
**“IS THE MEAT HERE SAFE?” HOW STRICT LIABILITY
FOR RETAILERS CAN LEAD TO SAFER MEAT**

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INTRODUCTION

In a book that I recently read about teaching reading to children, the author opens by staring at a potato on her kitchen table and asking, “[I]f I had a

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potato, nothing but a potato, how could I teach a classroom full of children?"¹ Thinking for just a few moments, she discovers the unlimited web of topics that burst forth from the shriveled potato on the table, from mathematics and science to history and literature.²

I begin this Note by taking a similar approach, but instead I use a hamburger patty. What can we learn from a hamburger patty in terms of the problems that plague the United States' food supply today? To begin, I would ask questions about how that burger came to be sitting on the table ready to eat. How did it go from cow to chow? Eventually, I would ask *why* it is there ready to eat. Is it the best choice for health or taste? Is it merely cheap and filling? Expanding my questions about the hamburger patty, I would inevitably ask, "Is it safe?" From the potato curriculum perspective, however, where on earth do I begin? Most of the literature on meat safety focuses only on the immediate relationship between consumer and patty. If the consumer eats the patty, will the consumer get sick from a microbial pathogen such as *E. coli*? But there are many more ways to frame the question, "Is the patty safe?" Did the employees of the slaughterhouses and processing facilities produce the patty under conditions safe for their own health? Was it safe for vegetable growers to use their water source to grow their crops?³ Is it safe for the consumer to eat so many burgers?⁴ Will eating the burger increase the consumer's resistance to antibiotics?⁵ The questions and corresponding problems go on and on.

¹ ESMÉ RAJI CODELL, *HOW TO GET YOUR CHILD TO LOVE READING 3* (2003).

² *Id.* (discussing how she could cut the potato to teach fractions, how the children could grow potatoes and track the growth, how the children could write and read fictional stories involving potatoes, and how they could learn about the Irish potato famine).

³ See Rong-Gong Lin II, *E. coli Found in Water, Pig Near Spinach*, L.A. TIMES, Oct. 27, 2006, at B4, for a discussion of the connection between a 2006 *E. coli* outbreak involving spinach and the possibility that the water source had been contaminated by *E. coli* from a nearby cattle ranch.

⁴ Americans' consumption of meat is eighteen percent higher than the USDA recommends. See *Diet Quality and Food Consumption: Dietary Trends from Food and Nutrition Availability Data*, U.S. DEPARTMENT AGRIC. ECON. RES. SERVICE, <http://www.ers.usda.gov/Briefing/DietQuality/Availability.htm> (last updated Sept. 2, 2011). Meat products are a major source of saturated fats, of which Americans consume approximately 26.35 grams per day, almost double the American Heart Association's recommended sixteen grams. See *Saturated Fats*, AM. HEART ASS'N, http://www.heart.org/HEARTORG/GettingHealthy/FatsAndOils/Fats101/SaturatedFats_UCM_301110_Article.jsp (last updated Oct. 29, 2010); *Nutrient Table 1 – Daily Intake of Nutrients by Food Source: 2005-08*, U.S. DEPARTMENT AGRIC. ECON. RES. SERVICE, <http://www.ers.usda.gov/Briefing/DietQuality/Data/foodandnutrient/index.htm> (last updated June 15, 2011) (compiling daily nutrient intake data from the 2005-2008 National Health and Nutrition Examination Survey); *U.S. Food Supply: Nutrients Contributed from Major Food Groups, per Capita per Day, 1970 and 2004*, U.S. DEPARTMENT AGRIC. ECON. RES. SERVICE., <http://www.ers.usda.gov/Data/FoodConsumption> (last updated July 13, 2011) (showing that meat, poultry, and fish contributed 22.5 percent of saturated fat intake in 2004). Studies have also correlated meat consumption with America's rising obesity problem. See, e.g.,

In regard to pathogens such as *E. coli*, however, when it comes to answering the question, “Is the patty safe?” the answer generally focuses on just one part of a vast web of relationships and interconnected problems. When we ask about meat safety, we look primarily to slaughterhouses and processors. We look there for regulatory solutions; we look there in our liability theories. This narrow focus obscures the overall problem of meat safety, which begins with livestock-raising practices and ends with a consumer developing an illness. Furthermore, such focus throws all liability onto the consumer. The consumer faces the risk of eating potentially contaminated meat without any information about the likelihood of contamination. If the consumer accepts that risk and gets sick, she faces overwhelming obstacles in bringing a successful lawsuit and, in many instances, must take responsibility for her illness. According to one commentator, “The underlying premise that erodes a civil liability theory is that the consumer ultimately is responsible for the proper preparation of the meat she ingests.”⁶

The system’s unfairness to the consumer in terms of both regulation and liability has been the focus of much discussion on improving meat safety. Commentators have widely and properly criticized meat regulations as ineffective and have also criticized liability rules for the seemingly insurmountable burdens they place on consumers. Little has been said, however, about the role that consumers themselves have played in this system, and little has been written about the tradeoff consumers have made. In exchange for accepting the risk associated with eating meat, consumers have received a nearly endless supply of cheap meat.⁷ And they have consumed much⁸ – their appetites putting further pressure on the meat industry. According to William Marler, a lawyer specializing in foodborne illness claims, “Industry economics are . . . problematic. Labor and other costs go up.

Youfa Wang & May A. Beydoun, *Meat Consumption Is Associated with Obesity and Central Obesity Among US Adults*, 33 INT’L J. OBESITY 621, 624 (2009).

⁵ Because cattle cannot digest the corn they are given as feed, they develop illnesses, which are treated with low levels of antibiotics. See *They Eat What? The Reality of Feed at Animal Factories*, UNION OF CONCERNED SCIENTISTS, http://www.ucsusa.org/food_and_agriculture/science_and_impacts/impacts_industrial_agriculture/they-eat-what-the-reality-of.html (last updated Aug. 8, 2006). Antibiotics given to cattle reduce the effectiveness of antibiotics in humans and lead to an increase in antibiotic resistant bacteria. See Mark Bittman, *Rethinking the Meat-Guzzler*, N.Y. TIMES, Jan. 27, 2008, § WK (The World), at 1.

⁶ Sharlene W. Lassiter, *From Hoof to Hamburger: The Fiction of a Safe Meat Supply*, 33 WILLAMETTE L. REV. 411, 418 (1997).

⁷ *Modern Meat: Industrial Meat: Interview of Patrick Boyle, CEO, Am. Meat. Inst.*, PUB. BROAD. SYS., FRONTLINE, <http://pbs.org/wgbh/pages/frontline/shows/meat/industrial/consolidation.html> (last visited Jan. 15, 2011) (reporting that “the price of beef today is about half, in real dollar terms, what it was in the 1970s”).

⁸ According to the *New York Times*, the average American eats approximately a half pound of meat per day, which is roughly twice the average of the rest of the world. Bittman, *supra* note 5, at 1.

Market pressures force retail prices down. So there's less room for thorough product testing and other safety measures."⁹ The demand for cheap meat, therefore, is as integral to the problem as the supply of potentially unsafe meat.

This Note will not analyze the web of interconnections applicable to meat safety in any detailed way. The web merely frames the discussion of how and why both regulation and litigation have failed to increase meat safety. Instead, by focusing on *E. coli* infection resulting from inadequate consumer protections, this Note contends that the current methods to promote safety ignore both ends of the supply chain: the livestock growers and the retailers. Additionally, regulation holds out little hope for improving the safety of meat. This Note argues that, though litigation has historically failed to incentivize safety across the supply chain, holding retailers strictly liable for the meat products they sell best addresses the problem of meat safety. Such a liability regime consciously considers the web of relationships along the chain and provides economic incentives along the chain to increase safety. Even so, in the end, something has to give. The problem of meat safety is so expansive and interconnected with so many other problems that it becomes obvious that the current method of production in the United States is unsustainable. So once again, we must ask consumers to make a tradeoff. This Note contends that the only logical tradeoff is that in which consumers can more easily litigate their claims but pay more for the meat they consume.

Although there are other known pathogens that also affect meat safety, this Note focuses on *E. coli* because it is the best known pathogen and best shows the complexity involved in addressing meat safety. Part I discusses the nature of *E. coli*, the consequences of infection, and the process by which the pathogen reaches the consumer. Part II looks at the regulatory system in place to protect consumers, its failure to do so, and why regulation will likely continue to fail to improve the overall safety of the meat supply. Part III analyzes the barriers consumers face in litigating foodborne illness claims under strict products liability theory. Little case law exists on *E. coli* claims, so this Part also relies on claims for other foodborne illnesses and food defects. It concludes that the current mode of strict liability practiced in the United States provides little protection for consumers and fails to incentivize producers to provide safer meat. Part IV explains that both regulation and litigation have failed to increase meat safety because of a misplaced focus on processors. As a consequence, this focus has severed the natural relationships that should develop along the supply chain to ensure safety. Thus, the relationships along the chain must be repaired, and that repair must be driven by reevaluating the consumer's role in meat safety. Finally, Part V proposes that, although state laws tend to insulate retailers from strict products liability, strict liability's original principles should drive the doctrine's reapplication to retailers as the best way to increase the safety of America's meat supply.

⁹ *Where Leading Plaintiffs' Lawyers Are Leading Now*, 29 OF COUNS., May 2010, at 6, 7 (interview with Bill Marler).

I. THE NATURE OF *E. COLI* AND ITS PATH TO THE CONSUMER

E. coli O157:H7 (*E. coli*) is a potentially deadly strain of a species of bacteria, which includes many other strains that are harmless and live in the digestive tracts of animals and humans.¹⁰ *E. coli* first gained notice in the health and science communities as a pathogen that causes foodborne illness during a 1982 outbreak of hemorrhagic colitis that occurred after people ate undercooked hamburger meat in a fast-food restaurant.¹¹ Though statistics on early outbreaks exist, they are somewhat dubious since “*E. coli* O157:H7 infection did not become a reportable disease in any state until 1987.”¹²

Symptoms associated with hemorrhagic colitis as the result of consuming meat or another food product contaminated with *E. coli* include severe abdominal cramps and bloody stool.¹³ In general, people develop symptoms approximately one week after ingesting contaminated food.¹⁴ Anyone can become infected, but the bacterium is most virulent in children¹⁵ and the elderly.¹⁶ The overall death rate based on data from past outbreaks is approximately zero to two percent but can be as high as sixteen to thirty-five percent in the elderly.¹⁷ An infected person faces a potentially deadly condition called hemolytic uremic syndrome (HUS), affecting approximately two to seven percent of people within ten days of the initial symptoms.¹⁸ As with overall infection, children are more susceptible to developing HUS.¹⁹ The

¹⁰ Peter Feng, Stephen D. Weagant & Michael A. Grant, *Bacteriological Analytical Manual, Chapter 4: Enumeration of Escherichia coli and the Coliform Bacteria*, U.S. FOOD & DRUG ADMIN. (Sept. 2002), <http://www.cfsan.fda.gov/~ebam/bam-4.html>.

¹¹ See Lee W. Riley et al., *Hemorrhagic Colitis Associated with a Rare Escherichia coli Serotype*, 308 NEW ENG. J. MED. 681, 684-85 (1983).

¹² Denis Stearns, *Preempting Food Safety: An Examination of USDA Rulemaking and Its E. coli O157:H7 Policy in Light of Estate of Kriefall Ex Rel. Kriefall v. Excel Corporation*, 1 J. FOOD L. & POL'Y 375, 383 (2005); see William E. Keene et al., *A Swimming-Associated Outbreak of Hemorrhagic Colitis Caused by Escherichia Coli O157:H7 and Shigella Sonnei*, 331 NEW ENG. J. MED. 579, 579 (1994).

¹³ See Patricia M. Griffin & Robert V. Tauxe, *The Epidemiology of Infections Caused by Escherichia coli O157:H7, Other Enterohemorrhagic E. coli, and the Associated Hemolytic Uremic Syndrome*, 13 EPIDEMIOLOGIC REVS. 60, 63 (1991).

¹⁴ Robert V. Tauxe et al., *Foodborne Disease*, in 2 MANDELL, DOUGLAS & BENNETT'S PRINCIPLES AND PRACTICE OF INFECTIOUS DISEASES 1150, 1152 (5th ed. 2000).

¹⁵ See Chinyu Su & Lawrence J. Brandt, *Escherichia coli O157:H7 Infection in Humans*, 123 ANNALS INTERNAL MED. 698, 703 (1995).

¹⁶ See Tauxe et al., *supra* note 14, at 1152.

¹⁷ *Id.*

¹⁸ See Beth P. Bell et al., *Predictors of Hemolytic Uremic Syndrome in Children During a Large Outbreak of Escherichia coli O157:H7 Infections*, 100 PEDIATRICS e12 (1997), available at <http://pediatrics.aappublications.org/content/100/1/e12.full.pdf>; Tauxe et al., *supra* note 14, at 1152.

¹⁹ Bell et al., *supra* note 18, at 1; Su & Brandt, *supra* note 15, at 700.

impact of infection on children is tragic: HUS constitutes the primary cause of renal failure²⁰ and may cause severe brain damage²¹ and death.²²

The *E. coli* bacteria originate in the intestines of cattle and other livestock²³ and are harmless to the animals themselves.²⁴ The bacteria occur naturally in the digestive tracks of cattle.²⁵ The cattle then excrete the *E. coli* pathogen in their feces and infect the hides of other animals in close proximity.²⁶ The cattle on feedlots spend their lives standing in manure.²⁷ During slaughter, *E. coli* on animals' hides, in their intestines, and in their feces can easily cross-contaminate other carcasses.²⁸ Once the pathogen is present in the meat, it remains there until it reaches the consumer and potentially causes illness.²⁹ The pathogen, however, need not be present in the animals when they go to slaughter or be the result of immediate cross-contamination. Contamination can occur at any point along the supply chain and even at the point of consumption through cross-contamination.³⁰ Once the pathogens are in the meat, they survive through food handling errors such as poor hygiene of processing workers, poorly cleaned and maintained equipment, improper

²⁰ Su & Brandt, *supra* note 15, at 700.

²¹ Richard L. Siegler, *Postdiarrheal Shiga Toxin-Mediated Hemolytic Uremic Syndrome*, 290 J. AM. MED. ASS'N 1379, 1379 (2003).

²² See Su & Brandt, *supra* note 15, at 700 (“[T]he mortality rate is 5-10% . . .”).

²³ *Escherichia coli O157:H7 and Other Shiga Toxin-Producing Escherichia coli (STEC): General Information*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/nczved/divisions/dfbmd/diseases/ecoli_o157h7/ (last updated July 8, 2011).

²⁴ *Id.*

²⁵ See *Food Safety Consequences of Factory Farms*, FOOD & WATER WATCH (Mar. 27, 2007), <https://www.foodandwaterwatch.org/food/factoryfarms/food-safety-consequences-of-factory-farms/> (discussing how the practice of “finishing” cattle with a corn-fed diet increases the levels of acid-resistant *E. coli* bacteria in their digestive tracts).

²⁶ See Robert O. Elder et al., *Correlation of Enterohemorrhagic Escherichia coli O157 Prevalence in Feces, Hides, and Carcasses of Beef Cattle During Processing*, 97 PROC. NAT'L ACAD. SCI. 2999, 3002 (2000).

²⁷ Michael Pollan, *The Vegetable-Industrial Complex*, N.Y. TIMES, Oct. 15, 2006, § 6 (Magazine), at 17 (discussing the conditions of cattle in feedlots).

