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FORBIDDEN FRUIT: TALKING ABOUT PESTICIDES AND FOOD SAFETY IN THE ERA OF AGRICULTURAL PRODUCT DISPARAGEMENT LAWS*

Eileen Gay Jones[†]

It would be difficult to conceive of any topic of discussion that could be of greater concern and interest to all Americans than the safety of the food that they eat.¹

INTRODUCTION

Dirty Rice is a favored Louisiana dish, but it may have to be renamed. Ordering "Dirty Rice" may subject one to civil liability under Louisiana's agricultural product disparagement law.² Jokes aside, Louisiana is not alone in codifying this new form of law. Over thirty state legislatures have at least considered making disparaging comments about farm produce subject to civil penalty.³ Thirteen states have actually passed a bill,⁴

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¹ *Texas Beef Group v. Winfrey*, 11 F. Supp. 2d 858, 862 (N.D. Tex. 1998), *aff'd*, 201 F.3d 680 (5th Cir. 2000).

² LA. REV. STAT. ANN. §§ 4501-4504 (West Supp. 1996).

³ Arkansas (1999 H.B. 1938, 82nd Reg. Sess. (Ark. 1999)); California (S.B. 492, Reg. Sess. (Cal. 1995); A.B. 558, Reg. Sess. (Cal. 1995)); Colorado (1991 H.B. 1176, 1st Reg. Sess. (Co. 1991)); Delaware (S. 311 Leg. Sess. (Del. 1991)); Illinois (S. 234, 89th Gen. Assem., Reg. Sess. (Ill. 1995)); Iowa (H.R. 106, 76th Gen. Assem., Reg. Sess. (Iowa 1995); H.R. 389, 77th Gen. Assem., Reg. Sess. 1997 (Iowa 1997)); Maine (S.B. 937, 1st Leg. Sess. (Me. 1997)); Maryland (S. 445, Leg. Sess. (Md. 1996); S. 34 (Md. 1997)); Massachusetts (S. 937, Leg. Sess. (Mass. 1997)); Michigan (H.R. 5808, 88th Leg., Reg. Sess. (Mich. 1995); H.R. 4660, 89th Leg., Reg. Sess. (Mich. 1997)); Minnesota (H.R. 2804, 78th Leg., Reg. Sess. (Minn. 1994)); Missouri (H.R. 1720, 87th Leg., 2d Reg. Sess. (Mo. 1994); H.R. 923, 89th Leg., 2d Reg. Sess. (Mo. 1998)); Nebraska (L.B. 367, 94th Leg., 1st Sess. (Neb. 1995); H.R. 175, 95th Leg., 1st Sess. (Neb. 1997)); New Hampshire (H.R. 1105, Leg. Sess. (N.H.

making a new cause of action for publicizing false information about food safety or quality.⁵ So watch out George Bush, Sr.⁶ and Oprah Winfrey,⁷ because broccoli and beef have been elevated to sacred cow status. In the popular media, these laws have become popular fodder for humorous characterizations such as "veggie libel" laws⁸ or "banana bills."⁹ Journalists have generated headlines such as "Legislators Prove They Are Bananas"¹⁰ or "Bad-Mouthing Food Can Land You in the Fry-

1997)); New Jersey (H.R. 5159, 205th Leg., 1st Reg. Sess. (N.J. 1992)); North Dakota (H.B. 1192, 54th Leg. Sess. (N.D. 1995)); Pennsylvania (H.R. 949, 179th Gen. Assem., Reg. Sess. (Pa. 1995); H.R. 2731, 178th Gen. Assem. (Pa. 1993)); South Carolina (S. 160, Statewide Sess. (S.C. 1995); H.R. 4706 Statewide Sess. (S.C. 1994)); Vermont (H.R. 735 Adjourned Reg. Sess. (Vt. 1996); H.R. 690, Leg., 65th Adjourned Sess. (Vt. 1997)); Washington (H.R. 1098, 54th Leg. Sess. (Wash. 1995)); Wisconsin (A.B. 702, 92nd Leg., Reg. Sess. (Wis. 1995)); Wyoming (H.R. 308, 53rd Leg., Gen. Sess. (Wyo. 1995), H.R. 127, 54th Leg., Gen. Sess. (Wyo. 1997)).

⁴ Alabama (ALA. CODE §§ 6-5-620 to -625 (Supp. 1996)); Arizona (ARIZ. REV. STAT. ANN. § 3-113 (West Supp. 1995)); Colorado (COLO. REV. STAT. ANN. § 35-331-01 (West 1999)); Florida (FLA. STAT. ANN. § 865.065 (West. Supp. 1996)); Georgia (GA. CODE ANN. §§ 2-16-1 to -4 (Supp. 1996)); Idaho (IDAHO CODE §§ 6-2001 to -2003 (Michie Supp. 1996)); Louisiana (LA. REV. STAT. ANN. §§ 4501-4504 (West Supp. 1996)); Mississippi (MISS. CODE ANN. §§ 69-1-251 to -257 (Supp. 1994)); North Dakota (N.D. CENT. CODE §§ 32-44-01 to -04 (1997)); Ohio (OHIO REV. CODE ANN. § 2307.81 (West Supp. 1996)); Oklahoma (OKLA. STAT. ANN. tit. §§ 2-3010 to -3012 (West Supp. 1996)); South Dakota (S.D. CODIFIED LAWS §§ 20-10a-1 to -4 (Michie 1995)); and Texas (TEX. CIV. PRAC. & REM. CODE ANN. §§ 96.001-96.004 (Vernon 1996)). Agricultural product disparagement laws are also known as agricultural disparagement, food product disparagement, food slander, banana bills, veggie libel, veggie defamation, and sirloin slander. See Jerry Doan, *Agricultural Defamation No Laughing Matter*, BISMARCK TRIB., Feb. 23, 1997, at 4D; Nichols Fox, *Bad-Mouthing Bananas*, 17(2) AM. JOURNALISM REV. 12, 12 (1998); Anne Hawke, *Veggie Disparagement: Laws in 13 States Prompt Fears Activists—and Journalists—Will be Stifled*, 86 THE QUILL 13, 13 (1998), available at 1998 WL 12879573; Clarence Page, "Veggie Libel" Law Good for Emus, Bad for People, THE GRAND RAPIDS PRESS, Mar. 3, 1998, at A7.

⁵ Colorado is the only state that makes food disparagement a crime. See COLO. REV. STAT. ANN. § 35-31-01 (West 1999).

⁶ See *Agrivation*, THE ECONOMIST, Nov. 26, 1994, available at 1994 WL 12754590; Bill Geist, 48 *Seconds With Bill Geist*, 48 HOURS, July 10, 1997, available at 1997 WL 7813606; Scott Parks, *Amarillo Suit a Test for Veggie Libel Law*, THE DALLAS MORNING NEWS, Oct. 5, 1997, at 44A.

⁷ Ms. Winfrey was sued, inter alia, under Texas' agricultural product disparagement law. See *Texas Beef Group v. Winfrey*, 11 F. Supp. 2d 858, 864-65 (N.D. Tex. 1998) (dismissing claim based on agricultural food product disparagement law), *aff'd*, 201 F.3d 680 (5th Cir. 2000). See generally *Suit Claims Beef was Defamed on 'Oprah'*, THE NEWS & OBSERVER, Jan. 18, 1998, 1998 WL 6122784.

⁸ Page, *supra* note 4, at A7.

⁹ David Segal, *When a Put-Down of Produce Could Land You in Court*, WASH. POST, May 27, 1997, at E1 [hereinafter Segal, *Put-Down*].

¹⁰ Gary Stein, *Legislators Prove They Are Bananas*, SUN SENTINEL, Mar. 28,

ing Pan"¹¹ and statements such as "don't dis your vegetables."¹² While these laws have generated humorous commentary, their purpose and effect are not as funny. This Article examines the history of these laws, summarizes the academic debate over their validity, and raises issues presented by this change in law at the crossroads of environmental policy and tort law.

In Part I, the historical background of agricultural disparagement statutes is provided. Most scholars attribute the Alar incident of 1989 as the catalyst for veggie libel laws. A summary of the Alar incident is outlined in Part I. Following the historical information, Part II traces the initial drafting and passage of these laws. Part III provides an overview of the arguments that the laws cannot pass constitutional muster. While the Supreme Court has not reviewed a case involving an agricultural product disparagement statute, based on other free-speech or First Amendment case law, one can argue that it is likely that agricultural disparagement statutes are not consonant with well-established constitutional principles.

Part IV of this Article reviews the few known cases involving agricultural product disparagement legislation. Part V provides an outline of the policy issues involved with agricultural product disparagement laws. Part VI addresses some of the more fundamental issues that arise in public debates about food safety. By using Alar as a case study, one can explore in more detail why some states have claimed an economic imperative to quash free speech about food safety, and more particularly, the risks posed by pesticides.

Part VII contains a review of various incidents in which there was media coverage of a precise incident involving purportedly contaminated or tainted food. That Part is included to illustrate the point that food scares are a contemporary phenomena and to highlight the importance of public knowledge about them. In the new era of agricultural disparagement

1994, at 1B. Other examples include the following: Connie Koenenn, *Mind How You Disparage Asparagus or Berate Broccoli*, L.A. TIMES, Jan. 18, 1996, at E1; Thomas Kelly & Ronald K.L. Collins, *State's Food Law a Real Lemon*, DENVER POST, Sept. 19, 1999, at H4.

¹¹ *Bad-Mouthing Food Can Land You in the Frying Pan*, TIMES UNION, Dec. 29, 1997, at A2, available at 1997 WL 14936904.

¹² Segal, *Put-Down*, *supra* note 9, at E1.

laws, we can no longer assume public awareness and dialogue are possible, and this is at a time when food safety issues are becoming more complex. Finally, Part VIII provides examples of the effect the laws are having on free speech and again illustrates the trade-offs involved with the enactment of agricultural product disparagement laws.

I. EVOLUTION OF A NEW TORT

When writing about agricultural product legislation, most authors focus on First Amendment issues, particularly whether the acts violate constitutional principles.¹³ But underlying that debate are the policy questions about the use of pesticides.¹⁴ While one could argue that the debate over pesticides crystalized into a public issue with the publication of *SILENT SPRING*,¹⁵ agricultural product disparagement legislation was a response to the Alar crisis of the 1980s.¹⁶ In the larger picture, agricultural disparagement legislation is a response to

¹³ See generally David J. Bederman et al., *Of Banana Bills and Veggie Hate Crimes: The Constitutionality of Agricultural Disparagement Statutes*, 34 HARV. J. ON LEGIS. 135 (1997); Julie J. Scrochi, Note, *Must Peaches Be Protected at All Costs? Questioning the Constitutional Validity of Georgia's Perishable Product Disparagement Law*, 16 GA. ST. U. L. REV. 1223 (1996); Megan W. Semple, *Veggie Libel Meets Free Speech: A Constitutional Analysis of Agricultural Disparagement Laws*, 15 VA. ENVTL. L.J. 403 (1995-1996); Eric M. Stahl, *Can Generic Products be Disparaged? The 'Of and Concerning' Requirement After Alar and the New Crop of Agricultural Disparagement Statutes*, 71 WASH. L. REV. 517 (1996).

¹⁴ The term pesticide does not have a universal definition. In this Article, the author assumes a broad definition that would encompass the use of any man-made chemical applied to fruits and vegetables. Cf., e.g., RICHARD B. PHILP, ENVIRONMENTAL HAZARDS AND HUMAN HEALTH 191 (1995) (defining pesticides as "insecticides, herbicides, fungicides, rodenticides and fumigants employed to control one or more species deemed to be undesirable from the human viewpoint"). According to a representative of DuPont Agricultural Products, in 1995, "herbicides represented 49% of the market; insecticides, 30%; [and] fungicides, 20%." Phil Zahodiakinn, *OPs Should Remain Mainstay for Foreseeable Future, Panelists Tell NRC*, 26(22) PESTICIDE & TOXIC CHEM. NEWS, 1998 WL 11008949. The Natural Resources Defense Council has cited pesticides as one of the "five worst environmental threats to children's health." *The Five Worst Environmental Threats to Children's Health*, 60(9) J. ENVTL. HEALTH 46, 46 (1998).

