

1 Introduction

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[1] *Adaptation of Food Law*

Food law is both old and new. From the beginning of recorded history, societies have sought to regulate the production, trade, and consumption of food. This historical fact makes sense given the important roles of food: food sustains life; food affects quality of life; food shapes societies; food manifests cultural values. The modern food society has transformed food – its composition, taste, availability, value, and appearance – raising novel societal issues that affect the lives of consumers. In response, food law is adapting and developing into a distinctive area of law. Indeed, if the measure of the importance of law is how it affects the lives of people on a daily basis, then food law as it has developed is of paramount significance.

The adaptability of food law reflects the notion articulated by legal historian Lawrence M. Friedman, in *The History of American Law*, that modern law mirrors society and moves with its times so that it is always new.¹ Friedman explains that “[i]n traditional cultures, law was basically static: a divine or time-honored body of rules. It defined people’s place in the order of society. In modern times, law is a tool, an instrument; the people in power use it to push or pull toward some definite goal.”² While it is true that law also influences society and promotes change, the adaptation of food law to the modern food system and to the interest of consumers is why food law is new, as well as provocative: the adaptation requires new rules and fresh ideas and the two subjects – the modern food system and the interest of consumers – are not always in sync. In other words, the goal is not always definite. As a result, palatable tensions in food law provoke divisive issues (proposed mandatory labeling for genetically modified food, zoning rules for the production of backyard chickens, and proposed restrictions on sugar-added beverages, to name just a few) that make food law interesting and relevant to modern civil society.

[2] *Phases of Food Law*

[a] Phases: Sequential and Cumulative

The field of modern, emerging food law could be organized in diverse ways. This treatise divides food law into five topical phases: commerce, safety, marketing, nutrition,

¹ See LAWRENCE M. FRIEDMAN, *THE HISTORY OF AMERICAN LAW* XI–XX (Simon & Schuster., 3d ed. 2005).
² *Id.* at XX.

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and systems.³ These phases constitute the chapters presented in this treatise. This phase by chapter approach provides a historic framework that accepts Friedman's notion that modern law adapts to social change. Each phase started and has evolved in response to problems and challenges in the food system. In addition to addressing problems in the food system, each phase also reflects societal values and perceptions of food and underscores that food law is a dynamic, emerging field. Although the phases are for the most part sequential, they are also cumulative: the phases build on each other, creating overlap and spillover effects. The phases are distinctive enough, however, to justify separate attention. A brief summary of each phase is presented in the following sections.

[b] Commerce

Food has been at the heart of commercial activity since the days of antiquity. The oldest recorded food laws were designed to preserve the integrity of food commerce and fair play among purveyors of food by preventing food fraud and also to promote the trade of food in order to feed rising urban populations. The colonies followed suit and enacted food adulteration laws to prohibit economically motivated adulteration, a principal form of food fraud. The trade of food evolved in response to social and economic conditions to where today the US food system is part of a global food production and commercial trading network that relies upon trade to ensure for consumers the availability of an abundance of whole foods and food ingredients from around the world. Modern food commerce raises the same issues of fraud and market access that confronted ancient societies. The response of the law in the United States has been to enact domestic laws against economically motivated adulteration and to help develop a global trade legal architecture based on international legal instruments in the forms of treaties and international institutions that promote among participating countries free trade and harmonization of food quality and safety standards. Resolving trade conflicts within this architecture is one of the biggest challenges facing the international food trade system.

