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Tainted: Food, Identity, and the Search for Dignitary Redress

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Tainted

FOOD, IDENTITY, AND THE SEARCH FOR DIGNITARY REDRESS

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INTRODUCTION

Consider the following examples: a kosher consumer buys and eats "all beef franks" that are packaged in pork casings. A halal person buys and ingests vitamins that contain pig gelatin, even though no animal products are listed on the label. A vegetarian consumes undisclosed beef fat. In each of these situations, the consumer ingests food products that they find both viscerally disgusting and morally repugnant, undermining the consumer's very religious and moral identity. In each of these cases, the FDA does not require the manufacturer to disclose the offensive food substance on its labels if the substance's content is below the statutory minimum and the offensive ingredient does not have a health, functionality, or safety impact. Currently, the law provides redress for exposure to foods that are toxic and poisonous—tainted as a matter of physical safety.[1] But it provides little redress for exposure to foods that are tainted otherwise. Should it? If so, what type of law can or should address this issue?

Discussing the nature of taint, impurity, and offensive taint specifically, this article seeks to expand discussions of food safety and security beyond access to *any* food, to access to food that is in accordance with an individual's identity and beliefs.[2]

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[1] *See* Alexia Brunet Marks, *Check Please: Using Legal Liability to Inform Food Safety Regulation*, 50 HOUS. L. REV. 723, 723-25 (2013) (discussing over 300 food safety cases and related laws and regulations).

[2] VANDANA SHIVA, STOLEN HARVEST: THE HIJACKING OF THE GLOBAL FOOD SUPPLY 21 (2000) ("Food security is not just having access to adequate food. It is also

Food is more than just fuel to people. Food is intimately intertwined with self, identity, and personhood. Food choices can express our religious beliefs, our political views, and our basic understandings of culture. Thus, "safe" foods can also be tainted—not in terms of being medically poisonous or toxic—but because of the religious and social implications associated with eating them. This article labels such exposure to medically safe but otherwise impure foods as "offensive taint."

Some have argued that food oppression occurs when facially neutral laws have disproportionally adverse health impacts on minority populations.[3] This article argues that facially neutral laws may also adversely impact minorities' ability to express their beliefs and exercise personal autonomy, thereby inflicting dignitary harm.

For those who might dismiss these hypotheticals as the result of highly idiosyncratic food preferences, as opposed to genuine harms that the law should protect against, consider exposure to foods that are merely viewed as offensive in American culture.[4] What if the aforementioned "all beef" hot dogs were covered in insect-based casings? The hypothetical situation is simply an "ick" factor not grounded in any health claims[5]—but likely most people in modern U.S. society would consider the presence of bugs in their food highly offensive, without any deep religious or political conviction. Most likely, the average citizen would feel personally and physically violated by eating food that had those components, regardless of the food's safety.[6]

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having access to culturally appropriate food. Vegetarians can starve if asked to live on meat diets.").

[3] *See* Andrea Freeman, *The 2014 Farm Bill: Farm Subsidies and Food Oppression*, 38 SEATTLE U. L. REV. 1271, 1276 (2015) (defining food oppression as the study of "how facially neutral food policy and law can physically debilitate members of marginalized and subordinated groups").

[4] It is questionable whether law need be applicable to large numbers of people to be valid. Indeed, much of law is preoccupied with protecting individual rights—an individual being, by definition, just one person.

[5] This is despite there being no health risk necessarily associated with these choices, and in other countries, people do ingest insects. Insects are becoming increasingly recognized as an efficient source of high nutritional value. Melanie Haiken, *The Next New Miracle Superfood: Insects, Scientists Say*, FORBES (July 11, 2014, 11:43 AM), http://www.forbes.com/sites/melaniehaiken/2014/07/11/the-next-new-miracle-superfood-insects-scientists-say [http://perma.cc/8GB5-7AW9] (noting the high protein and beneficial fat content of insects).

[6] This article does not argue that a pure "ick" factor should necessarily be enough to recover under the law, although it could be. Rather, it uses this example to make the point that many people find foods highly and viscerally objectionable based on loose social norms, let alone personal or religious convictions.

This article is the first to directly identify and confront this gap in the law. Part I begins by outlining the issue: why such taint is a real harm deserving of legal compensation and how it has been raised in previous cases. Part II then discusses the current state of the law and exposes how such harms are not adequately protected under existing constitutional, statutory, regulatory, and common law structures. Finally, Part III concludes that in lieu of statutory and regulatory reform, traditional dignitary torts—particularly battery—may provide the most immediate form of redress for individuals seeking to protect themselves from unwanted exposure to offensively tainted foods. This article argues that, in many ways, offensive food taint is a food justice issue that is about recognizing the failure of law to provide redress for something that is intuitively fundamental: the ability to control our dignitary space and physical autonomy.

I. WHY OFFENSIVE FOOD TAINT IS A HARM

Food is not just a product. It is central to human survival, not only because it provides physical nourishment, but also because it defines who we are as people.[7] Food traditions mark the important moments in human lives: holidays, weddings, births, deaths. Food choices solidify nationalism, delineate faiths, and signal political beliefs.[8] Food cultures and traditions dignify group memberships and individual identity. As such, exposure to food that is repugnant for reasons other than food safety is a real harm deserving of legal protection. Courts, however, have failed to consistently find that someone who has unwittingly come into contact with food that is offensive to their beliefs has suffered actual injury.

A. Food, Faith, Identity, Nationhood

The clearest example of food's unique role in society is its centrality in expressions of faith. Faiths often define what

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[7] SIDNEY W. MINTZ, TASTING FOOD, TASTING FREEDOM: EXCURSIONS INTO EATING, CULTURE, AND THE PAST 7 (1996) ("[E]ating is never a 'purely biological' activity . . . . [F]oods eaten have histories associated with the pasts of those who eat them.").

[8] *See generally* PAMELA GOYAN KITTLER ET AL., FOOD AND CULTURE 4-12 (6th ed. 2012) (discussing the role of ethnicity and culture in food traditions); Peter Smith, *Mythology and the Raw Milk Movement*, SMITHSONIAN (May 9, 2012), http://www.smithsonianmag.com/arts-culture/mythology-and-the-raw-milk-movement-84299903/?no-ist [http://perma.cc/M57S-4H5K] (discussing how the raw foods movement views consumption of raw milk to be a manifestation of libertarian political beliefs).

adherents can and cannot eat. Meat in particular is highly restricted. Jews have kosher laws that dictate not only that certain meats are prohibited outright but also how meat that is not prohibited must be slaughtered and eaten.[9] These rules are detailed and provide that certain foods, such as meat and dairy, cannot be combined.[10] Muslims do not eat pork.[11] Out of a commitment to nonviolence and a belief in reincarnation, strict Hindus and Buddhists are vegetarian.[12] In addition to rules regarding what can be eaten, abstention from eating also plays a significant role in religious practice. Catholics, Jews, Muslims, Hindus, Buddhists, and Latter Day Saints all engage in some form of ritual fasting as a way to cleanse or purify.[13]

Food is also central to nationalism.[14] Whether discussing wine (and therefore France) or rice (and Japan), foods and eating practices often represent or symbolize entire countries.[15] Nations and cultures take pride in their food traditions. At times, foods from a country are synonymous with not only the country itself but also its people; during World War II, the French were disparagingly referred to as "Frogs" and the Germans known as "Krauts," highlighting divergent food traditions as a way to elicit intuitive dislike or disgust.[16]

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[9] TIMOTHY D. LYTTON, KOSHER: PRIVATE REGULATION IN THE AGE OF INDUSTRIAL FOOD 7, 40 (Harvard Univ. Press 2013) (discussing kosher rules).

[10] *Id.*

[11] PETER SMITH & DAVID WORDEN, KEY BELIEFS, ULTIMATE QUESTIONS AND LIFE ISSUES 115 (2003) (noting that pork is viewed as dirty in the Islamic faith).

[12] *Id.* at 114 (discussing why Hindus and Buddhists generally abstain from eating meat).

[13] CAROLINE WALKER BYNUM, HOLY FEAST AND HOLY FAST: THE RELIGIOUS SIGNIFICANCE OF FOOD TO MEDIEVAL WOMEN 37 (1987) (discussing the tradition of Lent and fasting prior to Easter); NATANA DELONG-BAS, THE FIVE PILLARS OF ISLAM: OXFORD BIBLIOGRAPHIES ONLINE RESEARCH GUIDE 15 (2011) (describing Muslim fasting during Ramadan); *Yom Kippur—Day of Atonement*, REFORMJUDAISM.ORG, http://www.reformjudaism.org/jewish-holidays/yom-kippur-day-atonement [http://perma.cc/7NB8-JEJN] (last visited Apr. 10, 2016) (discussing fasting during Jewish high holy days); KITTLER ET AL., *supra* note 8, at 98 (describing how Hindus fast on several days throughout the year to coincide with cycles of the lunar calendar, anniversaries of the deaths of parents, and other key holidays); Elder Joseph B. Wirthlin, *The Law of the Fast*, LDS.ORG (July 2001), http://www.lds.org/liahona/2001/07/the-law-of-the-fast?lang=eng [http://perma.cc/UCT4-R7WL] (noting that Latter Day Saints should fast to gain spiritual clarity).

[14] ATSUKO ICHIJO & RONALD RANTA, FOOD, NATIONAL IDENTITY AND NATIONALISM: FROM EVERYDAY TO GLOBAL POLITICS 2 (2016) ("[F]ood, or more precisely food culture, builds and sustains a particular relationship between the individual and the nation.").

[15] Mark Weiner, *Consumer Culture and Participatory Democracy: The Story of Coca-Cola During WWII*, *in* FOOD IN THE USA: A READER 123 (Carole M. Counihan ed., 2002) (noting the relationship between wine and France, rice and Japan, and whiskey and Scotland).

[16] *See Frog*, OXFORD ENG. DICTIONARY: ONLINE EDITION (2014), http://www.oxforddictionaries.com/us/definition/american_english/frog [http://perma.cc/Y4CU-7UF6] (defining "Frog" with a capital letter as a derogatory term for the French); *Kraut*, OXFORD ENG.

