

# LEGAL ISSUES IN LOCAL FOOD SYSTEMS

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I.	Introduction.....	10
II.	Background and Definitions .....	10
III.	Legal Issues .....	14
	A. Contracts .....	14
	B. Food Safety .....	18
	C. Federal and State Procurement Laws Provide Constraints and Opportunities for Institutional Purchases of Local Foods .....	22
	1. Federal Statutes.....	23
	a. Richard B. Russell National School Lunch Act.....	23
	b. Child Nutrition Act of 1966.....	24
	c. Office of Federal Procurement Policy Act.....	24
	2. Federal Regulations .....	25
	3. Several States Have Begun Addressing Procurement Legislation and Local Foods .....	26
	a. North Dakota... ..	26
	b. Montana.....	29
	c. Michigan.....	30
	4. Procurement Laws Will Increasingly Need To Be Amended to Encourage Purchases of Local Foods.....	31
IV.	Conclusion .....	32

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## I. INTRODUCTION

The purpose of this article is to review some of the current laws that apply to local food systems in the United States, and to discuss how these laws are being changed and adapted to serve the needs of such systems. This is not as easy a task as it may appear on the surface, as the laws that apply to local food systems cannot be found within one body of law, but must be pulled from a variety of areas such as: food safety, contract law, and zoning and planning, among others.

The local food movement in the United States has seen an upsurge in interest the past two years or so, and in that time it has moved from being more of a “fringe” movement into the mainstream. At its heart is a desire on the part of consumers to connect more closely with the food that they eat in conjunction with a sense of environmental responsibility. From the start, the nature of the farms that were involved with the local food movement were smaller operations, and often produced a diverse array of crops. As the interest in local food moves into the mainstream, however, there are certain changes that are, inevitably, taking place. It is the belief of the authors that these changes include increased oversight and regulation of the various aspects of local food systems, and will eventually include more standardized definitions of the term “local food.”

It is important that lawyers keep up with the legal changes that are occurring in the area of local food. As mentioned *supra*, the laws that affect local food systems draw from many other sources of law. For this reason, it is beyond the scope of this article to touch on all of the relevant areas. Rather, it is the authors’ intent to focus on a few of the major areas of law that the authors believe to be most relevant to local food systems at this time.

## II. BACKGROUND AND DEFINITIONS

In order to understand the legal issues that are relevant to local food systems, it is important to develop an understanding of this term. The first component of the term “local food” does not have one set definition, legal or otherwise. Local food currently has a variety of meanings, depending on the context and the party defining it. It is an evolving and often debated term.

There has been a substantial increase in the interest in local food over the past few years. While it is difficult to objectively quantify this movement, there have been numerous articles in the popular press about it; non-profit organizations, consumer interest groups, farm interest groups, large retailers, and even state governments that have dedicated resources to local food. Interest in local

food and what it stands to offer farmers, consumers, and the environment has also been taken up by the federal government. The most visible form of this interest can be seen by the United States Department of Agriculture (USDA). For example, this agency started a campaign called “Know Your Farmer, Know Your Food” that was announced in September of 2009.<sup>1</sup>

However, for all of this interest, the term “local food” still does not have a set meaning. It is a term that is defined by the individuals, entities, or organizations that decide to use it, and they may (at this time, anyway), attach whatever meaning they choose to the term.<sup>2</sup>

One of the focal points of the local food movement was initially the often-cited fact that fresh produce consumed in the United States travels for more than 1,500 miles between where it is raised and when it reaches the end consumer.<sup>3</sup> This number became a benchmark for some proponents of local food, with the goal of reducing the number of food miles that the food they were consuming had traveled. This was done in an effort to both obtain food that was fresher, as well as to reduce the carbon footprint of food.<sup>4</sup> One broad way to define local food, then, could be food that has traveled less than 1,500.

There are other definitions of local food that are also based on mileage:

For example, the Internet company Google . . . opened a restaurant on its California campus called Café 150; its name reflects the decision to serve food that has been sourced from within a 150 miles radius of the campus. Author Gary Nabhan says that local food is food grown or produced within a 250 miles radius. Author and nutritionist Joan Dye Gussow’s definition of local food is food that can be procured “within a day’s leisurely drive of our homes.”<sup>5</sup>

These examples illustrate the spectrum of definitions that have been utilized to define “local food.”<sup>6</sup>

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1. Press Release, U.S. Dep’t of Agric., USDA Launches “Know Your Farmer, Know Your Food” Initiative to Connect Consumers with Local Producers to Create Economic Opportunities for Communities (Sept. 15, 2009), *available at* [www.usda.gov/wps/portal/tut/p/\\_s.7\\_0\\_A/7\\_0\\_10B?contentidonly=true&contentid=2009/09/0440.xml](http://www.usda.gov/wps/portal/tut/p/_s.7_0_A/7_0_10B?contentidonly=true&contentid=2009/09/0440.xml).

2. See Marne Coit, *Jumping on the Next Bandwagon: An Overview of the Policy and Legal Aspects of the Local Food Movement*, 4 J. FOOD L. & POL’Y 45, 47 (2008).

3. HOLLY HILL, NAT’L SUSTAINABLE AGRIC. INFO. SERV., ATTRA, FOOD MILES: BACKGROUND AND MARKETING 1 (2008), *available at* <http://attra.ncat.org/attra-pub/PDF/foodmiles.pdf>.

4. See *id.* at 1, 8.

5. Coit, *supra* note 2.

6. Sometimes the terms “local food” and “organic” are used either in reference to one another, or interchangeably—and this can cause confusion. It is important to note that these are not, by definition, the same. As stated *supra*, local food does not have one particular set legal definition. The term “organic,” however, does have a precise legal definition. It is set out by the Organic Food Production Act of 1990, and the accompanying regulations, which create the Nation-

As the popularity of local food has grown, so have the attempts to define the term legislatively. At the state level, these definitions typically use the relevant state boundaries as the reference point. Illinois passed one of the most comprehensive pieces of legislation regarding local food in August of 2009.<sup>7</sup> The Local Food, Farms, and Jobs Act states, “[l]ocal farm or food products are products grown, processed, packaged, and distributed by Illinois citizens or businesses located wholly within the borders of Illinois.”<sup>8</sup> It also establishes as a goal that twenty percent of food purchased by state agencies should be locally grown by the year 2020.<sup>9</sup>

At the federal level, the first definition of local food came from the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill).<sup>10</sup> Section 6015 amends the Consolidated Farm and Rural Development Act, which establishes a loan program.<sup>11</sup> The amendment directs the Secretary of Agriculture to “make or guarantee loans to individuals . . . businesses, and other entities to establish and facilitate enterprises that process, distribute, aggregate, store, and market locally or regionally produced agricultural food products to support community development and farm and ranch income.”<sup>12</sup> It defines locally or regionally produced agricultural food products as:

[A]ny agricultural food product that is raised, produced, and distributed in-- (I) the locality or region in which the final product is marketed, so that the total distance

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al Organic Program (NOP). Food, Agriculture, Conservation, and Trade Act of 1990, 7 U.S.C. § 6501-6522, 6503 (2006). The NOP sets forth specific production and handling practices that must be met in order for a food or food product to be labeled “organic.” 7 U.S.C. § 6504. The term “local food,” on the other hand, may denote a geographic basis, but does not have any meaning in terms of production practices. Confusion about the meaning of these terms may stem from the fact that there are similar characteristics that proponents attach to both. As social movements, there are some commonalities. For example, proponents of both mention the importance of knowing where one’s food comes from, supporting farmers, eating healthy, fresh, less processed food, etc. MICHAEL POLLAN, *THE OMNIVORE’S DILEMMA: A NATURAL HISTORY OF FOUR MEALS* 239-42 (2006).