[c] Food Safety

Although food law in previous societies and early in the United States recognized the connection between adulteration of food and public health, scientists did not begin to understand bacteria, and their relationship to disease, until the late nineteenth century. It was recognized that food spoils, but the reasons for that and the potential for becoming ill from food were unknown. The history of food safety regulation is really the history of discoveries and inventions enabling regulatory responses to emerging safety problems, including sophisticated forms of contamination, various food additives, new pesticides, and scientific changes in the composition of food. Today, the technical intricacies in the making and handling of food raise safety risks at each segment of the supply chain, including the production, manufacturing, processing, packaging, marketing, distribution, and consumption of food. Lives depend on the efficacy of a wide range of federal, state, and local legal tools employed from the farm to the fork to safeguard food at each

³ See Peter Barton Hutt, *Government Regulation of the Integrity of the Food Supply*, 4 ANN. REV. NUTR. 1 (1984) (Peter Barton Hutt, an eminent food and drug law scholar, has previously noted that food regulation has evolved over the centuries into the three phases of food fraud, food safety, and nutrition).

of the critical points along the supply chain. These laws continue to expand the government's role in the inspection of food product and in the enforcement against violations of law. These laws also continue to expand the responsibilities of food enterprises to keep records, follow safety rules and protocols, and develop preventive control standards. Increasing attention is being paid to imported food. The development of other forms of law besides regulatory law – such as litigation and third-party verification – are also increasingly used as legal tools to help ensure safe food.

[d] Food Marketing

Radical changes in the nineteenth century to the food system that were driven by technology and consumer demand – the creation of new types of food that were convenient and appealing to consumers on the move, improvements in preservation and transportation, and the economics of mass production and mass marketing – triggered a phenomenon that has since then challenged the application of food law: the rise of the brand name.⁴ From the beginning, brand-name foods were marketed to consumers on the basis of “purity, convenience, quality and reliability, and the consumer bought the promises as well as the product.”⁵ The ever-changing composition and nature of food and the competitive environment in which food is marketed has necessitated laws that regulate the conveyance of information to consumers about food through marketing (labeling and advertising). These laws require food enterprises to tell the truth, to warn, and to educate. In an attempt to restrict commercial speech, marketing laws often generate novel conflicts over the First Amendment and over fundamental questions of what consumers need to know. Recent legal activity in the form of class action litigation against marketing claims has developed as a gap filler in some respects where regulations fail to provide clear direction or where enforcement falls short.

[e] Nutrition

While the link of food to nutrition has long been established, the public health consequences of the modern food system has generated an increase in nutrition regulation, starting in the 1960s in the United States. Although there are numerous facets to the response of law to nutrition issues, three general categories take shape: (1) the regulation of dietary supplements; (2) nutrition labeling; and (3) legal responses to malnutrition and obesity. While the regulation of dietary supplements and nutrition labeling is covered by detailed regulations, the outcome of the consumption of food or lack thereof in the modern food system has generated a plethora of nutrition policies, initiatives, and programs from multiple levels of government that address and legislate both obesity and hunger, plights that afflict millions of consumers in the United States and the world. Public health advocates adapt strategies from tobacco litigation for use in litigation against the food industry. Legal theories range from inadequate disclosure of health risks, misleading advertisements, targeting of children, and deceptive practices used. The approach of food law to the obesity epidemic is complicated by the debate over

⁴ See REAY TANNAHILL, *FOOD IN HISTORY* 328–31 (1988).

⁵ *Id.* at 331.

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personal responsibility. Legislative and regulatory actions, such as restricting junk food in schools, controlling the portion size of soda drinks, mandating menu labeling, altering industry marketing practices, and taxing junk food are contested by critics, who invoke personal responsibility and express concerns over a “nanny state.”

[f] Food Systems

Notwithstanding the industrialization of food, the act of eating has never been nor likely ever will be a simple exercise of satisfying a basic physiological need. Culture has always mattered. The governance of food is shaped by cultural, political, and sociological norms articulated by consumers and communities, the force of which has intensified with growing concerns about the modern food system. Concerns over sustainability, access to healthy food, localness, the right to certain information about food, the treatment of animals intended for food, monoculture, food justice and equity, and food security are generating new laws and recasting the debate over the role of law in the basic acts of making and eating food.