¹⁵ RACHEL CARSON, *SILENT SPRING* (1962).

¹⁶ See Fred H. Altshuler, *Perspective of an Environmentalist*, in 1998 LIBEL DEFENSE RESOURCE CENTER, LDRC BULLETIN, AGRICULTURAL DISPARAGEMENT LAWS 2, at 67, 68; Bruce E.H. Johnson, *Alar Problems: The Auvil v. CBS Case*, in 1998 LIBEL DEFENSE RESOURCE CENTER, LDRC BULLETIN, AGRICULTURAL DISPARAGEMENT LAWS 2, at 11, 11.

this country's ongoing dialogue about the use and safety of pesticides.¹⁷ The United States is the largest user of chemical pesticides at a national cost of about 19 million dollars.¹⁸ Public interest groups have a history of watch-dogging the pesticide industry.

In the 1980s, environmental groups actively sought the cancellation of the registration of the growth regulator daminozide—what is now well-known as Alar. The Natural Resources Defense Council (the "NRDC") published a report, *Intolerable Risk: Pesticides in Our Children's Food*, documenting the risks associated with the use of Alar and other pesticides.¹⁹ *Intolerable Risk* received national coverage when used as the basis of a *60 Minutes* television program on February 26, 1989.²⁰ This followed on the heels of the EPA's announcement that it was in the process of canceling the registration of the chemical.²¹ An estimated 60 million Americans watched the *60 Minutes* broadcast.²² Following the program, other media, such as *The Today Show*, *The Phil Donahue Show*, *Entertainment Tonight*, *Woman's Day*, and *Redbook*, ran similar stories.²³ The media exposure was part of the NRDC's public relations campaign. The NRDC had hired a professional public relations firm, Fenton Communications, to help the NRDC

¹⁷ See generally THE PESTICIDE QUESTION: ENVIRONMENT, ECONOMICS, AND ETHICS (D. Pimenthal & H. Lehman eds., 1993).

¹⁸ See USDA Nat'l Agric. Statistical Serv., Statistical Highlights 1996-97: Farm Economics, available at <http://www.usda.gov/nass/pubs/stathigh/1997/content1.htm> (last visited Mar. 29, 2001).

¹⁹ See generally Nat'l Res. Def. Council, *Intolerable Risk: Pesticides in Our Children's Food* (1989) [hereinafter *Intolerable Risk*].

²⁰ A transcript of the program is available as Appendix to *Auvil v. CBS "60 Minutes"*, 800 F. Supp. 928 (E.D. Wash. 1992) [hereinafter *Auvil I*]. A subsequent *60 Minutes* program on May 14, 1989 did little to change public opinion about Alar. See Gershon Fishbein, *Alar PR: A Media Victory*, 20 CHEMTECH 264, 265 (1990).

²¹ See 54 Fed. Reg. 47493 (1989); Leslie Roberts, *Alar: The Numbers Game*, 243 SCIENCE 1430, 1430 (1989). Apple retailers attempted to deal with the Alar incident by posting signs that their apples were Alar-free. Alan R. Newman, *The Great Fruit Scares of 1989*, 61(14) ANALYTICAL CHEMISTRY 861A, 861A (1989).

²² Doug Haddix, *Alar as a Media Event*, 28 COLUM. JOURNALISM REV. 44, 44-45 (1990).

²³ ANDREA ARNOLD, FEAR OF FOOD: ENVIRONMENTAL SCAMS, MEDIA MENDACITY, AND THE LAW OF DISPARAGEMENT 5 (1990). On March 7, 1989, actress Meryl Streep announced the organization of the interest group Mothers and Others for Pesticide Limits. Fishbein, *supra* note 20, at 266.

with media coverage about Alar.²⁴ One of the principals of the firm, David Fenton, described the work performed on behalf of the NRDC as follows: "Our goal was to create so many repetitions of NRDC's message that average American consumers . . . could not avoid hearing it The idea was for the 'story' to achieve a life of its own, and continue for weeks and months to affect policy and consumer habits."²⁵

What ensued helped explain the subsequent rush to curb critical statements about farm products. A serious downturn in apple sales followed the publication of the NRDC report,²⁶ irrespective of whether the apples had been treated with Alar²⁷ or the public relations campaign launched by apple growers.²⁸ Opinions about the extent to which the apple industry was actually harmed vary widely.²⁹ Regardless of actu-

²⁴ See RON ARNOLD & ALAN GOTTLIEB, *TRASHING THE ECONOMY* 332 (1994).

²⁵ *Alar's Real Victims*, WASH. POST, Feb. 26, 1990, at D2 (second alteration in original). Fenton Communications, Inc. was hired to handle the public relations campaign in October 1988. See ARNOLD & GOTTLIEB, *supra* note 24, at 332; Will Stockwin, *Apple Growers File Alar Lawsuits*, FRUIT GROWER, Jan., 1991, at 34.

²⁶ WALTER A. ROSENBAUM, *ENVIRONMENTAL POLITICS AND POLICY* 123 (1998); Warren T. Brookes, *The Wasteful Pursuit of Zero Risk*, FORBES, Apr. 30, 1990, at 170; Linda M. Correia, *A is for Alar: EPA's Persistent Failure to Promptly Remove Hazardous Pesticides from the Food Supply*, 16 CHEM. REG. REP. 868, 870 (1992); Roberts, *supra* note 21, at 1430.

²⁷ The research reported in *Intolerable Risk* was based on the assumption that only ten to eleven percent of domestic apples were treated with Alar. *Auvil I*, 800 F. Supp. 941, 944 (E.D. Wash. 1992).

²⁸ See Fishbein, *supra* note 20, at 267. See N.Y. TIMES, Apr. 5, 1989, at A11 (depicting an advertisement paid for by apple growers). Subsequent media coverage also attempted to counterbalance earlier anti-pesticide articles. See ELIZABETH WHELAN, *TOXIC TERROR: THE TRUTH BEHIND THE CANCER SCARES* 191-92 (1993) (discussing the *Washington Post's*, *Chicago Tribune's*, *Los Angeles Times's*, *New York Times's*, and *Wall Street Journal's* efforts). The International Apple Institute also placed full-page advertisements designed to re-educate the public about the health benefits of apples in newspapers. See Roberts, *supra* note 21, at 1430. Four years earlier, the EPA had been poised to ban Alar. This was halted by the EPA's Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") Scientific Advisory Panel, which concluded that the data was insufficient to reach that conclusion. See MICHAEL FUMENTO, *SCIENCE UNDER SIEGE* 22 (1993); Eliot Marshall, *Science Advisors Need Advice*, 245 SCIENCE 20, 20-21 (1989) [hereinafter Marshall, *Science Advisors*]; Newman, *supra* note 21, at 863A.

²⁹ Some have placed the economic loss at \$100 million. See Linda Ashton, *Alar Scare 10 Years Old, But Issue Still Controversial*, ASSOCIATED PRESS (1999), 1999 WL 8525529. Others have estimated the economic loss at \$250 million, see WHELAN, *supra* note 28, at 18, or even over \$500 million. See Jennifer J. Mattson, *North Dakota Jumps on the Bandwagon by Enacting Legislation to Meet a Concern Already Actionable Under State Defamation Law and Failing to Heed Constitution-*

al losses, apple farmers believed the incident caused serious adverse economic effects,³⁰ and they were given \$250 million in compensation from federal coffers for losses allegedly caused by the incident.³¹ Similarly, the extent to which Alar was used on American apple crops³² or the risks posed by Alar remain controversial.³³ While the NRDC stands behind its

ality Concerns, 74 N.D. L. REV. 89, 101 (1998) (citing Jerry Jackson, *Bashing Beef? Be Careful of State Libel Law*, ORLANDO SENTINEL, Aug. 23, 1997, at A6). The USDA reported that "as of May 1, 1989, the national supply of 1988 crop fresh apples was 53 percent greater than the previous three-year average." Regulation Governing the Fresh Apples Diversion Program for 1988 Crop Apples, 7 C.F.R. pt. 81 (1990). In contrast, others contend that losses were minimal because the apple industry was already in trouble at the time of the Alar incident, that the downturn only lasted a few months, and that two years following the incident yielded bumper crops with corresponding record-high prices. PAUL R. EHRLICH & ANNE H. EHRLICH, *BETRAYAL OF SCIENCE AND REASON* 159 (1991).

³⁰ See, e.g., Rocky Barker, *Emmett Fruit Grower Says Law Keeps People Honest*, THE IDAHO STATESMAN, Jan. 6, 1998, at 8A, available at 1998 WL 6093078; Timothy Egan, *Apple Growers Bruised and Bitter After Alar Scares*, N.Y. TIMES, July 8, 1991, at A1; Stockwin, *supra* note 25, at 34.

³¹ Ashton, *supra* note 29.

³² Compare ROSENBAUM, *supra* note 26, at 123 (stating that Alar was present in five percent of red apples) with Egan, *supra* note 30, at A1; and Edward Groth III, Letter, *Alar in Apples*, 244 SCIENCE 755, 755 (1989) (both contending that fifteen to fifty-five percent of all apples were treated with Alar).

³³ The risks posed by Alar differ by a factor of twenty-five. See Ann M. Thayer, *Alar Controversy Mirrors Differences in Risk Perception*, CHEMICAL & ENGINEERING NEWS, Aug. 28, 1989, at 7, 9. Kuran and Sunstein write that the EPA's review of the evidence following the 60 Minutes broadcast showed that "the risk was vastly exaggerated; one in 111,000 rather than one in 4,200." Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 699 (1999). Subsequently, the EPA concluded that one in 250,000 children exposed to Alar was likely to develop cancer. GEN. ACCOUNTING OFFICE, TOXIC CHEMICALS, REPORT TO CONGRESS 23 (1991). The EPA's final report on Alar classifies it and its breakdown metabolite UDMH as a probable human carcinogen. See RONALD E. GOTS, TOXIC RISKS: SCIENCE, REGULATION, AND PERCEPTION 254 (1993); ENVTL. PROT. AGENCY, THIRD PEER REVIEW OF DAMINOZIDE AND ITS METABOLITE BREAKDOWN PRODUCT OF 1,1-DIMETHYHYDRAZIDE 24 (1991) [hereinafter EPA REVIEW OF DAMINOZIDE]. The EPA appears committed to its anti-Alar position. See Victor J. Kimm, Letter, *Alar's Risks*, 254 SCIENCE 1276, 1276 (1991). Whether Alar posed a health risk warranting removal from the market was and remains a controversial issue. The NRDC remains committed to its original report, *Intolerable Risk*. See Ashton, *supra* note 29; Kimm, *supra*, at 1276. Some remain supportive of the NRDC's report. See David Rall & Philip J. Landigan, Letter, *Of Apples and Alar*, WASH. POST, Jan. 13, 1998, at A14. Others have vigorously argued that fears about Alar were not scientifically justified. See, e.g., ROSENBAUM, *supra* note 26, at 124 ("By mid-1991, most scientists had concluded that the public risks posed by Alar never justified the alarm aroused by the Alar controversy."); see also FUMENTO, *supra* note 28, at 34-35; WHELAN, *supra* note 28, at 199-200; Bruce N. Ames & Lois S. Gold, Letter, *Pesticides, Risk, and Apple Sauce*, 244

1989 report,³⁴ many have vigorously argued that the risks posed by Alar were greatly exaggerated.³⁵ One critic of the NRDC wrote, "The syndrome its report [*Intolerable Risk*] played out is by now dishonestly familiar: a few suggestive tests involving tiny quantities raised way above the actual amount by extreme assumptions about children's eating habits, expanded further by statistical manipulation, extrapolated against huge populations to create row-upon-row of child cancer victims."³⁶ In contrast, others describe the Alar aftermath as a "gold mine" for the political right³⁷: "[T]he issue would have dropped from public view long ago if the brownlash hadn't kept it alive."³⁸

The EPA's final position on Alar is that it is a probable human carcinogen.³⁹ In the aftermath of the public's response to the publicity about Alar, the manufacturer of the chemical, Uniroyal Chemical Company, halted sales and requested cancellation of its registration for use on food crops.⁴⁰ By that time, the EPA and Congress had already taken steps to halt sales of the chemical.⁴¹ The Alar incident also prompted Congress to order the National Academy of Sciences to study risks to children posed by pesticide residues in food.⁴² The Academy

SCIENCE 755, 756 (1989); Warren Brooks, *The Wasteful Pursuit of Zero Risk*, FORBES, Apr. 30, 1990, at 160.

