

**THE FOOD-SAFETY FALLACY:  
MORE REGULATION DOESN'T NECESSARILY  
MAKE FOOD SAFER**

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**I. BACKGROUND**

Last year President Barack Obama signed into law a sweeping update of the nation's food-safety system.<sup>1</sup> Many commentators have called the new legislation the most important update of Food & Drug Administration (FDA) authority in nearly seventy-five years.<sup>2</sup>

Just what does the new \$1.4-billion law provide taxpayers? The general consensus among supporters of the Food Safety Modernization Act (FSMA) is that it will both give the FDA more power to crack down on food-safety scofflaws and decrease the incidence of foodborne illness across the country.<sup>3</sup>

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1 FDA Food Safety Modernization Act, Pub. L. No. 111-353, 124 Stat. 3885 (2011).

2 See Dan Flynn, *Food Policy Editors Want Single Food Safety Agency*, FOOD SAFETY NEWS (Feb. 23, 2011), <http://www.foodsafetynews.com/2011/02/food-policy-editorial-says-single-food-safety-agency-needed/>. Some commentators are already calling for still more federal spending and authority in the area of food safety. See Mark Bittman, *A Food Manifesto for the Future*, N.Y. TIMES OPINIONATOR (Feb. 1, 2011, 10:28 PM), <http://opinionator.blogs.nytimes.com/2011/02/01/a-food-manifesto-for-the-future> (calling for cuts in certain subsidies and the dissolution of the U.S. Department of Agriculture, while suggesting increased subsidies in other areas, more FDA authority, the banning of certain food-production methods, and spending and tax increases).

3 See Press Release, Sen. Carl Levin, Senate Floor Statement on the FDA Food

The Act will almost certainly accomplish the former by providing the agency with not just tens of millions of additional dollars to spend each year, but also new ways to spend the money, including the ability to hire thousands of new inspectors with new powers.<sup>4</sup> But was FDA power and authority really an issue?

Prominent food-safety advocates from Marion Nestle to Michael Pollan over the years have painted the FDA as a neutered agency powerless to stop the excesses of large food producers.<sup>5</sup> Similarly, a joint Institute of Medicine/National Research Council food-safety report issued in 2010 concluded that the FDA needed more power,<sup>6</sup> a claim the agency immediately embraced.<sup>7</sup> Others, though, chafe at this characterization. One critic claims the FSMA will “waste billions of taxpayer dollars without making our food supply any safer.”<sup>8</sup>

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Safety Modernization Act (Nov. 30, 2010), *available at* <http://levin.senate.gov/newsroom/speeches/speech/senate-floor-statement-on-the-fda-food-safety-modernization-act>; Josh Ozersky, *The Food-Safety Bill: Flawed, and Needed*, TIME (Dec. 8, 2010), <http://www.time.com/time/nation/article/0,8599,2035806,00.html>; Sen. Harry Reid, *Food Safety Modernization Act: Why Its Passage Matters*, HUFFINGTON POST (Nov. 30, 2010, 5:25 PM), [http://www.huffingtonpost.com/sen-harry-reid/food-safety-modernization\\_b\\_790069.html](http://www.huffingtonpost.com/sen-harry-reid/food-safety-modernization_b_790069.html).

- 4 See David Bennett, *FDA Gets New Powers with Food Safety Bill*, DELTA FARM PRESS (Dec. 22, 2010), <http://deltafarmpress.com/government/fda-gets-new-powers-food-safety-bill> (“[T]he food safety bill will allow the FDA to hire some 2,000 new inspectors.”).
- 5 See Marion Nestle, *If I Had a Food Safety Magic Wand*, FOOD POLITICS (Jan. 14, 2011), <http://www.foodpolitics.com/2011/01/if-i-had-a-food-safety-magic-wand/>; Michael Pollan & Eric Schlosser, Op-Ed., *A Stale Food Fight*, N.Y. TIMES, Nov. 28, 2010, at A25.
- 6 Press Release, The Nat’l Acad., *FDA Should Adopt Risk-Based Approach to Food Safety and Take Steps to Prevent Foodborne Illnesses More Effectively* (June 8, 2010), <http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=12892>.
- 7 See Mary Clare Jalonick, *FDA Needs to Make Changes, Report Finds*, BOSTON.COM (June 9, 2010), [http://www.boston.com/news/nation/washington/articles/2010/06/09/fda\\_needs\\_to\\_make\\_changes\\_report\\_finds](http://www.boston.com/news/nation/washington/articles/2010/06/09/fda_needs_to_make_changes_report_finds) (quoting FDA commissioner Margaret Hamburg, who claims “the report clearly highlights the need for enactment of pending legislation that provides much needed authorities and resources to assist in our efforts to ensure the safety of our nation’s food supply”).
- 8 Gregory Conko, *More FDA Authority Won’t Improve Food Safety*, FORBES (Dec.

Who will see their competing vision proven correct—critics or supporters of the new law? While only the future will tell, we can and should look to the past to predict whether costly government efforts to make our food safer will succeed. In hindsight, the FDA's own record—and those of other federal agencies—shows that food-safety regulations often rest on factually erroneous premises<sup>9</sup> and, consequently, can sometimes be so counterproductive that they may tend to actually make consumers *less* safe. Examples of this phenomenon exist throughout history, and these examples will serve as the focus of this article.<sup>10</sup>

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2, 2010), <http://www.forbes.com/2010/12/02/fda-regulation-food-safety-opinions-contributors-gregory-conko.html>. Amazingly, some who echoed Conko's opposition to the FSMA supported its passage in spite of predicting it would be ineffective and a waste of money. *See, e.g.,* Ozersky, *supra* note 3 ("Yes, it will be expensive, and yes, it might not help much. But I am behind the bill, and want it to pass, however impotent and futile it may be. We need more regulation in our food supply, and in America generally, not less.")

