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# Oprah Winfrey v. Texas Cattlemen, Food Libel Laws in the United States and the Constitutionality of the Texas False Disparagement of Perishable Food Products Act

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**Oprah Winfrey v. Texas Cattlemen, Food Libel  
Laws in the United States and the  
Constitutionality of the Texas False  
Disparagement of Perishable Food Products Act**

By

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Senior Honors Thesis

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## Introduction

In 1996, Britain experienced an outbreak of Bovine Spongiform Encephalopathy, commonly known as Mad Cow Disease. Cattle initially contracted the disease and twenty-three people subsequently died from eating the contaminated beef of these cattle.<sup>1</sup> Although at the time there had been no trace of the disease in the United States, anxieties ran high among Americans who were fearful of the chance that the disease could spread overseas. All aspects of the media thrived on discussion of the possibility of the disease emerging in the United States, including the popular Oprah Winfrey Show.

On April 16, 1996, Winfrey aired a segment of her show titled, “Dangerous Foods.” Winfrey was joined by animal rights activist Howard Lyman, along with a representative from the National Cattlemen’s Beef Association and William Hueston, a United States Department of Agriculture expert on Mad Cow Disease. The four discussed the issue of cows being fed the remains of other cows, which is the direct cause of the disease. Lyman emphasized the danger of U.S. beef and Winfrey declared in front of television viewers that she would never consume a hamburger again. After the show aired, cattlemen in Texas claimed the statements that had been made injured them. The price of cattle dropped and they believed that the statements made by Winfrey and Lyman tarnished their reputation and that of the whole beef industry. They decided to sue under the Texas law, False Disparagement of Perishable Food Products Act. The case went to trial in 1998 at the United States District Court for the Northern District of Texas at Amarillo.

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<sup>1</sup> “Oprah Free Speech Rocks.” *CNN*, February 26, 1998. Accessed March 15, 2011. [http://articles.cnn.com/1998-02-26/us/9802\\_26\\_oprah.verdict\\_1\\_mad-cow-disease-bovine-spongiform-encephalopathy-human-version?\\_s=PM:US](http://articles.cnn.com/1998-02-26/us/9802_26_oprah.verdict_1_mad-cow-disease-bovine-spongiform-encephalopathy-human-version?_s=PM:US).

The Texas law under which the cattlemen attempted to sue Winfrey and Lyman is just one of a series of state food libel laws that have been drafted in the United States since 1989. Colloquially deemed as “Veggie Libel” laws, these laws attempt to provide protection for producers of perishable food products from accusations that suggest their particular product is unfit for human consumption. In addition to Texas, the states of South Dakota, Georgia, North Dakota, Oklahoma, Ohio, Mississippi, Louisiana, Idaho, Florida, Colorado, Arizona, and Alabama all have food disparagement statutes.

Since the first law was devised by Colorado in 1991, the so-called “Veggie Libel” laws have been the topic of much discussion in the legal world. The main focus of debate is whether or not these laws violate the right to freedom of speech protected by the First Amendment. Key precedents established by the Supreme Court cases, *New York Times v. Sullivan*, *Bigelow v. Virginia* and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* have formed the legal discussion. In the *Sullivan* case, the court determined that commercial speech in the form of paid advertisements was entitled to protection under the freedom of speech clause. It also established that it was necessary for the American public to endure a degree of falsehood in order to encourage public debate. The *Bigelow* case established that advertisements that are crucial to communicating information should be protected, even if that information alludes to something that is illegal in one state but legal in another. Finally, the *Virginia State Pharmacy* Case under the ruling of Justice Harry Blackmun determined that there should be protection for the “flow of information” process involved in commercial speech in which a speaker communicates information to a consumer. This case is the foundation for the extension of First Amendment protection to commercial speech.

When considering the protection of commercial speech, Americans should question if “Veggie Libel” laws possibly violate this protection precedent. It seems plausible that Lyman and Winfrey acted as speakers and Winfrey’s audience and viewers as consumers. If various laws seek to prohibit what they did, it is arguable that this is prohibiting the “flow of information” that the court granted worthy of First Amendment protection. Indeed the history of Winfrey’s trial points to the conclusion that “Veggie Libel” laws, like that of Texas, are unlawful attempts to hinder public debate on commercial issues that are crucial to consumers.

### **Constitutional Protection of Commercial Speech**

In the case, Texas Beef Group vs. Oprah Winfrey and Howard Lyman, Winfrey and Lyman were initially sued under the Texas Statute, False Disparagement of Perishable Food Products. This statute along with the statutes of twelve other states intend to provide protection for producers of food products from false libelous statements made against them which might destroy the integrity of their products. Supporters of these laws argue that they are constitutional because they are similar to human Libel and Slander laws, which allow a person to sue another person who has made false statements that were intended to discredit his or her reputation. However, critics argue that these food libel laws essentially violate the First Amendment Freedom of Speech clause. If the critics are correct, then Winfrey and Lyman’s comments would fall under what has come to be known as the Commercial Speech provision of the freedom of speech clause of the First Amendment.

In 1791, the states ratified the first ten amendments to the Constitution. The first of these ten Amendments guarantees freedom of speech for all American citizens.<sup>2</sup> Freedom of speech and the other rights protected under the First Amendment are known as “expressive freedoms.”<sup>3</sup> In the 20<sup>th</sup> century, freedom of speech has expanded to include for protection of Commercial Speech through various Supreme Court Decisions. For over a century, the courts protected only political speech by individuals.<sup>4</sup> In time, the clause has been extended to protect other forms of communication, such as self-expression or symbolic speech.<sup>5</sup> Commercial speech and obscene speech were not entitled to any protection under the First Amendment.<sup>6</sup> Exclusion of these forms of speech began to change later on with various cases that came before the Supreme Court.

In 1942, *Valentine v. Chrestensen* began the process of commercial speech being included in the First Amendment by the courts first defining what commercial speech was.<sup>7</sup> Chrestensen, who had attempted to distribute a printed advertisement announcing the display of his former United States Navy submarine, sued the police commissioner of New York City for preventing him from doing so.<sup>8</sup> The commissioner of New York City had informed Chrestensen that to do so would be in violation of a New York City Sanitary Code, and that it would only be legal if the circular “consisted solely of a protest

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<sup>2</sup> David Schultz, John R. Vile, Michelle D. Deardorff, *Civil Rights and Liberties* (New York: Oxford University Press, 2011),16.

<sup>3</sup> Ibid..

<sup>4</sup> Ibid., 278.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> *Valentine, Police Commissioner of New York v. Chrestensen*. 316 U.S. 52, (Supreme Court of the United States, 1942).

<sup>8</sup> Ibid.

against political action.”<sup>9</sup> In response to this warning, Chrestensen decided to instead prepare a two-sided notice that had printed on one side a political protest and on the other side a copy of the advertisement for his submarine. In the initial hearing of the case at the District Court of the United States for the Southern District of New York, Chrestensen argued that the city of New York and the Commissioner were in violation of the Fourteenth Amendment, which allows for due process and equal protection for all citizens.<sup>10</sup> Chrestensen was issued the injunction that he sought and it was affirmed on appeal. However, the United States Supreme Court reversed this decision when Valentine appealed the injunction.

The Supreme Court, upon hearing the case, reversed the order that prohibited the Police Commissioner from interfering with Chrestensen’s circulation of his advertisement on the streets of New York City. The Supreme Court stated that, “The legislative body was free to regulate to what extent one could pursue an occupation in the streets if it did not infringe upon free speech. In this instance, free speech violations could not have occurred because respondent’s only purpose in adding the political protest was avoidance of an ordinance.”<sup>11</sup> The Supreme Court recognized that had Chrestensen merely printed his circular to voice his political protest, he would be entitled to protection from the legislative body’s interference because they would have violated his right to freedom of speech. However, because he only included the political speech in order to make it appear as if he was in compliance with the New York City Sanitary Code, he was not entitled to protection under the freedom of speech clause. The political protest did not

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<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

override the commercial advertisement. In other words, the Supreme Court upheld that while political speech was entitled to protection under the First Amendment, commercial speech was not.

But as freedom of speech rights expanded during the 1960s, the distinction between commercial speech and political speech faded. During the Civil Rights era the media, particularly newspapers, came to play a critical role in the movement. *The New York Times* had become an outlet in the North for civil rights groups. In one particular instance, on March 29, 1960, the newspaper printed a full-page advertisement titled “Heed Their Rising Voices,” which requested monetary donations to the cause to defend Dr. Martin Luther King Jr., who was being indicted for perjury in Alabama at the time.<sup>12</sup> The advertisement alluded to harsh treatment of civil rights’ protestors carried out by the police force of Montgomery, Alabama and other southern cities. It stated that, “In Montgomery, Alabama, after students sang ‘My Country Tis of Thee’ on the State Capitol Steps, their leaders were expelled from school and truckloads of police armed with shotguns and tear gas ringed the Alabama State College Campus.”<sup>13</sup> The advertisement later commented that, “Small wonder that the Southern violators of the Constitution fear this new, non-violent brand of freedom fighters...”<sup>14</sup> In other words, the advertisement was attempting to create an image of peaceful protestors being forcibly and illegally put down by various police forces.

Although no one was explicitly named in the advertisement, Montgomery City Commissioner L.B. Sullivan was one of a few who believed that the criticism of the

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<sup>12</sup> Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (New York: Vintage Books, 1991), 2.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*



actions by the police force was a defamation of not only his reputation, but his position as supervisor of the police department as well.<sup>15</sup> The day after the advertisement was printed, Sullivan wrote a letter to the *New York Times* stating that, “the advertisement charged him with ‘grave misconduct’ and ‘improper actions and omissions as an official of the City of Montgomery.’”<sup>16</sup> He then requested that the *New York Times* publish, “a full and fair retraction of the entire false and defamatory matter.”<sup>17</sup> He also sent letters to four individuals whose names were included in the advertisement as a part of members of the Southern community who had endorsed it. They were all African American ministers in Alabama and they would later testify that until Sullivan informed them of the advertisement, they had never even known of its existence.<sup>18</sup> Following Sullivan’s letter to the newspaper, the attorneys representing *The New York Times* replied to him stating that, “We are somewhat puzzled as to how you think the statements [in the ad] reflect on you.”<sup>19</sup> Sullivan neglected to respond to this letter, and instead on April 19, filed a libel action in the Circuit Court of Montgomery County against *The New York Times* Company and the four Alabama ministers whose names had appeared in the ad. Sullivan believed that the statements made in the advertisement “libeled” him and he sought damages in the amount of \$500,000, a large amount of money for the time.<sup>20</sup> Two weeks later, Alabama Governor Pattison filed an almost identical suit demanding one million dollars in damages for the same advertisement. Eventually, three other men sued for libel

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<sup>15</sup> *Ibid.*, 11.

<sup>16</sup> *Ibid.*, 12.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*, 13.

<sup>19</sup> *Ibid.*, 12.

<sup>20</sup> *Ibid.*, 13.

because of the same case, Earl James, the mayor of Montgomery; Frank Parks, another city commissioner; and Clyde Sellers, a former commissioner.<sup>21</sup>

The Plaintiffs' attorneys decided it would be wise to include the four ministers in the lawsuits because "having the ministers in there would prevent the *Times* from removing the cases from the state court to a federal court."<sup>22</sup> Sullivan's case was heard in November of 1960. Because the case took place in Alabama, Sullivan and his attorneys had the advantage of securing an all-white twelve-man jury.<sup>23</sup> It took the jury a mere two hours and twenty minutes to come to a verdict. They ruled for the plaintiff against both *The New York Times* and the four Alabama ministers and awarded Sullivan the full \$500,000. This decision was later upheld when the Alabama Supreme Court heard it on appeal in August 1962.<sup>24</sup>

*The New York Times* and the four Alabama ministers appealed their case to the Supreme Court of the United States, which agreed to hear the case in January 1963. The trial began on January 6, 1964. The issue in the case was whether Sullivan stood as a representative for the whole police department and therefore, whether a jury would be justified in finding that a charge against the terrible actions of the police was an ultimate charge against Sullivan.<sup>25</sup> In essence, it was up to the Supreme Court Justices to decide the issue of whether or not Sullivan deserved reparations and ultimately, whether the advertisement deserved protection under the Constitution's Freedom of Speech Clause.

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<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid., 23.

<sup>24</sup> Ibid., 45.

<sup>25</sup> Ibid., 112.

Justice Brennan delivered the opinion of the court. In the opinion, he stated that in hearing the case, the court sought to “determine for the first time the extent to which the constitutional protections for speech and press limit a State’s power to award damages in a libel action brought by a public official against critics of his official conduct.”<sup>26</sup> Justice Brennan stated in his opinion that some of the facts included in the advertisement were not actually factual. For example, the students did not sing “My Country ‘Tis of Thee,” rather they sang the National Anthem. Also, the expelled students were not expelled because of the demonstration at the State Capitol but because of a lunch counter sit-in.<sup>27</sup> In addition, Justice Brennan pointed out that the advertisement falsely accused the police of “ringing” the campus and that they were not called to the campus because of the demonstration that had taken place at the Capitol.<sup>28</sup>

Justice Brennan then went onto state that, “Under Alabama law...a publication is ‘libelous per se’ if the words ‘tend to injure a person...in his reputation’ and that, “where the plaintiff is a public official his place in the governmental hierarchy is sufficient evidence to support a finding that his reputation has been affected by statements that reflect upon the agency of which he is in charge.”<sup>29</sup> If the advertisement damaged the reputation of official position that Sullivan held, he should be entitled to damages. Justice Brennan stated that with that in mind, the question at hand was whether the liability of the defendant for criticizing a public official goes against the freedom of speech and press guaranteed by the First and Fourteenth Amendment. Justice Brennan also addressed the Sullivan case’s relationship to the *Valentine v. Chrestensen* case. He stated that the court

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<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

in that case reaffirmed the constitutional protection for the freedom of communicating information and criticism that may go against the government, but it upheld that the handbill distributed by Chrestensen was “purely commercial advertising” and thus that portion of it was not protected under the Freedom of Speech clause.<sup>30</sup> Justice Brennan then said that “Heed Our Rising Voices” was not a commercial advertisement in the same way that Chrestensen’s was, because it “communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.”<sup>31</sup> Although “Heed Our Rising Voices” was an advertisement, Justice Brennan said that was irrelevant in this case because it also addressed an important political issue that was taking place at the time.