³⁴ Ashton, *supra* note 29; Lawrie Mott et al., Letter, 255 SCIENCE 665, 665 (1992) (Mott is an employee of the NRDC).

³⁵ See FUMENTO, *supra* note 28, at 44; WHELAN, *supra* note 28, at 199-200; Ames & Gold, *supra* note 33, at 755; Kuran & Sunstein, *supra* note 33, at 700. The United Nations World Health Organization (the "UNWHO") and the Food and Agricultural Organization (the "FAO") have determined that Alar is safe if consumed in prescribed quantities. See GOTS, *supra* note 33, at 253. England's Ministry of Agriculture, Fisheries and Food has also concluded that Alar is safe. *Id.* at 253-54. For a succinct review of the supporters of Alar, see KENNETH SMITH, ALAR FIVE YEARS LATER: SCIENCE TRIUMPHS OVER FEAR 12-13 (1994).

³⁶ AARON WILDAVSKY, BUT IS IT TRUE? 222 (1995).

³⁷ EHRLICH & EHRLICH, *supra* note 29, at 157.

³⁸ EHRLICH & EHRLICH, *supra* note 29, at 157.

³⁹ EPA REVIEW OF DAMINOZIDE, *supra* note 33, at 24; *Auvil v. CBS* "60 Minutes," 67 F.3d 816, 821 (9th Cir. 1995) (citing 57 Fed. Reg. 46436, 46437-440 (1992)) [hereinafter *Auvil II*].

⁴⁰ *Pesticides: Washington Growers Sue CBS, NRDC for Product Disparagement of Red Apples*, 14 CHEM. REG. REP. 1530, 1531 (1991).

⁴¹ By the mid-1980s, the EPA had started the process to ban Alar. See Joseph D. Rosen, *Much Ado About Alar*, 17 ISSUES IN SCIENCE AND TECHNOLOGY 85, 85 (1990); Keith Schneider, *Tiny Traces of Suspect Chemical Found in Apples*, N.Y. TIMES, Jan. 14, 1996, at A15.

⁴² See Stanley H. Abramson & Rachel G. Lattimore, *Kid's Risk: Expanding*

established the National Research Council (the "NRC") to carry out this task. The NRC's final report on the subject, *Pesticides in the Diets of Infants and Children*, generally found that children were probably not being protected under then-current regulations.⁴³ Ultimately, the report spawned the enactment of the Food Quality Protection Act of 1996.⁴⁴ That law has begun a new round in the pesticide debate.⁴⁵

The Alar media coverage and subsequent public responses also prompted a lawsuit filed on behalf of a group of Washington apple farmers.⁴⁶ Eleven apple growers filed suit on behalf of 4,600 growers against CBS, the NRDC, and others in a Washington federal court.⁴⁷ This was, of course, prior to the era of agricultural disparagement laws. Plaintiffs sued, *inter alia*, under the common law tort of trade disparagement.⁴⁸ One element of the cause of action was that the statements in question were false. Because plaintiffs could not prove that the statements were false, as required under common law, they were not able to prevail.⁴⁹ At best, plaintiffs could show that some of their statements were ambiguous or possibly false. According to the Court of Appeals for the Ninth Circuit, that was not sufficient.⁵⁰

The elements of an actionable claim based on a derogatory statement about farm produce were about to change with the advent of agricultural product disparagement laws. In contrast to the common law, under agricultural product disparagement laws a statement is false if it is not based on "reasonable and reliable" science.⁵¹

Health and Safety Protection for Infants and Children, 14(4) NAT'L RESOURCES AND THE ENV'T 223, 224 (2000).

⁴³ NAT'L RESEARCH COUNCIL, PESTICIDES IN THE DIETS OF INFANTS AND CHILDREN 7-12, 360-363 (1993).

⁴⁴ Pub. L. No. 104-170, 110 Stat. 1489 (codified as amended in scattered sections of 7 U.S.C.).

⁴⁵ See generally AMERICAN BAR ASS'N, SPECIAL COMMITTEE ON PESTICIDES, CHEMICAL REGULATION, AND RIGHT-TO-KNOW, 1999 ANNUAL REPORT (1999).

⁴⁶ See Laurie Moses, *Alar Lawsuit Dismissed*, FRUIT GROWER, Oct., 1993, at 10, 10.

⁴⁷ *Auvil II*, 67 F.3d 816 (9th Cir. 1995).

⁴⁸ *Id.* at 820.

⁴⁹ *Id.*

⁵⁰ *Id.* at 820-21.

⁵¹ See, e.g., LA. REV. STAT. ANN. § 4502 (West Supp. 1996) ("[I]nformation is presumed false when not based upon reasonable and reliable scientific inquiry,

II. THE ADVENT OF AGRICULTURAL PRODUCT DISPARAGEMENT LEGISLATION

Finding that state law would not protect them from the fallout from food scares, farmers rallied for a change that would be more beneficial to their interests. Surprisingly, efforts at legal reform did not start in Washington, but in Colorado. There, State Representative Steve Aquafresca introduced the first agricultural product disparagement legislation.⁵² Although the bill met defeat at the hands of the governor,⁵³ agricultural interests adopted the idea and made it part of their lobbying agenda throughout the country.

The American Feed Industry Association (the "AFIA") engaged the assistance of a Washington, D.C. law firm to draft model legislation.⁵⁴ The drafts were then disseminated throughout the country and lobbied for by agricultural interests—particularly meat businesses,⁵⁵ farming associations,

facts, or data."); ALA. CODE § 6-5-621 (Supp. 1996) ("[I]nformation shall be deemed to be false if it is not based upon reasonable and reliable scientific inquiry, facts, or data."); ARIZ. REV. STAT. ANN. § 3-113E (West Supp. 1995) ("[I]nformation that is not based on reliable scientific facts and reliable scientific data.").

⁵² See James Coates, *Colorado Bill Cuts to Core of Produce-Bashing*, CHI. TRIB., Mar. 19, 1991, 1991 WL 9361098.

⁵³ See John Margiotta, *The Movement Begins: The Model Bills for Agricultural Disparagement Statutes*, in 1998 LIBEL DEFENSE RESOURCE CENTER, LDRC BULLETIN, AGRICULTURAL DISPARAGEMENT LAWS 2, at 17, 17. Subsequently, Colorado passed a criminal agricultural product disparagement law. See COLO. REV. STAT. ANN. § 35-31-01 (West 1999). This is the only law of its type in the country. Delaware's governor also vetoed an agricultural product disparagement bill. See S. 311 Leg. Sess. (Del. 1991); Semple, *supra* note 13, at 403 n.14.

⁵⁴ A copy of the model bill is provided in 1998 LIBEL DEFENSE RESOURCE CENTER, LDRC BULLETIN, AGRICULTURAL DISPARAGEMENT LAWS 2, at 91-93. That bill was modeled after State Rep. Aquafresca's bill. See Margiotta, *supra* note 53, at 18.

⁵⁵ See SHELDON RAMPTON & JOHN STAUBER, *MAD COW USA: COULD THE NIGHTMARE HAPPEN HERE?* 143-44 (1997); Bruce E.H. Johnson & Susanna M. Lowry, *Does Life Exist on Mars? Litigating Falsity in a Non-"Of and Concerning" World*, 12 COMM. L. 1, 22 (1997); Elizabeth Allen, *Bill Filed Opposing 'Veggie Libel Law'*, SAN ANTONIO EXPRESS-NEWS, Dec. 19, 1998, at 1D; see also Colleen K. Lynch, Note and Comment, *Disregarding the Marketplace of Ideas: A Constitutional Analysis of Agricultural Disparagement Statutes*, 18 J.L. & COM. 167, 173 (1998) (suggesting that agricultural interests in Colorado and California were the political force behind the bills); Mattson, *supra* note 29, at 106 (indicating that a rancher's association was the moving force behind North Dakota's agricultural product disparagement bill). The American Feed Industry Association drafted model bills and sent them to each state legislature. See Hey, *Your Zucchini Wears Army Boots*,

and chemical or pesticide manufacturers.⁵⁶

In 1991, Louisiana was the first state to actually put an agricultural product disparagement statute on the books.⁵⁷ A majority of the states have at least considered agricultural product disparagement legislation. For instance, eleven states followed Louisiana in passing new laws.⁵⁸ Today, agricultural product disparagement bills are still being debated,⁵⁹ including legislative attempts at a federal law.⁶⁰ Texas even considered repealing (unsuccessfully) their agricultural product disparagement law.⁶¹

III. AGRICULTURAL PRODUCT DISPARAGEMENT LAWS: ARE THEY CONSTITUTIONAL?

Very little new insight can be added to the scholarly research on the substance or the arguments about the constitutionality of agricultural product disparagement legislation. Overwhelmingly, scholarly opinion is that these laws are not going to pass constitutional muster.⁶² One might hypothesize

TIME, Aug. 4, 1997, at 7; see also Margaret Jacobs, *Public Interests Groups Want Law on Produce*, WALL ST. J., Feb. 25, 1998, at B5.

⁵⁶ See Margiotta, *supra* note 53, at 17-18; Jack McDonald, *Anatomy of a Legislative Battle: The North Dakota Story*, in 1998 LIBEL DEFENSE RESOURCE CENTER, LDRC BULLETIN, AGRICULTURAL DISPARAGEMENT LAWS 2, at 27, 27.

⁵⁷ LA. REV. STAT. ANN. §§ 4501-4504 (West Supp. 1996).

⁵⁸ The states that have passed civil causes of action for food defamation in chronological order of passage are: Louisiana, Idaho, Alabama, Georgia, Mississippi, South Dakota, Arizona, Florida, Oklahoma, Texas, Ohio, and North Dakota. See *supra* note 4.

⁵⁹ See Arkansas (1999 H.B. 1938, 82nd Reg. Sess. (Ark. 1999)); Vermont (H.R. 735 Adjourned Reg. Sess. (Vt. 1996); H.R. 690, Leg., 65th Adjourned Sess. (Vt. 1997)).

⁶⁰ See Ronald K.L. Collins & Paul McMasters, *'Veggie Libel' Laws Still Pose a Threat*, N.J.L.J., Apr. 6, 1998, at 24; Paul Rauber, *Vegetable Hate Crimes*, SIERRA MAG. Nov./Dec., 1995, at 16-17.

⁶¹ See Ron Ruggless, *It's Not Easy Being Green—or Red—in New Mexico*, NATION'S RESTAURANT NEWS, June 28, 1999, at 246; Associated Press, *House Lets 'Veggie Libel' Law Stand*, DALLAS MORNING NEWS, May 8, 1999, at A1.