9 Policies that are based on flawed science and that negatively impact public health are by no means confined to the area of food safety. For example, the FDA recently attempted to ban electronic cigarettes. *See* Don Jeffrey, *FDA Loses Appeal, Can't Regulate E-Cigarettes as Drug*, BLOOMBERG (Dec. 7, 2010), <http://www.bloomberg.com/news/2010-12-07/fda-can-t-regulate-electronic-cigarettes-as-drug-u-s-appeals-court-rules.html>. Public-health researchers paint electronic cigarettes as a safer alternative to traditional cigarettes. *See Electronic Cigarettes Hold Promise as Aid to Quitting*, BOS. UNIV. SCH. OF PUB. HEALTH, [http://sph.bu.edu/index.php?option=com\\_insidernews&categoryid=94&sectid=15&articleid=3497&task=view&id=623&deptid=&Itemid=617365](http://sph.bu.edu/index.php?option=com_insidernews&categoryid=94&sectid=15&articleid=3497&task=view&id=623&deptid=&Itemid=617365) (last visited June 24, 2011) (quoting a study by Prof. Michael B. Siegel, M.D., who notes that banning electronic cigarettes "would invariably result in many ex-smokers returning to cigarette smoking . . . [and] would substantially harm the public's health"). In another notorious example of federal policies that diminished the public health, the federal government only in 2010 lifted its morally shameful and scientifically indefensible twenty-two-year ban on admitting immigrants to the United States who were known to carry the HIV virus or to have AIDS. *See US Lifts HIV/AIDS Immigration Ban*, BBC (Jan. 4, 2010), <http://news.bbc.co.uk/2/hi/americas/8438865.stm>. While there is no evidence the ban made Americans safer, it no doubt harmed those seeking to travel to the United States in search of medical care.

10 One recent example, which was used to drive home the need for more FDA power and funding during the FSMA debate, involved data pertaining to the high incidence of foodborne illness in America. As Senator Carl Levin emphasized during debate over the bill's enactment: [E]ach year, 76 million Americans are sickened by food-borne illness. More than 300,000 become so

Section II of this article describes key differences between “old” and “new” conceptions of public health, and the evolving relationship of these terms to food safety. Section III gives several examples of food-safety regulations that made consumers *less* safe, rather than safer. Finally, Section IV suggests a return to “old” public health as a meaningful alternative to increased federal spending and authority in the area of “new” public health.

## II. FOOD SAFETY: OLD V. NEW

When I refer to “food safety,” I am discussing food matters that reside within the realm of public health. But because the kingdom of public health has evolved and expanded over the last couple of decades—reaching beyond what Prof. Richard Epstein refers to as “old” public health to also include what he labels “new” public health<sup>11</sup>—a modern definition of “food safety” requires a consideration of both the *old* and the *new*.

To distinguish between *old* and *new* public health, Epstein notes that *old* seeks chiefly to prevent the spread of “communicable diseases” between and among unsuspecting victims.<sup>12</sup> Not coincidentally, the *old* public health constituted a chief focus and mission of the FDA at its formation (e.g., protecting public health by seizing tainted foods that were traveling in the stream of interstate commerce).<sup>13</sup>

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sick they must be hospitalized. More than 5,000 die of their illness. . . . The situation cries for action, which is why I support passage of the legislation we are now considering, the FDA Food Safety Modernization Act. Levin, *supra* note 3. As Congress considered passage of the FSMA, the Centers for Disease Control and Prevention (CDC) reduced its estimates of both deaths and illnesses by approximately forty percent, claiming the revised numbers more accurately reflected the burden of foodborne illness among the U.S. population. See Maggie Fox, *Tainted Food Sickens 48 Mln Each Year: CDC*, REUTERS (Dec. 15, 2010), <http://www.reuters.com/article/2010/12/15/us-food-sickness-id-USTRE6BE4CG20101215>.

- 11 See generally Richard A. Epstein, *In Defense of the “Old” Public Health: The Legal Framework for the Regulation of Public Health* 12 (Univ. of Chi. Inst. for Law & Econ., Working Paper No. 170, 2002), available at [http://ssrn.com/abstract\\_id=359281](http://ssrn.com/abstract_id=359281) (“[T]he new definition sees public health as all measures to protect individual or collective health that are not involved with the treatment of given individuals within a medical setting.”).
- 12 *Id.* at 4 (noting that “old” public health focuses on “matters of communicable diseases and sanitation”).
- 13 See, e.g., *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, 409

New public health, on the other hand, does not concern itself with the spread of communicable diseases. Rather, writes Epstein, it “reaches to any matter of general public interest or concern,” such as people’s choice to eat certain foods that are not adulterated—at least not in any traditional, scientific, or “old” sense of the word.<sup>14</sup>

Evidence of regulatory mission creep—with agencies shifting foci from *old* to *new*—abound. The CDC presents one good example. Even acknowledging that the agency is now the “Centers for Disease Control and Prevention,” one would need to stretch the limits of the English language beyond the breaking point to determine what “disease” the CDC is trying to either “control” or “prevent” when it focuses (as it does) on topics like seat belt use<sup>15</sup> or marriage.<sup>16</sup>

Notably, the FDA itself acknowledges that its own concept of “food safety” transcends the *old* and embraces the *new*. For example, on its *Keep Food Safe* blog, located at FoodSafety.gov, the agency describes its recent campaign against beers that contain caffeine, alleging that caffeine is—in only certain tortured and specific instances—unsafe when appearing in beer.<sup>17</sup>

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(1914) (holding the Pure Food and Drugs Act of 1906 “upon its face shows that the primary purpose of Congress was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated foods”). Early critics of FDA mission creep had been some of the 1906 Act’s biggest supporters. See, e.g., HARVEY W. WILEY, *THE HISTORY OF A CRIME AGAINST THE FOOD LAW* 354 (Arno Press 1976) (1929) (lamenting, as the architect of the Act, that what he saw as the express purpose of the Act—to protect the public health—had taken a back seat to other concerns almost at the Act’s inception). The FDA acknowledges this mission creep in its own publications. See *About FDA: History*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/AboutFDA/WhatWeDo/History/default.htm> (last visited Jan. 24, 2012) (“The FDA and its responsibilities have undergone a metamorphosis since 1906.”).

14 See Epstein, *supra* note 11, at 2.

15 See *Seat Belts: Every Person, Every Seat, Every Trip*, CTNS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/Features/VitalSigns/SeatbeltSafety> (last updated Jan. 4, 2011).

16 See *Marriage and Divorce*, CTNS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/nchs/fastats/divorce.htm> (last updated Oct. 5, 2010).

17 See Catherine L. Copp, *What’s Up with the FDA and Caffeinated Alcoholic Beverages?*, FOODSAFETY.GOV (Dec. 2, 2010), <http://www.foodsafety.gov/blog/cabs.html> (last visited Feb. 26, 2011); see also *infra* Part III.D.

### III. POKED! SNIFFED! BANNED!

Examples abound throughout history of well-intentioned food laws that made consumers less safe. France once banned potatoes, as many early food-safety advocates considered them to be poisonous and believed they caused leprosy.<sup>18</sup> The “poke-and-sniff” method—employed for decades by the U.S. Department of Agriculture (USDA) to inspect meats so as to *prevent* foodborne illness—was, instead, probably the best means of *transmitting* foodborne illness.<sup>19</sup> In these and other instances, costly federal action did not improve public health but instead likely made consumers less safe.