The food systems approach bespeaks of a growing recognition by consumers of the importance and relevance in their daily lives of food systems – local, regional, national, and global food systems. The focus on issues within these systems includes safety, marketing, and nutrition; however, the focus is couched with the context of food systems. For example, recent class action litigation over the claim “natural” on food products that have been genetically modified has less to do with the safety of these products and more to do with the methods, processes, and outcomes of the modern food system.⁶ A food systems orientation raises challenges for a food regulatory system that is built on science; hence, nonregulatory law, such as private standards, voluntary standards, and litigation are emerging as legal tools to meet the expectations and demands of consumers. However, there are signs that cultural, religious, and proscriptive meanings can affect government policy and regulation. For example, policies such as food security can play a role in the use of law to support regional food systems and the US trade policy.

[3] *Expansion of Food Law*

[a] Building on Traditional Food Law

The expansion of food law by its adaptation to societal concerns builds on traditional food law, which is a discipline that has historically been coupled with drug law via the federal government agency charged with a central role in the regulation of food consumed in the United States – the Food and Drug Administration (FDA). The focus of FDA regulation of food is on public health.⁷ Hence, the governing statutes and implementing regulations, rules, and standards that are generally oriented toward the prevention of unsafe

⁶ See generally Michael Pollan, Vote for the Dinner Party, N.Y. TIMES MAG., October 10, 2012 at MM62.
⁷ See Margaret A. Hamburg, M.D., Comm’r of Food and Drugs, Address on Effective Enforcement and Benefits to Public Health (August 6, 2009) (emphasizing FDA’s responsibility to take swift and aggressive action to protect the public health).

and misbranded food are all intended to protect public health.⁸ Although food safety has materialized as the top priority of the FDA, emerging concerns of malnutrition and obesity have expanded the FDA's regulatory scope to include nutrition, which generally involves regulating the dissemination of information to consumers about the properties and composition of food products. The regulations promulgated by the Federal Trade Commission (FTC) (advertising of food); the Food Safety and Inspection Service (FSIS) (safety of meat, poultry, and egg products), an agency in the US Department of Agriculture (USDA); and the Environmental Protection Agency (EPA) (pesticide residue on food) are also part of a tapestry of agency-regulated food law that focuses primarily on the safety and marketing of food.

Food law under the rubric of FDA food and drug law is the practice of a corps of law firms and lawyers who represent food enterprises engaged in the manufacturing, packaging, labeling, advertising, and distribution of food products. Many of these lawyers are organized in food and drug law practice groups in law firms located in Washington D.C., Chicago, and other large metropolitan areas. These lawyers typically participate in the Food and Drug Law Institute (FDLI)⁹ and represent food and drug companies of all sizes. The practice of food law by these lawyers is mostly administrative law and is rich in its complexities. The literature relied upon by these lawyers are FDA-centric. The *Food and Drug Law Journal*, published quarterly by the Food and Drug Law Institute, for more than sixty years has offered scholarly articles providing insight into the actions of the FDA, as well as the FTC and USDA. The highly regarded casebook, *Food and Drug Law*, published by Foundation Press,¹⁰ has been a mainstay in Law School food and drug law courses taught in US law schools, often by adjunct law professors who practice in the area.¹¹

[b] Distinguishing Agricultural Law

Traditional food law is to be distinguished from agricultural law, which is rooted in the concept of agrarianism or "agricultural exceptionalism."¹² The Thomas Jefferson creed that "[t]hose who labour in the earth are the chosen people of God, if ever he had a chosen people" has translated into the societal goal to preserve and protect farms.¹³ Agricultural law has been the legal tool to accomplish this objective: the use of legal exceptions, protections, and programs has been advanced to preserve the agricultural industry. Examples of agricultural exceptionalism via the law include protections afforded

⁸ See, e.g., 21 U.S.C. § 393(b)(2)(A) (FDA is to protect public health by ensuring that "foods are safe, wholesome, sanitary, and properly labeled").

⁹ Founded in 1949, FDLI is a nonprofit organization that provides a forum for discussion of food and drug issues through conferences, publications, and member interactions.

¹⁰ See Peter Barton Hutt, Richard A. Merrill & Lewis A. Grossman, *FOOD AND DRUG LAW CASES AND MATERIALS* (Foundation Press, 3d ed. 2007).