He concluded his opinion of the Court’s decision by saying that a public official can only recover damages from defamatory statements if he can prove not only that the statements were made out of malice, but that those who made the statements knew that they were false. Because Sullivan failed to do so, the Supreme Court overturned the verdict of the two lower Alabama courts that had ruled in his favor.<sup>32</sup> In this case, an advertisement was protected under the First Amendment freedom of speech clause, not because the court ruled that commercial speech in the form of advertisements was entitled to Constitutional protection, but because the advertisement was more a political commentary than an actual advertisement. In other words, while the Sullivan case was a step closer to the protection of commercial speech, it did not establish it just yet.

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<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

In the Supreme Court case, *Bigelow v. Virginia*, there came “the crack in the commercial speech wall.”<sup>33</sup> The case pertained to a Virginia newspaper that printed an advertisement of an organization in New York State that performed legal abortions.<sup>34</sup> The state of Virginia sued the newspaper editor for violation of a Virginia statute, Va. Code Ann. § 18.1-63, which, “made it a misdemeanor, by the sale or circulation of any publication, to encourage or prompt the procuring of an abortion.”<sup>35</sup> The editor was found guilty of violating the statute after the initial trial that took place in the County Court of Albemarle County, Virginia. The guilty verdict was upheld after Bigelow appealed his case to the Circuit Court of Albemarle County and then again when it was appealed to the Supreme Court of Virginia.<sup>36</sup> The Supreme Court in Virginia denied Bigelow’s claim that they were violating his First Amendment rights because, “the advertisement was a commercial one which could be constitutionally prohibited by the state.”<sup>37</sup> The Virginia Court again found Bigelow guilty of violating the statute on advertising abortions in the state when it heard the case again on appeal.

On June 16, 1975 the United States Supreme Court reversed the decision of the Virginia State Supreme Court when it heard the case on appeal. Supreme Court Justice Blackmun delivered the opinion of the court. Justice Blackman stated that the Supreme Court decided to reverse its prior decision for two reasons. First, the Virginia courts did not allow the editor of the newspaper to challenge the statute as being “overbroad.”<sup>38</sup> The Constitutional Right to Due Process guaranteed by the Fourteenth Amendment requires

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<sup>33</sup> Schultz, Vile, and Deardorff, *Civil Rights and Liberties*, 279.

<sup>34</sup> *Bigelow v. Virginia*. 421 U.S. 809, (Supreme Court of the United States, 1975).

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

all statutes to be sufficiently clear in order to be enforced, and the Courts denied Bigelow the opportunity to argue that perhaps the Virginia statute was too broad or not clear enough to be enforced. Secondly, Justice Blackmun said the reversal came because the statute unconstitutionally violated Bigelow's First Amendment rights to Freedom of Speech and Press which were not sacrificed simply because there was a commercial advertisement involved.<sup>39</sup> Justice Blackmun also stated that the advertisement that was the center of the case presented, "information of potential interest and value to a diverse audience."<sup>40</sup> Essentially, Justice Blackmun said that the court found that the particular advertisement involved in the case was crucial to communicating information and that it, along with some other forms of commercial speech, were entitled to protection under the First Amendment.<sup>41</sup>

Ultimately, the case *Virginia State Board of Pharmacy vs. Virginia Citizens Consumer Council, Inc.* overturned the *Valentine v. Chrestensen* case. The case concerned a resident of Virginia and two non-profit organizations whose members were prescription drug users. The resident and the organizations brought a suit to the United States District Court for the Eastern District of Virginia to challenge part of a Virginia statute that made it unprofessional for a pharmacist in Virginia to advertise prescription drug prices. They claimed that this provision violated the First and Fourteenth Amendments.<sup>42</sup> The District Court ruled in favor of the Virginia Citizens Consumer Council and said that the statute did, in fact, violate consumers' rights under the First

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<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Virginia State Board of Pharmacy et al. v. Virginia Citizens Consumer Council, Inc., et al.* 425 U.S. 748 (Supreme Court of the United States, 1976).

Amendment and that it was not “adequately justified.”<sup>43</sup> The Court subsequently declared the portion of the statute void that prohibited the advertising of drug prices and denied the Virginia State Pharmacy Board and its members from enforcing it.<sup>44</sup> The Board then appealed the case to the United States Supreme Court.

After hearing the case, the Supreme Court Justices affirmed the decision of the District Court of Virginia by a vote of eight to one. Justice Rehnquist was the only judge who dissented. Justice Blackmun, again, delivered the opinion of the Supreme Court. He gave three reasons for the why the court upheld the lower court’s decision. First, he stated that the advertising of prescription drug prices was a First Amendment protection enjoyed by the advertisers themselves who seek to disseminate the information but also one enjoyed by the plaintiffs and people like them.<sup>45</sup> Second, Justice Blackmun stated that, “since ‘commercial speech’ was protected under the First Amendment, the advertisement of prescription drug prices was protected under the First Amendment.”<sup>46</sup> In other words, commercial speech was encompassed under the First Amendment Freedom of Speech clause and advertisements are a part of commercial speech. The third reason that Justice Blackmun gave was, the Pharmacy Board’s ban on advertising as a means to enforce professionalism was not a valid argument.

The Supreme Court’s affirmation of the District Court’s decision to strike down the Virginia statute was crucial. In ruling the law unconstitutional, the Court established that the First Amendment should protect not only the speaker, but the consumer as well.<sup>47</sup>

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<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Schultz, Vile, and Deardorff, *Civil Rights and Liberties*, 278.

The consumer was entitled to receive information. The Court also pointed out that the First Amendment is about a “flow of information” that can involve many different parties of people. Therefore, in ruling the Virginia statute unconstitutional, the Court recognized that advertising was essential in the process of conveying information from a speaker to a consumer.<sup>48</sup> While the Virginia Pharmacy Case recognized the American people’s right to be informed of knowledge that affects them as consumers, it also established constitutional protection for advertisements or communications by businesses.

When Oprah Winfrey and Howard Lyman were sued under a Texas Food Disparagement statute, their defense was freedom of speech. In fact, when the case was ultimately dismissed under the Texas statute and instead tried as a common law disparagement case and Winfrey and Lyman won, Winfrey emerged from the courthouse in Amarillo, Texas and yelled to reporters, “Free Speech not only lives, it rocks!”<sup>49</sup> While the case did not go to the Supreme Court, and did not address the commercial speech issue, it would be hard for the court not to have granted Winfrey and Lyman protection under the First Amendment due to the precedent of commercial speech. The Virginia Pharmacy Case seems to indicate that the Food Disparagement Laws would be in violation of the First Amendment protection of commercial speech. While Lyman and Winfrey, as well as CBS’s 60 Minutes are not a business and had not produced an advertisement, they could be included under the commercial speech precedent merely because they participated in the so called “flow of information” from speaker to consumer that Justice Blackmun declared worthy of First Amendment protection. In other words, Lyman telling audience members of Winfrey’s show that cattle are being ground

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<sup>48</sup> Ibid., 279.

<sup>49</sup> Kitty Kelley, *Oprah: A Biography* (United States: Crown Publishing, 2010), 324.



up and fed to other cattle, and CBS airing a special report about the use of a certain hazardous chemical in the production of apples are both examples of a speaker relaying information that is of benefit to consumers throughout the United States. The issue of libel is still at hand, meaning no one should be permitted to knowingly make false statements out of malice about a perishable food product in an attempt to harm its producer. However, Food Disparagement Laws that seek to interrupt the “flow of information” that may be true and useful to consumers, may be found to violate the precedent set in the Virginia Pharmacy Case and the First Amendment protection of commercial speech sometime in the future.

### **Food Disparagement Laws in the United States**

Prompted by the counterculture movement of the 1960’s and 1970’s, American views on food and the food industry began to change. These changing views also came as a result of a consumerism movement in which advocates argued that sellers’ greed caused them to withhold valuable information from consumers and also prevented sellers from taking costly steps to ensure the safety of consumers.<sup>50</sup> The 1960’s has been deemed by some as the Golden Age of Food Faddism.<sup>51</sup> With the expansion of the health industry and the influence of the consumerism movement, people began to research and question the nutritional value of food. Many feared that the use of chemical pesticides stripped foods of their nutritional value and compromised the safety of the food. In the 1960’s, the Food and Drug Administration took steps to assure Americans about the safety of

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<sup>50</sup> Robert N. Mayer. *The Consumer Movement: Guardians of the Marketplace*. (Boston: Twayne Publishers, 1989)

<sup>51</sup> Harvey Levenstein. *Paradox of Plenty: A Social History of Eating in Modern America*. (New York: Oxford University Press, 1993), 167.

their food supply by issuing fact sheets and reports.<sup>52</sup> Despite these efforts, many people remained wary of the safety and nutritive value of the foods that they were buying and consuming.

Along with questioning the safety and value of food, some people became convinced that organic foods were a better alternative. They thought that the use of chemical pesticides on various fruits and vegetables deprived the foods of vitamins and minerals. They also believed that processed and refined foods lost their “value for health.”<sup>53</sup> The FDA tried to inform the general public that these claims were overstated or inaccurate; chemical fertilizers did not strip foods of vitamins and minerals and the FDA protected consumers from chemical residue that may remain on crops. In addition, they assured people that organic foods were no healthier than non-organic foods because vitamins and minerals that go into produce food items come from the soil and fertilizers do not interfere with them.<sup>54</sup> However, many people from the 1960’s remained unconvinced and persistent that organic foods were healthier and continued to criticize the food industry.

Such scrutiny and criticism extended to the meat industry. In 1967, United States Department of Agriculture inspectors tipped off consumer advocate, Ralph Nader, that for the past four years their department had hidden reports of horrid conditions in meat packing plants that were not subject to federal regulations because they processed meat that was not shipped across state lines.<sup>55</sup> In other words, these plants were not subject to federal interstate commerce rules and regulations. In response, Nader devised a bill that

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<sup>52</sup> *Ibid.*, 168.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*, 169.

would force these plants to be included under federal regulation. Congress passed the bill in a swift six months.<sup>56</sup> In addition, by 1969, Nader had launched an attack on the food industry by seeking secret government reports, researching ingredient lists, and studying the use of food additives.<sup>57</sup> He then appeared before the Senate's Committee on Nutrition and Human Needs and he alleged that the main issue was that those who ran the food industry were primarily concerned with making a profit, and not the nutritive value of their products.<sup>58</sup> Nader embodied a radical consumerist in that he believed corporations are like big governments. He believed they had an overwhelming degree of power like governments but were "exempt from public control and accountability" and also corporations had the ability to protect individual members from liability, thus making it difficult to pinpoint who exactly was responsible for addressing and resolving consumer issues.<sup>59</sup> Nader argued that corrupt food corporations used "manipulative strategies" to hide "the silent violence of their harmful food products."<sup>60</sup> He believed the food industry was a perfect example of how corporations' exemption from public control and accountability had an adverse affect on consumers.<sup>61</sup> Nader's accusations put the government in a tough position in which they were forced to answer to millions of concerned consumers, many of which blamed the government for neglecting to punish the food industry for its misdeeds.<sup>62</sup> Many other consumer advocates shared Nader's concerns. By the beginning of the 1970's, pressure consumerist groups publicly voiced

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<sup>56</sup> Ibid., 170

<sup>57</sup> Ibid., 171.

<sup>58</sup> Ibid.

<sup>59</sup> Mayer. *The Consumer Movement: Guardians of the Marketplace*, 71.

<sup>60</sup> Levenstein. *Paradox of Plenty: A Social History of Eating in Modern America*, 171.

<sup>61</sup> Mayer. *The Consumer Movement: Guardians of the Marketplace*, 70.

<sup>62</sup> Ibid., 73.

their accusations against the food industry. Researchers who studied the safety of the food industry used the media as an outlet, who were eager to report the findings. A large proportion of middle class people became highly concerned about the food industry and began to lose their faith in the industry as a whole and the government due to its lack of protection for Americans.<sup>63</sup>

By the 1970's, the obsession with food safety and filth led many people to adopt macrobiotic diets or diets strictly of organic foods. In addition, people turned to vegetarianism. The change in many Americans' diets was a result of counterculture thinking that prompted people to "purge themselves of the dirty things modern eating put into their systems."<sup>64</sup> This purging for many meant eliminating foods treated with chemical fertilizers and meat products produced in filthy packing plants. The fears introduced in the 1960's persuaded some by the 1970's to take steps to secure their own safety, since they believed the food industry and the government were not properly looking after their health and safety.

By the 1990's, the concern for food safety remained high. In fact, in 1991 the United States Government passed the "truth in labeling" law, which required food producers to be honest about what was in their products.<sup>65</sup> This law represented an effort by the government to appease the fears of Americans. However, people continued to critique the food industry. The counterculture movement inspired a lasting reversal of attitude in which people directed anxieties about food onto the food industry. People in the past would experiment with food to cure their anxieties by cooking, seasoning and

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<sup>63</sup> Levenstein. *Paradox of Plenty: A Social History of Eating in Modern America*, 177.