²⁸ Pathogen Reduction: Hazard Analysis and Critical Control Point (HACCP) Systems, 61 Fed. Reg. 38,806, 38,837 (July 25, 1996) (codified throughout 9 C.F.R.) (“In slaughter establishments, fecal contamination of carcasses is the primary avenue for contamination by pathogens. Pathogens may reside in fecal material and ingesta, both within the gastrointestinal tract and on the exterior surfaces of the animals going to slaughter.”).

²⁹ See Jackson W. Adams, *Cow 54, Where Are You? Producer Liability and the National Animal Identification System*, Comment, 23 J. CONTEMP. HEALTH L. & POL'Y 106, 111-12 (2006) (explaining how *E. coli* travels from animals to consumers' plates).

³⁰ See Stearns, *supra* note 12, at 387-88 (discussing the ease and likelihood of cross-contamination and concluding that “ultimately no real margin of error exists and the cost of error can be death”).

storage, spoilage, and failure to cook meat products fully so as to finally kill the pathogens.³¹

A recent example of contamination that occurred during later processing involved the meat processor Beef Products Inc. The company developed a process for using the trimmings from cattle by “liquefying the fat and extracting the protein from the trimmings in a centrifuge.”³² While the process transforms what was once usable only for pet food into a product to add to ground beef, it also distills the pathogen with the protein.³³ To combat the pathogen, Beef Products Inc. developed a process that killed the pathogen by injecting the meat product with ammonia.³⁴ Though the Food and Drug Administration (FDA) exempted the product from testing,³⁵ *E. coli* tainted product still survived the process.³⁶ Fortunately, Beef Products Inc. discovered that the process had failed and prevented the product from reaching its destination, many of the nation’s fast food and school lunch hamburgers.³⁷

Once *E. coli* is present in the meat, the final line of defense is cooking.³⁸ While cooking meat to the proper temperature to kill the pathogen may seem like a simple solution, there are two major underlying problems. First, this assumes that a consumer has the knowledge and expertise to determine whether meat is properly cooked. Second, cooking involves many levels of preparation, which can lead to cross-contamination.³⁹ Thus, without a clear gatekeeper⁴⁰ to ensure that safe meat reaches the consumer through multiple

³¹ JEAN C. BUZBY ET AL., ECON. RESEARCH SERV., U.S. DEP’T AGRIC., PRODUCT LIABILITY AND MICROBIAL FOODBORNE ILLNESS: AGRIC. ECON. REP. NO. 799, at 4 (2001), available at <http://www.ers.usda.gov/publications/aer799/aer799.pdf>.

³² Michael Moss, *Company’s Record on Treatment of Beef Is Called into Question*, N.Y. TIMES, Dec. 31, 2009 at A1 (discussing Beef Products Inc.’s patented processes for transforming fat trimmings into a ground meat additive and killing *E. coli* pathogen with ammonia).

³³ See *id.* (“[T]he trimmings ‘typically includes [sic] most of the material from the outer surfaces of the carcass’ and contains [sic] ‘larger microbiological populations.’”).

³⁴ *Id.*

³⁵ *Id.* (discussing the USDA decision to exempt the additive from testing).

³⁶ *Id.* (“*E. coli* and salmonella pathogens have been found dozens of times in Beef Products meat, challenging claims by the company and the U.S.D.A. about the effectiveness of the treatment.”).

³⁷ *Id.* (“The company says its processed beef, a mashlike substance frozen into blocks or chips, is used in a majority of the hamburger sold nationwide.”).

³⁸ Estate of Krieffall *ex rel.* Krieffall v. Sizzler USA Franchise, Inc., 665 N.W.2d 417, 426 (Wis. Ct. App. 2003) (discussing the fact that *E. coli* bacteria can be killed when cooked properly); cf. Stearns, *supra* note 12, at 386 (emphasizing that the even meat that is “slightly undercooked . . . can result in infection”).

³⁹ See *infra* notes 93-97 and accompanying text.

⁴⁰ See Denis W. Stearns, *On (Cr)edibility: Why Food in the United States May Never Be Safe*, 21 STAN. L. POL’Y REV. 245, 269-70 (2010) (discussing the fact that no single entity bears the responsibility for food safety, and it therefore falls on the consumer).

points of possible contamination along the processing chain, the majority of the risk is thrown on the consumer to protect herself.

In attempting to protect herself from *E. coli*, the consumer may be hamstrung by her limited knowledge of present-day commercial agriculture. Contained in today's patty is the web of connections, which foils answering the question, "Is the patty safe?" She has no idea how the ground meat she purchased made its way from the farm to the table.

She does not know, for example, that modern feedlot farming, involving the pervasive practice of feeding cattle corn to fatten them up for slaughter, increases the amount of *E. coli* bacteria in their digestive tracks.⁴¹ Cattle naturally eat grass, not corn.⁴² This corn is often genetically modified and developed through a process that alters the DNA of corn using *E. coli* bacteria.⁴³ I do not suggest that this particular use of *E. coli* is the reason why corn raises the bacteria count in cattle. Nevertheless, according to at least one commentator, industrial farming practices on the whole are responsible for *E. coli* in our food supply.⁴⁴

The consumer also likely does not know that the danger is to the entire food supply, not just the meat supply. The burger with all the trimmings, once the very image of America, potentially contains other *E. coli* sources besides the patty. In furthering the web-of-connections theme, the lettuce and tomatoes may be contaminated too. In older forms of agriculture manure was fertilizer, but in an age of feedlots it has become a pollutant.⁴⁵ The concentration of animals in feedlots and dairies creates a tremendous amount of animal waste. "A single cow produces the same amount of waste as 23 humans . . ."⁴⁶

⁴¹ Anastasia S. Stathopoulos, Note, *You Are What Your Food Eats: How Regulation of Factory Farm Conditions Could Improve Human Health and Animal Welfare Alike*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 407, 424 (2010) ("A grain-based diet provides the ideal intestinal habitat for *E. coli* bacteria to grow and mutate into more virulent strains . . ."); see Pollan, *supra* note 27, at 17.

⁴² See Stathopoulos, *supra* note 41, at 416 (discussing the "unhealthy and unnatural nature of [corn- and soy-] diets" in cattle).

⁴³ See *Intro to GMOs*, POWERED BY PRODUCE (Jan. 5, 2010), <http://www.powered-by-produce.com/2010/01/05/intro-to-gmos/> ("They cut out the sequence of DNA that is resistant to Round Up, but simply inserting this sequence alone into a corn plant has no effect because cells will naturally reject foreign DNA. So, they use *E. coli* bacteria to ferry the DNA to the plant cell's nucleus.").

⁴⁴ Pollan, *supra* note 27, at 17.

⁴⁵ See *id.* ("To think of animal manure as pollution rather than fertility is a relatively new (and industrial) idea.").

⁴⁶ *Family Farmer KO's CAFOs*, *Sierra Club Scrapbook*, SIERRA CLUB (Sept. 23, 2010), <http://sierraclub.typepad.com/scrapbook/2010/09/family-farmer-kos-cafos.html> ("[A] dairy farm with 2,500 cows – not an especially high number by CAFO standards – produces as much waste as a city of 400,000 people. But unlike human waste, CAFO waste goes untreated.").

Inevitably the stored waste leaks or spills, polluting the local groundwater.⁴⁷ Once waste escapes into the water supply, *E. coli* infects fruits and vegetables.⁴⁸

These harmful practices of factory farms, despite having direct impacts on food safety, have been relatively exempt from inquiry in either regulation or litigation. In asking whether the patty is safe, regulators, courts, and consumers have been unable to get beyond outdated notions of what that hamburger patty actually is.

II. THE FAILURE OF REGULATION TO IMPROVE MEAT SAFETY

The 1906 publication of Upton Sinclair's *The Jungle*, which depicted the horrifying conditions of Chicago slaughterhouses, revealed the need for meat regulation and inspection.⁴⁹ Since that time, the history of regulation has been fraught with problems ranging from the ineffective to the corrupt and has been strengthened or relaxed by both Congress and the United States Department of Agriculture (USDA) in response to the public's perceptions concerning the safety of meat.⁵⁰ While this Note does not trace the entire history of meat regulation, it briefly describes the overall landscape of meat regulation and gives a recent historical example of a strengthening of regulation followed by a subsequent relaxing as public fears subsided.

A. Regulatory Authority

The regulation of meat, poultry, and eggs falls to the Food Safety and Inspection Service (FSIS), a division of the USDA.⁵¹ The USDA, and consequently the FSIS, derives regulatory authority from the Federal Meat Inspection Act of 1906 (FMIA).⁵² The FMIA resulted from the tremendous public outcry that followed the publication of *The Jungle*.⁵³ Although the FSIS purports to use a farm-to-table approach to undertake measures to ensure meat safety,⁵⁴ its authority at the farm end is limited to practices occurring just

⁴⁷ *Id.*

⁴⁸ See Stathopoulos, *supra* note 41, at 415 (“[L]eaks, spills, and run-off from . . . toxic cesspools inevitably pollute nearby groundwater, rivers, and streams . . . tainting water that is used to irrigate crops.”).

⁴⁹ Stearns, *supra* note 12, at 388.

⁵⁰ *Id.* at 388-89 (characterizing the food safety efforts in the United States as inept and “piecemeal”).

⁵¹ 7 C.F.R. § 2.53 (2011) (delegating USDA inspection authority to the FSIS).

⁵² Federal Meat Inspection Act of 1906, ch. 2907, 34 Stat. 1260 (codified as amended at 21 U.S.C §§ 601-683).

⁵³ See Stearns, *supra* note 12, at 388.

⁵⁴ See Julie Follmer & Roseann B. Termini, *Whatever Happened to Old MacDonald's Farm . . . Concentrated Animal Feeding Operation, Factory Farming and the Safety of the Nation's Food Supply*, 5 J. FOOD L. & POL'Y 45, 47 (2009).

before slaughter in order to prevent the slaughter of obviously unfit animals.⁵⁵ FSIS has no authority to regulate common practices regarding live animals on factory farms or feedlots to ensure meat safety.⁵⁶ Under the current regulatory scheme responsible for meat safety, the FDA regulates animals at the farm level, primarily focusing on drugs administered to farm animals and farm animal feed.⁵⁷

The overall regulatory authority for the safety of meat in regard to *E. coli* focuses on slaughter and processing. The industry, however, has organized an efficient supply chain – beyond that of slaughter and processing – allowing more fattened cattle to enter the meat supply. The regulatory framework fails to follow this chain in a manner even remotely approaching the efficiency of the industry. First, the split in jurisdiction between the USDA and FDA reveals the near impossibility of regulating the industry’s efficient, seamless production chain from farm to fork. Some commentators believe that this split jurisdiction results in particularly ineffective regulation at the farm level because the FDA lacks USDA’s expertise and resources in regulating livestock farming.⁵⁸

Second, as the industry continues to streamline and centralize production, regulatory changes and updates only further emphasize the disconnect between regulators and the industry. For example, the Food Safety Modernization Act of 2011⁵⁹ expands the authority of FDA to combat increased food safety dangers.⁶⁰ Yet because meat and poultry regulation fall under USDA

⁵⁵ See 21 U.S.C. § 603 (2006) (authorizing USDA inspection of all animals “before they shall be allowed to enter into any slaughtering, packing, meat-canning, rendering, or similar establishment”); Stathopoulos, *supra* note 41, at 436 (“[T]he USDA currently has no authority to regulate and inspect the living conditions of the farms on which cattle, swine, and poultry are raised under the existing statutes.”).

⁵⁶ Stathopoulos, *supra* note 41, at 436.

⁵⁷ See Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-399(d) (giving FDA authority to regulate food and drugs given to farm animals); *Fourth Draft: Framework of the FDA Animal Feed Safety System*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/AnimalVeterinary/SafetyHealth/AnimalFeedSafetySystemAFSS/ucm196795.htm> (last updated Jan. 8, 2010) [hereinafter *Fourth Draft*] (“The Animal Feed Safety System (AFSS) is the FDA’s program for animal feed aimed at protecting human and animal health by ensuring production and distribution of safe feed.”).

⁵⁸ Bob Goodlatte, *Keep FDA Authority Out of Farm Practices*, THE HILL (June 4, 2009), <http://thehill.com/special-reports/agriculture-and-food-safety-june-2009/8189-keep-fda-authority-out-of-farm-practices.htm> (“While the FDA has an extensive knowledge base regarding the science of food processing, the agency has neither the expertise nor the resources to tell farmers how to farm . . . [and] [t]he USDA has a much better understanding of how farming works in the real world.”).

⁵⁹ FDA Food Safety and Modernization Act, Pub. L. No. 111-353, 124 Stat. 3885 (2011) (improving the prevention of food safety problems, the ability to respond to food safety problems, and the safety of imported food).

⁶⁰ *Background on the FDA Food Safety and Modernization Act (FSMA)*, U.S. FOOD AND

authority, the new law exempts the meat industry.⁶¹ Thus, what many have hailed as a landmark law in the battle against foodborne illness⁶² has failed to attack, in any meaningful way, a major source of foodborne illness – *E. coli*. Further emphasizing this point, the FDA’s regulation of feed corn addresses only toxins in the feed corn that may harm cattle, ignoring the effect of corn on the production of *E. coli* in cows’ intestines before those intestines are spilled during slaughter.⁶³ The USDA must clean up that mess, and so far the USDA has not cleaned it up very well.

B. *USDA and HACCP: Working Toward a Modern Approach*

In the early 1990s, Jack in the Box restaurants introduced many Americans to *E. coli*. A devastating outbreak of *E. coli* caused by contaminated hamburger meat hit several Jack in the Box restaurants in the Northwest.⁶⁴ Contaminated meat infected more than 500 people, and four people died.⁶⁵ The outbreak not only brought *E. coli* to the forefront of America’s consciousness in regard to meat safety, but it also prompted an almost immediate regulatory response from the USDA.⁶⁶ The case was also noteworthy for plaintiffs receiving large damages settlements.⁶⁷ The case, however, should be noteworthy for three other reasons. First, Americans did not stop eating meat from Jack in the Box or other fast food restaurants.

DRUG ADMIN., <http://www.fda.gov/downloads/Food/FoodSafety/FSMA/UCM263773.pdf> (last updated July 12, 2011) (“The law . . . provides FDA with new enforcement authorities designed to achieve higher rates of compliance with prevention- and risk-based food safety standards and to better respond to and contain problems when they do occur.”).

⁶¹ FDA Food Safety and Modernization Act § 403(4)(A) (“Nothing in this Act, or an amendment made by this Act, shall be construed to . . . alter or limit the authority of the Secretary of Agriculture under the laws administered by such Secretary, including . . . the Federal Meat Inspection Act (21 U.S.C. 601 et seq.).”).

⁶² See *The Food Safety Modernization Act Becomes Law*, GROUNDSWELL (Jan. 9, 2011, 5:15 PM), <http://groundswell-ithaca.blogspot.com/2011/01/food-safety-modernization-act-becomes.html> (“As the most far-reaching overhaul of the food system since the Federal Food, Drug, and Cosmetic Act of 1938, the law represents a sea change in the American food system.”).

⁶³ See *Fourth Draft*, *supra* note 57 (“An unacceptable feed risk is defined as a biological, chemical, or physical agent in, or a condition of, feed which is reasonably likely to cause illness or injury to animals or humans.”).

⁶⁴ *Jack in the Box’s Worst Nightmare*, N.Y. TIMES, Feb. 6, 1993, at A35; see *Update: Multistate Outbreak of Escherichia coli O157:H7 Infections from Hamburgers – Western United States, 1992-1993*, 42 MORBIDITY & MORTALITY WKLY. REP. 258 (1993), available at <http://www.cdc.gov/mmwr/PDF/wk/mm4214.pdf>.