Governments can also use food to foster a stronger sense of national identity through various actions including "national branding, standardisation of a 'national' cuisine, [and] protection of the agricultural sector or restriction of trade of certain food items."[17] Wartime often highlights the nationalism infused in food traditions when common foods may be rebranded to avoid associations with the enemy.[18] In war, food may also be used to win over enemy civilians by introducing them to foreign food that is easy to prepare and thus is easily assimilated into their existing food cultures.[19]

A situation need not rise to the level of armed conflict, however, for food to be used to protect a certain sense of national identity. Recently, European countries have reaffirmed a commitment to a non-Muslim national identity by refusing to accommodate religious needs in state school-meal programs.[20] In a recent vote, a Danish locality's flexibility with regards to drug policies contrasted sharply with its adoption of rigid school meal requirements, declaring that Danish schools and daycares must include pork meatballs: "'Danish food culture' must be a 'central part of the offering—including serving pork on an equal footing with other foods.'"[21] Such views are not exclusive to the international realm; anti-Muslim sentiment has also fueled strong reactions to keeping pork in schools in the United States.[22]

DICTIONARY: ONLINE EDITION (2014), http://www.oxforddictionaries.com/us/definition/american_english/kraut [http://perma.cc/DRL4-4VAS] (defining "Kraut" as a derogatory term for a German, especially a German soldier).

[17] ICHIJO & RANTA, *supra* note 14, at 5.

[18] *See, e.g.*, *Liberty Cabbage*, OXFORD ENG. DICTIONARY: ONLINE EDITION (2014), http://www.oxforddictionaries.com/us/definition/american_english/liberty-cabbage [http://perma.cc/26ZV-RUZQ] (defining "liberty cabbage" as an American noun "[a]dopted during the First World War (1914–18) to avoid the German associations of sauerkraut"); *French Fries Back on House Menu*, BBC NEWS (Aug. 2, 2006), http://news.bbc.co.uk/2/hi/americas/5240572.stm [http://perma.cc/GW5M-E2Q2]. In response to French resistance to American policy, some legislatures sought to remove the word "French" from house menus. Reporters likened this to "similar protest action against Germany during World War I, when sauerkraut was renamed liberty cabbage and frankfurters became hot dogs." *Id.*

[19] Recent war efforts continue this trend with Afghan civilians receiving regular air drops of culturally acceptable (halal) yet Western-style food. *See* Associated Press, *U.S. Airstrikes also Include Airdrops of Food, Medicine*, AUGUSTA CHRON. (Oct. 7, 2001), http://chronicle.augusta.com/stories/2001/10/07/wor_324787.shtml [http://perma.cc/CG9B-4WDC] (noting that the contents of the drops included peanut butter, strawberry jam, crackers, a fruit pastry, and entrees such as beans with tomato sauce and bean and potato vinaigrette).

[20] Dan Bilefsky, *Denmark's New Front in Debate over Immigrants: Children's Lunches*, N.Y. TIMES (Jan. 20, 2016), http://www.nytimes.com/2016/01/21/world/europe/randers-denmark-pork.html?_r=1 [http://perma.cc/MZ4B-RJ9R].

[21] *Id.*

[22] Todd Starnes, *Why Did a Tennessee Grade School Ban Pork?*, FOX NEWS RADIO, http://radio.foxnews.com/toddstarnes/top-stories/why-did-a-tennessee-grade-school-ban-

Likewise, cognizance of a food's relationship to the nation-state and nation building has led to the emergence of "gastro-diplomacy"—the act of attempting to create diplomatic ties between nations through a deeper relationship with national food practices.[23] The term "gastro-diplomacy" was coined in 2002 by the *Economist* when reporting on a Thai government initiative, called "Global Thai," which was created to increase the number of Thai restaurants worldwide.[24] The program was intended not only to introduce Thai food to new populations in an attempt to increase tourism in Thailand, but also to "subtly help to deepen relations with other countries."[25] In the years since, Japan, South Korea, Taiwan, and Malaysia have all created gastro-diplomacy programs specifically with the goals of increasing commerce and tourism and diplomatic ties.[26] Realizing the diplomatic potential of such outreach, the U.S. State Department created the Diplomatic Culinary Partnership in 2012 to increase cross-cultural diplomacy through food.[27] Such official actions reflect what general citizens know from daily life—eating together and sharing foods and food experiences can be intimate and meaningful.[28]

Food-centered holidays can also create a common sense of nationalism across different cultures. For example, in the United States, Thanksgiving has a set of food traditions, in terms of

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pork.html [http://perma.cc/55L9-YHZB] (last visited Apr. 6, 2016) (discussing backlash against a public school that distributed a snack list that stated that children should avoid bringing snacks containing pork).

[23] Paul Rockower, *The Gastrodiplomacy Cookbook*, HUFFINGTON POST (May 25, 2011), http://www.huffingtonpost.com/paul-rockower/the-gastrodiplomacy-cookb_b_716555.html [http://perma.cc/UG36-ZFEJ] (describing gastrodiplomacy as "the act of winning hearts and minds through stomachs").

[24] *Food as Ambassador: Thailand's Gastro-Diplomacy, Like the Cuisine, Like the Country*, ECONOMIST (Feb. 21, 2002), http://www.economist.com/node/999687 [http://perma.cc/KL29-748T].

[25] *Id.*

[26] *See* Juyan Zhang, *The Foods of the Worlds: Mapping and Comparing Contemporary Gastrodiplomacy Campaigns*, 9 INT'L J. COMM. 568 (2015), http://ijoc.org/index.php/ijoc/article/viewFile/2847/1316 [http://perma.cc/S2HQ-AXTG].

[27] Press Release, U.S. Dep't of State, U.S. Department of State to Launch Diplomatic Culinary Partnership (Sept. 5, 2012), http://www.state.gov/r/pa/prs/ps/2012/09/197375.htm [http://perma.cc/WWR6-AUP5] (noting that this program will "elevate the role of culinary engagement in America's formal and public diplomacy efforts"). It is worthwhile to note that Americans have been unofficially engaged in gastro-diplomacy for decades through the global proliferation of fast food chains and American staple products, such as Coca-Cola. Mark Weiner, *Consumer Culture and Participatory Democracy: The Story of Coca-Cola During WWII*, *in* FOOD IN THE USA: A READER, *supra* note 15, at 123, 123-24 (noting that "Coca Cola . . . has come to symbolize the American nation . . . . [T]he national characteristic it represents is a political one, a democratic vision of consumer abundance . . . .").

[28] *See* MINTZ, *supra* note 7, at 13 (discussing the particular importance of sharing meals as at "the same time a form of self-identification and of communication").

content, preparation, and the format of the meal, that impart a sense of uniformity and commonality on a diverse population.[29] Participation in the ritual is a nationalistic affirmation, a commitment to joining the United States' (revisionist) history. "Recalling the first harvest of the Pilgrim Fathers, it has never become just another holiday . . . . [It] has been embraced by each immigrant wave as a sign of arrival, an assertion of American oneness."[30]

When a political, religious, or ethnic minority is unable to conform to a national food practice, that minority is also excluded from a sense of national identity.[31] Historically, fear of the impact that immigrant populations would have on American life has led to efforts to reprogram immigrants' diets through classes, school lunches, and cookbooks.[32] In discussing Jewish middle-class homes in the United States, Timothy Lytton noted that many Jews stopped keeping kosher because it "set them apart from other Americans."[33] Ultimately, this led to a proliferation of products marketed to kosher families to make them feel "American": recipes for kosher meatloaf, oatmeal cookies, and even imitation bacon.[34]

B. Taint: Real Harm, Real Cases

Whether or not offensive taint to food is a real harm is not abstract. Plaintiffs have sought redress for exposure to such tainted foods, although these claims have not been conventionally successful.[35] Many of these claims are tied to religious beliefs, though they need not be to qualify as offensive taint. Claims could

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[29] *See generally* Janet Siskind, *The Invention of Thanksgiving: A Ritual of American Nationality*, *in* FOOD IN THE USA: A READER, *supra* note 15 at 42 (describing how participation in Thanksgiving "transforms a collection of immigrants into Americans").

[30] Simon Jenkins, *The Politics of Giving Thanks*, LONDON TIMES 16 (Nov. 27, 1993) (reporting on the political meaning of Thanksgiving).

[31] *See* Melissa Mortazavi, *Consuming Identities: Law, School Lunches, and What It Means to Be American*, 24 CORNELL J.L. & PUB. POL'Y 1, 4, 22-28 (2014) (discussing how the school meal program marginalizes children from minority food backgrounds).

[32] *See, e.g.*, Carole Bardenstein, *Transmissions Interrupted: Reconfiguring Food, Memory, and Gender in the Cookbook—Memoirs of Middle Eastern Exiles*, 28 SIGNS 353, 357 n.6 (2002).

[33] LYTTON, *supra* note 9, at 43.

[34] *Id.* at 44-45.

[35] Tort lawsuits, however, play an important role in bringing forward additional viewpoints and arguments in the American legal system, and they support democratic structures by increasing venues for deliberative input. Melissa Mortazavi, *Tort as Democracy: Lessons from the Food Wars*, 57 ARIZ. L. REV. 929, 931 (2015).

be made in any case where a party is exposed to food that the party finds morally or politically objectionable.

The religiously animated cases involve exposure to food that violates the religious food restrictions of the parties suing. Strict Hindu plaintiffs, who as a matter of faith are vegetarian, have sought redress for exposure to foods that contain meat—each time unsuccessfully.[36] But Hindus are not alone in seeking redress for exposure to offensively tainted food. Jews have sued for being sold and served nonkosher food when the food was represented as kosher.[37] In these cases, claims have been successful where the failure to provide religiously compliant food was a breach of contract, but courts in these cases have not recognized a dignitary harm.

Muslim plaintiffs have also sued grocery stores, restaurants, and vitamin companies for exposure to nonhalal products, but they have rarely received relief.[38] In *Lateef v. Pharmavite LLC*, the plaintiff who sought redress for exposure to pork content in vitamins labeled as vegetarian had her claims denied as preempted by federal law.[39] Recently, in a 2012 suit against fast-food behemoth Wendy's, a pro se Muslim plaintiff claiming "unspecified damages for pain and suffering" had his complaint dismissed for failure to state a claim.[40] Such claims are not new; more than a decade earlier, a Muslim plaintiff sued McDonald's for unwanted exposure to animal

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[36] *See, e.g.*, Gupta v. Asha Enters., L.L.C., 27 A.3d 953 (N.J. Super. Ct. App. Div. 2011); Valluru v. Taco Bell, Case Nos. SC99-417, SC99-418 (Small Cl. Ct., Lancaster Cty., Neb., filed 1999).

