

# VALUE HYPOCRISY AND POLICY SINCERITY: A FOOD LAW CASE STUDY

Joshua Ulan Galperin\*†

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\* The author is on the faculty of Yale Law School and the Yale School of Forestry and Environmental Studies; J.D., Vermont Law School; M.E.M., Yale School of Forestry and Environmental Studies, B.A., University of Delaware.

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## INTRODUCTION

In the spring of 2017, the United States Senate considered a bill that would significantly change healthcare policy in the country.<sup>1</sup> This began in 2009 and 2010 when Democrats in Congress and from President Obama's White House crafted the Affordable Care Act.<sup>2</sup> That process was the subject of criticism for its lack of transparency, seen as backroom secrecy designed to avoid public debate.<sup>3</sup> Fast forward to spring 2017, as Republicans in Congress and from President Trump's White House pushed another healthcare bill.<sup>4</sup> In 2017, the same Republicans who criticized secrecy practiced it; the same Democrats who practiced it have criticized it.<sup>5</sup> This is remarkably articulate hypocrisy, even for Washington, D.C. It clearly spotlights a procedural breach in which policymakers focus squarely on the outcomes of the policymaking process and ignore satisfaction with the process itself.

Scholars have long understood the importance of procedure. The legal and psychological literatures include robust consideration of procedural fairness.<sup>6</sup> But the concept of hypocrisy—so abundant in politics—provides additional and novel insight into the appropriateness, legitimacy, and worth of policy instruments.

New research from psychologist Jillian Jordan and colleagues at Yale University reinforces that people hate hypocrisy, and suggests that the hatred is not because hypocrisy is ineffective or because hypocrisy demonstrates any specific instrumental weakness.<sup>7</sup> Hypocrisy is condemned

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1. *E.g.*, Thomas Kaplan & Robert Pear, *Vote Delayed as G.O.P. Struggles to Marshal Support for Health Care Bill*, N.Y. TIMES (June 27, 2017), <http://www.nytimes.com/2017/06/27/us/politics/republicans-struggle-to-marshal-votes-for-health-care-bill.html> (noting the “Republicans’ seven-year effort to dismantle” the Affordable Care Act).

2. *E.g.*, Aaron Blake, *20 GOP Criticisms of Obamacare’s Secrecy that Now Look Eerily Hypocritical*, WASH. POST (June 20, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/06/20/gop-criticisms-of-obamacares-secrecy-that-now-look-eerily-hypocritical/?utm\\_term=.74088af0b405](https://www.washingtonpost.com/news/the-fix/wp/2017/06/20/gop-criticisms-of-obamacares-secrecy-that-now-look-eerily-hypocritical/?utm_term=.74088af0b405) (suggesting that Democrats secretly passed the Affordable Care Act).

3. *Id.*

4. *Id.*

5. *Id.*

6. *E.g.*, JOHN W. THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 102–03 (1975) [hereinafter THIBAUT & WALKER, PROCEDURAL JUSTICE] (appraising the procedural system of justice); John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541 (1978) [hereinafter Thibaut & Walker, *A Theory*] (suggesting that procedure is an avenue for resolving legal disputes); TOM R. TYLER, ET AL., SOCIAL JUSTICE IN A DIVERSE SOCIETY (1998) (pointing out literature on procedural fairness).

7. JILLIAN JORDAN, ET AL., WHY DO WE HATE HYPOCRITES? EVIDENCE FOR A THEORY OF FALSE SIGNALING I (Association for Psychological Science, 2017) [hereinafter JORDAN, FALSE SIGNALING].

and unsatisfying because it is an intentional disconnect between the values signaled in words and achieved in deeds.<sup>8</sup> We condemn an intentional disconnect between words and deeds, even if the hypocritical deeds are in some way useful.<sup>9</sup> Thus, a policymaking process, such as that around healthcare, which signals transparency but practices secrecy, is unwanted hypocrisy regardless of one's preference for more or less government involvement in health insurance. This Article argues that the concept of hypocrisy is a useful analytical tool in policymaking and policy advocacy.

The problem of hypocrisy in policymaking is obvious in the policy process, where the words and behaviors of politicians are so often in opposition.<sup>10</sup> But this Article goes deeper to focus on hypocrisy in policy-instrument choice. A set of public values will motivate any given policy goal. For instance, the inherent rights of nature may influence the goal of better environmental quality.<sup>11</sup> The instrument used to achieve the policy goal may or may not embody those same public values. Tradable pollution permits can achieve the goal of environmental protection,<sup>12</sup> but buying and selling pollution may also undermine rights of nature as a motivating value.<sup>13</sup> Hypocrisy arises here when the values of the instrument do not match the values that motivate the goal. Thus, to avoid hypocrisy, policymakers should develop and use policy instruments (roughly equivalent to an individual's deeds) that reflect the values that motivate the policy goals (roughly equivalent to an individual's words).

Drawing on the new Yale psychology research suggesting that people decry hypocrisy because of the disconnect between personal signaling and personal deeds, we might call the disconnects between the values sought in policy goals and the values reflected in policy instruments *value hypocrisy*.<sup>14</sup> We may then call the alternative *policy sincerity*, in which the disconnect closes and the values that motivate a policy goal are embedded in the policy instrument.

The word *values* can raise more questions than it answers. To avoid unnecessary confusion, throughout this article, the standard dictionary

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8. *Id.* at 1–2.

9. *Id.* at 2.

10. *Id.*

11. Anthony Weston, *Beyond Intrinsic Value: Pragmatism in Environmental Ethics*, 7 ENVTL. ETHICS 321, 323, 337 (1985).

12. *E.g.*, Eric Pooley, *15 Years of "Ways That Work" for People and Planet*, ENVTL. DEF. FUND (Sept. 12, 2014), <https://www.edf.org/blog/2014/09/12/15-years-ways-work-people-and-planet> (providing examples of economic mechanisms to protect the environment).

13. *E.g.*, Kirk Junker, *Ethical Emissions Trading and the Law*, 13 U. BALT. J. ENVTL. L. 149, 170 (2006) (discussing how market price may motivate emission reduction more than environmental reasons).

14. JORDAN, FALSE SIGNALING, *supra* note 7.

definition applies. The Oxford English Dictionary defines “values” as “the principles or standards of a person or society, the personal or societal judgment of what is valuable and important in life.”<sup>15</sup> *Values*, therefore, simply means the ideals, ethics, beliefs, opinions, or basic criteria people use for deciding what they want.

Given the unique importance of food to our bare survival and frivolous indulgences, this Article introduces hypocrisy as an analytical tool for instrument choice by using the area of food law and policy as a case study.

For example, Wal-Mart’s foray into the local food movement and the United States Department of Agriculture’s (USDA) National Organic Program breathe life into what have so far been general assertions.<sup>16</sup> In 2010, Wal-Mart announced a program to double its sales of locally grown produce.<sup>17</sup> While this program could have a range of outcomes—from economic growth to sustainability benefits<sup>18</sup>—if the values that motivate local food activists are closer connections to farmers, or transparency in production, the giant retailer’s new program would not reflect those motivators. In organic agriculture, the USDA’s organic seal is now a ubiquitous symbol.<sup>19</sup> The seal announces that farmers followed certain rules in raising or growing their products.<sup>20</sup> If the value that motivates organic production is consistency, then a uniform federal National Organic Program probably advances this value. But, if the values include individuality, then the National Organic Program fails to capture this value.<sup>21</sup> In other words, in both the private strategies of Wal-Mart or the public policies of the National Organics Program, there may be hypocrisy.

This Article makes two points about the connection between policy instruments and their motivating values. First, and most importantly, analysis of policy-instrument choice tends to focus on the ability of the instrument to achieve the policy goal. I argue that the non-instrumental nature of the policy tool—its value sincerity—deserves increased attention. That is to say, an instrument that can achieve a stated goal may nevertheless be suboptimal if it does not fit with the values that motivate the policy goal

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15. *Values*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

16. Stephanie Clifford, *Wal-Mart to Buy More Local Produce*, N.Y. TIMES (Oct. 14, 2010), <http://www.nytimes.com/2010/10/15/business/15walmart.html?mcubz=2>.

17. *Id.*

18. *Id.*

19. *USDA Reports Record Growth in U.S. Organic Products*, USDA (April 4, 2016), <https://www.usda.gov/media/press-releases/2016/04/04/usda-reports-record-growth-us-organic-producers>.

20. SUSAN A. SCHNEIDER, *FOOD, FARMING, AND SUSTAINABILITY: READINGS IN AGRICULTURE LAW* 662–64 (2d ed. 2016).

21. *See id.* at 662 (emphasizing the uniform standards that the Organic Foods Production Act of 1990 sought to impose on all producers).

in the first place. This Article's second point, which should serve as a case study to illuminate the first, is that common law litigation deserves more consideration as a food law and policy instrument because—in addition to consequential benefits of the common law—the common law fits well with the values such as community empowerment, participatory decision-making, and progressive traditionalism that motivate the food movement.

Section I of this Article surveys the ways in which policymaking strategies and legal doctrines intentionally prioritize either process or consequences, but always see these two foci as linear rather than reflexive. This view should contextualize the ideas of *value hypocrisy* and *policy sincerity* by distinguishing the common focus on an instrument's effectiveness from a renewed focus on an instrument's sincerity. Section II introduces the food movement as a case study, and seeks to approximately define the movement's policy goals and motivating values in order to assess how these values fit with different policy instruments. Section III looks closely at the common law, with a special emphasis on tort law as a policy tool. This section reviews theories of common law and the values that are part of common law jurisprudence. Section IV first explores the existing literature on the role of common law to advance food policy, concluding that while the little analysis that exists does support the use of common law, it uses an instrumentalist approach. Far from condemning this approach, Section IV affirms the current literature and the instrumental importance of common law as a food-policy tool—and enhances this conclusion—arguing that by fitting values between tool and goals, the common law can offer significant and additional instrumental and non-instrumental benefits to the food movement.

#### I. PROCESS AND OUTCOME, NOT PROCESS THEN OUTCOME

The exploration of laws as tools for desirable outcomes and as inherently justifiable restrictions is not in the least bit new.<sup>22</sup> This section will briefly describe perspectives on this subject and will compare these perspectives with the new *value hypocrisy* and *policy sincerity* approach, which recommends instrument choice as a self-justifying component of policy. A key purpose of this section is to demonstrate that, while we often expect outcomes to define which laws are just, just laws can also arise from processes. If we acknowledge the importance of process, it is only a small

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22. See, e.g., IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 104–10 (Mary Gregor trans., 1996) (indicating that the law can be used as a vehicle for implementing sound policy changes); PLATO, *LAWS IN PLATO: THE COLLECTED DIALOGUES* 1486 (A. E. Taylor trans., 1961) (describing the ways in which laws may not only restrict conduct but also maintain an orderly society).

step to accepting that the appropriateness of a legal instrument can also arise from the instrument's sincerity to motivating values.

### A. Goal Setting

Two competing philosophical commitments—deontology and consequentialism—structure the conversation around both setting goals and designing policy to achieve those goals.<sup>23</sup> To begin, society or lawmakers should have a justification for asserting that a specific policy goal is desirable. A goal of making homicide illegal and designing punishments to match is to announce and assure that unjustified killing is not welcome in society.<sup>24</sup> But to justify this goal, it is helpful to understand why stopping murder is valid in the first place.<sup>25</sup>

Deontology and consequentialism provide alternative explanations. The distinction here is between a moral philosophy that values a behavior as right or wrong, in and of itself, and a philosophy that values behavior as a means to achieving a distinct end.<sup>26</sup> For example, presuming that a person has committed a crime, the deontological perspective asserts that the law should punish the criminal because she has done wrong and deserves punishment.<sup>27</sup> A consequentialist perspective asserts that the law should punish the criminal because punishment will achieve a desired result, most often deterrence from future criminal activity.<sup>28</sup>

An ethical justification for a specific policy goal provides a baseline from which to assess a law's underlying validity and effectiveness; but regardless of the nature of that justification, once a goal is set, lawmaking becomes a process of designing a tool for achieving that goal, and in this sense lawmaking is always at least partially consequentialist.<sup>29</sup> Put more plainly, the process of designing a specific instrument to achieve a specific goal requires careful consideration of whether the instrument will do what it is supposed to do.

The specific goal of the Pure Food and Drug Act of 1906, for example, was to protect the public from “adulterated or misbranded or poisonous or

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23. KANT, *supra* note 22, at 107.

24. *E.g., id.* (providing an example of how death as punishment would dissuade someone from committing murder).

25. *See* BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 126 (6th ed. 2012) (describing that the overall goal of punishment—i.e., what it seeks to accomplish—is key in its application).

26. *Id.* at 125–26.

27. *Id.* at 125.

28. *Id.* at 127.

29. *See id.* at 126 (“Any evaluation of punishment which focuses on its future effects will be based on an express or implied foundation of consequentialism.”).

deleterious foods, drugs, medicines, and liquors . . . .”<sup>30</sup> Whether the ethical justification for this goal was that (1) there is an inherent right to have safe food; (2) manufacturers have an ethical duty to provide safe food; or (3) a safe food supply reduces healthcare costs, produces fit workers, and spurs a stronger economy, once there is a goal in mind, the primary inquiry is how to achieve it. In the service of assuring safe food, Congress made it unlawful to sell, transport, or manufacture these undesirable products.<sup>31</sup> Future congresses were then able to judge the prohibitions by their ability to protect the food supply and, by 1936, did indeed find that the Act was insufficient with respect to its stated goals.<sup>32</sup>

### B. Instrument Building

Within this narrower inquiry into a legal instrument’s ability to achieve its specific goals there are competing ideas about what strategies are best. In some cases these ideas are grounded in moral philosophy,<sup>33</sup> and in other cases they vary based on the specific policy goal and are untethered from broader ethical commitments.<sup>34</sup> Some strategies look keenly at, and give priority to, *what* the law will do, and other strategies prioritize *how* the law will do it. Put differently, the *what* strategies imply that carefully predicting outcomes will assure the best results, while the *how* strategies imply that carefully designing processes will assure the best results. Neither is ignorant of the other, and neither pretends that only process or only outcome is relevant. Each merely prioritizes and focuses on different aspects of lawmaking.