#### *A. Historical Food-Safety Bans: Potatoes, Tomatoes, & Café au Lait*

In his influential *Notes on the State of Virginia*,<sup>20</sup> Thomas Jefferson strongly refutes the notion that government has a role to play in determining what we can and cannot eat. And he does so in part by expressing umbrage toward a contemporary French food-safety law.

The legitimate powers of government extend to such acts only as are injurious to others. . . . Was the government to prescribe to us our medicine and diet, our bodies would be in such keeping as our [British-subjugated] souls are now. Thus in France the emetic was once forbidden as a medicine, and the potato as an article of food.<sup>21</sup>

France—which lends its name to the “French fry”—once banned potatoes. Why? The potato ban was based on food-safety concerns, which centered on the spud’s purported ability to cause “not only leprosy, but

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18 See discussion *infra* Part III.A.

19 See discussion *infra* Part III.B.

20 THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, reprinted in EARLY AMERICAN WRITING 437 (Giles Gunn ed., Penguin Books 1994) (1785).

21 *Id.* at 440-41.

also syphilis, narcosis, scronfula, early death, sterility [sic], and rampant sexuality.”<sup>22</sup> For these reasons, France banned eating potatoes in 1748.<sup>23</sup>

It took the efforts of one Frenchman whose life had been *saved* by the potato to reverse the ban.<sup>24</sup> Antoine-Augustine Parmentier, a French military pharmacist captured in the Eighteenth Century by the Prussian army, had been forced to live for years on a ration of nothing but potatoes.<sup>25</sup> Soon after Parmentier returned to France upon his release, he found the country suffering from food shortages and famine.<sup>26</sup> Parmentier appealed on behalf of the potato to both the nobility and peasants—by, for example, planting the spud on public land and posting guards nearby so as to make the potato seem like a valuable commodity—which helped the potato become a staple in France.<sup>27</sup> There is no telling how many lives Parmentier saved through his efforts in times of famine to both legalize and popularize potatoes.

While the potato ban may have had dire consequences in France, it hardly stands alone as an example of a needless ban. The mixing of milk and coffee was once falsely thought to cause leprosy,<sup>28</sup> while the tomato was once widely considered to be poisonous.<sup>29</sup>

If these food-safety scares seem quaint and steeped in folklore, perhaps it is because of their antiquity. But more recent—even current—actions by a host of federal agencies still conjure images of a pseudo-scientific approach to ensuring the food we eat is safe. These examples are ones we might have thought (and hoped) had been abandoned long ago.

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22 See Linda Stradley, *Potato—History of Potatoes*, WHAT’S COOKING AM. (2004), <http://whatscookingamerica.net/History/PotatoHistory.htm>.

23 AMY JO EHMAN, PRAIRIE FEAST 213 (2010).

24 See Daven, *The History of French Fries*, TODAY I FOUND OUT (Sept. 23, 2010), <http://www.todayifoundout.com/index.php/2010/09/the-history-of-french-fries/> (describing the potato’s interesting voyage from poison to food).

25 *Id.*

26 See LARRY ZUCKERMAN, THE POTATO 82 (1999) (describing how an award-winning essay on the potato that Parmentier wrote during France’s 1770 famine brought him to the attention of King Louis XV).

27 See *id.* at 83 (reporting that Parmentier used this “ruse” to help popularize the potato among the peasant class).

28 See, e.g., STEWART LEE ALLEN, THE DEVIL’S CUP 25 (1999) (noting the beliefs of ancient Muslim alchemists about the dangers of mixing coffee and milk).

29 See, e.g., KEN ROBBINS, FOOD FOR THOUGHT: THE STORIES BEHIND THE THINGS WE EAT 27 (2009).

### *B. The USDA: Poke-and-Sniff*

The Federal Meat Inspection Act,<sup>30</sup> passed in June 1906, arrived on the heels of the publication of Upton Sinclair's novel *The Jungle*.<sup>31</sup> While Sinclair's book was a work of fiction—and the author wrote the work not to advocate in favor of food-safety reforms, but rather in support of socialism and the working class<sup>32</sup>—the novel's description of filthy Chicago stockyards and vile meat processing conditions hit a nerve both with the public and elected officials.<sup>33</sup>

The Federal Meat Inspection Act required USDA meat inspectors to be in place during working hours at all meatpacking plants and other facilities.<sup>34</sup> The “poke-and-sniff”<sup>35</sup> method very ably describes the approach inspectors employed to determine whether a given piece of meat was safe. Poke-and-sniff often entailed having an inspector “poke” a piece of meat with a rod and “sniff” the rod to determine, in the inspector's opinion, whether the meat contained pathogens.<sup>36</sup> This method meant that the hands, eyes, and noses of inspectors were to be literally the front line of the USDA's food-safety regime.

30 Ch. 3913, 34 Stat. 674 (1906).

31 UPTON SINCLAIR, *THE JUNGLE* (1906).

32 *Cf.* UPTON SINCLAIR, I, *CANDIDATE FOR GOVERNOR: AND HOW I GOT LICKED* 5 (1935) (recounting Sinclair's own numerous forays into candidacy for elected office on the Socialist Party ticket).

33 Eric Schlosser, *Foreword*, in UPTON SINCLAIR, *THE JUNGLE* (Penguin Enriched eBook Classic 2008) (1906) (“President Roosevelt used the controversy and public outrage inspired by *The Jungle* to seek passage of two important pieces of legislation: the Pure Food and Drugs Act and the Meat Inspection Act. Both promised an unprecedented expansion of federal power[.]”).

34 21 U.S.C. § 606(a) (1907) (requiring the “examination and inspection of all meat food products prepared for commerce in any slaughtering, meat-canning, salting, packing, rendering, or similar establishment”).

35 *See Evaluating the Inspection System—What Is HACCP?*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/meat/evaluating/haccp.html> (last visited Jan. 24, 2012).

36 *Id.* (“Inspectors would literally touch, smell, and prod the meat to test its wholesomeness.”); Hana Simon, Comment, *Food Safety Enforcement Enhancement Act of 1997: Putting Public Health Before the Meat Industry's Bottom Line*, 50 ADMIN. L. REV. 679, 681, 687 (1998) (using the fanciful term “organoleptic inspection” to describe poke-and-sniff).