⁶² See, e.g., Bruce E.H. Johnson & Eric M. Stahl, *Food Disparagement: An Overview of the Constitutional Issues*, in 1998 LIBEL DEFENSE RESOURCE CENTER, LDRC BULLETIN, AGRICULTURAL DISPARAGEMENT LAWS 2, at 31, 31. One of the most recent pieces provides an excellent review of the law. See generally Ronald K.L. Collins, *Free Speech, Food Libel, & the First Amendment . . . in Ohio*, 26 OHIO N.U. L. REV. 1 (2000). For another excellent analysis of agricultural product disparagement legislation, see Margaret R. Hughes (Assistant Attorney General of Idaho), *Opinion Letter Re Product Disparagement*, Feb. 28, 1992, at Center for

that for precisely this reason, very little agricultural product disparagement litigation has surfaced. It is important to note, however, that no court has reached the merits of the constitutional arguments. All scholarship is based on other types of First Amendment law, the closest of which (at the Supreme Court level) is *Bose Corp. v. Consumers Union of the United States*,⁶³ the one product disparagement case the Court has entertained. Below is a summary of the commonly-raised concerns central to the claim that agricultural disparagement statutes are unconstitutional.

A. *Arguments That Agricultural Disparagement Laws Are Unconstitutional*

Much has already been written about why agricultural disparagement laws are probably unconstitutional.⁶⁴ Of central concern has been the lack of what is called the "of and concerning" element and the constitutionally required level of intent. Other concerns include whether the burden of proof violates constitutional principles, whether the determination of fault violates the Constitution, whether damages exceed constitutional limits, and whether the laws are neutral. These issues are addressed in turn below.

Science in the Public Interest, <http://www.cspinet.org/foodspeak/laws/idago.htm> (last visited Mar. 29, 2001).

⁶³ 466 U.S. 485 (1984). One of the most comprehensive pieces on the law of agricultural product disparagement legislation is published by the Libel Defense Resource Counsel. See generally 1998 LIBEL DEFENSE RESOURCE CENTER, LDRC BULLETIN, AGRICULTURAL DISPARAGEMENT LAWS 2.

⁶⁴ See generally Bederman et al., *supra* note 13; Mattson, *supra* note 29; Semple, *supra* note 13; Stahl, *supra* note 13; Lynch, *supra* note 55; Scrochi, *supra* note 13. But see Kevin A. Isern, *When Speech is no Longer Protected by the First Amendment: a Plaintiff's Perspective of Agricultural Disparagement Law*, 10 DEPAUL BUS. L.J. 233 (1998); Brent J. Hagy, Comment, *Let Them Eat Beef: The Constitutionality of the Texas False Disparagement of Perishable Food Products Act*, 29 TEX. TECH. L. REV. 851 (1998).

1. The "Of and Concerning" Element

Much of the literature focusing on agricultural disparagement legislation has raised a concern about the level of specificity or particularity in a statement about a product.⁶⁵ This idea is commonly known as the "of and concerning" element; this means, in general terms, that the alleged defamatory statement was about a defendant (in the case of defamation) or a specific product (in the case of product disparagement).⁶⁶ The genesis of this argument can be found in Supreme Court case law. From the outset, one must be mindful that the United States Supreme Court has never reviewed an agricultural product disparagement statute, and in only one instance has it entertained a product disparagement claim.⁶⁷

The Supreme Court's seminal case addressing the "of and concerning" element was a defamation case, *New York Times Co. v. Sullivan*.⁶⁸ In that case, an advertisement appeared in the *New York Times* that did not fully identify the plaintiff by name.⁶⁹ The Court rejected the analysis of the Alabama Supreme Court that the plaintiff met his prima facie burden because readers may have inferred that the advertisement referred to the plaintiff.⁷⁰ The Court disagreed: "[T]he evidence was constitutionally deficient in . . . [that] it was incapable of supporting the jury's finding that the allegedly libelous statements were made 'of and concerning' the plaintiff."⁷¹

Although the Supreme Court has not had the opportunity to consider whether an "of and concerning" element is necessary for a claim to be constitutional under an agricultural disparagement statute, there are sound arguments that if given such an opportunity, the Court would impose that re-

⁶⁵ See generally Stahl, *supra* note 13. Idaho's statute is anomalous in this regard. Under that statute, the allegedly disparaging statement must be concerning plaintiffs specific product, not a "generic group of products." IDAHO CODE §§ 6-2002(1)(a), 6-2003(4) (Michie 1996).

⁶⁶ See Semple, *supra* note 13, at 429-30.

⁶⁷ See generally *Bose Corp. v. Consumers Union of the United States*, 466 U.S. 485 (1984).

⁶⁸ 376 U.S. 254, 292 (1964).

⁶⁹ *Id.* at 288-91.

⁷⁰ *Id.*

⁷¹ *Id.* at 288; see also *Rosenblatt v. Baer*, 383 U.S. 75, 79-80 (1966) (confirming the necessity of the "of and concerning" element).

quirement. The Court has previously reasoned that an "of and concerning" element is necessary in defamation cases to limit the universe of claims that abridge free speech.⁷² Since free speech is highly valued, only a discrete, circumscribed set of facts gives rise to a cause of action. The malice prong of *Sullivan* was applied in *Bose*, although the Court specifically stated it was not deciding whether all of the *Sullivan* principles applied to product disparagement cases.⁷³

The "of and concerning" element may be particularly contentious in agricultural product disparagement litigation because standing has been so broadly defined in many of the statutes. While no definitive statements can be made about standing because of the paucity of case law, the plain language of the statutes does suggest that many of the statutes provide standing to a wide range of persons. All states allow "producers" to sue under their agricultural product disparagement statute, as indicated in Table 1. However, some statutes broaden the group of those who may sue. Georgia may be the most liberal in its grant of standing.

⁷² *Bose*, 466 U.S. at 503-08.

⁷³ See *id.* at 499. As noted by others, many federal courts and state courts entertaining common law defamation claims incorporate an "of and concerning" requirement. See Seth D. Berlin, *Of and Concerning*, in 1998 LIBEL DEFENSE RESOURCE CENTER, LDRC BULLETIN, AGRICULTURAL DISPARAGEMENT LAWS 2, at 43, 45-47; David Heller, *Product Disparagement: The Common Law Tort*, in 1998 LIBEL DEFENSE RESOURCE CENTER, LDRC BULLETIN, AGRICULTURAL DISPARAGEMENT LAWS 2, at 7, 10.

Table 1. Standing.

State	Standing
ALABAMA	marketer, producer, seller
ARIZONA	marketer, producer, seller, shipper, or association thereof
FLORIDA	producer or association thereof
GEORGIA	marketer, processor, producer seller, or consumer
IDAHO	producer
LOUISIANA	producer
MISSISSIPPI	producer
NORTH DAKOTA	distributor, manufacturer, producer, seller, or association thereof
OHIO	distributor, producer, seller, or association thereof
OKLAHOMA	producer
SOUTH DAKOTA	producer
TEXAS	producer

2. Intent

Most prior scholarship has attacked agricultural product disparagement laws for their general absence of a heightened level of intent by the party who makes the allegedly disparaging statement.⁷⁴ To be more precise, the various state statutes actually vary from a level of intent reflective of the accepted defamation standard of malice,⁷⁵ to the lowest level of intent or negligence,⁷⁶ to no standard of intent.⁷⁷ Again, because the Supreme Court has not reviewed a claim under an agricultural product disparagement law or even decided whether *Sullivan* fully applies to product disparagement claims, scholars are left to debate whether agricultural product disparagement laws need a constitutionally acceptable level of intent to support viable claims. Overwhelmingly, people opine that statutes should not pass constitutional muster without a malice standard (among other requirements).⁷⁸ Malice is shorthand for knowing that a statement was false, or acting in reckless disregard of its falsity.⁷⁹

3. Burden of Proof

Another common criticism of agricultural product disparagement legislation is that the laws unconstitutionally shift the burden of proof from the plaintiff to the defendant.⁸⁰

⁷⁴ See, e.g., Johnson & Stahl, *supra* note 62, at 34-36; see also John Borger & Deborah Ellingboe, *State of Mind*, in 1998 LIBEL DEFENSE RESOURCE CENTER, LDRC BULLETIN, AGRICULTURAL DISPARAGEMENT LAWS 2, at 53, 57-58.

⁷⁵ See IDAHO CODE § 6-2002(1)(d) (Michie Supp. 1996); N.D. CENT. CODE § 32-44-01(6) (1997).

⁷⁶ See FLA. STAT. ANN. § 865.065 (West. Supp. 1996); LA. REV. STAT. ANN. § 4502(1) (West Supp. 1996); OHIO REV. CODE ANN. § 2307.81 (West Supp. 1996); OKLA. STAT. ANN. tit. §§ 2-3010 to -3012 (West Supp. 1996).

⁷⁷ See Alabama (ALA. CODE §§ 6-5-621(1), 6-5-623).

⁷⁸ See Hughes, *supra* note 62. As noted by Assistant Attorney General Hughes, many, although not all, lower federal courts and state courts have applied a malice standard in product disparagement cases. See Borger & Ellingboe, *supra* note 74, at 56-69; Charles Tobin, *The Burden of Proof*, in 1998 LIBEL DEFENSE RESOURCE CENTER, LDRC BULLETIN, AGRICULTURAL DISPARAGEMENT LAWS 2, at 39, 40.

⁷⁹ See Hughes, *supra* note 62.

⁸⁰ See Hagy, *supra* note 64, at 874; Julie K. Harders, *The Unconstitutionality of Iowa's Proposed Agricultural Food Products Act and Similar Veggie Libel Laws*, 3 DRAKE J. AGRIC. L. 251, 270-71 (1998); Lynch, *supra* note 55, at 173. But see

Again, the statutes can be classified into different groups. Two statutes follow the traditional mode by explicitly placing the burden of proving a *prima facie* case on the plaintiff.⁸¹ On the other extreme are the statutes that contain language to the effect that falsity is presumed under certain conditions. For example, Louisiana's act provides that a statement is "presumed to be false when not based upon reasonable and reliable scientific inquiry, facts, or data."⁸² Most states chose to incorporate some form of a reasonable or reliable measure. Arizona's law is typical: statements "not based on reliable scientific facts and reliable scientific data" are false.⁸³ This is what might be called the "whatcha got" of agricultural product disparagement litigation.

In such litigation, the defendant is required to proffer evidence in the form of scientific studies or research, and reasonable or reliable ones at that—whatever that means. Frequently, scientists will disagree about data, methodology, or interpretation of results.⁸⁴ Moreover, scientists may also debate who is qualified as an expert in a given field.⁸⁵ Thus, the notion that there is "a" science that is "reasonable and reliable" is largely a myth. As was succinctly stated by the Supreme Court, "Scientific conclusions are subject to revision."⁸⁶

Isern, *supra* note 64, at 255-57 (1998) (arguing that Texas' law does not violate malice standard).

⁸¹ See IDAHO CODE § 6-2001 (Michie Supp. 1996); OHIO REV. CODE ANN. § 2307.81 (West Supp. 1996).

⁸² See LA. REV. STAT. ANN. § 4502 (West Supp. 1996); see also GA. CODE ANN. § 2-16-1 (Supp. 1996); MISS. CODE ANN. § 69-1-251 (Supp. 1994).

⁸³ ARIZ. REV. STAT. ANN. § 3-113 (West Supp. 1995).

⁸⁴ See Eileen Gay Jones, *Risky Assessments: Uncertainty of Science and the Human Dimensions of Environmental Decisionmaking*, 22 WM. & MARY ENVTL. L. REV. 1, 31-32 (1997) [hereinafter Jones, *Risky Assessments*].

⁸⁵ Eileen Gay Jones, *Gatekeeping Soothsayers, Quacks, and Magicians: Defining Science in the Courtroom*, 25 WM. MITCHELL L. REV. 315, 326 (1999) [hereinafter Jones, *Gatekeeping*].

⁸⁶ *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993).

