

# RECONFIGURING CHILDREN IN FOOD LAW AS AN ESSENTIAL SUBSET: REVIEW OF FOOD NUTRITION FACTS LABELS

*Yi Seul Kim*<sup>†</sup>

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<sup>†</sup> This article was written when the author was a Senior C.V.Starr Lecturer of Law at Peking University School of Transnational Law. Harvard Law School LL.M., Peking University School of Transnational Law J.D. & J.M. She can be reached at [yiseul87@gmail.com](mailto:yiseul87@gmail.com). The author is grateful to Dr. Lindsey Kurtz and Professor Francis Snyder for the helpful discussions. She also thanks her young nieces, Soojung, Jungwon, and Soobin for their interesting insights and inspiration.

## ABSTRACT

*It is troubling not to find much evidence in modern food law that distinguishes children more than early literature on food safety regulation did. We certainly fall behind science in this respect, especially if we consider how modern food law in the United States emerged. It is a product from both Food and Drug Law and Agricultural Law in response to litigations, pop culture, and public demand.<sup>1</sup> It developed as responses to public outcry<sup>2</sup> rather than from a microscopic perspective of progressively protecting children as a specific population group. The body of food law is written as a general superset of law, but it fails to incubate and include the necessary subsets of law to ensure appropriate enforcement and implementation of child protection. Legal experts should keep in mind the importance of “gaz[ing] inward, to the world that she makes with the [child] as they work together”<sup>3</sup> while acknowledging children as rights holders.<sup>4</sup> This is often an overlooked value in food law and a common mistake made as we conveniently presume services only reach children through parents or legal guardians.<sup>5</sup> Currently, we draft and implement food regulations and design food nutrients fact labels as they would be read by adults and caregivers,<sup>6</sup> which should lead us to think about how we have left children in the shadows.*

## I. INTRODUCTION

We easily understand and then accept food law as it is written. Once enforced, it tends to serve as the standard and framework of our understanding of

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1. See Baylen J. Linnekin & Emily M. Broad Leib, *Food Law & Policy: The Fertile Field's Origins and First Decade*, 2014 WIS. L. REV. 557, 587, 593-595, 612 (2014).

2. See Peter Barton Hutt, *Food Law & Policy: An Essay*, 1 J. FOOD L. & POL'Y 1, 6 (2005) (using the emergence of the Infant Formula Act of 1980 as an example).

3. Lucie E. White, *Goldberg v. Kelly On the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 862 (1990) [hereinafter *Paradox of Lawyering for the Poor*].

4. See *In re Gault*, 387 U.S. 1, 13, 16 (1967) (“[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.”). While much of Professor White’s work discusses lawyering, one intends to expand and supplement the scope to general advocacy and scholarly contributions as well.

5. See Jonathan Todres, *Independent Children and the Legal Construction of Childhood*, 23 S. CAL. INTERDISC. L.J. 261, 263 (2014) (discussing the “helping hand of the law” reaching children through parents and legal guardians).

6. Liberty was a concept not applicable to children. Children were traditionally viewed as belongings. Tamar Ezer, *A Positive Right to Protection for Children*, 7 YALE HUM. RTS. & DEV. L.J. 1, 2 (2004) (quoting JOHN STUART MILL, *ON LIBERTY* 22-23 (1986) (“It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children . . .”)).

the acceptable boundaries in society.<sup>7</sup> Both time and cost are needed to change it once it is established. However, it is also a constraint that should be deconstructed for this very reason.<sup>8</sup> The troubling reality in food law is while this multidisciplinary body of law<sup>9</sup> reflects certain important human values that society favors and promotes, it is often ad hoc and built on necessity<sup>10</sup> arising after a major crisis. This then results in one pitfall: it addresses vulnerability discovered postcrisis rather than building in general objectives designed primarily as ex ante risk prevention mechanisms, which would be the ideal function of regulations.<sup>11</sup> Subject to a handful of exceptions, this phenomenon also effectively results in a “superset” body of law that fails to incubate and balance essential “subsets” of laws, regulations, policies taking into consideration the intricate values and interests of different population groups. Identifying and defining nonexistent consumer groups may be viewed as superfluous by many when there is no precedent. Such a superset body of law is unbalanced for this very reason. For the purpose of this paper, one views the body of modern food law as a superset comprised of multiple subsets: regulations on labeling, advertising, safety standards, et cetera. This view, however, lacks a separate and unique subset—laws, regulations, and policies specifically designed for children’s food. By children’s food, one refers to snacks with cartoon characters drawn on the packaging and containers, cereals advertised for children showing fun features of the “others” who consume them, and beverages featuring popular cartoon characters.<sup>12</sup> This paper exclusively deals with nutrition fact labeling regulations and policies for children’s food in the United States. Identification of more detailed subsets with a microscopic perspective is needed to enhance and develop food law to ensure the