Law and economics analysis, for instance, and the related cost-benefit analysis, appraise outcomes (what a law will do) to maximize efficient resource use.<sup>35</sup> Cost-benefit analysis, as one way of implementing an economic view of policy instruments, asks policymakers “to assess the

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30. Pure Food Act of 1906, Pub. L. No. 59-384, 34 Stat. 768, 21 U.S.C.A. §§ 1, 5–7, 14–15 (repealed 1938).

31. *Id.*

32. Peter Barton Hutt & Peter Barton Hutt II, *A History of Government Regulation of Adulteration and Misbranding of Food*, 39 FOOD DRUG COSM. L.J. 2, 61–62 (1984).

33. *E.g.*, DOUGLAS A. KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY 71–72 (2010) (discussing a law’s ability to achieve specific goals grounded in moral philosophy).

34. *E.g.*, Charles E. Lindblom, *The Science of “Muddling Through,”* 19 PUB. ADMIN. REV. 79, 79 (1959) (showing how policy goals are untethered from broader ethical commitments).

35. *E.g.*, RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 115 (1981) (advancing a moral theory that maximized the wealth of society); KIM LANE SCHEPPELE, LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW 24 (1988) (suggesting that common law promotes economic efficiency because it distributes resources effectively).

costs and benefits of various standards and to select the standard that . . . maximizes overall social welfare.”<sup>36</sup> In law and economics generally, or cost-benefit analysis specifically, the focus of policy analysis is not primarily on the design of the law, but the impacts of the law.<sup>37</sup> Legal pragmatism has a similar focus.<sup>38</sup> Legal pragmatists such as Richard Posner and Oliver Wendell Holmes before him caution that overreliance on theoretical or procedural strictures distracts from the more important inquiry of whether the legal rules produce the desired results.<sup>39</sup>

Alternative analytical strategies focus more on the nature of the legal instrument and process.<sup>40</sup> Proponents of deliberative democracy explain that legal instruments prioritizing discourse, articulation, and justification will deliver better and more legitimate results.<sup>41</sup> Approaching process prioritization with a different strategy, Professor Daniel Farber crafted “ecopragmatism” as an analytical tool that explicitly relies on the public preference for environmental protection not just “to control the results of cases, but also to leave us satisfied with the process of reaching the result.”<sup>42</sup> This sort of thinking is also evident in American criminal procedure, which self-consciously accepts that strict adherence to procedural safeguards can more effectively deliver justice than prioritizing the immediate outcome of an individual conviction.<sup>43</sup>

Procedural justice, or procedural utility in the economics literature, is one of the most vigorous areas of analysis on process distinct from outcomes.<sup>44</sup> For instance, Tom Tyler’s research demonstrates the importance of subjectively fair processes for generating policy legitimacy.<sup>45</sup> Tyler points specifically to objective procedural components that can

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36. KYSAR, *supra* note 33, at 7.

37. *Id.* at 7, 9.

38. *See* BIX, *supra* note 25, at 284 (describing the cost-benefit analysis as applied to legal pragmatism).

39. *Id.*

40. DANIEL A. FARBER, ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD 113 (1999) [hereinafter ECO-PRAGMATISM].

41. Melissa Mortazavi, *Tort as Democracy: Lessons from the Food Wars*, 57 ARIZ. L. REV. 929, 936 (2015).

42. ECO-PRAGMATISM, *supra* note 40, at 113.

43. *See e.g.*, Gary D. Spivey, Annotation, *Fruit of the Poisonous Tree Doctrine: Excluding Evidence Derived from Information Gained in Illegal Search*, 43 A.L.R.3d 385, §2[a] (1972) (indicating that evidence will be excluded if gathered in a procedurally incorrect manner).

44. *E.g.*, THIBAUT & WALKER, PROCEDURAL JUSTICE, *supra* note 6, at 7–8 (discussing procedural choices and relating outcomes); Thibaut & Walker, *A Theory*, *supra* note 6, (asserting that the goal of procedure is justice through the legal system); TYLER, *supra* note 6 (providing an example of procedural justice literature and showing how fair processes generate policy legitimacy).

45. TYLER, *supra* note 6, at 11–12.



advance subjective feelings of fair process.<sup>46</sup> These procedural components include opportunities for input, transparency, understandability, neutrality, objectivity, and consistency.<sup>47</sup> However, the procedural justice literature primarily recognizes the value of procedure for improving compliance and, therefore, improving policy efficiency and outcomes.<sup>48</sup>

Neil Komesar's comparative institutional analysis is a hybrid method, combining institutional process and goal orientation, asking which institution—i.e., a court, market, legislature, or regulator—is best positioned to deliver a specific goal.<sup>49</sup> The polestar of comparing these institutions is their “dynamics of institutional participation.”<sup>50</sup> Komesar's analysis asks decision makers to focus on: “Who transacts? Who litigates? Who votes, organizes or lobbies?” What are the costs and benefits of this participation?<sup>51</sup> Looking at the distribution of this participation and the costs and benefits thereof, one can better understand the appropriate institution for achieving an explicit policy goal.<sup>52</sup>

In a way, the consideration of value hypocrisy is a subspecies of this comparative analysis, insofar as both ask the decision maker to focus on matching tools and goals. The key point of distinction (explained more in the remainder of this Article) is that value hypocrisy analysis does not focus precisely on goals as much as the values that motivate those goals.<sup>53</sup> Nevertheless, Komesar's project offers an example that moves a step closer to the framework of hypocrisy and sincerity. As Professor Komesar explains, understanding only a policy goal misses the point if we do not seek to understand the institution that will best get us to that goal.<sup>54</sup>

This section's overview of instrument selection spotlights largely linear policy analysis. The limited analysis here begins with a policy goal, which might be justified by any number of ethical commitments, including deontology and consequentialism. With the immediate goal established, the second inquiry is what instrument will best achieve that goal. Instrument choice prioritizes a prediction of the outcome, as is the case with cost-benefit analysis, or it prioritizes the nature of the process, as is the case with

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46. *Id.* at 12.

47. *Id.* at 13.

48. *Id.* at 4.

49. See, e.g., Neil Komesar, *Exploring the Darkness: Law, Economics, and Institutional Choice*, 1997 WIS. L. REV. 465, 466 (1997) (explaining how hybrid institutional analysis is a balance between process and goals).

50. *Id.* at 471.

51. *Id.*

52. *Id.*

53. *Id.* at 466, 468.

54. *Id.* at 466, 468–71.

deliberative democracy and procedural justice. While they do respect the subjective positioning of participants, even the process-focused frameworks, and Komesar's hybrid institutional analysis, do not fully address the importance of harmonizing the values that motivate a policy goal and the values inherent in the policy instrument.

### C. Value Fitting and Sincerity

The concept of value hypocrisy and policy sincerity offers a way to fit instruments and goals by instructing advocates and policymakers to uncover motivating values and to design instruments that advance these same values. The focus on value hypocrisy and policy sincerity that I develop here benefits from scholarship in areas like deliberative democracy and procedural justice, but I propose to expand the list of arguments in favor of non-consequentialist policy analysis. I propose that by identifying the social values that motivate policy advocacy, and by seeking policy instruments that are harmonious with those values, policymakers and advocates can leverage new opportunities to advance social goals through policy outcomes and through mere implementation of the policy, regardless of outcome. In this regard, the new analysis looks beyond a means-ends distinction and asks not only whether the instrument can achieve the goal, but also whether it is a sincere adherence to the goal's underlying purpose.

In the remainder of this Article, I will develop and test this reflexive approach. Food law and policy makes a good case study for this effort because, as an area of scholarship and as a movement, it is still in its infancy,<sup>55</sup> its motivations are diverse,<sup>56</sup> it is still struggling to find the best legal instruments,<sup>57</sup> and its participants and practitioners are communicative about their motivating values.<sup>58</sup>

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55. Baylen J. Linnekin & Emily M. Broad Leib, *Food Law & Policy: The Fertile Field's Origins and First Decade*, 2014 WIS. L. REV. 557, 595 (2014).

56. Laurie Ristino, *Back to the New: Millennials and the Sustainable Food Movement*, 15 VT. J. ENVTL. L. 1, 21 (2013).

57. *Id.* at 20.

58. *E.g.*, Michael Pollan, *The Food Movement Rising*, N.Y. REV. BOOKS (June 10, 2010), <http://www.nybooks.com/articles/2010/06/10/food-movement-rising/?printpage=true> (“[F]ood in America has been more or less invisible, politically speaking, until very recently.”); Stephanie Tai, *The Rise of U.S. Food Sustainability Litigation*, 85 S. CAL. L. REV. 1069, 1071 (2012) (demonstrating the various reasons people join the food movement).

## II. CHARACTERIZING THE FOOD MOVEMENT

Every area of law has its unavoidable tropes. In food law and policy, the trope is that the food movement—if such a thing exists—is diverse, conflicted, and unwieldy.<sup>59</sup> Nevertheless, the purpose of this section is to try and characterize the movement, first by the types of policy goals it declares and then through a deeper look at the values that motivate it. This may be an impossible feat, as the trope suggests. But drawing on the legal literature for recurring themes and sociological literature for more disciplined assessment, this section should at least outline a justifiable perspective on some values common to many participants within the food movement. Certainly, there is need for deeper primary research on this subject.

There is at least something like a food movement, and also a growing professional field of food law and policy.<sup>60</sup> The field of food law and policy is more clearly defined, and given the substantive overlap, understanding the movement is easiest if it begins with a fairly simple definition of the subject. Food law and policy “is the study of the basis and impact of those laws and regulations that govern the food and beverages we grow, raise, produce, transport, buy, sell, distribute, share, cook, eat, and drink.”<sup>61</sup> The field includes the longstanding areas of agriculture law and food and drug law, but it goes beyond, including health law, environmental law, and constitutional law.<sup>62</sup> It is also interdisciplinary, bringing together law with social sciences, medicine, public health, psychology, food studies, and urban studies.<sup>63</sup> The significant focus on policy—as opposed to merely positive law—within food law and policy brings the professional and scholarly pursuit closest to the new social food movement.<sup>64</sup>

Professor Ernesto Hernandez-Lopez uncovers the fundamental reason that the food movement is not, and probably never could be, a cohesive movement, when he reminds us that “food controversies . . . are never just about food.”<sup>65</sup> Like food law and policy, *the* food movement is really “a

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59. Pollan, *supra* note 58, at 2–3; Stephen Carpenter, *A New Higher Calling in Agriculture Law*, 18 *DRAKE J. AGRIC. L.* 13, 22 (2013).

60. Pollan, *supra* note 58.

61. Linnekin & Broad Leib, *supra* note 55, at 584.

62. *Id.* at 586.

63. *Id.* at 586–87.

64. *See id.* at 589 (describing food law and policy as “unique because of the essential role policy considerations play in the field”).

65. Ernesto Herndández-Lopez, *Sriracha Shutdown: Hot Sauce Lessons on Local Privilege and Race*, 46 *SETON HALL L. REV.* 189, 192 (2015).

number of interrelated food movements . . . .”<sup>66</sup> These movements are recognizable as: the organic movement, local food movement, slow food movement, new food movement,<sup>67</sup> sustainable food movement,<sup>68</sup> food sovereignty movement,<sup>69</sup> eat food movement,<sup>70</sup> food justice movement,<sup>71</sup> food revival, food democracy,<sup>72</sup> farm-to-fork, snout-to-tail,<sup>73</sup> even (more broadly) voluntary simplicity,<sup>74</sup> and no doubt others that I have neglected. These interrelated movements are all focused on aspects of the food system and they are, by and large, conceptually bound by their general opposition to the mainstream food system.<sup>75</sup> But, because food is never just about food, the pieces of the food movement are really *about* distinct political goals.

#### A. Political Goals

Politically, the food movement strives for: sustainability, equity, access, economic development, fair labor, animal health, food security,<sup>76</sup> human health through prevention of foodborne illness and obesity or other diet-related illness,<sup>77</sup> hunger relief, environmental protection, farm security (in terms of economic resilience), energy efficiency and conservation,<sup>78</sup> and more. Most participants in the food movement share an expectation that “reforming or dismantling the industrial, commodity-based food system” could help achieve these political goals.<sup>79</sup> According to this view, the tools for deconstruction include “reducing or eliminating agricultural subsidies, utilizing taxes or regulations to force industrial food producers to

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66. Tai, *supra* note 58, at 1072.

67. *Id.*

68. *Id.* at 1073.

69. Allison Condra, *Food Sovereignty in the United States: Supporting Local and Regional Food Systems*, 8 J. FOOD L. & POL’Y 281, 283 (2012).

70. Rebecca L. Goldberg, *Administering Real Food: How the Eat-Food Movement Should—and Should Not—Approach Government Regulation*, 39 ECOLOGY L.Q. 773, 775 (2012).

71. Adam B. Lichtenberger, *Toward a Just Food Regime: Consumption, Ideology, and Democratic Strategy*, 10 J. FOOD L. & POL’Y 173, 174 (2014).

72. Neil Hamilton, *Food Democracy and the Future of American Values*, 9 DRAKE J. AGRIC. L. 9, 12, 13 (2004) [hereinafter Hamilton, *Food Democracy*].

73. Brad Weiss, *Configuring the Authentic Value of Real Food: Farm-to-Fork, Snout-to-Tail, and Local Food Movements*, 39 AM. ETHNOLOGIST 614, 614 (2012).

74. Samuel Alexander & Simon Ussher, *The Voluntary Simplicity Movement: A Multi-national Survey Analysis in Theoretical Context*, 12 J. CONSUMER CULT. 66, 66 (2012).