<sup>64</sup> *Ibid.*, 183.

<sup>65</sup> *Ibid.*, 255.

processing various foods.<sup>66</sup> Today Americans turn to the food industries themselves to cure anxieties. The counterculture views that led people to question the food industry still exist to this day. It is believable that this questioning of the food industry has led to the food industry's response of proposing and passing food disparagement laws to protect food products and their producers.

In terms of the United States legal system, food libel laws, or food disparagement laws, are a relatively recent phenomenon. In fact, since 1989, only thirteen states have adopted some kind of act for the protection of food products and for those who market these products. These states were Texas, South Dakota, Oklahoma, Ohio, Mississippi, North Dakota, Louisiana, Idaho, Georgia, Florida, Colorado, Arizona and Alabama.<sup>67</sup> Each of these states aim to provide food producers with a "cause of action against anyone who knowingly makes false statements about food products."<sup>68</sup> The outcome of their "cause of action" then subsequently relies on a food producer being able to prove that a particular critic not only made false disparaging comments but also that they knew their statements were false and that they made the false statements out of malice. Essentially, in order to prove disparaging statements have been committed against a food product, the same procedure must be followed in order to prove libel has been committed against a person.

The emergence of food disparagement laws came about because of the case *Auvil vs. CBS's "60 Minutes."* On February 26, 1989, CBS correspondent reporter Ed Bradley

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<sup>66</sup> *Ibid.*, 194.

<sup>67</sup> J. Brent Hagy. "Let Them Eat Beef: The Constitutionality of the Texas False Disparagement of Perishable Food Products Act," in *Texas Tech Law Review*, 29 *Tex. Tech L. Rev.* 851 (1998), accessed December 1, 2010, LexisNexis.

<sup>68</sup> *Ibid.*

reported on a segment entitled “ ‘A’ is for Apple.” The segment discussed the use of a chemical growth regulator known as “Daminozide,” or more commonly known as “Alar” in the production of apples.<sup>69</sup> The CBS segment was based on a report that had been released at the time by The National Resources Defense Council (NRDC). The report was called, “Intolerable Risk: Pesticides in Our Children’s Food.”<sup>70</sup> During “60 Minutes,” Bradley discussed some of the NRDC claims, particularly the claim that Alar was “the most potent cancer-causing agent in our food supply,” and that it was especially dangerous when consumed by children.<sup>71</sup> In addition to Bradley’s discussion of the dangers of the chemical, he also reported on the lack of government efforts to ban use of the chemical.<sup>72</sup> A congressman interviewed on the show speculated that the Environmental Protection Agency, the government department which would be responsible to recall the chemical, was hesitating to do so because of fear that Uniroyal, the company that manufactured daminozide, would sue the EPA.<sup>73</sup> Others interviewed as part of the segment included an NRDC attorney, a Harvard pediatrician, and an EPA administrator. The EPA administrator and the pediatrician supported the NRDC’s findings and the NRDC attorney discussed the cancer risks that Daminozide posed for children.<sup>74</sup> Finally, it is important to note that the segment ended with a Consumers Union scientist arguing that most producers of apple products said they no longer used

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<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> *Auvil v. CBS “60 Minutes.”* 67 F.3d 816, (United States Court of Appeals for the Ninth Circuit, 1994).

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

Daminozide treated apples but that at the present time it was impossible to completely eliminate Daminozide from affecting their products.<sup>75</sup>

In 1989, the show “60 Minutes” was one of the leading primetime shows on television. In fact, the show had rated in the top ten on the Nielsen ratings each consecutive year beginning in 1978.<sup>76</sup> The Nielsen Television Ratings rate each show by its number of viewers per week. In 1989 alone, the year that “60 Minutes” aired the segment, “ ‘A’ is for Apple,” the show was the number seventh ranked show in the country.<sup>77</sup> Needless to say, many Americans tuned into the segment and were outraged to hear about the use of chemical daminozide in apple production. Subsequently, after the “60 Minutes” broadcast apple producers experienced a tremendous decline in the demand for their products.<sup>78</sup> According to apple growers, they lost millions of dollars and many even lost their homes and businesses due to lack of funds coming in from apple production. Therefore, in November 1990, eleven Washington State apple growers, on behalf of more than 4,700 other growers throughout the state, filed suit against CBS, the National Resources Defense Council, and Fenton Communications, Inc., the public relations firm of the NRDC.<sup>79</sup> The suit was filed in the Federal District Court of Washington state. The apple growers were filing suit under the common law tort of trade disparagement.<sup>80</sup> The common law essentially is a series of unwritten principles that have

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<sup>75</sup> Ibid.

<sup>76</sup> “60 Minutes Milestones,” last modified August 20, 1999, <http://www.cbsnews.com/stories/1999/08/20/60minutes/main59202.shtml>.

<sup>77</sup> “U.S. TV Nielsen Ratings,” CTVA, accessed March 18, 2011, [http://ctva.biz/US/TV-Ratings/CTVA\\_NielsenRatings\\_1989-1990.htm](http://ctva.biz/US/TV-Ratings/CTVA_NielsenRatings_1989-1990.htm).

<sup>78</sup> *Auvil v. CBS “60 Minutes.”*

<sup>79</sup> Ibid.

<sup>80</sup> David J. Bederman, “Limitations on Commercial Speech: The Constitutionality of Agricultural Disparagement Statutes: Food Label: Litigating Scientific Uncertainty in a

been derived into our present legal system from old English law. The common law of trade disparagement or product disparagement originates from the concept of defamation, which made it unlawful for a person to defame the reputation of another person. The common law of trade disparagement was adapted out of defamation to extend to a product or service that a person may provide.<sup>81</sup>

After the Washington State apple growers raised their lawsuit, CBS pushed for a motion for summary judgment, which meant that the apple growers were going to have to provide sufficient facts to show that there was adequate reason for the case to go to trial, otherwise it would be dismissed.<sup>82</sup> The growers argued that no studies had been carried out that proved there was a relationship between ingesting Daminozide and a later incidence of cancer in people.<sup>83</sup> However, the court stated that this evidence was insufficient for the case to go to trial regarding the segment's statements that Daminozide is a powerful carcinogen.<sup>84</sup> Other than claims of insufficient evidence, the apple growers provided no other challenges to the findings of the Environmental Protection Agency and they did not establish the falsity of the scientific studies upon which the "60 Minutes" report was based.<sup>85</sup> According to the tort of common law product disparagement, the burden of proof lies with the plaintiff to prove that the defendant had no scientific grounds to make the statements that were made. The court said that, "the statements [on "60 Minutes" were] factual assertions made by the interviewees, based on the scientific

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Constitutional Twilight Zone," *DePaul Business Law Journal* 10 DePaul Bus. L.J. 191 (1998), accessed March 3, 2011. LexisNexis

<sup>81</sup> Ibid.

<sup>82</sup> *Auvil v. CBS "60 Minutes."*

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.



findings of the NRDC. These findings were corroborated by the EPA administrator and a Harvard pediatrician.”<sup>86</sup> In other words, the court believed that while the statements may have been harmful to the business of the apple producers, they were based on the testimony of experts and on scientific experiments that supported the statements that Daminozide was an “acceptable risk.”<sup>87</sup>

The apple growers submitted to the court’s findings that “60 Minutes” did have scientific proof that Daminozide caused cancer in people. However, they instead turned their argument to say that the broadcast used information based on studies conducted on adults, not children; therefore, their claims that the chemical was harmful to children was not supported by scientific fact. They attempted to argue that “60 Minutes” could not assume that because something was harmful to adults it would subsequently be harmful to children as well.<sup>88</sup> But the court refuted this by saying that, “the fact that there have been no studies conducted specifically on the cancer risks to children from daminozide does nothing to disprove the conclusion that, if children consume more of a carcinogenic substance than do adults, they are at a higher risk for contracting cancer.”<sup>89</sup> Basically, the court said that even though studies had not been carried out to test daminozide’s cancerous affect on children specifically, studies that had been conducted that proved there was cancer risk to adults from the chemical should be sufficient enough to make the statements that CBS had made. Therefore, the apple growers did not successfully prove that the “60 Minutes” segment’s assertion that daminozide is more harmful to children was false.

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<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

After failing to prove that the comments made on “60 Minutes” were false, the apple growers then argued, in a last-ditch effort, that a summary judgment on behalf of CBS would be improper because a jury could decide that the segment had a false implied message when viewed in its entirety.<sup>90</sup> The growers also believed that they would be able to prove the falsity of this implied message.<sup>91</sup> However, the court dismissed this argument. It stated that, “Their attempt to derive a specific, implied message from the broadcast as a whole and to prove the falsity of that overall message is unprecedented and inconsistent with Washington law. No Washington court has held that the analysis of falsity proceeds from an implied, disparaging message.”<sup>92</sup> In other words, it was legally impossible for the growers to prove an implied message was false. The only way they could prove that libel had taken place in this case was if they could prove the actual and literal statements made were untrue. Therefore, the apple growers neglected to provide the burden of proof against “60 Minutes.” The court affirmed CBS’s motion for summary judgment and the case was dropped.<sup>93</sup>

Those who support Food Disparagement Statutes are likely to be people who thrive off of producing perishable food products. As of the 2007 United States Agricultural Census, the country had a total of 2,294,792 farms.<sup>94</sup> The thirteen states that have adopted Food Disparagement Statutes total 737,712 of those farms, comprising thirty two percent of the nation’s total.<sup>95</sup> These states are clearly popular states for

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<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> “2007 Census of Agriculture Report,” United States Department of Agriculture, accessed March 14, 2011, [www.agcensus.usda.gov](http://www.agcensus.usda.gov).

<sup>95</sup> Ibid.

agriculture, and thus many people living in these states would be highly concerned about protecting their perishable food products from disparagement situations. Washington State currently does not have a Food Disparagement Statute, but it also is a big state for agriculture and has a total of 39,284 farms.<sup>96</sup> When CBS's "60 Minutes" made statements suggesting that apples could pose a cancer risk to American children, obviously apple growers were going to be offended by these statements. But to them, being offended was not the real issue. Washington Apple Growers were hurt economically by the CBS special as they saw a rather dramatic decrease in the demand for their apples after the special aired. When they tried to sue under common law product disparagement, they were unsuccessful. When the case went to trial in 1989, no food disparagement statutes were then in effect. It was difficult for the apple growers to argue their case under the common law. After this case, thirteen states decided that something needed to be done in order to provide protection for perishable food products and those who produce them. Colorado began the push for a food disparagement act and eleven other states followed suit shortly after.

Oprah Winfrey and Howard Lyman were sued under the Texas Food Disparagement Statute. However, Texas is not the only state to have enacted this kind of statute in recent years. In the Texas Tech Law Review, J. Brent Hagy published an article entitled, "Let Them Eat Beef: The Constitutionality of the Texas False Disparagement of Perishable Food Products Act." In the article, to support his argument, Hagy explores the various food disparagement statutes that exist in the United States. It is important to consider these statutes as a whole in determining the constitutionality of states passing

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<sup>96</sup> Ibid.

laws that restrict what can be said about a perishable food product. Hagy notes that twelve other states besides Texas have adopted similar acts for the protection of producers of perishable foods; in many ways the provisions of each state's statute are analogous, but some provisions vary. The state to adopt one of these statutes was Colorado in 1991.<sup>97</sup> In the wake of the *Auvil vs. CBS* controversial case, a Colorado state representative, who also happened to be an apple producer, proposed a food disparagement bill. The bill was passed by the legislature but was then vetoed by the state Governor. The Governor argued the First Amendment right to freedom of speech as his reason for vetoing the bill.<sup>98</sup> Because of this veto, Colorado has no statutory cause of action for agricultural and food disparagement. The state legislature evaded the Governor's veto by amending a state criminal statute to include a provision that made it illegal to make false and disparaging statements about food products.<sup>99</sup> Colorado is the only one of the thirteen states that does not have an independent statute for food disparagement.

All of the statutes share one thing in common, that is they strictly apply to "perishable" food products. The reasoning behind this is that false statements should not seriously adversely affect products whose marketability is not diminished by time. The assumption is that eventually the truth will come out and the demand for these products will recover.<sup>100</sup> Perishable products that only have a short shelf life are more likely to endure negative effects.

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<sup>97</sup> Hagy, "Let Them Eat Beef."

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> Bederman, "Limitations on Commercial Speech."

The statutes are somewhat similar in their structures, in addition to all providing protection for perishable food products. For example, Ohio, Mississippi, Louisiana, Georgia, Florida and Alabama have almost identical statutes that contain four general provisions. The first is a statement that indicates why it is important to protect food products. The second is a short definitions section of what the provisions of the law mean, as in what does disparagement and perishable mean. The third is a statement of cause of action defining who can sue under the statute.<sup>101</sup> Finally, the last provision provides a statute of limitation section. For example, in the Louisiana statute, the final section states that a lawsuit must commence within one year after the cause of action accrues.<sup>102</sup> Idaho and Oklahoma have similar provisions but lack a Statute of Limitations section.<sup>103</sup> This means these statutes do not contain any time limit on when a cause of action can be raised by a plaintiff who is attempting to sue. Texas, Arizona and South Dakota have a definitions section, a cause of action section and a statute of limitations but do not provide legislative intent.<sup>104</sup> Legislative intent is a purpose for why the statute is passed. Overall, the statutes are somewhat similar in structure; their differences lie in who can sue under the statute, whether disparaging statements must be false in order for a defendant to be held liable under the statute and what kind of reparations a guilty defendant would be required to pay to the plaintiff.