The expense and inherent difficulties caused by scientific uncertainty could take up volumes.⁸⁷ Again, if common law product disparagement is the model, the burden of proving falsity should rest with the plaintiff.⁸⁸ If defamation law is the model, the plaintiff once again bears the burden of proving falsity.⁸⁹

4. "Falsity"

The departure in agricultural product disparagement law from common-law definitions of falsity is notable.⁹⁰ Under common law, if a statement could reasonably be true, then it is not false. One of the statements examined by the *Auvil* court illustrates this point: "The most cancer-causing agent in our food supply is a substance sprayed on apples to keep them on the trees longer and make them look better."⁹¹ As indicated by the district court, given the evidence, this statement could be true, and accordingly, "it cannot be proven false."⁹² Thus, the dichotomy: If possibly true, then not legally false.

Agricultural product disparagement laws turn this dichotomy on its head. At present, what is only possibly true may be legally false. Indeed, unless a statement can be supported by reasonable scientific evidence (whatever that is), it is presumed false. In short, in the agricultural product disparagement world, "truth" is only found among reasonable scientists. One might question who these reasonable scientists are. Are they the ones that agree with a certain proposition? Do they only

⁸⁷ See Altshuler, *supra* note 16, at 69-70; Johnson, *supra* note 16, at 11; Luther T. Munford & Hayes Johnson, *Verifiability, Truth, Opinion and Scientific Inquiry*, in 1998 LIBEL DEFENSE RESOURCE CENTER, LDRC BULLETIN, AGRICULTURAL DISPARAGEMENT LAWS 2, at 49, 49-51.

⁸⁸ See, e.g., *Sys. Operations, Inc. v. Scientific Games Dev. Corp.*, 555 F.2d 1131, 1141-42 (3d Cir. 1977) (discussing New Jersey law). It should be noted, however, that not all courts require a showing of malice in a product disparagement claim. See Hughes, *supra* note 62.

⁸⁹ See *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 725-76 (1986).

⁹⁰ See generally Rodney A. Smolla, letter to Kevin Smith in Opposition to Proposed Food Disparagement Bill (1999) (on file with author) [hereinafter Smolla Letter].

⁹¹ *Auvil II*, 67 F.3d 816, 820 (9th Cir. 1995).

⁹² *Auvil v. CBS "60 Minutes"*, 836 F. Supp. 740, 742 (E.D. Wash. 1993) (deciding plaintiffs' motion to strike experts' opinions and motion for partial summary judgment and defendants' motion for summary judgment).

include those who can pass the *Daubert* test?⁹³ The absurdity of the notion of "reasonable scientific" evidence can be demonstrated by a plethora of examples, but one shall suffice. When did we reasonably know that smoking causes cancer? What would happen if we had been denied the right to publicly debate smoking risks, however speculative at the time? The Alar controversy also illustrates the difficulty of determining what is reasonable or reliable as scientific information.

5. Damages

Although the central arguments in opposition to agricultural product disparagement laws have been the lack of an "of and concerning" element, the level of intent, burden of proof, and falsity, the damage provisions have also been criticized. Johnson and Stahl write that some of the statutes unconstitutionally allow for punitive damages without a showing of actual malice, required, in their opinion, by *Gertz v. Robert Welch, Inc.*⁹⁴ Arguably, Alabama, Florida, Georgia, Louisiana, Ohio, and Oklahoma fall within this class of statutes. To the extent that the statutes provide injunctive relief and may be classified as a "prior restraint" on free speech, they may also be unconstitutional.⁹⁵

6. Viewpoint Neutrality

Not widely articulated is the idea that statutes must not favor one group at the expense of others.⁹⁶ In constitutional case law, this is known as "viewpoint neutrality."⁹⁷ Others have also made the argument that agricultural product disparagement statutes are impermissibly vague.⁹⁸ The answer to

⁹³ See generally Jones, *Gatekeeping*, *supra* note 85.

⁹⁴ See Johnson & Stahl, *supra* note 62, at 34 (citing *Gertz*, 418 U.S. 323, 349-50 (1974)).

⁹⁵ See Amy B. Gimensky & Kathy E. Ochroch, *Damages*, in 1998 LIBEL DEFENSE RESOURCE CENTER, LDRC BULLETIN, AGRICULTURAL DISPARAGEMENT LAWS 2, at 61, 64.

⁹⁶ See Johnson & Stahl, *supra* note 62, at 36.

⁹⁷ See Johnson & Stahl, *supra* note 62, at 36.

⁹⁸ See Smolla Letter, *supra* note 90. See *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (vague laws should be avoided so citizens are put on notice of law and to avoid arbitrary application of law by officials); *Hynes v. Mayor and*

the question of whether any of the arguments concerning the constitutionality of the laws will prove persuasive in court will have to wait for another day. While five known cases have been litigated under an agricultural product disparagement law, none of the courts involved ruled on the constitutionality of the statutes.

IV. CASE LAW INVOLVING CLAIMS UNDER AGRICULTURAL PRODUCT DISPARAGEMENT STATUTES

Of the five known cases involving agricultural product disparagement claims, only two resulted in published opinions.⁹⁹ None of the cases reached the agricultural product disparagement claim on the merits, but were instead dismissed or withdrawn prior to full adjudication of the disparagement claim. Of the five cases, three originated in Texas, one in Georgia, and one in Ohio. By far the most well-known case is that in which popular television host Oprah Winfrey was sued by a group of cattle ranchers. The other two Texas cases involved the alleged disparagement of emus and turf grass, respectively. The Ohio case concerned the sale of allegedly old eggs. The plaintiffs in the Georgia case were not concerned about an actual disparaging statement, but rather they were seeking a judicial declaration as to the constitutionality of Georgia's agricultural product disparagement statute. Each of these cases is discussed below.

In *Texas Beef Group v. Winfrey*,¹⁰⁰ Texas cattlemen sued Oprah Winfrey for the statements made when an animal-rights activist, Howard Lyman, appeared on her show. Among their claims, the plaintiffs argued that Lyman's televised statements violated Texas' agricultural product disparagement statute.¹⁰¹ In response to Lyman's assertion that Bovine Spongiform En-

Council of Oradell, 425 U.S. 610, 620 (1976) ("The general test of vagueness applies with particular force in review of laws dealing with speech.").

⁹⁹ See *Texas Beef Group v. Winfrey*, 11 F. Supp. 2d 858 (N.D. Tex. 1998), *aff'd*, 201 F.3d 680 (5th Cir. 2000); *Action for a Clean Env't v. Georgia*, 457 S.E.2d 273 (1995), *cert. denied*, No. S95C1382, 1995 Ga. LEXIS 1012 (Ga. Sept. 5, 1995).

¹⁰⁰ 11 F. Supp. 2d 858. The description of the facts are taken from the district court opinion.

¹⁰¹ *Id.* at 862-63. Lyman was also sued.

cephalopathy, more commonly known as "mad cow" disease, "could make AIDS look like the common cold," Ms. Winfrey exclaimed, "It has just stopped me cold from eating another burger."¹⁰²

The *Texas Beef* court granted the defendants' motion for summary judgment as to the agricultural-product disparagement claim. The court found that the claim could not be sustained for two reasons: first, cattle were not a "perishable" agricultural product within the meaning of the statute;¹⁰³ second, assuming *arguendo* that the cattle were perishable, the plaintiffs failed to present evidence that the defendants knew that the statements about cattle were false.¹⁰⁴ In fact, the court noted that some of the plaintiffs' evidence suggested that at least part of what Lyman said had a factual basis in the practice of cattle raising.¹⁰⁵ In short, the court did not address whether Texas' statute was constitutional; instead it disposed of the claim by finding that the plaintiffs lacked standing.

The other reported decision, *Action for a Clean Environment v. Georgia*,¹⁰⁶ involved two environmental groups, Action for a Clean Environment and Parents for Pesticide Alternatives, which sought a declaratory judgment as to the constitutionality of Georgia's agricultural product disparagement act.¹⁰⁷ The court of appeals affirmed the lower court's judgment dismissing the lawsuit.¹⁰⁸ The court held that there was no controversy or live dispute between the plaintiffs and the defendant, the State of Georgia.¹⁰⁹ Again, as in the *Texas Beef* case, in this case the constitutionality of the agricultural product disparagement statute was not addressed on the merits.

Three other lawsuits have been filed under agricultural product disparagement laws. However, none of these appear in reported decisions. In another Texas case, *Anderson, d/b/a A-*

¹⁰² *Id.* at 865.

¹⁰³ *Id.* at 863.

¹⁰⁴ *Id.*

¹⁰⁵ *Texas Beef*, 11 F. Supp. 2d at 863.

¹⁰⁶ 457 S.E.2d 273.

¹⁰⁷ *Id.* at 273.

¹⁰⁸ *Id.* at 274.

¹⁰⁹ *Id.*

1 Turf Farm, and d/b/a A-1 Grass Co. v. McAfee,¹¹⁰ the owner of a grass farm sued a state agricultural agent.¹¹¹ The agent, James McAfee, had contributed to an article that had appeared in the Dallas Morning News gardening section. In the article, McAfee indicated that a certain type of grass, identified as Texturf 10, was "very susceptible to disease" in the humid conditions of the Dallas metropolitan area¹¹² and "just isn't happy here."¹¹³ The plaintiff was the owner of the A-1 Turf Farm, which grew eighty percent of the commercial Texturf in Texas. The judge granted defendant's motion for summary judgment, finding that defendant was insulated from liability under the doctrine of sovereign immunity.¹¹⁴ However, again, the merits of the agricultural-product disparagement claim were not reached.

In a case involving emus, *Burleson Enterprises, Inc. v. American Honda Motor Co., Inc.*,¹¹⁵ the plaintiffs used the Texas agricultural product disparagement statute to sue Honda Motor Co.¹¹⁶ The plaintiffs were a group of nine ranchers who raised emus as commercial livestock. Honda had televised a commercial in which emus were used to suggest that some deals are fraudulent and should be avoided.¹¹⁷ The commercial depicted a fictitious young man attempting to choose a job. Emus were referred to as the "pork of the future,"¹¹⁸ a statement that allegedly cast emus in a poor light, particularly to Jewish and Muslim viewers.¹¹⁹ The case was dismissed before

¹¹⁰ No. 96-12667 (Dallas County Dist. Ct., 134th Judicial Dist., April 24, 1998).

¹¹¹ This account of the turf suit is based on Collins, *supra* note 62, at 17 & n.85; Tom Leatherby & Stacy Simon, *Emus and Sod*, in 1998 LIBEL DEFENSE RESOURCE CENTER, LDRC BULLETIN, AGRICULTURAL DISPARAGEMENT LAWS 2, at 81; Hawke, *supra* note 4, at 13; *Judge Throws Out "Veggie Libel" Lawsuit*, SAN ANTONIO EXPRESS-NEWS, Apr. 26, 1998, 1998 WL 5089477.

¹¹² See Collins, *supra* note 62, at 17 n.85.

¹¹³ Leatherby & Simon, *supra* note 111, at 83.

¹¹⁴ Leatherby & Simon, *supra* note 111, at 84.

¹¹⁵ No. 2-97-CV-398 (N.D. Tex. Nov. 7, 1998).

¹¹⁶ This account of the facts of the case are taken from J. Mark Finnegan, *Eggs in Ohio*, in 1998 LIBEL DEFENSE RESOURCE CENTER, LDRC BULLETIN, AGRICULTURAL DISPARAGEMENT LAWS 2, at 85; Hawke, *supra* note 4, at 13; Margaret A. Jacobs, *Public Interest Group Want Law on Produce*, WALL ST. J., Feb. 25, 1998, at B5.

¹¹⁷ For the text from the commercial, see Suzanne Sprague, *Defending Emu's Honor*, MORNING EDITION, Nov. 24, 1997 WL 12823956.

¹¹⁸ *Id.*

¹¹⁹ See Collins, *supra* note 62, at 17 n.85; Leatherby & Simon, *supra* note 111,

the constitutionality of the food-product disparagement statute was adjudicated.