75. Tai, *supra* note 58, at 1075.

76. Ristino, *supra* note 56, at 21.

77. Emily Broad Leib, *The Forgotten Half of Food System Reform: Using Food and Agriculture Law to Foster Healthy Food Production*, 9 J. FOOD L. & POL’Y 17, 18 (2013).

78. Tai, *supra* note 58, at 1077.

79. Broad Leib, *supra* note 77, at 19.

internalize the costs of their negative impacts on health and the environment, or decreasing consumer access to or demand for these products by implementing marketing restrictions, labeling requirements, or bans . . . .”<sup>80</sup> Others, notably food scholar Baylen Linnekin, imply agreement with the general diagnosis, but argue that regulation is often the cause of the symptoms; therefore, targeted *deregulation* of the food system, rather than deconstruction *by regulation*, is the appropriate remedy.<sup>81</sup> Despite refrains that the food movement includes consumers, farmers, and diverse cultural components, it is “blunt, confusing, and sometimes self-contradictory . . . .”<sup>82</sup> The general critique of the industrial food system and the more immediate constructive policy proposals do in fact give the food movement some political coherence.

### B. Motivating Values

This coherence may be even tighter when explored through the underlying social values that motivate the political and legal goals. In his essay on food democracy, Professor Neil Hamilton helped clarify the link between policy goals and underlying values when he wrote: “The medium is food, but the theme is democracy. The purpose is to empower citizens to have choices and find greater satisfaction in a food system reflecting the democratic values we share and that underpin our society and economy.”<sup>83</sup> The democratic values to which he refers are important, but the real action is the clear connection between a very practical thing—food—and the laws that surround it and the way the thing animates, or actualizes, our deeply held values. In other words, food is uniquely important to our lives as a physical necessity, and our approach to food is therefore both driven by, and a signal of, our values.<sup>84</sup> Perhaps today the “food movement is being driven by deeper political, ethical, and philosophical issues,” deeper values than in the past.<sup>85</sup>

I intend the term *values* here to reflect the standard dictionary definition. The Oxford English Dictionary defines “values” as “the principles or standards of a person or society, the personal or societal

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80. *Id.*

81. BAYLEN J. LINNEKIN, BITING THE HANDS THAT FEED US: HOW FEWER, SMARTER LAWS WOULD MAKE OUR FOOD SYSTEM MORE SUSTAINABLE 194–95, 198 (2016).

82. Carpenter, *supra* note 59, at 22.

83. Hamilton, *Food Democracy*, *supra* note 72, at 15–16.

84. Joshua Ulan Galperin et al., *Eating is Not Political Action*, 13 J. FOOD L. & POL’Y 113, 114 (2017).

85. A.H. Kiran, *Scaling Values: A Perspective from Philosophy of Technology*, in THE ETHICS OF CONSUMPTION 347 (Helena Rocklinsberg & Per Sandin eds., 2013).

judgment of what is valuable and important in life.”<sup>86</sup> In this respect, when I refer to social values, I mean those things that a social group holds to be important and the foundational principles and standards by which they determine that importance.

The range of values that motivate the food movement is wide, but several recur, and recur with greater emphasis than others. These recurring values can be placed into three broad categories. The first category is decision-making, which refers to shared principles of good governance.<sup>87</sup> The second category is the nature of interactions, which refers to the way different food system participants stand in relation to one another.<sup>88</sup> The third and final category is sources of knowledge, which refers to where people locate the genesis of norms and authority for food decision-making.<sup>89</sup>

### 1. Good Governance: Democracy, Transparency, Choice, and Empowerment

Professor Hamilton captured the dominant decision-making values when he authored two essays on food democracy.<sup>90</sup> Hamilton asks: “How do we learn more about our food system and have confidence it serves our values?”<sup>91</sup> To which he answers, in part, “[f]ood democracy is about knowledge and understanding, about asking questions and getting answers.”<sup>92</sup> With respect to decision-making, the diverse participants in the food movement largely agree that decision-making should be driven by transparency, accessible information, robust choice, and broad consumer and producer empowerment.<sup>93</sup> These values overlay Hamilton’s list of the four key values of food democracy: broad engagement, diverse choices, participation at all levels of decision-making, and accessible information.<sup>94</sup>

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86. *Values*, *supra* note 15, at 416.

87. Hamilton, *Food Democracy*, *supra* note 72, at 15–16.

88. Goldberg, *supra* note 70, at 783.

89. Carmen G. Gonzalez, *Climate Change, Food Security, and Agribiodiversity: Toward a Just, Resilient, and Sustainable Food System*, 22 FORDHAM ENVTL. L. REV. 493, 494 (2011).

90. Hamilton, *Food Democracy*, *supra* note 72, at 13; Neil D. Hamilton, *Food Democracy II: Revolution or Restoration*, 1 J. FOOD L. & POL’Y 13, 13 (2005) [hereinafter Hamilton, *Food Democracy II*]; *see also* Ristino, *supra* note 56, at 19 (“Fundamental to this movement are the democratic principles that it embraces.”).

91. Hamilton, *Food Democracy*, *supra* note 72, at 19.

92. *Id.*

93. *Id.*

94. *Id.* at 21–22.

Transparency, for example, motivates calls for labeling<sup>95</sup> and localization, and production downscaling.<sup>96</sup> The value of robust choice internalizes the belief that food is a dignitary issue, not just a matter of physical survival, and that people should be able to make “autonomous decisions” about their food.<sup>97</sup> Decisions are autonomous if they are based on transparency, but also if they are not restricted by limited options.<sup>98</sup> Baylen Linnekin’s work reminds that choice is not just a matter of choosing among available options, but of having a sufficient menu of options from which to choose.<sup>99</sup>

Extensive choices and the information and transparency that shine light on the available choices help support empowerment, which is the final value in the governance category. Empowerment here simply means the ability to behave meaningfully both in one’s private decisions and the ability to influence public arrangements. Participation and empowerment undergird the interest in food.<sup>100</sup> People want to know what they are eating, they want to have free choice to eat a variety of foods, and—lest this be only a restatement of classical liberal values—they want their actions to have some impact on the system, that is, on public wellbeing.<sup>101</sup>

## 2. Interactions: Participation, Relationships, and Dialogues

The second category of values that drive the food movement emphasizes interactions. Food movement participants prefer a world in which participation, relationships, and dialogues infuse and create communities in which “personal connections, a stronger sense of community,” are priorities and are supported by the food system.<sup>102</sup> To some extent, a desire for closer connections and more participation in the system are instrumental toward other values such as confidence and

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95. See Jason Czarnezki et al., *Creating Order Amidst Food Eco-Label Chaos*, 25 DUKE ENVTL. L. POL’Y F. 281, 281 (2015) (“Eco-labels also provide a basis for . . . transparency.”).

96. See Kiran, *supra* note 85, at 348 (“That is to say, small scale production invites transparency between producer and consumer.”).

97. Mortazavi, *supra* note 41, at 952.

98. See *id.* at 955 (noting that food lawsuits are about individual desires to make moral choices as consumers).

99. LINNEKIN, *supra* note 81, at 195.

100. Laura B. DeLind, *Are Local Foods and the Local Food Movement Taking Us Where We Want to Go? Or Are We Hitching Our Wagons to the Wrong Stars?*, 28 AGRIC. HUM. VALUES 273, 273–74 (2011).

101. *But see* Lichtenberger, *supra* note 71, at 178 (describing people generally as unwilling to participate in politics yet paradoxically desiring leaders who make neutral policy).

102. Hamilton, *Food Democracy II*, *supra* note 90, at 41; see also, e.g., Goldberg, *supra* note 70, at 782 (describing the food movement); Marne Coit, *Jumping on the Next Bandwagon: An Overview of the Policy and Legal Aspects of the Local Food Movement*, 4 J. FOOD L. & POL’Y 45, 48 (2008).

transparency,<sup>103</sup> but the desire also stands alone as a self-justifying value.<sup>104</sup> Marne Coit asserts that a main motivation of local food consumers is the relationship between growers and buyers.<sup>105</sup> This is “a deeper connection beyond the financial one.”<sup>106</sup> It is a “face to face interaction [that] provides a connection not available when purchasing food at a supermarket.”<sup>107</sup>

The desire to participate in food system decision-making and meaningful relationships among participants may stem from a recognition that food is part of a complex ecological system; humans are no less a part of that system than the plants and animals we eat. If anything, we are a larger part insofar as our actions more dramatically change the system. Social interactions, particularly as they relate to food, help us make sense of that reality.<sup>108</sup> Interconnections and social processes, therefore, are “overarching motivation[s]”<sup>109</sup> because they allow each of us to be a meaningful part of the array of persons, animals, things, and the “web of relationships” in which we live and eat.<sup>110</sup> Though not writing about food, Professor Peter Bell explains that “[j]ust as persons in society have concerns about being overcome or invaded by others, so too do we have concerns about being isolated . . . from others.”<sup>111</sup> The truth of this sentiment is probably especially true when we eat.

Importantly, however, the mere existence of a participatory system with closer and more diverse relationships is not the full extent of what motivates this second category of values. It is also important that the relationships include conversation, back-and-forth, and learning. “The core of the new movements” argues Stephen Carpenter, is “dialectic between farmers, consumers, and those in between.”<sup>112</sup>

### 3. Sources of Knowledge: Local, Community, Traditions, and Progress

Finally, shared values about the appropriate source of knowledge motivate the food movement.<sup>113</sup> The food movement consistently agrees

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103. Phil Mount, *Growing Local Food: Scale and Local Food Systems Governance*, 29 AGRIC. HUM. VALUES 107, 109 (2012).

104. JEDEDIAH PURDY, *AFTER NATURE: A POLITICS FOR THE ANTHROPOCENE* 234 (2015).

105. Coit, *supra* note 102, at 49.

106. *Id.*

107. *Id.*

108. PURDY, *supra* note 104, at 230.

109. Weiss, *supra* note 73, at 615.

110. Goldberg, *supra* note 70, at 782.

111. Peter A. Bell, *Analyzing Tort Law: The Flawed Promise of Neocontract*, 74 MINN. L. REV. 1177, 1205 (1990).

112. Carpenter, *supra* note 59, at 24.

113. Broad Leib, *supra* note 77, at 33–34.



that the dominant sources of norms, and knowledge about how to govern the food system, are embedded in local communities, local traditions, and that progress should grow from those sources.<sup>114</sup> It is within this category of values that reaction to the mainstream food system is most apparent.<sup>115</sup> The modern food system is characterized (especially within the food movement) as removed from any sense of place; a collection of industrial giants; a commodity-based, bland behemoth supported by government subsidies, which produces “unhealthy, overly-processed foods.”<sup>116</sup> If this system is undesirable, it is not because of inefficiency or high prices: it is because it does not account for social values and the traditions of local communities because there is a disassociation between desire and opportunity.<sup>117</sup> The current system imposes practices, it imposes limited relationships, and it imposes local externalities, but it does not have room for “unique local expressions . . . .”<sup>118</sup> Thus, across the food movement, there is demand for “[c]ommunity [s]elf-[g]overnance”<sup>119</sup> and a food “system that is appropriate for a particular community.”<sup>120</sup> Desire for localism does have connections to concepts like food miles and the energy use of food transportation,<sup>121</sup> but at base it is motivated by a preference for sense of place,<sup>122</sup> for “place-based inquiry and innovation.”<sup>123</sup>

The relationship between innovation, progress, and tradition is the final aspect of this final category of motivating values. Despite the reticence to accept large-scale efficiencies and the technical innovations of the last half-century, the food movement is indeed a progressive movement.<sup>124</sup> The value of progress within the movement, however, is rooted in these local, place-based, community foundations.<sup>125</sup> The food movement values progressive traditionalism—progress that evolves from local traditions rather than change that lurches forward, disconnected from current practice

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114. Ristino, *supra* note 56, at 24; DeLind, *supra* note 100, at 274, 279–80; Condra, *supra* note 69, at 303; Gonzalez, *supra* note 89, at 494.

115. Broad Leib, *supra* note 77, at 31–34.

116. *Id.* at 19.

117. See generally Susan A. Schneider, *Reconnecting Consumers and Producers: On the Path Toward A Sustainable Food and Agriculture Policy*, 14 *DRAKE J. AGRIC. L.* 75, 75 (2009) (describing the current state of food production and consumption as an inadequate system that (1) is disconnected from its consumers; and (2) fails to consider relevant cultural and societal values).

118. DeLind, *supra* note 100, at 274.

119. Condra, *supra* note 69, at 302.

120. *Id.* at 306.

121. Broad Leib, *supra* note 77, at 18.

122. DeLind, *supra* note 100, at 274.

123. *Id.* at 279.

124. Ristino, *supra* note 56, at 17.

125. Weiss, *supra* note 73, at 619.

because of the decisions of corporate or government leaders.<sup>126</sup> As Professor Laurie Ristino poetically explains, “[a] feature of humanity is that as we push forward, we reach back seeking to anchor the soul.”<sup>127</sup>

The three value categories in this section are, of course, not entirely distinct. There are relationships between the values of good governance, interconnection, and localism.<sup>128</sup> In the 1940s, the USDA conducted research that compared two California towns that were primarily distinguished by the type of farm ownership prevalent in each.<sup>129</sup> In the first town, large-scale industrial operations owned by out-of-town interests were dominant.<sup>130</sup> In the second town, the principal farm structure was local and family owned.<sup>131</sup> Suggesting that the values of localism and decision-making are interrelated both philosophically and instrumentally, the USDA research concluded that local democracy was more robust in the town with local, family-farm ownership because where the outside agribusinesses dominated, they could exert control over local government.<sup>132</sup>

To this sort of influence, Professor Ristino responds that the food movement seeks “grounding in, and reclaiming of, community. Thus, the legal tools that are developed should reflect this value.”<sup>133</sup> Indeed, the legal tools should reflect this value and the others discussed in this section. In the two concluding sections, I argue that the common law is a tool that meets this challenge. Importantly, if the characterization of the values of the food movement in this section is not convincing because the reader believes the movement is simply too diverse for such an account, the argument for a sincerity between the common law and the food movement should still persuade. If the food movement is intractably diverse, policy developed through the majority-rule of Congress or the bureaucratic filtering of administrative rulemaking is less equipped to deal with the diverse values than the case-by-case scrutiny of common law discussed below.