The most frequent criticism lobbed against the poke-and-sniff method—indeed the justification for dispensing with it in favor of the more modern Hazard Analysis and Critical Control Points (HACCP) approach—is that it was an ineffective means of detecting pathogens in food.<sup>37</sup> This is because bacteria, even when legion, are microscopic. They are not visible to the naked eye, and can be odorless.<sup>38</sup> Bacteria's putrefying effects on meat may become visible or detectable to the nose over time. However, the period of time needed for contamination to become readily detectable by human senses (like sight or smell) can be lengthy and varies due to factors like temperature.<sup>39</sup> This means that contaminated meat inspected in a slaughterhouse becomes more likely to display evidence of pathogens the more time passes and the closer it gets to the consumer—as in a butcher shop, a restaurant, or the home.

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37 See Editorial, *Applaud Belated Scientific Approach to Testing Meats, Poultry for Safety*, FT. LAUDERDALE SUN-SENTINEL, July 14, 1996, at 4G (“Since 1907, the U.S. government has relied on an unscientific and grossly inadequate ‘poke and sniff’ method, in which the inspector would look at, feel and smell the meat to judge if it were fresh or spoiled.”); Ron Hicks, Acting Undersecretary for Food Safety, U.S. Dep’t of Agric., Remarks at the Association of Food and Drug Officials 113th Annual Education Conference (June 8, 2009), *available at* [http://www.fsis.usda.gov/News\\_&\\_Events/Speech\\_060809\\_Hicks/index.asp](http://www.fsis.usda.gov/News_&_Events/Speech_060809_Hicks/index.asp) (contrasting the old poke-and-sniff method with more modern means of detecting pathogens that embrace “science and technology”). Interestingly, this criticism seems at least as appropriately directed at the more modern regime as it is at the poke-and-sniff regime. See Conko, *supra* note 8 (“[T]he usefulness of inspections is limited by a practical inability to detect microbial pathogens.”). For more information on the FDA’s HACCP system, see *Hazard Analysis & Critical Control Points (HACCP)*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/food/foodsafety/hazardanalysiscriticalcontrolpointshaccp/default.htm> (last visited Jan. 24, 2012) (“HACCP is a management system in which food safety is addressed through the analysis and control of biological, chemical, and physical hazards from raw material production, procurement and handling, to manufacturing, distribution and consumption of the finished product.”).

38 See LINDA K. DEBRUYNE, KATHRYN PINNA & ELEANOR NOSS WHITNEY, *NUTRITION AND DIET THERAPY* 135 (2007) (“[M]ost food-poisoning bacteria are odorless, colorless, and tasteless.”).

39 See STEPHEN J. JAMES & CHRISTIAN JAMES, *MEAT REFRIGERATION* 4 (2002) (describing the process by which odor and “slime” on spoiled meat become apparent to human senses, and stating that the early stages of spoilage detection are largely a subjective effort on the part of an inspector).

Thus, under poke-and-sniff, if a piece of meat was in fact tainted but the inspector's eyes or nose could not detect the contamination after he poked the meat, the inspector would again use his hands or the same rod to poke the next piece of meat, and the next, and so on. In this way, USDA inspectors undoubtedly transmitted harmful bacteria from one contaminated piece of meat to other uncontaminated pieces in untold quantities and, consequently, were directly responsible for sickening untold numbers of Americans by their actions. Poke-and-sniff—incredibly a centerpiece of the USDA's meat inspection program until the late 1990s<sup>40</sup>—was, in terms of its sheer efficiency at transmitting pathogens from infected meat to clean meat, nearly the ideal device. Add to this the fact that the USDA's own inspectors were critical of the inspection regime from the start,<sup>41</sup> and that the USDA abdicated its inspection role at hundreds of meat processors for nearly three decades,<sup>42</sup> and it becomes quite apparent that instead of making food safer, poke-and-sniff made food and consumers *less* safe.<sup>43</sup>

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40 FT. LAUDERDALE SUN-SENTINEL, *supra* note 37.

41 *See Says Bad Meat is Passed*, N.Y. TIMES, June 11, 1909, available at <http://query.nytimes.com/mem/archive-free/pdf?res=F60614FB355512738DDDA80994DE405B898CF1D3> (“‘The inspection at the National Stock Yards,’ [says former USDA inspector J.F. Harms, who resigned in protest and went public with his claims against the USDA,] ‘is costing the people approximately \$100,000 a year, and it is not actually worth \$1 to them.’”).

42 *See* Charles Abbott, *USDA Admits Skipped Meat Plant Checks for 30 Years*, REUTERS (Mar. 29, 2007), <http://www.reuters.com/article/2007/03/29/us-meat-usda-idUSN2930654720070329> (“For three decades, U.S. inspectors visited 250 meat processing plants as rarely as once every two weeks despite federal law requiring daily inspection[.]”).

43 The FSMA mandates that “all high-risk domestic facilities must be inspected within five years of enactment and no less than every three years thereafter.” Margaret A. Hamburg, *Food Safety Modernization Act: Putting the Focus on Prevention*, FOODSAFETY.GOV, <http://www.foodsafety.gov/news/fsma.html> (last visited Jan. 24, 2012). The FSMA requires the FDA to carry out exactly two inspections of each high-risk facility over a period of eight years. *See* FDA Food Safety Modernization Act, 21 U.S.C.A. § 350j(a)(2)(B) (West 2011). This reveals how pitifully little bang for the buck the FSMA delivers to consumers and taxpayers.

### ***C. The FDA & EPA: Saccharin***

The FDA attempted to ban the sweetener saccharin in the late 1970s.<sup>44</sup> The ban was based on one Canadian study that showed evidence of bladder cancer in rats that consumed massive quantities of saccharin daily, for a period lasting their entire lifetimes.<sup>45</sup> The scientific justification underpinning such a ban appeared ludicrous at the time, even to the FDA.<sup>46</sup> Public outrage followed.<sup>47</sup> After Congress and President Carter balked, the agency permitted the sale of products containing saccharin, the only artificial sweetener on the market at the time, provided product labels and vending machines displayed a required cancer warning.<sup>48</sup> In May 1980, the Environmental Protection Agency (EPA) added saccharin to its “list of hazardous constituents.”<sup>49</sup> Twenty years later, Congress finally lifted the FDA’s warning requirement.<sup>50</sup> A mere ten years after that, the

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44 See Bernard Weintraub, *Saccharin Ban Stirs Demand to Curb F.D.A.*, N.Y. TIMES, Mar. 12, 1977, at 11. Opposition to the ban stemmed in part from possible increases in heart disease and arthritis that critics said would result from it. *Id.*

45 See *What the Country's Newspapers are Saying*, NASHVILLE TENNESSEAN, reprinted in BRYAN TIMES, Mar. 18, 1977, at 4, available at <http://news.google.com/newspapers?id=iblPAAAAIIBAJ&sjid=VFIDAAAAIIBAJ&dq=100-rats-were-fed-a-diet%20saccharin&pg=6588%2C6641666> (“The FDA banned saccharin on the basis of a Canadian study in which 100 rats were fed a diet of 5 [percent] pure saccharin for their entire lives.”).

