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SYMPOSIUM: THE FUTURE OF FOOD REGULATION

Wendy E. Wagner[†]

When most of us think about food regulation, we imagine infected cattle and contaminated peanut butter. The articles in this symposium shatter this narrow conception and underscore just how central food regulation is to public health protection. We are what we eat, and how we produce this food affects how we live. Systemic problems of obesity, infection, and a wide range of diseases are tied to our failure to come to terms with a variety of risks associated with food. The methods we use to produce food involve the application of large amounts of dangerous chemicals and expose workers to a wide range of serious and often life-threatening risks. Food regulation is so central to public health protection that it was even a line item in the recent health care reform law.¹

The contributing authors, all top scholars in public health and environmental regulation, offer fresh and important perspectives on the challenges that food safety presents to the regulatory state and propose new, more productive reforms as we move forward. Each of the five articles in the symposium maps out an area within the larger and poorly understood area of food regulation and in so doing provides readers with a better understanding how this sprawling regulatory enterprise works and why it sometimes fails. The authors also confront the global reality of our food supply in their inventory of regulatory challenges for the future. Through their intricate analyses of food safety, the authors ultimately offer important regulatory lessons for other areas of health and environmental regulation as well, including drug licensing, pollution control, and worker protection.

[†] Joe A. Worsham Centennial Professor, University of Texas School of Law. I am most grateful to the Health Matrix staff for their excellent work on this symposium.

¹ See, e.g., Katie Drummond, *Hidden Health Care Clause: Menu Labels Go National*, AOL NEWS, March 22, 2010, available at <http://www.aolnews.com/healthcare/article/health-care-bill-mandates-nutritional-labels-on-chain-restaurant-menus/19409727> (discussing how Section 2572 of the new health care law “will force chain restaurants and vending machines to post nutritional labels on their food”).

The symposium issue opens with a breathtakingly comprehensive introduction to the globalization of food regulation and the methods used to assess food safety risks by Dr. Sandra Hoffmann and Mr. William Harder. After providing an overview of the types of issues that occur under the umbrella of food regulation, the authors then trace regulatory responses to these risks, not only in the United States, but in other countries and across international regimes. The important theme that runs throughout the authors' analysis is the increased reliance on science-based forms of risk assessment to determine the point at which a food risk should trigger regulatory intervention. This science-based or technocratic form of risk assessment is generally conducted in ways that tend to eschew social science and related methods of analysis that account for larger social and human factors that affect food risks. Global regimes such as the Sanitary and Phytosanitary (SPS) Agreement and Codex, for example, assume that risks can be estimated without consulting the social sciences. After isolating this emerging trend, the authors express concern that a narrow focus on scientific factors in food risk assessments could unduly limit the regulatory consideration of viable regulatory alternatives, produce an incomplete assessment of risk, and ultimately cause regulatory programs to be more vulnerable to political challenges.

Dr. Elizabeth Fisher continues and elaborates on the theme developed by Hoffmann and Harder regarding the scientification of food safety regulation. Using her path breaking book – *Risk Regulation and Administrative Constitutionalism* – as a springboard, Dr. Fisher identifies two very different, but often competing paradigms for risk regulation. The first is the science-based or technocratic method of risk assessment described by Hoffmann and Harder. The alternative paradigm is more deliberative and considers natural science as only one ingredient within a larger set of social issues relevant to determining how best to regulate food risks. Using two case studies arising in the United States and Europe, Dr. Fisher illustrates how the technical, risk-based regulatory paradigm has generally risen to dominate risk regulation at the expense of the deliberative approach. While dissenting voices periodically advocate for a more deliberative approach to food regulation, these dissenters seem routinely overpowered by those who espouse the technocratic view. Yet, adopting only the technocratic paradigm and rejecting the need to take into account social issues when addressing the inescapable, underlying policy issues concerning food safety regulation results in a regulatory system that is built on an analytic house of cards and is destined to fail, particularly once it is subjected to challenges within the political process. Dr. Fisher convincingly argues that greater attention to the underlying constitutionalism of a country's administrative state, as well as a con-

certed effort to integrate both technocratic and deliberative paradigms in regulation, could lead to more grounded and successful regulatory programs in the future.