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126. DeLind, *supra* note 100, at 280.

127. Ristino, *supra* note 56, at 1.

128. PEW CHARITABLE TR., PUTTING MEAT ON THE TABLE: INDUSTRIAL FARM ANIMAL PRODUCTION IN AMERICA 38, 41, 45 (2008), <http://www.pewtrusts.org/~media/legacy/uploadedfiles/pewpublications/report/pcfapfinalpdf.pdf>.

129. *Id.* at 42.

130. *Id.*

131. *Id.*

132. *Id.*

133. Ristino, *supra* note 56, at 24.

## III. CHARACTERIZING THE COMMON LAW

In the opening chapter of his book, *The Concept of Law*, H.L.A. Hart addresses the question: “What is law?”<sup>134</sup> Professor Brian Bix nicely summarizes the answer. According to Bix, Hart’s answer to the question “[w]hat is law?” is “why do you ask?”<sup>135</sup> This section is an attempt to answer, “what is the common law?” Why do I ask? Because I want to understand whether the common law is an appropriate legal structure for addressing the motivating values in food law and policy.

The simple way to characterize the common law is to define it as judge-made law, stemming from post-Norman England, based on community norms and practices, and practically implemented in areas such as tort, contract, property, and to a lesser extent, criminal law.<sup>136</sup> This section will further elaborate this definition and describe the various theories of the common law, trying to define the values of the common law that are implied in these theories.

A deeper characterization of common law needs to begin with a distinction between common law and other overarching sources of law. The three primary sources of positive legal commands come from constitutions, statutes (including the administrative law that emerges from statutes), and the common law.<sup>137</sup> A key distinction between the common law and these other sources is the point of reference. When presented with a constitutional or statutory question of law there is almost boundless room for different interpretations, analysis, and application of the law to the facts, but there is relatively easy agreement on the specific positive language that a court must interpret, analyze, and apply.<sup>138</sup> For instance, if a conflict revolves around the small producer exemptions in the Food Safety Modernization Act (“the Act”), then the starting point for legal analysis is the Act itself<sup>139</sup> and the Act’s implementing regulations.<sup>140</sup> If somebody contends that portions of the Act create uncompensated regulatory takings because of their economic burden on small farmers, then the starting point for legal

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134. H.L.A. HART, *THE CONCEPT OF LAW* 1 (3d ed. 2012).

135. BIX, *supra* note 25, at 6.

136. *Id.* at 154.

137. *Origins of American Law*, LUMEN, <https://courses.lumenlearning.com/boundless-politicalscience/chapter/origins-of-american-law/> (last visited Dec. 6, 2017).

138. SCHEPPELE, *supra* note 35, at 95.

139. Food Safety Modernization Act, 21 U.S.C. §§ 2201–2252 (2012).

140. *E.g.*, Standards for Growing, Harvesting, Packing, and Holding Produce for Human Consumption, 21 C.F.R. §112 (2017) (providing an example of an implementing regulation for the Food Safety Modernization Act).

analysis is the Fifth Amendment of the United States Constitution.<sup>141</sup> If a conflict arises under the common law, even settling on the binding precedent is a respectable challenge. This is one of—perhaps the key—characteristics that sets the common law apart from other areas of law: there is no single, authoritative source that gives a general, interpretable rule. There is a sea of precedent that provides support for multiple, competing arguments.<sup>142</sup>

It is true that much of what was once purely common law derived exclusively from judicial opinions over centuries has now been codified in state statutes.<sup>143</sup> Codification narrows the scope of judicial interpretation, but on the whole, it still maintains the basic common law flavor.<sup>144</sup> While a state legislature may have defined the elements or limited the application of a common law tort, such as nuisance,<sup>145</sup> the majority of controlling law from defining causation to calculating damages is still typically found in the sea of common law precedent and not in statutory language.<sup>146</sup> Thus, the characterization in this section includes both strict common law and legislative tweaks to the common law.

#### A. *The Environmental Protection Template*

This endeavor—to characterize the common law for the purpose of assessing its fit with a specific policy area—is not new.<sup>147</sup> For nearly the

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141. See, e.g., Joshua Ulan Galperin, *Does the Compensation Clause Burden the Government or Benefit the Owner? The Compensation Clause as Process*, 1 U. BALT. J. LAND & DEV. 27, 27 (2011) [hereinafter Galperin, *Burden or Benefit*] (explaining that the debate around the Takings Clause is concerned with when a regulation goes too far and therefore becomes a taking such that compensation is due); U.S. CONST. amend. V (prohibiting the taking of private property without just compensation).

142. SCHEPPELE, *supra* note 35, at 95.

143. BIX, *supra* note 25, at 153 n.1.

144. *Id.*

145. For example, so-called right-to-farm laws have become common. Reagan M. Marble, *The Last Frontier: Regulating Factory Farms*, 43 TEX. ENVTL. L.J. 175, 181 (2013). Such laws limit nuisance lawsuits against agricultural operations. *Id.*

146. BIX, *supra* note 25, at 153 n.1.

147. E.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 306 (1970) (showing how the debate progressed over using the common law to solve environmental problems); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089–90 (1972) (outlining a framework for integrating property and torts and examining the previously ignored relationships between them); Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 372 (1984) (suggesting that some individuals view tort regulations as ineffective and inadequate while others find tort liability to be unduly restrictive and costly); Andrew Jackson Heimert, *Keeping Pigs Out of Parlors: Using Nuisance Law to Affect the Location of Pollution*, 27 ENVTL. L. 403, 415 (1997) (identifying three negative characteristics of relying on nuisance in pollution contexts); Richard A. Epstein, *Too Pragmatic By Half*, 109 YALE L.J. 1639, 1643 (2000) [hereinafter Epstein, *Too Pragmatic*] (emphasizing that the common law approach to property rights is applicable to environmental issues);

last half century, scholars have debated whether the common law is a useful tool for solving environmental problems.<sup>148</sup> That debate (if recounted briefly enough) provides additional insight for the present effort.

Importantly, this debate and this subsection focus on tort as a subset of the common law. There is no doubt that other common law areas such as property and contract are relevant to environmental protection.<sup>149</sup> Even criminal law has a role to play.<sup>150</sup> But, tort has dominated the debate, and I continue that focus here because it is more precise to delve into the specifics of a narrower area and because a burning controversy is always more interesting.

The dominant environmental law narrative is that environmental protection began with the common law,<sup>151</sup> but the realities of environmental problems and the constraints of the common law were simply too great, necessitating the age of statutes in which environmental law now lives.<sup>152</sup> This simple narrative suggests that food law and policy has little to learn from the environmental experience because food law and agriculture law,

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Christopher H. Schroeder, *Lost in Translation: What Environmental Regulation Does that Tort Cannot Duplicate*, 41 WASHBURN L.J. 583, 587 (2002) [hereinafter Schroeder, *Lost in Translation*] (describing a process for assessing the consequences of relying on torts in the environmental context by ascertaining the goals of tort in general); Peter Cane, *Using Tort Law to Enforce Environmental Regulations?*, 41 WASHBURN L.J. 427, 429 (2002) (stating that some argue for the use of common law in the environmental regulation context while others advocate for a complete abandonment of tort law in this sector); Thomas O. McGarity, *Regulation and Litigation: Complementary Tools for Environmental Protection*, 30 COLUM. J. ENVTL. L. 371, 372–73 (2005) [hereinafter McGarity, *Regulation and Litigation*] (criticizing tort reform and highlighting the importance of enforcing environmental statutes with “vigorous” tort litigation); Adam D.K. Abelkop, *Tort Law as an Environmental Policy Instrument*, 92 OR. L. REV. 381, 400 (2014) (positing that tort law is an imperfect environmental policy tool).

148. CALABRESI, *supra* note 147, at 296, 306.

149. See, e.g., ENVIRONMENTAL CONTRACTS: COMPARATIVE APPROACHES TO REGULATORY INNOVATION IN THE UNITED STATES AND EUROPE 47, 77, 80, 83, 288–89 (Eric W. Orts & Kurt Deketelaere eds., 2001) (discussing how civil law areas relate to environmental protection); James E. Krier, *The Tragedy of the Commons, Part Two*, 15 HARV. J.L. & PUB. POL’Y 325, 325 (1992) (demonstrating that property and contracts are relevant to environmental protection). In one sense, property law as a tool for environmental law does not really stand on its own because robust tort actions, such as trespass and nuisance, must be available to defend common law property rights.

150. See generally Cane, *supra* note 147, at 428 (noting the relevance of criminal law deterrence, strict liability, responsibility, and risk assessment in an environmental context).

151. See, e.g., ROBERT V. PERCIVAL ET. AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 63 (7th ed. 2013) (“Prior to the explosion of environmental legislation in the 1970s, the common law was the legal system’s primary vehicle for responding to environmental problems.”).

152. See, e.g., *id.* (“After centuries of wrestling with environmental conflicts, the common law now has been supplemented, and in some cases supplanted, by regulatory statutes . . .”); Richard A. Epstein, *From Common Law to Environmental Protection: How the Modern Environmental Movement Has Lost Its Way*, 23 SUP. CT. ECON. REV. 141, 143 (2016) [hereinafter Epstein, *Environmental Protection*] (asserting that “most people” believe strong state and federal administrative agencies are necessary for environmental protection “even though these were not in evidence in the United States until 1970”).

the forebears of food law and policy,<sup>153</sup> essentially began as statutory creations,<sup>154</sup> while environmental law began in the common law.<sup>155</sup> There is no doubt that this inversion leads to some stark difference. But the deeper questions, those questions that get at Hart's "why do you ask?,"<sup>156</sup> are enlightening and provide a helpful template for characterizing the common law.

Scholars who explore the intersection of the common law and the environment use two basic approaches. One approach seeks to uncover the fundamental purpose of tort, thereby evaluating the jurisprudential fit between environmental degradation as a problem and tort as a theoretical solution.<sup>157</sup> The other approach looks at the practicalities of tort and the characteristics of environmental problems to gauge whether tort actions can effectively and practically resolve environmental problems.<sup>158</sup>

### 1. Fundamental Purposes

Of course, those scholars who inquire about the purpose of tort do not agree on that purpose.<sup>159</sup> One school of thought argues that tort essentially serves a utilitarian public policy goal, to maximize public welfare.<sup>160</sup> The other school argues that tort is essentially an area of private law (more analogous to other common law fields such as contract and property), which assures that when one person harms another there is a forum for civilized confrontation, adjudication, and ultimately compensation.<sup>161</sup>

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153. Linnekin & Broad Leib, *supra* note 55, at 559.

154. See Hutt, *supra* note 32, at 47 (describing federal legislation beginning prior to 1906 and the 1906 passage of the Food, Drug, and Cosmetics Act).

155. PERCIVAL ET AL., *supra* note 151, at 63.

156. BIX, *supra* note 25, at 6.

157. E.g., Schroeder, *Lost in Translation*, *supra* note 147, at 587 (explaining how "to assess the environmental consequences" of tort law).

158. E.g., Susan Rose-Ackerman, *Public Law versus Private Law in Environmental Regulation: European Union Proposals in the Light of United States Experience*, 4 REV. EUR. COMP. & INT'L ENVTL. L. 312, 317 (1995) (declaring tort law "inadequate to deal effectively with environmental [law] problems").

159. Schroeder, *Lost in Translation*, *supra* note 147, at 587 ("The objectives of tort are the subject of a long-running debate that shows no signs of resolving itself any time soon.").

160. BIX, *supra* note 25, at 266–67; see also CALABRESI, *supra* note 148, at 86–88 (discussing welfare economics); Keith Hylton, *The Economic Theory of Nuisance Law and Implications for Environmental Regulation*, 58 CASE W. RES. L. REV. 673, 674–75 (2008) [hereinafter Hylton, *Economic Theory*] (describing an economic theory of nuisance, which accounts for the benefits of decentralizing environmental regulation and relying on tort law).

161. BIX, *supra* note 25, at 268–69; see also Cane, *supra* note 147, at 429 (taking the position that the purpose of tort law is to justify requirements for restitution).

The public policy view of tort law has dominated for the past half century.<sup>162</sup> This approach asserts that tort must be understood through an economic lens, and that tort must be judged by its ability to efficiently distribute limited resources.<sup>163</sup> Tort can facilitate efficient distribution of resources because through damage awards, the law can quantify the cost of risk-taking.<sup>164</sup> All members of society take risks, and those risks can result in accidents.<sup>165</sup> According to this view, the law should not discourage all risk-taking, but it should offer price signals. Risk-takers can balance the benefit of taking a risk—for example, the benefit of using a new food processing technique or marketing strategy—against the costs of taking the risk—for example, occasional injuries that might arise from the new process or harms that stem from potentially misleading advertising. When a court awards damages, those damages send a price signal to other risk-takers, deterring them from taking unreasonable risk, but allowing them to judge what is reasonable based on their own economic calculations.<sup>166</sup> Of course, either party could calculate the cost of taking risks. One party calculates the risk of a new product; the other calculates the risk of using that product. The law and economics approach tells judges to place the burden and the damages on the party with the most information and who is most able to make a reasoned economic decision about reducing risk.<sup>167</sup> This is the “cheapest cost avoider.”<sup>168</sup> Judges, therefore, must analyze a given conflict in such a way as to “prevent[] those harms whose costs of precaution are less than the anticipated cost of harm.”<sup>169</sup>

One of the defining characteristics of the economic view is that individual decisions in individual conflicts aggregate into broader public signals, influence private behavior, and therefore have a distinct public

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162. See Abelkop, *supra* note 147, at 392 (“The dominant position, however, seems to be the instrumentalist view, which emphasizes the general deterrent effects of liability as public law.”); see also Calabresi & Melamed, *supra* note 147 (analyzing the use of criminal sanctions in the context of pollution as nuisance); Shavell, *supra* note 147, at 372 (outlining the shortcomings of regulation in assigning liability for toxic waste); Keith N. Hylton, *The Economics of Public Nuisance Law and the New Enforcement Actions*, 18 SUP. CT. ECON. REV. 43, 44 (2010) [hereinafter Hylton, *Public Nuisance*] (asserting that nuisance law effectively encourages people to choose socially responsible actions when liability exceeds benefits).