The statutes of Texas, South Dakota, Oklahoma, Mississippi, Louisiana and Idaho all afford a cause of action under each particular statute only to a “producer” of an

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<sup>101</sup> Hagy, “Let Them Eat Beef.”

<sup>102</sup> Louisiana Disparagement of Agricultural or Aquacultural Products, La. Rev. Stat. Ann. 3:4501 (1991).

<sup>103</sup> Idaho Disparagement of Agricultural Food Products, Idaho Code 6-2001 (1992).

<sup>104</sup> Hagy, “Let Them Eat Beef.”

agricultural or aquaculture food product. However, these states' statutes all neglect to define exactly who constitutes a "producer."<sup>105</sup> The other six states do include in their provisions some sort of explanation as to who is considered a "producer" and thus eligible to sue under the statute. Florida defines a "producer" as "the person who actually grows or produces" the food product and thus affords this person a cause of action.<sup>106</sup> Alabama allows for any person "who produces, markets, or sells" food products to have a cause of action.<sup>107</sup> Ohio's statute aims to provide only producers with a cause of action, but then broadly defines a producer as anyone who "grows, raises, produces, distributes, or sells" food products.<sup>108</sup> Arizona grants producers, shippers, or an association that represents producers or shippers with a cause of action under its particular statute. It defines a "shipper" as someone who "ships, transports, sells, or markets" a food product; however, it does not define an association that represents a shipper or producer.<sup>109</sup> Finally, Georgia has the widest definition out of the five states in its attempt to convey what constitutes a "producer." Its statute grants "producers, processors, marketers, and sellers" a cause of action, and it defines this group of producers as "the entire chain from grower to consumer."<sup>110</sup> Overall, the twelve statutes seem to lack a uniform definition as to who has cause of action to sue for disparagement, and each has adopted their own specific concept of a producer.

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<sup>105</sup> Hagy, "Let Them Eat Beef."

<sup>106</sup> Florida Violations of Certain Commercial Restrictions, Fla. Stat. ch. 865.065 (1995).

<sup>107</sup> Alabama Action for Disparagement of Food Product or Commodity, Ala. Code. 6-5-620 (1996).

<sup>108</sup> Ohio Disparagement of Perishable Agricultural or Aquacultural Food Product, Ohio Rev. Code. Ann. 2307.81 (1996).

<sup>109</sup> Arizona Action for False Claims Against Perishable Agricultural Food Product, Ariz. Rev. Stat. Ann. 3-113 (1996).

<sup>110</sup> Hagy, "Let Them Eat Beef."

As far as the requirements for a defendant to be accused of violating a statute and ultimately being found guilty of food disparagement, ten of the twelve states with a specific statute require a defendant to disparage the perishable food product that is directly associated with the plaintiff.<sup>111</sup> In other words, the Washington Apple Growers who sued CBS would have been eligible to do so under the statutes because the disparaging comments were made about apples in general; it would be irrelevant that they were not specifically about the apples that the Washington growers produced themselves. This is representative of what Professor Bederman terms, “group libel.”<sup>112</sup> “Group libel” is speech that defames a group of people, where more than one person is victimized. While Bederman acknowledges that the common law does not comfortably provide for this concept of “group libel,” it seems as if many of the food disparagement statutes attempt to make it a possibility. Idaho is the one state that requires that a defendant makes disparaging comments “clearly directed” at the plaintiff’s specific food product.<sup>113</sup> The Washington Apple Growers therefore would not have had a cause of action against CBS’s “60 Minutes” under the Idaho statute because it does not support “group libel”.

A majority of the twelve state statutes provide some sort of criteria for determining if a defendant made false statements.<sup>114</sup> Seven of the twelve states presume a defendant’s statements to be false if they are not made as the result of “reasonable and reliable scientific inquiry, facts or data.”<sup>115</sup> In other words, these states require that the burden of proof rest with the defendant and that he or she prove that they have the proper

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<sup>111</sup> Ibid.

<sup>112</sup> Bederman, “Limitations on Commercial Speech.”

<sup>113</sup> Idaho Disparagement of Agricultural Food Products.

<sup>114</sup> Hagy, “Let Them Eat Beef.”

<sup>115</sup> Ibid.

scientific backing to their statements. This is the exact opposite of a normal civil procedure in which a plaintiff has the burden of proof and is required to prove a preponderance of evidence against the defendant. Two of the twelve states, Idaho and South Dakota, provide no sort of guidelines as to how falsity of statements is to be determined.<sup>116</sup> Texas is the only state that requests that courts consider “scientific inquiry, facts or data” when determining the truth or falsity of statements made by a defendant.<sup>117</sup> This gives the defendant some sort of leniency behind their statements.

Once a plaintiff has proved that the defendant has made false statements against him or her, they must take further steps in order to obtain any reparations or “recovery.” Ten of the states with food disparagement statutes require that a defendant must show malice in some form in order the plaintiff to obtain recovery.<sup>118</sup> “Malice” is defined by the United States Supreme Court as either, “knowledge that a statement is false or reckless disregard for truth.”<sup>119</sup> This definition of malice pertains to common law defamation, which is when a person makes malicious false statements or accusations about another person. Two states, Florida and Georgia, require that the defendant must show either malice or intent to harm with their statements in order for the plaintiff to recover.<sup>120</sup> Arizona, Louisiana, Ohio, and Oklahoma only allow a showing of malice by the defendant in order for the plaintiff to receive reparations.<sup>121</sup> Three states including Mississippi, South Dakota and Texas, demand that a defendant had to have actually known the statements they made were false in order for the plaintiff to be compensated

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<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid.



for injuries.<sup>122</sup> Idaho has the strictest requirements; its statute compels a plaintiff seeking recovery to prove that a defendant knew the statements he or she made were false and that they made these false statements with the intention of bringing some sort of harm to the defendant.<sup>123</sup> Alabama has a simple negligence requirement, which outlines that a lack of knowledge of the falsity of statements made and a lack of harmful intentions on the part of the defendant is not a legitimate defense to disparagement under its statute.<sup>124</sup> If the defendant made false statements, then he or she is guilty. Therefore, it seems as if the Alabama statute would yield the most promising results for a plaintiff seeking recovery from a defendant, as that defendant can still be found guilty of disparagement even if he or she honestly believed their statements were truthful and did not make their statements out of ill will. At the same time however, it seems as if the Idaho statute yields the most promising results for a defendant being accused of making disparaging statements against a food producer and his or her product. This statute establishes a vague and fairly low standard of malice.

The amount of damages in recovery that a plaintiff is eligible to receive once he or she has proven that disparaging statements have been made against his or her food product varies by state. Texas, Oklahoma, Mississippi, Louisiana, Georgia, Florida, Arizona and Alabama do not provide any provision within their respective statutes regarding the proper amount of damages a plaintiff should receive for disparagement.<sup>125</sup> Idaho has the strictest measure of damages. Its statute only allows a plaintiff to receive actual damages and blocks them from obtaining any money from presumed or punitive

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<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

damages.<sup>126</sup> This is noteworthy due to its strict requirements for establishing malice; once a plaintiff has proved malice on the part of the defendant, he or she does not even receive that much in recovery. South Dakota allows a plaintiff to obtain “treble damages” if the court decides that a defendant had malicious intent to harm the plaintiff.<sup>127</sup> “Treble Damages” are when the damages received by a plaintiff are tripled.<sup>128</sup> Lastly, Ohio has the least restrictive amount of damages. Its statute allows plaintiffs to receive reparations from the defendant to cover actual damages, punitive damages, attorney’s fees, and court fees if the defendant has been convicted. The plaintiff can even recover treble damages from the defendant if intent to harm has been established.<sup>129</sup> In short, a defendant found guilty of making disparaging statements in Ohio could pay a heavy amount of damages to the plaintiff.

Oprah Winfrey and Howard Lyman were sued under the Texas Food Disparagement Statute because of statements the two made on Winfrey’s show on April 16, 1996. The particular statute was passed on September 1, 1995 and is called, “False Disparagement of Perishable Food Products.”<sup>130</sup> The statute has four different components to it. The first part defines “perishable food product” as a “food product of agriculture or aquaculture that is sold or distributed in a form that will perish or decay beyond marketability within a limited period of time.”<sup>131</sup> Thus the statute aimed to

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<sup>126</sup> Ibid.

<sup>127</sup> Ibid.

<sup>128</sup> “Legal Terms and Definitions,” Law.com, accessed March 1, 2011, <http://dictionary.law.com/Default.aspx?selected=2159>.

<sup>129</sup> Hagy, “Let Them Eat Beef.”

<sup>130</sup> Texas False Disparagement of Perishable Food Products Act, Tex. Civ. Prac. & Rem. Code Ann. 96.001-.004 (1995).

<sup>131</sup> Ibid.

protect perishable food products, which are products that producers need to market and sell within a specific time frame before they are no longer proper for consumption.

The second component to the Texas Statute, 96.002, entitled “Liability,” defines who could be sued under the statute for making disparaging statements about a particular food product. Liability has occurred if, “(1) the person disseminates in any manner information relating to a perishable food product to the public, (2) the person knows the information is false; and (3) the information states or implies that the perishable food product is not safe for consumption by the public.”<sup>132</sup> Essentially, as is the case with Libel and Slander cases, it needs to be proven that someone not only made false statements, but that the statements were knowingly false and that they were made with the intent and result of harming the party they concern. In addition, statements that are to be covered under the statute are specifically false statements that implied that the particular perishable food product at hand was unsafe for consumption. Consequently, , the Texas Statute “Liability” section states that if a person is to be found guilty of making false disparaging statements against a particular perishable food product, that person, “is liable to the producer of the perishable food product for damages and any other appropriate relief arising from the person’s dissemination of the information.”<sup>133</sup> In other words, the defendant if proven guilty, is responsible to compensate for their crime through monetary relief to the plaintiff.

The third section, “Proof,” states that, “In determining if information is false, the trier of fact shall consider whether the information was based on reasonable and reliable

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<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

scientific inquiry, facts, or data.”<sup>134</sup> This means that the jury or judge who heard the case needed to determine if the person who allegedly made disparaging statements did so after consulting scientific studies. If they had some sort of scientific evidence behind their statements, it is likely that their intentions were not malicious but more so an attempt to inform consumers of any dangers that may be associated with consuming a specific food product. This is a form of commercial speech because consumers need to know if perishable food products that they purchase are unfit for them to eat. The fourth and last section of the Texas Statute is called, “Certain Marketing or Labeling Excluded.” It states, “A person is not liable under this chapter for marketing or labeling any agricultural product in a manner that indicates that the product: (1) was grown or produced by using or not using a chemical or drug; (2) was organically grown; or (3) was grown without the use of any synthetic additive.”<sup>135</sup> A person who markets or labels a food product as produced through the use of a chemical, organically grown, or grown without an additive is excluded from protection and is not afforded a cause of action under the Texas Statute.

While food producers may believe various food disparagement statutes can protect them and their products, many people argue that laws such as the statutes of the aforementioned thirteen states ultimately go against the First Amendment right to freedom of speech. In other words, they believe food disparagement laws are unconstitutional. This has been a common complaint throughout American history against libel and slander laws for humans. The freedom of speech argument forms the backdrop of Oprah Winfrey and Howard Lyman’s defense in their 1998 trial in Texas against Texas Cattlemen. In addition to freedom of speech, critics of the food

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<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

disparagement laws argue that they violate the Constitutional protection of commercial speech. Commercial speech essentially provides protection for consumers who engage in the “flow of information” process as outlined in the *Virginia State Pharmacy Case*. It seems arguable that food disparagement laws may interrupt the “flow of information” and subsequently violate the commercial speech provision of the First Amendment, though this violation has yet to be established.

### **April 16, 1996: “Dangerous Foods” and the Aftermath**

On April 16, 1996 an episode of the Oprah Winfrey show titled, “Dangerous Foods,” was aired in the United States. The aim of the show was to explore if Bovine Spongiform Encephalopathy, more commonly known as Mad Cow Disease, could be spread in the United States as it had in Britain. In 1996, it was known that when humans come in contact with BSE contaminated beef products, the result is a similar disease known as Creutzfeldt-Jacob Disease. This disease attacks the human brain and leads to a slow excruciating death.<sup>136</sup> In 1996, there were around 120 deaths from Creutzfeldt-Jacob Disease in Britain and this prompted worldwide panic and of course, resulted in Winfrey attempting to attract ratings with her segment on the possibility of the disease existing in America.<sup>137</sup>

During the course of Winfrey’s “Dangerous Foods” segment, she interviewed five guests. The first guest was a British woman whose eighteen-year-old granddaughter was apparently dying of the disease after eating a hamburger that had mad cow. The second

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<sup>136</sup> Kelley, *Oprah: A Biography*, 315.