¹¹ Another text, *The Regulation of Food*, offers a pedagogical approach to the study of food regulation, geared to food regulatory scientists as well as food lawyers. See Neal D. Fortin, *FOOD REGULATION: LAW, SCIENCE, POLICY, AND PRACTICE* (2009).

¹² See Susan A. Schneider, *A Reconsideration of Agricultural Law: A Call for the Law of Food, Farming, and Sustainability*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 935, 946 (2010).

¹³ *Id.* at 939 (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 170 (Frank Shuffelton ed., 1999) (1785)).

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to farmers in labor, bankruptcy, and international trade; exceptions to environmental and antitrust regulations; and, programs based on subsidies, loans, and education.

Agricultural law has spawned law practices, largely in rural areas, that represent farms as well as agricultural enterprises, such as seed and chemical input companies. The academic approach to agricultural law started in the 1940s, where law schools at Harvard, Yale, Texas, and Iowa initiated short-lived agricultural law studies.¹⁴ Agricultural law really took hold in the 1970s, a period of economic hardship for farms and rural communities. In 1979, the *Agricultural Law Journal* was first published. In 1980, the American Agricultural Law Association was formed to provide a forum for presentation and networking among lawyers of agricultural law. A year later, the LL.M. Program in Agricultural Law was founded at the University of Arkansas School of Law. In 1981, the fifteen-volume Agricultural Law treatise was published.¹⁵ In 1985, the casebook, *Agricultural Law: Cases and Materials*, was published by West Publishing Co.¹⁶ The authors of *Agricultural Law: Cases and Materials* define agricultural law as a multidoc-trinal approach: “It is our view that agricultural law is not just a bit of contracts, a bit of torts, a bit of land use, a bit of commercial law, a bit of regulated industries, a bit of this and a bit of that. Rather, it is a complex and highly integrated field of law held together by certain broad themes.”¹⁷ These themes, according to the authors, include land use, economic regulation, and the promotion of family size farms. The authors conclude that agricultural law is the study of laws and institutions that have developed to reflect unique characteristics of agriculture and the need to preserve the farms. The contents of the textbook serve this purpose and include the financing the ownership of agricultural land, farm leases, warehouses, operational financing, animals, commodity futures contracts, agricultural cooperatives, agricultural employment, soil and water management, and farmlands preservation.¹⁸

Traditional food law is distinguishable from agricultural law in three ways. First, agricultural law focuses on the regulation of the production of agriculture, whereas food law traditionally focuses on the postproduction regulation of food – the processing, manufacturing, labeling, advertising, distribution, and consumption of food. Second, agricultural law focuses on the producer of food and the inputs that go into the production of food, whereas food law has a decided slant toward the interests of the consumer. Third, the practitioners of food law – typically urban lawyers in large metropolitan areas, who practice food and drug law – are a vastly different group in location of practice and cliental than agricultural law practitioners – typically lawyers in rural areas, who represent the interests of agriculture enterprises.

[c] Reframing Food Law

In the twenty-first century, there arose in the United States a nascent, social movement geared toward transforming the global food system.¹⁹ Although the food movement has been at the forefront of conversation, it has often evaded definition. The movement has

¹⁴ *Id.* at 941.

¹⁵ *Id.*

¹⁶ See Keith G. Meyer ET AL., *AGRICULTURAL LAW: CASES AND MATERIALS* (West Publishing Co. 1985).

¹⁷ *Id.* at XIX.

¹⁸ See generally MEYER ET AL., *supra* note 16.