In the fifth known case, *Agricultural General Co. v. Ohio Public Interest Research Group*, an egg producer sued a public interest group, Ohio Public Interest Research Group ("PIRG"), and one of its employees, Amy Simpson, for statements the group made during a press conference.¹²⁰ Simpson had reported that Buckeye washed, repackaged, and sold old eggs. Specifically, at a March, 1997 press conference, Simpson stated, "We have no idea how many, if any, consumers have been made ill by consuming these eggs."¹²¹ The story was also carried by NBC's program *Dateline*.¹²² Yet, the lawsuit was eventually dropped by the plaintiffs without a determination as to the constitutionality of the agricultural product disparagement statute.¹²³

One has to wonder why so few cases have been litigated and why states would pass laws that appear to be unconstitutional. These questions are explored in more detail in Part V.

V. PROTECTIONISM

Agricultural product disparagement statutes have created a new right—the right to produce a consumer good without public discourse about its safety. The creation of a new right should be supported by sound policy. In the case of these statutes, economic imperative is ordinarily the stated protectionist goal. In Alabama, for example, the purported legislative intent behind passage of its agricultural disparagement statute was that "agriculture [is] significant to [the] state economy."¹²⁴ Almost identical language is repeated in the laws of

at 83; Mark Babineck, *Two New 'Veggie Libel' Lawsuits Take Wing*, HOUSTON CHRONICLE, Mar. 5, 1998, at 25; Clarence Page, Editorials, *Emus Join The Food Fights*, THE SACRAMENTO BEE, Mar. 5, 1998, at B7.

¹²⁰ This account of the case was taken from Collins, *supra* note 62, at 5-6; Finnegan, *supra* note 116, at 85; Margaret A. Jacobs, *Public Interest Group Wants Law on Produce*, WALL ST. J., Feb. 25, 1998, at B5.

¹²¹ See Collins, *supra* note 62, at 5.

¹²² See Finnegan, *supra* note 116, at 85.

¹²³ See Collins, *supra* note 62, at 5 & n.30 (citing Vinu P. Goel, *Buckeye Egg Farm Drops Suit Against Ohio Consumer Group*, PLAIN DEALER, July 7, 1998, at C2).

¹²⁴ ALA. CODE § 6-5-622 (Supp. 1996).

Florida,¹²⁵ Georgia,¹²⁶ Louisiana,¹²⁷ and Mississippi.¹²⁸ Indeed, in many states, agriculture provides a significant source of revenue and jobs. Both North Dakota and Idaho, for instance, are leading producers of one or more of America's most widely-grown crops, wheat and corn, respectively.¹²⁹ For example, in Idaho, agriculture is a significant economic sector, accounting for about fifteen percent of the gross state product.¹³⁰ Similarly, North Dakota and South Dakota are highly dependent on agriculture; in these states, about twenty-five percent of the economy is based on agriculture.¹³¹ Yet many states that have a significant agricultural interest have not created this new right. For instance, Arkansas, Iowa, and Kansas rely heavily on agriculture for a healthy economy, yet none of these states have passed an agricultural product disparagement bill.¹³²

It is unclear why agriculture deserves special status. If impact on the economy is the test for whether to pass protectionist legislation, the safety of many types of activities or products could be removed from public purview and debate. For example, Michigan could pass an Automobile Defamation Act or Louisiana could quash debate about petro-chemical industries. To benefit industry, perhaps hazardous waste, air contamination, or polluted water could be removed from the public agenda in the name of economic prosperity.

¹²⁵ FLA. STAT. ANN. § 865.065 (West. Supp. 1996).

¹²⁶ GA. CODE ANN. § 2-16-1 (Supp. 1996).

¹²⁷ LA. REV. STAT. ANN. § 4502 (West Supp. 1996).

¹²⁸ MISS. CODE ANN. § 69-1-252 (Supp. 1994).

¹²⁹ See USDA NAT'L AGRIC. STATISTICAL SERV., STATISTICAL HIGHLIGHTS 1997-98: FARM ECONOMICS, available at <http://www.usda.gov/nass/pubs/stathigh/1998/content1.htm> (last visited Mar. 29, 2001).

¹³⁰ See U.S. DEP'T OF AGRIC., 1997 CENSUS OF AGRICULTURAL PROFILES, at <http://www.nass.usda.gov/census/census97/profiles/ag-state.htm> (last visited Mar. 29, 2001).

¹³¹ See *id.*

¹³² Agriculture accounts for about twelve percent of Arkansas' economy, about eighteen percent of Iowa's economy, and about thirteen percent of Kansas' economy. See *id.*

The arguments in favor of the statutes usually cite Alar-type scares as the concern. Proponents of agricultural food product disparagement legislation contend that even if they have the money to publicize reports that are contrary to the negative ones, it may either be too late or unhelpful given the public's lack of understanding about science.¹³³ These arguments do little to support an unprecedented entitlement. The marketplace has always been a hazardous place for the faint of heart; this is part of the push and sell of a free market economy. It is difficult to imagine a world in which controversial issues, some of which have economic ramifications, were removed from public discourse. The public has different perceptions from experts on a lot of issues.¹³⁴ The public's perception of lawyers is a classic example of this. How many members of the public would freely refer to lawyers as thugs and thieves who cheat and steal? But the ABA has not lobbied for protectionist legislation.

Scientific uncertainty is simply not a sound justification for abridging free speech about pesticides. The prospect of scientific surety, about food safety generally, and pesticides more particularly, is not likely. Scientists can almost never agree about risk. This is illustrated by the scientific studies involved in the Alar incident.

VI. ALAR AS A CASE STUDY OF SCIENTIFIC DISPUTES

Risk estimates are often taken as gospel when they really represent a best guess, built on myriad assumptions, some of which are invariably value laden.¹³⁵

The Alar controversy provides an example of many health-risk issues. In the face of uncertainty, or the lack of universal scientific agreement, what does reasonable scientific information mean? The Alar controversy is a poignant case study of a typical, although highly publicized, debate among scientists. For example, was the scientific opinion that Alar was a carcin-

¹³³ See Hagy, *supra* note 64, at 883; Eric Jan Hansum, *Where's the Beef? A Reconciliation of Commercial Speech and Defamation: Cases in the Context of Texas' Agricultural Disparagement Law*, 19 REV. LITIG. 261, 265-66 (2000); Allen, *supra* note 55, at 1D.

¹³⁴ See Jones, *Risky Assessments*, *supra* note 84, at 32-41.

¹³⁵ Roberts, *supra* note 21, at 1430.

ogen reasonable, or just the opposite? Surely, well-credentialed scientists hold contrary opinions. Alar is not atypical—just read a newspaper: coffee, soybeans, bran, artificial sweeteners, not to mention cell telephones, radar detectors, and breast implants all have been subject to scientific debate about the health risks they may pose.

To understand this debate, one must first be aware of the number of different studies concerning the potential carcinogenicity of Alar.¹³⁶ Of course, there is the well-known study by the NRDC.¹³⁷ There were also a series of studies performed on behalf of Uniroyal at the request of the EPA.¹³⁸ In addition, the California Department of Food and Agriculture performed an independent study.¹³⁹ The Food and Agricultural Organization and the United Nations World Health Organization (the "FAO/WHO") Joint Panel on Pesticide Residues in Food has also conducted an independent study.¹⁴⁰ The British government reviewed data and reached its own conclu-

¹³⁶ Between 1973 and 1984 there were five studies that indicated that daminozide was a carcinogen. See *Nader v. EPA*, 859 F.2d 747, 749 (9th Cir. 1988). Other studies not discussed at length in this Article include: Health and Welfare of Canada study of daminozide levels in apples, reprinted in PHILP, *supra* note 14, at 60, and others. See generally Charles R. Santerre et al., *The Decomposition of Daminozide (Alar) to Form Unsymmetrical Dimethylhydrazide (UDMH) in Heated, pH Adjusted, Canned Solutions*, 554 J. OF FOOD PROTECTION 225 (1991); M.J.I. Mattina et al., *Daminozide Residues in Apple Orchards: Concentrations in Fruit, Trees, and Soil*, 45 BULL. ENVIL. CONTAM. TOXICOL. 858 (1990); W.A. Dozier et al., *Reactive Levels of Daminozide in Apple Trees Sprayed the Preceding Spring and Summer*, 48 J. OF FOOD PROTECTION 1058 (1985); L.J. Edgerton et al., *Colormetric Detection of Alar Residues in Apples*, 15 J. OF AGRIC. FOOD CHEMISTRY, 812 (1967); Food and Drug Administration, *Analysis for Alar Residues in Various Crops*, Pesticide Analytical Manual, vol. 2, Rockville, MD: Food and Drug Administration, Pesticide Regulation Section 180 (1975); W.H. Newsome, *Determination of Alar Residues on Food and Its Degradation to 1,1-Dimethylhydrazine by Cooking*, 28 J. OF AGRIC. FOOD CHEMISTRY 319 (1980); B.D. Ripley et al., *Daminozide Residue in Orchard-Treated Apples*, 27(6) J. OF AGRIC. FOOD CHEMISTRY 1389 (1979). Kenneth Smith discusses other studies, including a 1966 study by Dr. Bernard Oser, that did not conclude that Alar was a carcinogen. See SMITH, *supra* note 35, at 12-13.

¹³⁷ See generally *Intolerable Risk*, *supra* note 19.

¹³⁸ See, e.g., Marshall, *Science Advisors*, *supra* note 28, at 21. The studies ordered by the EPA in 1986 were followed by the EPA's scientific advisory panel advising the EPA that it should not ban Alar based on the early 1980s studies. See *Nader v. EPA*, 859 F.2d 747, 749-50 (9th Cir. 1988).

¹³⁹ See GOTS, *supra* note 33, at 253.

¹⁴⁰ Eliot Marshall, *A is for Apple, Alar, and . . . Alarmist*, 254 SCIENCE 20, 22 (1989) [hereinafter Marshall, *A is for Apple*].

sions.¹⁴¹ Finally, there was research published in the 1970s known as the Toth studies.¹⁴² At least two other studies looked at the rate of exposure from apples in the marketplace, namely the Consumer's Union study and the Processed Apple Institute.¹⁴³ These studies are described in the next section to demonstrate how scientists may differ in their methodology and conclusions and, ultimately, why what constitutes "reasonable and reliable" science is fraught with political decisions.

A. *Of Mice and Men or What or Whom is the Subject of the Data?*

Researchers use different test subjects. For obvious moral reasons, human beings are not used in pesticide testing; instead animals are tested. No matter what animal is tested, there is always the issue of the extent to which one can extrapolate the evidence of one species, e.g., mice, to another, i.e., humans. As stated by one group of scientists, "Extrapolating from one species to another . . . is fraught with uncertainty."¹⁴⁴

In the case of Alar, one bone of contention was whether a mouse or a rat was a more accurate predictor of human carcinogenicity.¹⁴⁵ If one thinks it makes no difference whether mice or rats are used, consider this: in the studies conducted in the 1980s on behalf of Uniroyal, researchers were able to conclude that rats did not suffer excess cancer rates from exposure to Alar, but mice did.¹⁴⁶ To make matters more interesting, other research conducted by the FAO/WHO used not only mice and rats, but also rabbits, guinea pigs, and dogs.¹⁴⁷ That study concluded that Alar was safe for human consumption at up to .5 milligrams per kilogram per day.¹⁴⁸ Similarly, the British government based its conclusion that Alar was safe in

¹⁴¹ *Id.* at 22.

¹⁴² See GOTS, *supra* note 33, at 251.

¹⁴³ See ROSENBAUM, *supra* note 26, at 124.

¹⁴⁴ Lester Lave et al., *Information Value of the Rodent Bioassay*, 336 NATURE 631, 632 (1988).

¹⁴⁵ See FUMENTO, *supra* note 28, at 25.

¹⁴⁶ See Marshall, *Science Advisors*, *supra* note 28, at 21.

¹⁴⁷ See GOTS, *supra* note 33, at 253.