46 See *id.* (“The FDA said that in order to consume an equivalent amount of saccharin [as the Canadian rats], a person would have to drink 800 12-ounce diet sodas a day for a lifetime.”) (emphasis added).

47 See Tom Shales, *Fat Reaction to Ban Continues*, TUSCALOOSA NEWS, Apr. 10, 1977, at 8C (describing the passionate backlash against the FDA’s action, which included, according to one FDA employee, “more calls than we’ve ever received on a single subject that I can recall”).

48 *Delayed Ban on Saccharin Receives Carter OK*, PALM BEACH POST, Nov. 24, 1977, at A12.

49 *Saccharin Frequent Questions*, ENVTL. PROT. AGENCY, <http://www.epa.gov/osw/hazard/wastetypes/wasteid/saccharin/faqs.htm> (last updated Jan. 6, 2011). The current list of hazardous constituents may be found at 40 C.F.R. § 261.33(e) (2011).

50 *Saccharin*, CALORIE CONTROL COUNCIL, <http://www.caloriecontrol.org/sweeteners-and-lite/sugar-substitutes/saccharin> (last visited July 1, 2011) (“On December 21, 2000, the President signed federal legislation to remove the saccharin warning label that had been required on saccharin-sweetened foods

EPA finally removed saccharin from its list.<sup>51</sup> Saccharin, so long maligned and yet perfectly safe, had moved with the stroke of a pen from being a food-safety issue to being “safe.”

But there were consequences to the government’s treatment of saccharin. Today, some critics claim sugar in soda is a prime culprit behind America’s obesity epidemic<sup>52</sup> and the rising incidence of adult-onset diabetes.<sup>53</sup> Yet, for more than thirty years, federal agencies fought to prevent saccharine—a glucose- and calorie-free sweetener popular with diabetic consumers and those watching their weight—from appearing on the market, or permitted it to appear but unfairly smeared it with cancer warnings. This fearmongering by the government caused some who might have consumed diet soda to drink sugary soda instead. Regardless of whether sugary sodas bear any responsibility for the obesity epidemic or for rising levels of adult-onset diabetes,<sup>54</sup> federal saccharin regulations might have caused Americans to ingest more calories, over a period of more than three decades, than they otherwise would have.

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and beverages in the U.S. since 1977.”).

- 51 Removal of Saccharin and Its Salts From the Lists of Hazardous Constituents, Hazardous Wastes, and Hazardous Substances, 75 Fed. Reg. 78,918-01 (Dec. 17, 2010) (to be codified at 40 C.F.R. pts. 261, 268, and 302).
- 52 See, e.g., Marilyn Marchione, *Soda Causes Obesity, Researchers Assert*, SAN DIEGO UNION-TRIB. (Mar. 5, 2006), [http://www.signonsandiego.com/uniontrib/20060305/news\\_1n5soda.html](http://www.signonsandiego.com/uniontrib/20060305/news_1n5soda.html).
- 53 See Vasanti S. Malik et al., *Sugar-Sweetened Beverages and Risk of Metabolic Syndrome and Type 2 Diabetes: A Meta-Analysis*, 33 DIABETES CARE 2477, 2477-83 (2010), available at <http://care.diabetesjournals.org/content/33/11/2477.full?sid=808de41a-fc46-4d02-9e22-6ef612a66290>; Hanna Dubansky, *Even 1 Soda a Day Can Hike Your Diabetes Risk*, U.S. NEWS & WORLD REP. (Oct. 27, 2010), <http://health.usnews.com/health-news/diet-fitness/diabetes/articles/2010/10/27/even-1-soda-a-day-can-hike-your-diabetes-risk>. But see Lauren Ellis, *Teens Drinking Less Sugar, Obesity Still Rising*, MOTHER JONES (June 16, 2011, 4:33 PM), <http://motherjones.com/blue-marble/2011/06/obesity-on-the-rise>.
- 54 Cf. *Diabetes Association Backs Saccharin Use*, LODI NEWS-SENTINEL, Apr. 25, 1979, at 17 (showing support among diabetes interest groups for legalization of saccharin).

#### ***D. TTB & FDA Ban a Few Caffeinated Beers***

From 2009 to 2010, the FDA and the Treasury Department's Alcohol and Tobacco Tax and Trade Bureau (TTB) worked together to force several caffeinated beers—including Four Loko—off the market.<sup>55</sup> The FDA claimed that the presence of *added* caffeine in beer has not been shown to be safe.<sup>56</sup> Though Four Loko, one of the banned drinks, carried a nefarious reputation as the party drink of choice for college-age fraternity brothers, it contained about the same amount of caffeine as eight ounces of Starbucks coffee.<sup>57</sup>

Both the logic and science behind the ban do not withstand scrutiny.<sup>58</sup> First, Americans have consumed caffeinated drinks like Kahlúa or rum and cola for generations with no intrinsic ill effect.<sup>59</sup> Furthermore, during the course of one meal, people often consume alcohol beverages, like wine, with a main course and minutes later caffeinated beverages, like coffee, with dessert.<sup>60</sup> Centuries of human

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55 See *Alcohol Beverages with Added Caffeine*, ALCOHOL & TOBACCO TAX & TRADE BUREAU, [http://www.ttb.gov/main\\_pages/caffeine-added.shtml](http://www.ttb.gov/main_pages/caffeine-added.shtml) (last visited Jan. 24, 2012) (demonstrating TTB acted in harmony with the FDA's actions).

56 See Press Release, U.S. Food & Drug Admin., FDA Warning Letters Issued to Four Makers of Caffeinated Alcoholic Beverages (Nov. 17, 2010), *available at* <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2010/ucm234109.htm>.

