BAYLEN J. LINNEKIN

Biting the Hands that Feed Us

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How Fewer, Smarter Laws Would Make Our
Food System More Sustainable

Baylen J. Linnekin

Washington | Covelo | London

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Foreword

Few consumers realize the law's impact on our ability to produce and access certain foods. But food is a heavily regulated field—safety rules control the production and sale of food, labeling laws regulate the information that must, may, and may not appear on a package, and zoning ordinances restrict where food may be grown and where and when it may be sold. These examples are just the tip of the iceberg.

Recently, consumers have begun to recognize the significance of these laws and have started examining the policy decisions surrounding them. For some, this is due to changing eating habits, such as the growing interest in purchasing foods that were produced more sustainably, or products prepared without the use of certain ingredients. Others may have come into contact with this system when their favorite farm or dairy was forced to shutter its doors, not because its products were unsafe but because of the crushing burden of complying with regulations. *Biting the Hands that Feed Us* provides a groundbreaking account of this flawed system. Baylen Linnekin skillfully examines laws at various levels of government that, despite good intentions, operate in ways that make the food we produce and consume less sustainable, rather than more so.

I first met Baylen at a food law conference at Northeastern Law School in January 2011, where he spoke about current and historical food safety laws that, paradoxically, have made our food supply less safe.

I could see immediately that Baylen possesses a genuine curiosity about the consequences of our system of food regulation, and that he brings a necessary critical perspective to the discussion. He is a gifted storyteller, weaving together historical facts, personal anecdotes, and legal explanations in a way that makes this field compelling to a broad audience.

Baylen and I bonded over a shared frustration with the many laws that privilege large, industrial food producers at the expense of small, nonconventional food producers. These laws can stifle opportunity, even as their benefits are dubious or at least unproven. Examples of these contradictions are rife, and many are recounted in this book. They include USDA rules that require the use of nitrates or nitrites in the production of salumi, even though small-scale production does not necessitate such additives for safety. [p. 2] (What is salumi, you may ask? Read on to find out!) Or FDA on-farm requirements that could force small and large farmers alike to spend thousands of dollars to comply—rules that, as you’ll learn, “won’t put a stop to foodborne illness, but . . . threatened to put an end to sustainable farming.” [p. 27] There are even laws that make it impossible for people to grow and consume their own food, such as city ordinances that prohibit growing vegetables in a front yard. [p. 148]

Another crucial issue that I’m sure will incense readers concerns laws that cause the waste of healthy, wholesome food. Forty percent of the food produced in the United States goes to waste. For each pound of food wasted, we waste all of the energy, water, and other resources that went into producing that food, causing a tremendous environmental impact. Yet many laws either cause us to waste food or make wasting it the easy decision. *Biting the Hands that Feed Us* includes several maddening examples, such as the fruit and vegetable grading standards sanctioned by the U.S. Department of Agriculture. Grading is based on the visual appearance of produce rather than on its safety, healthfulness, or flavor, yet it dictates the purchasing decisions of most retailers. Stores

refuse to buy apples that are not graded “fancy” or carrots not graded “U.S. No. 1.” [p. 126] As Baylen describes, these grading standards are among many senseless rules that lead us to waste more food and have a less sustainable food system.

Baylen has a strong orientation toward “food freedom,” or the idea that individuals should have the right to grow, buy, and consume the foods of their choice. Indeed, he is recognized as a national leader in the food freedom movement. Supporting the food freedom agenda generally means limiting the government’s role in the food supply. Indeed, as Baylen shows, “the continued growth of the nation’s food rules has not made for a more sustainable food system.” [p. 194] In this book, he outlines his litmus test for how food regulations can and should be adapted to foster sustainability—by eliminating rules that promote unsustainable outcomes and those that prohibit sustainable practices. While I would not always prescribe the same policy solutions as he does, I see great value in learning about these failed regulations and engaging in robust debate about potential solutions. Baylen’s ease in relaying these compelling and frustrating stories demonstrates the absurdities in our current approach to regulating the food system and establishes the pressing need for reform. Though the structure of such reform is subject to debate, *Biting the Hands that Feed Us* provides the catalyst to stimulate this vital discourse.

In addition to shining a light on the many food laws that do not support sustainability, *Biting the Hands that Feed Us* presents readers with a call to action. Throughout the book, you will see how citizen outrage and organizing has helped halt legislation or influenced agency decisions. Such organizing led to (i) an FDA reversal of its spent-grain rules that, if enacted, would have made it nearly impossible for breweries to continue their age-old practice of donating spent grains for use as animal feed [p. 31], and (ii) FDA’s decision to rewrite its rules implementing the Food Safety Modernization Act (FSMA) after citizen pushback

about the potential effects on small farms. [p. 28] Food is personal, which makes this topic approachable, especially when described in Baylen's clear and straightforward manner. People know what they like to eat, how they like to eat it, and where they like to buy it. Baylen shows that when regulations thwart those choices, individuals can affect policy decisions if they make their voices heard.