¹⁹ See Michael Pollan, *The Food Movement, Rising*, N.Y. TIMES REVIEW OF BOOKS (June 10, 2010).

concerned itself with changing social norms and includes numerous directions in addition to basic food safety and marketing concerns, such as GMO labeling, nutrition, food waste, sustainability, new farmers, farmland preservation, food sovereignty, school lunch reform, local food, food access, urban agriculture, farm bill reform, initiatives to create gardens and cooking classes in school, farm worker rights, nutrition labeling, obesity, hunger, animal welfare, and environmental issues.²⁰

This growing interest in food has reframed food law in American society by creating aspirations that extend beyond the reach of traditional food law. As Michael Pollan points out, “[i]t would be a mistake to conclude that the food movement’s agenda can be reduced to a set of laws, policies, and regulations, important as these may be.”²¹ According to Pollan, the food movement is “about community, identity, pleasure, and, most notably, about carving out a new social and economic space removed from the influence of big corporations on the one side and government on the other.”²² In essence, the food movement has set out to foster new norms for civil society. It should be noted that the food movement carries with it equity concerns in that minorities are underrepresented, especially among farmers’ markets and community-supported customers.²³

Notwithstanding the transcendent nature of the food movement, modern law has responded to emergent concerns of health, environmental, and economic impacts of the modern food system in two ways: first, the addition of new laws that emanate from the traditional food law regime of the FDA-USDA-FTC-EPA cluster of laws, rules, and standards; second, an addendum of new laws and tools that source from outside the traditional regulatory regime.

Addition – The traditional food law regime has generated significant legal activity in recent years. For example, the 2011 Food Safety Modernization Act (FSMA) has been heralded as the most important food law since the 1938 Food Drug & Cosmetic Act (FDCA), as it attempts to deal with growing imports of food and systemic food safety problems in the global food supply chain. Through FSMA, the traditional food law regime is also reaching for the first time the farm where value-adding activities on farms generate food safety concerns and attention from regulators.

Addendum – New, distinctive food laws that fall outside of government regulation law include laws that are developed by litigation, voluntary standards, contracts evoking private standards, and municipal laws that govern urban agriculture and local food. New government programs that shape the way food is produced, marketed, and distributed also generate and shape new legal relationships among stakeholders. All of these new laws operate as filler law where traditional regulatory law falls short in addressing problems and issues. These new laws also encompass innovative ideas on the promotion of issues important to the food movement, including the extension of SNAP benefits to farmers’ markets and favorable zoning laws to promote aquaculture in blighted communities. These new laws are transformative to the extent that they shape the modern food systems approach. The food systems approach bespeaks of a growing recognition and concern by

²⁰ See *id.*
²¹ *Id.*
²² *Id.*
²³ See Julie Guthman, “If They Only Knew”: Color Blindness and Universalism in California Alternative Food Institutions, 60 PROF. GEOGRAPHER 387, 392 (2007).

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consumers of the importance and relevance in their daily lives of food systems – local food systems, regional food systems, national food systems, and the global food system. A food systems approach encompasses the cultural values of food, from food production to consumption. In addition to commerce, safety, marketing, and nutrition, these values include community building, connection to food sources, and sustainable practices in the food system. These values incentivize consumers to desire information about food from the farm to the fork. Hence, new marketing laws on animal welfare claims or environmental practices on the farm connect the interests of consumers and farmers. Even laws that are intended to attract new and beginning farmers are part of food policy and affect consumer interest.²⁴ To a degree, a food systems approach is a convergence between agricultural law and food law.²⁵

[d] Expanded Audience

The expansion of food law also broadens the invested audience. The first group is the legal bar, which includes the traditional FDA bar of attorneys whose practices are affected by the pressures and challenges imposed on their food enterprise clients by demands from consumers, litigation, and additional regulation. The food law bar also includes trial lawyers who engage in class action or other litigation involving food on issues not adequately addressed by regulation. Government counsel are increasingly being involved in city planning and public health issues on zoning of food desserts, community gardening, and farmers' markets, food access issues of food trucks, public health issues concerning nutrition programs, obesity, and even food and beverage taxes designed to change public consumption habits. Lawyers who represent advocacy groups, state and local food policy councils, pro-bono activities, and foundations have an interest in setting food policy.

A second group is the legal academy. Law schools are increasingly paying attention to food law and policy, an approach that examines the food system holistically and evaluates legal tools to address the problems from the modern food system.²⁶ Law schools are beginning to address issues about the food system through launching new courses, clinics, and centers.²⁷ Traditional law courses, including health law, environmental law, international law, public policy law, and intellectual law courses have components of food law and policy in their curriculum. Even traditional FDA law courses are well served by a larger contextual approach to food law and policy.

