 (2021).

¹⁵⁰ SUN YAT-SEN, GENERAL PLAN FOR NATION BUILDING (建國方略) (1917).

¹⁵¹ *Id.*

sweeping changes in the interest of the common good simply by ordering them to do so. This is at best an illusion and at worst a delusion in most areas of life.¹⁵² In any case the pagoda, in its political and bureaucratic contexts, turns out to be a remarkably soft instrument of public policy, adapting to, as much as challenging, the society's changing dietary patterns. The image of the Chinese government as a proactive, draconian climate defender does not hold up, at least not now, in the case of the food pagoda.

What our investigation shows is that the Chinese food/nutrition policy complex tends to frame rural China as a space that lags behind and needs to catch up with urban modernity.¹⁵³ But perhaps it is not rural China that has lagged behind, but rather urban-oriented food policies that are leading towards a dystopian future. With their dependence on plant-based food sources, preference for local supplies, attention to seasonality and active involvement in agricultural production, the rural people of China have wisdom, experience, and culture to offer. We are keenly aware of the danger in romanticizing rural ways of life, especially as growing numbers of Chinese urbanites flock to rural areas to get a taste of romantic rurality.¹⁵⁴ Much of this romanticizing reflects a jarring lack of evidence-based understanding of China's vast rural areas. However, future research would do well to examine more closely food, nutrition, sustainability and health in rural contexts.

Just as rural areas have much to offer to a rapidly urbanizing China, the country's own past also holds a rich repertoire of wisdom for living through the Anthropocene. In a rare display of internal dissent, Xianglin Xu, a seasoned economist at the Central Party School, wrote in criticism of the 1996 food pagoda that:

“the nutritionists’ proposal is incompatible with our national conditions. . . . Advocating for fully Westernizing our diet, [the food pagoda] tries to turn from plant-based food sources to animal ones, just like post-war Japan did. The result in Japan is that 60 percent of their caloric intake has become

¹⁵² See, e.g., Mark Beeson, *Coming to Terms with the Authoritarian Alternative: The Implications and Motivations of China's Environmental Policies*, 5 *ASIA & PAC. POL'Y STUD.* 34, 38 (2017), <https://onlinelibrary.wiley.com/doi/10.1002/app5.217>.

¹⁵³ See Afton Clarke-Sather, *'But We Are the Most Backward': Hierarchical Categorization of Modernity in Contemporary Chinese National Identity*, 83 *POL. GEOGRAPHY* 1,8 (2020), <https://www.sciencedirect.com/science/article/abs/pii/S0962629820303231>.

¹⁵⁴ See Choong-Hwan Park, *Nongjiale Tourism and Contested Space in Rural China*, 40 *MODERN CHINA* 519, 543 (2014).

import-dependent by the 1990s. ... It seems impossible for China to afford the same.”¹⁵⁵

Xu’s dissent has gone unnoticed in the last two decades and a half. China’s policymakers are yet to fully appreciate the real costs of abandoning plant-based food traditions in favor of animal-based culinary modernity.

Still, there are hopeful signs from many different directions. The China Vegan Society launched in May 2021 in Yunnan.¹⁵⁶ Buying discounted foods close to their “sell by” dates is becoming common among young people.¹⁵⁷ The COVID pandemic gave many in China renewed impetus for moving toward a plant-based diet.¹⁵⁸ Nestle plans to build a plant-based meat factory in Tianjin.¹⁵⁹ As in the rest of the world, capital is beginning to move towards plant-based protein.

In the final analysis, the problem is not that the Chinese state has been slow to foster a healthy and sustainable diet for the nation of 1.4 billion, but rather that the state has sometimes acted too much and often incoherently.¹⁶⁰ On the receiving end of mixed, frequently changing signals, the people have not been presented with clear messaging about food that actually engages with the realities of everyday life. If the state can dial back its promotion of the modern, urban diet, and foster the rediscovery of the many centuries of culinary richness—let food be what it has always been in the Middle Kingdom: culture, tradition, and identity—then Sun Yat-Sun’s hope of becoming “assuredly superior to that of all other nations”¹⁶¹ might

¹⁵⁵ Xianglin Xu (徐祥临), *Dietary Guidelines Should Be Based on National Conditions* (制定膳食指南要符合国情), 18 *理论前沿* (1996).

¹⁵⁶ See Samantha J. Hind, *China Vegan Society: An Alternative Vegan Activist Approach*, *SURGE* (July 28, 2021), <https://www.surgeactivism.org/articles/china-vegan-society-an-alternative-vegan-activist-approach>.

¹⁵⁷ Phoebe Zhang, *Near-Expired Food Bargain Sales the Latest Trend in China as Beijing’s Anti-Waste Drive Picks up*, *SOUTH CHINA MORNING POST* (May 24, 2021), <https://sg.news.yahoo.com/near-expired-food-bargain-sales-090157739.html>.

¹⁵⁸ Pamela Lin, *Meatless Encounters*, *CHINA DAILY* (Sept. 18, 2020), <https://epaper.chinadaily.com.cn/a/202009/18/WS5f63fbf1a31099a2343506f4.html>.

¹⁵⁹ Wang Zhouquong, *Nestle Launches New Line of Plant-Based Food*, *CHINA DAILY* (Dec. 18, 2020), <https://www.chinadaily.com.cn/a/202012/18/WS5fdc740aa31024ad0ba9cb86.htm>.

¹⁶⁰ China is not alone in this. See, e.g., Maneesha Deckha, *Something to Celebrate?: Demoting Dairy in Canada’s National Food Guide*, 16 *J. FOOD L. & POL’Y* 11, 11-47 (2020).

¹⁶¹ SUN, *supra* note 150.

just be within reach and, as a consequence, China may yet help to save the world.