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7. See Lucie E. White, *Seeking “. . . The Faces of Otherness . . .”: A Response to Professors Sarat, Felstiner, and Cahn*, 77 CORNELL L. REV. 1499, 1499-500 (1992) [hereinafter *Seeking the Faces of Otherness*] (outlining Professor White’s discussion of Clifford Geertz’s term of “terminal screens”).

8. See J. M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 763 (1987) (“Deconstruction is not a denial of the legitimacy of rules and principles; it is an affirmation of human possibilities that have been overlooked or forgotten in the privileging of particular legal ideas.”).

9. Linnekin & Broad Leib, *supra* note 1, at 586 (noting food law that covers environmental law, health law, education, property law and even constitutional law).

10. See Alberto Alemanno, FOUNDATIONS OF EU FOOD LAW AND POLICY 13, 18-19 (Alberto Alemanno & Simone Gabbi eds., 2014).

11. Todres, *supra* note 5, at 293-94 (“Every individual is vulnerable to some extent” and “. . . vulnerability ‘must be at the heart of our concept of social and state responsibility.’”) (quoting Martha A. Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 8 (2008)).

12. Sarah Klein, *Study: Cartoon characters attract kids to junk food*, CNN: HEALTH (June 21, 2010), <https://perma.cc/Z6A4-Y3V9>.

paucity on food nutrition for children is adequately addressed. One can even argue it is possible to create nuanced food laws by identifying new subsets in the body of food law.

This is an important study because, for children, stakes are a lot higher than for adult consumers when they make poor food choices and consume them. It affects nutrition intake, which in turn influences developmental growth and leaves lifelong impacts—physical, neurological, and immunological.<sup>13</sup> Yet, they easily make unhealthy food choices for complicated reasons stemming from a complex web of interests that altogether fail to take into account the existence of children. Although there have been growing numbers of scientific and psychological studies done on the impact of food nutrition fact labels, sugar consumption problems, and advertisements for children—there is still much room for development and improvement in each of these areas of study. Surprisingly, the United States is not alone in this respect, as this is a global trend. One could easily argue laws and regulations in multiple countries, including China that has been very active in reforming its food safety regime recently, appear to assume children only consume infant formula.<sup>14</sup> In other words, regulators and lawmakers often actively focus on regulating conducts of labeling, misbranding, advertising, and environmental pollution as separate fields of study within food law, while they fail to ensure these regulations do indeed have a positive impact on children. Although there are special labeling rules for those under two or four years old,<sup>15</sup> this clearly does not sufficiently meet societal needs. For all these reasons, one intends to revisit regulatory and policy gaps in one labeling area of the food regime for this special consumer group in the United States.

Placing children as a touchstone for the development of food law requires far more than merely recognizing biological differences between adults and children, as we need to apply “multiple theoretical lenses” such as those White discusses in the context of lawyering.<sup>16</sup> We need to carefully consider “institutions, on moments of recognition, as well as on the ebbs and flows of interpersonal power”<sup>17</sup> to deeply understand the internal dynamics among a child’s behavior, nutrition demands, and cognitive ability. It is even necessary to go as far as

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13. Exec. Order No. 13,045, 62 Fed. Reg. 19,885 at 19,885 (Apr. 21, 1997).

14. P’ship News Serv. Staff, *Minors Can Easily Avoid Age Requirements When Buying Alcohol Online*, PARTNERSHIP FOR DRUG-FREE KIDS (May 8, 2012), <https://perma.cc/M9VS-S896> (discussing one extreme example of children in China being able to easily purchase alcohol over food delivery applications without restrictions).