[37] Rockowitz, Roz & Edward v. Huntington Town House, Inc., Case No. 0026954/1994 (Sup. Ct., Suffolk Cty., N.Y. 1996) (plaintiffs won a jury verdict for defendant's failure to provide kosher food when contracted to do so; no emotional distress was recognized, as this verdict was based purely on breach of contract claim); Erlich v. Mun. Court of Beverly Hills Judicial Dist., 360 P.2d 334 (Cal. 1961) (finding that claims alleging sale of nonkosher chicken as kosher were not sufficient due to failure to adequately allege intent).

[38] Lateef v. Pharmavite LLC, No. 12 C 5611, 2013 WL 1499029 (N.D. Ill. Apr. 10, 2013) (Muslim plaintiff sued Nature Made Vitamins for failing to disclose the use of animal products in vitamin casing); Lopez v. Wendy's Int'l, Inc., No. 5:12 CV 1412, 2012 WL 5271747 (N.D. Ohio Oct. 23, 2012) (alleging misrepresentation when an employee failed to list bacon on a sandwich bought and consumed by a Muslim); Cofield v. McDonald's Corp., 514 So. 2d 953 (Ala. 1987) (dismissing for failure to state a claim a suit by a Muslim plaintiff against McDonald's for using animal fat in frying); Galaspi-Bey v. Safeway, Inc., No. 727493, 1996 WL 746906, 1996 WL 746335, 1996 WL 746575, 1996 WL 746404 (Cal. Super. Ct., Alameda Cty. 1994) (three Muslim plaintiffs sued Safeway for exposure to beef tainted with pork, chicken, and horsemeat; Safeway settled the suit); Verdict and Settlement Summaries, Galaspi-Bey v. Safeway, Inc., No. 727493, 1996 WL 746906, 1996 WL 746335, 1996 WL 746575, 1996 WL 746404 (Cal. Super. Ct., Alameda Cty. 1994).

[39] *Lateef*, 2013 WL 1499029, at *1.

[40] *Lopez*, 2012 WL 5271747, at *1.

fat.[41] That case was dismissed for a procedural error: failure to properly identify a defendant in a timely fashion.[42] Thus far, the most successful suit involving Muslim plaintiffs suing for offensive taint, *Benjamin Galaspi-Bey, Jr. v. Safeway, Inc.*, ended with a modest settlement of $1,500–$2,500 for each of four plaintiffs.[43] In *Galaspi-Bey*, the meat at issue allegedly contained both pork and horsemeat.[44]

Some claimants have also sought redress on behalf of many religious groups rather than just one. For example, a kosher Jewish plaintiff sued on behalf of not only Jews but also Hari Krishnas, Hindus, Jains, Buddhists, Taoists, Sikhs, and Muslims when she discovered that Panda Express used chicken stock in the preparation of vegetable menu items.[45] It is unclear how this case was resolved; a motion to certify a class was dismissed nearly two years later without a court opinion.[46]

One of the most famous examples of a suit regarding unexpected exposure to meat products was when McDonald's was sued for using beef tallow in its french fries.[47] In that suit, plaintiffs articulated their spiritual commitment to not eating beef and being vegetarian and alleged that the french fries at McDonald's were made using beef fat.[48] The case ultimately settled for roughly $12 million, but the terms of the settlement are more notable than its amount.[49] Here, the major settlement terms required the corporation to make a donation of $10 million to vegetarian and religious groups and to issue a public apology.[50]

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[41] *Cofield*, 514 So. 2d, at 953-54.

[42] *Id.*

[43] Verdict and Settlement Summaries, *Galaspi-Bey*, 1996 WL 746906, 1996 WL 746335, 1996 WL 746575, 1996 WL 746404.

[44] *Id.* It is worth noting that the broader market ramifications of horsemeat allegations as generally offensive may have been partially responsible for the willingness of the company to settle.

[45] *See* Complaint, Adelpour v. Panda Express, Inc., No. BC425869, 2009 WL 4055755 (Cal. Super. Ct., L.A. Cty. Nov. 12, 2009).

[46] Adelpour v. Panda Express, Inc., No. BC425869, 2011 WL 9689206 (Cal. Super. Ct., L.A. Cty. June 20, 2011) (noting rejection of class without prejudice).

[47] *McDonald's to Settle Suits on Beef Tallow in French Fries*, N.Y. TIMES (Mar. 9, 2002), http://www.nytimes.com/2002/03/09/us/mcdonald-s-to-settle-suits-on-beef-tallow-in-french-fries.html [http://perma.cc/S5BX-Q8CV] [hereinafter *McDonald's to Settle*] (reporting lawsuits in Washington, Illinois, California, New Jersey, and Texas).

[48] *Id.*; *Vegetarians' Suit Hits McDonald's French Fries*, CHI. TRIB., May 4, 2001, at 3 (reporting on a class action filed in Kings County, Seattle, by a Hindu, vegetarian plaintiff).

[49] *Beefing Up Its Fries Will Cost Fast-Food Giant $12.4M: A Victory for Veggies*, EDMONTON J. (Can.), Mar. 10, 2002, at A3.

[50] *McDonald's to Settle*, *supra* note 47 (reporting that the settlement would consist of $10 million to be donated to vegetarian, Sikh, and Hindu organizations, in addition to a public apology, small payments to class representatives, and lawyers' fees).

Plaintiffs have also expressly asserted the impact of such exposures on their identities in articulating their claims. In *Rai v. Taco Bell*, a devout Hindu who ordered a bean burrito was served a beef one.[51] Having eaten one bite of it, Mr. Rai claimed that his "most fundamental religious principle" was violated.[52] He stated that he needed to purify himself and that eating cow was "a really devastating experience . . . [,] [s]o much so that I had to go to a psychiatrist. I went to a doctor. I couldn't sleep."[53] In a similar case, devout Hindus were served meat samosas rather than vegetarian ones and also sought damages to pay for religious purification.[54]

In *Vallaru v. Taco Bell*, the plaintiffs, an Indian couple, appeared pro se in small claims court, where they sought redress for eating meat in rice that, according to the establishment's nutritional guide, should have contained no meat.[55] In making their claim, the Vallaru family also sought the cost of returning to India—$2,100 per person—to engage in a religious purification ceremony in the Ganges River.[56] When the court denied their claims for relief, it noted that "[while] the court does not question the sincerity of the Plaintiff's beliefs or motives in this case, the plaintiffs have failed to provide sufficient evidence to justify a judgment in their favor."[57] Reporting on the case, news sources stated that the judge dismissed the claims "because [the pleadings] did not show the rice was tainted or unfit for human consumption."[58] Mr. Vallaru stated that he would pay for the trip to India despite losing the case, because "[i]t's a must for me that I do it."[59]

The violation to personhood here is real. Another Hindu served meat products after diligently questioning the restaurant regarding the content of the food articulated his frustration and sense of marginalization in his pro se complaint as follows:

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[51] Hilary MacGregor, *Hindu Sues for Wrongly Being Served a Beef Burrito*, L.A. TIMES (Jan. 24, 1998), http://articles.latimes.com/1998/jan/24/local/me-11551 [http://perma.cc/G4PB-FRM8] (reporting on *Rai v. Taco Bell*, No. CIV178430 (Cal. Super. Ct., Ventura Cty. Jan. 20, 1998)).

[52] *Id.*

[53] *Id.* Mr. Rai's lawyer noted, "What about the mental impact here? . . . This is the equivalent of eating his ancestors." *Id.*

[54] Gupta v. Asha Enters., L.L.C., 27 A.3d 953, 956 (N.J. Super. Ct. App. Div. 2011).

[55] Valluru v. Taco Bell, No. SC99-417, SC99-418 (Small Cl. Ct., Lancaster Cty., Neb., filed 1999).

[56] *Id.*

[57] *Id.*

[58] *Vegetarians Lose Against Taco Bell*, CHI. TRIB. (Aug. 28, 1999), http://articles.chicagotribune.com/1999-08-28/news/9908280047_1_purification-ceremony-taco-bell-ganges-river [http://perma.cc/WM3U-CJ2V].

[59] *Id.*

> Imagine a restaurant you've trusted for five years tells you that they've been serving you cat meat in your food? How would you feel? Soiled? Violated? Deceived? Betrayed? That's how I feel. Are we veggies so marginal that we can be lied to over a period of years with immunity . . . ? [A]re we so little regarded that our sensibilities can be so routinely trivialized and trampled?[60]

Arguably, some of these cases are a result of carelessness, rather than deliberate action. Some, however, arose from situations where the food provider chose to include but not disclose the presence of an ingredient in its product that caused it to be offensively tainted. In *Lateef v. Pharmavite LLC*, Nature Made Vitamins had encapsulated its vitamins in pork gelatin without disclosing any animal byproducts on the label.[61] In fact, the label on the vitamins in question stated that "Vitamin B–12 supplements are recommended . . . for vegetarians and vegans who avoid dietary sources rich in Vitamin B–12."[62] A Muslim woman, having diligently read the label and visited the company website to ascertain whether the vitamins contained any pork, brought suit alleging a breach of express warranty, misrepresentation, and unjust enrichment when she learned the vitamins contained gelatin.[63] The vitamin company did not argue that the insertion of the pork gelatin was accidental—only that the disclosure of the gelatin was not required by law.[64] The court deemed the company's statements regarding the product's suitability for vegetarians—its "commitment to . . . transparency," "support[] [for] healthy lifestyles," "belief in 'empowering consumers,'" and communication regarding "important details of [its] products"—to be puffery and not actionable.[65]

Plaintiffs have also sought redress for offensive taint when the offense was not related to religious beliefs. Without making any religious claims, a 2007 class sued Vienna Beef for advertising its meat product as "all beef" when the casings were pork.[66] Despite pork clearly being prohibited in the Jewish and Muslim faiths, plaintiffs decided to articulate their

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[60] Complaint at ¶¶ (d), (e), Steve Karian v. Fajitas & Ritas Rest. (Mass. Super. Ct. Mar. 13, 2014) (No. 140857G).