²⁴ See Neil D. Hamilton, *Greening Our Garden: Public Policies to Support the New Agriculture*, 2 DRAKE J. AGRIC. L. 357, 361 (1997).

²⁵ Susan Schneider, the director of the LL.M. program at the University of Arkansas, has called for a convergence of sorts between agriculture law and food law: a food-based agricultural law that reconciles the interest of farmers with the public good of society, advancing sustainability, food safety, health, and nutrition. See Schneider, *supra* note 12, at 946. In a similar vein, Neil Hamilton makes the case that farmers have an important role in food law and policy. See Neil D. Hamilton, *Keeping the Farm and Farmer in Food Policy and Law*, 11 J. Food L. & Pol'y 9 (2015).

²⁶ See Baylen J. Linnekin & Emily M. Broad Leib, *Food Law & Policy: The Fertile Field's Origins and First Decade*, 2014 WIS. L. REV. 557 (2014) (documents the history of the development of food law in American law schools).

²⁷ Representative programs include the UCLA Resnick Food Law & Policy Program, the Harvard Food Law Lab, the University of Arkansas School of Law Agricultural and Food Law LL.M. Program, the Drake Law School Agricultural Law Center, the Howard University School of Law World Food Law Institute, and the Vermont Law School Center for Agriculture and Food Systems.

Additional groups comprise the audience of expanded food law. As jurists are increasingly hearing food law cases, a food law approach that is broad and contextualized helps in the decision making. Policymakers are increasingly cognizant of the importance of food law in not only adapting to changes in social food values, but also in the potential of law to shape food consumption priorities and habits. Finally, an assortment of nonlaw professionals – health advocates, urban planners, community organizers, and consumer advocates – are interested in the intersection of food law and their respective interests.

[e] Distinctive Discipline

The vastness of “food law” subject matter raises a legitimate question as to whether food law is not a discipline in and of itself, but merely a subsection of other forms of law – administrative, environmental, consumer protection, international, tort, zoning, animal welfare, constitutional, and intellectual property. However, the case to consider food law as a discipline (albeit multidisciplinary) in and of itself is strong. Its value lies in focusing attention on how law governs food from the field to the table. The challenges posed by a modern food system unlike anything that the world has experienced have generated attention on the governance of food to warrant a legal field and discipline such as food law. Moreover, by recognizing how law governs food, improvements can be made and dynamics can be better understood.

Finally, food law also has a framework, a fact occasionally overlooked by well-meaning practitioners and scholars when latching onto a food policy topic for the first time. It is this pre-existing framework that distinguishes emerging modern food law from other start-up law disciplines that are dismissed “as just another example of ‘the law and ...’ problem.”²⁸ This treatise explains how this framework has expanded as traditional and emerging legal doctrines operate and interact in response to changes in society that affect food and consumers. Whether this expanded field of “food law” is coherent and distinctive enough to evolve into a permanent discipline of law is a question that only time can answer. This treatise makes no pretense as to what the answer to this question ultimately will be. Instead, this treatise simply lays out the law governing food in order to equip the practitioner and scholar with an expanded legal framework to address the complexities and challenges of the modern food system.

The first step in the framework is the analysis of the subject matter of food law – food – which raises the issue of how does the law define food.

§ 1.02 Legal Definition of Food

[1] *Statutory Definition*

Section 321(f) of the 1938 Food, Drug, and Cosmetic Act (FDCA) defines “food” based on the use of the article in question: “(1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.”²⁹ The impact of the changing attitudes about food has influenced this statutory

²⁸ A. Dan Tarlock, *Is There a There in Environmental Law?*, 19 J. LAND USE & ENVTL. L. 213, 228 (2004).

²⁹ Federal Food, Drug, and Cosmetic Act (FDCA), ch. 675, § 201(f), 52 Stat. 1040, 1040 (1938) (current version at 21 U.S.C. § 321(f)).