15. NEIL D. FORTIN, *FOOD REGULATION* 107-08 (1st ed. 2007).

16. See *Seeking the Faces of Otherness*, *supra* note 7, at 1509-10.

17. *Id.*

applying a fresh view of the world from an autonomous child's perspective.<sup>18</sup> Because modern food law, as it exists today, is arguably less than two decades old, it is also our responsibility to constantly question whether the current food law is fair for children and "ensure that children have a voice in decisions that affect their lives."<sup>19</sup> Reflecting on the volatile character of food law, leading scholars support the idea that the study of food law should actually be taken as "Food Law & Policy."<sup>20</sup> In developing the body of law, one argues it is not much about the textual reading and the drafting of the laws and regulations per se, but rather developing a holistic management strategy involving careful maneuvering of actions and directions.<sup>21</sup>

In determining the direction, it is necessary to apply new lenses or a fresh view of the status quo and to question whether there exists fundamental fairness for children. In doing so, asking this also requires looking at "something more than formal equality in the procedural field."<sup>22</sup> It is not merely about whether we disallow children and minors from purchasing alcohol from liquor stores; rather, it is about taking a deeper and careful look at the substantive choices and resulting consequences children face in selecting food items considering their perspectives. This is an important study turning to the root cause of the disparity between current regulations and children's health because, despite recent legislative efforts to tackle childhood obesity, its rate in the country today reaches 18.5%.<sup>23</sup> Typical American children are known to consume approximately three times the recommended sugar intake level.<sup>24</sup> For sodium, they consume approximately one third more of their recommended amount.<sup>25</sup> And in order to test the claim of current food nutrition fact labels as protection mechanisms fail to do much for children, one must look into how children understand existing food labels today.

An institutional explanation provides an insight into the widespread perspective that adults are caregivers or proxies, and therefore, how laws are drafted taking them into primary consideration. Known as the "most complete

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18. For the purpose of this paper, "autonomous" means an independent child acting on his or her free will without a parent or a legal guardian.

19. Todres, *supra* note 5, at 268.

20. See Linnekin & Broad Leib, *supra* note 1, at 584-95.

21. *Id.*

22. *Paradox of Lawyering for the Poor*, *supra* note 3, at 877.

23. CTRS. FOR DISEASE CONTROL & PREVENTION, PREVALENCE OF OBESITY AMONG ADULTS AND YOUTH 1 (Oct. 2017), <https://perma.cc/DV8Y-UC7S>.

24. Press Release, Am. Heart Ass'n, Children Should Eat Less than 25 Grams of Added Sugars Daily (Aug. 22, 2016) (on file at <https://perma.cc/2SHM-RBEQ>).

25. *Reducing Sodium in Children's Diets*, CTR. FOR DISEASE CONTROL & PREVENTION (Sept. 2014), <https://perma.cc/98NG-4DM5>.

statement of children's rights ever produced"<sup>26</sup> the United Nations Convention on the Rights of the Child (CRC), stands on four widely recognized concepts: non-discrimination, the best interest of the child, right to life survival and development, and right to be heard.<sup>27</sup> In essence, even the most "complete" statement of children's rights fails to mandate a child's best interest as the only or the most important consideration.<sup>28</sup> Nevertheless, in the United States alone, children are increasingly becoming known as autonomous consumers. "Children 12 years or younger in the United States controlled the spending of \$28 billion in 2000 . . . ." In addition, they influenced \$250 billion of family spending. In the United States, the amount that children have to spend doubled between 1990 and 2000, and similar trends are found in European countries.<sup>29</sup>

Even putting these figures aside, it is not difficult to notice the flaw is instilled in the system. We have simply lumped all consumer groups together as one consumer group: the general public. One needs to intervene and address this flaw on accounts of both existing theories and policies,<sup>30</sup> in which we can safely conclude that food law today is an imbalanced superset body of law<sup>31</sup> as we left children in the shadows, but we reaped uncomfortable benefits as it allowed us to detangle the complex web of interests of administrative departments, practitioners

26. *UN Convention on the Rights of the Child*, UNICEF, <https://perma.cc/6JM8-9GG5> (archived Aug. 24, 2019).