⁶⁵ *Update: Multistate outbreak of Escherichia coli O157:H7 Infections from Hamburgers – Western United States, 1992-1993*, *supra* note 64, at 258.

⁶⁶ See MARION NESTLE, SAFE FOOD: BACTERIA, BIOTECHNOLOGY, AND BIOTERRORISM 90 (2003).

⁶⁷ Lassiter, *supra* note 6, at 443-44; see also *infra* Part III.D.

Second, regulatory changes did not better protect consumers. Third, and most important, the meat supply did not become any safer. In fact, some commentators have suggested that the meat supply has become less safe.⁶⁸

Consumer outcry for safe meat in the wake of the Jack in the Box outbreak drove the USDA to change the way FSIS regulated slaughterhouses and processors. The result was a shift from a “command and control” model, where regulators worked with plant workers inspecting meat, to the Hazard Analysis Critical Control Points (HACCP) model.⁶⁹ Despite high hopes for the success of HACCP, the shift has not had the desired impact on meat safety. Tracing the development of HACCP helps to understand this failure.

FMIA authorizes federal inspection of slaughterhouses, meat packing plants, and other establishments that handle raw meat to make sure such businesses follow proper sanitation procedures and locate contaminated meat in the production chain.⁷⁰ Until the 1990s, the primary means for inspecting meat involved looking, touching, and smelling the carcasses as they passed by during processing.⁷¹ When it comes to pathogens such as *E. coli*, however, such inspections are useless in detecting contaminated meat.⁷²

Following the Jack in the Box *E. coli* outbreak, the USDA responded by adopting a zero-tolerance policy toward fecal matter on raw beef and sought to develop a Pathogen Reduction Program, which ultimately led to the development of HACCP.⁷³ Essentially, HACCP “relies on a complex system of recordkeeping in order to detect and monitor the presence of microscopic pathogens such as *E. coli* and salmonella during the slaughtering process.”⁷⁴ Originally developed for the safety of astronauts, HACCP sought to improve the safety of meat “by systematically identifying and mitigating risk-points in the food production process.”⁷⁵ The purported advantages of HACCP were that it was based on sound science, focused on prevention, increased industry responsibility, and allowed for better government oversight through detailed

⁶⁸ See generally Lassiter, *supra* note 6; Stearns, *supra* note 12; Stearns, *supra* note 40, at 253.

⁶⁹ SUPERVISORY GUIDELINES FOR THE PATHOGEN REDUCTION/HACCP REGULATORY REQUIREMENTS 2 (1998), available at http://smas.chemeng.ntua.gr/miram/failes/publ_275_11_2_2005.pdf (“These regulations represent a fundamental shift in FSIS’s regulatory philosophy from, ‘command and control,’ to performance standards, which allow for more industry flexibility.”); see also Stearns, *supra* note 12, at 396 (“FSIS inspectors will no longer be working ‘shoulder-to-shoulder’ in the plant to ensure . . . safety . . . [, but] [r]ather, the inspectors will be looking over the shoulder of the meat industry as it tries to get it right.”).

⁷⁰ 21 U.S.C. §§ 603, 608 (2006).

⁷¹ See Lassiter, *supra* note 6, at 448-49.

⁷² See Stearns, *supra* note 12, at 379 (stating that the organoleptic (sight, smell, and touch) process is “incapable of detecting dangerous microbial pathogens”).

⁷³ See NESTLE, *supra* note 66, at 67-71.

⁷⁴ Lassiter, *supra* note 6, at 445.

⁷⁵ Follmer & Termini, *supra* note 54, at 50.

record keeping.⁷⁶ Such advantages, however, began to dissipate almost immediately.

Initially, the USDA sought to implement a testing program for pathogens as part of HACCP.⁷⁷ Upon the announcement of testing for microbial pathogens, the meat industry fought back and filed suit to enjoin the USDA from requiring testing, claiming that the USDA did not have the regulatory authority and that the regulations were arbitrary and capricious.⁷⁸ The court disagreed, finding that the USDA had a rational basis for testing, testing was an appropriate response, and trusting consumers to cook the food thoroughly was unreliable as a measure to protect consumers.⁷⁹

At this point, the USDA seemed poised to reign in the meat industry and use HACCP to increase the safety of the meat supply.⁸⁰ The organizational changes to FSIS under HACCP, however, actually gave the industry more control over regulations. HACCP marked a shift away from the USDA as inspectors of meat producers to more of an “oversight role” in a stated attempt to “make the Meat Industry responsible for product safety.”⁸¹ This move, according to the USDA, would solve the problem of the meat industry relying too much on government inspectors for the safety of their products.⁸² According to the USDA, the new regulations would involve performance standards based on “establishment specific decisions” rather than on a “one-size-fits-all regulatory system.”⁸³ In other words, each producer would be responsible for setting its own safety standards, and the USDA would be responsible for ensuring that the producer complied with those standards. In doing so, however, the USDA would have to rely only on the information

⁷⁶ *Id.* at 51.

⁷⁷ *Tex. Food Indus. Ass’n v. Espy*, 870 F. Supp. 143, 145 (W.D. Tex. 1994) (discussing FSIS notice that stated FSIS would “collect and test five thousand (5,000) samples of raw ground beef from federally-inspected establishments and retail stores”); *see also* Stearns, *supra* note 12, at 393 (discussing FSIS notice to implement *E. coli* testing for ground beef).

⁷⁸ *Tex. Food Indus. Ass’n*, 870 F. Supp. at 145.

⁷⁹ *Id.* at 148-49.

⁸⁰ Dion Casey, *Agency Capture: The USDA’s Struggle to Pass Food Safety Regulations*, 7 KAN. J.L. & PUB. POL’Y 142, 153 (1997) (discussing how bad press and public outcry made “it . . . seem the meat and poultry industry had no choice but to accept the proposed rule as it was”); *see also infra* Part II.D.

⁸¹ Stearns, *supra* note 12, at 394.

⁸² *See* Pathogen Reduction: Hazard Analysis and Critical Control Point (HACCP) Systems, 60 Fed. Reg. 6774, 6785 (1995) (“This line between industry and FSIS has become blurred . . . which . . . may have encouraged some establishments to rely on FSIS to ensure the safety of establishment’s products rather than take full responsibility themselves for the safety of their products.”).

⁸³ Pathogen Reduction; Hazard Analysis and Critical Control Point (HACCP) Systems, 61 Fed. Reg. 38,806, 38,808 (1996).

producers supplied.⁸⁴ Thus, the entire responsibility for regulating the safety of meat production lay in the hands of meat producers themselves.

With slaughterhouses and processors developing their own safety plans and wielding influence over the USDA,⁸⁵ the meat industry began eroding the goals of HACCP. One successful effort by the meat industry came in persuading the USDA to differentiate between intact meat and non-intact meat.⁸⁶ Intact meat was to be exempt from regulation requiring meat contaminated with *E. coli* to be labeled as adulterated.⁸⁷ In other words, an intact cut of meat such as a steak contaminated with an equal amount of *E. coli* bacteria as non-intact meat such as hamburger would not require an “adulterated” label. The rationale behind this, according to the meat industry, lay in the fact that *E. coli* bacteria tend to cover the outside of the flesh.⁸⁸ Since cooking kills the pathogen, there is little danger of an *E. coli* infection resulting from consuming steak, even if that steak is cooked medium rare.⁸⁹ Ground beef, however, requires the adulterated label since the grinding process potentially mixes the pathogen into the entire product.⁹⁰

The new regulatory policy focused on cooking meat properly in order to kill the pathogen.⁹¹ Such a shift created a dangerous situation for consumers and effectively put the burden of ensuring their safety entirely on them. Cook your meat carefully and prepare it properly or face the consequences. Focused on cooking, regulations entirely ignored another danger. With *E. coli*, “[t]he extremely low infectious-dose made cross-contamination as a big a risk as undercooking.”⁹² One tragic result of the USDA’s allowing the industry to distinguish between intact and non-intact meat came in an *E. coli* outbreak at a Sizzler restaurant in 2000.⁹³ The outbreak was caused by the cross

⁸⁴ See Lassiter, *supra* note 6, at 445 (“HACCP does not contain any mechanism to detect and confront fraudulent recordkeeping by the meat producer as a means to compel compliance with the program.”).

⁸⁵ See *infra* Part II.D.

⁸⁶ See Stearns, *supra* note 12, at 397.

⁸⁷ See *id.*

⁸⁸ Beef Products Contaminated with *Escherichia Coli* O157:H7, 64 Fed. Reg. 2803, 2803 (1999) (stating that *E. coli* is “introduced below the product’s surface by chopping or grinding”).

⁸⁹ *Id.* at 2803-04 (citing National Advisory Committee on Microbiological Criteria for Foods finding that *E. coli* on the surface of intact cuts of meat presented little danger since it is killed during proper cooking (citation omitted)).

⁹⁰ *Id.*

⁹¹ *Id.*; see also Stearns, *supra* note 12, at 401 (“The focus [was] placed upon cooking and nothing else when determining whether a category of meat products would be deemed adulterated.”).

⁹² Stearns, *supra* note 12, at 401. Cross-contamination refers to transferring *E. coli* bacteria from raw meat to utensils and other foods during food preparation.

⁹³ See *id.* at 377 (citing Wisconsin Division of Public Health, Final Report, *Investigation of an Outbreak of E. coli* O157:H7 Infection at the Layton Avenue Sizzler Restaurant,

contamination of watermelon by *E. coli*-infected raw sirloin tips.⁹⁴ The sirloin tips were not labeled as adulterated since they were intact cuts.⁹⁵ The contamination occurred as the result of tenderizing the sirloin, which involved piercing the surface of the meat.⁹⁶ The investigation report by the Wisconsin Department of Health confirmed sixty-two cases of *E. coli* infection with twenty-two hospitalizations and one death.⁹⁷

The Wisconsin outbreak clearly demonstrated the failure of HACCP to achieve its goals. The failure continues, as each year the industry recalls many pounds of meat for *E. coli* contamination, indicating that vast quantities of contaminated meat go undetected before entering the supply chain. By August of 2010, the industry had recalled 1,786,859 pounds of meat.⁹⁸ As recently as December of 2010, the FSIS issued a statement regarding the recall of organic beef from a California company for potential *E. coli* contamination.⁹⁹ While processors might point to the recalls as highlights of the system's success, tainted meat still passes through the system to the consumer, inflicting serious harm.¹⁰⁰ It takes little imagination to understand that high recall numbers reveal an increased potential for tainted meat to escape.

Not only does the tainted meat get through the system, but in very real ways, the regulations may deceive consumers into thinking the meat is safe. Such was the case in a 2007 *E. coli* outbreak caused by frozen hamburger patties that had been stamped "USDA inspected and passed."¹⁰¹ Since, under HACCP, the

Milwaukee, WI; July-August, 2000 (Oct. 6, 2000) [hereinafter Final Report], available at <http://www.washingtonpost.com/wp-srv/national/outbreak.pdf>.

⁹⁴ *Id.* at 402 (citing Final Report, *supra* note 93).

⁹⁵ Estate of Kriefall ex rel. Kriefall v. Sizzler USA Franchise, Inc., 665 N.W.2d 417, 427-28 (Wis. Ct. App. 2003) (discussing the facts that intact cuts are not labeled as adulterated and the meat came only with instructions to cook thoroughly and advised procedures to avoid cross-contamination).

⁹⁶ Stearns, *supra* note 12, at 410 (citing Final Report, *supra* note 93).

⁹⁷ *Id.* at 401-02 (citing Final Report, *supra* note 93).

⁹⁸ See Bill Marler, *12 E. coli Recalls Totaling 1,786,859 Pounds of Meat in 2010*, MARLER BLOG (Aug. 6, 2010), <http://www.marlerblog.com/legal-cases/12-e-coli-recalls-totalling-1786859-pounds-of-meat-in-2010/>.

⁹⁹ United States Department of Agriculture, Food Safety and Inspection Service, *California Firm Recalls Ground Beef Products Due to Possible E. coli O157:H7 Contamination*, U.S. DEPARTMENT AGRIC. (May 27, 2011), http://www.fsis.usda.gov/News_&_Events/Recall_070_2010_Release/index.asp ("First Class Foods, Inc., a Hawthorne, Calif., establishment, is recalling approximately 34,373 pounds of organic ground beef products that may be contaminated with *E. coli* O157:H7.").

¹⁰⁰ See Michael Moss, *The Burger That Shattered Her Life*, N.Y. TIMES, Oct. 4, 2009, at A1 (discussing an *E. coli* infection of a young woman in 2007, which caused her to be paralyzed from the waist down).

¹⁰¹ See Kenneth Li, *Cargill Recalls Beef Patties on E. coli Scare*, REUTERS (Oct. 7, 2007), <http://www.reuters.com/article/businessNews/idUSN0726594120071007>; see also Stearns, *supra* note 40, at 259-60.

USDA has relegated itself to a mere oversight role, the mark of inspection by the USDA is meaningless as to whether the meat was actually certified pathogen free.¹⁰² The USDA has, in fact, acknowledged this: “The mark of inspection is a reflection of a finding made by FSIS personnel that the [meat] establishment has followed validated procedures in its HACCP plan, not that the pathogen has been eliminated or reduced to undetectable levels.”¹⁰³

Why has HACCP failed so miserably? First, regulation fails to provide incentives for producers to provide safe meat. Second, regulating agencies are subject to agency capture. Third, while regulation has failed to keep *E. coli* out of the meat supply, the meat industry has tried to use regulation to shield itself from liability by arguing that FMIA preempts state tort laws.

C. *Regulation Fails to Promote Meat Safety*

In failing to follow and consistently regulate the supply chain, USDA regulations do little to curb the source of the *E. coli* problem: corn-fed cattle. If there are any incentives at work in this part of the production process, they center on incentivizing growers to maximize profits by passing all safety concerns regarding *E. coli* on to the slaughterhouses and processors. Once the cattle fall under the domain of the USDA, the incentives to ensure safe meat lack the strength to make regulation effective by creating market failure and incentivizing producers to cut corners on safety.

The most significant problem is information asymmetry. “[A] free market for food will always be defined by a near-perfect asymmetry of information. Such a market allows only producers and sellers the opportunity to be fully informed, and so to act freely in a way that allows them an advantage over uninformed buyers.”¹⁰⁴ Such is the case with the “USDA inspected and passed” seal. While consumers may assume that the hamburger patty has been tested for *E. coli* because of the USDA approval, this is not necessarily the case. All the approval means is that the meat company submitted the proper paperwork. Other than this meaningless information, under current regulations, the only information consumers have when purchasing meat at the market is weight, date, cooking instructions, and the retailer’s name.¹⁰⁵ To say that the buyer must purchase the meat based on trust understates the issue. Since trust generally implies a relationship between parties based on past experiences, the buyer actually makes the purchase on hope. This situation

¹⁰² See Stearns, *supra* note 40, at 260 (“The U.S. government thus appeared to vouchsafe the uniform quality and safety of all products so labeled, even though this was not in fact true.”).

¹⁰³ FOOD SAFETY AND INSPECTION SERV., UNITED STATES DEP’T OF AGRIC., VERIFICATION ACTIVITIES FOR *ESCHERICHIA COLI* O157:H7 IN RAW BEEF PRODUCTS 54 (2009), available at <http://www.fsis.usda.gov/OPPDE/rdad/FSISDirectives/10010.1Rev3.pdf>.