7. See Illinois Local Food, Farms, and Jobs Act of 2009, 30 ILL. COMP. STAT. 595/1-99 (2009).

8. *Id.* at 595/5.

9. *Id.* at 595/10(a). There are other states that also have preference statutes. For example, “Vermont has a statute that states that “[w]hen purchasing agricultural products, the secretary of administration, the secretary of buildings and general services and any state-funded institutions shall, other considerations being equal, purchase products grown or produced in Vermont when available and when they meet quality standards established by the secretary of agriculture, food and markets.” VT. STAT. ANN. tit. 6, § 4601 (2009).

10. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 6015, 122 Stat. 923, 1167 (2008) (to be codified at 7 U.S.C. § 1932).

11. *Id.*

12. *Id.* at 1168 (codified at 7 U.S.C. § 1932(g)(9)(B)(i)).

that the product is transported is less than 400 miles from the origin of the product; or (II) the State in which the product is produced.<sup>13</sup>

This definition is significant beyond the substantive definition it provides. It is evidence of the growing trend toward legislative definitions of local food. With the rapid increase in interest in local food in the last few years there has been a parallel trend in the increase in legal definitions of the term. Even three years ago, there were very few legal definitions of this term.<sup>14</sup> Today, we are seeing not only definitions from the states and the federal government, but comprehensive statutes, such as the one from Illinois, that seek to support all aspects of a local food economy.<sup>15</sup> It seems reasonable to assume that we will continue to see more legal definitions of local food in the future. It remains to be seen whether these definitions help to clarify the term or add to the existing array of definitions.

The second component of the term “food systems” is broadly defined as “everything from farm to table.”<sup>16</sup> In other words, “food systems” refers to everything that goes into producing food all the way through to the time that it reaches the consumer, and everything in between. It includes production, harvesting, processing, handling, packaging, storage, transportation, and waste disposal.<sup>17</sup> These are all factors that have to do with the food itself. The term “food systems” also includes other factors that are external to the supply chain itself such as policy decisions, effects on the environment and economic and cultural influences on food production.<sup>18</sup>

Local food systems, therefore, are the collection of any input or output that has a bearing on local food.<sup>19</sup> For the purposes of this article, the focus is on

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13. *Id.* at 1167 (codified at 7 U.S.C. § 1932(g)(9)(A)(i)).

14. Coit, *supra* note 2.

15. The Illinois Local Food, Farms, and Jobs Act establishes the Local Food, Farms, and Jobs Council. “The purpose of the . . . Council is to facilitate the growth of an Illinois-based local farm and food product economy that revitalizes rural and urban communities, promotes healthy eating with access to fresh foods, creates jobs, ensures a readily available supply of safe food in an emergency event, and supports economic growth through making local farm or food products available to all Illinois citizens.” Illinois Local Food, Farms, and Jobs Act of 2009, 30 ILL. COMP. STAT. 595/15 (2009).

16. Nat’l Agric. Library, USDA, Nutrition Assistance Programs, [http://fnic.nal.usda.gov/nal\\_display/index.php?info\\_center=4&tax\\_level=2&tax\\_subject=276&topic\\_id=1344](http://fnic.nal.usda.gov/nal_display/index.php?info_center=4&tax_level=2&tax_subject=276&topic_id=1344) (last visited Apr. 21, 2010).

17. Jennifer Wilkins & Marcia Eames-Sheavly, *Discovering the Food System: A Primer on Community Food Systems: Linking Food, Nutrition and Agriculture*, <http://www.hort.cornell.edu/departament/faculty/eames/foodsyst/pdfs/Primer.pdf> (last visited Apr. 21, 2010).

18. *Id.*

19. *Id.*

some of the legal issues that are relevant to local food systems. In other words, the focus is on any statute, regulation, or policy that affects local food from the field through washing, packaging, transportation and sale to the consumer. However, there could potentially be a limitless number of legal and policy issues to cover under this umbrella, and it is beyond the scope of this article to discuss them all. The authors have chosen a few topics to discuss that they think are most relevant at this time.

### III. LEGAL ISSUES

#### A. *Contracts*

The majority of sales of local food take place within the context of direct marketing.<sup>20</sup> “Direct marketing” is a term that encompasses the sale of food directly from the farmer to the consumer.<sup>21</sup> Some examples of direct marketing are farmers’ markets, pick-your-own operations, and community supported agriculture operations (CSAs). In the transactions listed *supra*, the consumer is buying the food right from the person who grew it. One effect of this type of transaction is that consumers are able to develop a relationship with the farmer who grew the food that they eat. It is this direct, more personal relationship that is often cited as one of the main reasons why consumers are interested in buying locally.<sup>22</sup>

In general terms, the purpose of a contract is to ensure that each party is getting what they have bargained for. Within the context of direct marketing there is little need for written contracts. For example, in the case of a sale of produce at a farmers’ market, the customer is right there, at the booth where the farmer has his or her products displayed for sale. The customer is able to see for his or herself what is available and generally is able to pick the exact product—such as the particular melon, zucchini, or pint of berries—that he or she wants. The customer then exchanges the agreed upon amount of currency with the farmer, and the deal is completed.

There is no written contract in this type of face-to-face sale. However, the principles of unwritten, or oral, contracts apply. Both parties know right away that they are getting what they have bargained for. The farmer has set the price for the products, and because they are receiving payment right at the time of the transaction, they are assured of getting paid. On the consumer side, they know before they walk away that they have received the product that they have bargained for.

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20. Coit, *supra* note 2, at 56.

21. NEIL D. HAMILTON, *THE LEGAL GUIDE FOR DIRECT FARM MARKETING* 1 (1999).

22. See POLLAN, *supra* note 6, at 242.

As mentioned previously, farmers' market transactions are often conducted without a written contract because of the nature of local food sales. A new issue is arising, however, as the popularity of local food continues to grow. There is a concurrent increase in non-direct sales of local food. This includes, but is not limited to, local food sales to state agencies, schools, universities and large retail grocery stores. In situations such as these, farmers are not selling their products directly to the end consumers.

The indirect sale of local food adds another dynamic to the idea of buying locally. As mentioned *supra*, one of the reasons often cited by proponents is that buying locally grown food enables them to establish a personal relationship with the person who grows their food. This personal element is taken out of the equation when consumers purchase local food from an intermediary.