[61] Lateef v. Pharmavite LLC, No. 12 C 5611, 2013 WL 1499029, at *1 (N.D. Ill. Apr. 10, 2013).

[62] *Id.* at *2.

[63] *Id.*

[64] Lateef v. Pharmavite LLC, No. 12 C 5611, 2012 WL 5269619, at *2 (N.D. Ill. Oct. 24, 2012) (earlier version of the case dismissed as being preempted by federal regulation).

[65] *Lateef*, 2013 WL 1499029, at *3.

[66] Gershengorin v. Vienna Beef, Ltd., No. 06 C 6820, 2007 WL 2840476 (N.D. Ill. Sept. 28, 2007), *dismissed without prejudice*, 2008 WL 751636 (N.D. Ill. Feb. 27, 2008).

claim without reference to religion.[67] Recently, the "kosher" content of Hebrew National Franks has been challenged as not being "100% kosher," on the broad basis that all consumers, religiously motivated or not, view "kosher" foods as more pure.[68]

In *Popovitch v. Denny's Restaurant*, a self-described but not religiously motivated vegetarian woman was served meat after specifically seeking a meat-free meal.[69] Afterwards, the woman became physically ill and emotionally distraught. The trial court dismissed her claims of negligence and negligent infliction of emotional distress, stating that the restaurant had no duty to protect her emotional well-being, and moreover, that she had failed to articulate a harm.[70]

One could argue that offensive taint need not be viewed as an issue confined to minority interests or even a religious, moral, or political conviction. Offensive taint could apply to the presence of nonphysically harmful substances that are repulsive due to social norms. A contemporary example of such "yuck" factor offensive taint was illustrated by the public outcry in 2012 regarding the use of lean finely textured beef (LFTB), colloquially known as "pink slime," in domestic beef products.[71] LFTB is a viscous substance made by highly processing beef trimmings using a centrifuge, treating the substance with ammonium gas, and then reintroducing this product into conventional ground beef.[72] There are no known health or safety issues associated with LFTB.[73] Nonetheless, consumers reacted negatively to having this form of beef added to standard ground beef. Because "pink slime" is made

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[67] *Id.*; *see* LYTTON, *supra* note 9, at 40.

[68] Wallace v. ConAgra Foods, Inc., 747 F.3d 1025, 1027 (8th Cir. 2014).

[69] Popovitch v. Denny's Rest., No. B177296, 2005 WL 1926550 (Cal. Ct. App. Aug. 12, 2005).

[70] *Id.* at *2.

[71] JOEL L. GREENE, CONG. RESEARCH SERV., R42473, LEAN FINELY TEXTURED BEEF: THE "PINK SLIME" CONTROVERSY 1 (2012), https://www.fas.org/sgp/crs/misc/R42473.pdf [http://perma.cc/8CL2-7BS4] (noting that "[t]he depiction of LFTB in the media as 'pink slime' raised the product's 'yuck' factor and implied that there were food safety issues with LFTB").

[72] *Questions and Answers About Lean Finely Textured Beef*, NORTH AM. MEAT INST., https://www.meatinstitute.org/index.php?ht=a/GetDocumentAction/i/76184%20 [http://perma.cc/T3QF-HKKC] (last visited Apr. 4, 2016).

[73] Elisabeth Hagen, *Setting the Record Straight on Beef,* U.S. DEP'T OF AGRIC. BLOG (Mar. 22, 2012, 11:42 AM), http://blogs.usda.gov/2012/03/22/setting-the-record-straight-on-beef/ [http://perma.cc/9JPG-JUE3] (USDA Under Secretary for Food Safety stated that "[t[he process used to produce LFTB is safe and has been used for a very long time" and furthermore that "adding LFTB to ground beef does not make that ground beef any less safe to consume"); Plaintiff's Opposition to the ABC Defendants' Motion to Dismiss, Beef Prods., Inc. v. ABC, Inc., No. 4:12-cv-04183, 2012 WL 6888678 (D.S.D. Nov. 28, 2012).

exclusively of beef, representing LFTB as 100% beef is factually accurate.[74] Thus, members of the public offended by the inclusion of LFTB in ground beef do not have clear legal redress regarding mislabeling, fraud, or consumer protection.[75]

These cases may seem limited; however, the fact that there are not more does not necessarily indicate that such infringements on personal autonomy are rare. Rather, this is likely a product of such claims' uncertain status and client screening by lawyers. Lawyers who take on these civil cases are likely to do them on a contingency-fee basis. In selecting cases, attorneys assess how likely the cases are to settle or to win.[76] Given that there is no clear statutory or regulatory hook for these types of claims, the lawyers are left to craft common law arguments—ones that may be less established. A risk-averse lawyer might not take on a food case related to offensive taint, particularly against a smaller-revenue defendant.[77] In the cases highlighted above, generally, counsel represented plaintiffs who confronted a large business entity such as ConAgra.[78] In cases with deep-pocket defendants, the potential of settlement, with or without a winning legal argument, may be enough to lure lawyers into representation.[79]

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[74] In this case, however, the *form* that the beef took was so offensive to the public that the USDA allowed schools to opt out of using it in school lunches, legislators called for it to be banned, and major companies volunteered to discontinue its use.

[75] The law does recognize and regulate food that is actually adulterated in some way that renders it "unfit" to eat. *See* Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 342(a)(3) (2012) (providing that a food is deemed adulterated "if it consists in whole or in part of any filthy, putrid, or decomposed substances, or if it is otherwise unfit for food").

[76] Michael A. Dover, *Contingent Percentage Fees: An Economic Analysis*, 51 J. AIR L. & COM. 531, 539-41 (1986) ("An attorney will accept a case only if he determines that the expected recovery is greater than the anticipated expenses of the litigation." (footnote omitted)); Stewart Jay, *The Dilemmas of Attorney Contingent Fees*, 2 GEO. J. LEGAL ETHICS 813, 815 (1989) ("The contingent fee, of course, shifts a large portion of the risk in a case to the attorney. Clients receive the added satisfaction of knowing that the lawyer would not have accepted the representation unless it was the attorney's professional judgment that the case presented a reasonable likelihood of a favorable outcome.").

[77] Herbert M. Kritzer, *Defending Torts: What Should We Know?*, 1 J. TORT L. 3, 19 (2007) ("A central question for any plaintiffs' lawyer considering accepting a new client is collectability of any settlement or judgment."); William A. Lovett, Exxon Valdez*, Punitive Damages, and Tort Reform*, 38 TORT TRIAL & INS. PRAC. L.J. 1071, 1097-98 (2003) ("Deep pockets are sought increasingly by plaintiffs['] attorneys as the best way to maximize larger verdicts, settlements, or punitive awards. To the extent that a wealthy defendant is a 'substantial' and 'legal cause in fact' of a tortious injury or accident, plaintiffs['] lawyers focus on these targets for suit." (footnote omitted)).

[78] *See, e.g.*, Wallace v. ConAgra Foods, Inc., 747 F.3d 1025 (8th Cir. 2014) (indicating that the Wallace class was represented by a team of at least five lawyers).

[79] The phenomenon of corporate settlement mills, where private corporations have policies regarding settlement as a matter of course to avoid costly litigation, prevent inquiries into actual fault. Rather than assessing settlement on the basis of the value of a legal claim, if the claim falls within a certain class of claims, the company

II. CURRENT LEGAL SYSTEM: SEARCHING FOR REDRESS

This article now turns to the issue of how the law treats claims of offensive food taint, rather than more conventional claims of food safety risk.

Whether courts will recognize the injury sustained to one's person in these cases of offensive food taint remains unclear. Traditionally, harm is either physical or economic, and some courts have specifically rejected spiritual damages as a cognizable injury.[80] Other courts have recognized more of food's unique nature. This part analyzes how courts have approached offensive food taint in the realms of constitutional law, state statutory law, regulatory law, and common law tort.

A. Constitutional Law

When seeking redress for infringements on expression, identity, or faith, constitutional law seems like a natural basecamp. Isn't the free exercise of faith protected by the First Amendment?[81] Couldn't the choice of what we eat be viewed as expressive conduct and therefore symbolic speech?[82] While a deeper development of constitutional theory as it applies to food is likely worth additional inquiry, existing constitutional law is unlikely to provide redress at this time.[83] Cases of offensive taint, like those this article has described, are not about infringement on expressive rights by the state so much as they are about the law recognizing certain rights between private parties.[84] Because

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will simply settle as a matter of course. *See* Dana A. Remus & Adam S. Zimmerman, *The Corporate Settlement Mill*, 101 VA. L. REV. 129, 141-42 (2015).

[80] Gupta v. Asha Enters., L.L.C., 27 A.3d 953, 960 (N.J. Super. App. Div. 2011) (stating that plaintiffs failed to allege a cognizable harm when what "they are seeking is the cost of cure for an alleged spiritual injury that cannot be categorized as either a loss of moneys or property").

[81] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

[82] Virginia v. Black, 538 U.S. 343, 358 (2003) (discussing cross burning and how "[t]he First Amendment affords protection to symbolic or expressive conduct as well as to actual speech").

[83] There has been limited discussion of the issue of the constitutionality of government restrictions on food choice and compelled eating. Samuel R. Wiseman, *Liberty of Palate*, 65 MAINE L. REV. 738,744 (2013) (concluding that there is no due process protection for right to food choice).

[84] Based on cases involving the refusal of medical treatment and nourishment, there may be a constitutional right to refuse to eat certain food if mandated by government. *See id.* at 748-49; Jamal Greene, *What the New Deal Settled*, 15 U. PA. J. CONST. L. 265, 266 (2012) (arguing that "force-feeding broccoli to an otherwise sui juris person suspected of nothing but an aversion to eating broccoli would

constitutional protections in the Bill of Rights apply as restrictions on federal and state action,[85] they are unlikely to be useful here, where the issue is not so much state action, but the actions of private food producers and marketers and their interactions with the public.[86] Moreover, existing constitutional law recognizes that generally applicable neutral laws are valid even if they incidentally burden religion.[87]

To the extent that government involvement is an issue, it is passive inaction that could be viewed as contributing to the issue of offensive taint. One argument might be that the failure to require more precise labeling undermines consumers' ability to protect their own expressive identity. In the takings context, scholars have argued that government failure to regulate action that results in the destruction of property could be viewed as a taking subject to constitutional protection.[88] Here, it could be argued that it is the failure of the government to regulate that results in the offensive taint exposure. This argument is unlikely to gain traction. Even in the takings context, where the loss of property is a clear and ascertainable traditional harm, equating government inaction to improper government action has not yet been embraced generally in the case law.