¹⁰⁴ Stearns, *supra* note 40, at 249.

¹⁰⁵ Justine Hinderliter, Comment, *From Farm to Table: How this Little Piggy Was Dragged Through the Market*, 40 U.S.F. L. REV. 739, 758 (2006).

weakens specific consumer demand for safe meat by translating it into “generalized demand (or hope) for safer food.”¹⁰⁶ This hope fails to incentivize firms to provide safer meat.¹⁰⁷

[R]egulations therefore tend to act as a ceiling rather than a floor, and effectively suppress most intra-industry competition in the realm of food safety. In economic terms, the regulations thus act as a negative incentive that prompts manufacturers to invest only in what is necessary to avoid non-compliance (or getting caught), but nothing more.¹⁰⁸

Because consumers lack information that they can translate into specific demand for safer meat, the result is that the hamburger patty the consumer purchases on hope may be deadly.

D. *Agency Capture Inhibits Regulation*

Effective regulation requires regulators to act independently of the industry they regulate. The development of HACCP has shown that meat regulators lack such independence and, in fact, that the meat industry may have fully captured regulators. “Agency capture occurs when ‘through lobbying the regulated firm is able to win the hearts and minds of the regulators.’”¹⁰⁹ Once captured, the agency serves private interests rather than the public good, which subverts the purpose of having the agency.¹¹⁰ Such capture is evident in the development of HACCP regulations.¹¹¹ Based on public outcry for safer meat in the wake of the Jack in the Box outbreak, the USDA responded, seeking to mandate testing and adopt a zero-tolerance policy for *E. coli*.¹¹² The meat industry immediately but unsuccessfully challenged mandatory testing in court.¹¹³ Having been rebuffed in court, the industry then lobbied Congress to stop funding for HACCP.¹¹⁴ Here the industry had more success. Representative David McIntosh of New York, leading the Republican-controlled Congress, put HACCP on the hit list.¹¹⁵ McIntosh stated, “The laws would remain on the books, but there would be no money to carry them out.

¹⁰⁶ Stearns, *supra* note 40, at 253.

¹⁰⁷ *See id.*

¹⁰⁸ *Id.*

¹⁰⁹ *See* Casey, *supra* note 80, at 142 (quoting IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 63 (1992)).

¹¹⁰ *See* John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 *HARV. L. REV.* 713, 723 (1986) (stating that regulation under a captured agency becomes “a method of subsidizing private interests at the expense of the public good”).

¹¹¹ *See generally* Casey, *supra* note 80.

¹¹² *See supra* note 77 and accompanying text.

¹¹³ *See supra* notes 78-79 and accompanying text.

¹¹⁴ *See* Casey, *supra* note 80, at 151.

¹¹⁵ *See id.* at 152 (discussing McIntosh’s placing of the proposed rule on a list of proposed rules “targeted for elimination or substantial modification”).

It's a signal to the agencies to stop wasting time on these regulations."¹¹⁶ The meat industry succeeded in persuading the House Appropriations Committee to refuse funding on the proposed bill, "unless the USDA created a task force representing all interested parties to come up with a completely new proposal."¹¹⁷

The Jack in the Box outbreak, however, had been too recent an event. The public still cried out for safe meat, and the meat industry faced defeat in the public debate that followed.¹¹⁸ Even President Clinton chimed in: "[B]elieve it or not, while we're working to bring meat inspection into the 20th century, some special interests are trying to stop it, in spite of the fact that people have died from E. coli."¹¹⁹ Though perhaps President Clinton did not mean for his statement to be taken ironically, one cannot escape the absurdity of seeking to bring regulation into the twentieth century when very few years of that century remained. Nevertheless, President Clinton got it right. Nineteenth century regulations could not compete with twentieth century agri-business, constantly evolving into twenty-first century agri-business.

Eventually public outrage dwindled, allowing the meat industry a final option. "[I]ndustry groups no longer tried to argue that bacterial testing was unnecessary and began pushing for a regulatory approach that would minimize government red tape by letting the industry – rather than the Agriculture Department – decide how best to clean up plants."¹²⁰ The result came in the form of the Final Rule in which the industry got what it wanted. The industry itself would be in charge of regulating meat safety.¹²¹ As for FSIS, according to former USDA head Ray Leonard, "HACCP represents a shift from monitoring meat to monitoring paperwork."¹²² Thus, the Final Rule was a far cry from the USDA's starting point, and the consumer is no safer.

This failure of the USDA to regulate to improve meat safety is part of the overall failure of the regulatory environment to follow cattle from birth to the consumer. Any regulation of live animals falls under the authority of the FDA.¹²³ Recent changes in FDA regulations on food safety reveal that agency

¹¹⁶ See *id.* (citing Roger Runningen, *House Committee Blocks New Rules for Meat Inspection*, FRESNO BEE, June 28, 1995, at D5).

¹¹⁷ *Id.* (citing Daniel P. Puzo, *Reform Stalls on Meat Inspections*, PLAIN DEALER (Cleveland), July 19, 1995, at 1E).

¹¹⁸ See *id.* at 153 ("After such a public relations disaster, it would seem the meat and poultry industry had no choice but to accept the proposed rule as it was.").

¹¹⁹ *Id.* (citing *HACCP Negotiated Rule Amendment Withdrawn in Compromise*, FOOD CHEMICAL NEWS (July 24, 1995)).

¹²⁰ Jerry Knight, *Meat Inspection Changes Produce an Unusual Unanimity*, WASH. POST, July 9, 1996, at D1.

¹²¹ See *supra* notes 80-84 and accompanying text.

¹²² See Fred Bayles, *Meat Safety Critics Say New Regulations Won't Work: Changes Put Focus on Process Not the Product*, USA TODAY, Oct. 8, 1997, at 1A.

¹²³ See *supra* note 57 and accompanying text (discussing FDA authority over animal feed).

capture is not just a USDA problem. Following the Food Safety Modernization Act of 2011, the American Feed Industry Association (AFIA) released a statement in response to new FDA authority.¹²⁴ The letter stated that AFIA played an integral role in developing regulations that best suited the industry.¹²⁵ According to AFIA President and CEO Joel G. Newman, “AFIA was very active in the drafting and editing of this legislation, but when it was clear it was destined to become law, the association worked to develop the least burdensome provisions.”¹²⁶ AFIA’s major goal in developing the new legislation “was to create a ‘firewall’ between food and feed provisions.”¹²⁷ As to the final bill, AFIA felt satisfied in its efforts to control the sweep of FDA regulation and promised to ensure “that the agency follows both the congressional intent and spirit when rulemaking begins.”¹²⁸ By working closely with the FDA, AFIA guided the development of legislation that was friendlier to the industry than it was protective of consumers.

E. Preemption Arguments

The preemption issue provides the perfect transition between this failure of regulation and the failure of civil litigation to provide for a safer meat supply. After successfully removing the teeth from HACCP to ensure that *E. coli* would survive processing and continue to reach consumers, once consumers suffered sickness from *E. coli* and sought remedies in court, the industry argued that industry compliance with regulation preempted state tort claims.

One major case involved the Sizzler *E. coli* outbreak in Wisconsin.¹²⁹ A defendant meat processor named Excel Corporation won summary judgment by claiming that FMIA preempted the state law tort claims at issue.¹³⁰ On appeal, Excel argued that FMIA preempted state tort law two ways:

First [Excel] assert[ed] that the sale of intact meat contaminated with *E. coli* O157:H7 is not “adulterated” under federal law. . . . Second, [Excel] argue[d] that the meat left its plant after it was inspected and approved by government inspectors, and . . . permitting these claims to proceed would punish that which federal law allows.¹³¹

¹²⁴ Leslie Malone, *President Signed into Law the Food Safety Modernization Act*, AM. FEED INDUSTRY ASSOC. (Jan. 6, 2011), http://afia.org/AFIA/NewsAndPress/NewsReleases/2011ArchivedNewReleases/2011singlenews/11-01-06/president_signed_into_law_the_food_safety_modernization_act.aspx.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See *supra* notes 93-97 and accompanying text.

¹³⁰ See Decision on Excel Corporations Motion for Summary Judgment, *In re Consolidated E. coli O157:H7 Cases*, No. 00-CV-006503 (Milwaukee Cir. Ct. May 15, 2002) (granting summary judgment and dismissing all claims).

¹³¹ Estate of Kriefall *ex rel.* Kriefall v. Sizzler USA Franchise, Inc., 665 N.W.2d 417,

The Wisconsin Court of Appeals rejected both arguments. As to the first argument, the Court found that the meat was adulterated under the language of the regulations, despite the industry's persuading FSIS that intact cuts should not be labeled "adulterated."¹³² The Court further reasoned that Excel had a duty under the regulations "to consider 'the intended use or consumers of the finished product.'"¹³³ Thus, Excel should have realized that the sirloin tips it shipped to Sizzler would likely undergo further processing in the restaurant.¹³⁴

As to Excel's second argument, that the meat had passed inspection before leaving the plant, the court stated that, under HACCP, each plant is responsible for developing its own plan to reduce *E. coli* in meat to an undetectable level.¹³⁵ Since a detectable amount of the pathogen reached consumers, Excel failed to regulate itself properly under HACCP, and it did not matter that federal inspectors stamped the meat as compliant.¹³⁶ The court went on to discuss the near impossibility for the two federal inspectors in the Excel plant to follow effectively the work of hundreds of plant workers who "daily cut the approximately seven-foot-long, 350-pound split carcasses into some 8,000 intact cuts of beef weighing approximately two to four or three to five pounds each."¹³⁷ If the purpose of HACCP was to make the meat industry more responsible for the safety of its meat and not to rely on FSIS inspectors, Excel argued contrary to that purpose. This was an interesting argument given the extreme involvement of the industry in the development of the Final Rule. Effectively, Excel developed a practice based on a self-serving policy that its industry developed, but when it faced accountability for that practice, it argued that the old rule should protect it.

Failing before the Wisconsin Court of Appeals, Excel appealed to the Wisconsin Supreme Court, which declined to hear the case.¹³⁸ Undaunted, Excel appealed to the Supreme Court of the United States, which also refused to hear the case.¹³⁹ Despite the industry's loss, "the *Kriefall* decision makes plain that the Meat Industry intends to use preemption to try to create de facto

424 (Wis. Ct. App. 2003).

¹³² *Id.* at 426 ("Meat contaminated by the *E. coli* strain that was on the Sizzler meat falls within this definition of 'adulterated' because the *E. coli* made the infected meat at least 'in part . . . unsound, unhealthful, unwholesome, or otherwise unfit for human food' within the meaning of the all encompassing phrase 'for any other reason.'" (quoting 21 U.S.C. § 601 (2006)).

¹³³ *Id.* at 428 (quoting 9 C.F.R. § 417.2(a)(2) (2001)).

¹³⁴ *Id.* at 427 ("Intact cuts of beef that are to be further processed into non-intact cuts prior to distribution for consumption must be treated in the same manner as non-intact cuts of beef, since pathogens may be introduced below the surface of these products when they are further processed into non-intact products.").

¹³⁵ *Id.* at 435.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Estate of Kriefall v. Sizzler USA*, 671 N.W.2d 849 (Wis. 2003).

¹³⁹ *Excel Corp v. Estate of Kriefall*, 541 U.S. 956 (2004).

uniform standards that will endanger the public while leaving people injured by unsafe meat without a remedy.”¹⁴⁰ Where *Kriefall* stands for consumer protection by holding the meat industry accountable to the regulations it had a significant hand in developing, the *Kriefall* court represents merely one state court, and given the meat industry’s history of tenacity, concerns over the possibility of preemption remain.¹⁴¹ A Michigan court in 1998, for example, held that FMIA preempted state tort claims in a case involving *E. coli* infection.¹⁴² Discussing this case, one commentator, referring to the powerful meat industry in Kansas, stated, “[H]eavy federal regulation in the field of meat production presents the opportunity for a host of preemption arguments.”¹⁴³

As the *Kriefall* court pointed out, “[M]icrobial pathogens associated with fecal contamination are the single most likely source of potential food safety hazard in slaughter establishments . . . [and] such contamination is largely preventable.”¹⁴⁴ Yet because regulation has failed to hold the industry responsible for meat safety, *E. coli* still reaches consumers. Furthermore, consumers lack any information to aid them in purchasing safe meat. In fact, relying on USDA inspection certification labeling, which has no bearing on whether *E. coli* bacteria inhabit the meat, may mislead consumers. Through preemption arguments, the industry has also sought to prevent consumers from accessing civil litigation to compensate them for their illnesses. Overall, the meat industry has successfully passed the risk of foodborne illness on to consumers.

III. THE FAILURE OF CIVIL LITIGATION TO IMPROVE MEAT SAFETY

Although she may not realize it, a consumer standing at the meat counter in a supermarket is in a tough spot. In choosing which package of ground meat to purchase, she can rely only on information such as price, weight, color, and date of packaging. None of this information, however, indicates whether the meat will likely infect her. Regulation does not allow her to assume that the ground meat is safe. Unfortunately for the woman at the meat counter, the meat industry has likely decided to risk liability for any unsafe meat. If the woman gets sick, she will have a difficult time recovering from the producers,

¹⁴⁰ Stearns, *supra* note 12, at 431.

¹⁴¹ *Id.* at 379-80 (arguing that Excel’s arguments were developed by and backed by the entire meat industry and that “USDA should . . . make clear that unless and until Congress expressly decides otherwise, USDA does not intend for its regulations to preempt state tort claims premised on an alleged defect in a meat product”).

¹⁴² *Boulahanis v. Prevo’s Family Mkt., Inc.*, 583 N.W.2d 509, 511 (Mich. Ct. App. 1998) (“The FMIA includes an express federal preemption provision.”).

¹⁴³ Stephen J. Torline & Derek Teeter, *Federal Preemption in Products Liability Cases*, J. KAN. B. ASS’N., July/Aug. 2007, at 32, 38.

¹⁴⁴ *Estate of Kriefall ex rel. Kriefall v. Sizzler USA Franchise, Inc.*, 665 N.W.2d 417, 431 (Wis. Ct. App. 2003).

and if she does recover, no single producer is likely to bear the total cost. The meat industry can rely on the fact that very few foodborne illness cases even lead to litigation in the first place, and of those that do, only about one-third result in damages awards for the plaintiffs.¹⁴⁵

A. *Strict Products Liability and Product Defect Tests*

If the consumer becomes sick from eating contaminated meat, “[w]ithout question, the single best weapon in the plaintiff’s arsenal in a foodborne illness case is the strict liability claim. It is well established that commercially sold food falls under a strict products liability scheme.”¹⁴⁶ Traditional strict liability is based on section 402A of the *Restatement (Second) of Torts*, which states in relevant part that “[o]ne who sells any product in a defective condition unreasonably dangerous to the consumer or to his property is subject to strict liability . . . if [the product] is expected to and does reach the consumer without substantial change in the condition in which it is sold.”¹⁴⁷

While most courts have adopted section 402A as a basis for adjudicating products liability claims,¹⁴⁸ they have struggled with two issues when dealing with foodborne pathogens in meat. First, to what extent did the product undergo a substantial change from the condition in which it was sold through the preparation process? That is, did the pathogen enter the product at the point of preparation as a result of mishandling? Second, if the pathogen was already present in the meat at the time of purchase, should the consumer have been aware of this and taken appropriate precautions?¹⁴⁹ Two early cases involving foodborne illness show that courts have struggled with the role that the consumer played in her own illness. In *Holt v. Mann* the plaintiff sued after becoming infected with trichinosis from eating contaminated ham.¹⁵⁰ Though cooking pork to 137 degrees Fahrenheit kills trichinae, the Massachusetts Supreme Judicial Court held that it was unreasonable to hold the consumer responsible for making sure all parts of the meat reached that temperature given the limitations of food preparation technology in consumers’ homes.¹⁵¹ Over ten years later, an Illinois court reached the opposite conclusion.¹⁵² Faced with similar facts, the court in *Nicketta v. National Tea*

¹⁴⁵ Buzby, *supra* note 31, at 2.