¹⁴⁸ See GOTS, *supra* note 33, at 253.

certain quantities on its review of mouse studies.¹⁴⁹ The problem with using animals as surrogates for humans, and drawing scientific conclusions about pesticide safety, is as salient today as it was during the Alar fiasco. It is just one of the risk assessment issues underlying the movement to pass agricultural product disparagement laws.

B. *How Many Apples a Day Keep the Doctor Away or How Much Residue Do Humans Consume Anyway?*

There is no reasonable way to know exactly how much pesticide residues Americans eat. By necessity, every study relies on estimates.¹⁵⁰ The basis of these estimates differs, again providing fertile ground for disputes about the ultimate validity of a study.¹⁵¹ In the case of Alar, the NRDC relied on a 1985-86 survey of fruit consumption, conducted by the USDA, that sampled 2,000 persons.¹⁵² From this, the NRDC estimated that thirty-four percent of a preschooler's diet consisted of fruit.¹⁵³ In contrast, the data used in the studies conducted on behalf of Uniroyal used a 1977-78 USDA food survey of 30,000 persons.¹⁵⁴ The significance of these two different sets of assumptions is obvious.¹⁵⁵

One consequence of different assumptions about consumption is the amount of Alar to which a test subject should be exposed. This too varied among studies. In the studies conducted for Uniroyal in the early 1980s (prior to the NRDC study and the Alar publicity), rats and mice were given 20 ppm of UDMH in water. Under these conditions, researchers were able to conclude that the animals did not develop excess tumors.¹⁵⁶ In the mid-1980s, the EPA ordered new tests with

¹⁴⁹ See Marshall, *A is for Apple*, *supra* note 140, at 22.

¹⁵⁰ See generally Chad B. Sandusky, *Developments of the Codex Committee on Pesticide Residues*, July FOOD TECH. 20, 20 (1996).

¹⁵¹ For further study of the issue of food consumption in risk assessment, see generally IAN MACDONALD, *MONITORING DIETARY INTAKES* (1991).

¹⁵² See GOTS, *supra* note 33, at 253.

¹⁵³ See Newman, *supra* note 21, at 862A.

¹⁵⁴ Roberts, *supra* note 21, at 1430.

¹⁵⁵ Data on diet continues to plague the risk assessment process for carcinogens in our diet. See NAT'L RESEARCH COUNCIL, *CARCINOGENS AND ANTI-CARCINOGENS IN THE HUMAN DIET* 11-12 (1996).

¹⁵⁶ See GOTS, *supra* note 33, at 252.

higher test-subject exposure rates.¹⁵⁷ In those tests, the UDMH exposure was set at up to 80 ppm. The conclusions that could be reached from these tests sparked debate. The EPA believed that the increased rate of tumors in mice could allow the agency to classify Alar as a carcinogen.¹⁵⁸ Uniroyal disagreed, contending that the animals died from toxicity and that cancer risk could not be accurately predicted from these excessive rates of exposure.¹⁵⁹ As stated by one researcher, "A good scientist can argue the case either way."¹⁶⁰

To make matters more controversial, there was also the issue of how much Alar remained once apples were in the market. Again, studies varied widely. An analysis sponsored by Consumers Union, the *Los Angeles Times*, and CBS News concluded that thirty to fifty-five percent of the apples and apple products it tested contained Alar.¹⁶¹ In direct contrast, the Processed Apple Institute found only negligible amounts (8 out of 4,623) of Alar in juice samples.¹⁶² Professor Wargo provides some insight: "If raw apples are tested for UDMH residues, normally none are found. If Alar is used on fresh apples and these are used to make apple juice, however, UDMH is normally detectable, unless it has been diluted by juices from apples not treated with Alar."¹⁶³ Not surprisingly, the California Department of Food and Agriculture concluded from its tests that excess cancer rates could be reduced from an estimated 2.6 per million persons to less than 1 per million by using Alar-free apples to make applesauce and apple juice.¹⁶⁴

¹⁵⁷ See GOTS, *supra* note 33, at 252.

¹⁵⁸ See SMITH, *supra* note 35, at 3; WHELAN, *supra* note 28, at 197-98.

¹⁵⁹ See GOTS, *supra* note 33, at 252; Marshall, *A is for Apple*, *supra* note 140, at 22.

¹⁶⁰ Marshall, *A is for Apple*, *supra* note 140, at 22 (quoting Charles Aldous, a former EPA toxicologist now at the California State Department of Food and Agriculture).

¹⁶¹ See Newman, *supra* note 21, at 863A.

¹⁶² See ROSENBAUM, *supra* note 26, at 124.

¹⁶³ JOHN WARGO, *OUR CHILDREN'S TOXIC LEGACY* 155 (1996).

¹⁶⁴ See GOTS, *supra* note 33, at 253.

The issue of consumption patterns was not resolved once Alar was removed from the market. Like other risk assessment issues, how much pesticide residues Americans eat is debatable. It is just one more reason why agricultural disparagement legislation may appeal to those involved in agricultural business.

C. *The Numbers Game or the Significance of Choosing a Risk Model*

The NRDC and the Uniroyal studies also differed based on the models used to estimate risk. Again, like other factors that affect test outcome, these too were based on assumptions. The NRDC used a time-dependent multistage model that "estimates a greater risk from carcinogen exposures at early stages than later."¹⁶⁵ In lay terms, this means that exposure early in life is riskier "because the cells have more time to multiply, thus children are more sensitive than adults."¹⁶⁶ In contrast, the EPA used a "time-independent model in which age at the time of exposure made no difference."¹⁶⁷ Again, this issue will resurface every time risk assessment studies are undertaken for a particular pesticide. This factor also provided an incentive to pass agricultural product disparagement legislation.

D. *Russian Roulette or What Conclusions Can Be Reached About How Much Exposure is Too Much?*

The EPA eventually concluded that the risk from exposure to Alar was 9 in 1 million for children. This was 25 times lower than the NRDC's estimate.¹⁶⁸ The NRDC concluded that the risk was 5 in 20,000, or 4,700-6,000 per 22 million.¹⁶⁹ The NRDC further stated that Alar's potency estimate was 8.9, or 10 times greater than the EPA's mid-1980s estimate of .88.¹⁷⁰

¹⁶⁵ See Newman, *supra* note 21, at 862A.

¹⁶⁶ GOTS, *supra* note 33, at 253. Gots also notes that the NRDC model assumed that "Alar and UDMH are genotoxins, an assumption that has not been established." GOTS, *supra* note 33, at 253.

¹⁶⁷ GOTS, *supra* note 33, at 253.

¹⁶⁸ Roberts, *supra* note 21, at 1430.

¹⁶⁹ Roberts, *supra* note 21, at 1430.

¹⁷⁰ GOTS, *supra* note 33, at 252.

The EPA's final estimate announced in 1991 was even lower, .46.¹⁷¹ Given the assumptions that went into these studies, some of which have been highlighted here, it should come as no surprise that the conclusions were so vastly different. This is yet another risk assessment issue that is as significant today, perhaps even more so, as it was in the 1980s during the Alar controversy.

E. *Mixing the Soup or the Debate Over Natural and Man-Made Pesticides and Potential Synergistic Effects*

What was true ten years ago is true today: "Cancer risk assessment is still a young field. Researchers do not understand what contribution 'natural' carcinogens such as psoralan, celery's own pesticide, make to these rates, or how exposure to different pesticides may combine [or not] synergistically to promote cancer."¹⁷² This is the cause celebre of a well-known scientist, Dr. Bruce Ames.¹⁷³ Some of his more publicized contentions are that pesticides produced naturally constitute a far larger part of the pesticides Americans consume.¹⁷⁴ Indeed, Ames posits that 99.9% of ingested pesticides are natural.¹⁷⁵ Some of these natural pesticides, like their man-made counterparts, are carcinogenic.¹⁷⁶

The potential problem of the synergistic effects of pesticide residues is an issue that is here to stay. The end of the Alar incident was just the beginning of a more intense and sophisticated battle over pesticide safety. In this Part of the Article, several of the risk assessment issues prominent during the Alar controversy have been highlighted. Risk assessment issues include animal testing, food consumption rates, the type of risk model used, the conclusions that can be reached based on the data, and the possible synergistic effects of pesticides.

¹⁷¹ GOTS, *supra* note 33, at 254.

¹⁷² See Newman, *supra* note 21, at 863A.

¹⁷³ For a summary of Dr. Ames' perspective, see Ames & Gold, *supra* note 33, at 755. Ames was one of the scientists interviewed for the follow-up Alar segment on *60 Minutes* on May 14, 1989. See Fishbein, *supra* note 20, at 265; see also EHRlich & EHRlich, *supra* note 29, at 160-61.

¹⁷⁴ Ames & Gold, *supra* note 33, at 755-56.

¹⁷⁵ Ames & Gold, *supra* note 33, at 755-56.

¹⁷⁶ Ames & Gold, *supra* note 33, at 756.

All of these issues are as significant now as they were during the Alar crisis.

Given both the passage of the Food Quality Protection Act of 1996, as well as agricultural disparagement laws in the states, environmental activists and agricultural businesses are again on a collision course. To be more accurate, these opposing groups have now been involved in an ongoing battle over pesticide safety for decades. However, since the Food Quality Protection Act requires review of risk assessments on all pesticides, while agricultural product disparagement laws effectively create an unprecedented cost and disincentive for talking about the safety of pesticides, we can expect some poignant clashes in the future between two warring types of political groups involving seemingly inconsistent state and federal law.

VII. FOOD SCARES

A driving force that may have influenced legislatures' interest in this new type of right was concern about the increased likelihood of Alar-type scares. Contemporary food safety issues have shown a history of scares, some real, some imagined or overblown. Perhaps the most infamous was the Alar incident, but others are also seen as motivating factors in the passage of agricultural disparagement laws. In the 1970s, South American grapes were purportedly tainted.¹⁷⁷ Also, during the 1970s, there was a scare over sodium nitrates in pork products.¹⁷⁸ In 1981, there was a widespread rumor that coffee was directly linked to pancreatic cancer.¹⁷⁹ Just after the Alar incident, a small number of grapes imported from Chili were found to be laced with cyanide.¹⁸⁰ In the 1990s, bovine spongiform encephalopathy, more commonly known as mad cow disease, was highly publicized.¹⁸¹ Indeed, several people died of mad cow disease in Great Britain.¹⁸²

¹⁷⁷ David Segal, *Don't Know Beans About Fruit? State Laws Could Clam You Up*, AUSTIN AMERICAN-STATSMAN, May 29, 1997, 1997 WL 2825322 [hereinafter Segal, *Don't Know Beans*].

¹⁷⁸ *Id.*

¹⁷⁹ See Jane E. Brody, *Health Scares That Weren't So Scary*, N.Y. TIMES, Aug. 18, 1998, at F7.

¹⁸⁰ Newman, *supra* note 21, at 861A.

¹⁸¹ Parks, *supra* note 6, at 44A.

¹⁸² Julie Hauserman, *Watch What You Say About Beef, Oranges, Strawberries*,

In 1993, several children in Washington died after eating hamburgers tainted with *E. coli* bacteria;¹⁸³ annually, the bacteria causes about sixty deaths nationwide.¹⁸⁴ In 1996, strawberries purportedly caused an outbreak of cyclospora.¹⁸⁵ In 1997, after regulators found bacteria in its hamburger patties, Hudson Foods, Inc. recalled its ground beef nationwide.¹⁸⁶ That summer, diarrhea, nausea, and other symptoms were caused by bacteria in raw oysters and other shellfish.¹⁸⁷ This was followed by an outbreak of bacteria in oysters that was described as the "nation's worst."¹⁸⁸ Also, Hepatitis A has been associated with sliced strawberries this year.¹⁸⁹ Rumors about unsafe levels of dioxin in farm-raised catfish provided the basis for Arkansas' House to pass an agricultural product disparagement bill.¹⁹⁰ These examples show that some food scares turn out to be accurate enough—people are sickened or die.