27. *Id.* (describing the four "General Principles" that "play a fundamental role in realizing all rights in the Convention for all children"); see United Nations Convention on the Rights of the Child, art. II, III, VI, XII, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (referencing Article 2: "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind . . . ."; Article 3: "In all actions concerning children, . . . the best interests of the child shall be a primary consideration."; Article 6: "1. State Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child."; and Article 12: "States Parties shall assure the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child . . . ." (emphasis added)).

28. See SHARON DETRICK ET AL., *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE "TRAVAUX PRÉPARATOIRES"* 131-34 (1992) (detailing the drafters long discussion over this particular text during its drafting process).

29. BARRIE GUNTER ET AL., *ADVERTISING TO CHILDREN ON TV* at 2 (2005) (citation omitted).

30. See Hutt, *supra* note 2, at 3. It is to be noted that research and analysis of the United States government food policy can be less challenging than that of China. In the United States, the 1966 Freedom of Information Act "permits access to internal government documents that were completely unavailable before the enactment."

31. See generally Lucie E. White, *Facing South: Lawyering for Poor Communities in the Twenty-First Century*, 25 *FORDHAM URB. L.J.* 813, 818-21 (1998) (analogous to Professor White's discussion of 'bad law' and logic behind bad law).

and educators in some ways. Standing on these two critical legs, this article aims to make an important contribution to both food law and children's rights using the case of nutrient facts labels. In the long term, it is inevitable to bring an end to the way food law is currently viewed, and different studies should be undertaken as a foundational groundwork for that change to occur. There is an understudied and overlooked flaw in our society, certainly deserving to be closely analyzed and revisited.

## II. UNDERSTANDING FOOD LAW AS AN IMBALANCED SUPERSET

### A. *Origins of the Imbalance and Children as an Imperceptible Subset*<sup>32</sup>

It is troubling not to find much evidence in modern food law distinguishing children more than early food literature. We certainly lag behind science in this respect, especially if we consider how modern food law in the United States emerged. Like in many other places, food law emerged from a combination of both food and drug law and agricultural law in response to litigations, pop culture, and public demand.<sup>33</sup> It was a result of public outcry,<sup>34</sup> and comprehensive frameworks were built to manifest this effort, rather than from a microscopic perspective of progressively protecting children specifically. This explains how, despite the importance of “gaz[ing] inward, to the world she makes with the [child] as they work together,”<sup>35</sup> we often fail to acknowledge children are rights holders.<sup>36</sup> This is a failure in food law and also a common mistake made in how we draft and implement both laws and regulations, presuming services only reach children through parents or legal guardians.<sup>37</sup> Simply put, we draft laws as they would be read and digested by adults and caregivers,<sup>38</sup> which then leads us to think about how we, adults and drafters of the law, have left children in the shadows.

Children in law are depicted as subjects of the law; therefore, the protection of children has been conventional rhetoric in torts, criminal law, family law, and constitutional law. In law, different standards are applied when it comes to the duty

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32. Linnekin & Broad Leib, *supra* note 1 (explaining early development of food law as an independent course).

33. *See id.* at 587, 593-95.

34. Hutt, *supra* note 2 (using the emergence of the Infant Formula Act of 1980 as an example).

35. *Paradox of Lawyering for the Poor*, *supra* note 3, at 862.

36. *See In re Gault*, 387 U.S. 1, 13 (1967).

37. *See* Todres, *supra* note 5 (discussing the “helping hand of law” reaching children through parents and legal guardians).

38. *See* Ezer, *supra* note 6.

of care for those of different age groups.<sup>39</sup> They are similarly seen as subjects for protection in the area of food law, in which the different stakeholders in the society act as proxies to exercise care in their health and food selection processes. There are various legislative efforts taking place in the country to increase health surveillance at schools and communities for this particular purpose.<sup>40</sup> Different types of food and beverages are prohibited on school grounds, tax policies are specially designed for certain foods and entertainment, and regulations have been placed on food advertisements primarily targeting children. Food labeling regulations also have been sharpened to convey portion sizes to assist parental understanding.<sup>41</sup> Conversely, with the increase of these conventional protection mechanisms, children have very little opportunity to have their voices heard. An assumption prevails that children are not regular consumers in the conventional meaning. Many legislative efforts target the conduct of the adult market players and fail to sufficiently consider children's autonomy, will, and ability to select and consume foods as a regular consumer.

