Transparency for Food Consumers: Nutrition Labeling and Food Oppression

Andrea Freeman

I. INTRODUCTION

Transparency for consumers through nutrition labeling should be the last, not the first, step in a transformative food policy that would reduce dramatic health disparities and raise the United States to the health standards of other nations with similar resources. Nonetheless, transparency in the food system is a key focal point of efforts to improve health by providing consumers with necessary information to make good nutritional choices, as well as to achieve sustainable food chains and ensure food safety and quality. In fact, nutrition labeling on packaging and in restaurants is the centerpiece of policy designed to decrease obesity, a condition many health advocates consider to be the most urgent public health crisis of the twenty-first century.

1 Assistant Professor, University of Hawai'i William S. Richardson School of Law. I am grateful to Kim Kessler and Michael Roberts for their invitation to think, speak, and write about this topic, and for the inspired and important work that they do; to the participants in the inaugural Harvard-UCLA Food Law Conference, particularly Erika George, David Kessler, and Stephanie Tai; to the organizers and panelists of the American Journal of Law & Medicine symposium The Iron Triangle of Food Policy; to Fran Miller for her comments on an earlier draft; to Angela P. Harris for her support; and to Fern Ann Grether for exceptional research assistance.


resulting increased transparency about food ingredients has led to some changes in industry practices and allowed many middle- and upper-income consumers to make informed choices about the products they purchase and consume. Unfortunately, however, research reveals that increased nutritional information does not improve health.

Most consumers do not use nutrition labeling to ameliorate their food choices, and those who do are already in good health. Further, low-income consumers who must select foods based entirely on availability and affordability derive few, if any, benefits from transparency. This is because their choices reflect structural conditions, not lack of information. Instead, transparency primarily benefits health-conscious, wealthier constituents as well as food corporations, which incur minimal costs from labeling in comparison to the expense that other, more impactful reforms would impose.

To eliminate or decrease socioeconomic and racial health disparities, structural changes that expand access to healthy food, regulate harmful food ingredients, and create opportunities for more active lifestyles are necessary. Therefore, to the extent that it replaces more meaningful structural reform, transparency’s primacy in food policy deepens the health divide between wealthy and poor individuals, and between whites and other racial groups. The immediate goal of transparency in the food system should accordingly not be to provide consumers with information about food ingredients and processes, but to expose the partnerships between the food industry and the government that lead food policy to prioritize private profit over public health.

This paper begins by describing nutrition labeling requirements and the research on their effectiveness. It then explores the obstacles that prevent information provision from effecting positive change. It interrogates how alliances between the government and corporations lead to food oppression, which arises from facially neutral laws and policies that disproportionately harm socially subordinated groups, and examines how racial stereotypes and popular perspectives on health exacerbate these harms. It concludes by proposing new directions in food policy that would render transparency more useful for all consumers and reduce health disparities.
II. NUTRITION LABELING

Americans consume one third of their calories and spend half of their food budgets on food prepared outside the home. This practice of eating pre-packaged and restaurant food, particularly from fast food establishments, correlates with obesity and other indicators of poor health. In an attempt to improve the health outcomes associated with eating food cooked outside the home, Congress enacted Section 4205 of the Patient Protection and Affordable Care Act. This provision requires chain restaurants to list the calorie content of their standard food and drink items on menus and menu boards, thereby ensuring that restaurant patrons receive information about menu items that overlaps with what manufacturers must display on packaged food products.

Food manufacturers, under the Nutrition Labeling and Education Act (NLEA), must include a label titled “Nutrition Facts,” displaying the amount of calories, sugars, fat, saturated fat, vitamins A and C, calcium, iron, fiber, and carbohydrates contained in a packaged food product. Manufacturers may also voluntarily post other nutritional content. In 2014, the Food and Drug Administration (FDA) proposed amendments to the NLEA that would create a new line on the label for added sugars (previous labels did not distinguish between added and natural sugars, such as those that come from fruit); adjust the serving size to reflect realistic portions; and make the caloric count...
more visible. Many food and health advocates view these amendments as an important victory for consumers.