Selling products indirectly also changes the nature of the transactional relationship for the farmer. Rather than selling a very small quantity of a variety of products to a large number of individual customers, there is a transition to selling a larger quantity of fewer types of products to a larger customer. For example, a farmer with a diversified operation who sells produce at a farmers' market might have peppers, tomatoes, squash, eggplant, corn, cucumbers and, and melon available on a given day. If this farmer wants to sell to a grocery store, it is possible that they will only sell a few of the items listed above. In addition, in order to provide the quantity of product needed, the farmer may need to increase the quantity of the particular crop that they are growing.

There are other issues that may also arise when a farmer sells to an intermediary. For example, indirect sales means that there might be a delay between the time that a farmer delivers the product and the time that the farmer gets paid. There may also be a power differential between the parties when it comes to negotiating the terms of the deal.

One way to deal with these issues is to set the terms of the agreement down in a written contract. The Uniform Commercial Code (UCC) is a uniform act that governs commercial transactions.<sup>23</sup> Article 2 of the UCC covers the sales of goods.<sup>24</sup> Goods are defined as "all things that are movable at the time of identification to a contract for sale. The term includes future goods, specially manufactured goods, the unborn young of animals, [and] growing crops. . . ."<sup>25</sup> Food and food products discussed in this article would likely be considered goods for the purposes of Article 2, whether they are food items already in existence or still growing in the fields.

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23. U.C.C. § 1-103 (2009).

24. *Id.* § 2-102.

25. *Id.* § 2-103(1)(k).

Section 2-201 requires that contracts for the sale of goods worth \$5,000 or more need to be recorded in order to be enforceable.<sup>26</sup> However, because the issues described may arise between a producer and a buyer, it may be advisable that parties consider using a written contract even in situations where it is not necessarily stipulated under the UCC.

There are a number of ways in which a written contract can be beneficial for both parties. Written contracts are a flexible tool because they allow the parties to customize the terms of the agreement to meet their particular needs. Contracts can also be used to clarify the parties' expectations and aid in long-term business planning.

Using a written contract allows the parties to clearly lay out the exact terms of the agreement. Some terms to consider including in a written contract have to do with the product itself. For example, the agreed upon price, the quantity, and terms regarding delivery, such as day(s) of delivery and time of delivery, are all terms that can be put into the contract. The parties might also consider spelling out the terms regarding "acceptability" of a product, including the level of quality that the buyer expects, as well as who has the right to determine whether the product is of acceptable quality.<sup>27</sup>

Another issue that can be addressed in a contract is what happens in the event that the farmer cannot provide the product—or enough of the product—at the agreed upon time. Farming is, after all, an inherently unpredictable business. Between weather, pests, and other influences, there is a good chance that at some point the farmer will not be able to deliver either the quantity or quality of a product as promised. The parties can agree ahead of time as to how they want to handle such situations and can include this in a written contract. This can provide a level of assurance for both sides. In addition, if both parties are aware that there is a valid written agreement, perhaps this will serve as motivation to work out problems that arise on their own, as opposed to taking the other party to court.<sup>28</sup>

The terms of payment can also be set out in a written contract. As opposed to direct marketing, where the buyer and seller are exchanging money for product simultaneously, when a farmer sells product to a grocery store, state agency, university, or other intermediary, there may be a lapse in time between when the product is delivered and the time of payment. It may be beneficial to both parties, therefore, to agree ahead of time as to what type of payment is ac-

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26. *Id.* § 2-201.

27. HAMILTON, *supra* note 21, at 74.

28. FARMERS' LEGAL ACTION GROUP, INC., SELLING FRUITS AND VEGETABLES TO LOCAL RETAILERS AND RESTAURANTS: AN OVERVIEW OF LEGAL ISSUES 2 (2009), available at [http://www.flaginc.org/topics/pubs/arts/SellingLocal\\_Jan09.pdf](http://www.flaginc.org/topics/pubs/arts/SellingLocal_Jan09.pdf).



ceptable, when payment is to occur, and what penalty there will be (if any) for late payments.<sup>29</sup>

Finally, a written contract provides the parties with an opportunity to think ahead, and to decide ahead of time how long they want their agreement to last.<sup>30</sup> Other terms that can be included are whether the contract can be modified, and if so, how, as well as what the consequences of a breach of contract are to be.

As mentioned *supra*, a lot of local food sales are conducted through direct marketing with very little use of accompanying written contracts. However, as the popularity of local food expands and opportunities to sell to larger entities increases, it may be necessary to shift business practices. As with any other type of business transaction, going through the process of developing a written contract provides both parties with the opportunity to think through the agreement they are about to enter. It can also help with business planning for both parties, as well as offer assurance as to what will happen should certain circumstances arise. There are a number of considerations for both the farmer and the buyer when thinking about entering into a contract to purchase local food:

Some farmers who market their products fear that asking for written agreements will be received as an expression of mistrust. However, the main problem with oral agreements is not unfair or sharp business practices, but simple confusion and misunderstandings.

Most disputes about contracts are the result of two basically honest parties having different needs and interests, which may lead to different understandings of the meaning of the agreement itself. These difficulties are compounded if the parties are forced to rely upon their memories of an oral agreement. Few people's memories are good enough to recall all of the important details of an agreement.

What is more, even the most honest and trusting relationships can change through no fault of the farmers or their buyers. Restaurants change hands or hire new chefs, distribution centers are closed. The list of possible problems is long. Keeping good records of dealings with buyers is a little like buying insurance.<sup>31</sup>

It should be noted that a written contract is one particular tool that can be utilized. Written contracts may not fit all situations and needs, and their usefulness for particular situations should be evaluated by the parties involved.

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29. JILL KRUEGER, FARMERS' LEGAL ACTION GROUP, INC., BEFORE YOU SIGN ON THE DOTTED LINE...QUESTIONS FOR FARMERS TO ASK BEFORE ENTERING INTO A DIRECT MARKETING AGREEMENT 4 (2005), available at <http://www.flaginc.org/topics/pubs/arts/DirectMarketingAgreement2005.pdf>.

30. *Id.*

31. *Id.* at 1-2.

### B. Food Safety

In recent years, there have been a number of outbreaks of food-related illnesses in the United States. In the fall of 2006, there was an outbreak of *E. coli* linked to contaminated spinach.<sup>32</sup> In 2008 there was an outbreak of salmonella which was originally thought to be linked to tomatoes,<sup>33</sup> but ultimately was linked to peppers.<sup>34</sup> There have been others that are not related to fresh produce, such as the salmonella outbreak attributed to foods made with contaminated peanut products in late 2008.<sup>35</sup> The number and seriousness of these outbreaks have called into question the effectiveness of the current American food safety system and whether the current laws and regulations are adequate to protect the public health. At this point in time, the need to seriously address these issues does not seem to be disputed. However, some of the solutions that have been proposed to fix these problems have been called into question by advocates of sustainable agriculture, and they may have an adverse affect on local food systems. A lot of attention was brought to this issue by the contamination of the peanut paste in particular for a number of reasons. First, it gained attention because the peanut paste was a manufactured product that was then sold to manufacturers for use in other products, such as crackers, candies, nutritional bars, etc.<sup>36</sup> Therefore, the contamination of this one product had the ability to create a wide-spread problem, and one that was more difficult to trace. A second reason is that there was an indication that even after learning of the contamination, the manufacturer of the product continued to sell it.<sup>37</sup> Finally, peanut products, and peanut butter in particular, are associated with children. When children get sick, this tends to trigger an emotional response in people. Children also tend to be a population that is more susceptible to illnesses that healthy adults are better able to fight off.<sup>38</sup>

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32. CDC, Dep't of Health & Human Servs., Update on Multi-State Outbreak of *E. coli* 0157:H7 Infections From Fresh Spinach, Sept. 15, 2006, <http://www.cdc.gov/ecoli/2006/september/updates/091506.htm>.