<sup>137</sup> Heather Timmons, “Mad Cow Disease in the United States: A Case History; Britain Has Learned Many Harsh Lessons in a Long Effort to Combat Mad Cow Disease,” *New York Times*, December 26, 2003, accessed March 1, 2011, <http://www.nytimes.com/2003/12/26/us/mad-cow-disease-united-states-case-history-britain-has-learned-many-harsh.html>.

guest Oprah interviewed was a woman whose mother in law died of the disease allegedly from eating contaminated beef in Britain. The third guests were Gary Weber, from the National Cattlemen's Beef Association, William Hueston, a U.S. Department of Agriculture expert on Bovine Spongiform Encephalopathy, and Howard Lyman, from the United States Humane Society and a known animal rights' activist and vegetarian.<sup>138</sup> Weber and Hueston both argued that government regulations guarantee the safety of beef and that there was no threat of a Mad Cow Disease in the United States. They also reported on the exact steps carried out to ensure the security of U.S. beef and stated that Bovine Spongiform Encephalopathy had never been found in the United States.<sup>139</sup> Lyman on the other hand had a quite contradictory argument. He claimed that annually in the United States one hundred thousand ill cows are "slaughtered, ground up, and used for feed" for other cows and he also said that "the human form of [Mad Cow] could make AIDS look like the common cold."<sup>140</sup>

Winfrey was not surprisingly disturbed or shocked by Lyman's statements. She asked him, "Howard, how do you know for sure that cows are ground up and fed back to other cows?" To which he replied, "Oh, I've seen it. These are U.S. Department of Agriculture statistics."<sup>141</sup> Winfrey then turned to the audience and asked, "Now, doesn't that concern y'all a little bit right here, hearing that? It has just stopped me cold from eating another burger. I'm stuck...Dr. Gary Weber says we don't have a reason to be concerned. But that in itself is disturbing to me. Cows should not be eating other

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<sup>138</sup> Martin L. Hayenga, "Texas Cattle Feeders v. Oprah Winfrey: The First Major Test of the "Veggie Libel Law," The National Agricultural Law Center (1998): 14, accessed October 15, 2011, LexisNexis.

<sup>139</sup> *Ibid.*

<sup>140</sup> Kelley, *Oprah: A Biography*, 315.

<sup>141</sup> *Ibid.*

cows...They should be eating grass.”<sup>142</sup> These exactly lines are what led to Winfrey and Lyman being sued under a Texas Food Disparagement Statute.

The day after “Dangerous Foods” aired, the price of cattle dropped and Winfrey and Lyman were blamed. Winfrey attempted to defend herself by saying publicly, “I am speaking as one concerned consumer for millions of others. Cows eating cows is alarming. Americans needed and wanted to know that. I certainly did.”<sup>143</sup> Winfrey also claimed that she felt her interview was fair as she did allow Weber to speak on behalf of cattlemen and to defend the industry. However, the National Cattlemen’s Beef Association remained outraged and unsatisfied. They claimed the editing of the show was “unbalanced” and favored Lyman’s remarks over Weber’s.<sup>144</sup> Therefore, the Association withdrew \$600,000 in advertising from the network and threatened to sue Winfrey and Lyman under a Texas statute aimed at protecting producers of perishable food products from malignant and false statements concerning their products.<sup>145</sup> Winfrey had to do something to protect herself from the threat of libel. Thus on April 23, 1996, Winfrey aired a second “Dangerous Foods” segment without Howard Lyman’s presence. She invited Dr. Gary Weber back to “augment the safe-beef points made on the previous show.”<sup>146</sup> However, a cattle rancher later vehemently said that the second segment was “too little too late” because “Oprah didn’t go on the program and eat a hamburger before the world.”<sup>147</sup>

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<sup>142</sup> Ibid.

<sup>143</sup> Ibid., 316.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid.

<sup>146</sup> Hayenga, “Texas Cattle Feeders v. Oprah Winfrey,” 14.

<sup>147</sup> Kelley, *Oprah: A Biography*, 316.

Within a month or so, cattle groups united to bring Lyman and Winfrey to court, as well as her production companies, King World Productions and Harpo. The cattlemen were seeking twelve million dollars in damages for the allegedly disparaging statements. They believed that, “the statements disparaged the American cattle industry and the safety of American beef, causing millions of dollars in losses for themselves, and in some cases permanent loss of consumer confidence in beef products.”<sup>148</sup> Winfrey and her crew spent the next year after learning that she was to be sued spending enormous sums of money on attorneys and jury consultants, as well as the costs necessary to move her show to Amarillo, Texas for the duration of the trial. The trial was to be held in the United States District Court for the Northern Division of Texas, Amarillo Division.<sup>149</sup> The Oprah Winfrey Show at the time was required to tape 152 shows a year, and a six week break would prevent her from meeting this quota, thus Winfrey and her show had to make the transition to Texas.<sup>150</sup>

Winfrey considered settling once she realized how serious the Texas Cattlemen were about taking her to court. Phil McGraw, more commonly known as talk show host personality Dr. Phil, worked as a trial consultant and was retained by Winfrey’s attorneys to help plan the strategy for the trial and prepare the defendants.<sup>151</sup> Apparently when Winfrey mentioned the idea of settling to McGraw he advised her that, “If you fight this to the bitter end, the line at the Sue Oprah window is going to get a lot shorter.”<sup>152</sup> He

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<sup>148</sup> Hayenga, “Texas Cattle Feeders v. Oprah Winfrey,” 14.

<sup>149</sup> Texas Beef Group, et al. v. Oprah Winfrey, Harpo Productions, Inc., and Howard Lyman, F. Supp. 2d. 858 (N.D. Tex. 1998).

<sup>150</sup> “The Oprah Winfrey Show, 20<sup>th</sup> Anniversary Collection,” *Oprah’s Angel Network* (Hollywood, CA: Paramount Home Entertainment, 2005), DVD.

<sup>151</sup> Kelley, *Oprah: A Biography*, 317.

<sup>152</sup> *Ibid.*



believed that if she took the easy way out, people would think it would be more manageable to sue her and just get her to settle outside of court without the drama of a trial. In other words, Winfrey needed to endure that bad publicity and media attention now to protect herself from more damage and money spent later. Later on, Winfrey denied considering the idea of settling. Howard Lyman said she did however, and even is on record saying, “If they could have found a way to feed me to the cattlemen and gotten her out of the lawsuit, I would have been down in a heartbeat. I have the highest regard in the world for Oprah.”<sup>153</sup> It’s uncertain who exactly “they” is. Perhaps Lyman was referring to the Texas cattlemen. Lyman has a history of being radical and fanatical in the media. In his book that was published shortly after the trial called, “Mad Cowboy: Plain Truth from the Cattle Rancher who won’t Eat Meat,” he gave a candid account of the events leading up to the trial and the trial itself. He also wrote, “A funny thing can happen in this country when you tell the truth. You can get sued...” in reference to his lawsuit with Winfrey.<sup>154</sup>

Although Lyman was pretty confident on April 16, 1996 when he made remarks about the practice of ranchers feeding their cows the remains of other cows, the idea of being convicted of food libel elicited a sense of fear in him. He said, “The toughest thing for me was when my wife looked me in the eye and asked, ‘If we lose, do we lose everything we have?’ I had to tell her yes.”<sup>155</sup> Even Winfrey, the highly regarded celebrity and philanthropist was afraid for two reasons. In an interview with Diane Sawyer she said, “I was afraid, physically afraid for myself. Before I went to Amarillo

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<sup>153</sup> Ibid., 318.

<sup>154</sup> Howard Lyman, *Mad Cowboy: Plain Truth from the Cattle Rancher Who Won’t Eat Meat*, (New York: Scribner, 1998), 13.

<sup>155</sup> Kelley, *Oprah: A Biography*, 318.

there were... ‘Ban Oprah’ buttons...and bumper stickers.”<sup>156</sup> To her, the threat of a random person buying into the hype of the trial and attempting to physically harm her was very real. In addition to the physical threat, Winfrey was worried about her credibility and how it would reflect on her career.

### **Texas Beef Group v. Oprah Winfrey and Howard Lyman**

After The Oprah Winfrey Show aired its segment entitled “Dangerous Foods,” it was not surprising that many people were outraged. Not only did Howard Lyman essentially condemn the United States Beef Industry, but also one of the most well-known and influential talk show hosts in the world proclaimed that she would never eat beef again after hearing what Lyman had to say about the industry. The impact of Lyman and Winfrey’s words was felt almost immediately. On April 16, 1996, the day the episode aired, the live cattle futures contract for the month of April dropped by \$1.50 per hundred pounds.<sup>157</sup> In fact, one trader deemed this drop in prices the “Oprah crash.”<sup>158</sup> However, the “Oprah crash” did not end there. In the subsequent two weeks that followed the show, cash prices for fed cattle dropped.<sup>159</sup> These drops in cattle prices were just the beginning of the anger that eventually drove the Texas Beef Group to seek a cause of action against Winfrey and Lyman.

The Texas Beef Group along with other cattle groups filed suit against Winfrey, Lyman and Harpo Productions Incorporated (Winfrey’s network) on December 29, 1997. After Winfrey attempted to settle and the cattlemen refused, the case was ready to go to

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<sup>156</sup> Ibid.

<sup>157</sup> Hayenga, “Texas Cattle Feeders v. Oprah Winfrey,” 14.

<sup>158</sup> Ibid.

<sup>159</sup> Ibid.

trial in early 1998.<sup>160</sup> The cattlemen claimed that Lyman and Winfrey had made false statements during “Dangerous Foods,” and they subsequently attempted to sue the two under the common laws of slander, libel, negligence, and statutory product defamation, as well as under the Texas Perishable Food Disparagement Statute. Winfrey and Lyman requested a motion for judgment as they believed that they had not made any false disparaging statements and thus that there was no legitimate ground for the plaintiffs’ claims.<sup>161</sup>

The Texas cattlemen claimed they had good reason to sue under the Texas Statute. In their Pretrial Order, they argued that the Oprah Winfrey Show’s segment was, “nothing more than a ‘scary story,’ falsely suggesting that U.S. beef is highly dangerous because of Mad Cow Disease and that a horrible epidemic worse than AIDS could occur from eating U.S. beef.”<sup>162</sup> They furthered claimed that Lyman, as a vegetarian activist, was intent on “wiping out” the United States beef industry.<sup>163</sup> As far as Winfrey and her network was concerned, the plaintiffs believed they intentionally edited the taped show before it aired so that it would not include many of the factual and scientific data that would have counteracted “Lyman’s false exaggerations.”<sup>164</sup> The cattlemen said this intentional editing eliminated information that would have “calmed the hysteria [that] Lyman’s false exaggerations would create” among “Oprah’s 20 million American TV viewers.”<sup>165</sup>

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<sup>160</sup> Kelley, *Oprah: A Biography*, 316.

<sup>161</sup> Texas Beef Group, et al. v. Oprah Winfrey, Harpo Productions, Inc., and Howard Lyman, F. Supp. 2d. 858 (N.D. Tex.1998).

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

Specifically, the cattlemen honed in on a few different phrases made by the defendants that they believed constituted the bulk of their claim. Most of these statements were those made by Lyman. The first statement was in reference to Bovine Spongiform Encephalopathy, commonly known as Mad Cow Disease, that “this disease could make AIDS look like the common cold.”<sup>166</sup> The second statement was when he said, “fourteen percent of all cows are ground up, turned into feed and fed back to other animals.”<sup>167</sup> The next statement was simply, “feeding cows to cows.”<sup>168</sup> Finally, the last statement that Lyman made that the plaintiffs’ claimed was false was, “any animal that is not staggering around goes in there.”<sup>169</sup> In this last comment, Lyman was speculating that sick cows are being allowed to be ground up and sold to the American public. While the plaintiffs used a few of Lyman’s quotes, they only used one of Winfrey’s: “It has just stopped me cold from eating another burger.”<sup>170</sup> They claimed that Winfrey’s making this statement was harmful to their industry because of the influential power she held within the media.

Once the cattlemen identified the precise statements that they intended to rest their case on, they would have to prove to the court that the statements were false and that Winfrey and Lyman knew they were but made them anyway out of malice. In addition, the cattlemen also needed to prove to the court that their live cattle were a “perishable food product.”<sup>171</sup> This point was crucial because the Texas Food Disparagement of Perishable Food Products Act applied only to perishable products. If the plaintiffs did not

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<sup>166</sup> Hayenga, “Texas Cattle Feeders v. Oprah Winfrey,” 14.

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*

<sup>171</sup> *Texas Beef Group, et al. v. Oprah Winfrey, Harpo Productions, Inc., and Howard Lyman*, F. Supp. 2d. 858 (N.D. Tex. 1998).

prove that their cattle fell under the “perishable” provision of the statute, their claim would essentially have no standing under the statute. Instead, the cattlemen would have to attempt to argue their case under common law product disparagement, as the Washington State Apple Growers had to do in 1989 before any Food Label Statutes existed in the United States.

By early 1998, the case went to trial in the United States District Court for the Northern District of Texas at Amarillo. The attorneys of both the defendants and the plaintiffs examined the transcript of the show and the unedited version of it in excruciating detail during their obtainment of depositions and direct and cross examinations of the witnesses.<sup>172</sup> The plaintiffs called Winfrey and Lyman to the stand as witnesses. They were asked to interpret and rationalize statements that they both had made during “Dangerous Foods.”<sup>173</sup> The examinations were based off of depositions given in the months prior to the trial. In the depositions, Winfrey was asked, “What reasonable scientific basis do you have for saying that cows should not eat other cows?” To which she replied, “No scientific basis. Common sense. I’ve never seen a cow eat meat.”<sup>174</sup> Winfrey later described how harsh she believed the plaintiff’s attorneys had been to her. She said, “Crew cut. Southern, young snuff-spittin’ lawyer, asking me if I’d just used my ‘common sense.’ Humiliating. They loved it... First time I ever felt pinned down, my back against the wall.”<sup>175</sup> During the cross examination of Winfrey and Lyman, the two’s attorneys sought to determine whether the statements in dispute were facts or opinions, whether other people had made similar statements in the past, and

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<sup>172</sup> Hayenga, “Texas Cattle Feeders v. Oprah Winfrey,” 15.

<sup>173</sup> *Ibid.*

<sup>174</sup> Kelley, *Oprah: A Biography*, 319.