Research reveals, however, that nutrition labels and restaurant calorie counts have little or no impact on consumer choice and health. Both teenagers and adults notice calorie counts when restaurants provide them, but neither group alters their food selection in response. Similarly, behavioral economic strategies designed to encourage healthy selections by making certain products more accessible and prominent in lunchrooms or restaurants do not appear to reduce overall caloric consumption, and instead may, in some instances, increase it. For example, one study demonstrated that consumers did, in fact, make healthier selections based on the addition of healthy items to a fast food restaurant menu. Nonetheless, they then compensated for making a healthy choice, such as a sandwich instead of a burger, by adding an unhealthy item, such as fries or a milkshake, to their meal. Ironically, the healthy selection served to assuage the consumer’s guilt about unhealthy eating, opening the door to further unhealthy choices. Similarly, another study found that adding a healthy option, like a salad, to an otherwise unhealthy fast food menu increases selections of unhealthy products even when the consumer does not purchase and consume the salad. Merely viewing the healthy option on the menu satisfies the eater’s need for good health practices.

Nutrition labels on packaged foods sold in stores also do not appear to improve health outcomes by reducing consumers’ intake of calories, saturated fats, or sodium. Instead, the evidence suggests that labeling only facilitates better choices for middle and high-income consumers, the Whole Foods shoppers who already engage in healthy eating habits. Consequently, the labels fail to result in an overall change in consumer

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11 See id.
15 Wisdom, supra note 14, at 164.
16 Id. at 170.
17 Wilcox, supra note 14, at 382.
18 Id. at 381.
In addition to socioeconomic class, gender can determine the use and effect of labeling. Women are more likely than men to read nutrition labels and, while women usually use nutritional information to attempt to lose weight, men often employ it to increase their caloric intake, or “bulk up.”

However, although nutrition label requirements appear to have only a minimal impact on consumer health and behavior, they do influence the conduct of manufacturers, who sometimes reformulate ingredients in anticipation of new rules to gain a competitive advantage. Several large food companies, for example, altered their products in reaction to trans fat labeling requirements and the 2005 Dietary Guidelines’ recommendations of a specific daily intake of whole grains. Additionally, changes implemented in response to the guidelines’ advice to eat foods lower in fat content significantly increased the market share of fat-modified cheese products and cookies. Chain restaurants similarly reacted to labeling requirements by reducing the calories in many of their non-core menu items. It is not clear, however, that these changes by manufacturers and restaurants result in better health outcomes for consumers, as more nutritious products may only appeal to already health-conscious consumers. Moreover, in a phenomenon branded “the Snackwell’s effect,” some people binge on foods, such as low-fat Snackwell’s cookies, in the mistaken belief that these foods are healthy due to their low-fat content. In fact, the reverse is true, as these types of foods usually contain high amounts of sugar and chemicals that disrupt metabolism and engender other negative health consequences.

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32 See Jacqueline I. Aaron et al., Paradoxical Effect of a Nutrition Labeling Scheme in a Student Cafeteria, 15 NUTRITION RES. 1251, 1256 (1995); Martha T. Cooklin et al., College Students’ Use of Point of Selection Nutrition Information, 20 TOPICS CLINICAL NUTRITION 97, 98 (2005); Lisa J. Harnack et al., Effects of Calorie Labeling and Value Size Pricing on Fast Food Meal Choices: Results from an Experimental Trial, 5 Int’l J. BEHAV. NUTRITION & PHYSICAL ACTIVITY 1, 3 (2008).
35 See KEYSTONE CTR., THE KEYSTONE FORUM ON AWAY-FROM-HOME FOODS: OPPORTUNITIES FOR PREVENTING WEIGHT GAIN AND OBESITY 73 (2006), available at http://archive.onha.org/knowledge/publications/us_keystone-center-obesity-forum_may-2006.pdf (“Between 1991 (before the implementation of the NLEA) and 1995 (after implementation), the number of available fat-modified cheese products tripled, and the market share for fat-modified cookies increased from zero percent of the market to 15%.”).
37 See id. at 75.
production of foods labeled low-fat and, by implication, healthy, can therefore lead to poorer health outcomes.

Nutrition labels may similarly contribute to this type of consumer confusion because the information they present is difficult to decipher. To improve consumers’ comprehension, an FDA study recommends that, instead of dividing calories and other nutritional content into servings, labels should post the total number of calories that are in the package. Even with this improvement, however, it is likely that consumers would not fully understand the significance of the numbers that appear on labels cross-listed with calories and other food components. Clearer labeling might, however, lead to significant changes. For example, David Kessler, the former commissioner of the FDA who designed and oversaw the implementation of the first nutrition label, proposes that instead of displaying the required information on the side of packaged foods, manufacturers should prominently feature the three top ingredients, the number of calories per serving, and the amount of additional ingredients on the front of packages. Research demonstrates that this type of plain language can alter consumer behavior. For example, in one study, six Baltimore convenience stores posted large, brightly colored signs on refrigerators containing sweetened beverages that stated how long it would take to walk off the calories in each drink. There was a corresponding drop from 98% of adolescent shoppers choosing sugary beverages to 89%.