The roots of such notions are traceable to as early as to Ancient Greece, and more recently, the beginning of the twentieth century. Although different in form from today's modern food law, ancient food regulations from Egypt, Greece, and Rome, among others, shed light on the origin of this problem.<sup>42</sup> The laws of Moses, which is often referred to as a reflection of modern food laws,<sup>43</sup> did not differentiate food produced and consumed for adults from those for children. It was written and understood from a general perspective of the grand objective of having honest and correct statements of quantity. This was perhaps because the "general" public had an interest in ensuring they were purchasing and trading on food and other goods based on accurate statements of the weight. The text read: "Thou shalt not have in thy bags divers weights, a great and small; thou shalt not have in thy house divers measures, a great and small; but thou shalt have a perfect and just weight, a perfect and just measure shalt thou have."<sup>44</sup> Prophet Amos is similarly described as a

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39. Lisa Perrochet & Ugo Colella, *What A Difference A Day Makes: Age Presumptions, Child Psychology, and the Standard of Care Required of Children*, 24 U. PAC. L.J. 1323, 1329-30 (1993).

40. Samuel S. Gidding et al., *Dietary Recommendations for Children and Adolescents: A Guide for Practitioners*, 112 CIRCULATION 2061, 2069 (2005).

41. *Id.* at 2062.

42. See RADOMIR LASZTITY, *FOOD QUALITY AND STANDARDS VOL. I* at 65 (2009).

43. JACOB GERSEN ET AL., *FOOD LAW AND POLICY* 114 (1st ed. 2018).

44. F. Leslie Hart, *A History of the Adulteration of Food Before 1906*, 7 FOOD DRUG COSM. L.J. 5, 7 (1952) (citation omitted).



strong proponent of accurate and honest statements of weight while trading grain for silver.<sup>45</sup>

The substantive foundation that served both Moses and Amos are still alive today. The general public has a shared interest in correct and accurate statements of the quantity of food content. As if to carry on the spirit, the United States Code Section 1453 under Chapter 39 of Title 15 similarly states:

(3) The separate label statement of net *quantity of contents* appearing upon or affixed to any package—

(A)(i) if on a package labeled in terms of weight, shall be *expressed in pounds*, with any remainder in terms of ounces or common or decimal fractions of the pound; or in the case of liquid measure, in the largest whole unit (quarts, quarts and pints, or pints, as appropriate) with any remainder in terms of fluid ounces or common or decimal fractions of the pint or quart . . . .<sup>46</sup>

This language suggests that early food law was designed to meet the common interest of the general public—from infants to the elderly. While it is true that such perspective remains valuable today, there is still a need for a more nuanced categorization of consumer groups.

Interestingly, wine was a rare food product receiving special treatment for public health purposes in ancient Greece. Plato wrote while it was a “remedy” for the old, people under eighteen were prohibited from consuming it, and excessive consumption was not recommended for those under thirty years of age.<sup>47</sup> Such familiar classification of ages allows us to make an additional inference that there exists strong parallelism between ancient and modern food regulations, and it is high time to consider updating areas of the law where they lag behind the science. The fact alone that there is much in commonality on both the conceptual and practical levels should raise questions on whether we have made the mistake of conveniently accepting laws and regulations as they are currently written. While many do not even have an answer to why people are considered to have matured to become an adult at eighteen years of age, alcohol is still prohibited for those under eighteen years of age.<sup>48</sup> It is likely this is not merely a coincidence and strongly suggests there is room for new interventions in the body of food law. Even

45. LASZTITY ET AL., *supra* note 42.

46. 15 U.S.C. § 1453(3)(A)(i) (2018) (emphasis added).