These competing paradigms re-emerge in Professor Timothy Lytton's important article on nutrient profile labeling. Nutritional labeling that rates foods on a unified nutrition scale and allows for cross-food comparisons has become an increasingly important concept in the food safety arena. Prof. Lytton's taxonomy of approaches to nutrient profile labeling and his overview of how these approaches fit within existing U.S. Food and Drug Administration regulations and voluntary programs offer an invaluable roadmap to this growing area of food safety regulation. Prof. Lytton also underscores how science and policy must work together in establishing the best approach to nutrient profile labeling. The science of nutritional labeling involves numerous, contestable policy choices in deciding how to rank nutritional values and in identifying which foods should be compared. Despite these challenges, Prof. Lytton makes a persuasive case for how one type of nutrient profile label could be developed to avoid the most significant problems and pitfalls. His proposal seems precisely the kind of incremental approach needed to improve nutrition labeling practices in the future.

The imperative for a more holistic approach to food regulation is replayed again by Professor Donald Hornstein, who focuses on an earlier point in the food regulatory continuum – the point at which food is produced. In his article, Prof. Hornstein emphasizes that although the significant negative externalities generated by food production have been well understood by scientists since Rachel Carson's seminal work in the 1960's, little has been accomplished within the federal regulatory system to regulate these sources of pollution. Instead, the agricultural lobby has succeeded in incorporating a long list of exemptions in virtually every environmental statute passed to date. Prof. Hornstein considers whether the myriad ecological connections between agricultural production with the latest and most urgent environmental crisis – climate change – may at last sweep oversight of the externalities associated with agricultural production into the regulatory process. Using examples drawn from ongoing regulatory debates over biofuels and the capability of agricultural production to act as a carbon sink, Prof. Hornstein suggests that this ecological interconnectedness is becoming generally accepted, a development that may be due in part to the crisis-driven qualities of climate change and in part to the prospect of regulatory advantages, as well as costs, to agricultural interests from recognizing this ecological interconnectedness. Thus, while powerful farm lobbies continue to exert a heavy hand in regulatory outcomes, an official acknowledgement of the interconnec-

tedness between agricultural production and ecological integrity may finally be on the regulatory table and could lead to more comprehensive regulation across a wide range of regulatory programs.

Professor Rena Steinzor closes the symposium with an abrupt wake-up call that reminds us that, regardless of how we regulate, ultimate enforcement of the resulting rules must occur if regulation is to matter. As long as the thinly financed agencies are strapped for investigative resources, however, regulated parties will recognize that the likelihood that their violations will be exposed is low. Rather than simply concluding that more resources are needed for enforcement, a conclusion that seems naïve and unrealistic in this shrinking economy, Prof. Steinzor instead focuses on the penalty side of the equation. Even with a low probability of being caught, high sanctions – i.e., the prospect of criminal liability against corporate officials – may offset some of the otherwise rational decision-making that tilts towards non-compliance. Criminal enforcement is all the more appropriate, she argues, since the consequences of noncompliance with food safety requirements often result in death or serious injuries to members of the public, which is fully consistent with the concept of manslaughter. Prof. Steinzor's article not only makes important advances in refocusing attention on enforcement in food safety regulation, but revives older debates within public health regulation regarding the appropriateness of criminal enforcement. Her article should lead to a more systemic rethinking of the underutilization of criminal provisions in public health and welfare law.

By the end of the issue, readers will have a much richer appreciation of the challenges arising in food regulation and, equally important, will have a glimpse of some of the most promising and immediate paths to reform. The authors' contributions, which pull back the curtain to expose the real regulatory program governing food safety in a variety of complementary lights, help demystify the issues regarding "what is a food risk." Their work focuses policymakers and students of food regulation on the need to design underlying regulatory approaches that actually fit the mixed, science-policy nature of the problems. In the process of developing this larger theme using dozens of different issues and case studies, the authors also highlight the challenges and possibilities for redressing inadequate consumer information regarding the nutritional value of food; the unaddressed health and environmental risks that arise during the production of food, before it reaches the table; and the imperative for more rigorous enforcement of regulatory requirements. Through their thoughtful articles, the authors give us hope that, with some regulatory and legislative ingenuity, substantial improvements in food safety may ultimately be within reach.