Similarly, a study conducted at Massachusetts General Hospital cafeteria labeled foods with red, yellow, and green symbols intended to evoke responses to food items ordinarily associated with traffic symbols. Green (go) signified the healthiest options, including fruits and vegetables; yellow (proceed with caution) indicated a need for moderation in consuming those foods; and red (stop) signaled items containing little or no nutritional value. To boost these symbols’ effectiveness, posted signs encouraged customers to choose according to the colors and provided more detailed nutritional information.

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31 See Lando & Lo, supra note 30, at 244.


34 See Sara N. Bleich et al., Diet-Beverage Consumption and Caloric Intake Among US Adults, Overall and by Body Weight, 104 AM. J. PUB. HEALTH, e72, e72 (2014); Sara N. Bleich et al., supra note 33, at 2417; see also I Have To Walk How Many Miles to Burn Off This Soda?, JOHNS HOPKINS BLOOMBERG SCH. PUB. HEALTH (Oct. 16, 2014), http://www.jhsph.edu/news/news-releases/2014/i-have%20to-walk-how-many-miles%20to-burn-off-this-soda.html. It is still problematic, however, that almost 90% of teenagers entering the store purchased an unhealthy sweetened beverage.


36 Id.
This experiment led to significant decreases in purchases of red items and corresponding increases in the selection of green items. Despite these promising results, however, nutrition labeling in any form faces a number of serious limitations to its potential to alter behavior and health for most consumers.

III. OBSTACLES TO THE EFFECTIVENESS OF NUTRITION LABELING

There are a multitude of factors that contribute to individuals’ decisions regarding what foods to buy and consume, of which nutrition labeling is only one. Therefore, even when consumers have the luxury—in terms of time, resources, and choice—to consider nutrition information, external factors may inhibit the usefulness of this information. For example, behavioral economics research indicates that the acquisition of information simply may not have the power to increase self-control, particularly when a person is hungry. Further, individuals tend toward impulsivity in food selection, which allows environmental factors at the point of purchase, such as colors, smells, and product positioning, to exert greater influence over decision-making than rational thinking about diet and health. Finally, people possess a limited capacity to process new information that may be exhausted when the time to make food choices arrives.

Food preferences are also resistant to change because the food industry has invested millions in perfecting the exact measurements and proportion of sugar, salt, and fat that will render a food addictive. This addiction is powerful enough to overcome rational thinking about the health impact of consuming a food perfectly balanced in sugar, salt, and fat, such as McDonald’s McGriddles, a breakfast sandwich consisting of egg, bacon, and cheese layered between two sweet pancakes studded with syrup. Further, food corporations devote extensive resources to studying how to motivate consumption once hunger is satiated. They use the results of these studies to

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37 Id.
38 Id.
39 See, e.g., NICOLE LARSON & MARY STORY, ROBERT WOOD JOHNSON FOUND., MENU LABELING: DOES PROVIDING NUTRITION INFORMATION AT THE POINT OF PURCHASE AFFECT CONSUMER BEHAVIOR? 1, 3 (2009) (“Although consumers want nutrition information to be available, several other factors, aside from nutrition concerns, influence their menu selections. Most notably, food prices, taste and convenience are frequently reported as important influences on menu selections, and these factors are often at odds with healthful eating.”); see also Melissa A. Z. Knoll, The Role of Behavioral Economics and Behavioral Decision Making in Americans’ Retirement Savings Decisions, 70 SOC. SEC. BULL. 1, 2 (2010), available at http://www.ssa.gov/policy/docs/ssb/v70n4/v70n4p1.html (noting in the context of retirement savings that “[e]ven if decision makers had complete and accurate information ... empirical findings suggest that they would still make suboptimal savings decisions as a result of issues related to the second category, heuristics and biases”).
develop marketing tactics that successfully increase the desire to eat junk food, such as M&Ms, regardless of the body’s lack of need for surplus calories. 44

Even more importantly, for many consumers, taste, price, and convenience matter more than nutritional content. 45 Moreover, although price and convenience are salient factors in all consumers’ food decisions, they are determinative for those who lack access to a range of foods. For example, most individuals living in low-income urban communities have seen their grocery stores relocated to suburbs. 46 These distant locations often do not fall on bus or train lines. 47 In their place, corner stores sell poor quality produce at inflated prices. 48 These establishments usually sell only one brand of each type of food offered, such as soup stock or pasta, making choice based on nutritional content impossible. The fact that these products often contain harmful preservatives that increase shelf life further compounds this harm. 49