To the extent that courts have applied constitutional law in the food context, it has been to avoid imposing additional labeling requirements that would implicate religious beliefs. In this way, the First Amendment may actually impede courts' ability to adjudicate instances of offensive taint. Courts have held that extensive regulation oversteps the bounds of protected commercial speech.[89] In relation to food specifically, courts

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also violate either the Fifth or the Fourteenth Amendment, depending on whether the force-feeders were federal or state officials").

[85] Duncan v. Louisiana, 391 U.S. 145, 177 (1968) (noting that "the Due Process Clause imposes some restrictions on state action that parallel Bill of Rights restrictions on federal action").

[86] That said, cases regarding search and seizure that recognize bodily integrity are useful in seeing how the law recognizes intrusion on one's physical person. However, this article brackets off the fascinating topic of the Fourth Amendment's treatment of bodily intrusion and its potential intersection with civil conceptions of bodily harm for a fuller discussion and more thorough treatment at a later time.

[87] Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 890 (1990), *superseded by statute as stated in* Holt v. Hobbs, 135 S. Ct. 853, 859 (2015).

[88] Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345, 346 (2014).

[89] *See generally* Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67 (2d Cir. 1996) (sustaining dairy manufacturers' challenge to the constitutionality of a 1994 Vermont law requiring products from cows treated with bovine growth hormone to be labeled as such as an infringement on protected commercial speech); Coleen Klasmeier & Martin H. Redish, *Off-Label Prescription Advertising, the FDA and the First Amendment: A Study in the Values of Commercial Speech Protection*, 37 AM. J.L., MED. & ETHICS 315,

have recognized labeling as a form of protected commercial speech.[90] This can be problematic for regulators who seek to add labeling requirements for public policy reasons.[91]

Some have also argued (with limited success) that the Establishment Clause prohibits courts from adjudicating issues that implicate religious food rules.[92] The First Amendment dictates that courts cannot make decisions on "intrinsically religious" questions.[93] Under the dominant Establishment Clause test initially articulated in *Lemon v. Kurtzman*, which bars "excessive government entanglement with religion,"[94] the inquiry is "whether the government is being 'charged with enforcing a set of religious laws' . . . or is making an inquiry into the religious content of the items sold."[95] In *Wallace v. ConAgra*, consumers sued the manufacturer of Hebrew National hot dogs, alleging that the meat inside was not 100% kosher. The defendant's lawyers successfully argued at the district court level that the case rested predominately on interpreting the religious laws defining kosher meat practices, and therefore, enforcing kosher provisions would impermissibly entangle government with religious interpretation.[96] On appeal, the Eighth Circuit refused to reach the First Amendment question.[97] Instead, the case was remanded to the state court on standing grounds for failure to state an injury in fact.[98]

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317 (2011) (describing how commercial speech limits FDA regulatory action, particularly regarding off-label uses).

[90] N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 131 (2d Cir. 2009) (recognizing First Amendment commercial speech issues in a case involving restaurant menu calorie information); Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 635 (6th Cir. 2010) (finding that terms like "antibiotic-free" and "pesticide-free" constitute commercial speech).

[91] Pearson v. Shalala, 164 F.3d 650, 661 (D.C. Cir. 1999) (finding that FDA pre-approval of dietary supplement information violated the First Amendment protections on commercial speech).

[92] Wallace v. ConAgra Foods, Inc., 920 F. Supp. 2d 995, 998-1000 (D. Minn. 2013), *reversed, remanded, and vacated by* Wallace v. ConAgra Foods, Inc., 747 F.3d 1025 (8th Cir. 2014) (recognizing a First Amendment conflict in discerning whether kosher standards had been breached in producing kosher-marketed meat products, finding that "whether such products are indeed '100% kosher' is a religious question that is not the proper subject of inquiry by this Court").

[93] Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 451-52 (1969); Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 363 (8th Cir. 1991).

[94] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

[95] Commack Self-Service Kosher Meats, Inc. v. Hooker, 800 F. Supp. 2d 405, 414 (E.D.N.Y. 2011) (quoting Commack Self-Service Kosher Meats v. Rubin, 106 F. Supp. 2d 445, 447 (E.D.N.Y. 2000)).

[96] *Wallace*, 920 F. Supp. at 997-98 (stating that "[a]djudication of Plaintiffs' claims in this case would clearly require a review of doctrinal and religious matters").

[97] Wallace v. ConAgra Foods, Inc., 747 F.3d 1025, 1028-29 (8th Cir. 2014).

[98] *Id.* at 1033.

The Second Circuit, considering whether it could enforce the New York "Kosher Act," found that the law enforcing "kosher" labeling did not excessively entangle government with religion.[99] Instead, the court reasoned,

> [t]he law only requires that if a product is to be held out to the public as "kosher," the product must bear a label describing it as such, and information is to be provided to the purchaser as to the basis for that description. The presence of the label does not affect the seller's assessment of the kosher nature of a product and is not what makes a product kosher or not kosher. The label simply indicates to the consumers that the seller or producer, and its certifier, believe the food to be kosher under their own standards.[100]

Finally, one case has allowed assertions of a more generalizable right of autonomy grounded in food choice to move forward. In *Farm-to-Consumer Legal Defense Fund v. Sebelius*, a case challenging regulations preventing the transport of raw milk across state lines, plaintiffs asserted harm to their "fundamental and inalienable rights . . . to produce, obtain, and consume the foods of choice for themselves and their families."[101] The court found that plaintiffs had standing and that their claim was ripe on a theory that a "credible threat of an injury exists" so long as possible enforcement actions by governmental entities might arise.[102] While this is far from recognizing food choice as a liberty interest, it did allow a claim so articulated to withstand judicial scrutiny. Still, as of yet, none of these cases have provided a clear or successful cause of action.

B. State Statutory Law

Many food-related cases today are brought pursuant to statutory tort regimes that protect consumers from misleading statements and false advertising.[103] Misleading statements are a

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[99] Commack Self-Service Kosher Meats, Inc. v. Hooker, 680 F.3d 194, 208 (2d Cir. 2012).

[100] *Id.* at 207.

[101] Farm-to-Consumer Legal Def. Fund v. Sebelius, 734 F. Supp. 2d 668, 678 (N.D. Iowa 2010).

[102] *Id.* at 690 (quoting American Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas Cty., 221 F.3d 1211, 1213 (8th Cir. 2000)).

[103] *See, e.g.*, Gustavson v. Mars, Inc., No. 13-cv-04537-LHK, 2014 WL 6986421, at *1 (N.D. Cal. Dec. 10, 2014) (misrepresentation of calorie content); Gitson v. Trader Joe's Co., 63 F. Supp. 3d 1114, 1117 (N.D. Cal. 2014) (alleging misrepresentation in using the term "evaporated cane juice" instead of sugar); Rojas v. General Mills, Inc., No. 12-cv-05099-WHO, 2013 WL 5568389, at *1 (N.D. Cal. Oct. 9, 2013) (alleging that General Mills deceptively and misleadingly marketed their products as "100% natural" when the products contained GMOs); *In re* Frito-Lay N. Am., Inc. All Nat. Litig., No. 12-MD-2413 (RRM)(RLM), 2013 WL 4647512, at *1 (E.D.N.Y. Aug. 29, 2013) (alleging Frito-Lay

statutory form of common law negligent misrepresentation and arise where a false statement of material fact may be actionable, absent intent, because a tortfeasor owed a duty of care to the injured party and there is detrimental reliance (as manifested in an economic or physical harm).[104] False advertising is a claim about fraud and differs from negligent misrepresentation in that it requires intent to deceive.[105] While almost every state in the United States has some form of statutory tort law regarding deceptive practices, states differ on whether their consumer protection laws protect consumers from misrepresentation, fraud, or both.[106]

But these statutory tort forms of redress usually impliedly exclude freestanding dignitary harms that include exposure to offensive foods. Such statutes, like many of their common law predecessors, require a showing of reliance that led to economic detriment.[107] In Georgia, for instance, the Georgia Uniform Deceptive Trade Practices Act has been applied to deny any monetary relief and authorizes only equitable relief.[108]

Some states' laws are more open ended, arguably covering offensive taint. In Vermont, to establish a claim under the Consumer Protection Act, a plaintiff must prove three elements:

> (1) [T]here must be a representation, practice, or omission likely to mislead consumers; (2) the consumers must be interpreting the message reasonably under the circumstances; and (3) the misleading

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fraudulently marketed products as "all natural" when the products contained GMOs). Some estimate that fraud-related food litigation has increased markedly in recent years. *See* Ray Latif, *Explosion of Consumer Fraud Lawsuits Has Industry on Its Heels*, BEVNET (June 17, 2013, 1:18 PM), http://www.bevnet.com/news/2013/explosion-of-consumer-fraud-lawsuits-has-industry-on-its-heels [http://perma.cc/C6XF-KF4V].

104 DAN B. DOBBS, THE LAW OF TORTS §§ 469, 472, at 1343-44, 1349 (2008).

105 *Id.*

106 *See, e.g.*, Kansas Consumer Protection Act, KAN. STAT. ANN. 50-626(b)(1) (West 2015) (not requiring intent to deceive); Moore v. Bird Eng'g Co., 41 P.3d 755 (Kan. 2002) (interpreting a Kansas statute as not requiring intent to deceive); Louisiana Unfair Trade Practices and Consumer Protection Law, LA. STAT. ANN. § 51:1405 (2006) (providing cause of action for both unfair and deceptive trade practices).