57 Greg Conko, *Four Loko: Just How Potent is the Caffeinated Alcoholic Drink?*, OPENMARKET.ORG (Nov. 19, 2010), <http://www.openmarket.org/2010/11/19/four-loko-just-how-potent-is-the-caffeinated-alcoholic-drink/> (noting that a twenty-three-ounce can of Four Loko contains 156 milligrams of caffeine, while a short cup of Starbucks coffee contains 160 milligrams of caffeine).

58 See generally Baylen J. Linnekin, *Extreme Refreshment Crackdown*, COMPETITIVE ENTER. INST. (May 27, 2010), [http://cei.org/cei\\_files/fm/active/0/Baylen%20Linnekin%20-%20Extreme%20Refreshment%20Crackdown.pdf](http://cei.org/cei_files/fm/active/0/Baylen%20Linnekin%20-%20Extreme%20Refreshment%20Crackdown.pdf).

59 See *id.* at 6.

60 On November 24, 2009, nine days after the FDA revealed it had sent warning letters to the makers of Four Loko and other caffeinated alcohol beverages, the Obama administration served guests at its first formal state dinner a five-course meal featuring four different wine pairings followed by a coffee service. See State Dinner in Honor of His Excellency Dr. Manmohan Singh, Prime Minister of the Republic of India, and Mrs. Gursharan Kaur, White House (Nov. 24, 2009), <http://www.whitehouse.gov/files/documents/2009/november/state-dinner-press-preview.pdf>; Press Release, U.S. Food & Drug Admin., FDA To Look Into Safety of Caffeinated Alcoholic Beverages; Agency Sends Letters to

experience with alcohol and caffeine have demonstrated the safety of this combination.

Second, the chief study upon which the ban is based focuses on drinks like rum and cola.<sup>61</sup> Such drinks differ markedly from pre-mixed drinks like Four Loko in that the former are mixed at home or in a bar in potentially indeterminate and varying quantities,<sup>62</sup> while drinks like Four Loko contain pre-measured quantities of both alcohol and caffeine.<sup>63</sup> As a result, the science upon which the ban rests is not specific to the beverages that are subject to the ban.

Third, and perhaps most important, the FDA's action only bans the *direct* addition of caffeine, in any amount, to beer.<sup>64</sup> The ban leaves on the market both other non-beer alcohol beverages containing added caffeine and beers containing substances that themselves contain caffeine as an ingredient.<sup>65</sup> As for the former, the FDA has not explicitly banned the direct addition of caffeine to either wine or spirits.<sup>66</sup> As for the latter, the agency still *does* permit the direct addition to beer of various substances

Nearly 30 Manufacturers (Nov. 13, 2009), <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2009/ucm190427.htm>.

- 61 See Linnekin, *supra* note 58, at 3-4 (describing the influence on a group of state attorneys general and the FDA of a study by Wake Forest University researcher Dr. Mary Claire O'Brien).
- 62 See, e.g., Joanne Silberner, *Glass Shape Can Affect Amount of Alcohol Poured*, NAT'L PUB. RADIO (Dec. 26, 2005), <http://www.npr.org/templates/story/story.php?storyId=5070178> (describing research by Cornell University Professor Brian Wansink that reveals bartenders "pour 20 to 30 percent more alcohol in the short, wide glasses than in tall, skinny glasses").
- 63 See Linnekin, *supra* note 58, at 1.
- 64 See Larry Greenemeier, *Buzz Kill: FDA Cracks Down on Caffeinated Alcoholic Beverages*, SCI. AM. (Nov. 17, 2010), <http://www.scientificamerican.com/article.cfm?id=fda-caffeinated-alcohol>.
- 65 The logic behind the ban—that beer made with caffeine is unhealthy, but beer made with coffee *containing* caffeine is not—brings to mind the absurd alchemist's warning that mixing coffee with milk caused leprosy (but that either coffee alone or milk alone was perfectly healthy). See ALLEN, *supra* note 28, and accompanying text.
- 66 Buckfast Tonic Wine, a caffeinated British wine that boasts fifteen percent ABV, is available for sale on the Internet. See *Buckfast Tonic Wine*, MASTER OF MALT, <http://www.masterofmalt.com/otherdrinks/buckfast-tonic-wine/> (last visited Jan. 24, 2012).

that contain caffeine naturally—such as coffee, tea, mate, and guarana—at *any* level, without limitation.<sup>67</sup>

Evidence of the slapdash nature of the ban can be seen in the FDA's decision to ban Moonshot '69, a beer with added caffeine brewed by Rhonda Kallman, one of the founders of the Boston Beer Company.<sup>68</sup> Moonshot contained about the same amount of alcohol as a can of Budweiser and similar caffeine levels as those found in half a cup of coffee.<sup>69</sup> Dozens of higher-alcohol-content beers flavored with coffee or other caffeinated substances thankfully escaped the wrath of the FDA and TTB and remain on the market.<sup>70</sup>

From a food-safety perspective, the FDA's decision to remove a product like Moonshot from the market simply because it contains *added* caffeine—while allowing (as the agency should) products that contain both more alcohol and more caffeine to remain on the market—smacks of fearmongering and pseudoscience. The FDA's actions here under the guise of food safety will do nothing to make food safer. Meanwhile, the concomitant health halo<sup>71</sup> that the ban may place around drinks

67 BrewDog Dogma Ale, for example, “is an innovative, enigmatic ale brewed with guarana”—a substance that contains caffeine—and other ingredients. See *Dogma*, BREWDOG BREWERY, <http://www.brewdog.com/dogma> (last visited Jan. 24, 2012). Dogma is available for purchase in the United States. See, e.g., *Brew Dog Dogma Ale Brewed with Honey, Kola Nut, Poppy Seed and Guarana 22.4oz*, LIQUORAMA FINE WINE & SPIRITS, <http://store.liquorama.net/Brew-Dog-Punk-IPA-3.aspx> (last visited Jan. 24, 2012).

68 See Jon Chesto, *Mass. Market: FDA's Move is Last Call for Local Beer Company*, PATRIOT LEDGER (June 25, 2011), <http://www.patriotledger.com/business/x1413087821/MASS-MARKET-FDA-s-move-is-last-call-for-local-beer-company>.

69 Moonshot, which is no longer on the market after the ban, contained sixty-nine milligrams of caffeine. See *All Systems Go*, NEW CENTURY BREWING CO., [http://web.archive.org/web/20110202153329/http://moonshotbeer.com/Moonshotbeer.com/All\\_Systems\\_Go.html](http://web.archive.org/web/20110202153329/http://moonshotbeer.com/Moonshotbeer.com/All_Systems_Go.html). That amount is less than half that found in an eight-ounce cup of Starbucks coffee. See Conko, *supra* note 57, and accompanying text.