33. See Karen Gaudette, *Many Varieties of Tomatoes Disappear from Markets Restaurants*, SEATTLE TIMES, June 10, 2008, available at [http://seattletimes.nwsourc.com/html/localnews/2004468095\\_tomatoes10.html](http://seattletimes.nwsourc.com/html/localnews/2004468095_tomatoes10.html).

34. Julie Schmit, *Tainted Jalapeño Found in Texas*, USA TODAY, July 21, 2008, available at [http://www.usatoday.com/news/nation/2008-07-21-SalmonellaPepper\\_N.htm](http://www.usatoday.com/news/nation/2008-07-21-SalmonellaPepper_N.htm).

35. Gardiner Harris, *Peanut Product Recall Grows in Salmonella Scare*, N.Y. TIMES, Jan. 29, 2009, available at <http://www.nytimes.com/2009/01/29/us/29peanut.html>.

36. *Id.* (estimating the contaminated peanuts to have been used in over 400 products).

37. *See id.*

38. *See id.*

The issue of food safety has received attention from the White House Administration.<sup>39</sup> On March 14, 2009, President Obama created the Food Safety Working Group (FSWG) “to advise him on how to upgrade U.S. food safety laws for the 21st century, foster coordination of food safety efforts throughout the government, and ensure laws are being adequately enforced to keep the American people safe from foodborne illness.”<sup>40</sup> The FSWG is co-chaired by the Secretary of Health and Human Services and the Secretary of Agriculture, and also includes representatives from a number of other agencies, including the Centers for Disease Control and Prevention (CDC), the Environmental Protection Agency (EPA), and the Department of Homeland Security.<sup>41</sup>

So far, the FSWG has proposed “a new, public health-focused approach to food safety based on three core principles: (1) prioritizing prevention; (2) strengthening surveillance and enforcement; and (3) improving response and recovery.”<sup>42</sup> The current plan involves focusing on preventing *Salmonella* contamination, reducing the threat of *E. coli*, creating a national traceback system, and improving the organization of food safety responsibilities at the national level.<sup>43</sup>

Simultaneously, Congress has also been considering ways to modify the food safety system. In 2009, over ten pieces of legislation were introduced in

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39. During his weekly address on March 14, 2009, President Obama addressed his concerns about the current state of the U.S. food safety system. In doing so, he also referenced his own daughter, as follows:

In the end, food safety is something I take seriously, not just as your President, but as a parent. When I heard peanut products were being contaminated earlier this year, I immediately thought of my 7-year old daughter, Sasha, who has peanut butter sandwiches for lunch probably three times a week. No parent should have to worry that their child is going to get sick from their lunch. Just as no family should have to worry that the medicines they buy will cause them harm. Protecting the safety of our food and drugs is one of the most fundamental responsibilities government has, and, with the outstanding team I am announcing today, it is a responsibility that I intend to uphold in the months and years to come.

Press Release, The White House, Weekly Address: President Barack Obama Announces Key FDA Appointments and Tighter Food Safety Measures (Mar. 14, 2009), *available at* [http://www.whitehouse.gov/the\\_press\\_office/Weekly-Address-President-Barack-Obama-Announces-Key-FDA-Appointments-and-Tougher-F/](http://www.whitehouse.gov/the_press_office/Weekly-Address-President-Barack-Obama-Announces-Key-FDA-Appointments-and-Tougher-F/).

40. President’s Food Safety Working Group, Learn, <http://www.foodsafetyworkinggroup.gov/Content/Learn/HomeLearn.htm> (last visited Apr. 21, 2010).

41. *Id.*

42. President’s Food Safety Working Group, Delivering Results, [http://www.foodsafetyworkinggroup.gov/FSWG\\_Fact\\_Sheet.pdf](http://www.foodsafetyworkinggroup.gov/FSWG_Fact_Sheet.pdf) (last visited Apr. 21, 2010).

43. *Id.*

Congress relating to these issues.<sup>44</sup> It is beyond the scope of this article to address all of them; however, it is valuable to review at least one in order to understand what the concerns are in terms of local food systems.

The Food Safety Enhancement Act which passed in the House of Representatives in July of 2009 is an example of this type of legislation.<sup>45</sup> House Bill 2749 seeks to amend the Federal Food, Drug, and Cosmetic Act (FDCA), which is the primary source of authority for the Food and Drug Administration (FDA) in terms of regulating food safety.<sup>46</sup> It requires the registration of food facilities.<sup>47</sup> Section 101(b) defines food facilities, which are required to register annually, as “any factory, warehouse, or establishment . . . that manufactures, processes, packs or holds food.”<sup>48</sup> It goes on to exempt farms, private residences, and restaurants from this requirement. Farms are defined as follows:

(D)(i) The term farm means an operation in one general physical location devoted to the growing and harvesting of crops, the raising of animals (including seafood), or both.

(ii) Such term includes--

(I) such an operation that packs or holds food, provided that all food used in such activities is grown, raised, or consumed on such farm or another farm under the same ownership;

(II) such an operation that manufactures or processes food, provided that all food used in such activities is consumed on such farm or another farm under the same ownership;

(III) such an operation that sells food directly to consumers if the annual monetary value of sales of the food products from the farm or by an agent of the farm to consumers exceeds the annual monetary value of sales of the food products to all other buyers;

(IV) such an operation that manufactures grains or other feed stuffs that are grown and harvested on such farm or another farm under the same ownership and are distributed directly to 1 or more farms for consumption as food by humans or animals on such farm; and

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44. A summary of the legislation is available on the blog of Bill Marler, a personal injury attorney based in Seattle, WA who focuses on food safety. Marler Blog, <http://www.marlerblog.com/2009/03/articles/lawyer-oped/united-states-food-safety-legislation-2009-quite-a-lot-to-chew-on/print.html> (Mar. 23, 2009, 9:55 EST).

45. 111 CONG. REC. H9138 (daily ed. July 30, 2009).

46. See Food Safety Enhancement Act of 2009, H.R. 2749, 111th Cong. (1st Sess. 2009).

47. H.R. 2749, § 101.

48. H.R. 2749, § 101(b)(1)(A).

(V) a fishery, including a wild fishery, an aquaculture operation or bed, a fresh water fishery, and a saltwater fishery.