<sup>175</sup> *Ibid.*

whether the two had the authority to state their opinions on such a matter.<sup>176</sup> They used consumer surveys conducted by the National Cattlemen's Beef Association, an affiliated organization with the Texas Beef Group, in directing the cross examinations. The surveys showed that no significant alterations in consumer confidence in United States' Beef had occurred following the "Dangerous Foods" segment, even though the plaintiffs argued the opposite.<sup>177</sup>

After Lyman and Winfrey testified, the Texas cattlemen's attorneys called to testify Dr. Gary Weber and Dr. William Hueston, who had both been guests on Winfrey's show. They also called to testify Dr. Lester Crawford, the former head of the United States Department of Agriculture Meat Inspection and Food Safety Operations.<sup>178</sup> The three argued that United States Beef was safe from Mad Cow Disease and that the government's inspection measures were sufficient enough that the American people could safely assume that their beef is safe. They further argued that after the outbreak of Mad Cow Disease occurred in Britain, the United States banned its beef imports from the country beginning in 1989.<sup>179</sup> In other words, they argued that the chance of Mad Cow Disease being spread from overseas was almost completely non-existent. They also cited that in the 1990's, the USDA's Bovine Spongiform Encephalopathy Monitoring Program had examined the brains of thousands of cattle that had exhibited rabies or BSE symptoms and found that not one had been plagued by the disease.<sup>180</sup> However, it is important to note when considering Lyman's accusations that, the U.S. Food and Drug

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<sup>176</sup> Hayenga, "Texas Cattle Feeders v. Oprah Winfrey," 15.

<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid.*

<sup>179</sup> Hayenga, "Texas Cattle Feeders v. Oprah Winfrey," 15.

<sup>180</sup> *Ibid.*

Administration proposed a mandatory ban of the use of ruminant-derived meat and bone meal in ruminant feed in the summer of 1996. This act was taken after the “Dangerous Foods” show had aired. The ban became effective on August 4, 1997.<sup>181</sup> During the defendant’s cross examination of Weber, Hueston and Crawford, Lyman and Winfrey’s attorneys attempted to compare the United States to the United Kingdom in terms of the possibility of a Mad Cow outbreak. They cited how the British government reassured its people that they were safe from BSE and then the outbreak occurred. In other words the defendants’ attorneys were trying to establish that the United States may have been deceived in thinking the disease would not touch them, as the U.K. was.<sup>182</sup>

As far as the exact losses that the cattlemen accrued following the Winfrey show, two traders from the Chicago Mercantile Exchange were called upon to testify. They claimed that many traders watched the show in Chicago on the morning it aired. From this, they speculated that that was why the prices on the futures contracts dropped by \$1.50 per hundred pounds.<sup>183</sup> While this may have been true, on cross examination by the defendants, the traders proved their bias lay with the plaintiffs. Also, during the cross examination the defendants showed two video interviews of one of the witnesses who claimed the drops were because of the Winfrey show in one and because of other unrelated issues in another.<sup>184</sup>

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181 *Ibid.*

182 *Ibid.*

183 *Ibid.*

184 *Ibid.*

The plaintiffs also brought in as a witness an economist, Wayne Purcell, to examine how the prices for cattle dropped as a direct result of Winfrey and Lyman's statements on her show.<sup>185</sup> Purcell devised a mathematical model,

$$CP = 11.37 + 0.90 CP_{t-1} - 0.01 BfProd + e.^{186}$$

In the model, CP refers to the weekly weighted average USDA Texas-Oklahoma "Choice Steer" price. BfProd is the weekly U.S. federally inspected beef production, in millions of pounds. Purcell assumed the BfProd amount to be predetermined to be .06, as a reflection of the negative confidence level in the beef industry, with a standard error of 1.5.<sup>187</sup> In short, the equation was used to show how the confidence level for Texas Cattle due to the Oprah Winfrey show dropped, thus subsequently lowering the overall price of the cattle. When Purcell presented his findings to the jury during trial, he only showed a graph of confidence levels that he had produced as a result of the equation. He never gave the precise details behind the equation.<sup>188</sup> He claimed that the price drops were not from the normal economic motions of the beef industry and instead that they came as a result of an outside influence, namely, the Oprah Winfrey Show. Purcell then claimed that because of the show, the damages that resulted lasted for at least eleven weeks afterwards.<sup>189</sup> While Purcell's calculations may have appeared well thought out and accurate to the jury, during his cross examination his credibility crumbled. Attorneys for Winfrey and Lyman focused on calculation errors in his findings. They also focused on a newsletter he wrote in April of 1996 in which he wrote of several factors responsible for the dropped cattle

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<sup>185</sup> Ibid.

<sup>186</sup> Ibid.

<sup>187</sup> Ibid.

<sup>188</sup> Ibid.

<sup>189</sup> Ibid., 16.



prices, none of which had anything to do with Winfrey.<sup>190</sup> The defendants clearly showed that Purcell could not be trusted as a witness and that his findings were essentially void; thus suggesting that perhaps the cattlemen did not actually directly suffer from Winfrey and Lyman's statements.

Damage experts were called in to testify to determine how much money the Texas cattlemen had lost due to the show. However, the calculations that the damage experts used relied on the cattlemen's claim that the lower cattle prices lasting from a week before the show to eleven weeks after were all because of the "Dangerous Foods" comments.<sup>191</sup> They did not consider that another factor might have influenced the drop in prices. For example, they did not consider price changes that occurred in the days leading up to the show's broadcast. The reason for this was because the trading volume on those days was minimal and the resulting prices were not considered normal prices so they were exempt from appropriate damage calculations.<sup>192</sup> In the damage period that the plaintiffs cited, the differences in sale prices and should-have-been prices were all considered.<sup>193</sup> In other words, the plaintiffs were seeking for the defendants to pay as much as possible to compensate for the lull in the beef industry that occurred at the time. This calculation resulted in total damage claims numbering between ten and twelve million dollars, although the number kept changing as more and more people claimed that they had been harmed by the remarks made on The Oprah Winfrey Show. In fact, the calculating of damages was done so abysmally that at first the Texas Beef Group claimed

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<sup>190</sup> *Ibid.*

<sup>191</sup> *Ibid.*

<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid.*

that changes in the value of cattle from April 1, 1996 to May 1, 1996 were all because of the show, which in fact had not even aired until April 16<sup>th</sup>.<sup>194</sup>

After the Texas Beef Group rested their case, Lyman and Winfrey asked Texas Judge Mary Lou Robinson to dismiss all of the charges that had been brought against them. Judge Robinson stated that the plaintiffs had not proved that the defendants knowingly made false disparaging statements against them. In fact, the show had never even mentioned Texas or the plaintiffs specifically. She also stated that referring to cattle or the beef industry as a whole covered too many people in order to allow any one person to receive monetary damages.<sup>195</sup> This fact was based upon a previous precedent that had been set by the Texas Court of Appeals. Also, the common law says that disparagement needs to be “of and concerning the plaintiffs.” Therefore, the plaintiffs did not meet the burden of proof.<sup>196</sup>

As far as the Texas Food Disparagement of Perishable Food Products Act, Judge Robinson stated that the, “plaintiffs’ product is sold *in the form of* live cattle. Live cattle are not generally perishable as perishable is defined in the statute.”<sup>197</sup> Although the Judge acknowledged the cattlemen’s claims that in a sense cattle can be perishable if fed too much or inadequately fed, she ultimately said that none of this evidence fit within the “carefully crafted statutory language” which requires that a food product in question perish or decay “beyond marketability.”<sup>198</sup> Essentially, the cattle owned by the cattlemen were still marketable, “although they may be less profitable, and in some cases not

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<sup>194</sup> Ibid.

<sup>195</sup> Texas Beef Group, et al. v. Oprah Winfrey.

<sup>196</sup> Ibid.

<sup>197</sup> Ibid.

<sup>198</sup> Ibid.

marketable to every buyer.”<sup>199</sup> Judge Robinson further said that even if the cattle were considered a perishable food product, the plaintiffs failed to prove that the defendants knew their statements to be false, something that is one of the strictest standards set forth by the First Amendment.<sup>200</sup> She stated that in including this standard in its statute, “the Texas Legislature exceeded even the constitutionally required ‘actual malice’ standard of knowledge or reckless disregard established in *New York Times Co. vs. Sullivan* for defamation of public officials.”<sup>201</sup> In short, the Texas statute has a stricter standard for plaintiffs attempting to prove their products have been disparaged. It is difficult to prove what a person knows or does not. However, this is the standard that the statute sets forth and Judge Robinson said that the plaintiffs failed in establishing the burden of proof and failed to provide evidence that would lead a juror to believe that the defendants had knowledge of the falsity, if any, of the statements that they had made.<sup>202</sup>

After failing to prove their case under the food disparagement law, the plaintiffs’ last resort was the common law business disparagement claim. However, to prove business disparagement involved high standards of proof. Judge Mary Lou Robinson advised the jury that if they were to decide that Winfrey and Lyman had committed libel under business disparagement, they would need to be certain that the two had knowledge that their statements were false, or at least serious doubts as to its truth. In addition, they needed to decide if the defendants had harmful or malicious intent against the business of the plaintiffs. Finally, the plaintiffs needed to convince the jury that they had endured

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<sup>199</sup> *Ibid.*

<sup>200</sup> *Ibid.*

<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid.*

damages because of false and malicious statements made by the defendants.<sup>203</sup> The common law states that under business disparagement, a person can be held liable for a mere “reckless disregard for the truth,” where as the food disparagement statute requires that a person states something that they know for sure is untrue.<sup>204</sup> In this way, it seems likely that the plaintiffs would have had a better shot at proving that they had been libeled than they had under the Texas Statute. However, the toughest obstacle for them was still going to be proving how Winfrey and Lyman’s statements specifically harmed them. The “of and concerning” provision of the common law meant that the cattlemen would have to prove that the statements were directed at them and not a larger general group of cattle feeders.

In regards to the charge of common law business disparagement against the plaintiffs and their cattle, Winfrey and Lyman’s attorneys took the approach of trying to prove to the jury that their statements were factual or they at least were opinions that should be permitted for the talk show environment in which they were expressed.<sup>205</sup> Diane Hudson, Winfrey’s executive producer, first testified about the intentions behind the show’s “Dangerous Foods” episode. She defended it by saying that the Winfrey show as a whole was seeking to present a crucial and relevant issue that concerns the safety of American consumers.<sup>206</sup> This mission to inform consumers included advising people about the potential of Mad Cow Disease being spread due to cattle being fed the remains of other cattle. Furthermore, she defended Harpo Productions Incorporated by saying that members of its staff believed the statements made by Lyman were truthful, and that the

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<sup>203</sup> Hayenga, “Texas Cattle Feeders v. Oprah Winfrey,” 17.

<sup>204</sup> *Ibid.*

<sup>205</sup> *Ibid.*

<sup>206</sup> *Ibid.*

representatives from the beef industry were included in the show to debate him if his statements were not true.<sup>207</sup> Finally, Hudson explained that no one from Harpo knew the cattlemen who were now suing them and that after Winfrey aired the second segment in which Dr. Weber reiterated the safety of American beef, the network received a letter of appreciation from the National Cattlemen's Beef Association.<sup>208</sup> In essence, Hudson's testimony made the plaintiffs appear as if their cause of action was unwarranted.

The defense also called economist Martin L. Hayenga as an expert witness to argue that the Winfrey show did not directly cause the drop in cattle prices. Hayenga attempted to prove that there were other factors that influenced the cattle prices during the time period in which the show took place and that these factors, not the show, resulted in the lower prices. In addition, he sought to prove that the outrageously high amount of damages that the plaintiffs were asking for was unreasonable.<sup>209</sup> Hayenga explained to the jury the simple economics of supply and demand in order to prove the defendants' case. He pointed out that at the time, the number of cattle in the market increased dramatically while the export market demand in Southeast Asia dropped and cancellations or renegotiations of prior sales had begun around the time that Winfrey's show aired. Thus these two factors were more reasonable explanations for the price drop. Further, Hayenga argued that both the United States Department of Agriculture and the Texas Cattle Feeders Association reported the price drops in the week prior to the show as reliable indications of the market prices.<sup>210</sup> Therefore, there was no reason why Purcell should not have used these price changes in his calculations. Hayenga also pointed out

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<sup>207</sup> *Ibid.*

<sup>208</sup> *Ibid.*

<sup>209</sup> *Ibid.*

<sup>210</sup> *Ibid.*

that during past spring and summer months it was common for the price of cattle to drop and that after the two weeks following the show when prices had dramatically dropped, the cattle prices then experienced a long steady increase. Finally, he finished his testimony by pointing out that it was possible that Winfrey and Lyman could have caused the price drop, however, he believed there was no effective way to distinguish the effect of their statements from other factors occurring in the market at that time.<sup>211</sup>

The defense then called Bettina Whyte as a damage expert from Price Waterhouse to argue that the Texas Beef Group was asking for an amount in damages that was higher than they actually deserved. She testified that the damages that the plaintiffs sought would be significantly smaller had they used prices the day before “Dangerous Foods” as a base. In addition, the plaintiffs were seeking for Lyman and Winfrey to cover damages from price declines before the show aired, which was just downright illogical. Whyte also alluded to the fact that the Texas Beef Group saved a lot of money from lower feeder cattle purchase prices and that the amount saved should have been enough to balance out any losses endured from the lower cattle prices.<sup>212</sup> In other words, as was proven on the cross examination of Purcell, the plaintiffs’ damage calculations were not entirely accurate.