163. Calabresi & Melamed, *supra* note 147, at 1096–97; Daniel A. Farber, *The Story of Boomer: Pollution and the Common Law*, in ENVIRONMENTAL LAW STORIES 37 (Richard J. Lazarus & Oliver A. Hauk eds., 2005).

164. CALABRESI, *supra* note 147, at 18, 21; Hylton, *Economic Theory*, *supra* note 160 at 673.

165. CALABRESI, *supra* note 147, at 17.

166. Schroeder, *Lost in Translation*, *supra* note 147, at 587.

167. Mortazavi, *supra* note 41, at 935.

168. Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972).

169. Schroeder, *Lost in Translation*, *supra* note 147, at 587.

policy impact.<sup>170</sup> Another important quality is that the utilitarian approach is nominally value neutral.<sup>171</sup> While environmental statutes explicitly seek to solve specific substantive problems and environmental harms, the law and economics approach does not distinguish environmental damage from, for example, a car accident or slip-and-fall.<sup>172</sup> In this view, risk-taking of any nature has its costs and benefits, and tort should not treat environmental harms as inherent wrongs. Rather, environmental harms are neutral, and only wrong if their benefits do not outweigh their costs.<sup>173</sup> For that matter, no act is inherently wrong; it is merely efficient or inefficient.

The alternative private conceptions of tort do assign value to individual accidents distinct from their public policy impacts.<sup>174</sup> Private justice theories fall into two categories—restorative justice and civic recourse—both of which rely on social expectations rather than economic outcomes.<sup>175</sup> These theories treat tort as “a responsibility-based mechanism”<sup>176</sup> that focuses its analysis on “rights and obligations,” such that “the function of tort law is to protect rights and to enforce obligations.”<sup>177</sup>

Restorative justice is the older of these private views of tort, and it was the dominant view prior to the emergence of the utilitarian model.<sup>178</sup> Restorative justice enforces duties, responsibilities, and obligations by imposing damages.<sup>179</sup> It stresses that the purpose of tort is to restore an injured party, when the defendant wronged that party, regardless of price signals or efficient distribution of resources.<sup>180</sup> The civic recourse theory agrees that norm-based interpersonal responsibilities animate tort law, but that compensation is not the critical tool for enforcing these responsibilities.<sup>181</sup> Instead of compensation and restoration, civic recourse stresses the process of confrontation, of calling on alleged wrongdoers to account for their actions as a means of empowering individuals in a broader

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170. Hylton, *Economic Theory*, *supra* note 160, at 673.

171. *See, e.g.*, Epstein, *Too Pragmatic*, *supra* note 147, at 1643 (arguing that statutory law is a form of special pleading for the environment because statutes explicitly elevate environmental protection over competing societal interests, while the common law is neutral as among various social values).

172. *Id.*

173. *See* Mortazavi, *supra* note 41, at 934–35 (noting that reasonable harm is discerned by balancing the cost of prevention against the cost of a remedy).

174. *Id.* at 934.

175. Cane, *supra* note 147, at 429.

176. *Id.*

177. *Id.* at 430.

178. Schroeder, *Lost in Translation*, *supra* note 147, at 587.

179. *Id.* at 590.

180. Cane, *supra* note 147, at 429.

181. John C. P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364, 406 (2005).



society.<sup>182</sup> Professors John Goldberg and Benjamin Zipursky, leading advocates of civic recourse theory, write that the tort process “affirms the notion that each of us is equal in owing and being owed various obligations by others,” and the nature of tort adjudication both provides the forum for realizing social obligations and must operate with this responsibility in mind.<sup>183</sup>

Tort could be viewed as a public policy tool that assures efficient use of resources, a private ordering tool that offers compensation for wrongdoing, or a forum for expressing individual equality under the law. It is not essential to commit to any of these first principles of tort. In fact, a pragmatic approach to the law insists that we do not demand a single theory, but rather that we see the value of either conception and can call on either depending on the relevant social goal.<sup>184</sup> The next section of this Article will argue that having both a public policy and classically liberal justification makes the common law particularly well suited as an instrument for food law and policy. But, it is also not necessary to commit to either of these philosophies because, in practice, tort still has relevant qualities whether or not it is tethered to some unalterable and universal justification.

## 2. Practical Purposes

In the environmental space, those scholars who eschew fundamentalist inquiry instead explore both the practical limitations and benefits of tort as an environmental protection tool.<sup>185</sup> Among the limitations are: (1) concerns about the long-term nature of environmental problems getting appropriate attention in a common law court that looks at short-term problems;<sup>186</sup> (2) the diffuse nature of environmental harms, which makes appropriate defendants hard to identify;<sup>187</sup> (3) the challenge of proving causation when environmental harms have uniquely complex pathways;<sup>188</sup> and (4) the lack of expertise among common law judges.<sup>189</sup> On the other hand, the common law can offer benefits, which include: (1) avoiding some

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182. *Id.*

183. *Id.* at 369.

184. Joshua Ulan Galperin, *Trust Me, I'm A Pragmatist: A Partially Pragmatic Critique of Pragmatic Activism*, 42 COLUM. J. ENVTL. L. 425, 436–37 (2017) [hereinafter Galperin, *Trust Me*].

185. Schroeder, *Lost in Translation*, *supra* note 147, at 587.

186. Kenneth S. Abraham, *The Relation Between Civil Liability and Environmental Regulation: An Analytical Overview*, 41 WASHBURN L.J. 379, 380 (2002).

187. *Id.* at 386.

188. Schroeder, *Lost in Translation*, *supra* note 147, at 592.

189. Heimert, *supra* note 147, at 415.

of the inefficiencies of regulation, such as the agency-cost problem;<sup>190</sup> (2) limiting the impact of rent-seeking politics, agency capture, and immense wealth disparities;<sup>191</sup> and (3) providing opportunities to uncover valuable information through discovery.<sup>192</sup> There is certainly some food and environmental overlap within these considerations, but there are some more general and meaningful characteristics within tort, and the common law at large, that are more relevant for food law and policy.

### *B. Defining Characteristics of the Common Law*

One defining characteristic of the common law is its process, a process that is “a form of common or collective reasoning, or a common or collective form of moral intuition.”<sup>193</sup> Common law decision-making is case by case, which necessarily makes common law progress incremental, rather than transformative as legislative or administrative fiat can be.<sup>194</sup> The characteristic that is most responsible for the incrementalism of the common law is *stare decisis*, which directs that each judicial decision should be consistent with earlier decisions.<sup>195</sup> Professor Bix pulls these threads together to define common law by its four central elements: (1) incremental development; (2) by judges; (3) case by case; and (4) with consistency among decisions.<sup>196</sup> According to Bix, these features make use of “moral intuition, hierarchical discipline, and principled consistency.”<sup>197</sup> In this way, “common law reasoning seems to reflect at a more public level the way people develop their own moral principles and views on life.”<sup>198</sup> If Professor Bix is correct in this assessment, one might describe the common law as a formal legal process for reflecting human nature.

#### 1. Community Norms

Other scholars have also focused on the way that the common law process formalizes, but essentially captures, norms of communal decision-making. Professor Gerald Postema explains that common law originated as

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190. Hylton, *Public Nuisance*, *supra* note 162, at 676.

191. See McGarity, *Regulation and Litigation*, *supra* note 147, at 373 (2005) (stating that tort litigation provides benefits of predictability, control, efficiency, and fairness in the context of environmental litigation).

192. *Id.* at 396; Abelkop, *supra* note 147, at 393.

193. BIX, *supra* note 25, at 153.

194. *Id.*

195. *Id.* at 155.

196. *Id.* at 154.

197. *Id.*

198. *Id.* at 157.

“a public process of reasoning in which practical problems of daily social life were addressed. ‘Custom’ and ‘reason’ were the twin foci of this conception of law.”<sup>199</sup> But Professor Postema notes “[c]ommon law, and widely shared conceptualizations of it, may have been (and may continue to be) considerably more complex than our common knowledge admits.”<sup>200</sup> Widely shared conceptions of common law presume judges are the arbiters of custom and reason, and that common law is simply judge-made law.<sup>201</sup> Postema cautions that, in fact, the way in which the law is “taken up” is actually rooted more in community acceptance.<sup>202</sup> A judicial pronouncement does not effectively become common law unless it is rooted in a nation’s “basic normative structure . . . .”<sup>203</sup>

In a different context, Douglas Edlin makes essentially the same argument that common law is not just judge-made law, because law is necessarily tied to its community.<sup>204</sup> Professor Edlin studied the way in which we superficially demand judicial objectivity, but—in fact—expect and cannot avoid intersubjectivity.<sup>205</sup> “*Intersubjectivity* means that the judge decides as an individual within a larger community, that the judge produces judgments with the understanding that they must contain statements of justificatory reasons for legal conclusions, and that these conclusions depend on their evaluation and validation by the community as legal judgments.”<sup>206</sup> Edlin has two key points. First, that objectivity has little meaning in the law since it is wrong to speak of true or false legal decisions.<sup>207</sup> Second, a universally objective argument necessarily ignores the local nuances of community expectations.<sup>208</sup> Identity of the judge and the community are both important.<sup>209</sup>

## 2. Progressive Traditionalism

Community identities and norms, however, are not fixed. Just as these practices and expectations change over time, so too does the common law,

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199. Gerald J. Postema, *Philosophy of the Common Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 588, 590 (Jules L. Coleman et al. eds., 2002).

200. *Id.* at 589.

201. *Id.* at 591.

202. *Id.*

203. *Id.*

204. DOUGLAS E. EDLIN, *COMMON LAW JUDGING: SUBJECTIVITY, IMPARTIALITY, AND THE MAKING OF LAW* 5–6 (2016).

205. *See generally id.* (discussing objectivity in law and subjectivity in judging).

206. *Id.* (emphasis added).

207. *Id.* at 14–15.

208. *Id.* at 6.

209. *Id.* at 9.

which, no matter how longstanding, is always open to re-evaluation.<sup>210</sup> The form of common law adjustment might be called progressive traditionalism in that it is incremental, based on past precedents, but seeking to resolve new problems and adapt to new circumstances as necessary.<sup>211</sup> It is traditionalism because the common law looks backward at precedent and at norms in an effort to be continuous.<sup>212</sup> It is progressive because it is adaptive, and because the common law not only reflects norms, but also shapes norms.<sup>213</sup> Common law rules “are refined over time, softened to fit the contours of the community’s daily life. Simultaneously, following the rules and practices [of the common law] shapes the dispositions, beliefs, and expectations of the people.”<sup>214</sup>

The common law’s flexibility, especially with regard to new scientific information, also lies within the ideal of progressive traditionalism.<sup>215</sup> Where legislative decision-making can freely ignore scientific input, and administrative decision-making can set extraordinarily high (political) standards for acting on new scientific inputs, the common law has a more flexible process for integrating and acting on scientific knowledge.<sup>216</sup> This flexibility adds to the growth of common law and its responsiveness to changing local and global circumstances.

Common law, as practiced, can be aggressive, confrontational, technical, burdensome, and shadowed by jargon and maxims, but according to Christopher St. German, maxims are “rooted in a shared sense of . . . reasonableness.”<sup>217</sup> In other words, custom is a source of common law’s validity, but it is not the same thing as common law because common law is a reflexive institution.

### 3. Collaborative Decision-making

Common law shifts, progresses, and reformulates—in agricultural terms, it breeds, grows, and evolves—through a structure for deliberative

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210. *Id.* at 66.

211. See Postema, *supra* note 199, at 591 (describing the common law as being both progressive and continuous at the same time).

212. *Id.*

213. *Id.* at 592.

214. *Id.*

215. See, e.g., Michael H. Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness*, 1986 U. ILL. L. REV. 43, 43 (discussing the changes in common law in the context of expert witness testimony as a reaction to developments in the scientific community).

216. *Id.* at 43, 89–90.

217. Postema, *supra* note 199, at 592.

reasoning and argument.<sup>218</sup> The discursive process allows participants to present their arguments for both interpreting existing norms and recognizing changing norms.<sup>219</sup> Thus, even while the common law can create “strikingly adversarial relationships,”<sup>220</sup> it is also “essentially collaborative: it is a practice of thinking, arguing, deliberating, and deciding in common.”<sup>221</sup> This is to say that while the common law may seem like an ancient or burdensome legal quagmire, it is validated and shaped by both subtle norms and direct and intentional community engagement.<sup>222</sup> To frame this relationship slightly differently, the common law is a concept, but it is also a real framework for engagement, and that framework “provides a public focus, forum, and exemplar for a practice with the potential for wide participation in society.”<sup>223</sup> It is a “methodological thesis . . . not an ontological point about the ultimate order of being.”<sup>224</sup> The framework “offers ordinary practical reasoning a multi-layered, practi[c]ed discipline of deliberating and reasoning together regarding public matters.”<sup>225</sup>

With a sense of the common law as a legal instrument and an expression of what makes law valid, it is possible to consider whether the common law is a suitable structure for food law and policy. As the first section of this Article argues, this inquiry certainly demands consideration of whether the common law will be effective at achieving the political goals of the food movement. But it also suggests that a non-instrumentalist assessment of the policy sincerity—the match between the values that motivate the common law and the food movement—will help determine the fit between the common law and the food movement. The next section pursues both lines of inquiry.