(iii) Such term does not include such an operation that receives manufactured feed from another farm as described in clause (ii)(IV) if the receiving farm releases the feed to another farm or facility under different ownership.<sup>49</sup>

It appears that there is not a blanket exemption for farmers selling directly to consumers.<sup>50</sup> However, they are exempt from the registration requirement if more than fifty percent of their annual sales come from direct marketing.<sup>51</sup> As one non-profit noted:

Many farms process their own jams, cheeses, beverages, or other products, therefore qualifying as “facilities” under the terms of the bill. While [the] bill exempts facilities that sell over 50.1% of their processed products directly to the consumer, it still imposes a fee on those who primarily sell wholesale. The direct marketing exemption, while welcome, is not sufficient.<sup>52</sup>

Other concerns include the proposed flat, \$500 annual registration fee.<sup>53</sup> There is a concern that this fee will pose an unfair, and possibly prohibitive, burden on smaller farms:

[A]ccording to the Energy and Commerce Committee staff estimates, the majority of the registration fees will be collected from the smallest processors . . . . In many cases, the \$500 fee will be cost-prohibitive for a small farm operation whose value-added processing activity is a small offshoot of the primary farming business. This is a fundamental issue of equity.<sup>54</sup>

Additionally, there are concerns that small-scale producers will also be more heavily burdened by record keeping and administrative requirements, including compliance with the traceability requirements under the proposed legislation.

There is further concern relating to local food systems regarding the traceability requirements:

HR 2749 contains an exemption from traceability for food sold directly from a farmer to consumers, restaurants and grocery stores, but not for farmers who sell to school or hospital kitchens. There is a groundswell of activity across the country around getting fresh, local, high quality food into our public institutions to help re-

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49. H.R. 2749 § 101(b)(1)(D)(i-iii).

50. See H.R. 2749 § 101(b)(1)(D)(i-iii).

51. See H.R. 2749 § 101(b)(1)(C)(iii).

52. Alexis Baden-Mayer, *Food Safety Bill Passes House After Concerns of Organic & Small Producers Stall Passage*, ORGANIC CONSUMERS ASS'N, July 30, 2009, [http://www.organicconsumers.org/articles/article\\_18709.cfm](http://www.organicconsumers.org/articles/article_18709.cfm).

53. H.R. 2749 § 743(b)(1).

54. Baden-Mayer, *supra* note 51.

verse a public health crisis highlighted by burgeoning rates of obesity and diabetes. HR 2749 should recognize and encourage the increased demand for locally-produced agricultural products . . . .<sup>55</sup>

While House Bill 2749 does provide some support for aspects of local food systems, such as direct marketing, there are valid concerns that it, and other proposed legislation, does not go far enough.

At the time of this writing, there has been no consensus between the House of Representatives and the Senate as to what food safety reform should look like. However, it seems inevitable that some action will be taken in terms of changing the food safety system at the federal level. The question remains, however, as to what kind of an impact it will have on small-scale, diversified farms, and on local food system, overall.

### *C. Federal and State Procurement Laws Provide Constraints and Opportunities for Institutional Purchases of Local Foods*

As the local foods movement has gained traction, interest has also increased in finding ways to integrate local foods into institutional settings such as hospitals, prisons and schools. “Farm-to-school” projects have come to the fore as a leading model for institutionalizing local food systems.<sup>56</sup> These projects increased from around 400 in 2004, to over 2,000 in 2009, spanning 40 states.<sup>57</sup>

Many efforts to reorganize food systems are a simple matter of agency; for example, choosing to buy your tomatoes at the farmers’ market rather than the grocery store. Effecting significant change in large institutions rather than individual consumers, however, presents greater difficulty. “Agency invariably runs up against obstacles of structure, yet it is important to recognize that humans, in the exercise of agency, are in a continual process of reshaping those structures to varying degrees.”<sup>58</sup>

Many institutions, such as schools, are under the direction of, and receive funding from, state and federal governments. Therefore, they are subject to an array of laws, regulations, and guidelines which can constrain agency and choice, and thus, the ability to purchase food locally. Federal and state procurement laws have presented obstacles in many states for institutions attempting to purchase

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55. Baden-Mayer, *supra* note 51.

56. See Ctr. for Food & Justice & Comty. Food Sec. Coal., Farm to School, About Us, <http://www.farmtoschool.org/aboutus.php> (last visited Apr. 21, 2010).

57. *Id.*

58. Wynne Wright & Gerad Middendorf, *Introduction to THE FIGHT OVER FOOD: PRODUCERS, CONSUMERS, AND ACTIVISTS CHALLENGE THE GLOBAL FOOD SYSTEM* 1, 15 (Wynne Wright & Gerad Middendorf eds., 2008).

local foods, but legislative efforts by local foods supporters have helped to relax some of these constraints, and even to encourage procurement of locally produced foods.

### 1. *Federal Statutes*

On the federal level, procurement of foods for schools is controlled primarily by three statutes.<sup>59</sup> These statutes provide the framework for several programs developed through federal regulations. It should be noted, however, that there is greater regulation of elementary and high schools that receive federal funding and excess commodities to provide school meals and snacks,<sup>60</sup> so much of the following discussion will focus on public elementary and high schools.

#### a. *Richard B. Russell National School Lunch Act*

Most people today take for granted the breakfast and lunches served in elementary school, the daily little cartons of milk, and other foods served in schools to children. The programs created to deliver these foods, however, have been in development in many forms for over a century.<sup>61</sup> Initially, many states created and administered school meal programs.<sup>62</sup> These were often underfunded, and the need for federal aid became clear.<sup>63</sup> Initially federal funds were not dedicated on a permanent basis, and the precariousness of future funding left many local school authorities hesitant to commit to significant school meal programs.<sup>64</sup> Recognizing the need for permanent legislation, the 79th Congress passed the first version of the Richard B. Russell National School Lunch Act (“School Lunch Act”).<sup>65</sup> The following is the School Lunch Act’s declaration of policy:

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59. See Richard B. Russell National School Lunch Act, 42 U.S.C. § 1751 (2006); Child Nutrition Act of 1966, 42 U.S.C. § 1771 (2006); Office of Federal Procurement Policy Act, 41 U.S.C. § 403 (2006).

60. See 7 C.F.R. §§ 210.1-2 (2010) (setting forth regulations for the National School Lunch Program and defining “school” as, *inter alia*, “[a]n educational unit of high school grade or under. . .”).

61. Tatiana Shohov, *Foreword* to GORDON W. GUNDERSON, NATIONAL SCHOOL LUNCH PROGRAM: BACKGROUND AND DEVELOPMENT vii (Susan Boriotti & Donna Dennis eds., 2003).

62. GORDON W. GUNDERSON, THE NATIONAL SCHOOL LUNCH PROGRAM: BACKGROUND AND DEVELOPMENT 19 (Susan Boriotti & Donna Dennis eds., 2003).

63. *Id.* at 29.

64. *Id.* at 29-30.

65. *Id.* at 30.