70 See, e.g., *Beers*, LAGUNITAS BREWING CO., <http://www.lagunitas.com/beers/> (last visited July 5, 2011) (describing the company's Cappuccino Stout, which contains 9.2 percent ABV and “Loads of Sebastopol's Hardcore Coffee for Even Bigger Roasty Flavors and that Extra Krunk”); Bryce Eddings, *Coffee Beer*, ABOUT.COM, <http://beer.about.com/od/beerstyles/tp/coffeebeer.htm> (last visited Jan. 24, 2012) (compiling a list of “favorite coffee beers” brewed).

71 See Alex Mindlin, *Eating Up Calories and Propaganda*, N.Y. TIMES (Sept. 3,

still on the market that contain more caffeine, more alcohol, or both compared to some of the banned drinks—along with the uncertain amounts of alcohol and caffeine that appear in beverages that are not pre-mixed—could actually mean the FDA ban will make drinkers less safe.

### *E. The FDA, USDA, and the 380-Million-Egg Recall*

In August 2010, approximately 380 million salmonella-tainted eggs from one laying facility were recalled by the producer, Wright County Egg.<sup>72</sup> Controversy arose over the fact that USDA egg graders were present at the offending laying facility but did not report numerous alleged violations of federal law.<sup>73</sup>

In the wake of the recall, many advocates of increased food-safety spending and the FSMA argued that the problems arose from deficits in agency oversight authority,<sup>74</sup> which they claimed left giant egg-laying operations virtually unregulated.<sup>75</sup> These advocates claimed the duty of USDA egg inspectors was merely to perform voluntary egg grading for labeling purposes.<sup>76</sup> Taken to its logical end, this line of reasoning

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2007), <http://www.nytimes.com/2007/09/03/business/03drill.html> (citing research that suggests consumers who buy foods they believe are healthful may tend to overeat or “underestimate the calories in their food”); John Tierney, *Health Halo Can Hide the Calories*, N.Y. TIMES, Dec. 2, 2008, at D1 (describing the “health halo” effect).

72 See William Neuman, *Egg Recall Expanded After Salmonella Outbreak*, N.Y. TIMES, Aug. 19, 2010, at B1.

73 See Alison Young, *Food Safety Groups Slam USDA Egg Graders at Farms in Recall*, USA TODAY (Sept. 3, 2010, 1:34 PM), [http://www.usatoday.com/yourlife/food/safety/2010-09-02-eggregulations2\\_ST\\_N.htm](http://www.usatoday.com/yourlife/food/safety/2010-09-02-eggregulations2_ST_N.htm).

74 See Philip Brasher, *Egg Recall: Grassley Asks USDA to Explain Federal Inaction on Egg Farms*, DES MOINES REG. (Sept. 7, 2010, 11:12 PM), <http://www.desmoinesregister.com/article/20100908/BUSINESS01/9080358/Egg-recall-Grassley-asks-USDA-explain-federal-inaction-egg-farms> (referring to one U.S. Senator’s letter to the USDA questioning “deficiencies in food safety communications’ between the [USDA and the FDA]” brought to light by the egg recall).

75 Lyndsey Layton, *As Egg Producers Consolidate, Problems of Just One Company Can Be Far-Reaching*, WASH. POST, Aug. 24, 2010, at A1 (“As the mega-producers have developed during the past 20 years, they have gone largely unregulated by government agencies responsible for making sure food is safe.”).

76 *But see* Young, *supra* note 73 (“U.S. Department of Agriculture staff regularly

would mean that USDA inspectors were not charged with “regulating” anything. These advocates argued that any oversight authority rested not with USDA, but with the FDA—which governs most aspects of shell eggs—and that the FDA only gained the power to inspect egg-laying premises in the wake of the 2010 egg recall.<sup>77</sup>

This characterization of a narrow USDA role finds strong opposition from the USDA’s own American Egg Board (AEB), which “is funded by a national legislative checkoff” program and which consists of a board of eighteen members who are “appointed by the U.S. Secretary of Agriculture.”<sup>78</sup> The AEB website states that USDA graders first—before any grading takes place—examine eggs “for both interior and exterior quality.”<sup>79</sup> Furthermore, an egg grader may only stamp eggs as meeting a certain grade if the grader determines “that the eggs have been processed, packaged and certified under federal supervision. . . . Plant processing equipment, facilities, sanitation and operating procedures are continuously monitored by the USDA grader.”<sup>80</sup>

Thus, USDA egg graders *were* at least partly responsible for determining whether the eggs they graded were safe. Yet the presence of these egg graders at the laying facility did nothing to ensure the eggs were safe—in spite of the graders’ duty. The egg graders’ presence and oversight merely offered a false veneer of safety—a facade that made food less safe.

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on site at two Iowa egg processors implicated in a national salmonella outbreak were supposed to enforce rules against the presence of disease-spreading rodents and other vermin, federal regulations show.”)

77 *Cf. In Face Of Egg Recall, FDA Calls For More Authority*, NAT’L PUB. RADIO (Aug. 23, 2010), <http://www.npr.org/templates/story/story.php?storyId=129373553> (“Food and Drug Administration chief Margaret Hamburg said Monday . . . Congress should pass pending legislation that would provide her agency with greater enforcement power[.]”).

78 *About AEB*, AM. EGG Bd., <http://www.incredibleegg.org/about-aeb> (last visited Jan. 24, 2012).

79 *Grading*, AM. EGG Bd., <http://www.incredibleegg.org/egg-facts/eggcyclepedia/g/grading> (last visited Jan. 24, 2012).

80 *Id.*

#### IV. AN ALTERNATIVE TO INCREASED FEDERAL SPENDING AND AUTHORITY

Typically, when news reports expose problems in the food-safety system, commentators instinctively urge that more money and more authority be shifted from taxpayers to regulators.<sup>81</sup> In the case of the FSMA, passage of the Act itself has been used to justify more spending on food safety.<sup>82</sup> But bigger budgets and more authority did nothing, for example, to end the decades-long poke-and-sniff regime. Neither did decades of increased budgets and increased power prevent the recall of more than 300 million eggs laid and graded at a facility teeming with federal regulators.

These examples, along with the potato ban and others, demonstrate that laws and regulations often lack a reasonable basis in logic and science on the one hand, and a mistaken belief that government has the authority, knowledge base, and duty to micromanage the nation's eating habits on the other. These low points in food-safety regulation have had unintended food-safety consequences of their own. While Americans may chuckle today at the irony of USDA inspectors spreading disease from carcass to carcass to consumer under the guise of preventing disease, not only did the poke-and-sniff method and other aforementioned regulations not make food safer, they also sometimes succeeded in making food *less safe* and people *less healthy*.