#### IV. COMMON LAW FOOD POLICY?

This is not the first article to consider the importance of the common law as a component of food policy. It is, however, one of only a very few. Through this section, it is also the first article to argue that the common law can serve the interest of policy sincerity—of fitting the values of a legal tool with the values that motivate a movement’s goals. To set the stage, this

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218. *Id.* at 594.

219. *Id.*

220. Bell, *supra* note 111, at 1207 n.110.

221. Postema, *supra* note 199, at 603.

222. *Id.* at 602–03.

223. *Id.* at 603.

224. *Id.* at 602.

225. *Id.*

section begins by looking at two recent articles that consider the common law as a strategic tool for food policy. It builds on this existing analysis by comparing the values that motivate the food movement with the values that are embedded in the common law, concluding that there is a strong fit, and, therefore, satisfying policy sincerity.

*A. Tai and Mortazavi on Flexibility and Democracy*

Because it is a young endeavor, and probably because it is also so diverse, the food movement is still searching for a strong set of legal and policy tools.<sup>226</sup> This Article argues that common law tools are well suited for advancing food policy and this conclusion grows from earlier work by Professors Stephanie Tai and Melissa Mortazavi, both who have convincingly argued for more consideration of tort actions.<sup>227</sup> Professor Tai, among other things, demonstrates that common law litigation is relatively more effective at furthering the political goals of the food movement than administrative litigation, in large part because of the flexibility of the common law.<sup>228</sup> Professor Mortazavi reiterates this point and adds an important additional benefit: tort litigation supports deliberative democracy, which serves a legitimating function, thereby also improving food policy.<sup>229</sup> Although both analyses look to the instrumental value of common law litigation, they argue that even in losing a lawsuit, the litigation process can benefit the development of sound food policy.<sup>230</sup> This complementary reasoning is at once strategically useful for the food movement and conceptually directive for the idea of the common law as sincere policy within the food movement.

Tai begins her article, *The Rise of U.S. Food Sustainability Litigation*, by reviewing the nature of the “growing interest in the United States regarding the sustainability of food.”<sup>231</sup> This review considers whether there is such a thing as a food movement,<sup>232</sup> the putative movement’s immediate policy goals,<sup>233</sup> and its loftier “aspirational features.”<sup>234</sup> Professor Tai concludes that “[t]he interest in sustainable food appears to fulfill all of

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226. Tai, *supra* note 58, at 1074.

227. Mortazavi, *supra* note 41 at 931.

228. Tai, *supra* note 58, at 1117.

229. Mortazavi, *supra* note 41, at 931.

230. Tai, *supra* note 58, at 1073.

231. *Id.* at 1074.

232. *Id.*

233. *Id.* at 1076 (noting that environmental protection, reduced pesticide and fertilizer use, farm security, hunger relief, and advocacy for local food systems are among the policy goals of the food movement).

234. *Id.* at 1079.

the[] descriptions of social movements.”<sup>235</sup> The movement generally “draws . . . its force from opposition to” the industrialized food system.<sup>236</sup> From this opposition, it pursues environmental and small farm security policies, and to a lesser degree “hunger relief.”<sup>237</sup> In its more constructive moments, the movement also supports policies that work to reduce pesticide and fertilizer use or to advocate for local food systems.<sup>238</sup>

Tai also turns to sociological research for “a deeper inquiry into the values embodied in this movement,” because these values can provide “a more insightful legal analysis.”<sup>239</sup> For this, Professor Tai refers to the research of Jack Kloppenburg, who studied “what food activists are contemplating when they discuss food sustainability.”<sup>240</sup> Tai reports that the “aspirational features” of those who are active in food sustainability include: ecological sustainability, knowledge availability, proximity of food to the consumer, economic sustainability, individual participation in the food system, justice of the system, regulations to foster environmental and social values, cultural and spiritual wellbeing, and food as cultural expression.<sup>241</sup> This list is specifically focused just on the term *sustainability* as applied to food, but nevertheless gives a sense of motivating aspirations. It likewise provides a useful baseline for assessing whether any policy instrument actually achieves what it is meant to achieve.

To determine whether litigation has been a useful tool for furthering food sustainability goals, Tai narrows in on two ripe areas of conflict: concentrated animal feeding operations (CAFOs) and genetically modified organisms (GMOs).<sup>242</sup> The movement targets CAFOs because of their mistreatment of animals, enormous size in comparison to other methods for raising poultry and livestock, use of antibiotics, environmental impacts, ownership structure, and impacts on local quality of life.<sup>243</sup> The movement began to target GMOs because of concerns about transgenic migration, pesticide resistance and overuse, food adulteration, and biodiversity loss.<sup>244</sup>

The bulk of Professor Tai’s study surveys specific lawsuits brought against CAFO and GMO defendants.<sup>245</sup> In both cases, the vast majority of

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235. *Id.* at 1075.

236. *Id.*

237. *Id.* at 1076.

238. *Id.*

239. *Id.* at 1078–79.

240. *Id.* at 1079.

241. *Id.* at 1079–80.

242. *Id.* at 1080.

243. *Id.* at 1086.

244. *Id.* at 1089–90.

245. *Id.* at 1080.

litigation involves regulatory and administrative processes.<sup>246</sup> CAFO litigation has emerged from the Clean Water Act,<sup>247</sup> Clean Air Act,<sup>248</sup> Comprehensive Environmental Response Compensation and Liability Act,<sup>249</sup> the Emergency Planning and Community Right-to-Know Act,<sup>250</sup> state regulation, and to a lesser extent, common law.<sup>251</sup> GMO litigation has been narrower, typically using the National Environmental Policy Act<sup>252</sup> to challenge federal agency approvals of GMOs.<sup>253</sup> In this case, common law has not played a role.<sup>254</sup>

Professor Tai concludes that common law suits, particularly nuisance suits, have been relatively more successful in the ongoing fight against CAFOs than much of the regulatory litigation.<sup>255</sup> She points to success both in legal victories<sup>256</sup> and in advancing values, even in defeat.<sup>257</sup> One case in particular stands out as a partial legal victory with a decisive moral component.

*Wendinger v. Forst Farms* arose out of a conflict between Julia and Gerald Wendinger—landowners in Nicollet County, Minnesota—and their neighbors, the Forsts.<sup>258</sup> In 1994, the Forsts contracted with Wakefield Pork to transition their operation into a pork CAFO.<sup>259</sup> Over the years, the smells from the CAFO became increasingly difficult for the Wendingers to bear. After personal and state-level administrative complaints, the Wendingers filed a suit in 2001 claiming nuisance, negligence, and trespass.<sup>260</sup> The trial court ruled against the Wendingers, finding, *inter alia*, that trespass requires a physical invasion, and odor is not physical;<sup>261</sup> that nuisance requires a wrongful act, and operating a CAFO, even if it causes damages, is not wrongful,<sup>262</sup> and that a farm operating under “generally accepted agricultural practices,” has an affirmative defense against nuisance

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246. *Id.* at 1101, 1122.

247. 33 U.S.C. §§ 1251–1387 (2012).

248. 42 U.S.C. §§ 7401–7671 (2012).

249. *Id.* §§ 9601–75.

250. *Id.* §§ 11001–50.

251. Tai, *supra* note 58, at 1101.

252. 42 U.S.C. §§ 4321–70 (2012).

253. Tai, *supra* note 58, at 1122.

254. *See id.* (explaining that most GMO challenges have been under federal statutes and not mentioning any common law theories).

255. *Id.* at 1117.

256. *Id.*

257. *Id.* at 1078.

258. *Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546, 549 (Minn. Ct. App. 2003).

259. *Id.*

260. *Id.*

261. *Id.* at 550.

262. *Id.* at 551.



claims.<sup>263</sup> With respect to their trespass claim, the Court of Appeals agreed with the trial court and ruled against the Wendingers.<sup>264</sup> However, the Court of Appeals breathed life into the Wendingers' suit with respect to the nuisance and negligence claims. That Court of Appeals ruled, first, that while nuisance requires a harmful act, that act need not be unlawful or negligent.<sup>265</sup> Thus, even though a CAFO is permitted and lawfully operated, it is still subject to nuisance challenges.<sup>266</sup> Second, and more interestingly, according to Professor Tai,<sup>267</sup> the Court of Appeals ruled that compliance with generally accepted agricultural practices does not provide an affirmative defense against nuisance.<sup>268</sup>

Like many states, the Minnesota legislature, through a right-to-farm statute, has limited common law claims against agricultural businesses.<sup>269</sup> Part of Minnesota's right-to-farm statute defines "[g]enerally accepted agricultural practices" as those agricultural businesses operating within an agricultural zone.<sup>270</sup> According to the court, this provision is merely a definition and not an affirmative defense against nuisance claims.<sup>271</sup> With respect to the negligence claim, the Court of Appeals held that generally acceptable agricultural practices are merely a statutory floor; even if the Forsts' CAFO operated within these standard practices, it could still be liable in negligence.<sup>272</sup> The Court of Appeals therefore remanded the case to the trial court.<sup>273</sup>

Professor Tai emphasizes the effects of this decision beyond the simple legal victory. She writes that the decision "may have also advanced the movement's desire to distinguish CAFOs from traditional farming practices, and perhaps even of preserving traditional farming practices."<sup>274</sup> This distinction and preservation is the result of the court "holding that generally acceptable agricultural practices did not act as a shield against a

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263. *Id.* at 553.

264. *Id.* at 550–51.

265. *Id.* at 551–52.

266. *Id.* at 551–53.

267. See Tai, *supra* note 58, at 1118 ("Beyond the environmental protection values of the sustainable food movement, the lawsuit may have also advanced the movement's desire to distinguish CAFOs from traditional farming practices . . .").

268. *Wendinger*, 662 N.W.2d at 553.

269. MINN. STAT. ANN. § 561.19 (West 2017).

270. *Id.*

271. *Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546, 553 (Minn. Ct. App. 2003).

272. *Id.* at 554.

273. *Id.* at 555.

274. Tai, *supra* note 58, at 1118.

negligence claim,” and thus “CAFOs can be held accountable for their effects apart from their status as farms.”<sup>275</sup>

The focus on this decision is appropriate. Though I would argue that the reason it deserves focus is slightly different. The *Wendinger* decision reflects more on the nature of the common law than on the distinction between CAFOs and more traditional farms. The court, notably, did not make a determination that CAFOs—through their size, operations, corporate structure, or other unique aspects—are fundamentally distinct from smaller, family-owned, traditional farming.<sup>276</sup> Rather, the Court of Appeals refused, as a matter of the common law, to treat generally accepted agricultural practices as a dispositive affirmative defense to nuisance.<sup>277</sup> The court found that those generally accepted practices, as a statutory baseline, do not create a standard of care in negligence.<sup>278</sup> The standard of care remains a creature of the common law: always open to change, reflecting community norms and expectations, and subject to the communal process of common law litigation.<sup>279</sup> Thus, perhaps the significance of the *Wendinger* case is not just in its signaling about CAFOs, but in its signaling about the resilience of the common law.

This general point about the nature of the common law is not lost on Professor Tai. As she tries to understand why common law litigation seems to be a more fruitful tool for food policy than administrative regulation, Tai considers some of these inherent features.<sup>280</sup> “One possible explanation for the relative success of common law challenges compared to those brought under state CAFO permitting laws” says Professor Tai, “may be the somewhat greater openness of the common law for introduction of broader concerns regarding residents’ quality of life and industrialization of meat production as opposed to the context of the more constrained state CAFO permitting requirements.”<sup>281</sup> Permitting, or another statutory-based challenge, forces plaintiffs to structure their grievances to fit within a predetermined and often unyielding conception of what is wrong.<sup>282</sup> Although common law theories of liability are consciously bound to traditional causes of action, they typically allow for flexibility and value

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275. *Id.*

276. *See Wendinger*, 662 N.W.2d at 554 (“We therefore conclude that the district court erred as a matter of law in dismissing the Wendingers’ claim without determining whether it alleged a legally sufficient cause of action in negligence.”).

277. *Id.* at 553–54.

278. *Id.*

279. *Id.* at 554.

280. Tai, *supra* note 58, at 1120.

281. *Id.*

282. *Id.*

signaling in a much more vital way.<sup>283</sup> As Professor Tai notes, when participants in the food movement are forced to reshape or constrict their complaints to fit statutory demands, it may be a “threat[] to their own identity . . . .”<sup>284</sup>

The common law, on the other hand, can be an opportunity to exercise identity and legitimize progressive food policy. This is where Professor Mortazavi’s work, *Tort as Democracy: Lessons from the Food Wars*,<sup>285</sup> joins the narrative. While Professor Tai’s basic assertion is that common law litigation is an effective tool for furthering the interests of the food movement, Professor Mortazavi’s basic argument is that common law torts play a larger societal role in which food policy benefits because food is uniquely situated within society.<sup>286</sup>

Professor Mortazavi contextualizes her argument that tort is a critical piece of deliberative democracy by recounting the views of tort as “risk management” or “corrective justice.”<sup>287</sup> Because I describe these positions in Section IV, I will only reiterate Mortazavi’s point that the risk management perspective sees tort as a value-neutral mechanism that facilitates economic efficiency, while a corrective justice position describes tort as serving “an important moral function beyond loss of compensation and efficient allocation.”<sup>288</sup> Professor Mortazavi adds the concept of deliberative democracy to these two standards of tort justification. This addition is “[a]nchored in conceptions of accountability and discussion . . . .”<sup>289</sup>

“[D]eliberative democratic theory asserts that legitimate political order rests on ‘publicly articulating, explaining, and most importantly justifying public policy.’”<sup>290</sup> Professor Mortazavi summarizes a body of research that stresses the legitimizing benefits of communication, debate, deliberation, and responsiveness.<sup>291</sup> In addition to the substantive call for more, and more reasoned discourse, there is also “[a] procedural approach to a deliberative democratic model [that] seeks to cultivate venues for selecting and developing policies. More venues for public input and the input of ideas

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283. *Id.*

284. *Id.* at 1121.