It is declared to be the policy of Congress, as a measure of national security, to safeguard the health and well-being of the Nation's children and to encourage the domestic consumption of nutritious agricultural commodities and other food, by assisting the States, through grants-in-aid and other means, in providing an adequate supply of foods and other facilities for the establishment, maintenance, operation, and expansion of nonprofit school lunch programs.<sup>66</sup>

The School Lunch Act sets forth the framework for school lunch programs, and contains specific provisions related to nutritional requirements,<sup>67</sup> directives on federal and state expenditures,<sup>68</sup> and other foundations for the school lunch programs.

b. *Child Nutrition Act of 1966*

The success of the School Lunch Act led Congress to expand support for school meals and child nutrition.<sup>69</sup> Congress declared:

In recognition of the demonstrated relationship between food and good nutrition and the capacity of children to develop and learn, based on the years of cumulative successful experience under the national school lunch program with its significant contributions in the field of applied nutrition research, it is hereby declared to be the policy of Congress that these efforts shall be extended, expanded, and strengthened under the authority of the Secretary of Agriculture as a measure to safeguard the health and well-being of the Nation's children, and to encourage the domestic consumption of agricultural and other foods, by assisting States, through grants-in-aid and other means, to meet more effectively the nutritional needs of our children.<sup>70</sup>

The Child Nutrition Act of 1966 ("Child Nutrition Act") created several new programs, including an extension of the Special Milk Program,<sup>71</sup> a School Breakfast Program,<sup>72</sup> and funding for states to utilize additional equipment and train staff.<sup>73</sup>

c. *Office of Federal Procurement Policy Act*

Although the School Lunch Act and the Child Nutrition Act set forth requirements and stipulations on funding, as well as the framework for the pro-

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66. 42 U.S.C. § 1751 (2006).

67. *Id.* §§ 1754, 1758.

68. *Id.* §§ 1755-56, 1765.

69. GUNDERSON, *supra* note 61, at 39.

70. 42 U.S.C. § 1771 (2006).

71. GUNDERSON, *supra* note 61, at 39; *see also* 7 C.F.R. § 215 (2009).

72. GUNDERSON, *supra* note 61, at 40; *see also* 7 C.F.R. § 220 (2009).

73. GUNDERSON, *supra* note 61, at 40-41; *see also* 7 C.F.R. §§ 227, 235 (2009).



grams enacted, it is the Office of Federal Procurement Policy Act (“Procurement Policy Act”) that sets forth the federal practices and procedures for purchasing and procuring the foods used in the aforementioned legislation.<sup>74</sup>

The Office of Federal Procurement Policy . . . plays a central role in shaping the policies and practices federal agencies use to acquire the goods and services they need to carry out their responsibilities [and] was established . . . to provide overall direction for government-wide procurement policies, regulations and procedures and promote economy, efficiency, and effectiveness in acquisition processes.<sup>75</sup>

The Procurement Policy Act establishes the Office of Federal Procurement Policy and provides the basic framework and guidance for the regulations controlling federal procurement policies and procedures.<sup>76</sup>

## 2. *Federal Regulations*

The School Lunch Act establishes the National School Lunch Program, which is created by and administered according to federal regulations.<sup>77</sup> The Child Nutrition Act establishes several other programs, such as the Special Milk Program<sup>78</sup> and the School Breakfast Program,<sup>79</sup> also created by and administered according to federal regulations. Federal regulations also set out the framework by which states may administer these programs, including guidelines on how payments for these programs will be made to the states.<sup>80</sup> More general provisions of federal regulations also establish the broad framework through which the federal government, states, and Indian tribes work together to administer federal programs such as these.<sup>81</sup>

Federal regulations regarding procurement are extensive, but in the context of the present discussion, it is sufficient to note that there are generally two procedural frameworks for procurement of foods by schools and other such institutions receiving federal funds for administration of school food programs. First, there are formal procurement procedures that set out rules for solicitations of goods and services, as well as rules for the decision-making process when choos-

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74. 41 U.S.C. § 404(a) (2006).

75. Office of Federal Procurement Policy, Office of Management and Budget, Mission, [http://www.whitehouse.gov/omb/procurement\\_default/](http://www.whitehouse.gov/omb/procurement_default/) (last visited Apr. 21, 2010).

76. 41 U.S.C. § 404 (2006).

77. 7 C.F.R. § 210 (2010).

78. *Id.* § 215.

79. *Id.* § 220.

80. *Id.* § 235.1.

81. *See id.* §§ 3015, 3016, 3019.

ing a bidder.<sup>82</sup> The Procurement Policy Act also sets a “[s]implified acquisition threshold”<sup>83</sup> for smaller purchases, which are subject to the “simplified acquisition procedures.”<sup>84</sup> The “simplified acquisition threshold” is currently \$100,000.<sup>85</sup> The simplified acquisition procedures provide a more streamlined and less onerous procedural process for institutions to procure foods (and other items).<sup>86</sup>

### 3. *Several States Have Begun Addressing Procurement Legislation and Local Foods*

Interest in local foods has grown not only among general consumers, but among those purchasing foods for school food programs as well. Procurement officers at these institutions must comply with either the federal procurement procedures, or a qualifying state version of the procurement procedures.<sup>87</sup> The increased interest in local food purchases by procurement officers purchasing food for school food programs has led to legislative initiatives in several states.

#### a. *North Dakota*

In the 2009 legislative session, representatives and senators in North Dakota introduced House Bill Number 1543 (“HB 1543”) which related to procurement of local foods, and preferences for North Dakota agricultural products.<sup>88</sup> The Bill was initially modeled after similar legislation in Montana.<sup>89</sup> Its purpose was, generally, to encourage purchases of North Dakota agricultural products by state institutions and local governments.<sup>90</sup> More specifically, the bill as initially proposed would have allowed procurement officers to give a preference to North Dakota food products, and the ability to pay more for a local product so long as the institution or local government remained within its budget.<sup>91</sup> The Bill also allowed for direct purchase of local food products without

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82. *See generally id.* §§ 3016.36-3019.53 (establishing uniform administrative and procurement policies for use of federal funds).

83. 41 U.S.C. § 403(11) (2006).

84. *Id.* § 427.

85. *Id.* § 403(11).

86. *See id.* § 427.

87. 7 C.F.R. § 3016.36 (2000).

88. H.B. 1543, 61st Leg. Assem. (N.D. 2009), available at <http://www.legis.nd.gov/assembly/61-2009/bill-text/JBKB0100.pdf>.

89. Telephone Interview with Mary Mitchell, Dakota Res. Council Organizer, Dakota Res. Council (Sept. 1, 2009).

90. *Id.*

91. *Id.* *See also*, H.B. 1543, 61st Leg. Assem. (N.D. 2009), available at <http://www.legis.nd.gov/assembly/61-2009/bill-text/JBKB0100.pdf>.

regard to the formal procurement procedures contained in North Dakota state laws.<sup>92</sup>

The Bill was initially opposed by the North Dakota Department of Public Instruction (“DPI”), primarily due to an objection over the exemption from procurement procedures.<sup>93</sup> The North Dakota Office of Management and Budget also opposed the Bill, asserting that if passed, it would subject North Dakota food producers to punitive provisions in other state procurement laws, commonly referred to as “reciprocity laws.”<sup>94</sup> A closer look at the source of opposition to HB 1543 illustrates some of the more general issues with state legislative efforts related to procurement law.