Additionally, the predominance of fast food restaurants in these neighborhoods ensures that residents have no alternatives to the unhealthy, high calorie items on offer. 50 Realistically, fast and cheap junk foods often represent the most prudent choice for individuals who must struggle to stretch thin food budgets to maximize the intake of calories required to fulfill overwhelming work and family responsibilities. Finally, public schools provide students with an array of unhealthy foods in their lunchrooms, making them an ideal site of exposure to unhealthy foods. 51, 52

44 Id.

45 See generally Cheryl L. Albright et al., Restaurant Menu Labeling: Impact of Nutrition Information on Entree Sales and Patron Attitudes, 17 HEALTH EDUC. Q. 157 (1990); Harnack et al., supra note 22, at 1 (finding that including calorie information and value size pricing did not significantly impact fast food meal choices); Jane Kolodinsky et al., The Use of Nutritional Labels by College Students in a Food-Court Setting, 57 J. AM. C. HEALTH 297 (2008) (finding that price, convenience, calories, fat, and nutrition labels play roles in food purchases); Amy M. Lando & Judith Labiner-Wolfe, Helping Consumers Make More Healthful Food Choices: Consumer Views on Modifying Food Labels and Providing Point-of-Purchase Nutrition Information at Quick-Service Restaurants, 39 J. NUTRITION EDUC. & BEHAV. 157 (2007) (finding that more studies are necessary to determine whether alternative presentations of nutrition information would be helpful); Maureen O’Dougherty et al., Nutrition Labeling and Value Size Pricing at Fast-Food Restaurants: A Consumer Perspective, 20 AM. J. HEALTH PROMOTION 247 (2006).

46 See Andrea Freeman, Fast Food: Oppression Through Poor Nutrition, 95 CALIF. L. REV. 2221, 2226 (2007) (“While the growth of fast food in poor urban neighborhoods has increased steadily, supermarkets stocking fresh, high-quality food have simultaneously relocated to the more spacious and affluent suburbs.”).

47 See Sarah Treuhaft & Allison Karpyn, The Grocery Gap: Who Has Access to Healthy Food and Why it Matters, FOOD TRUST 8, http://thefoodtrust.org/uploads/media_items/grocerygap.original.pdf (“Residents in many urban areas (including Seattle, Central and South Los Angeles, and East Austin, Texas) have few transportation options to reach supermarkets. Inadequate transportation can be a major challenge for rural residents, given the long distances to stores.”); see also id. at 21 (“Until more systemic solutions are instituted, transportation barriers to fresh food markets need to be removed. Community groups and planners should evaluate existing transportation routes and improve coordination of bus routes, bus stops, and schedules or add vanpools or shuttles to maximize transit access to grocery stores and farmers’ markets.”).


49 See Andrea Freeman, Behavioral Economics and Food Policy: The Limits of Nudging, in BEHAVIORAL ECONOMICS, LAW & HEALTH POLICY (forthcoming Fall 2016) (on file with author). Ingredients banned in other countries but still legal and commonly used here include petroleum-based artificial dyes, olestra, brominated vegetable oil, potassium bromate, azodicarbonimide, butylated hydroxyanisole (BHA) and butylated hydroxytoluene (BHT), synthetic growth hormones rBGH and rBST, and arsenic. Susanna Kim, 11 Food Ingredients Banned Outside the U.S. that We Eat, ABC NEWS (June 26, 2013), http://abcnews.go.com/Lifestyle/Food/11-foods-banned-us/story?id=19457237#10.

50 See Freeman, Fast Food: Oppression Through Poor Nutrition, supra note 46, at 2225.
often as a result of the USDA’s need to support subsidized commodities, such as meat, dairy, wheat, rice, corn, and soybeans, the last two primarily through secondary markets of high fructose corn syrup and oils.51

All of these structural factors prevent nutrition labeling from improving food choices and health for individuals living on or near the poverty line. In 2013, more than fourteen million people in the United States lived in poverty, and many others lived in near-poverty.52 Members of racialized groups, such as Blacks, Latinos, Indians, Native Hawaiians and Pacific Islanders are overrepresented among the poor and in federal nutrition programs.53 Therefore, to the extent that food policy focuses on nutrition labeling and other strategies targeted at individuals to improve health, instead of structural reform, that policy is a manifestation of food oppression.