107 *See* Alabama Deceptive Trade Practices Act, ALA. CODE § 8-19-10 (2016) (requiring monetary damages); Weiner v. Snapple Beverage Corp., No. 07 Civ. 8742(DLC), 2011 WL 196930, at *3 (S.D.N.Y. Jan. 21, 2011) (granting summary judgment to beverage manufacturer because plaintiffs failed to prove they paid more for Snapple's products than they would have for comparable beverages); Weiner v. Snapple Beverage Corp., No. 07 Civ. 8742(DLC), 2010 WL 3119452, at *1 (S.D.N.Y. Aug. 5, 2010) (denying class certification because plaintiff could not demonstrate that issues of causation and economic injury could be established on a class-wide basis).

108 Somerson v. McMahon, 956 F. Supp. 2d 1345, 1358 (N.D. Ga. 2012) (interpreting Ga. Code Ann. § 10-1-372); First Quality Carpets, Inc. v. Kirschbaum, 54 A.3d 465, 472 (Vt. 2012) (quoting Greene v. Stevens Gas Serv., 858 A.2d 238 (Vt. 2004)).

> effects must be "material," that is, likely to affect consumers' conduct or decision with regard to a product.[109]

Under a statute worded this way, the court would be left to interpret how to assess material effects. Given the limited circumstances in which these damages are generally recognized, such an interpretation is unlikely absent legislative action.

C. Federal Statutory and Regulatory Law

Food is a heavily regulated commodity in the American market. At present, at least 15 federal agencies work to regulate food production, consumption, and marketing.[110] Of these, three agencies play the principal roles in regulating food: the United States Department of Agriculture (USDA), the Food and Drug Administration (FDA), and the Environmental Protection Agency (EPA). In the broadest strokes, the USDA oversees the regulation of livestock products (meat, eggs, and dairy), the organic foods program, and food security programs such as school meals and the Supplemental Nutrition Assistance Program (SNAP).[111] The FDA is charged with regulating "any poisonous or deleterious substance which may render [food] injurious to health."[112] The EPA takes the lead on regulating herbicides, pesticides, and the quality of bottled water.[113]

Congress delegates power to federal agencies through statutes. The scope of these agencies' powers is limited and

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[109] *See* Poulin v. Ford Motor Co., 513 A.2d 1168, 1171 (Vt. 1986) (citing International Harvester Co., 3 Trade Reg. Rep. (CCH) ¶ 22,217 (Dec. 21, 1984)); *see also* VT. STAT. ANN. tit. 9, § 2453 (2016).

[110] *See* RENÉE JOHNSON, CONGR. RESEARCH SERV., RS22600, THE FEDERAL FOOD SAFETY SYSTEM: A PRIMER 1 (2014), https://www.fas.org/sgp/crs/misc/RS22600.pdf [http://perma.cc/FS2R-8NA3].

[111] *USDA Programs and Services*, U.S. DEP'T OF AGRIC., http://www.usda.gov/wps/portal/usda/usdahome?navid=PROGRAMS_SERVICES [http://perma.cc/X7GN-87Q7] (last updated Mar. 31, 2016) (noting USDA oversight of organic program as well as federal assistance programs such as SNAP); *Food Safety*, U.S. DEP'T OF AGRIC., http://www.usda.gov/wps/portal/usda/usdahome?navid=food-safety [http://perma.cc/DF93-VBYF] (last updated June 29, 2015) (discussing the USDA's role in relation to livestock and that the "USDA's Food Safety and Inspection Service (FSIS) ensures that our nation's meat, poultry and processed egg supply is wholesome, safe and properly labeled").

[112] Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 342(a)(1) (2012).

[113] Toxic Substances Control Act, 15 U.S.C. §§ 2601-2692 (2012) (generally granting the EPA the power to regulate and define toxic substances); *see also* Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (2012) (vesting the EPA with the power to license pesticides and herbicides as well as set levels of acceptable toxicity in food); 40 C.F.R. § 152.1 (2015) (detailing registration of pesticides under the Federal Insecticide, Fungicide and Rodenticide Act); 21 U.S.C. § 349 (2012) (authorizing the EPA's power to regulate bottled water).

determined by the statutes that create them.[114] In the case of the FDA, its principal enabling statutes[115] are the Federal Food, Drug, and Cosmetic Act (FDCA) and its most recent and comprehensive revision, the Food Safety Modernization Act (FSMA).[116] Labeling is generally governed by the Fair Packaging and Labeling Act (FPLA) and the 1990 revisions to the FDCA, known as the Nutrition Labeling and Education Act (NLEA).[117] The FPLA requires that the FDA issue labeling regulations requiring the disclosure of the contents, identity, and name and location of the manufacturer or distributor of all food commodities on the domestic market.[118] The NLEA and subsequent regulations and guidance documents set forth mandatory requirements for labeling on packaged food and in restaurants and retail food establishments.[119] Among many other requirements, labels under the regulations promulgated pursuant to NLEA must include certain nutritional and serving information as well as sodium, carbohydrate, and fat content.[120] Labeling regulations do not, however, require disclosure of all ingredients in a marketed foodstuff.[121] Rather, according to the FDA, "If an ingredient is present at an incidental level and has no functional or technical effect in the finished product, then it need

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[114] Cheng v. WinCo Foods LLC, No. 14-cv-0483-JST, 2014 WL 2735796, at *7 (N.D. Cal. June 10, 2014) (noting that "administrative agencies derive their power from their enabling statutes," and "[a]n agency cannot expand the scope of its powers independent of a legislative grant of authority" (citation omitted)).

[115] An "enabling statute," also known as an originating or organic statute, is a statute that delegates power to administrative agencies and sets forth the scope of their legislative mandate.

[116] Federal Food, Drug and, Cosmetics Act, 21 U.S.C. §§ 301-399 (2012); FDA Food Safety Modernization Act, Pub. L. No. 111-353, 124 Stat. 3885 (2011); *see FDA Food Safety Modernization Act (FSMA)*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/Food/GuidanceRegulation/FSMA/default.htm [http://perma.cc/596X-3SFB] (last updated July 8, 2016) (expanding the FDA's ability to regulate the production process and refuse tainted imports or shipments that did not pass inspection for the purposes of protecting food safety).

[117] Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451-1467 (1966); Federal Food, Drug and, Cosmetics Act, 21 U.S.C. § 403(w) (2012); Nutrition Labeling and Education Act of 1990, § 6(a), 21 U.S.C. § 343.

[118] 15 U.S.C. §§ 1451-1453.

[119] Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 79 Fed. Reg. 71,156 (2014) (to be codified at 21 C.F.R. pts. 11, 101), https://www.gpo.gov/fdsys/granule/FR-2014-12-01/2014-27833 [http://perma.cc/Z753-8RZG]; *Nutrition Labeling and Education Act (NLEA) Requirements (8/94-2/95)*, U.S. FOOD AND DRUG ADMIN., http://www.fda.gov/iceci/inspections/inspectionguides/ucm074948.htm [http://perma.cc/ZE64-BJQP] (last updated Nov. 25, 2014) [hereinafter *NLEA Requirements*].

[120] *NLEA Requirements*, *supra* note 119.

[121] Exemptions from Food Labeling Requirements, 21 C.F.R. § 101.100(a)(3) (2015) (listing foods that are exempt from declaration on a label due to their presence as an "incidental additive").

not be declared on the label."[122] The principal exception to this general rule is major allergens, which need to be disclosed regardless of amount.[123]

In the flurry of food-related litigation in recent years, the scope of the USDA's and FDA's power to consider non-safety-related issues has been questioned. As a doctrinal matter, there is a strong argument that these agencies' regulatory powers are limited by their enabling statutes to considering food safety–related issues and not to issues beyond those concerns.[124] The Supreme Court recently reiterated that the statute granting the FDA the bulk of its delegated authority, the FDCA, "is designed primarily to protect the health and safety of the public at large."[125] These agencies themselves also interpret their mandate narrowly. The FDA describes its directive relating to food as regulating "the safety and security of most of our nation's food supply, all cosmetics, [and] dietary supplements."[126] The USDA reiterated a commitment to food safety in public statements made in response to public outcries regarding meat fillers, stating, "[I]t is important to distinguish people's concerns about how their food is made from their concerns about food safety."[127]

Defendants have also successfully argued that regulating for purposes other than public health and safety is legally impermissible. For example, in *Alliance for Bio-Integrity v. Shalala*, a case challenging FDA regulations for not requiring the labeling of genetically modified components of food products, defendants successfully argued that the FDA's power is limited by statute.[128] Specifically, defendants argued that the FDA does not have the power to regulate based on consumer interests, but only on health and safety risks.[129]

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[122] U.S. DEP'T OF HEALTH AND HUMAN SERVICES, A FOOD LABELING GUIDE 18 (2013), http://www.fda.gov/downloads/Food/GuidanceRegulation/UCM265446.pdf [http://perma.cc/YP5V-US5W]; *see also* 21 C.F.R. § 101.100(a)(3).

[123] Food Allergen Labeling and Consumer Protection Act of 2004, 21 U.S.C. § 343(w) (2012) (requiring label for major food allergens).

[124] ROBERT L. GLICKSMAN & RICHARD LEVY, ADMINISTRATIVE LAW: AGENCY ACTION IN CONTEXT 4 (2015) (discussing how "agencies act pursuant to statutory authority and . . . agencies exercise considerable discretion and power, although that power is constrained by law"); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 123 (2000) (finding that regulating tobacco was outside the scope of the powers delegated to the FDA).

[125] *See* POM Wonderful LLC v. Coca-Cola Co., 134 S. Ct. 2228, 2234 (2014).

[126] *FDA Fundamentals*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/AboutFDA/Transparency/Basics/ucm192695.htm [http://perma.cc/QK7M-ZCTY] (last visited Apr. 10, 2016).

[127] *See* Hagen, *supra* note 73.

[128] All. for Bio-Integrity v. Shalala, 116 F. Supp. 2d 166, 178 (D.D.C. 2000).

[129] *Id.* at 179.