47. JACQUES JOUANNA, GREEK MEDICINE FROM HIPPOCRATES TO GALEN 181 (2012).

48. See *The Law Reform Commission's Working Paper on the Law Relating to the Age of Majority, the Age for Marriage and some Connected Subjects*, at 121-35, No. 2-1977 (1977); Jennifer Lai, *Old Enough to Vote, Old Enough to Smoke?*, SLATE (Apr. 23, 2013), <https://perma.cc/W4FE-VB45>.

a study on why we currently have the age of majority system as we do, sends a message that there is a flaw in the current way we view food law and children. There is no fundamental fairness if we fail to take into account their perspectives.

It is true, over the years, food regulations became more nuanced to have realistic impacts on the general public. For example, several regulations are no longer absolute or inflexible—even with the statement of net quantity, “reasonable variations” are allowed in cases of minor alterations made during “good distribution practices” or unavoidable “good manufacturing practices.”<sup>49</sup> Despite leeway in the law text, it is important to recognize such approaches are still misaligned with a possibly narrow approach identifying the intricate subsets of food law that may exist in the superset body of food law. In other words, it failed to recognize the reality of different groups of consumers whose assessment and assumption of risk vary. Then to complicate the situation further, the risks per se have different impacts on different groups of people because people’s nutritional requirements or tolerance of specific nutritional values vary.

As another example of ancient food adulteration with a general view becoming a framework of today’s modern food law, Pliny the Elder wrote: “. . . [T]he dealers have set up regular factories where they give a dark hue to their wine by means of smoke, and, I regret to say, employ noxious herbs, inasmuch as a dealer actually used aloe for adulterating the flavor and color of his wine.”<sup>50</sup>

Today, the proposed legislation of Title 21 Section 342 of the United State Code purports a food is considered adulterated when:

(1) If any valuable constituent has been in whole or in part omitted or abstracted therefrom; or (2) if any substance has been substituted wholly or in part therefor; or (3) if damage or inferiority has been concealed in any manner; or (4) if any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is.<sup>51</sup>

Such textual reading provides a hint on where today’s general food law framework fails to reasonably incubate essential subsets of food law originates from. As mentioned above, ancient food law had one clear objective—to prevent fraud in trade, such as misrepresenting oil made from wood, leaves, and berries as

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49. *Jones v. Rath Packing Co.*, 430 U.S. 519, 529-30 (1977) (quoting 9 C.F.R. § 317.2 (2019)).

50. Hart, *supra* note 44.

51. 21 U.S.C. § 342(b)(1)-(4) (2018).

olive oil and claiming beverage made from various plants as wine.<sup>52</sup> In fact, this *caveat emptor* belief was so significant in crafting the foundation of food law it served as the driving engine to the development of early civil law in Rome.<sup>53</sup> At the time, there was no clear declaration to protect the public's health.<sup>54</sup> Leaping from this void in logic, we come to a point where we need to reconceptualize food law specifically for children.

### B. Promoting Children to Becoming a Critical Subset in Food Law

We still live in John Stuart Mill's age when we come to discuss the status of children in the body of food law.<sup>55</sup> Buss's description of Mill's general doctrine of liberty is very interesting: "First, Mill feels compelled to acknowledge that the exclusion of children is so obvious it almost does not bear mentioning."<sup>56</sup> This general approach of silencing children represents the prevailing view in food law today. While some may claim the silence exists with the assumption caregivers make decisions for the children, this is not far from Mill's propositions from centuries ago.<sup>57</sup> In today's reality though, it does not take much thought to realize children also act as autonomous human beings when it comes to purchasing and consuming food and snacks at their own will. Children often act as independent human beings and make their own food consumption decisions, especially when they attend school and spend time away from their guardians. Recent social study additionally finds children as early as five years old form both emotions and attitudes towards spending behaviors.<sup>58</sup>

### C. Children as Independent Consumers

Reformation can be effectively carried out by first reconceptualizing different consumer groups beyond the conventional dichotomy of adults versus children in the body of food law. In what later became known as Scarman guidelines, the court in *Gillick v. West Norfolk* hinted the potential to move beyond the classic age division while stating:

52. LASZTITY ET AL., *supra* note 42, at 64-66.

53. PATRICIA A. CURTIS, GUIDE TO US FOOD LAWS AND REGULATIONS 23 (2nd ed. 2013).

54. LASZTITY ET AL., *supra* note 42.

55. *See generally id.*; JOHN STUART MILL, ON LIBERTY 81 (1986).