IV. FOOD OPPRESSION

Food oppression is institutional, systemic, food-related action or policy that physically debilitates a socially subordinated group.54 It is present where there is a facially neutral law, policy, or government action that disproportionately harms a socially marginalized group that experiences health disparities in food and nutrition-related deaths and diseases. To constitute food oppression, the law, policy, or action must result at least in part from corporate influence, and the disproportionate harm that it causes must erroneously appear to arise from cultural or individual, not structural, factors, because of racial stereotypes and mistaken beliefs about what motivates or causes health-related choices and outcomes.55 Food oppression falls heaviest on

51 The USDA is responsible for both agricultural commodities and the federal nutrition programs, including school lunchrooms. See Andrea Freeman, Farm Subsidies and Food Oppression, 38 SEATTLE U. L. REV. (forthcoming 2015); Juliana F.W. Cohen et al., Impact of the New U.S. Department of Agriculture School Meal Standards on Food Selection, Consumption, and Waste, 46 AM. J. PREVENTIVE MED. 388, 392 (2014).
53 Andrea Freeman, Transparency for Food Consumers & Food Oppression 33, n. 90, in UCLA-Harvard Food Law and Policy Conference, Transparency in the Global Food System: What Information and to What Ends? (Oct. 24, 2014) (unpublished article), available at https://www.law.ucla.edu/~media/Files/UCLA/Law/Pages/Publications/RES_PUB_Panel%202014Oct2014.ashx [hereinafter Transparency for Food Consumers & Food Oppression] (internal citation omitted) ("While only 9.7% of whites lived below the poverty line in 2012, 27.2% of Blacks, 25.6% of Latinos, and 11.7% of Asian Americans did."); id. (internal citation omitted) ("In 2013, 26% of Black households and 24% of Latino households had higher rates of food insecurity than the national average."). People who have ever received food stamps through the Supplemental Nutrition Assistance Program are 31% Black, 22% Latino, 18% other, and 15% white. See id. (citing Rich Morin, The Politics and Demographics of Food Stamp Recipients, PEW RES. CTR. (July 12, 2013), http://www.pewresearch.org/fact-tank/2013/07/12/the-politics-and-demographics-of-food-stamp-recipients). Additionally, “Black women and children make up 19.8% of WIC participants and only 12.0% of the population; Latinas represent 11.5% of WIC recipients but only 16.3% of the population." Id.; see also USDA, WIC PARTICIPANT AND PROGRAM CHARACTERISTICS 2012 FINAL REPORT 1, 27 (2013), available at http://www.fns.usda.gov/sites/default/files/WICPC2012.pdf [hereinafter WIC PARTICIPANT REPORT].
individuals who experience marginalization along multiple axes, including race, class, gender, sexuality, ability, age, gender identity, and immigration status. 56

Facially, the policy choice to showcase nutrition labeling and other strategies directed toward influencing individual behavior, such as education and behavioral economics, is a race-neutral one. Although there is some recognition of racial health disparities in government literature outlining objectives for improving health outcomes, such as Healthy People 2020, 57 laws and regulations that mandate labeling and other information provision do so in a completely race-neutral way, focusing solely on manufacturers’ and restaurant owners’ duties, not consumers’ social identities. Despite this appearance of neutrality, however, the impact of this policy choice falls heaviest on the communities who face the greatest structural obstacles to healthy eating. These communities include residents of low-income, urban Black and Latino neighborhoods and individuals living on lands colonized by the United States, including Hawai‘i and Puerto Rico, among others.

The adverse impact of nutrition labeling on marginalized communities manifests itself in several ways. At best, nutrition labeling has no effect on most members of these communities, because they simply are not in a position to exercise choice in food selection based on nutritional content due to the environmental and financial constraints described above. This absence of impact is not, however, an absence of harm, because the harm is located in the focus on nutrition labeling, not the degree to which it influences consumer behavior. Policy designed to improve health by altering consumer conduct effectively obfuscates and negates the primacy of structural determinants of health, and stands in the way of meaningful reform.

Identifying nutrition labeling as an essential pathway to improving health supports the popular misperception that good health reflects a combination of sufficient information, intelligence, and willpower. Society commonly reads robust health as a manifestation of an individual’s positive characteristics. However, this widely held belief is wrong on both broad and narrow scales. Social psychology reveals, for example, that personality predicts very few, if any, of the decisions we make. 58 Instead, studies demonstrate, we respond to situations in pre-determined ways unrelated to what we consider to be our own, particularized philosophies and perspectives, or disposition. 59

This insight is especially relevant in the context of food because external factors almost entirely shape access to healthy food and, even where some degree of choice exists, social position and financial conditions created by historical and present discrimination circumscribe those choices.