At the same time, FDA labeling regulations have been used to successfully preempt offensive taint claims based on state law. Preemption, in its most basic form, is a doctrine that provides that where federal law has directly spoken on a legal issue, the federal law trumps conflicting state law.[130] In *Lateef v. Pharmavite LLC*, discussed in more detail above,[131] the court dismissed the plaintiff's claims without prejudice on the ground that federal law, specifically the NLEA, preempted her claims.[132] In that case, the plaintiff had based her argument regarding misrepresentation on the label of the Nature Made Vitamins that she was purchasing and ingesting. In finding her claims preempted, the court noted that the NLEA has an express preemption clause to "ensure uniform labeling of food products" and that plaintiffs conceded that additional disclosure requirements would be "inconsistent with what the NLEA requires."[133]

This preemption argument and the argument that agency power is strictly limited to public health and safety concerns are inapposite, however. If agencies promulgating labeling laws are limited to regulating purely on the basis of public health and safety, then they cannot be understood to have created rules that directly speak to, and preempt, state law claims of offensive food taint that would fall decisively outside the gamut of their power. Therefore, under this interpretation of agency power, preemption is not applicable. On the other hand, if agencies do have the power to regulate based on other public concerns, including offensive food taint, then agencies like the FDA should be held accountable for failing to do so.

In *Wyeth v. Levine*, the Supreme Court took a more limited view of the scope of preemption in the food and drug context and refused to preempt state law without express congressional intent.[134] In that case, plaintiff alleged that a drug manufacturer failed to disclose negative side effects of a drug available on the market. Defendants argued that federal regulations preempted plaintiffs state common law causes of action in negligence and strict liability. [135]

Generally, statutory and regulatory law has maintained a singular focus on food safety. There is, however, one notable

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[130] Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 226-27 (2000) (outlining three traditional forms preemption takes: express, field, and conflict).

[131] *See supra* Section I.B.

[132] Lateef v. Pharmavite LLC, No. 12 C 5611, 2012 WL 5269619 (N.D. Ill. Oct. 24, 2012).

[133] *Id.* at *2-3.

[134] Wyeth v. Levine, 555 U.S. 555, 563, 574-75 (2009).

[135] *Id.* at 560.

example of when a federal statute took into account the expressive qualities of food consumption in relation to prisoners and the state. The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) specifically provides that

> [n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . , even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[136]

This statute provides a template for how food's unique position can be recognized, protected, and even augmented beyond typical legal conceptions of food law and regulation. Under federal regulations implementing this statute, prison officials at the state and federal level are required to accommodate prisoners' religious dietary needs once the prisoner has made that need known through a written statement.[137] Pursuant to this law and subsequent regulations, many prisoners have brought viable causes of action to seek food accommodations not based on health, but on faith.[138]

D. Common Law Torts

Torts—the law of accidents—would appear initially as another natural fit for redressing exposure to offensive taint. Leaving aside the intentional tort of battery for a fuller discussion,[139] other torts, such as common law negligence, are a poor fit to address the harm in offensive taint claims. Although such exposures arise from physical contact with a substance, their impacts are not physical in the traditional sense of requiring medical attention, causing deformity, or creating physical disability. Generally, negligence requires a showing of harm that, except in limited situations, must be physical or, at

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[136] Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified as amended at 42 U.S.C. § 2000cc).

[137] Dietary Practices, 28 C.F.R. § 548.20 (2015) (stating that "[t]he Bureau provides inmates requesting a religious diet reasonable and equitable opportunity to observe their religious dietary practice within the constraints of budget limitations and the security and orderly running of the institution and the Bureau through a religious diet menu" and that "[t]he inmate will provide a written statement articulating the religious motivation for participation in the religious diet program").

[138] *See, e.g.*, Lovelace v. Lee, 472 F.3d 174 (4th Cir. 2006) (recognizing a valid RLUIPA claim even after an inmate violated a religious fasting program); Shakur v. Schriro, 514 F.3d 878 (9th Cir. 2008) (Muslim inmate sought accommodation for halal food needs under RLUIPA).

[139] *See infra* Section III.B.

minimum, economic.[140] While the modern recognition of freestanding emotional harms has grown, negligent infliction of emotional distress in most situations still requires a physical manifestation of distress.[141]

A claim of intentional infliction of emotional distress (IIED) is equally unlikely to suffice. Even if a consumer can establish that his or her exposure to the unwanted food was the consequence of an intentional act (e.g., intentionally adding animal-derived products to an otherwise vegetarian product without disclosing it on the label), it is unlikely that this conduct would be viewed as "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[142] As such, situations where the law has recognized IIED are limited to extreme situations of direct, inhumane interaction such as torture,[143] racial threats, and harassment.[144]

III. RECOGNIZING PERSONHOOD AND FOOD: A PATH TO REMEDIES

A. Statutory and Administrative Remedies: Potential Without Political Will

There are two clear avenues for reform in this area. The first is to modify existing federal labeling laws to recognize sources of offensive taint or require all ingredients and additives to be included on labels, thereby providing a cause of action should there be noncompliance. The second is to amend state statutory torts to recognize a broader understanding of dignitary harm deriving from an infringement on a party's physical person. Neither of these is likely to gain the political traction needed to move forward.

Modern labeling laws do not require disclosure of all ingredients purposely included in a product.[145] If it appears in only "incidental levels" and lacks a "functional or technical effect," the

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[140] JOHN C. P. GOLDBERG ET AL., TORT LAW: RESPONSIBILITIES AND REDRESS 47-50 (3d ed. 2012).

[141] *Id.* at 699-700.

[142] RESTATEMENT (SECOND) OF TORTS § 46, cmt. d (AM. LAW INST. 1965).

[143] Dickens v. Puryear, 276 S.E.2d 325 (N.C. 1981) (finding intentional infliction of emotional distress where plaintiff was chained to a vehicle, repeatedly hit with a blunt instrument, and threatened with mayhem and murder).

[144] Littlefield v. McGuffey, 954 F.2d 1337 (7th Cir. 1992) (finding IIED where a woman in an interracial relationship was repeatedly threatened by her landlord by phone and with notes left on the door to her home).

[145] *See supra* notes 121-23.

FDA does not require disclosure.[146] Congress has, in recent years, passed some statutes that demand more stringent labeling. The major exception to this general rule of nondisclosure of trace ingredients is the requirement of labeling major food allergens. In 2004, in response to public concern over allergy-related injuries and death, Congress enacted the Food Allergen Labeling and Consumer Protection Act, requiring that eight particular allergens must be listed on product labels regardless of the allergen's amount or functionality.[147]

There are four reasons why offensive food taint is unlikely to elicit the same public outcry to build the political will for national reform. First, each instance of offense impacts a limited swath of the population. Unlike allergies, offensive food taint does not cut across ethnic, cultural, or class divides. Second, one could argue that allergies are immutable, biological limitations, whereas offensive taint is driven by choice. Third, the harm of offensive taint does not have the same obvious gravity as death. As such, strong ex ante regulation is easier to justify as a matter of policy for life-threatening allergens, as opposed to offensive taint. Fourth, any reform to food labeling in general means facing a broad array of industry opposition, much of which would be costly to counter or defeat in terms of political support. Modifying state consumer protection law would face similar political hurdles as national-level statutory reforms.

B. Food as Tort: Battery's Potential in Relation to Dignitary Harms

While statutory reform on the federal and state level would most immediately impact the lack of legal consequences of offensive taint, the likelihood of such changes is contingent on mass political action. For the reasons discussed above, such action is unlikely to materialize for some time. On a claim-by-claim basis, however, the flexibility and full scope of common law torts has been strangely underexplored as an option for offensive taint claims. For one sizeable subclass of cases—those involving

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[146] Exemptions from Food Labeling Requirements, 21 C.F.R. § 101.100(a)(3) (2015).

[147] Food Allergen Labeling and Consumer Protection Act of 2004, 21 U.S.C. § 343(w) (2012) (requiring major food allergens be listed on labels); Food Allergen Labeling and Consumer Protection Act, 21 U.S.C. § 321(qq) (2012) (identifying the eight major food allergens covered by the act).

intentional action—common law battery could provide a needed and more immediate avenue of redress.[148]

Tort law is, at its very heart, about defining harms between people.[149] Applying traditional dignitary torts, specifically battery, in the context of food-related harms may protect claims between private parties regarding offensive food taint.[150] Battery is one of the oldest common law torts, and it recognizes that "the slightest touching of another . . . if done in a rude, insolent, or angry manner, constitutes a battery for which the law affords redress."[151] A prima facie case for battery requires an act intending to cause a harmful or offensive contact with another person or a third person, or an imminent apprehension of such a contact, and that such an offensive or harmful contact directly or indirectly results.[152]

In recent cases analyzing force, the Supreme Court confirmed that battery was "satisfied by even the slightest offensive touching."[153] Purely offensive touchings that do not

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[148] Others have noted how traditional dignitary harms provide workable solutions to modern harms. *See* Jane Yakowitz Bambauer, *The New Intrusion*, 88 NOTRE DAME L. REV. 205 (2012) (arguing that common law intrusion, with its emphasis on observation rather than dissemination, is the most effective way to provide redress for modern privacy concerns).

[149] "To study torts is to learn what sort of conduct our legal system defines as wrongfully injurious toward another such that, when committed, the victim is entitled to exact something from the wrongdoer. This is the domain of law that was born centuries ago. . . ." John C. P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 919 (2010).

[150] "The behavior underlying these torts does more than inflict property damage or even physical injury that the modern man is expected to rationally commodify. Instead, it invades an individual's sense of worth and dignity, important values in a relational society." Cristina Carmody Tilley, *Rescuing Dignitary Torts from the Constitution*, 78 BROOK. L. REV. 65, 69 (2012).

[151] *Crosswhite v. Barnes*, 124 S.E. 242, 244 (Va. 1924); 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 120, 218 (1768); Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 114 (1784) ("[T]hough no great bodily pain is [s]uffered by a blow on the palm of the hand, or the [s]kirt of the coat, yet the[s]e are clearly within the legal d[e]finition of A[ss]ault and . . . ."); 1 FRANCIS HILLIARD, THE LAW OF TORTS OR PRIVATE WRONGS 191 (1859) (noting that the writ of trespass covered many of what we would now view as offensive bodily contacts, such as "spitting upon a person; pushing another against him; throwing a squib or any missile or water upon him" (footnotes omitted)); Wood v. Commonwealth, 140 S.E. 114, 115 (Va. 1927).

[152] RESTATEMENT (SECOND) OF TORTS § 35 (AM. LAW INST. 1965). Older cases often describe the necessary touching as needing to be unlawful. *See* Vosburg v. Putney, 50 N.W. 403 (Wis. 1891) (describing the necessary element of intent as the intent to commit an "unlawful" act). But "unlawful act" language popular in the nineteenth century gave way in 1934, when the First Restatement rejected this formulation in favor of the current "harmful or offensive contact or an apprehension thereof" under Chapter 2, entitled "Intentional Invasions of Interests in Personality." RESTATEMENT (FIRST) OF TORTS § 13 (AM. LAW INST. 1934).