285. Mortazavi, *supra* note 41, at 951.

286. *Id.* at 975.

287. *Id.* at 935–36.

288. *Id.* at 935.

289. *Id.* at 936.

290. *Id.*

291. *Id.*

increases democratic deliberation.”<sup>292</sup> Mortazavi, a tort scholar, sees the features of tort that fit easily with this theory.<sup>293</sup>

“[T]ort litigation,” contends Professor Mortazavi, “is one such additional venue for increasing the amount of discussion and attendant responsiveness. It is through the use of this venue (tort) as an additional channel of input that American society and laws themselves can increase accountability, legitimacy, and potentially reach better policy decisions.”<sup>294</sup> Specifically, tort facilitates greater deliberative democracy because its touchstone is social reasonableness. Tort provides a forum for civil society to hear arguments. Tort is flexible and open.<sup>295</sup> Tort holds parties “accountable by virtue of having to appear in court or dignify a pleading with a response.”<sup>296</sup> As Professor Tai also explained, tort is available, perhaps the most available instrument for greater engagement in food policy, because tort is, “by design and history, relatively fluid and potentially tempered by equity considerations.”<sup>297</sup>

In addition to these inherent characteristics, tort, as a common law process, also has specific benefits when compared to the administrative process.<sup>298</sup> Professor Mortazavi reminds that the “administrative state is exceedingly complex,” which necessarily limits, or complicates, public participation.<sup>299</sup> Statutory language and agency discretion dictate the administrative process.<sup>300</sup> “[A]gency rulemaking dictates the subject matter of debate, whereas in a tort suit, the plaintiff’s complaint sets the agenda.”<sup>301</sup> And not to be overlooked, the real politics of administrative decision-making—the real influence and debates—“increasingly occur outside of the official public process.”<sup>302</sup> In comparison to the administrative alternative, tort provides accountability, both monetary and procedural; individual citizens can initiate it; and it is fact specific.<sup>303</sup>

The modern food movement, according to Professor Mortazavi, recognizes that food law and policy goes beyond, for example, food safety to encompass important discursive issues about culture and individuality, and that common law litigation and deliberative democracy are part of a

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292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.* at 937.

296. *Id.* at 938.

297. *Id.* at 937.

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.* at 938.

303. *Id.*

supportive feedback loop with food.<sup>304</sup> Thus, the specific causes of action that recur are negligent misrepresentation, intentional misrepresentation (fraud), nuisance, and product liability.<sup>305</sup> But these actions are used to advance new conversations about food-related liability. The three major areas of food discourse that are “pushing the development of food law and policy towards new conceptions of the role of food in American society and in the lives of individuals” are: (1) the long-term, as opposed to incidental and accidental, health impacts from food, that is, the impacts from *recurring consumption patterns*;<sup>306</sup> (2) overcoming the myopic view of food as merely a final edible product rather than the deliverable of a social and environmental process;<sup>307</sup> and (3) claiming food as more than nutrition, but also a meaningful part of cultural, religious, and political identity.<sup>308</sup>

Central to Professor Mortazavi’s analysis is a review of tort litigation that fits into each of these new areas of food discourse.<sup>309</sup> Suits over obesity at the very beginning of the century, and health-related labeling more recently, demonstrate a growing demand that courts and society engage with the notion that food can cause long term damages.<sup>310</sup> “The idea that individuals are responsible for those long-term harms, such as obesity and various other health issues, is competing against arguments that such choices are undermined by corporate actors who obscure meaningful consumer choices by creating information deficiencies or exploiting differences in bargaining power.”<sup>311</sup>

Like Professor Tai, Mortazavi focuses on CAFOs and GMOs to make out her point about the process-over-product view of food.<sup>312</sup> Mortazavi details cases alleging harm from food production, including negligence and nuisance suits over CAFOs,<sup>313</sup> and on misrepresentation around GMO food products.<sup>314</sup> The GMO cases do not primarily argue any food safety claims, but instead “take the view that consumers have a right to know if GMO products are in their food so that they can make informed choices about what type of foods and food systems they are supporting.”<sup>315</sup>

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304. *See id.* at 938–39 (“[M]uch of the current food litigation . . . [pushes] the development of food law and policy towards new conceptions of the role of food in American society . . .”).

305. *Id.* at 939.

306. *Id.*

307. *Id.* at 945.

308. *Id.* at 951.

309. *Id.* at 943.

310. *Id.* at 944.

311. *Id.*

312. *Id.* at 946.

313. *Id.* at 947–48.

314. *Id.* at 949.

315. *Id.* at 950.

*Wendinger*<sup>316</sup> also makes an appearance in Professor Mortazavi's analysis.<sup>317</sup> Although Mortazavi describes the legal issues at play, she uses the case to support one of her subtler points, that CAFO litigation can "do more than protect people or the environment from exposure to physical harm" and it can also "support a view that traditional, smaller scale farming plays a vital role in food production."<sup>318</sup> The *Wendinger* court does not consider relative farm size in its legal analysis, and it only briefly touches on the nature of the Wendingers' property as a farm, never mentioning the size or farming technique.<sup>319</sup> Nonetheless, Professor Mortazavi's point is correct because the ability of an individual, who is (or was at one time) a small-farm owner,<sup>320</sup> to engage with and at least partially prevail over a larger operation and its corporate partner,<sup>321</sup> demonstrates that tort can be a meaningful venue for food-policy discourse.

The final category of new food policy conversations is food as identity. Here, Professor Mortazavi again points to misrepresentation claims as tools for "vindicat[ing] dignitary rights and protect[ing] the ability to make informed, autonomous decisions."<sup>322</sup> Cases in this category include suits by those with religion-based dietary restrictions, other restrictions such as vegetarianism, or raw-food diets.<sup>323</sup> There is a case in which a woman who follows Muslim restrictions on pork consumption sued a vitamin manufacturer that claimed its pills were pork free when in fact they used pork-based gelatin.<sup>324</sup> Consumers also sued McDonald's for selling non-vegetarian French fries.<sup>325</sup> These cases have had mixed results, but they provide a deliberative benefit as they "tease out in more detail the religious and moral implications of food consumption for personal identity" or raise "concern[s] predominately as a liberty interest."<sup>326</sup>

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316. I do not mean for my attention to *Wendinger* to suggest that this case is a paragon of food policy litigation. Although it is a perfectly useful example of a number of legal issues within food law, it has not yet had any especially impressive influence on the field. According to a 2017 Westlaw search, other courts have cited to it 18 times, and 12 law review articles have also cited to it. The case is interesting because both Tai and Mortazavi gave it attention and cited to it for advancing larger issues in food law and policy.

317. Mortazavi, *supra* note 41, at 948.

318. *Id.*

319. See generally *Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546 (Minn. Ct. App. 2003) (discussing the way the Forsts' used their land for farming).

320. See *id.* at 549 ("Gerald Wendinger was born on and farmed the Wendinger land until the 1970s.").

321. See *id.* ("In 1994, the Forsts entered into an agreement with Wakefield Pork . . .").

322. Mortazavi, *supra* note 41, at 952.

323. *Id.* at 952–54.

324. *Id.* at 952–53.

325. *Id.* at 954.

326. *Id.* at 952.

*Tort as Democracy* concludes with two points about the indirect benefits of tort's democratic function. First, Professor Mortazavi shows how tort claims can be "an adversary and companion to the regulatory state," because "[t]ort and the administrative state have long coexisted in a mutually reinforcing dialectic—where one system moves and the other system often reacts."<sup>327</sup> By way of example, Mortazavi identifies legislative actions, such as mandatory calorie counts on restaurant menus, as regulatory responses to grievances originally aired in common law courts.<sup>328</sup> Second, Mortazavi describes the way in which tort litigation influences private behavior, even outside the deterrent effect of compensation.<sup>329</sup> This involves private behavior to "improve information sharing, product features, and informally 'preempt' the need for regulatory action."<sup>330</sup> Examples here include discontinuation of "natural" labeling<sup>331</sup> and introduction of third party auditing for production practice claims, such as "cage free" eggs.<sup>332</sup>

The food movement, according to Professor Mortazavi, is raising important issues about the role of food in our culture and as a part of our identity.<sup>333</sup> As such, food is not merely a source of both risk and benefit, but a part of our national and community dialogues.<sup>334</sup> Tort, as a venue for deliberative democracy, creates a uniquely equal and flexible forum for at least beginning these new discussions—and debates—about the role of food.<sup>335</sup>

Taken together, Professor Tai and Professor Mortazavi build a strong foundation for the common law as a central and essential feature of food law and policy. Professor Tai essentially demonstrates that tort is an effective way to achieve policy goals, and Professor Mortazavi additionally shows that the benefit of tort is more than meets the eye.<sup>336</sup> Tort is useful not only for achieving legal victories, but also for creating a platform for a necessary discourse that cannot take place as effectively in other policymaking arenas.

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327. *Id.* at 955.

328. *Id.* at 959.

329. *Id.* at 969.

330. *Id.*

331. *Id.* at 970.

332. *Id.* at 974.

333. *Id.* at 951.

334. *Id.* at 955.

335. *Id.* at 935–36.

336. *Id.* at 931.

*B. Value Hypocrisy and Policy Sincerity in the Food Movement and Common Law*

I hope that the concepts of value hypocrisy and policy sincerity will be a significant contribution to the general scholarship on procedural justice, deliberative democracy, and other non-consequentialist methods of policy analysis and design. I also expect that these concepts will be a necessary, though not sufficient, framework for advancing an affirmative and positive vision of the food movement.

I argue that in addition to legal victories and expanded discourse, the common law includes inherent features that allow participants to exercise the same values that motivate the food movement. In this way, win or lose, by bringing food law and policy arguments into the common law courts, litigants are partially realizing the same benefits—community empowerment, collaborative decision-making, and progressive traditionalism—they aim to realize through food system reform.<sup>337</sup> At the very least, if this Article’s earlier characterization of the food movement is not convincing, the common law system allows movement participants to pursue parallel efforts that can vindicate diverse goals in a way not possible through legislation and regulation.

Section II of this Article describes some of the values that motivate the food movement, and Section III describes characteristics of the common law. There is significant overlap. The food movement is motivated by individual empowerment facilitated by transparency and participation, a sense of place, progress rooted in traditions, and dialogic face-to-face relationships.<sup>338</sup> The common law provides, in fact requires, face-to-face debate in a surprisingly collaborative forum; community norms; and community acceptance of incremental changes that are based on existing practice and expectations.<sup>339</sup> Tort empowers plaintiffs through an opportunity to tell one’s own story and make one’s own argument.<sup>340</sup> Tort litigation puts a plaintiff and a defendant together; opponents must relate to one another, which forces dialogue and relationships.<sup>341</sup> It “creates a constant pressure on the parties to create a mutually satisfying relationship . . . .”<sup>342</sup> Through its public performance and transparency, the common law allows a community to hear both sides of a story and weigh in

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337. *See id.* at 931 (arguing that tort has value in shaping the way political actors conceptualize legal and policy issues around food).

338. *Id.* at 946, 975.

339. Bell, *supra* note 111, at 1218.

340. *Id.*

341. *Id.* at 1220.

342. *Id.*



on the process, formally through juries<sup>343</sup> and informally through community conversations.<sup>344</sup>

The consistency of values underlying the food movement is an important premise in the logic of fitting the food movement into the common law process. However, even if this Article paints too consistent a picture of the food movement's values, the common law can still play an important role. Dr. Phil Mount sees a much more diverse movement than I describe in this article, and he stresses the need for attendant governance.<sup>345</sup> "Given the multi-faceted priorities of farmers and consumers, establishing a broadly-based approach to governance," writes Dr. Mount, "involves reconciling diverse goals and values, rather than identifying shared goals and values."<sup>346</sup> To him, "collective decision making will reflect a diversity of interests, interpretations and priorities. As such, decisions will generate legitimacy more through a general satisfaction with the nature of the process rather than the nature of the consensus."<sup>347</sup> The common law, much more than legislation and regulation, provides space for disparate values and political goals. The common law is individualistic and collective, public and private, just like eating. The common law "is one bridge by which we pursue these simultaneous and inseparable interests."<sup>348</sup>

The food movement's motivations may indeed be inconsistent, but so is the common law. Professor Peter Bell nicely describes the common law by reminding his readers that "[a]n accurate portrait of a blurry scene is a blurry portrait."<sup>349</sup> Like his portrait, the common law "is inconsistent. It sends unclear messages. And, it reflects realities."<sup>350</sup> If the food movement is not a movement at all, if it does not share sufficient values, then perhaps the common law is an even more important instrument.

All of this value correspondence and institutional fit is unique, and certainly distinguishes the common law as a food-policy venue from other venues such as legislative and administrative decision-making.<sup>351</sup> Legislatures and administrators necessarily impose top-down requirements

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343. JAMES A. HENDERSON, JR. ET AL., *THE TORTS PROCESS* 6 (9th ed. 2017).

344. Bell, *supra* note 111, at 1218.

345. Mount, *supra* note 103, at 110.

346. *Id.* at 115 (citations omitted).

347. *Id.* at 116 (citation omitted).

348. Marc Feldman, Essay, *The Intellectual Ordering of Contemporary Tort Law*, 51 MD. L. REV. 980, 992 (1992).

349. Bell, *supra* note 111, at 1215.

350. *Id.* at 1214–15.