Biting the Hands that Feed Us presents fascinating illustrations of food laws gone wrong, showcasing Baylen's knowledge of the legal issues and ability to convey their relevance to everyday eating. This book is written in his unique, witty, and insightful voice, and will both inspire readers to understand these struggles and empower them to take action.

—Emily Broad Leib, assistant clinical professor of law, director of the Harvard Food Law and Policy Clinic, and deputy director of the Center for Health Law and Policy Innovation, Harvard Law School

Preface

In this book, I take a fresh look at many of the things that are wrong with America's food system—specifically, rules that hinder sustainable food practices and promote unsustainable ones—and propose much-needed changes. The book's focus on ways that government rules hamper sustainability may be a new one for many readers. But its recommendation that the solution to many sustainability issues in the food realm is *fewer* rules—rather than more—is likely to strike most readers as new, unusual, and even a little unsettling. But I believe strongly that readers who truly want a more sustainable food system should—and will—embrace my arguments in favor of eliminating these bad rules. Consider, for example, that if rules senselessly shut out farmers who want to sell meats or produce at their local farmers market—as you'll learn, they very often do—then those rules are broken. They're not serving farmers or consumers. Instead, they're what's biting the hands that feed us. The correct response isn't to build new rules on top of the old, dysfunctional ones. Rather, it's to throw out the broken rules. As I argue throughout this book, we need to remove the shackles that bind America's food system to ensure a more sustainable food future. Notably, although I believe many food rules hamper sustainability, this is not a book about eliminating all rules that govern food. I support many food rules and suspect readers will agree with my arguments in favor of

those rules, which I describe throughout the book and in greater detail in chapter 5.

I think you'll see that I want many of the same things that other supporters of sustainable food want. Unlike some writers, though, I see laws and regulations as frequent barriers to sustainability. Simply piling on more and more rules, as commentators often suggest, isn't going to solve many of the problems with our food system. Instead, doing so will exacerbate these problems. The alternative I propose is this: I think it's easier, smarter, more just, and less costly to remove all of the anti-sustainability regulations that helped get us into this mess in the first place. People waste food, for example. But as you'll see in chapter 3 of this book, oftentimes that's because rules mandate that they do so, or make it more difficult or expensive for them not to do so. Eliminate the rules that promote food waste, and we'll see it decrease dramatically.

My journey to write this book has taken several years. In law school, about ten years ago, I decided that I would make food law my life's work. Delving deep into the past and present of many terrible food laws during my academic studies while also tending an organic garden plot in Washington, D.C.'s oldest and largest victory garden, in the city's Glover Park neighborhood—coupled with my long-standing interest in civil liberties—perhaps made that focus inevitable. After graduating in 2009, I moved to Fayetteville, Arkansas, where I spent the year studying for a master of laws degree in agricultural and food law. Once I moved back to the District, I put the degree to good use by starting a nonprofit group, Keep Food Legal, that worked to promote the idea that people have the right to make their own food choices.

Since that time, I've written hundreds of online columns for *Reason*, a libertarian magazine, on the pervasive impact of many federal, state, and local food laws. Many of the columns I've written there and elsewhere—including at outlets such as the *Boston Globe*, *Huffington Post*, *New York Post*, *Baltimore Sun*, and *Playboy*, and scholarly legal publications such as

the *Wisconsin Law Review* and *Hastings Constitutional Law Quarterly*—have served to stimulate the ideas that form the basis of this book. Over the years, my writings have focused on topics as varied as cottage food laws, animal welfare, soda taxes, barbecue fumes, school lunches, food safety, GMOs, “ag gag” laws, urban agriculture, local meat processing, food trucks, dietary guidelines, raw milk, obesity, farm subsidies, food deserts, beer laws, food waste, and countless others. Along the way, I’ve been fortunate to have the opportunity to speak out on many of these same issues on MSNBC, HuffPost Live, Fox Business Network, numerous NPR affiliates, BBC Radio, and other radio shows and television channels, and have been quoted by leading news outlets such as the *Wall Street Journal*, *Washington Post*, *Los Angeles Times*, Reuters, and many others.

In recent years, I’ve also taught a variety of food-policy courses to undergraduate students at American University, my alma mater (both for my bachelor’s and law degree). And I’ve taught a food law and policy seminar at George Mason University Law School for the past few years. The excellence of the students at both schools means I’ve been fortunate to have the opportunity to discuss many of the issues in this book with interesting—and interested—young adults. The location of these schools—both are situated in the Washington, D.C. area—also means that I’ve had the opportunity to tap into the area’s vast network of experts to serve as guest lecturers in my classes. That list so far has included congressional staffers, journalists from publications such as *National Geographic*, the *Washington Post*, and *Politico*, and policy experts from the Humane Society of the United States, the Environmental Working Group, and many other nonprofits. And I’ve been able to take advantage of other unique resources in the area. For example, I’ve taken my undergraduate students on a tour of First Lady Michelle Obama’s White House garden, and my law students to a farm-to-table restaurant and a local craft brewery.