Opposition to HB 1543 from DPI revolved around what was effectively an exemption from any procurement procedures for purchases of local foods. Such a wholesale exemption raised concerns of collusion between purchasers and sellers in the procurement process.<sup>95</sup> As discussed *infra*, other states have successfully loosened the constraints on purchases of local foods by raising the simplified acquisition threshold, thus allowing for larger purchases under the less rigorous simplified acquisition procedures. These procedures still require competition in the bidding process and thereby address concerns about collusion.

Although HB 1543 made no attempt to raise the simplified acquisition threshold in North Dakota, such a measure would have been beneficial for procurement officers in the state seeking to purchase local foods. In North Dakota, “[a] small purchase need not be made through competitive sealed bidding or competitive sealed proposals. However, small purchases must be made with competition that is practicable under the circumstances.”<sup>96</sup> These provisions only apply, however, if the purchase is \$25,000 or less.<sup>97</sup> Raising this threshold to the federal level of \$100,000<sup>98</sup> would allow school food purchasers greater leeway in procuring local foods in larger amounts without the more onerous formal procurement procedures. As will be discussed, other states have introduced and passed legislation with this effect.

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[legis.nd.gov/assembly/61-2009/bill-text/JBKB0100.pdf](http://legis.nd.gov/assembly/61-2009/bill-text/JBKB0100.pdf); S.B. 328, 60th Leg. (Mont. 2007), available at <http://www.growmontana.ncat.org/docs/SB0328.pdf>.

92. Telephone Interview with Mary Mitchell, *supra* note 88.

93. *Id.*

94. Interview with Sherry Neas, Dir. of Cent. Servs., N.D. Office of Mgmt. & Budget (Jan. 26, 2009).

95. *See* 7 C.F.R. § 220 (2000).

96. N.D. CENT. CODE § 54-44.4-11 (2009).

97. *See id.* (“[a] procurement not exceeding the amount established . . . by the state board of higher education under subsection 5 of section 15-10-17 may be made in accordance with small purchase procedures”); N.D. CENT. CODE § 15.1-09-34 (2009).

98. 41 U.S.C. § 403(11) (2006).

The primary opposition to HB 1543 as introduced came from OMB, and arose from concerns about reciprocity laws in other states.<sup>99</sup> According to OMB, the language in HB 1543 stating that North Dakota purchasers “shall provide a preference for food products grown or produced in this state”<sup>100</sup> would subject North Dakota sellers in other states to a 100% reciprocity penalty.<sup>101</sup> To illustrate, North Dakota’s preference law states:

The office of management and budget, any other state entity, and the governing body of any political subdivision of the state in purchasing any goods, merchandise, supplies, or equipment of any kind, or contracting to build or repair any building, structure, road, or other real property, shall give preference to bidders, sellers, or contractors resident in North Dakota. *The preference must be equal to the preference given or required by the state of the nonresident bidder, seller, or contractor.*<sup>102</sup>

Thus, if neighboring Minnesota hypothetically had a ten percent preference for its own resident bidders, it would give its own bidders a ten percent boost on their bids (which, practically speaking, would mean a ten percent reduction in the bid). This would give Minnesota bidders a decided advantage when bidding in Minnesota. If that same bidder were to bid on a project in North Dakota, however, it would become an equivocal disadvantage. Any Minnesota bidder would automatically be subject to a ten percent penalty by virtue of North Dakota’s reciprocity law.

The OMB in North Dakota read the preference language in HB 1543 to be a 100% preference, and therefore opposed the Bill for fear that North Dakota producers would be subject to a draconian penalty when doing business outside the state.<sup>103</sup> Whether this would necessarily have been the case is uncertain, but the concern was legitimate. Although HB 1543 was amended more than once, and in the end looked nothing like its progenitor, it still failed to pass in a final vote in April of 2009.<sup>104</sup> Efforts in other states have met with greater success than in North Dakota, and serve to further illustrate some of the issues with procurement laws pertinent to the local foods movement.

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99. Interview with Sherry Neas, *supra* note 94.

100. H.B. 1543, 61st Leg. Assem. (N.D. 2009).

101. Interview with Sherry Neas, *supra* note 94.

102. N.D. CENT. CODE § 44-08-01 (2009) (emphasis added).

103. Hearing on H.B. 1543, Before the H. Agric. Comm., 61st Leg. Assem. (N.D. 2009) (statement of Sherry Neas, Dir., OMB, Centr. Serv. Div., State Procurement Office), *available at* <http://www.legis.nd.gov/assembly/61-2009/bill-Status/house/HB1543.pdf>.

104. N.D. Leg. Council, Measure Actions: H.B. 1543 (2009), <http://www.legis.nd.gov/assembly/61-2009/bill-actions/ba1543.html>.

b. *Montana*

In Montana, a coalition of organizations came together to form Grow Montana to, “promote community economic development policies that support sustainable Montana-owned food production, processing, and distribution” and improve access to Montana grown food.<sup>105</sup> In 2007, Grow Montana successfully supported passage of Senate Bill 328 (“SB 328”).<sup>106</sup> “SB 328 allows public institutions such as Universities and hospitals more flexibility to buy Montana-produced food. It does this by providing an optional exemption in the Montana Procurement Act.”<sup>107</sup> Officials in Montana did not raise the same concerns regarding collusion, as did officials in North Dakota.<sup>108</sup> Montana institutions purchasing from local producers may, however, develop bidding processes in situations where there is more than a single local producer from whom to purchase foods.<sup>109</sup> Fresh produce has been exempted from Montana’s procurement laws prior to this legislation, so its impact in this area is nil.<sup>110</sup> It may be that Montana’s previous experience with the exemption of produce from formal procurement procedures allayed any concerns with collusion when the exemption was expanded.

The most significant impact of the aforementioned legislation, according to some organizers working on local food issues, actually has more to do with its social ramifications than its legal effect.<sup>111</sup> Organizers in Montana working to encourage schools to purchase local foods often faced opposition from the food purchasers or procurement officers, who would refer to the procurement law as prohibiting them from making direct purchases from local farmers and ranchers.<sup>112</sup> The passage of S.B. 328 sent a clear message to procurement officers and school food service directors that local and direct food purchases are allowed,

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105. Grow Montana, About Grow Montana, <http://www.growmontana.ncat.org/about.php> (last visited Apr. 21, 2010).

106. MONT. CODE ANN. § 18-4-132 (2007), S.B. 328, 60th Leg. (Mont. 2007); Kisha Lewellyn Schlegel, *Increasing Montana Institutions’ Local Purchasing Power*, May 22, 2007, [http://www.growmontana.ncat.org/signed\\_bill\\_328.php](http://www.growmontana.ncat.org/signed_bill_328.php).

107. See S.B. 328, 60th Leg. (Mont. 2007), available at <http://www.growmontana.ncat.org/docs/SB0328.pdf>; Kisha Lewellyn Schlegel, *Increasing Montana Institutions’ Local Purchasing Power*, May 22, 2007, [http://www.growmontana.ncat.org/signed\\_bill\\_328.php](http://www.growmontana.ncat.org/signed_bill_328.php).