Some of the historical events and present conditions that relegate certain groups to poverty and ill health are slavery; the invasion, occupation, and colonization of island nations; the theft of land from indigenous and Mexican people; the perpetuation of racial myths and stereotypes through media and popular culture; punitive and

59 Id. at 1658-68.
restrictive immigration laws; devaluing of Black and Latino/a lives by law enforcement and the criminal justice system; and an inadequate social safety net. Although advocates for both food and social justice often do not draw these connections, all of these powerful forces play a part in determining communities' and individuals' ability to eat in a way that sustains good health. The obfuscation of these links allows for an insistence on nutrition labeling as a solution to poor eating and bad health that perpetuates harmful myths about the importance of information and willpower in relation to food selection.

Further, focusing on individual agency instead of the roles played by corporate and government actors in limiting food choices reduces the likelihood that the government will enact structural reform. The conclusion to this paper proposes a number of steps that the government could take to improve the health of marginalized communities and reduce health disparities.

There are significant racial and socioeconomic health disparities that buttress the contention that food policy focused on consumer behavior disproportionately harms socially marginalized communities. Blacks, Latina/os, Indians, Pacific Islanders, Native Hawaiians and other racialized groups experience greater health problems than whites. Specifically, there are pronounced racial disparities in diseases and deaths related to food and nutrition, including obesity diagnoses, high blood pressure, diabetes, high cholesterol, and cancers. Many factors contribute to

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63 See, e.g., Alvaro Alonso et al., Diary Intake and Changes in Blood Pressure over 9 Years: The ARIC Study, 63 EUR. J. CLINICAL NUTRITION 1272, 1274 (2009).

these disparities, including access to care, racial bias in treatment, environmental harms prevalent in segregated neighborhoods, mass incarceration, medical research priorities, colonialism, and correlation with poverty. Food policy that focuses on consumer behavior is another important factor that is instrumental in creating and widening health disparities.

In the United States, a desire to satisfy the interests of the food and agricultural industries drives much of food policy. These industries derive their influence over policy through campaign contributions, lobbying, and a revolving door between corporate and administrative positions. Their efforts yield impressive results, including control over the wording of the federal Dietary Guidelines; low standards for school lunches, despite considerable public pressure to increase them; and telling children what to eat."

68 See generally Ctr. for Responsive Politics, Influence & Lobbying: Food & Beverage, OPENSECRETS.ORG, http://www.opensecrets.org/industries/index.php?ind=NO1 (last visited May 14, 2015). In the 2008 campaign cycle, food and beverage companies donated over $16 million to political candidates. In 2013-14, the top campaign contributors in these industries were the National Restaurant Association, Coca-Cola, McDonald’s, Darden Restaurants (including the Olive Garden), Pepsi, Bloomin’ Brands (including Outback Steakhouse), CKE restaurants (including Carl’s Jr. and Hardee’s), Wendy’s and the American Beverage Association. See id.

69 In 2014, the industry spent over $15.7 million on lobbying. The top lobbyists were Coca-Cola, Pepsi, the National Restaurant Association, McDonald’s and Mars. See id.


72 See Mary Clare Jalonick, Pizza Is a Vegetable? Congress Says Yes, NBC NEWS (Nov. 15, 2011), http://www.nbcnews.com/id/45306416/ns/health-diet_and_nutrition/t/pizza-vegetable-congress-says-yes/#.VCn3AxbpdtU (“Food companies that produce frozen pizzas for schools, the salt industry and potato growers requested the changes, and some conservatives in Congress say the federal government shouldn’t be telling children what to eat.”).
subsidization of food commodities that leads to unhealthy eating habits;\textsuperscript{73} and the dismantling of pesticide regulations, even where legislatures have voted to maintain them.\textsuperscript{74}

Significantly, nutrition labeling imposes relatively small costs on food corporations in terms of printing and posting and, in its present form, appears not to lead to lost sales. Therefore, in comparison with other possible laws and regulations designed to improve health, such as the removal of harmful chemical preservatives from packaged foods, nutrition labeling is a bargain for food corporations. Nonetheless, the industry remains vigilant in its efforts to minimize the reach and impact of food labeling laws. For example, movie theatres, after extensive lobbying by the National Association of Theatre Owners, remain exempt from nutrition labeling requirements imposed on other food sellers, despite the high content of unhealthy oils in movie theater popcorn.\textsuperscript{75} Similarly, food companies have so far successfully lobbied to prevent the adoption of David Kessler’s proposal to require clearer and more prominently placed nutrition labels.\textsuperscript{76} The content and form of nutrition labeling requirements thus appear to be additional manifestations of corporate influence over government policy.