56. Emily Buss, *What the Law Should (And Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13, 17 (2009).

57. *See id.*

58. Craig E. Smith et al., *Spendthrifts and Tightwads in Childhood: Feelings About Spending Predict Children's Financial Decision Making*, 31 J. BEHAVIORAL DECISION MAKING 446, 456 (2018).

As a matter of law the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates if and when the child achieves sufficient understanding and intelligence to understand fully what is proposed [and has] sufficient discretion to enable him or her to make a wise choice in his or her own interests.<sup>59</sup>

Such case law becomes the steppingstone in deeply considering how we should improve the conceptual understanding of our duty to protect the children in consideration of their perspective and development. In a nutshell, it is possible with such an approach to view food choices from the other side. The claim that there is no need to develop a separate body of food law because they do not have the same mental or the physical capabilities as an adult to engage in selecting food from supermarket shelves no longer becomes a valid proposition. Equally, we cannot claim, by lumping all ages under eighteen together, children react to food products and labels in the same as adult consumers.

The legal inquiries and tests in food law should reflect the developments in modern science. In areas where extra precaution allows or encourages essential protection for children, it would be important to introduce it. Similarly, when the age restraint is based on whether a child is over eighteen or not fails to serve a protective function, it should be discarded.<sup>60</sup> Particularly for children in their early years and those that have just gained mobility, there is an additional need to ensure children comply with safety rules and are warned of the risks that can be associated with food.<sup>61</sup> It is often directly related to their survival,<sup>62</sup> and children who are acting as autonomous consumers must be able to comprehend the consequences of their food choices. In taking a careful look at food nutrition fact labels, it would be reasonable to determine children's capacity in understanding and interpreting the information on the label.

Furthermore, there should be increased recognition of children's dignity,<sup>63</sup> and we should "favor interacting directly with children" rather than borrowing the hands of parents and legal guardians as a policy matter.<sup>64</sup> The few instances in the

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59. CHILD RIGHTS INT'L NETWORK, AGE IS ARBITRARY: SETTING MINIMUM AGES 5, <https://perma.cc/9B7J-27KS> (archived Aug. 24, 2019).

60. *Id.* at 4-5.

61. See Perrochet & Colella, *supra* note 39, at 1342-43.

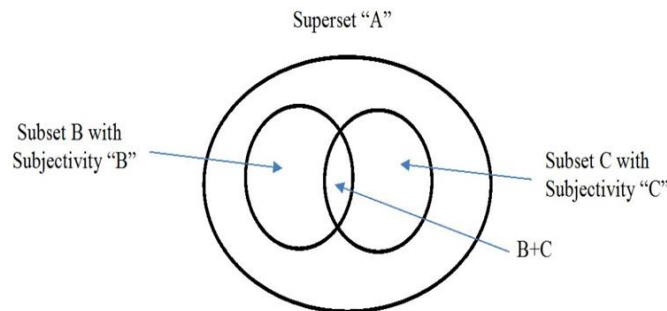
62. *Id.* at 1343.

63. See generally JOHN RAWLS, A THEORY OF JUSTICE 453-512 (1971); Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153, 1172 (1998).

64. See Charles Robert Tremper, *Respect for the Human Dignity of Minors: What the Constitution Requires*, 39 SYRACUSE L. REV. 1293, 1328, 1344 (1988).

United States where we focused on tackle children health<sup>65</sup> allows us to doubt whether these regulations were truly drafted from a child's perspective. They have simply failed to serve their purpose.

With any food label, it would be ideal to develop ways of ensuring information is transmitted with clarity and precision.<sup>66</sup> In fact, the specific purpose of food communication is: getting the message regarding the quality of the food across to every consumer.<sup>67</sup> Such information can assist in the understandings of any health consequences. In addition, for those that have found and made certain choices of food and snacks, the market should provide what it promised regardless of a consumer's age. Failing to do so would have a negative impact on consumers, old and young, and it would be detrimental in both the short and long term. Scholarship in consumer studies exists in explaining the prevalent subjectivism in food and related experience. Meaning and satisfaction are based on a person's cultural background, education, and personal preferences. Bringing such discussion into context, one could claim children lie between two sets of subjectivity—one from where they come from (Space B) and the other from what they encounter in the market (Space C). "Space B+C" is where "subjectivity B" and "subjectivity C" come together, or when children are in the situation of making food consumption choices. It would be necessary to take into consideration two different factors: children's understanding and interpreting capacity that originates from Space B, and the substance of the information from Space C.