351. *See id.* at 1203, 1205 (explaining that neocontractual analysis exposes an emphasis on individuals and procedures, rather than relationships and substance).

on the food system.<sup>352</sup> Top-down impositions can achieve political goals, from labeling requirements to environmental restrictions. In many cases, they are necessary to achieving such goals, but they do not usually emerge from a deeply rooted sense of place or robust community dialogue.<sup>353</sup> The politics of administrative decision-making can lead to the “agency cost problem” and “suboptimal outcomes” when administrators lack knowledge about a policy problem.<sup>354</sup> Nevertheless, the common law can overcome these shortcomings by providing some additional accountability and individual empowerment.<sup>355</sup> For example, writing about environmental protection, Professor Thomas McGarity says that “[t]ort law corrects for a regulatory system that is too easily controlled by the very interests that it is supposed to be controlling.”<sup>356</sup> Furthermore, as Professor Mortazavi also noted, the common law gives the public direct access to justice on an individual’s own initiative, rather than limiting the already limited debate to pre-determined technical issues.<sup>357</sup>

### C. Value Hypocrisy and Policy Sincerity Applied

Legislation and regulation may, at times, fit awkwardly with the food movement, but they are still frequently necessary and appropriate for advancing the movement’s goals. The purpose of this Article is to introduce the idea of value hypocrisy and policy sincerity, not to rule out other tools for the food movement. Thus, a short survey of some food and farming policies through the lens of hypocrisy and sincerity can demonstrate the sort of inquiry that this new framework demands, irrespective of the general type of governance (e.g., common law, regulatory, or private).

What better way to apply a new framework than by starting at the beginning? Thomas Jefferson is the earliest, best champion of American agriculture, having memorably called farmers “the most valuable citizens . . . the most vigorous, the most independent, the most virtuous . . . .”<sup>358</sup> The “most spectacular victory” of Jefferson’s ideals was

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352. David Schoenbrod, *Protecting the Environment in the Spirit of the Common Law*, in *THE COMMON LAW AND THE ENVIRONMENT: RETHINKING THE STATUTORY BASIS FOR MODERN ENVIRONMENTAL LAW* 17 (Roger Meiners & Andrew Morriss eds., 2000).

353. *Id.*

354. Hylton, *Economic Theory*, *supra* note 160, at 676.

355. McGarity, *Regulation and Litigation*, *supra* note 147, at 372.

356. *Id.* at 373.

357. Michael Anderson, *Transnational Corporations and Environmental Damage: Is Tort Law the Answer?*, 41 WASHBURN L. J. 399, 409 (2002).

358. Letter from Thomas Jefferson, to John Jay (Aug. 23, 1785), <https://founders.archives.gov/documents/Jefferson/01-08-02-0333>.

the passage of the 1862 Homestead Act.<sup>359</sup> That Act gave 160 acres of western lands to any person who would actively farm that land.<sup>360</sup> Using Jefferson's expressed values for comparison, one could argue that the motivations for this Act were to develop independent, self-sufficient citizens. Certainly the Act did create more farms and farmers.<sup>361</sup> But the primary tool in the Act—presentation of free land to all comers—does not itself reflect economic self-sufficiency.<sup>362</sup> It may instead have undermined that value by grounding agriculture on government supports.<sup>363</sup>

In more recent times, the role of complex farm financing has become a matter of public and private policy.<sup>364</sup> Finance is necessary for small farm growth, large farm sustainability, tenants and owners, and others involved in food production.<sup>365</sup> Financing undoubtedly advances many goals of food movement participants, but it also challenges some of their motivating values. Financing through purely private arrangements or through government-sponsored programs circumscribes the independence and the rural character of farming and belies self-sufficiency.<sup>366</sup> If one ascribes to M. Thomas Inge's assessment of agrarian values, finance also draws farming closer to, rather than further from, the "urban life, capitalism, and technology [that] destroy our independence and dignity while fostering vice and weakness within us."<sup>367</sup>

Over two decades after its passage, controversy around the Organic Food Production Act<sup>368</sup> illustrates some additional concerns. The Act enabled the now well-known USDA organic seal, which represents a limited range of allowable agricultural production methods, including restrictions on the type of pesticides and fertilizers that are permissible.<sup>369</sup> Some organic food advocates oppose this system, even though it promotes practices that are more closely aligned with the goals of the food movement.<sup>370</sup> Opposition stems from what critics see as the Act's

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359. Richard S. Kirkendall, *Up to Now: A History of American Agriculture from Jefferson to Revolution to Crisis*, 4 AGRIC. HUM. VALUES 4, 5 (1987).

360. The Homestead Act of 1862, H. R. Res. ch. 75, 37th Cong. (2d. Sess. 1862).

361. SCHNEIDER, *supra* note 20, at 4.

362. *See id.* (describing the Homestead Act as a "safety valve" for farmers).

363. *But see id.* ("Nevertheless, the image of an independent and self sufficient land owner . . . perseveres.").

364. *Id.* at 217.

365. *Id.*

366. *Id.*

367. *Id.* at 4–5.

368. Organic Foods Production Act of 1990, 7 U.S.C. §§ 6501–23 (2012).

369. SCHNEIDER, *supra* note 20, at 664.

370. *E.g.*, Tai, *supra* note 58, at 1077 (indicating that the Organic Foods Production Act partially captures the values of "working with natural systems").

“reductionist approach[, which] fails to fully capture the holistic worldview of organic agriculture.”<sup>371</sup> Likewise, a single federal scheme is a questionable tool when “advocates of organic food differ in why they value organic food production.”<sup>372</sup> Some argue that the corporate commodity food industry controls the organic program;<sup>373</sup> others argue that a federal program that tries to emulate what otherwise developed as a small-scale innovation is simply impossible.<sup>374</sup> In either case, there is a mismatch and perhaps some value hypocrisy in this program.

While there is a certain sense of libertarianism that might tint these critiques of mostly government-driven agriculture policy and the recommendation of common law strategies, that is not the intent. Its individual and case-by-case focus rather than generally applicable restrictions are libertarian arguments for the common law. And, libertarian ideals are tied up in the values that motivate the food movement.<sup>375</sup> But there are also examples of purely private instruments that fit the food movement as awkwardly as regulatory options.

Wal-Mart’s buy-local initiative is one example.<sup>376</sup> At first glance, when a retail behemoth determines to purchase more of its food locally, it is a major triumph for the food movement. But in practice, “it is less clear whether [Wal-Mart’s buy-local initiative] fulfills some of the other, non-tangible goals of the movement, such as creating a sense of connection and community between consumers and farmers and educating consumers about where their food comes from and how it is produced.”<sup>377</sup> More local food is a political goal for the food movement, but the Wal-Mart case shows that a policy achievement is worth less when the instrument does not reflect motivating values.

It is necessary for legislators, regulators, and private businesses to advance food policy, but it is not sufficient. Food progress also demands general participation because that is the heart of food, and why it is a salient issue with which we all intimately engage. Professor Hamilton writes that “[d]emocracy isn’t something out there others do for us; it is something

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371. *Id.*

372. *Id.*

373. *See* SCHNEIDER, *supra* note 20, at 666–67 (emphasizing the food movement advocates’ desires to maintain the integrity of the organic food system).

374. *See id.* at 664 (explaining that the responsible government agencies experience “conflicting loyalties” and “significant lobbying pressures”).

375. *See supra* Part II (discussing libertarianism in the food movement).

376. *See* Pollan, *supra* note 58, at 5 (indicating that many advocates of the food movement question the integrity of Wal-Mart’s buy-local programs).

377. Coit, *supra* note 102, at 62–63.

close by that we are part of and share with others.”<sup>378</sup> This is similarly true for the common law. It invites us to engage, and when we do, demands that we share the experience—sometimes unpleasantly and sometimes satisfyingly—with our opponents and our community. This is the sentiment of food and the sentiment of common law, and therefore the confirmation of policy sincerity.

#### *D. Caveats, Limitations, and Warnings*

I use the terms *value hypocrisy* and *policy sincerity* to explain this new perspective. I do not mean to implicate any baggage from the philosophical literature or other scholarship that discusses the deeper meanings of hypocrisy and sincerity. Rather, using both words in their vernacular sense, I hope to highlight two main points. The first point is that society seems to have distaste for hypocrisy because it exposes a disconnection between words and deeds.<sup>379</sup> Hypocrisy is unwelcome because it is unsatisfactory even though it does not necessarily make deeds less effective.<sup>380</sup> It might make deeds less meaningful; that is, deeds become mere instruments. The crux of this first point, then, is that deeds—policy instruments—can be more than mere instruments. Policy instruments can also be value expressions, and implementation of these instruments can activate values in the same way achieving a policy goal can activate values.

The second point of using the words *hypocrisy* and *sincerity* is to express how an approach to policymaking can be instrumental even in non-instrumentalist pursuits. Where hypocrisy is unsatisfying, it can undermine trust in the deeds that do not connect to words. In policy terms, when a policy instrument shares values with a policy goal—when it is sincere—it is satisfying. Satisfaction with a policy instrument can lead to greater support for that instrument. Philosopher John Dewey, for instance, was a champion of deliberative democracy not only because it was a good tool for producing social goals, but also because it was a satisfying way to produce these goals and therefore to build confidence and effectiveness.<sup>381</sup>

A few other caveats are also called for here. First, this section is intended to demonstrate the way that the common law calls on the same or very similar values as those motivating the food movement. I hope that this

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378. Hamilton, *Food Democracy*, *supra* note 72, at 22.

379. Jillian Jordan, Roseanna Sommers & David Rand, *The Real Problem With Hypocrisy*, N.Y. TIMES (Jan. 13, 2017), <https://www.nytimes.com/2017/01/13/opinion/sunday/the-real-problem-with-hypocrisy.html>.

380. *Id.*

381. JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS: AN ESSAY IN POLITICAL INQUIRY 158–60 (Melvin L. Rogers eds., 2012); Galperin, *Trust Me*, *supra* note 184, at 439.

is a tight connection, but I do not mean to imply that common law is somehow the same as, or a substitute for, an improved food system. Simply using common law causes of action to address food policy is obviously not sufficient.

Second, with respect to the characteristics I have identified in the common law, I do not mean to imply that things such as community empowerment and collaborative decision-making are the purpose of the common law. Perhaps they are, but that is a conversation better carried on by others. Rather, I hope to highlight these characteristics of the common law as emergent benefits of the process.

Third, in describing the policy sincerity that the common law provides vis-à-vis food policy, I absolutely do not mean to limit food advocacy to common law litigation. I hope the consideration of *hypocrisy* and *sincerity* will add to existing scholarship, such as that of professors Tai and Mortazavi, and enhance interest in the common law as a food policy tool. I hope that this consideration will not detract from efforts to use legislative, administrative, and private governance mechanisms as well.

Finally, a severability clause is needed. Although I have addressed both food policy and value hypocrisy together, I hope that each piece can stand on its own. This Article makes two distinct arguments. The first argument is that policy instrument choice should consider the fit between the values that motivate a policy and the values embodied within the instrument. The second argument is that there is a good fit between the values that motivate food law and policy and the values embodied within the common law.

## V. CONCLUSION

All the talk of motivating values and fundamental purpose could give the impression that philosophical formalism should rule the food movement, and *a priori* dogmas should restrict the movement's legal and policy efforts. The opposite is true. This Article is meant to deepen a pragmatic approach to policy. Many activists today—those I have elsewhere called pragtivists—describe their work as pragmatic, but they tend to aim only for “what works” to achieve nominal, goal-centric victories, while ignoring the important aspects of instrument choice and development.<sup>382</sup> Value sincerity does not demand that policy advocates or policymakers tie their work to any ideologically pure set of values.

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382. See generally Galperin, *Trust Me*, *supra* note 184, at 452 (positing that “pragtivists” disregard the complexities of instrument choice and development).

Quite the contrary, value sincerity recognizes the diversity of motivating values, whatever they are, and proposes that policy advocates and policymakers consider the way that these values, whatever they are, are reflected in legal instruments. This reflection, coherence, or sincerity is not a philosophical imperative. It is a pragmatic opportunity for actualizing values, whatever they are, twice over: once by achieving the policy goal that stems from those values, whatever they are; and again by utilizing a legal instrument that itself exercises the values, whatever they are.

This pragmatic depth is achieved by eschewing value hypocrisy in pursuit of policy sincerity. This Article argues that, while a given policy instrument may help achieve a policy goal, it is important to look beyond the goal and ask what values motivate it in the first place. Where a policy instrument helps achieve the goal—but in so doing undermines or ignores motivating values—it is policy hypocrisy. The values embedded in or reflected by the instrument do not match the values that inspired the goal. For example, Wal-Mart's local food initiative may facilitate the policy goal of increasing local food consumption, but it does not match the values of face-to-face relationships, transparency, and community empowerment that inspired the local food goal in the first place. Advocates and policymakers can achieve policy sincerity when they help people to satisfy their values both in using a legal instrument and, when that instrument accomplishes its policy goal, in seeing the impacts of a policy. The case of *Wendinger v. Forst Farms, Inc.* may be an example insofar as the case was a legal victory against industrial agriculture and represented the values of individual empowerment, community coherence, and progressive traditionalism.<sup>383</sup>

In addition to sketching some ideas about policy hypocrisy and value sincerity, this Article further suggests that participants in the food movement may find a sincere match between their motivating values and the nature of the common law as a policy instrument. The food movement is unquestionably a diverse and sometimes conflicting assemblage, but it is roughly tied together by the values of individual empowerment, transparency and participation, sense of place, progress rooted in traditions, and dialogic, face-to-face relationships. Existing scholarship shows the ways in which the common law is already an effective tool for achieving some policy goals of the food movement. But the common law is also a sincere policy fit because it enables face-to-face and collaborative debate grounded in community norms, striving for incremental progress that is rooted in tradition.

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383. *Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546, 549 (Minn. Ct. App. 2003).

Today's incredibly divisive politics is probably driven in some part by the fact that we talk about political games and who wins, but we too rarely talk about what we ultimately want and why. If nothing else, an effort to avoid value hypocrisy and find policy sincerity forces greater consideration of motivating values—of what we really want. Perhaps this is too optimistic, as unfounded optimism is a chronic problem of mine, but if we attend to values, we may find that the American public has more in common than our politics project.