The success of corporations in achieving their food policy goals, however, relies in part on public acquiescence to the health paradigms underlying government efforts to combat obesity and other health problems. These public perceptions of the proper path to better health arise from popular and pervasive framing of health issues as products of individual decisions.\textsuperscript{77} This type of blaming is most apparent in the context of weight and obesity, where it is common to associate excessive weight with poor eating choices,\textsuperscript{78} despite evidence that corporations play a significant and deliberate

\textsuperscript{73} See Freeman, Farm Subsidies and Food Oppression, supra note 51.

\textsuperscript{74} For example, on the island of Kaua’i in Hawai’i, the mayor vetoed a law regulating pesticide use after the city council passed the controversial bill by a vote of six to one, despite substantial lobbying efforts by the affected corporations, Syngenta Hawaii, DuPont Pioneer, Dow AgroSciences and BASF. See Natasha Lennard, How the Monsanto Protection Act Snuck into Law, SALON (Mar. 27, 2013, 4:44 PM), http://www.salon.com/2013/03/27/how_the_monsanto_protection_act_snuck_into_law. See generally State & County QuickFacts: Kaua’i County, Hawai`i., U.S. CENSUS BUREAU (Feb. 5, 2015), http://quickfacts.census.gov/qfd/states/15/15007.html. The Kaua’i ordinance also sought to protect its residents from potential health hazards from genetically modified (GM) crops. See Kaua’i Mayor Vetoes Popular Ordinance Safeguarding Public from Pesticides, EARTHJUSTICE.ORG (Oct. 31, 2013), http://earthjustice.org/news/press/2013/kaua-i-mayor-vetoes-popular-ordinance-safeguarding-public-from-pesticides. Large agricultural corporations have been very successful at blocking local and federal regulation of genetically modified organisms (GMOs). In March 2013, President Obama signed into law the Farmer Assurance Provision, also deemed the ‘Monsanto Protection Act’ as section 735 of H.R. 933, the Consolidated and Further Continuing Appropriations Act, 2013. See Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, § 735, 127 Stat. 198, 231-32 (2013). The provision allows major agricultural corporations to bypass standard regulatory requirements regarding new GM crops by instructing the Secretary of Agriculture to “immediately grant temporary permit(s) or temporary deregulation” upon a farmer, grower, farm operator or producer’s request. Id. at 232. The provision eliminates judicial review, even upon a finding that a crop poses health harms. See id.


\textsuperscript{76} See Tavreinsie, supra note 10 (stating that Kessler’s changes have faced opposition, especially his push to place nutrition labels on the front of food items).

\textsuperscript{77} See infra pp. 14-15.

role in causing and perpetuating obesity. 79 Even before the obesity crisis, however, people associated illness with poor choices. For example, the attribution of AIDS transmission to the choice to lead a gay lifestyle and the homophobia this perspective embodied led to tragic consequences, as the government delayed funding for AIDS research while thousands of people died. 80

In fact, it is rare for the public to associate sickness with environmental and structural factors under any circumstances. For example, even when communities experience the harmful side effects of industrial pollution, they often become marginalized and blamed for their own ill health. This allows corporations to exploit racism and indifference to poverty by deliberately locating their most toxic enterprises in poor neighborhoods of color, where others will associate the resulting harms to health with the residents’ social defects instead of the companies’ acts. 81 Similarly, support for nutrition labeling stems from an internalized belief that people are responsible for their own health and an optimistic view that sufficient information will transform shopping and eating habits. Unfortunately, however, even the most detailed and prominently placed information cannot alter the structural forces and corporate tactics that determine eating habits.

Popular views about the relationship between eating, weight, and personality traits receive reinforcement from the proliferation of racial stereotypes that portray obesity and related health conditions as endemic to certain groups. For example, most overweight characters on television are Black. 82 One example of a common racial trope in television is the “sassy Black woman.” 83 An overweight version of this character first appeared on shows from the 1970s and 1980s, such as What’s Happening!!, 84 Good Times, 85 and Gimme a Break!. 86 More recent popular shows, including How I Met Your Mother, 87 The Big C, 88 and Glee, 89 continue to feature her. The negative

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79 See generally Benforado, supra note 58, at 1689-1742.
82 See Greenberg et al., Portrayals of Overweight and Obese Individuals on Commercial Television, 93 AM. J. PUB. HEALTH 1342, 1342 (2003); see also Gregory Fouts & Kimberly Burggraf, Television Situation Comedies: Female Weight, Male Negative Comments, and Audience Reactions, 42 SEX ROLES 925, 927 (2000); Susan Himes & J. Kevin Thompson, Fat Stigmatization in Television Shows and Movies: A Content Analysis, 15 OBESITY 712, 713 (2007).
implications of this sassy Black woman’s weight (that she is lazy and unattractive) diminish her positive qualities (that she is outspoken and honest).