¹⁴⁶ William Marler, *Serving Up Trouble*, 45 TRIAL 40, 44 (2009). Four states (Delaware, Michigan, North Carolina, and Virginia) do not recognize strict products liability. See DAVID G. OWEN, PRODUCTS LIABILITY LAW 482 n.67 (2d ed. 2008).

¹⁴⁷ RESTATEMENT (SECOND) OF TORTS § 402A (1965).

¹⁴⁸ See Brandon Baird, Note, *The Pending Farmers’ Market Fiasco: Small-Time Farmers, Part-Time Shoppers, and a Big-Time Problem*, 1 KY. J. EQUINE, AGRIC. NAT. RESOURCES L. 49, 56 (2009).

¹⁴⁹ Adams, *supra* note 29, at 122.

¹⁵⁰ *Holt v. Mann*, 200 N.E. 403, 404 (Mass. 1936).

¹⁵¹ *Id.* at 405.

¹⁵² See *Nicketta v. Nat’l Tea Co.*, 87 N.E.2d 30, 34 (Ill. App. Ct. 1949).

Co. placed the responsibility for the illness on the consumer: “[A] human being cannot contract or get the illness or disease known as trichinosis from eating pork which has been properly cooked.”¹⁵³ The court found that the plaintiffs’ argument that the meat had been properly cooked failed as a scientific impossibility and consequently held that the plaintiffs were responsible for the illness.¹⁵⁴ These two cases represent an early split among courts as to how the consumer’s role in preparation should factor into the liability of the producers.¹⁵⁵

Though courts still base strict liability theory on section 402A, the *Restatement (Third) of Torts* has somewhat modified the theory. Under the *Restatement (Third)*, a seller or distributor “who sells or distributes a defective product is subject to liability if . . . [the product] contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings.”¹⁵⁶ This standard is somewhat less stringent than the original section 402A requirement that the product be “unreasonably dangerous.” In attempting to determine whether a food product is defective or “unreasonably dangerous,” courts have historically used two tests: the foreign-natural test and the reasonable consumer expectations test.¹⁵⁷

Under the foreign-natural test, “if the food item is contaminated by a foreign substance the injured consumer can recover damages.”¹⁵⁸ However, “[i]f the substance in food which caused the injury is natural to the food, the consumer cannot recover damages.”¹⁵⁹ A classic case that employed the foreign-natural test involved a plaintiff injured by a chicken bone in a potpie.¹⁶⁰ The court held,

It is sufficient if it may be said that as a matter of common knowledge chicken pies occasionally contain chicken bones. We have no hesitancy in so holding, and we are of the opinion that despite the fact that a chicken bone may occasionally be encountered in a chicken pie, such chicken pie, in the absence of some further defect, is reasonably fit for human consumption.¹⁶¹

In contrast, the reasonable-consumer-expectations test, which has become the primary test adopted by most courts,¹⁶² states that “if the substance which

¹⁵³ *Id.* at 30.

¹⁵⁴ *Id.* at 34.

¹⁵⁵ See Adams, *supra* note 29, at 123 n.103, 124 n.107 (noting cases that have followed the *Holt* court’s reasoning and those that have followed the *Nicketta* court’s reasoning).

¹⁵⁶ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. §§ 1-2 (1998).

¹⁵⁷ See Lassiter, *supra* note 6, at 435.

¹⁵⁸ O’Dell v. DeJean’s Packing Co., 585 P.2d 399, 401 (Okla. Ct. App. 1978).

¹⁵⁹ *Id.* (stating that consumers cannot recover for injuries caused by such things as bones in meat or chicken and seeds in fruit).

¹⁶⁰ See *Mix v. Ingersoll Candy Co.*, 59 P.2d 144, 148 (Cal. 1936).

¹⁶¹ *Id.*

¹⁶² See OWEN, *supra* note 146, at 488 (“[C]ourts from the 1980s forward adopted a

caused the damage can be ‘reasonably expected’ to be in the food or drink, the consumer is deemed to be on guard for same and if injured the consumer cannot recover.”¹⁶³ Keeping with the chicken bone theme, in a case involving a woman injured from swallowing a chicken bone in soup, the Rhode Island Supreme Court in 1951 rejected the foreign-natural test and adopted a reasonable-consumer-expectations test.¹⁶⁴ Further encouraging courts to abandon the older test, one of the United States’ preeminent food law scholars, Professor Reed Dickerson, argued against the foreign-natural test in favor of inquiring into consumer expectations.¹⁶⁵ According to Professor Dickerson, “The better test of what is legally defective appears to be what consumers customarily expect and guard against.”¹⁶⁶ Over the next couple of decades courts continued to adopt the reasonable-consumer-expectations test.¹⁶⁷ The *Restatement (Third) of Torts*’ adoption of the reasonable-consumer-expectations test¹⁶⁸ solidified the doctrinal shift, as courts have rarely invoked the foreign-natural test in recent years.¹⁶⁹

To reap the benefits of strict liability in an *E. coli* claim, then, a consumer faces one of two difficult challenges, which effectively constitute a Hobson’s choice. She must show either that harmful bacteria are foreign to the product or that she should not reasonably expect the product to contain pathogens. These barriers may be difficult for consumers to overcome because a producer may be able to argue that although *E. coli* is not naturally occurring in all raw meat,¹⁷⁰ *E. coli* is inherent because of the nature of the processing.¹⁷¹ On the other hand, if bacteria are inherent in meat or even if their presence is likely in today’s processing environment, the consumer cannot claim that such a product is defective because she should reasonably expect the meat to contain the pathogen.¹⁷² A consumer litigating foodborne illness claims faces the same

reasonable consumer expectations standard, often explicitly rejecting the foreign/natural doctrine, for determining the defectiveness of food.” (footnote omitted).

¹⁶³ *O’Dell*, 585 P.2d at 401.

¹⁶⁴ *Wood v. Waldorf Sys., Inc.*, 83 A.2d 90, 93 (R.I. 1951) (“In our judgment the question is not whether the substance may have been natural or proper at some time in the early stages of preparation of this kind of soup, but whether the presence of such substance, if it is harmful and makes the food unfit for human consumption, is natural and ordinarily expected to be in the final product which is impliedly represented as fit for human consumption.”).

¹⁶⁵ See OWEN, *supra* note 146, at 487.

¹⁶⁶ REED DICKERSON, *PRODUCTS LIABILITY AND THE FOOD CONSUMER* 185 (1951).

¹⁶⁷ See OWEN, *supra* note 146, at 188.

¹⁶⁸ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 7 (1998) (“[A] harm-causing ingredient of the food product constitutes a defect if a reasonable consumer would not expect the food product to contain that ingredient.”).

¹⁶⁹ See OWEN, *supra* note 146, at 489.

¹⁷⁰ See Stearns, *supra* note 12, at 417.

¹⁷¹ See Lassiter, *supra* note 6, at 442.

¹⁷² *Id.* at 442-43 (“[T]he consumer cannot reasonably expect that a beef . . . product is

responsibility in court as under the current regulatory regime – all risk of infection is thrown on her. Such is the case even if a court rejects the meat industry’s argument that the consumer should be responsible for proper preparation and thorough cooking, since both tests incorporate the meat industry’s argument.

Two prominent cases from different jurisdictions illustrate the limitations of even looking into the threshold questions of whether *E. coli* is a natural or foreign substance or whether the consumers should reasonably expect the meat they purchase to contain pathogens. In the first case, *Mexicali Rose v. Superior Court*, the California Supreme Court rejected the foreign-natural test.¹⁷³ The court instead adopted the reasonable-consumer-expectations test and held that the term “natural” applied only to bones and other natural features of the product and not to other substances such as mold or botulinus bacteria.¹⁷⁴ Though the court held that botulinus bacteria (the result of improper handling) was not natural, it went on to hold that “if the injury-producing substance is natural to the preparation of the food served, it can be said that it was reasonably expected by its very nature and the food cannot be determined to be unfit for human consumption or defective.”¹⁷⁵ The key language of the court’s holding is the shift from using “natural” in reference to features of the products such as bones in its rejection of the foreign-natural test to using “natural” in reference to the preparation process. If *E. coli* can be considered natural to the preparation process, “then by its nature, the food prepared cannot be considered unfit.”¹⁷⁶

In the second case, *Kriefall*, the meat processor did in fact, though unsuccessfully, make this argument: “*E. coli* is a *natural inhabitant* in the intestines of animals . . . [and] cannot always be completely avoided.”¹⁷⁷ In rejecting this argument, the court stated that “a goal of the Food Safety and Inspection Service and the Hazard Analysis and Critical Control Point plans it implements is to ‘prevent’ fecal and *E. coli* contamination – what the agency called ‘zero tolerance’ for fecal contamination and the concomitant reduction to the *E. coli* bacterium to an ‘undetectable level.’”¹⁷⁸ Even if all courts took this approach, however, the consumer would still face poor odds of

free from a contaminant that may cause serious illness or death . . .”).

¹⁷³ *Mexicali Rose v. Superior Court*, 822 P.2d 1292, 1301 (Cal. 1992). In this case, the plaintiff sued a restaurant owner over a chicken bone in an enchilada that caused injury. *Id.* at 1293.

¹⁷⁴ *Id.* at 1301 n.5.

¹⁷⁵ *Id.* at 1301.

¹⁷⁶ Lassiter, *supra* note 6, at 441.

¹⁷⁷ Brief and Appendix of Defendant-Respondent at 8, *Estate of Kriefall ex rel. Kriefall v. Sizzler USA Franchise, Inc.*, 665 N.W.2d 417 (Wis. Ct. App. 2003) (No. 02-1939) (emphasis added) (citation omitted).

¹⁷⁸ *Estate of Kriefall ex rel. Kriefall v. Sizzler USA Franchise, Inc.*, 665 N.W.2d 417, 431 (Wis. Ct. App. 2003) (citing 61 Fed. Reg. 38,850 (July 26, 1996); 67 Fed. Reg. 62,329 (Oct. 7, 2002)).

successfully litigating a claim. Litigants would still have to show that they had no reasonable expectation that the meat contained *E. coli*. Since the *Kriefall* court dealt only with preemption, the court did not decide whether a consumer should reasonably expect *E. coli* in the meat.

Although strict liability seems to govern these cases,¹⁷⁹ the test applied by most courts today, the reasonable-consumer-expectations test, may not be strict liability at all. The test itself predates section 402A and the development of strict products liability.¹⁸⁰ What's more, despite the *Restatement (Third)*'s adoption of the test for product defects, the very language of the test suggests negligence – in this case the plaintiff's contributory negligence.¹⁸¹ Under the prevailing reasonable-consumer-expectations test, what a consumer should reasonably expect is a question for the jury.¹⁸² An injured consumer, therefore, must convince a jury that she should not reasonably have expected the pathogen in her meat. This can be a tall order since courts seem to give the question to the jury even in extreme cases.

Courts have been unwilling to rule on the question as a matter of law.¹⁸³ *Gates v. Standard Brands Inc.*,¹⁸⁴ for example, affirmed a holding that the question of reasonable expectations is a jury question.¹⁸⁵ When the plaintiff in the case bit into a candy bar, he also bit into a snake bone.¹⁸⁶ Posing such a question to the jury rather than ruling as a matter of law “is a classic example of a court claiming to protect the consumer by enforcing strict liability. Nevertheless, the court permits the defendants the opportunity to escape liability because the product may not be considered defective.”¹⁸⁷ In essence, courts have created a situation in which a producer is strictly liable unless the consumer is contributorily negligent. A consumer bringing a strict liability claim therefore likely faces a disguised negligence test.

¹⁷⁹ See *supra* note 146 and accompanying text.

¹⁸⁰ See *infra* Part V.A for a history of strict products liability theory.

¹⁸¹ See *infra* notes 255-257 (discussing a shift in strict products liability theory to a negligence-based standard).

¹⁸² Baird, *supra* note 148, at 58 (discussing reasonable expectation as a question for the jury rather than for the judge); see also *Zabner v. Howard Johnson's, Inc.*, 201 So. 2d 824, 828 (Fla. Dist. Ct. App. 1967) (rejecting the foreign-natural test and holding that “what the consumer might reasonably expect to find in the food as served and not on what might be natural to the ingredients of that food prior to preparation and what is reasonably expected by the consumer is a jury question in most cases”).

¹⁸³ See, e.g., *Zabner*, 201 So. 2d at 827.

¹⁸⁴ 719 P.2d 130 (Wash. Ct. App. 1986).

¹⁸⁵ *Id.* at 135 (“[T]he [trial] court correctly left the question of defectiveness to the jury . . .”).

¹⁸⁶ *Id.* at 131.

¹⁸⁷ Baird, *supra* note 148, at 59.

B. *Bringing the Proper Defendant to Court*

Assuming the consumer meets the necessary causation requirements (that she in fact got sick from contaminated meat rather than something else),¹⁸⁸ the next challenge she faces is getting the proper defendant into court.¹⁸⁹ “Under the prevailing product liability laws, no one participant in the chain of distribution for a product is primarily accountable for its safety.”¹⁹⁰ If traceability is not possible,¹⁹¹ the defendant must join all possible defendants in the supply chain that may have been responsible.¹⁹² *Kriefall*¹⁹³ illustrates the difficulty of identifying the proper defendants and the arguments that inevitably occur among the named defendants. In the aftermath of *Kriefall*, the named defendants in the case settled with the Kriefall family and others.¹⁹⁴ At a trial to determine which among the named defendants was at fault for the *E. coli* outbreak, a jury found that Excel was eighty percent at fault, E&B (the owner of the franchise) was twenty percent at fault, and Sizzler was not at fault.¹⁹⁵ E&B and Sizzler both argued that Excel was one hundred percent to blame. Excel, on other hand, contended that E&B was responsible because of their poor product handling and unsanitary preparation and that Sizzler was responsible for poor quality control in their franchise.¹⁹⁶

Besides clearly illustrating the finger-pointing problem among defendants, this case also reveals the complexity of the supply chain and the somewhat arbitrary nature of assigning fault. The meat company deemed most at fault had no relationship with the consumer and sold a product that it thought

¹⁸⁸ Causation is not discussed in this Note since under any liability rule the consumer must first show the food product in question caused the illness. A major difficulty of showing causation in foodborne illness cases comes from the fact that the consumer often has eaten all the food in question or thrown it away, leaving no samples for testing. See OWEN, *supra* note 146, at 492. Courts deal with this problem by allowing “reasonable circumstantial evidence of defectiveness, such as that a particular food item smelled or tasted strange.” *Id.* The plaintiff’s case will fail, however, if she cannot offer credible evidence that at least suggests the food was defective. *Id.* at 493.

¹⁸⁹ See Adams, *supra* note 29, at 107 (“Throughout the day, a typical consumer is likely to eat foods from several different sources: grocery stores, fast food eateries, and restaurants.”).

¹⁹⁰ Stearns, *supra* note 40, at 269-70.

¹⁹¹ *Id.* at 254 (“[T]he U.S. system of ground beef production, which is highly regulated, is too big and complicated to be adequately controlled from farm to table.”).