I also speak regularly at many law schools and universities around the country. In winter 2014, I was invited by Yale Law School student organizers to take part in a workshop at Yale's annual environmental law conference, *New Directions in Environmental Law*. The workshop at which I presented focused on recent progress in environmentally sound food policies. Despite the focus of the workshop, I sounded an ominous tone. Progress was scant, I noted. So many federal, state, and local food rules were environmentally *unsound*, I told attendees, that there was perhaps more work that needs to be done than ever before. My remarks at that workshop served as an inspiration for many of the ideas that appear in this book. Around that same time, I also met with Emily Turner Davis, my editor at Island Press, to discuss some of these ideas. We'd had an initial conversation thanks to Prof. Michael T. Roberts, who leads UCLA Law School's Resnick Program on Food Law and Policy. Prof. Roberts had very kindly suggested that Emily speak with me about a book for Island Press. Without Michael and Emily, this book simply wouldn't exist. I'm grateful to both for seeing promise in me and in my ideas.

Later that same year, I was invited by Prof. Emily Broad Leib, who founded and leads Harvard Law School's pioneering Food Law and Policy Clinic, to moderate a panel on sustainable and humane meat production as part of a conference cosponsored by two student groups at the law school. The panel's focus on reducing regulatory barriers for sustainable meat producers was the impetus for me to begin to dig deeper into the implications of freeing the nation's sustainable livestock farmers from needlessly burdensome regulations, something I discuss at length in chapter 1 of this book. The panel, unintentional as the timing was, coincided with the U.S. Department of Agriculture's (USDA) controversial recall of millions of pounds of meat from a USDA-inspected meat processor in California, an issue I also discuss in some detail in chapter 1.

Since agreeing to write this book, I've had the opportunity to discuss many of the issues you'll read about here at conferences held at Duke Law School, University of Kentucky Law School, and Seattle University Law School, and in talks at the University of Chicago Law School, University of Idaho Law School, and many other law schools and other forums around the country. These conferences and lectures, the excellent questions and feedback I've received from students, faculty, and other audience members alike, and the inspiration I've taken from my fellow speakers have helped me to hone many of the arguments I make in this book.

I've also had the opportunity to play a small role in three legal cases I discuss in the book. The first is a recent Supreme Court case that centered on California raisins (yes, including the claymation ones from the 1980s). The second is a federal court case that centers on skim milk labeling and the First Amendment. The third case, also now in federal court and also focusing on the First Amendment, concerns restrictions on agricultural whistle-blowing. You'll learn much more about these cases in chapter 2.

This work—focused as it has been on so many different food-law issues—has helped me to better learn to look beyond the obvious. To take a fresh look, as I noted here earlier. Often, when it comes to food policy in this country, that's a skill that seems to be sorely lacking. Consider, for example, that even food laws that appear to have little or nothing to do with the environment can have truly unintended consequences for sustainability. Take the U.S. Food and Drug Administration's (FDA's) 2015 decision to ban partially hydrogenated oils that contain trans fat. These oils are typically found in processed foods such as frostings and coffee creamers that don't exactly form the cornerstone of any diet that might be pegged as grounded in sustainability.

Still, although the public health community, the media, and the public were generally receptive to the law, many rainforest and animal-

welfare advocates worry about what exactly will replace partially hydrogenated oils in processed foods. “The biggest beneficiary of the demise of trans fat has been palm oil, which has seen a dramatic increase in demand as a result,” says Paul Shapiro, vice president for farm animal protection with the Humane Society of the United States.¹ “Most of the palm oil in the world comes from Indonesia and Malaysia, typically from plantations now sitting on former rainforests.” Those rainforests, Shapiro explains, are home to threatened populations of animals such as orangutans, Sumatran tigers, pygmy elephants, Sumatran rhinos, and clouded leopards, to name a few. When the FDA banned partially hydrogenated oils, it didn’t consider the ban’s impact on Sumatran tigers. Yet the future of the tiger and many of its fellow Indonesian and Malaysian rainforest dwellers is threatened today by the FDA’s ban.

You’ll learn about many, many other unintended consequences throughout this book. Most often, they’re more direct than the connection between banning trans fats and harming rainforests and the creatures that live there. As you’ll see, however well-meaning a law is, it can have dramatic unintended consequences. You’ll also see that many laws appear not to be very well-meaning at all. Regardless of intent, you’ll learn that laws that might seem “good” or “bad” often have a similar effect: they handcuff sustainable food producers, create tons of food waste, or even prohibit people like you from engaging in sustainable food practices at home.

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