So if more money and more authority do not make food safer, is there an alternative? Yes. Congress should require federal agencies to return to regulating on behalf of the *old* public health.<sup>83</sup> The government

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81 Critics have attacked America's federal food laws as toothless at least since Harvey W. Wiley, the very architect of the Pure Food and Drugs Act of 1906, blasted enforcement under the Act in 1929. See WILEY, *supra* note 13, and accompanying text.

82 See Bittman, *supra* note 2. Within weeks of the FSMA's passage, Marion Nestle had already proposed eight costly improvements to the Act. Nestle, *supra* note 5. Likewise, the new editors of the journal *Food Policy* view the FSMA as a mere weigh station en route to still more federal funding and regulation. See Flynn, *supra* note 2 (noting that though the FSMA "was the biggest thing to happen to food safety in Washington D.C. in the past 73 years," it is still insufficiently sweeping to please the journal's editors).

83 See Epstein, *supra* note 11, at 4-5, and accompanying text.

should stop trying to eliminate all risk from the adult diet, and let people knowingly make decisions about their own health vis-à-vis food (as with unpasteurized dairy products or Four Loko).

A return to *old* public health would help agencies that claim to be hampered by limited budgets to fulfill more effectively their missions.<sup>84</sup> Efforts by the FDA to prevent mad cow disease by banning the feeding of offal to animals,<sup>85</sup> for example, demonstrate a proper “old” public-health focus that government regulators should pursue.

Is mere scientific consensus the answer? No. Scientists and scientific consensus are often wrong.<sup>86</sup> And as America inches more and more toward technocracy<sup>87</sup>—the misguided idea that “smart” people in the “right” places in government who think for us can and should identify and solve all our problems—we move further away from America’s founding values.

The increasingly chic Precautionary Principle<sup>88</sup>—the notion that all is bad unless proven good—is too costly, freedom-constraining, and innovation-killing a rule by which to govern society, and it runs

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84 *See id.* at 5 (“The new public health frustrates the very ends that it is intended to serve because it lacks focus and definition. It extends regulation into areas where it ought not to take place, and thus saps the resources and focus to deal with matters, here the spread of communicable diseases where regulation is appropriate.”).

85 *See* Press Release, U.S. Food & Drug Admin., Expanded “Mad Cow” Safeguards Announced to Strengthen Existing Firewalls Against BSE Transmission (Jan. 26, 2004), *available at* <http://www.fda.gov/newsevents/newsroom/press-announcements/2004/ucm108230.htm> (noting public health measures that the federal government has undertaken to prevent mad cow disease).

86 Ronald Bailey, *Scientific Consensus Redux*, REASON.COM (June 29, 2011), <http://reason.com/archives/2010/06/29/agreeing-to-agree>.

87 MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1283 (11th ed. 2003) (defining the term as “management of society by technical experts”).

88 *See generally* INDUR M. GOKLANY, THE PRECAUTIONARY PRINCIPLE: A CRITICAL APPRAISAL OF ENVIRONMENTAL RISK ASSESSMENT (2001).

afoul of basic constitutional principles.<sup>89</sup> The Harm Principle,<sup>90</sup> on the other hand, was a good enough premise upon which to cement our country's founding,<sup>91</sup> and has not lost its luster in the centuries since.

"Truth can stand by itself," writes Jefferson in his *Notes on the State of Virginia*,<sup>92</sup> a statement that immediately follows his remarks on food safety and which demonstrates his faith in the Harm Principle. "Subject opinion to coercion: whom will you make your inquisitors? Fallible men; men governed by bad passions, by private as well as public reasons. And why subject it to coercion. To produce uniformity. But is uniformity of opinion desirable? No more than of face and stature."<sup>93</sup>

Importantly, Jefferson points here to the role of civil society in helping ensure our food is safe. Rather than subjecting opinion to coercion, we should subject it to debate within the marketplace of ideas. Such is the public sphere where advocacy groups with markedly different views of nutrition and health—including the Center for Science in the Public Interest (which publishes the often-excellent *Nutrition Action Healthletter*),<sup>94</sup> as well as vegan,<sup>95</sup> Paleo,<sup>96</sup> organic,<sup>97</sup> and myriad other

89 See ROBERT M. HARDAWAY, *NO PRICE TOO HIGH: VICTIMLESS CRIMES AND THE NINTH AMENDMENT* 202 (2003) (contending the Ninth Amendment supports the premise that "legislation that interferes with an individual's right to privacy by prohibiting activity that does not violate the harm rule should be considered unconstitutional").

90 See JOHN STUART MILL, *ON LIBERTY* (1859). In referring to the principle, Mill wrote that, "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number . . . is to prevent harm to others." *Id.* at 22; see also JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986).

91 See HARDAWAY, *supra* note 89; JEFFERSON, *supra* note 20, at 440-41.

92 JEFFERSON, *supra* note 20, at 441.

93 *Id.*

94 *Nutrition Action Healthletter*, CTR. FOR SCI. IN THE PUB. INTEREST, <http://www.cspinet.org/nah/> (last visited June 17, 2011).

95 See, e.g., VEGAN SOCIETY, <http://www.vegansociety.com/> (last visited Jan. 24, 2012) (advocating a diet free of animal products, and including many grains).

96 See, e.g., ANCESTRAL HEALTH, <http://www.ancestralhealth.net/> (last visited Jan. 24, 2012) (advocating a diet free of grains, and including many animal products).

97 See, e.g., ORGANIC CONSUMERS ASS'N, <http://www.organicconsumers.org/> (last visited Jan. 24, 2012) (advocating a diet that includes only organic animal products and grains).

groups—scholars like Nestle<sup>98</sup> and Pollan,<sup>99</sup> business leaders, the legal community, and others can debate issues and ideas on food and food safety, and where the public can turn for guidance and answers.

Despite Jefferson's admonition, we have allowed food-safety regulators—fallible men, governed by bad passions and by private and public reasons—to be our inquisitors for too long. Limiting the scope of government action in the area of food safety to old notions of public health, and returning to the Harm Principle of Mill and Jefferson, will make food safer. It will also help ensure that fewer food-safety fallacies that actually make food less safe occur in the future.

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98 See Nestle, *supra* note 5.

99 See Pollan & Schlosser, *supra* note 5.