¹⁹² See Lassiter, *supra* note 6, at 435.

¹⁹³ Estate of Kriefall *ex rel.* Kriefall v. Sizzler USA Franchise, Inc., 665 N.W.2d 417, 421 (Wis. Ct. App. 2003) (holding that FMIA did not preempt state tort claims in case of a child who died from an *E. coli* infection).

¹⁹⁴ Brief for Appellant at 8, Estate of Kriefall v. Sizzler USA, 801 N.W.2d 781 (Wis. Ct. App. 2011) (Nos. 2009AP001212, 2010AP491), 2010 WL 2934859, at *5.

¹⁹⁵ *Id.* at 7.

¹⁹⁶ *Id.* at 13-15.

complied with federal regulation.¹⁹⁷ From the consumer's perspective, Sizzler sold the tainted meat but was not at fault. The franchisee, of whom the consumer had not likely heard, had only a modicum of culpability, despite physically causing the problem through cross-contamination. Not only does this allocation of fault seem arbitrary, but it also locates the fault precisely at the point where the consumer is least likely to recover.

C. *Protecting Both Ends of the Supply Chain*

What does it mean to say that E&B was twenty percent at fault for the Sizzler *E. coli* outbreak? E&B sold and served tainted meat and a customer died. Doesn't the retailer owe more to the consumer than twenty-percent protection? Not necessarily. American products liability law generally insulates retailers from strict liability claims and holds them accountable only for their own negligence.¹⁹⁸ In Washington State, for example, only manufacturers can be strictly liable for defective products; non-manufacturing sellers can only be held liable for negligence.¹⁹⁹ Following this law, a Washington court dismissed a claim for foodborne illness that resulted from the plaintiff eating contaminated ground beef from a Quality Food Center (QFC) store.²⁰⁰ Despite the fact that QFC reground and repackaged the meat, the court found that QFC did not qualify as a manufacturer under Washington law.²⁰¹ "QFC was functioning as a 'mere conduit' within the chain of

¹⁹⁷ See *Kriefall*, 665 N.W.2d at 424.

¹⁹⁸ Some states completely exempt sellers from strict liability and only allow strict liability claims against manufacturers. See, e.g., GA. CODE ANN. § 51-1-111.1 (2000) (limiting strict liability to manufacturers only); NEB. REV. STAT. § 25-21 (2008) ("No product liability action based on the doctrine of strict liability in tort shall be commenced or maintained against any seller or lessor of a product which is alleged to contain or possess a defective condition unreasonably dangerous . . ."). Other states limit the application of strict liability to sellers subject to certain exceptions. See, e.g., COLO. REV. STAT. § 13-21-402 (2005) (stating that sellers can be held strictly liable only if court lacks jurisdiction over the manufacturer); DEL. CODE ANN. tit. 18, § 7001 (2007) (exempting a seller from strict liability unless "[t]he claimant is unable to identify the manufacturer through reasonable effort [or the] manufacturer is insolvent, immune from suit, or not subject to suit in Delaware"); IND. CODE ANN. § 34-20-2-3 (West 2011) ("A product liability action based on the doctrine of strict liability in tort may not be commenced . . . against a seller of a [defective product] unless the seller is a manufacturer of the product."); N.C. GEN. STAT. § 99B-2 (2007) (limiting strict liability for defective products to manufacturers unless the court lacks jurisdiction or the manufacturer is insolvent). See also Marler, *supra* note 146, at 44 ("[M]any states operate under statutory schemes, or common law schemes bounded by statute, that limit full application of strict liability to manufacturers."); Stearns, *supra* note 40, at 270-71.

¹⁹⁹ WASH. REV. CODE ANN. §§ 7.72.010(2), 7.72.040(1) (West 2007).

²⁰⁰ *Crowson v. Quality Food Ctrs. Inc.*, No. 04-2-05608-0 SEA, 2004 WL 1530885, at *3 (Wash. Super. Ct. June 14, 2004).

²⁰¹ *Id.* at *2.

distribution of the ground beef. Logic, law and public policy compel the conclusion that it should not be treated as the manufacturer of that beef.”²⁰² Clearly, public policy, in the view of this court, meant that the public has no recourse against the one entity in the supply chain with which it has a relationship.

Livestock growers fall at the other end of the supply chain, and courts have not decided whether to consider the animals they sell for slaughter “products” for strict liability lawsuits.²⁰³ Courts have only considered animals as products where they were sold “for their qualities as live animals . . . [rather than] for their potential as food products.”²⁰⁴ On the one hand, this makes sense because for meat to become contaminated with *E. coli* it must contact the animals’ fecal matter during processing – a process for which the growers are not responsible. On the other hand, the animals provide more than the raw materials for meat products. They also provide the pathogen in the first place.²⁰⁵

This leaves the consumers left with those in the middle of the production chain, the processors and the packers, and the relationships among these parties are often complex.²⁰⁶ In the Beef Products Inc. process, for example,²⁰⁷ the company adds its meat product to ground beef from other sources. Any *E. coli* that reaches the consumer may have entered the meat at one of several points. Beef Products Inc.’s product, if pathogen free, may be contaminated when mixed with ground beef containing pathogen. The reverse may also be the case. If the meat survives the initial mixing process free of pathogen, contamination can still occur at a later point as the result of cross-contamination as the meat is repackaged at market. Without knowing the exact point at which the meat became contaminated, the consumer likely faces extreme difficulty getting the responsible defendant into court.

D. *Failing to Incentivize Safety Throughout the Supply Chain*

For any individual consumer, the problem of identifying the exact source of contamination is not of particular concern because she can name all producers as defendants. If litigation is to have any impact on creating incentives for producers to increase the safety of the meat supply, however, this situation is unacceptable. “Principles of indemnification and contribution . . . allow

²⁰² *Id.*

²⁰³ Adams, *supra* note 29, at 128.

²⁰⁴ *Id.* at 127.

²⁰⁵ See *supra* notes 23-25 and accompanying text.

²⁰⁶ See Moss, *supra* note 100, at A1 (discussing a case in which “Cargill records show that the hamburgers were made from a mix of slaughterhouse trimmings and a mash-like product derived from scraps that were ground together at a plant in Wisconsin. The ingredients came from slaughterhouses in Nebraska, Texas and Uruguay, and from a South Dakota company that processes fatty trimmings and treats them with ammonia to kill bacteria.”).

²⁰⁷ See *supra* notes 32-37 and accompanying text.

multiple defendants to share the cost of the ultimate monetary award or settlement, which will dilute the transactional cost impact on any one defendant, thereby further minimizing the impact of the civil action on the overall cost-benefit analysis.”²⁰⁸ Such was the case with the Jack in the Box lawsuits where the parties in nine civil suits settled before trial.²⁰⁹ One claim, for the injuries sustained by a nine-year-old girl, settled for \$15,600,000.²¹⁰ Another claim settled for \$5,000,000.²¹¹ Though the damage to Jack in the Box’s reputation provided the restaurant with an incentive to take steps to improve the safety of its product, the producers themselves “may pay as little as one-twentieth of the highest settlement amount.”²¹²

Individual consumers may have obtained large settlements in the past, but litigation has not proved a useful tool in promoting safer meat along the supply chain. The single most significant reason is that “civil action through consumer lawsuits seeking monetary damages has failed to shift the cost-benefit analysis for the meat producer enough to alter the status quo.”²¹³ This failure stems from the barriers consumers face in bringing successful lawsuits and from the fact that no single business bears the brunt of any damage awards. Furthermore, the reasonable-consumer-expectations test weakens strict liability claims by putting the focus on the consumers’ roles in causing their own illnesses.

IV. SUPPLY-CHAIN RELATIONSHIPS AND THE CONSUMER’S ROLE

Despite the persistent prevalence of unsafe meat, few solutions have been offered. Some scholars have seemed to completely disregard the possibility of using civil litigation to provide businesses with incentives to make meat safer.²¹⁴ This disregard may be rash, especially considering the willingness of a court, such as the *Kriefall* court, to hold the industry accountable. Other writers offer solutions that address only the barriers that individual consumers face in seeking to recover. One such example is the promotion of alternative liability theory in litigating food safety claims.²¹⁵ This theory would hold all

²⁰⁸ Lassiter, *supra* note 6, at 435.

²⁰⁹ *See id.* at 444.

²¹⁰ Kiner, *Pro Ami v. Foodmaker, Inc.*, No. 147527, 1995 WL 259620 (W.D. Wash. Mar. 1995).

²¹¹ Jefferson, *Pro Ami v. Foodmaker, Inc.*, No. C93-394Z, 1995 WL 536904 (W.D. Wash. Apr. 24, 1995) (approving a settlement for a two-year-old girl who suffered brain damage and internal injuries and required a colostomy).

²¹² Lassiter, *supra* note 6, at 444 (citing DAN. B. DOBBS, *DOBBS LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION* § 4.3(4) (2d ed. 1993)).

²¹³ *Id.* at 417.

²¹⁴ *Id.* at 444 (stating that litigation “cannot influence the meat producer effectively” and therefore a regulatory solution is required).

²¹⁵ Angela Holt, Note, *Alternative Liability Theory: Solving the Mystery of Who Dunit in Foodborne Illness Cases*, 2 *PITT. J. ENVTL. & PUB. HEALTH L.* 105, 112 (2007).

possible defendants jointly and severally liable for a consumer's foodborne illness unless a defendant can offer evidence to exculpate its role in the consumer's illness.²¹⁶ Though this theory might genuinely aid individual consumers in overcoming the high burdens involved with successfully litigating their claims, it will do little to provide incentives along the supply chain. The theory will still likely distribute damages among any number of defendants.

Finally, William Marler of the law firm Marler & Clark, perhaps the most prominent firm in the country dealing with foodborne illness, claims that neither regulation nor the courts can effectively solve foodborne illness problems.²¹⁷ Instead, Marler argues, "[C]ommercial buyers must put pressure on growers and distributors to engage in safer food production and handling processes."²¹⁸ This Note, however, argues that the judicial system should serve as the vehicle for encouraging retailers to develop relationships with upstream producers in which retailers can apply such pressure. To succeed in this task, the theory of liability that can impact the overall safety of meat must consider the entire supply chain. But first, it must also properly define the consumer's role in the chain.

A. *Twenty-First Century Realities and Developing Relationships*

It may have made sense in the nineteenth and early twentieth centuries to have different agencies in charge of different parts of the food supply chain. But over time the food supply has become industrialized and centralized, facilitating extreme efficiency in producing low-cost food but creating a vast web of interconnecting problems. As a result of this efficiency and centralization, in the twenty-first century, only four companies slaughter most of the meat Americans eat.²¹⁹ The same phenomenon occurs across the entire food supply. Referencing the 2006 *E. coli* outbreak involving tainted spinach from Natural Selections, Michael Pollan said, "The plant in question washes 26 million servings of salad every week. In effect, we're washing the whole nation's salad in one big sink."²²⁰

Both regulation and litigation have responded to this situation through a sort of gravitational pull exerted by these behemoths. Regulation of meat focuses more on slaughterhouses and processors,²²¹ and litigation seeks their deep

²¹⁶ *Id.*

²¹⁷ See Marler, *supra* note 146, at 47 ("The long-term solution for food safety problems lies not with the federal government or the judicial system . . .").

²¹⁸ *Id.*

²¹⁹ Pollan, *supra* note 27, at 17.

²²⁰ *Id.* ("[Seventy-five] percent of the precut salads are processed by two [companies] . . .").

²²¹ See Rupert Loader & Jill E. Hobbs, *Strategic Responses to Food Safety Legislation*, 24 FOOD POL'Y 685, 697 (1999) ("The main organisational strategy initiatives in the U.S. and Canada appear to originate from the food processing sector.").

pockets. On the one hand, this makes sense because such firms play enormous roles in creating and perpetuating the problem. On the other hand, the attack has in many ways made Goliath even stronger and fortified him against consumers. Regulatory focus on producers has failed to provide incentives to produce safe meat, instead providing incentives for capture. The complexity of meat production and distribution has insulated firms from liability. Yet somewhere we forgot that Goliath might just be a middleman who could best be monitored and controlled another way.

B. *Reinterpreting the Consumer's Role*

Before developing a useful liability rule, we must redefine the consumer's role in meat safety. Current regulation clearly places liability on consumers. The history of litigation for foodborne illness shows that "[t]he underlying premise that erodes civil liability theory is that the consumer ultimately is responsible for the proper preparation of the meat she ingests."²²² Placing such responsibility on the consumer, however, ignores contemporary realities.

Today, the very concept of food – where it comes from and what exactly it is – has undergone a radical change. Before the complex processing of food, consumers may have had a better idea of what their food contained. For example, a 1936 court resolved a case involving a chicken bone in a potpie by holding that since chicken bones are natural to chickens and the consumer had this knowledge, the consumer could not recover.²²³ In 2011, however, an urban consumer, far from any factory chicken farm, can eat something called chicken everyday without ever knowing that chickens have bones. The possibility exists for today's consumer to lack the knowledge that the products they eat called chicken actually come from a flightless fowl. Though perhaps this seems far-fetched, a recent television program²²⁴ made this possibility all too real. In one memorable scene, the host held up various fruits and vegetables to a group of elementary schoolers.²²⁵ The children failed to identify any of the food items in their natural state.²²⁶ Most troubling was that none of the children could identify a potato, yet all identified French fries.²²⁷

Perhaps the children in the television show were too young to make the connection between potatoes and French fries. Perhaps the example is too extreme to be useful. Perhaps the answer lies in the hamburger patty introduced at the beginning of this Note. What is it? If it contains the patented product from Beef Products Inc. processed with ammonia, and yet still potentially containing pathogen, it is not entirely ground meat at all. Some

²²² Lassiter, *supra* note 6, at 418.

²²³ *Mix v. Ingersoll Candy Co.*, 59 P.2d 144, 148 (Cal. 1936).

²²⁴ *Jamie Oliver's Food Revolution: Episode 2* (ABC television broadcast Mar. 26, 2010).

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

commentators have even suggested that calling hamburger “ground beef” may be factually inaccurate.²²⁸ If what Americans eat fails to conform to traditional definitions of food, and if Americans lack knowledge about what they are really consuming, there is an inherent injustice in a system that places all the risk on consumers and holds them liable for the safety of meat.

The purpose of this Note, however, is not to lambaste the meat industry as an evil entity bent on poisoning Americans by design. That would minimize an extremely complex problem and contribute little to any possible solutions. The current efficiency of the meat industry is no doubt a result of its response to consumer demand. At some point, any realistic solution must involve the consumer paying more for meat – paying for the true cost of production. Looking at the broader scope of the problem, another issue with potential regulatory solutions arises. On the surface, regulatory solutions seem obvious and workable – if we ignore the capture problem. USDA should inspect all meat products for pathogens. USDA should require slower processing of fewer animals per day. More inspectors should be on site inspecting carcasses. Further, the FDA could require that cattle be fed grass rather than corn to eliminate the ultimate source of *E. coli* in the supply chain.²²⁹ These changes would certainly increase meat safety and potentially raise the cost of the meat. The current system, however, would resist such regulations.

C. *The Current Systems Are Not Based on Relationships Among Stakeholders*

Changes in the regulations would likely fail because no relationship exists, or really can exist, between the consumer and the processors in the middle of the chain. And where no relationship exists between two entities, they are likely to pursue competing goals. The consumer will continue to demand cheap meat and the processors will continue to seek to increase profits. Regulation could potentially mitigate such competing goals if, as some commentators have suggested, consumers are willing to pay more for safer meat.²³⁰ Better regulation could help consumers verify the safety of the meat they purchase. Consumers are not, however, willing to pay for safety when they can’t verify it.²³¹ This inability leads to a breakdown in the market, and

²²⁸ See Moss, *supra* note 100, at A1 (“[A] single portion of hamburger meat is often an amalgam of various grades of meat from different parts of cows and even from different slaughterhouses.”).

