FOREWORD

WHAT IS FOOD LAW?

"What is food law?" may be a surprising question in a book titled *Food Regulation*. When I entered this field, the answer was a simple one. Then "food law" meant food regulatory law. Food law had two main audiences: lawyers and the regulated food industries. At the universities, these audiences were reflected in courses at law schools and in food science departments. Food law was not a stand-alone course at law schools but rather was a subset of food and drug law courses. There it dealt largely with the regulation of food by the Food and Drug Administration (FDA). In food science departments, the food law courses covered the law that the regulated food businesses needed to know, mostly the regulation by FDA, the U.S. Department of Agriculture (USDA), and related state agencies.

This traditional approach to food law remains important today, and this book largely follows that traditional meaning of food law as food regulatory law. Foremost, food regulatory law remains the main practice area for attorneys involved in food law and the main interest of professionals working in the food industry. This book uniquely approaches food regulatory law as a single subject for both the lawyer and the food scientist.

In recent years, the question "What is food law?" has become much more complex due to the growing food movements. Writers like Michael Pollan, Eric Schlosser, Greg Critser, and Barbara Kingsolver have brought new interest and attention to food and food policy. The power of this public desire to know where their food comes from was observed in the barrage of criticism and consumer backlash to "pink slime."

"Pink slime" is a pejorative term for a defatted beef product that USDA euphemistically termed "lean finely textured beef" or "LFTB." To make LFTB, beef trimmings are heated and then processed by centrifuge action to separate and remove fat. The lean beef extract is treated with ammonium gas to kill bacteria.

Consumers were disturbed and even outraged to discover that USDA permitted the industrially processed, defatted fat trimmings—pink slime—to be labeled as "ground beef." The uproar caused sales of LFTB to plummet. Beef Products, Inc. (BPI), the primary producer of LFTB, had to close plants, lay off workers, and lost perhaps more than a billion dollars in sales.[1]

At the same time, a broader perception of the interconnectedness of food, agriculture, and law emerged. As Wendell Berry observed, "Eating is an agricultural act." Agricultural law affects our food, and thus in this sense swatches of agricultural law are part of "food law." Today "food law" is sometimes broadened in meaning to include all law related to agricultural trade, such as how food is grown, humane animal treatment, and environmental rules for farms and processors. One can find many connections between these various areas and food. For instance, the law applying to farm workers has implications in food safety because more than one foodborne illness outbreak has been attributed to a lack of proper sanitation facilities for field workers.

However, this broad approach to food and agriculture law is susceptible to the concern expressed by Judge Frank Easterbrook about teaching a course, "The Law of the Horse." He said, "Lots of cases deal with sales of horses; others deal with people kicked by horses; still more deal with the licensing and racing of horses, or with the care veterinarians give to horses, or with prizes at horse shows. Any effort

[1] For more on LFTB, see Chapter 3.

to collect these strands into a course on 'The Law of the Horse' is doomed to be shallow and to miss unifying principles."[2]

Judge Easterbrook's point is a good one, but it applies more to how a course in the food and agriculture law is taught than to the concept of a broader sense of food law. A law student will better learn the law of torts in torts class rather than studying torts related to personal injury from foodborne illness. Nevertheless, a chapter on food and product liability is included here. In part this is for the food scientists, who do not take a torts law course, but also because it allows teaching about the intersection of science and tort law. For instance, the proof of causation from foodborne illness injury is more difficult than the contours of tort law.

Judge Easterbrook, however, had an additional concern about "The Law of the Horse" as "courses suited to dilettantes." He noted, "We are at risk of multidisciplinary dilettantism, or, as one of my mentors called it, the cross-sterilization of ideas. Put together two fields about which you know little and get the worst of both worlds."[3]

It is not that multidisciplinary courses cannot be taught, but that they should illuminate our entire understanding of law. For instance, a "Food Law for Public Health" course taught by an attorney and public health professional is apt to teach about the role of law as a tool in public health plus the limits of law in public health.

Food law can teach about the scope and limits of regulatory law and the direct and indirect effects of law. For instance, governmental approaches seeking to reduce obesity might consider a law to tax obesity, such as charging more for government health insurance for those who are overweight. The law could fund a public advertising campaign about healthy weight and healthy diet. The law could regulate what foods are provided in school lunches. The law could detail how foods are displayed at school lunch lines to encourage more fruit and vegetable consumption. The law could tax "junk food" as a way to decrease their consumption. The law of crop subsidies could be designed to make fruits and vegetables lower in price. Each approach has limits and costs. Each approach also raises questions of cultural values, such as the value we place on individual choice. An examination of these choices and mixes of these choices provides insight into the challenges facing the modern regulatory state.

Still, Easterbrook's concern remains, and we should be cautious about accepting the beliefs of lawyers about farm price support policy, journalists' beliefs about food science, or any non-scientist's belief about molecular biology. While cross-fertilization can provide real value, there remains the risk of cross-sterilization.

In the end, I think broadening of the concept and interest in food law is exciting and important. A widening recognition of related areas, such as farm policy, public health, and food security, as a part of the broader whole of food and agriculture law and policy is an important evolution. Food and agriculture law and policy are at the center of some of the world's most pressing concerns. In addition, food is often at the center of issues related to how our modern regulatory state should be ordered. Nonetheless, we should not forget that the primary practice area of food law remains traditional food regulatory law. The broader interest in food and agriculture law and policy needs to take measure of traditional food (regulatory) law lest its ideas fail as a casualty of cross-sterilization.

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[2] Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, University of Chicago Legal Forum 207 (1996).
[3] *Id.*