During the closing arguments, the cattlemen and Winfrey and Lyman’s sides each got to make their final attempts to state their claims. The plaintiffs reiterated that false and disparaging statements made on the Oprah Winfrey Show resulted in negative outcomes for the plaintiffs and their products. In addition they argued that the drops in cattle prices were solely because of the show and that damages should be based on the

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<sup>211</sup> *Ibid.*, 18.

<sup>212</sup> *Ibid.*

much higher prices of the week before the show rather than the day before when a minimal amount of cattle were marketed.<sup>213</sup> Attorneys for the defense also reiterated their points that they had made throughout the course of the trial. The attorney for Howard Lyman persisted that his client's statements were based on scientific study and Winfrey's attorney focused on the First Amendment Freedom of Speech clause.<sup>214</sup> In conclusion, the defendants' attorneys stressed that the confidence of consumers in the Beef Industry was not dramatically altered after the show, and thus there really was no true claim for damages.<sup>215</sup>

When it was time for the jury to decide a verdict in the case Texas Beef Group vs. Oprah Winfrey and Howard Lyman, Judge Mary Lou Robinson directed jurors to answer a set of questions that would determine if business disparagement as defined under the common law had been committed. The first question asked, and perhaps the most crucial, was, "Did a below-named defendant publish a false, disparaging statement that was of and concerning the cattle of a below-named Plaintiff as those terms have been defined for you?"<sup>216</sup> After the panel of jurors all unanimously answered no, there was no other questions that needed to be asked of them, because it was then irrelevant whether the defendants knew their statements were false, if malice was involved and how much damages were at stake.<sup>217</sup> It was an explicit victory for the defense. At least one of the

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<sup>213</sup> *Ibid.*, 19.

<sup>214</sup> *Ibid.*

<sup>215</sup> *Ibid.*, 18.

<sup>216</sup> *Ibid.*

<sup>217</sup> *Ibid.*, 19.

jurors later said to the press that he felt as if Freedom of Speech played a key role in his decision in the case.<sup>218</sup>

What really barred the plaintiffs from winning their case under the business disparagement aspect of the common law was that they could not meet the “of and concerning” requirement.<sup>219</sup> Judge Robinson stated that, “None of the Plaintiffs were mentioned by name on the April 16, 1996 *Oprah Winfrey Show*, and it is stipulated that this program did not mention by name the State of Texas, the Texas Panhandle, or West Texas.”<sup>220</sup> Lyman and Winfrey never explicitly mentioned any of the plaintiffs who had raised the suit against them. Therefore it was irrational for the Texas cattlemen to even assume that they were the targets of the statements made on “Dangerous Foods.” In addition, as Judge Robinson noted in her court opinion, the Texas Court of Appeals has held as a precedent that, “as a matter of law that an individual may not recover damages for defamation of a group or class in excess of 740 persons of which he is a member.”<sup>221</sup> The statements made by Lyman and Winfrey, if false and disparaging, would have been directed at all of the cattlemen in the United States, not the Texas cattlemen in particular. Therefore, the plaintiffs had no legal right for any compensation. Group libel makes it difficult for any specific person or group of people to gain recovery and Texas precedent eliminates the option of it. The plaintiffs appealed their case to the United States Court of Appeals for the Fifth Circuit in April of 2000 and their request was denied.<sup>222</sup>

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<sup>218</sup> *Ibid.*

<sup>219</sup> *Texas Beef Group, et al. v. Oprah Winfrey, Harpo Productions, Inc., and Howard Lyman*, F. Supp. 2d. 858 (N.D. Tex. 1998).

<sup>220</sup> *Ibid.*

<sup>221</sup> *Ibid.*

<sup>222</sup> *Ibid.*



After the verdict was read, Oprah Winfrey emerged from the court house in Amarillo, Texas (where Judge Robinson requires all women to wear skirts) and yelled out, “Free Speech not only lives, it rocks!”<sup>223</sup> She was correct. Indeed, the First Amendment protected Winfrey and Lyman from being convicted under the Texas False Disparagement of Perishable Food Products Act and the common law of business disparagement. However, what speculators in the media hoped would become “the first major test” of what has become known as “veggie libel laws” failed to do so. The trial’s dismissal of the Texas Statute as a viable claim for the plaintiffs left the proceedings to carry on as a simple common law libel case. This change meant that the Winfrey and Lyman case did not determine whether the Food Disparagement Statute adopted by Texas or similar statutes adopted by eleven other states are constitutional or not. The Winfrey case only seemed to reiterate the statutory language of the Texas law that specifically refers to “perishable” food products only. Subsequently, the constitutionality of Food Disparagement laws remains up for debate.

### **The Unconstitutionality of the Texas Food Disparagement of Perishable Food Products Act**

The difficulty with Food Disparagement laws and libel laws in general is that the court needs to make certain that it balances its responsibility to protect an individual’s reputation but also to protect another individual’s First Amendment rights. Perhaps this balancing act is why Food Libel laws have been the source of a great deal of controversy in recent years. Some people have argued that the laws are unconstitutional, as did the group Action for a Clean Environment in their lawsuit against the state of Georgia, while others believe that they are constitutional. However, the Texas law along with the other

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<sup>223</sup> Kelley, *Oprah: A Biography*, 324.

twelve state food disparagement laws, has yet to be ruled constitutional by a court. In fact, most of these laws have become obsolete in the past decade.

One of the most crucial components of the food libel laws is the standard of liability provision. Some of these states, including Louisiana, Alabama, and Georgia have very strict liability standards. For example, Alabama's law, entitled, "Action For Disparagement of Food Product or Commodity," states that, "It is no defense under this article that the actor did not intend, or was unaware of, the act charged."<sup>224</sup> In other words, a person can be convicted of food disparagement under the law solely for speech that is later found to be false. *New York Times v. Sullivan* has become the most modern standard for libel cases in the United States.<sup>225</sup> This case determined that in order for a defendant to be convicted of common law libel, the plaintiff must prove constitutional malice has occurred, which means the defendant had knowledge of falsity or reckless disregard for the truth.<sup>226</sup> This requirement places the burden of proof on the plaintiff to prove that the defendant made false statements. This standard is not upheld in the Alabama statute. Is being unaware of the falsity of a statement, which is the standard of liability in Alabama, the same as recklessly disregarding the truth? The answer to this question is unclear. The *Sullivan* case established the key point that sometimes in our society we need to tolerate a certain degree of falsehood if we want to live in a world that allows for public debate.<sup>227</sup> That is why the Civil Rights Group won their case even though they had included false details in their advertisement. The Alabama statute

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<sup>224</sup> Alabama Action for Disparagement of Food Product or Commodity.

<sup>225</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (Supreme Court of the United States, 1964).

<sup>226</sup> *Ibid.*

<sup>227</sup> Bederman, "Limitations on Commercial Speech."

punishes speech merely because it is false. If this is allowed, people would be fearful of speaking because they do not want to say something that is untrue. This fear is precisely what the *New York Times* case sought to prevent. Therefore, the Alabama statute in its current form is probably unconstitutional based on its liability standards alone.

The Texas statute is different from the Alabama statute and those like it in terms of its liability standards. Texas has a provision that a defendant's statement must be made on the basis of "reasonable and reliable scientific inquiry, facts, or data."<sup>228</sup> Texas also states that a defendant must know the information is false in order to be convicted.<sup>229</sup> In other words, if a defendant can prove that they had no idea their statements were false and that they had consulted scientific resources prior to making their statements, then they cannot be found guilty of food libel under the Texas act. This form of defense seems to match the constitutional standard upheld by the *New York Times* case. Thus, the Texas statute is probably constitutional based on its liability standards alone.

However, while the Texas False Disparagement of Perishable Food Products Act follows the line laid down in *New York Times v. Sullivan*, one of its weaknesses lies in its definition of what constitutes a falsehood. As Professor Bederman explored in his speech that he gave at the DePaul University College of Law conference, "Limitations on Commercial Speech", the issue with relying on scientific data to support statements, is that science is not a static field of knowledge.<sup>230</sup> The various Food Disparagement laws deal with questions of science, but questions of science and the knowledge that comes out of them are constantly being updated or revised. What might have been thought to be true

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<sup>228</sup> *Ibid.*

<sup>229</sup> Texas False Disparagement of Perishable Food Products Act.

<sup>230</sup> Bederman, "Limitations on Commercial Speech."

about the safety of our food products even a year ago may no longer be accurate today. That being said, for these statutes to call for “reasonable and reliable scientific inquiry, data or facts” is a little unattainable. What might have been “reliable” scientific facts at the time that Winfrey hosted “Dangerous Foods,” may no longer be so. Professor Bederman said that, “That is precisely the evil to me of these statutes, because they convert questions that are best reserved for scientific inquiry and peer review and robust public debate, and turn them instead into legal questions...and it totally distorts the ongoing process of scientific inquiry.”<sup>231</sup> In other words, science unlike the law is something that is not definite. This ambiguity makes it difficult for the court to decide whether a defendant had proper proof for what he or she may have said and thus whether statements were made out of truth or falsity. Texas along with Oklahoma, Florida, Arizona and Ohio have the reasonable and reliable scientific data provision. The law is intended to be clear and easily understood. By relying on a provision that is relatively ambiguous given each individual case, one could argue that these statutes are unconstitutional in regards to how falsehood is established.

Another area of the Texas statute that is unclear pertains to the burden of proof, and who exactly has it. The statute states that, “the trier of fact shall consider whether the information was based on reasonable and reliable scientific inquiry, facts, or data.”<sup>232</sup> The trier of fact is assumed to be the judge or jury, depending on the case. However, the statute does not state who is required to prove to the “trier” that the information disseminated was based on scientific fact. If one was going to assume based on the

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<sup>231</sup> *Ibid.*

<sup>232</sup> Texas False Disparagement of Perishable Food Products Act, Tex. Civ. Prac. & Rem. Code Ann. 96.001-.004 (1995).

language alone, it seems as if the defendant would be required to show that their statements were based on “reasonable and reliable scientific inquiry, facts, or data.” If this were the case, then the Texas Statute is in violation of the common law requirement that for a civil case the plaintiff, not the defendant, has the burden of proof.<sup>233</sup> This is because in an action of a tort, which a libel case is, the plaintiff is required to “prove all the elements.”<sup>234</sup> Many statutes, like the Texas one, are either ambiguous about who has the burden of proof or do not even refer to it at all. Only one state, Idaho, explicitly states that, “The plaintiff shall bear the burden of proof as to each element of the cause of action and must prove each element by clear and convincing evidence.”<sup>235</sup> Therefore, the constitutionality of the statutes, with the exception of Idaho, seem to be questionable on the grounds that they do not specifically uphold the requirement of a civil case that a plaintiff must prove a defendant’s guilt with a preponderance of evidence.

While there are specific provisions in the Texas Statute that suggest its unconstitutionality, there is also the issue of Commercial Speech. In the case, *Virginia State Board of Pharmacy vs. Virginia Citizens Consumer Council, Inc.*, Supreme Court Justice Harry Blackmun upheld that commercial speech is covered by the First Amendment Freedom of Speech Clause and thus deserves protection. Commercial speech, as outlined by the court, consists of a “flow of information” between a speaker and a consumer.<sup>236</sup> Most of the Food Disparagement statutes explicitly protect food products from false statements that “states or implies that the perishable food product is

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<sup>233</sup>Hagy, “Let Them Eat Beef.”

<sup>234</sup> Bederman, “Limitations on Commercial Speech.”

<sup>235</sup> Idaho Disparagement of Agricultural Food Products.

<sup>236</sup> *Virginia State Board of Pharmacy et al. v. Virginia Citizens Consumer Council, Inc., et al.*

not safe for consumption by the public.”<sup>237</sup> However, this provision seems to impede upon the process of a speaker providing information that could be of value to a consumer. While these laws aim to prevent false statements that may cause damage to the producer of a particular food product, as Professor Bederman noted, the laws may also discourage people from making true statements out of fear of being convicted if they happen to get their facts wrong. The *Sullivan* case highlighted the importance of the general public enduring a degree of falsity for the sake of valuable debate. Therefore, because these laws can instill a sense of fear of speech or prevent people from participating in the flow of communication amongst consumers, it seems likely that they unconstitutionally violate First Amendment Rights.

Finally, an important part to consider about each of the states’ Food Disparagement law is how they treat, or do not treat, the issue of opinion based statements.<sup>238</sup> How should these statutes deal with someone who merely states an opinion? If their opinion causes damage to a food producer, should they be charged under the statutes? Surely an opinion cannot be proven to be false. Professor Bederman acknowledges the thin line between statements that are opinions and just statements that can contain false information. He cites the example of President George Bush saying on the lawn of the White House, “I hate broccoli.”<sup>239</sup> Bederman acknowledges that there is a difference between this statement and a statement such as, “eating broccoli will make your brains fall out,” which implies that broccoli is unsafe for humans to consume.<sup>240</sup> The comments made by Howard Lyman on “Dangerous Foods,” implied that he believed his

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<sup>237</sup> Texas False Disparagement of Perishable Food Products Act.

<sup>238</sup> Bederman, “Limitations on Commercial Speech.”

<sup>239</sup> *Ibid.*

<sup>240</sup> *Ibid.*

statements to be factual and not just his mere opinion, so the issue of opinion was irrelevant. However, it seems as if it would not be unreasonable for the states that have food disparagement statutes to include some kind of provision that addresses the discrepancies that may arise over a statement that a defendant claims was made out of opinion rather than fact.