²²⁹ See Stathopoulos, *supra* note 41, at 439 (proposing farm-level regulations requiring grass feeding).

²³⁰ See Hinderliter, *supra* note 105, at 761 (citing a survey which showed that seventy-one percent of Americans would pay more for meat if they knew it had been tested for Mad Cow disease); Stearns, *supra* note 40, at 253 (“Numerous studies have shown that consumers are willing to pay more for safer food.”).

²³¹ Helen Jensen & Laurian Unnevehr, *The Economics of Regulation and Information Related to Foodborne Microbial Pathogens*, in FOOD & CONSUMER ECON. DIV., U.S. DEPT.

consumers cannot vote with their dollars to encourage safety.²³² Yet surveys and studies suggesting that consumers will gladly pay more for safe meat do not comport with the current rate of meat consumption.²³³ Since the amount of meat consumed is unnecessary for health and wellbeing, the potential for unsafe meat should lead to a decrease in demand. Since demand has not decreased, consumers seem more than willing to take the risk imposed on them. The market actually seems to function well. Consumers, in fact, are significantly more motivated by price than by safety. If their focus were on safety, consumers could vote with their dollars to encourage safety by not purchasing untested meat.

Consumers will continue to put this price pressure on the meat companies, especially where no clear relationships exist between processors and consumers. Few consumers know who supplies them with the meat they crave. For example, in a crowded lecture hall during a corporate law class recently, only two students were familiar with Cargill, beyond simply recognizing the name. I admit to having been among those who did not know. Cargill is not just a massive meat company;²³⁴ it is a dominant company in the grain industry as well.²³⁵ Cargill has also been the subject of major *E. coli* recalls.²³⁶ Yet few consumers eating Cargill meat likely view Cargill as the source. On the other side, Cargill executives never see consumers pull Cargill meat from the market shelves, go home, and cook a family dinner.

V. STRICT LIABILITY FOR RETAILERS

Following the 2006 *E. coli* outbreak from tainted spinach, Michael Pollan clearly articulated the difference between consumers trusting their food to be safe and merely hoping for it to be safe:

The week of the *E. coli* outbreak, washed spinach was on sale at my local farmers' market, and at the Blue Heron Farms stand, where I usually buy

OF AGRIC, PUB NO. 1532, TRACKING FOODBORNE PATHOGENS FROM FARM TO TABLE: DATA NEEDS TO EVALUATE CONTROL OPTIONS 125, 126 (1995), available at <http://ageconsearch.umn.edu/bitstream/33549/1/mp951532.pdf>.

²³² See Stearns, *supra* note 40, at 254.

²³³ See *supra* notes 7-8 and accompanying text.

²³⁴ See William D. Heffernan, The Influence of the Big Three – ADM, Cargill and ConAgra, Address Given at Farmer Cooperatives in the 21st Century 4 (June 9-11, 1999) (transcript available at www.foodcircles.missouri.edu/coop.pdf) (identifying Cargill as one of four companies responsible for slaughtering more than three quarters of America's beef).

²³⁵ *Id.* at 2 (discussing Cargill's control of thirty-five to fifty percent of America's grain).

²³⁶ As recently as August 2010, Cargill recalled 8,500 pounds of ground beef tainted with *E. coli*. See Dan Flynn, *E. Coli Recalls Remain Low in 2010*, FOOD SAFETY NEWS (Dec. 14, 2010), <http://www.foodsafetynews.com/2010/12/e-coli-recalls-up-about-one-third-over-09-but-still-low/>. Most dramatically, in 2007, officials determined that Cargill was the source of *E. coli* tainted ground beef that infected a young woman causing permanent paralysis from the waist down. See Moss, *supra* note 100, at A1.

my greens, the spinach appeared to be moving briskly. I tasted a leaf and wondered why I didn't think twice about it. I guess it's because I've just always trusted these guys; I buy from them every week.²³⁷

Pollan's relationship with Blue Heron Farms stands in clear contrast to consumers' relationships with companies such as Natural Selections and Cargill. Pollan not only trusts in the safety of the product, but he knows exactly who to go to if there is a problem. Blue Heron Farms also has a clear incentive to give the man named Michael Pollan a quality product that is safe. After all, he buys from them weekly. An effective liability rule to increase the safety of the meat supply must center on this relationship between buyer and seller. Modern products liability law, however, has evolved away from this relationship.

A. *A Brief History of Strict Products Liability Law*

In early products liability law, the relationship between buyer and seller was reflected in a liability rule that required privity between buyer and seller, allowing the buyer to bring an action only against the seller.²³⁸ The first case involving strict products liability to overthrow the privity requirement was *Escola v. Coca Cola Bottling Co. of Fresno*,²³⁹ in which the Supreme Court of California held Coca Cola liable for a bottle that exploded in a waitress's hand.²⁴⁰ In a famous concurring opinion, Justice Roger Traynor stated, "[I]t should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings."²⁴¹ Justice Traynor recognized that relationships between producers and consumers were changing: "As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered."²⁴² Traynor's awareness accurately dealt with the consumer's needs for many products. With a Coke bottle or a car, the consumer can clearly trace the design defect back to the manufacturer. With *E-coli* contamination of

²³⁷ Pollan, *supra* note 27, at 17.

²³⁸ David G. Owen, *The Evolution of Products Liability Law*, 26 REV. LITIG. 955, 961 (2007) ("The development of products liability law in early America was retarded by the two powerful doctrines borrowed from England, *caveat emptor* and privity of contract.").

²³⁹ 150 P.2d 436 (Cal. 1944).

²⁴⁰ *See id.* at 440 (affirming the trial court's holding based on the negligence doctrine of *res ipsa loquitur*). Though the majority ruled under a negligence theory, Justice Traynor argued in his concurrence that strict liability was the proper theory. *See id.* at 441 (Traynor, J., concurring) ("It is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence.").

²⁴¹ *Id.* at 440.

²⁴² *Id.* at 443.

meat, however, such traceability is vastly more complex and may not in fact be possible at all.²⁴³

Traynor did not absolve the retailer but rather sought to streamline the system in which a consumer would sue the retailer who would, in turn, sue the manufacturer. In *Greenman v. Yuba Power Products, Inc.*,²⁴⁴ a majority of the California Supreme Court adopted Justice Traynor's view and held the manufacturer strictly liable.²⁴⁵ The American Law Institute adopted the result in *Greenman* in 1965 by drafting section 402A of the *Restatement (Second) of Torts*,²⁴⁶ which held sway over American products liability until 1980.²⁴⁷ In *Vandermark v. Ford Motor Co.*,²⁴⁸ however, the California Supreme Court reminded sellers that they too still faced strict liability, holding both the manufacturer and the seller strictly liable for a defective car.²⁴⁹ The court based its reasoning on the need to provide maximum protection to consumers and its belief in the solidity of the business relationship between the seller and the manufacturer.²⁵⁰ This reasoning, however, came with costs. Sellers faced litigation on two fronts: as defendants in consumer actions and as plaintiffs in bringing actions against manufacturers.²⁵¹ While both the California Supreme Court and section 402A subject sellers and manufactures to strict liability, such a system "is needlessly circuitous and engenders wasteful litigation. Much would be gained if the injured person could base his action directly on the manufacturer's warranty."²⁵² Despite *Vandermark's* and section 402A's applicability to both sellers and manufacturers, Justice Traynor's belief in the need to streamline the process worked too well, as more and more lawsuits sought to bring manufacturers into court.

²⁴³ See Stearns, *supra* note 40, at 254 (discussing the fact that the U.S. system for ground beef production system "is too big and complicated to be adequately controlled from farm to table").

²⁴⁴ 377 P.2d 897 (Cal. 1963).

²⁴⁵ See *id.* at 901 ("To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the [product] in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the [product] unsafe for its intended use.").

²⁴⁶ See Putnam v. Erie City Mfg. Co., 338 F.2d 911, 918-19 (5th Cir. 1964) (discussing the development of section 402A).

²⁴⁷ See Owen, *supra* note 238, at 977.

²⁴⁸ 391 P.2d 168 (Cal. 1963).

²⁴⁹ *Id.* at 172 ("[A] retailer engaged in the business of distributing goods to the public is . . . strictly liable in tort for personal injuries caused by defects in cars sold by it.").

²⁵⁰ *Id.* at 171 ("[S]trict liability on the manufacturer and the retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, for they can adjust the costs of such protection between them in the course of their continuing business.").

²⁵¹ See Frank J. Cavico, *The Strict Tort Liability of Retailers, Wholesalers, and Distributors of Defective Products*, 12 NOVA L. REV. 213, 229 (1987).

²⁵² *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 442 (Cal. 1944).

Two key developments in products liability following 1980 solidified the trend toward hauling manufacturers into courts and making it more difficult for consumers to succeed in foodborne illness litigation: (1) the development of the *Restatement (Third) of Torts*²⁵³ and (2) the Model Uniform Products Liability Act (MUPLA).²⁵⁴ The new *Restatement (Third)* changed little in terms of product defect liability. It did, however, change from a strict liability standard to a negligence standard for design defects and failure to warn.²⁵⁵ Though product defect liability technically remained strict, it now existed within a larger framework motivated more by negligence principles.²⁵⁶ Section 402A still generally governs products liability for defects; however, the *Restatement (Third)*'s negligence-based language suggests that strict products liability may one day go the way of the privity requirement.²⁵⁷ In the context of food safety, negligence principles only place higher burdens on consumers to succeed in litigation.

In 1979, a task force, formed because of concern about the ability of producers and retailers to obtain insurance and about diverse legal standards from state to state,²⁵⁸ published the final draft of the MUPLA.²⁵⁹ Section 105(A) of the MUPLA provides that non-manufacturer sellers will no longer face strict liability and will instead be held to a fault-based standard.²⁶⁰ “[P]roduct sellers shall not be subject to liability in circumstances in which they did not have a reasonable opportunity to inspect the product in a manner which would or should, in the exercise of reasonable care, reveal the existence of the defective condition.”²⁶¹ States did not universally adopt the MUPLA, though some developed statutes based on it.²⁶² It is beyond the scope of this

²⁵³ See Owen, *supra* note 238, at 979 (discussing the *Restatement (Third) of Torts* as part of a “shift away from examining why and how the new products liability doctrine should be expanded to why and how the doctrine should be curtailed”).

²⁵⁴ See Cavico, *supra* note 251, at 233-237 (1987) (discussing the Model Uniform Products Liability Act and how it limits an injured person’s ability to hold non-manufacturers liable).

²⁵⁵ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (1998) (dividing products liability into three classes – manufacturing defect, design defect, and failure to warn – and adopting a negligence-based rule for cases involving design defects and failure to warn); see also Owen, *supra* note 238, at 987 (“[L]iability in section 2 of the *Third Restatement* truly is strict for manufacturing defects but is based in negligence principles (but not explicitly negligence doctrine) for design and warning defects.”).

²⁵⁶ See Owen, *supra* note 238, at 978-89.

²⁵⁷ See *id.* at 985-89.

²⁵⁸ U.S. DEPARTMENT OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCTS LIABILITY: FINAL REPORT, at xliii-iv (1979).

²⁵⁹ Model Uniform Product Liability Act, 44 Fed. Reg. 62,714-50 (1979).

²⁶⁰ *Id.* at 62,726.

²⁶¹ *Id.*

²⁶² See Cavico, *supra* note 251, at 237 (“By the end of the 1970s, a majority of states had enacted product liability reform statutes, and many of these statutes have provisions dealing

Note to examine these statutes, but their presence furthers the point that the one entity with which the consumer has a relationship is often skipped over or even insulated entirely from liability. To combat the problem, lawyers have had to make creative arguments concerning the definition of “manufacturer” under state law in order to hold sellers strictly liable for foodborne illnesses.²⁶³

The driving impetus for states to shield non-manufacturing sellers from liability stemmed from the belief that manufacturers were in the best position to know and test for defects, and sellers act as mere “conduits of the product between the manufacturer and consumer.”²⁶⁴ While this may be true for products like cars, meat products thwart the reasoning. First, because of the complex production process, in the case of ground beef, for example, producers often cannot determine the source of contamination.²⁶⁵ Second, retailers often play a role in the production process: retailers often repack bulk meat and “[a]s a consequence any bacteria that enters the meat only during the slaughtering process – such as *E. coli* and salmonella – can be spread quickly throughout any bulk meat container and will contaminate the various smaller packages sold to consumers.”²⁶⁶ This practice of retailers also potentially plays into a processor’s arguments against strict liability since, under section 402A, the manufacturer is strictly liable only if “[the product] is expected to and does reach the consumer without substantial change in the condition in which it is sold.”²⁶⁷ Producers are, therefore, likely to argue that they should not be held strictly liable under this provision. They may, in fact, be right.²⁶⁸

Products liability law clearly did not evolve with an eye toward foodborne illness claims such as those from *E. coli* contaminated meat. In fact, the arguments for eliminating strict liability for retailers of other products counsel against such a move for meat retailers. Strict liability claims against producers lack the surety of other types of products liability claims that the proper defendant is in court, and retailers are often more than mere conduits. Even

with the liability of non-manufacturers.”); *supra* notes 199-202 and accompanying text (discussing Washington State’s products liability law).

²⁶³ Alex Ferguson, Comment, *Product Liability and Food in Washington State: What Constitutes Manufacturing?*, 32 SEATTLE U. L. REV. 741, 743 (“Because a non-manufacturing seller can be held liable only for negligence, whether the seller of an unsafe food product is a manufacturer under WPLA critically impacts the seller’s liability.”); *see also* *Almquist v. Finely Sch. Dist. No. 53*, 57 P.3d 1191, 1197 (Wash. Ct. App. 2002) (holding the school district liable as a manufacturer for meeting the requirement for physical alteration under the WPLA).

²⁶⁴ *See* Cavico, *supra* note 251, at 227.

²⁶⁵ *See supra* notes 23-31 and accompanying text.

²⁶⁶ Lassiter, *supra* note 6, at 434 (citing Pathogen Reduction; Hazard Analysis Critical Control Point (HACCP) Systems, 60 Fed. Reg. 6782 (1995)).

²⁶⁷ RESTATEMENT (SECOND) OF TORTS § 402A (1965); *see also supra* note 147 and accompanying text.

²⁶⁸ This Note does not discuss whether sellers ought to be able to bring strict liability claims against processors or whether such claims can only be based in negligence.

where meat is not repackaged, the pathogen can spread through other mishandling problems such as storing at improper temperatures.

B. *Holding Retailers Strictly Liable for the Safety of the Meat They Sell*

Courts should hold retailers strictly liable for the *E. coli*-tainted meat they sell. In order to do this effectively, however, they must first take the reasonable-consumer-expectations test away from the jury and hold as a matter of law that consumers should not reasonably expect *E. coli* in meat. This is consistent with both the modern relationship consumers have with food, discussed in Part IV, and the ruling by the *Kriefall* court.²⁶⁹ Although the *Kriefall* court held that the processor's preemption claims failed, the court did suggest that the processor faced liability because *E. coli* should not reach the consumer at all.²⁷⁰ In cases where it does reach the consumer, "it may be said that the illness was 'caused' by improper handling. Yet disease would not have occurred if the pathogen had not been present in the raw product in the first place."²⁷¹ Based on this reasoning, consumers should not reasonably expect *E. coli* in their meat.