These incidents illustrate that we have an ongoing social and political issue—food safety. This issue is not likely to dissipate, given concern not only over pesticides, antibiotics in livestock,¹⁹¹ irradiated foods,¹⁹² recycling of animal waste in

Farm-Raised Seafood, ST. PETERSBURG TIMES, Jan. 18, 1998, 1998 WL 4241140; Parks, *supra* note 6, at 44A.

¹⁸³ Associated Press, *E. Coli in Cattle Said Common: Health Measures Adequate*, THE ADVOCATE (Baton Rouge), Mar. 1, 2000, at 8A.

¹⁸⁴ *Id.*

¹⁸⁵ Estimated loses to the California strawberry industry ranged from \$20 million to \$40 million. *Support Grows for "Veggie Libel" Laws*, SAN ANTONIO EXPRESS-NEWS, Aug. 28, 1997, at A18, available at 1997 WL 13202143; Russ Parsons, Editorial, *Irony-Rich*, L.A. TIMES, Feb. 4, 1998, available at <http://www.ecoli.cas-psu.edu/fooddef.htm> (last visited Mar. 29, 2001).

¹⁸⁶ Jerry Jackson, *Bashing Beef? Be Careful of State Libel Law*, ORLANDO SENTINEL, Aug. 23, 1997, 1997 WL 13286357; see also John Buell, *Our Corporate Food Chain*, THE HUMANIST, Nov. 21, 1997, 1997 WL 9007079 (reporting that "[p]athogens, including *E. coli*, salmonella, campylobacter, and listeria, are responsible for somewhere between 80 million and 260 million cases of food poisoning each year").

¹⁸⁷ Russ Bynum, *CDC: Oysters Caused Record Sickness in '97*, THE ADVOCATE (Baton Rouge), June 12, 1998, at 4B.

¹⁸⁸ *Galveston Oysters Blamed in Illnesses*, TIMES-PICAYUNE (New Orleans), June 24, 1998, at A17.

¹⁸⁹ Associated Press, *Frozen Strawberries Recalled, Linked to Hepatitis A Outbreak*, THE ADVOCATE (Baton Rouge), May 6, 2000, at 4B.

¹⁹⁰ Phillip Taylor, *Arkansas House Passes Food-libel Bill, FREE!*, at www.freedomforum.org/speech/1993/3/10arfoodlibel.asp (last visited Mar. 29, 2001).

¹⁹¹ See Buell, *supra* note 186.

¹⁹² See Ben Lilliston & Ronnie Cummins, *Food Slander Laws in the US: The*

feed,¹⁹³ and food-borne illnesses,¹⁹⁴ but also genetically-altered seeds, produce,¹⁹⁵ and animals.¹⁹⁶ The value of public discourse and participation in environmental issues that are not only part science, but also part policy and politics, has been well documented.¹⁹⁷ In the era of agricultural disparagement laws, one must consider the costs and risks of penalizing speech about these issues.

VIII. RESTRICTING FREE SPEECH

Proponents of agricultural product disparagement statutes have not been shy about the goal in passing these laws. Silencing critics of agricultural products is the primary goal.¹⁹⁸ The

Criminalization of Dissent, 27 THE ECOLOGIST 6, 17 (1997).

¹⁹³ *Food Scares: Fear and Loathing*, THE ECONOMIST, Aug. 21, 1999, at 42.

¹⁹⁴ Justin Bachman, *CDC Says Rate of Food-Borne Illnesses Declining*, THE ADVOCATE (Baton Rouge), Mar. 17, 2000, at 10A; see also Collins, *supra* note 62, at 39 (commenting on the rate of food-borne illnesses).

¹⁹⁵ See Gwynne Dyer, *Backlash Grows, Despite Powerful Political Lobby*, DAILY NEWS, March 2, 1999, 1999 WL 7906796; Marc Kaufman, *Better Oversight of Genetically Modified Crops Suggested*, SEATTLE TIMES, Apr. 6, 2000, at A6; Andrew Pollack, *New Ventures Aim to Put Farms in the Pharmaceutical Vanguard*, N.Y. TIMES, May 14, 2000, at 1; Andrew Pollack, *Vaccine Delivered by Fork, Not Needle*, N.Y. TIMES, May 14, 2000, at 26; Andrew Pollack, *We Can Engineer Nature. But Should We?*, N.Y. TIMES, Feb. 2, 2000, at 16; *Europe Fights War Against Genetically Modified Food*, JAKARTA POST, June 9, 1998, 1998 WL 13119579.

¹⁹⁶ Editorial, *Coping With Supersalmon*, N.Y. TIMES, May 14, 2000, at 14.

¹⁹⁷ See generally Eileen Gay Jones, *Knights at the Roundtable: Public Participation Joins the Battle to Clean-Up Cold War Waste*, 8 FORDHAM ENVTL. L.J. 277 (1997).

¹⁹⁸ Steve Kupperud, an executive with the American Feed Industry Association (the "AFIA") is reported as having said, "I think that to the degree that the mere presence of these laws has caused activists to think twice, then these laws have already accomplished what they set out to do." Aaron Epstein, *Court Case to Test Food Defamation Laws*, THE DENVER POST, Dec. 29, 1997, at A-01. Rex Runyon, also a spokesperson for the AFIA, is credited with having said, "This is about encouraging responsible science and causing speakers to think twice about opportunistic statements." Segal, *Don't Know Beans*, *supra* note 177. Similar sentiment has been attributed to Texas State Representative Bob Turner, who said, "The intent of the law was not to foster lawsuits, but to discourage people from giving out false information about perishable agricultural products." Parks, *supra* note 6, at 44A. Bill Fritz, a Washington State Food Processors Council spokesperson, is reported as having said that an agricultural disparagement law would "send a big message to the people that start these things . . . I would hope this would have a chilling effect on the sometimes very irresponsible journalism and reporting." Michael Paulson, *Belittling Farm Crops Could Cost Big Bucks Under Senate Bill*, SEATTLE POST-INTELLIGENCER, Jan. 28, 1994, at A1. THE ECOLOGIST reports that eighty percent of Americans are concerned about food safety

extent to which this goal has been met is almost impossible to discern. One would assume that the chilling effect would have a disproportionate effect on small groups and individuals because they would be most vulnerable should they actually be sued.¹⁹⁹ The potential for chilling speech is even greater in the Internet age.²⁰⁰ Information about food safety and pesticide risks found on the web may provide a basis for liability in any of the thirteen states that have enacted an agricultural product disparagement law. This, of course, has not yet been tested in court.

Among reported incidences of restricted speech about food safety are the following: In 1999, actor Alec Baldwin believed that the Discovery Channel balked at the prospect of a four-hour show about pesticides, herbicides, and cattle ranching practices.²⁰¹ This was denied by the channel.²⁰² In 1998, information about growth hormones in dairy cows was deleted from a manuscript written by research scientist J. Robert Hatherill.²⁰³ During the same year, the National Fisheries Institute warned that public activism designed to protect swordfish might be met with a food disparagement lawsuit.²⁰⁴ In addition, a book about food safety was canceled after Monsanto Company warned the book's publisher that it could be sued under agricultural disparagement statutes.²⁰⁵ The book was subsequently published by a different company, and Monsanto has not taken action against the authors.²⁰⁶ Simi-

issues. See Lilliston & Cummins, *supra* note 192, at 17.

¹⁹⁹ Ronald K.L. Collins has reported that the cost of defending Oprah Winfrey in the Texas cattlemen's lawsuit was nearly a million dollars. Ronald K.L. Collins, Op-Ed, NAT'L L.J., June 22, 1998. Amy Simpson, who was sued under Ohio's agricultural product disparagement statute, see *supra* text accompanying note 120, says that the lawsuit "has made her much more guarded about the way she does her job and with the media." Hawke, *supra* note 4, at 13.

²⁰⁰ See, e.g., Edward Groth III et al., *Do You Know What You're Eating? An Analysis of U.S. Government Data of Pesticide Residues in Foods*, at Consumers Union of United States, Inc., http://consumersunion.org/food/do_you_know1.htm (last visited Mar. 29, 2001).

²⁰¹ Melody Petersen, *Farmers' Right to Sue Grows, Raising Debate on Food Safety*, N.Y. TIMES, June 1, 1999, at A1.

²⁰² See *id.*

²⁰³ *Id.*

²⁰⁴ Karen Uhlenhuth, *Missouri May Join Debate on Food Defamation*, THE KANSAS CITY STAR, Jan. 22, 1998, at F1.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

larly, a small book publisher in Portland reported that she felt threatened by a telephone call she received from a representative of the Pet Food Institute regarding a forthcoming book she was publishing about meat products.²⁰⁷ The caller indicated that inaccuracies in the book could become the subject of legal action.²⁰⁸ The book in question, *FOOD PETS DIE FOR*, addressed the use of dead animals in pet food.²⁰⁹

In 1997, an environmental group, Food & Water, received a letter from a lawyer for the United Fresh Fruit and Vegetable Association. The letter stated that the group should cease distribution of reports about the safety of irradiating fruits and vegetables.²¹⁰ Similarly, members of Ohio's Sierra Club have reported that they are more cautious about what they say about genetically modified food.²¹¹

Local television reporters have also been threatened with agricultural product disparagement lawsuits.²¹² However, at least one major study critical of pesticide residues on food apparently has not generated an agricultural product disparagement lawsuit.²¹³ Nonetheless, others have also expressed their lack of fear in speaking out about food safety.²¹⁴

These anecdotes suggest what others have feared about agricultural product disparagement laws: they will disproportionately affect the speech of smaller, less well-financed groups and non-affluent individuals. Oprah Winfrey may be able to afford a legal bill of half a million plus dollars, but the leader of a local environmental activist group may not.²¹⁵ The anecdotes may also demonstrate that the laws

²⁰⁷ See Ellen Emry Heltzel, *Writing in the Rain: Publisher Has Her Own Mad-Cow Scare*, PORTLAND OREGONIAN, Oct. 12, 1997, 1997 WL 13128066.

²⁰⁸ See *id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*; see also Lilliston & Cummins, *supra* note 192, at 17.

²¹¹ Lilliston & Cummins, *supra* note 192, at 17.

²¹² Fox, *supra* note 4, at 12.

²¹³ Cf. George Anthan, *New Study Stirs Up More Controversy Over Food Safety*, THE DES MOINES REGISTER, Feb. 8, 1998, at A1 (Environmental Working Group study); Bruce Ingersoll, *Study Warns on Pesticide Levels in Food*, THE WALL ST. J., Jan. 30, 1998, at A16 (same).

²¹⁴ Paul Rarbner, *Eaters Against Extinction*, SIERRA, July 1, 1998, at 24; see also Fox, *supra* note 4, at 15 (quoting Lucy Riley, news director of WSFA-TV in Montgomery, Alabama: "We're not going to be scared or intimidated . . . We do stories and let the chips fall where they may.").

²¹⁵ See Ronald K.L. Collins & Jonathan Bloom, *Win or Lose, Dissing Food Can*

are, in fact, achieving their desired end—limiting public debate about food safety and the risks associated with chemical pesticide use in agriculture.

CONCLUSION

Agricultural product disparagement laws are the embodiment of frustration with scientific knowledge. “Safety” is a constructed term—part scientific, part political.²¹⁶ This principle has been catalogued repeatedly for many years. The Alar incident is a classic example. In the agricultural product disparagement world, however, there is only one science—the reasonable and reliable one. Yet the terms “reasonable” and “reliable” are ambiguous. If one looks at any case that involved scientific evidence, one can easily conclude that there is no scientific truth with a capital “T.” This leaves those who want to publicly address food safety issues with an ambiguous standard by which to judge the propriety of their speech.

be Costly, NAT'L L.J., Mar. 8, 1999, at A21.

²¹⁶ See Jones, *Risky Assessments*, *supra* note 84, at 34-38.