Overall, it seems as if some aspects of the Texas Food Disparagement of Perishable Food Products Act are constitutional. For example, the statute provides for liability standards that adhere to the precedent set by the Supreme Court in the *New York Times v. Sullivan* case. However, there are also some aspects of the Texas Statute that seem to be unconstitutional. This includes ambiguous requirements for determining falsehood and an unclear indication of who is responsible for the burden of proof in a disparagement case. Also, it would strengthen the nature of the law if it included some kind of provision about opinion-based statements and where they stand in regards to the statute. It would be possible for the Texas False Disparagement of Perishable Food Products Act to be amended via court interpretation or through the law itself so that it clears up any ambiguities and accounts for opinions. Then it could possibly be deemed constitutional. However, this does not address the issue that is still to be debated over whether food libel laws in general, not just that of Texas, are constitutional.

“Veggie Libel” laws do seem to violate the Freedom of Speech provision for Commercial Speech in that they hinder the reception of valuable information by consumers. This potential violation of free speech is something that still needs to be determined. But as Professor Bederman remarked, the American public seems to be

competent enough to determine what is smart information from what is not.<sup>241</sup> We as consumers should know when radical Howard Lyman is being slightly over the top. We should be able to distinguish between what statements are serious from those that are trivial. In the end, it seems as if Food Disparagement Laws are not as necessary as some people might think. The Winfrey case is living proof of this point. The Texas cattlemen tried to win their claim under the Texas Statute and their suit ended up being dropped to a common law business disparagement claim. Because these laws have not been effectively used in the decade and a half that they have been in existence, it seems as if they are not necessary for the American public. Therefore, it does not seem as if they are good public policy.

## **Conclusion**

Following *Auvil v. CBS*, thirteen states passed laws to prohibit food disparagement. Since these laws have been passed, only in Texas, Georgia and Ohio has anyone attempted to sue under the respective laws. Three lawsuits were raised under the Texas False Disparagement of Perishable Food Products Act. The first was raised by the Texas cattlemen against Winfrey and Lyman. Following Winfrey's victory, another lawsuit was raised under the Texas statute. In *Anderson A-1 Turf Farm and A-1 Grass Co. v. McAfee*, the owner of a grass farm attempted to sue Texas state agricultural agent James McAfee who had contributed to an article that claimed that a certain kind of grass was "very susceptible to disease."<sup>242</sup> McAfee requested a motion for summary judgment

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<sup>241</sup> *Ibid.*

<sup>242</sup> Eileen Gay Jones, "Forbidden Fruit: Talking About Pesticides and Food Safety in the Era of Agricultural Product Disparagement Laws," *Brooklyn Law Review* (2001), accessed March 31, 2011, LexisNexis.



and was granted it because of the common law doctrine of sovereign immunity.<sup>243</sup> This doctrine protects government workers from civil suits. In this case, like the Winfrey case, the issue of the constitutionality of the Texas False Disparagement of Perishable Food Products Act was not addressed. The last case that was raised in Texas was *Burleson Enterprises, Inc. v. American Honda Motor Co., Inc.*, in which a group of Emu Ranchers attempted to sue Honda for a television commercial in which emus were referred to as, “the pork of the future.”<sup>244</sup> Ultimately the case was dismissed and since no further suits have been raised under the Texas False Disparagement of Perishable Food Products Act. The law has essentially become unnecessary. The *Dallas Morning News*, a conservative Texas newspaper, even hinted that, “Veggie Libel Laws’ are for the birds,” and that the Texas Cattlemen and others who tried to raise suits under them were wasting their time.<sup>245</sup>

The lawsuit that was raised in Georgia was *Action for a Clean Environment v. Georgia*. The environmental group Action for a Clean Environment sought a declaratory judgment in the Georgia Court of Appeals as to the constitutionality of Georgia’s Action for Disparagement of Perishable Food Products or Commodities Act. The Court of Appeals upheld the lower court’s dismissal of the case.<sup>246</sup> The last suit raised under a “Veggie Libel” law was in Ohio in the case *Agricultural General Co. v. Ohio Public*

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<sup>243</sup> Ibid.

<sup>244</sup> Eric Jan Hansum, “Where’s the Beef? A Reconciliation of Commercial Speech and Defamation Cases in the Context of Texas’s Agricultural Disparagement Law,” *The University of Texas at Austin School of Law Publication: The Review of Litigation* (2000), accessed March 31, 2011. LexisNexis

<sup>245</sup> Mark Babineck, “‘Veggie Libel’ Law Fate Rests with Emus, Eggs, 2 Cases Seen as Crucial Tests of Law’s Durability,” *The Dallas Morning News*, March 5, 1998, accessed March 31, 2011, [http://nl.newsbank.com/nl-search/we/Archives?p\\_action=print&p\\_docid=0ED3DA98453F80FC](http://nl.newsbank.com/nl-search/we/Archives?p_action=print&p_docid=0ED3DA98453F80FC).

<sup>246</sup> Hansum, “Where’s the Beef?”

*Interest Research Group*. The egg producing company, Buckeye, attempted to sue the public interest group for statements that one of the group's employees made concerning Buckeye's repackaging and subsequent selling of old eggs. The interest group's allegations were aired on NBC's "Dateline."<sup>247</sup> Eventually, the plaintiffs dropped their suit and no suit has been raised since under the Ohio Disparagement of Perishable Agricultural or Aquacultural Food Products Act. Out of the five lawsuits that have been raised under the "Veggie Libel" laws, either no plaintiff has won their case or the case never went to trial. Therefore, the constitutionality of the laws has yet to be established. In addition, no states since the original thirteen have passed "Veggie Libel" laws. California and Michigan were considering passing a law in their individual states but this was never carried out.<sup>248</sup> The fact that suits under "Veggie Libel" laws have not successfully resulted in a victory for a plaintiff and because no other states have adopted food disparagement laws suggests that these laws have essentially become dead letter laws. They are still in effect but are obsolete.

While the Winfrey and Lyman case was not a true test of the Texas False Disparagement of Perishable Food Products Act because the case was changed to a common law business disparagement case, it did draw public attention and interest to "Veggie Libel" laws. The protection given to commercial speech by the Supreme Court decisions seems to indicate that these laws, particularly the Texas False Disparagement of Perishable Food Products Act, infringe upon the "flow of information" from speaker to consumer. Laws that punish those who falsely claim that a perishable food product is unfit for consumption also hinder the process of public debate. As pointed out in *New*

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<sup>247</sup> Ibid.

<sup>248</sup> "Legislate Update: Status of Proposed Food-Disparagement Laws."

*York Times v. Sullivan*, Americans must endure a degree of falsity or else people might refrain from speaking publicly on issues out of fear of saying the wrong thing and subsequently being accused of libel. This fear might prevent someone from sharing true information that is vital to the concerns of millions of consumers and their overall safety. The law in Texas is probably unconstitutional because it interrupts the “flow of information” and the tolerance of falsity that is protected under the commercial speech provision of the First Amendment. Also, if we accept laws that prevent disparagement against food, then there should be no limit to how far disparagement laws in general can go. For example, we could potentially pass laws that prevent disparaging statements about clothing products or automobiles. The limitations to freedom of speech would continue to increase. In addition, in a country that boasts of its many freedoms, it seems rather ironic in the first place that we have “Veggie Libel” laws that favor the right of a food product and its producers over our own right to be conscious of our health and aware of what we put in our mouths. We are competent enough to be able to distinguish between insignificant information and pertinent information. Thus, the Texas False Disparagement of Perishable Food Products Act is probably not only unconstitutional; it seems to be unnecessary as well.

## Works Cited

- “60 Minutes Milestones.” Last Modified August 20, 1999.  
<http://www.cbsnews.com/stories/1999/08/20/60minutes/main59202.shtml>.
- “2007 Census of Agriculture Report.” United States Department of Agriculture.  
 Accessed March 14, 2011. [www.agcensus.usda.gov](http://www.agcensus.usda.gov).
- Alabama Action for Disparagement of Food Product or Commodity, Ala. Code. 6-5-620 (1996).
- Arizona Action for False Claims Against Perishable Agricultural Food Product, Ariz. Rev. Stat. Ann. 3-113 (1996).
- Auvil v. CBS “60 Minutes.”* 67 F.3d 816, (United States Court of Appeals for the Ninth Circuit, 1994).
- Babineck, Mark. “‘Veggie Libel’ Law Fate Rests with Emus, Eggs, 2 Cases Seen as Crucial Tests of Law’s Durability.” *The Dallas Morning News*, March 5, 1998. Accessed March 31, 2011. [http://nl.newsbank.com/nlsearch/we/Archives?p\\_action=print&p\\_docid=0ED3DA98453F80FC](http://nl.newsbank.com/nlsearch/we/Archives?p_action=print&p_docid=0ED3DA98453F80FC).
- Bederman, David J. “Limitations on Commercial Speech: The Constitutionality of Agricultural Disparagement Statutes: Food Libel: Litigating Scientific Uncertainty in a Constitutional Twilight Zone.” *DePaul Business Law Journal* 10 DePaul Bus. L.J. 191 (1998). Accessed March 3, 2011. LexisNexis.
- Bigelow v. Virginia.* 421 U.S. 809, (Supreme Court of the United States, 1975).
- Florida Violations of Certain Commercial Restrictions, Fla. Stat. ch. 865.065 (1995).
- Hagy, J. Brent. “Let Them Eat Beef: The Constitutionality of the Texas False Disparagement of Perishable Food Products Act.” *Texas Tech Law Review*, 29 Tex. Tech L. Rev. 851 (1998). accessed December 1, 2010. LexisNexis.
- Hansum, Eric Jan. “Where’s the Beef? A Reconciliation of Commercial Speech and Defamation Cases in the Context of Texas’s Agricultural Disparagement Law.” *The University of Texas at Austin School of Law Publication: The Review of Litigation* (2000). Accessed March 31, 2011. LexisNexis.
- Hayenga, Martin L. “Texas Cattle Feeders v. Oprah Winfrey: The First Major Test of the ‘Veggie Libel Law.’” *The National Agricultural Law Center* (1998): 14. Accessed October 15, 2011. LexisNexis.
- Idaho Disparagement of Agricultural Food Products, Idaho Code 6-2001 (1992).

- Jones, Eileen Gay. "Forbidden Fruit: Talking About Pesticides and Food Safety in the Era of Agricultural Product Disparagement Laws." *Brooklyn Law Review* (2001). Accessed March 31, 2011. LexisNexis.
- Kelley, Kitty. *Oprah: A Biography*. United States: Crown Publishing, 2010.
- Law.com. "Legal Terms and Definitions." Accessed March 1, 2011. <http://dictionary.law.com/Default.aspx?selected=2159>.
- "Legislate Update: Status of Proposed Food-Disparagement Laws." Last Modified April 16, 1999. <http://www.cspinet.org/foodspeak/laws/pending.htm>.
- Levenstein, Harvey. *Paradox of Plenty: A Social History of Eating in Modern America*. New York: Oxford University Press, 1993.
- Lewis, Anthony. *Make No Law: The Sullivan Case and the First Amendment*. New York: Vintage Books, 1991.
- Louisiana Disparagement of Agricultural or Aquacultural Products, La. Rev. Stat. Ann. 3:4501 (1991).
- Lyman, Howard. *Mad Cowboy: Plain Truth from the Cattle Rancher Who Won't Eat Meat*. New York: Scribner, 1998.
- Mayer, Robert N. *The Consumer Movement: Guardians of the Marketplace*. Boston: Twayne Publishers, 1989.
- New York Times Co. v. Sullivan*, 376 U.S. 254 (Supreme Court of the United States, 1964).
- Ohio Disparagement of Perishable Agricultural or Aquacultural Food Product, Ohio Rev. Code. Ann. 2307.81 (1996).
- "Oprah Free Speech Rocks." *CNN*, February 26, 1998. Accessed March 15, 2011. [http://articles.cnn.com/1998-02-26/us/9802\\_26\\_oprah.verdict\\_1\\_mad-cow-disease-bovine-spongiform-encephalopathy-human-version?\\_s=PM:US](http://articles.cnn.com/1998-02-26/us/9802_26_oprah.verdict_1_mad-cow-disease-bovine-spongiform-encephalopathy-human-version?_s=PM:US).
- "The Oprah Winfrey Show, 20<sup>th</sup> Anniversary Collection," *Oprah's Angel Network* (Hollywood, CA: Paramount Home Entertainment, 2005). DVD.
- Schultz, David, Vile, John R. and Michelle D. Deardorff., *Civil Rights and Liberties*. New York: Oxford University Press, 2011.
- Texas Beef Group, et al. v. Oprah Winfrey, Harpo Productions, Inc., and Howard Lyman, F. Supp. 2d. 858 (N.D. Tex. 1998).

Texas False Disparagement of Perishable Food Products Act, Tex. Civ. Prac. & Rem. Code Ann. 96.001-.004 (1995).

Timmons, Heather. "Mad Cow Disease in the United States: A Case History; Britain Has Learned Many Harsh Lessons in a Long Effort to Combat Mad Cow Disease." *New York Times*, December 26, 2003. Accessed March 1, 2011.  
<http://www.nytimes.com/2003/12/26/us/mad-cow-disease-united-states-case-history-britain-has-learned-many-harsh.html>.

"U.S. TV Nielsen Ratings." CTVA. Accessed March 18, 2011.  
[http://ctva.biz/US/TV-Ratings/CTVA\\_NielsenRatings\\_1989-1990.htm](http://ctva.biz/US/TV-Ratings/CTVA_NielsenRatings_1989-1990.htm).

*Valentine, Police Commissioner of New York v. Chrestensen*. 316 U.S. 52, (Supreme Court of the United States, 1942).

*Virginia State Board of Pharmacy et al. v. Virginia Citizens Consumer Council, Inc., et al.* 425 U.S. 748, (Supreme Court of the United States, 1976).