108. Telephone Interview with Crissie McMullan, Program Specialist for Nat’l Ctr. For Appropriate Tech., leader of Grow Montana, (Sept. 25, 2009).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

and even encouraged.<sup>113</sup> Organizers in Montana have found that school food service directors and others are much more receptive to local foods campaigns since the passage of S.B. 328.<sup>114</sup>

One specific shortcoming of the Montana legislation can serve as a cautionary note for others working on procurement legislation related to local foods. Pursuant to S.B. 328, the term “produced” was defined as “planted, cultivated, grown, harvested, raised, collected, *processed*, or manufactured” in Montana.<sup>115</sup> The inclusion of the term “processed” allows a Montana business that processes food products to fall under the provisions of the new law (even if the products are in no way local) so long as the processing is done locally.<sup>116</sup> This exemption of all local processors is not in keeping with the intent and purpose of S.B. 328, and organizers in the state are working on amendatory language to refocus the definition of “locally produced” on local foods.<sup>117</sup>

Regardless of this issue, S.B. 328 has been a boon for organizers working on local food issues in Montana. Groups such as Grow Montana have had notable success with policy work on procurement law.<sup>118</sup> Other states have been successful promoting local foods by way of different legal avenues.

### c. *Michigan*

In December of 2008, Michigan passed a package of three bills designed to promote purchases of local foods, particularly in the state’s schools.<sup>119</sup> One primary thrust of the legislation focused on raising the small purchase threshold from \$20,000 to \$100,000.<sup>120</sup> Purchasers are still required to use some type of procedure to ensure competition.<sup>121</sup> The legislative changes helped to increase

113. See, S.B. 328, 60th Leg. (Mont. 2007); Interview with Crissie McMullan, *supra* note 108.

114. Telephone Interview with Crissie McMullan, *supra* note 107.

115. S.B. 328, 60th Leg. (Mont. 2007).

116. Telephone Interview with Crissie McMullan, *supra* note 107; *see also* Interview with Sherry Neas, *supra* note 93.

117. S.B. 328, 60th Leg. (Mont. 2007); Interview with Sherry Neas, *supra* note 93.

118. See, e.g., Grow Montana, Policies, <http://www.growmontana.ncat.org/policies.php>. (last visited Apr. 21, 2010) (stating passage of S.B. 328 to be one of the group’s legislative priorities).

119. See, Eartha Jane Melzer, *Farm-to-School Bills ‘a Tasty End-of-the-Year Treat,’* MICH. MESSENGER, Jan. 9, 2009, available at <http://michiganmessenger.com/11417/farm-to-school-bills-a-tasty-end-of-the-year-treat>.

120. *Id.*

121. HOUSE FISCAL AGENCY, LEGISLATIVE ANALYSIS, SCHOOL FOOD PURCHASES UNDER \$100,000: EXEMPT FROM FORMAL COMPETITIVE BIDDING 2 (Mich. 2008), available at <http://www.legislature.mi.gov/documents/2007-2008/billanalysis/House/pdf/2007-HLA-6365-3.pdf> [hereinafter H. FISCAL AGENCY].

the flexibility of school food purchasers by allowing them to make larger purchases without going through the formal competitive bidding process.<sup>122</sup>

As in Montana, the legislation enjoyed the support of a broad coalition of public and private entities.<sup>123</sup> Perhaps because the Michigan legislation did not raise any concerns related to reciprocity laws, it enjoyed a relative dearth of opposition.<sup>124</sup> Members of the C.S. Mott Group for Sustainable Agriculture developed a memorandum explaining the law in Michigan related to the small purchase thresholds.<sup>125</sup> A farm-to-school conference hosted by the Michigan Land Use Institute sparked interest in the issue<sup>126</sup> and led to what eventually was reflected in House Bills 6365 and 6366.<sup>127</sup>

The potential impact of the new legislation was illustrated by one school food purchaser, who had previously made purchases near the \$20,000 threshold, and following passage of the new legislation, had begun making purchases of local foods close to \$30,000.<sup>128</sup> Another entity in Michigan that buys direct from farmers and resells to school has also seen new potential as a result of the legislation.<sup>129</sup> Additionally, as with other state legislative efforts, the new laws sent a clear message to school food purchasers across the state that purchases of local foods are supported by the law and by lawmakers.<sup>130</sup>

#### 4. *Procurement Laws Will Increasingly Need To Be Amended to Encourage Purchases of Local Foods*

Even in states like North Dakota, where attempts to amend the procurement laws were unsuccessful, there is significant interest in these issues among legislators and citizens alike. In Montana, organizers and citizens made a similar initially unsuccessful attempt at amending procurement laws.<sup>131</sup> As in North Dakota, initial efforts in Montana failed as a result of concern over preference language, and the potential for punitive applications of reciprocity laws in other

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122. *Id.* at 1.

123. *See id.* at 4.

124. *See generally id.* at 4 (indicating no groups opposed to the bill).

125. Memorandum from Colleen Matts & Betty Izumi, C.S. Mott Group for Sustainable Food Sys. at Mich. State Univ., on Small Purchase Threshold Considerations (Apr. 10, 2008).

126. Telephone Interview with Colleen Matts, Outreach Specialist, C.S. Mott Group for Sustainable Agric. (Sept. 2, 2009).

127. H.B. 6365, 94th Leg. Reg. Sess. (Mich. 2008); H.B. 6366, 94th Leg. Reg. Sess. (Mich. 2008).

128. Telephone Interview with Crissie McMullan, *supra* note 107.

129. *Id.*

130. *Id.*

131. Interview with Sherry Neas, *supra* note 93.

states.<sup>132</sup> Nonetheless, some states have passed legislation giving an explicit geographic preference to food items produced within the state.<sup>133</sup> Oregon has enacted a new law that allows an agency using public funds to purchase agricultural products purchased and transported within the state, even if those products are up to ten percent more expensive than their out-of-state counterparts.<sup>134</sup> With the loosening of federal barriers to such preference laws, they are likely to become more and more common as the local foods movement grows.<sup>135</sup> While some states will inevitably lag behind others, the growth of the local foods movement will require a new look at procurement laws.

#### IV. CONCLUSION

Since its inception, the local foods movement has been primarily a social and philosophical movement, pushed forward by its advocates. The underpinnings of a local food system strike many as anachronistic, since such a system was actually around much longer than our present industrialized and globalized system. Regardless, our laws have been built up around the industrial and global model.

As food systems continue to localize, whether parallel to or in place of the current system, there is a growing need to rework our laws in order to make way for and take these systems into account. The foregoing discussion is intended to elucidate a few of the many areas of law that are being adapted to accommodate the changes that are occurring in our food system. Moving forward, it will be crucial for organizers and legal professionals alike to become cognizant of both the challenges and opportunities involved with a parallel effort at legal reform that must keep pace with the socio-philosophical changes taking place in food systems, and on the farms and ranches across the country.

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132. *Id.*

133. *See, e.g.*, H.B. 2763, 75th Legis. Assem., Reg. Sess. (Or. 2009), available at <http://www.leg.state.or.us/09greg/measures/hb276300.dir/hb2763.en.html>.

134. *See id.*

135. *See generally*, 42 U.S.C. §1758(j) (2006) (allowing institutions receiving federal funds to use a geographic preference for procurement of unprocessed agricultural products).