[153] Johnson v. United States, 559 U.S. 133, 139 (2010); *see also* United States v. Castleman, 134 S. Ct. 1405, 1410-14 (2014) (applying a common law definition of force as an offensive touching to interpret a domestic abuse statute).

result in physical, economic, or emotional harm have a long history of receiving redress in part to support tort as a peacekeeping measure.[154] In doing so, battery grounded in offensive touching protects an individual's dignitary right to his or her own physical autonomy.[155] Indeed, "[i]t is not necessary that the touching result in injury to the person. Whether a touching is a battery depends on the intent of the actor, not on the force applied."[156]

The Supreme Court is not alone in recently reaffirming battery's historic connection to offensive, but not physically harmful, touchings. The American Law Institute's Draft Restatement (Third) of Torts, revised in 2015, specifically recognizes offensive but not physically harmful touches as battery in the context of intentional torts.[157] Moreover, the current Draft Restatement (Third) specifically includes a fact pattern involving offensive food taint as an example of offensive battery.[158] The Restatement outlines a situation where a religious person informs a wedding caterer that they cannot eat pork since it is a great sin.[159] The caterer nonetheless serves the person pork rather than prepare an alternative.[160] The Restatement concludes that the "[c]aterer is subject to liability . . . for offensive battery."[161]

Many food cases involving consumers ingesting offensive foodstuffs could fit within this broad rubric. Food producers who intentionally, not accidentally, include in their products ingredients that are objectively offensive to consumers whom they know or should know will ingest their products should be subject to liability under a battery theory.[162] Intent to harm is not

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[154] Alcorn v. Mitchell, 63 Ill. 553 (1872) (awarding punitive damages where defendant deliberately spat on plaintiff while in court because such actions provoke physical retribution, and an alternative method of redress must be provided by the law to discourage future misconduct of this nature).

[155] In 1914, Judge Cardozo wrote, "Every human being of adult years and sound mind has a right to determine what shall be done with his own body." Scholendorff v. Soc'y of N.Y. Hosps., 105 N.E. 92, 93 (N.Y. 1914) (in discussing what type of touching is actionable under what is now the modern tort of battery).

[156] Adams v. Commonwealth, 534 S.E.2d 347, 350 (Va. Ct. App. 2000) (affirming trial court's decision to find that battery occurred in a case where a laser beam was deliberately pointed at the plaintiff's eye and no physical harm occurred).

[157] DRAFT RESTATEMENT (THIRD) OF TORTS § 103, at 96 (AM. LAW INST. 2015) (defining offensive contact for the purposes of battery).

[158] *Id.* § 103, at 96.

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] The doctrine of "extended personality" is well established in recognizing that objects may be the source or the point of contact of a tortious intentional touching. *See* Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627 (Tex. 1967) (finding battery where an employee snatched a plate violently away from an African-American

necessary, only the intent to create contact.[163] Thus, hot dogs marketed as "kosher" that purposely include nonkosher components are not only misleading, but are also intentionally touching a person in an objectively offensive way.[164]

The structure of the common law and the defense of consent also favor using this framework as a solution in food-based offensive taint cases. This structure for such legal claims focuses on a party's ability to control what is in his or her body and an unwanted imposition on that autonomy. If these cases are conceived of as battery claims, producers will better label products—not for fear of mislabeling claims, but because consent to the touching negates its wrongfulness. In order to bring plausible defenses that consumers "consented," manufacturers will be motivated to clearly and fully label products, thereby promoting the argument that consumers were aware of the offensive element and chose to encounter it nonetheless. Without clear labeling, food producers will most likely lose this defense to the counterargument that any "consent" to the touching by eating the product was obtained by fraudulent inducement.[165] Plaintiffs, in turn, will be able to make the moral choices that they are entitled to make.

The biggest hurdle for these claims may be that the offensive nature of a touching is assessed objectively.[166] Generally,

> in order for a contact [to] be offensive to a reasonable sense of personal dignity, it must be one which would offend the ordinary person and as such one not unduly sensitive as to his personal dignity. It must, therefore, be a contact which is unwarranted by the

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customer); Picard v. Barry Pontiac-Buick, Inc., 654 A.2d. 690, 694 (R.I. 1995) ("[C]ontact[ ] with anything so connected with the body as to be customarily regarded as part of the other's person and therefore as partaking of its inviolability [can establish battery]." (quoting RESTATEMENT (SECOND) OF TORTS § 18 cmt. c (AM. LAW INST. 1965))).

[163] For example, in *Mink v. University of Chicago*, 460 F. Supp. 713 (N.D. Ill. 1978), the pregnant plaintiffs were administered the drug DES without being told either that they were being given the drug or that they were part of a medical experiment. The U.S. District Court for the Northern District of Illinois said that "the plaintiffs need show only an intent to bring about the contact," but the focus of the opinion was the rejection of any requirement that the plaintiffs prove intent to harm. *Id.* at 718 ("[A]n intent to do harm is not essential to the action.").

[164] This was the subject of dispute in a recent case involving Hebrew National hot dogs. Wallace v. ConAgra Foods, Inc., 747 F.3d 1025 (8th Cir. 2014).

[165] *See* Nancy J. Moore, *Intent and Consent in the Tort of Battery: Confusion and Controversy*, 61 AM. U.L. REV. 1585, 1634 (2012).

[166] Contact is offensive when it "offends a reasonable sense of personal dignity." RESTATEMENT (SECOND) OF TORTS § 19 (AM. LAW INST. 1965). The inquiry is whether the touching "would be offensive to an ordinary person not unduly sensitive as to personal dignity." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 42 (5th ed. 1984).

> social usages prevalent at the time and place at which it is inflicted.[167]

Not unlike most torts concepts, the success of meeting this standard will depend on the factual framework's scope. If asked, "Is it objectively offensive to have meat in your food?" most jurors would likely answer no (although they may find this repugnant in a food item where meat is unexpected, like candy). But if phrased, "Is it objectively offensive to be unwillingly exposed to food that interferes with your religious or political beliefs?" the question seems more likely to be answered affirmatively. While the offense needed to trigger battery must be "*highly* offensive and not merely offensive to the other's sense of dignity,"[168] that standard is "significantly less demanding than the requirement of 'extreme and outrageous conduct' [required] for the purposes of the tort of intentional infliction of emotional harm."[169] Concerns over fraud may also be reassured by the fact that in addition to offense, an actual physical touching must occur to be actionable.[170]

Leaving aside arguments about scope, the common law also recognizes that notice can create additional forms of offensive battery. Once a party knows subjectively of a person's wish not to be touched a certain way, touching them in that particular way is battery.[171] Because "an individual's right of autonomy with respect to physical contact with his or her body historically has been very strongly protected," it is objectively offensive to touch a person in a way that they have already articulated is offensive to them individually.[172] Therefore, if the tortfeasor has knowledge of an individual's subjective and

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[167] Brzoska v. Olson, 668 A.2d 1355, 1361 (Del. 1995) (quoting RESTATEMENT (SECOND) OF TORTS § 19 cmt. a (AM. LAW INST. 1965)).

[168] DRAFT RESTATEMENT (THIRD) OF TORTS § 103, at 98 (AM. LAW INST. 2015) (noting how this elevated threshold is designed to restrict liability and combat potential fraudulent or meritless claims).

[169] *Id.* at 94.

[170] Any party alleging battery based on offensive taint still needs to prove that a touching actually occurred. *See* Siegel v. Ridgewells, Inc., 511 F. Supp. 2d 188, 194 (D.D.C. 2007) (finding no battery occurred where plaintiff failed to prove actual contact with nonkosher food that was served to wedding guests).

[171] *See, e.g.*, Cohen v. Smith, 648 N.E.2d 329 (Ill. App. Ct. 1995) (finding, in a case where a hospital was on notice that a patient's religion prohibited her from having her skin touched directly by men, that the touching of the patient's skin by a male nurse during surgery may constitute a battery); Perkins v. Lavin, 648 N.E.2d 839, 841 (Ohio Ct. App. 1994) (denying summary judgment for defendant in a case where a Jehovah's Witness plaintiff "specifically informed defendant that she would consider a blood transfusion offensive contact").

[172] DRAFT RESTATEMENT (THIRD) OF TORTS § 103, at 95 (AM. LAW INST. 2015) (noting additionally that "the individual's right to choose extends even to choices that reflect unusual subjective preferences and values").

perhaps idiosyncratic fragility, they must refrain from engaging in that intentional touching.[173] In the case of food, this provides another way to establish an offensive touching. Purchasers of food labeled as kosher, vegetarian, or "all beef" have identified that they find the inadvertent consumption of other products offensive. To then intentionally expose the individual to such touchings is battery.

CONCLUSION

Injured parties currently receive legal redress for exposure to food that is tainted in the sense of being toxic or poisonous, but have generally failed to recover in cases involving offensive taint, where food products contain substances that are socially, morally, or religiously repugnant to the consumer. This article argues that these food products are also "tainted" and cause real dignitary harm, and plaintiffs who unwillingly consume them deserve legal redress.

The American legal system has long recognized the need to protect these individual dignitary rights, particularly as related to personal physical autonomy. Yet facially neutral food laws and regulations are themselves tainted by embedded food norms and assumptions. Particularly in a pluralistic society like the United States where majority norms and values are pervasive, legislatures must make an effort to protect minority groups, views, and values in order to strengthen a longstanding commitment to both legal and social justice. Food is a key expression of self and belief. People who are in the minority in American society regarding their beliefs manifest those beliefs through, among other things, their food choices. Whether vegetarian, halal, or kosher—they deserve to have the right to control what they eat and to have their bodies respected, recognized, and protected under the law. Law must resist the temptation to taint those values, even through sheer omission, with a blind commitment to a majority food culture.

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[173] *Id.* at 105 (resolving in favor of liability the previously open question of whether a party who makes contact with a person in a way they know will be offensive to another's "abnormally acute sense of personal dignity" has engaged in battery).