Applying strict liability to meat retailers is consistent with the line of reasoning discussed by Justice Traynor in *Escola, Greenburg, and Vandermark*.²⁷² As the court in *Vandermark* clearly stated, extending strict liability to manufactures did not leave retailers off the hook.²⁷³ While state legislatures may be reluctant to change statutes insulating retailers from strict liability, courts should broaden the scope of activities that fall under manufacturing²⁷⁴ and further employ exceptions based on the plaintiff's inability to locate the proper defendant manufacturer.²⁷⁵

1. Bringing the proper defendant to court

Holding retailers strictly liable has distinct advantages over the current system. First, it alleviates some of the problems consumers face in successfully litigating a foodborne illness claim. Though consumers will still face causation problems, the proper defendant will be in court. This might seem unfair to retailers, but for too long they have been active participants in a system that gladly passes the risk of *E. coli* infection on to the consumer. The

²⁶⁹ Estate of Kriefall *ex rel.* Kriefall v. Sizzler USA Franchise, Inc., 665 N.W.2d 417, 421 (Wis. Ct. App. 2003).

²⁷⁰ *Id.* at 431 ("[Microbial] contamination is largely preventable." (quoting Pathogen Reduction, 61 Fed. Reg. 38,806, 38,837 (July 25, 1996))).

²⁷¹ *Id.* at 433 (quoting Pathogen Reduction, 61 Fed. Reg. 38,806, 38,966).

²⁷² See *supra* Part V.A.

²⁷³ *Vandermark v. Ford Motor Co.*, 329 P.2d 168, 171 (Cal. 1963) (discussing retailers' participation in a distribution chain that provides consumers with dangerous products); see also *infra* note 276 and accompanying text.

²⁷⁴ For the contrasting narrow view, see *supra* notes 200-202 and accompanying text.

²⁷⁵ See *infra* notes 290-293 and accompanying text.

Vandermark court took such a position on sellers: “Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products.”²⁷⁶ The current system has eroded the consumer’s only direct relationship along the supply chain, thus reducing trust to mere hope for safe meat. Strict liability at this end of the chain bears the hope of re-cementing the retailer-consumer relationship. Again, the court in *Vandermark* made this clear: “[Retailers] may be in a position to exert pressure on the manufacturer to that end; the retailer’s strict liability thus serves as an added incentive to safety.”²⁷⁷

2. Providing incentives for improving upstream safety

In keeping with *Vandermark*’s articulation of the relationship between sellers and manufacturers, holding retailers strictly liable for meat safety provides incentives for improving meat safety upstream. Retailers have significantly more bargaining power with processors than do consumers since, at the very least, a direct business relationship already exists.²⁷⁸ This was the rationale behind the 1990 Food Safety Act in Britain.²⁷⁹

[The act] extended legal liability for the safety and standards of food to all downstream firms in the food chain, regardless of where the food safety problem originated. This meant that a food retailer could be held liable for selling food that was tainted by the actions of an upstream food manufacturer if the retailer could not show that they had taken all reasonable precautions²⁸⁰

This legislation gave retailers “much stronger incentive[s] to scrutinise the actions and products of food manufacturers.”²⁸¹

Examples of the type of incentives that the British law sought to encourage have, in fact, occurred in the United States. Following the 1993 *E. coli* outbreak in the Northwest,²⁸² Jack in the Box restaurants faced a serious public image problem. They had betrayed their consumers’ trust and needed to reestablish good relationships with their customers. As a result of the outbreak, Jack in the Box decided to purchase meat only from processors that tested for *E. coli*, and it required slaughterhouses and processors to allow Jack in the Box employees to conduct on-site inspections.²⁸³ Other large retailers

²⁷⁶ *Vandermark*, 329 P.2d at 171.

²⁷⁷ *Id.* at 171-72.

²⁷⁸ *Id.*

²⁷⁹ See Loader & Hobbs, *supra* note 221, at 687-88.

²⁸⁰ *Id.* at 687.

²⁸¹ *Id.* at 688.

²⁸² See *supra* notes 64-65 and accompanying text.

²⁸³ Philip Brasher, *USDA Reviews Regulation for Safe Meat*, DES MOINES REG., July 28, 2002, at 1A (“After an *E. coli* outbreak killed four customers of Jack in the Box restaurants

and restaurants have followed suit.²⁸⁴ Clearly, developing such relationships with upstream suppliers was easier for companies like Jack in the Box, who have a tremendous amount of bargaining power. But this does not preclude smaller retailers from developing such relationships or cutting them off, however difficult. “Generally speaking, US food retailers have less market power vis-à-vis manufactures compared to the UK”²⁸⁵ This difference, however, may reflect both the practices of focusing food safety regulation on processors²⁸⁶ and limiting the liability of retailers in foodborne illness claims.²⁸⁷ Interestingly, while the focus of both regulation and litigation is on processors, “there are moves towards closer supply chain relationships between processors and agricultural producers . . . in the US.”²⁸⁸ In other words, the liability of processors forces them to develop better relationships with above-chain growers. Thus, shifting the liability focus onto retailers for consumer illness may encourage relationships at all levels.

Apart from encouraging relationships that promote safety along the supply chain, strict liability for retailers will also help protect consumers where relationships along the supply chain cannot be determined or are fragmented. For a product such as ground beef, there is no single manufacturer, and determining the relationship among the various producers can be extremely complex.²⁸⁹ The lack of clear relationships between seller and manufacturer is akin to the recent problem with injury-causing products imported from China.²⁹⁰ Just as consumers face enormous barriers in litigating foodborne illness claims under modern liability rules, they face similar barriers recovering for injuries inflicted by Chinese products.²⁹¹ Following the reasoning

in 1993, the burger chain came up with the toughest safety rules in the industry for its meat suppliers.”).

²⁸⁴ *Id.* (stating that McDonald’s restaurants and Costco stores have implemented their own standards and testing procedures for their meat suppliers).

²⁸⁵ Loader & Hobbes, *supra* note 221, at 697.

²⁸⁶ *See supra* note 221 and accompanying text.

²⁸⁷ *See supra* note 198.

²⁸⁸ Loader and Hobbes, *supra* note 221, at 697.

²⁸⁹ *See Moss, supra* note 100, at A1 (“[H]amburger meat is often an amalgam of various grades of meat from different parts of cows and even from different slaughterhouses.”) The *E. coli*-tainted Cargill meat that caused paralysis in a young woman in 2007 was such an amalgam, coming from slaughterhouses in Nebraska, Texas, and Uruguay and further processed in South Dakota by Beef Products Inc.’s method for distilling fatty byproducts into a useable additive. *Id.*; *see also supra* notes 32-37 and accompanying text (discussing Beef Products Inc.’s ammonia processing method).

²⁹⁰ *See generally* Adam Feeney, Note, *In Search of a Remedy: Do State Laws Exempting Sellers from Strict Product Liability Adequately Protect Consumers Harmed by Defective Chinese-Manufactured Products?*, 34 J. CORP. L. 567, 568 (2009) (examining the “intersection” of the recent crisis of defective Chinese products with state laws insulating retailers from strict products liability).

²⁹¹ *Id.* at 576. In litigating a claim for injury caused by a defective Chinese product,

articulated in *Vandermark*, at least one commentator has argued that sellers who willingly engage in selling Chinese goods to the public should be held strictly liable for any injuries caused by product defects.²⁹² Besides creating incentives to foster relationships between sellers and manufacturers (where that is even possible in the context of Chinese products), holding retailers who sell Chinese products strictly liable will give sellers “an incentive to be more discriminating and exercise more diligence when choosing their supplier.”²⁹³ Larger American meat sellers have, in fact, engaged in this very behavior purely out of desire to protect their public images.²⁹⁴ In light of the problems associated with litigating foodborne illness claims, meat retailers occupy a similar position as retailers who sell Chinese products. Thus, the same logic for applying strict liability resonates in the meat safety context as well.

3. Raising the cost of meat

Holding retailers strictly liable will likely raise the cost of meat since retailers will pass on the increased safety and liability costs to the consumers. Where fast food giants such as Jack in the Box are concerned, consumers may notice very little in the way of increased costs. According to Jack in the Box, its increased testing only raised the cost of the meat by half a cent per pound.²⁹⁵ One Jack in the Box official stated, “We’ve demonstrated that we can do it efficiently and effectively.”²⁹⁶ While this might be the case, it might be worth inquiring into how the company struck the balance between being efficient in making a profit and being effective in ensuring safety. Is it truly safe? Or is it just safer? If Jack in the Box faced a strict liability claim as the sole defendant, would it still say that the meat is safe? Furthermore, because Jack in the Box prepares the meat for consumers, it can further mitigate foodborne illness problems through preparation and cooking policies. A meat retailer, however, cannot engage in such mitigation. Consequently, the cost of potential liability passed on to the consumer will likely be higher for retailers than for restaurants.

Some critics might argue that holding retailers strictly liable for meat safety will drive smaller retailers out of business since they may be unable to obtain

consumers face such challenges as locating the company, discovering adequate records, finding insufficient company assets, and overcoming jurisdictional problems. *Id.* Suing Chinese companies has been described as “spitting into the wind.” Xiyun Yang, *Liability Lawyers Struggle to Pierce the Chinese Curtain*, WASH. POST, July 28, 2007, at D1.

²⁹² Feeney, *supra* note 290, at 583 (arguing that in cases involving defective Chinese products, state laws insulating sellers from strict liability “potentially create situations where the injured consumer may not have an effective remedy against the seller or manufacturer,” and therefore such laws should be changed).

²⁹³ *Id.* at 584.

²⁹⁴ See *supra* note 283-284 and accompanying text.

²⁹⁵ Brasher, *supra* note 283, at 1A.

²⁹⁶ *Id.*

the necessary liability insurance or to charge enough for the meat to pass the costs on to consumers.²⁹⁷ While there is merit to the argument, and small retailers may face such a threat, we must keep in mind the scope of the *E. coli* problem from a policy perspective. Consumers do not need to consume as much meat as they do. It might take meat's disappearing from the shelves of local markets or its high cost to engage consumers as part of the solution, rather than as gluttonous eating-machines. On the other hand, such a liability rule may encourage better relationships between sellers and consumers. This possibility is evident in the farmers' market context where sellers are subject to strict liability,²⁹⁸ yet strong relationships based on trust exist between consumers and sellers.²⁹⁹

4. Developing alternative markets

A fourth potential benefit is the development of alternative food markets.³⁰⁰ I do not mean to diminish the argument that strict liability may force smaller retailers and restaurants out of business by driving prices in such establishments too high, but the process of homogenization began long ago. Four companies supply most of the meat consumed in the United States,³⁰¹ and increasingly supermarket and restaurant chains dot the landscape. Today, talk of "the little guys" in many industries exists only in the realm of campaign slogans. Further, there may be a need to investigate the extent to which larger companies have made arguments that regulations and liability rules will drive out smaller companies in order to promote their own industry dominance.³⁰²

²⁹⁷ See Owen, *supra* note 238, for a discussion of insurance and strict liability claims against product sellers. See also Baird, *supra* note 148, at 49 (discussing limited availability of products liability insurance for farmers' markets).

²⁹⁸ See Baird, *supra* note 148, at 59-60 (discussing liability of sellers at farmers' markets who are both processors and sellers).

²⁹⁹ See Pollan, *supra* note 27, at 17 (discussing a farmers' market seller from whom the writer buys spinach and concluding that he is unworried about foodborne illness since he knows the seller, trusts the seller, and knows exactly how the spinach traveled from field to market).

³⁰⁰ See *id.* (discussing the problems of poor traceability and trust in our massive, hyper-efficient, centralized food supply system, and, in reference to farmers' markets, concluding that "[f]ortunately, this is not the only food chain we have").

³⁰¹ See *supra* note 219.

³⁰² See Casey, *supra* note 80, at 151 (discussing small processors' objections to USDA testing proposals under HACCP); Cavico, *supra* note 262, at 231 (discussing the problem of rising prices of liability insurance and its impact on small firms). For an example of the phenomenon of large entities arguing for "the little guys," see Marjorie E. Kornhauser, *Shaping Public Opinion and the Law: How a "Common Man" Campaign Ended a Rich Man's Law*, 73 L. & CONTEMP. PROBS. 101, 102 (2010) (discussing the campaign against and temporary repeal of the 2001 estate tax). The campaign against the estate tax was driven by a few very wealthy families who focused on the effect the tax would have on regular Americans and in particular "quintessential American institutions – family farms

Such an investigation is beyond the scope of this Note, yet looking at the magnitude of the problem, another option presents itself. Smaller producers should work to take advantage of emerging local food markets.

Local food markets greatly reduce the complexity of the production chain and allow for the relationship between seller and consumer, missing from today's centralized food production system, to develop in ways that encourage safety.³⁰³ Here, the new tradeoff consumers need to make, paying more for increased safety, becomes a fundamental feature of doing business. Furthermore, such small, local producers may struggle less in obtaining liability insurance because they can demonstrate that their practices lead to safe meat. In the health and auto insurance markets, for example, consumers pay reduced premiums for healthy lifestyle choices and a strong safety record. As another approach, in the farmers' market context, sellers have "form[ed] statewide . . . associations that work to negotiate better rates for products liability insurance."³⁰⁴

The creation of this new market should involve small retailers who sell meat adopting a model more akin to the farmers' market model and competing on that level rather than trying to compete with large chain retailers. Earlier in this Note, I suggested that despite commentators' claims of market failure due to information asymmetry, the market actually functions efficiently in supplying consumers' voracious demand for cheap meat. This is true because both the current regulatory environment and modern liability rules have operated to create and entrench a single market, driven by the need to supply a tremendous amount of meat at a minimal cost. The creation of alternative markets will, for perhaps the first time, demonstrate to consumers the choices among competing meat sources that extend beyond the cheapest meat available. According to the market-failure analysis, consumers will not pay for what they cannot verify, but they would gladly pay more for safer meat.³⁰⁵ Because today's consumer in the typical market lacks the ability to choose for safety or overall healthful qualities of beef, the best option is the cheapest, thus driving competition in the industry to reduce costs at the expense of safety. The goal of a secondary meat market based on a trusting relationship between seller and consumer and cemented by strict liability for the seller can work to provide the consumer the choice she has lacked. She can now confidently pay more for safe meat.

CONCLUSION

From the single hamburger patty that we started with at the beginning of this Note, we have covered such topics as history, medicine, animal husbandry, political science, environmental science, and economics. What's more, we

and small businesses – the vast majority of whom never pay any estate tax." *Id.* at 102.

³⁰³ See Pollan, *supra* note 27, at 17.

³⁰⁴ Baird, *supra* note 148, at 65.

³⁰⁵ See *supra* note 230 and accompanying text.

have seen that meat safety in the United States is a vast problem of extreme and ever-increasing complexity. Neither regulation nor liability rules have kept pace. Furthermore, attempts to improve both have focused only on slaughterhouses and processors, ignoring the ends of the supply chain, the livestock growers and the retailers. Also, in misunderstanding the role of consumers, regulations and liability rules have essentially placed all the risk and liability associated with eating meat on the consumers themselves.

This Note suggests that any attempt to make the meat supply safer must focus on the relationships between the stakeholders along the chain. Since consumers' choices drive demand, the relationship that should be focused on most is that between consumer and retailer. Yet the current system focuses least on that relationship. To better align the system, the first step is to implement a liability rule that pushes harder from the end of the chain and holds retailers strictly liable to consumers for the safety of meat.