Similar stereotypes about Hawaiians and Pacific Islanders lead to discrimination based on weight that can lead to serious health consequences and social neglect. For example, a study of Tongans and Pacific Islanders living in the United States revealed their frustrations in dealing with a Western doctor fixated on their obesity. One participant in the study explained, “In reality, our wellness challenge is not obesity, but to live and work in the U.S. legally, obtain decent paying jobs with safe working conditions, have access to caring legal representation, and to tap into opportunities for education and quality child care for our children so they can go to college instead of being victims of community violence.”

Moreover, obesity and related health problems among Native Hawaiians arise from the disruption of their diets after the American overthrow of their monarchy that led to the near obliteration of traditional food practices. After its subsequent occupation of the Hawaiian Islands, the United States sought to increase consumption of American junk foods, such as spam, and eliminate reliance on locally grown, traditional foods. The solution to Native Hawaiians’ poor diets thus lies in complex approaches to sovereignty and independence, not consumer education.

Other popular racial stereotypes, such as the welfare queen, also mask the realities faced by individuals with limited or no access to privilege and political process. This stereotype suggests that poor black mothers are greedy, lazy, and indifferent to their children’s wellbeing, instead of constrained by racism and poverty. All of the factors outlined above—the facially neutral character of nutrition labeling that belies its disproportionate impact on marginalized communities; significant racial and socioeconomic health disparities; successful efforts by food and agricultural

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91 Id.

92 Id.


94 See ROBERT JI-SUN Ku ET AL., EATING ASIAN AMERICA: A FOOD STUDIES READER 326 (2013) (stating that SPAM has particular importance due to its association with the American militarization of Hawaii); see also Noa Helela, Ha, GENIUS, http://genius.com/Noa-helela-ha-annotated (last visited May 14, 2015) (“We are boxed up/like a can of spam/Ingredients: ham, pork, precooked native people, separated chicken fat, suffocation, and sodium nitrate/Nutrition facts: happiness, air, self-respect 0 grams/bloody fists, alcohol, destruction/It’s over 9000!/Basically, nothing worth breathing./But I don’t want to be an emergency food/farm-raised in immersion schools/to preserve the flavor of my native tongue/and used in time of war/so they can serve us up/in bite sized body bags.”).

corporations to influence food policy; and pervasive perspectives on health combined with racial stereotypes that create the illusion of personal responsibility for health and discourage structural reform—establish that the primacy of nutrition labeling in federal food policy is a form of food oppression. The conclusion of this Article offers a few proposals to dismantle or mitigate the effects of this oppression.

V. CONCLUSION

There are a number of directions food policy could take that would reduce health disparities and improve health outcomes generally. All of them involve change relating to corporate or government, not individual, conduct. First, and most importantly, the FDA and the USDA should operate independently of industry influence. Public health should be their top priority. This mandate should guide reforms that include: de-subsidization of commodities that fuel the markets for non-nutritious foods such as fast food, sweetened beverages, and processed foods; bans of extremely harmful food additives; limits on food ingredients linked to less serious but problematic health conditions; the establishment of higher standards for school lunches and other government assistance programs, including the elimination of the distribution of unhealthy foods through the Women, Infants and Children Nutrition Program (WIC); government-sponsored efforts to increase access to healthy food in all communities through financial support for grocery stores in underserved areas; minimum healthy food requirements for stores that are the sole purveyors of produce in food deserts; government funding for farmers markets, community supported agriculture programs, and urban agriculture; the building of playgrounds, recreation centers, and parks in depressed neighborhoods accompanied by efforts to keep these spaces safe for children and youth to play; and tangible support for traditional agriculture in Hawai’i and Puerto Rico.

Although altering many of the factors responsible for health disparities requires social movements and change at the highest level of politics, it is possible that greater awareness of the structural determinants of food choice would bring the United States closer to meaningful structural reform. Therefore, education through media and other forms of popular culture about these problems from a critical race and class perspective is important. Coalition building across social justice groups is also essential to the formation of a broader, critical food justice movement. To the extent that labeling can do some good, it should be clear and direct. Finally, where food consumers lack choice, the government’s responsibility is not merely to provide information, but to implement change until that choice comes into being.