65. See generally *Learn the Facts, LET'S MOVE!*, <https://perma.cc/9BHU-V6UJ> (archived Aug. 24, 2019).

66. See 21 C.F.R. § 101.1 (2019).

67. See *Changes to the Nutrition Facts Label*, FDA, <https://perma.cc/9P28-STHS> (archived Aug. 24, 2019).

As explained above, in Space B+C, they undergo an experience in which two sets of subjectivity come together. Labels are the means to ensure smooth interaction between the two subsets that exist in the larger superset of food law. The Food, Drug, and Cosmetics Act (FDCA) defines a label as:

a display of written, printed, or graphic matter upon the immediate container of any article; and a requirement made by or under authority of this chapter that any word, statement, or other information appear on the label shall not be considered to be complied with unless such word, statement, or other information also appears on the outside container or wrapper, if any there be, of the retail package of such article, or is easily legible through the outside container or wrapper.<sup>68</sup>

The graph above is an unrealistically simplified example, yet, serves as a quick guide to understanding the significance of a well-designed food communication with a digestible label from the eyes of a child. In other areas of law, courts will often adopt a standard of care based on “certain assumptions about child psychology.”<sup>69</sup> In jurisdictions adopting the conclusive presumption rule, children are viewed as “impulsive [beings who] cannot foresee the consequences of their actions.”<sup>70</sup> Other jurisdictions presume elements of “knowledge, experience, *and* age” together matter in deciding whether children act spontaneously and have the ability to appreciate the consequences of their conduct.<sup>71</sup> Therefore, the proposition that children must be seen as a separate consumer group that warrants separate treatment seems valid.

#### *D. Consumer Economics Theories Borrowed*

In order to better understand the current superset body of food law, one can also think about how, in a market, there is information asymmetry<sup>72</sup> and sellers interact with potential purchasers with food nutrition fact labels. Labels serve to provide information for consumers in what could be considered a “lemons market” where they access a very limited amount of information on the quality of their potential purchases, and these stakeholders believe food labels make accurate statements regarding the quality of the food.<sup>73</sup> In hopes of making it helpful for the

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68. 21 U.S.C. § 321(k) (2018).

69. Perrochet & Colella, *supra* note 39, at 1330.

70. *Id.* at 1331.

71. *Id.* (emphasis in original).

72. See George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECONOMICS 488 (1970).

73. See *id.* In a larger context, “labels are designed for their impact on the whole food marketing system . . .” serving as a “significant product-design influence, an advertising

general consumer group, the Federal Food, Drug, and Cosmetic Act of 1938 “favor[ed] clear labeling,”<sup>74</sup> including the food nutrition fact label. The theory to overcome asymmetric information can be applied to children’s cognitive ability to distinguish and select food products.

Generally, scholarship distinguishes foods according to the detectable level of quality a consumer may see at points of time throughout the purchase. Phillip Nelson, Michael R. Darby, and Edi Karni categorize products based on timing and the types of quality-related information available to consumers.<sup>75</sup> Nelson identified and discussed the difference between the “search” and “experience” qualities of a good.<sup>76</sup> According to Nelson, search qualities in a good convey quality information before a consumer even purchases the food.<sup>77</sup> For search goods, the consumer can accurately ascertain the product’s quality before purchase, while experience qualities are those that are only discovered after the purchase and usage thereof.<sup>78</sup> Darby and Karni identified “credence” qualities in which even after purchase and usage, consumers are still left in the dark regarding the quality of the good.<sup>79</sup> With credence goods, quality cannot be accurately judged even after purchase and use and, thus, “must be taken on faith.”<sup>80</sup> The cost of identifying the quality is high for products since special litmus tests are to be used to allow an ordinary consumer to

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franchise, a public surveillance assurance, a public values definition, and a nutrition and food safety education format.” Julie A. Caswell & Daniel I. Padberg, *Toward a More Comprehensive Theory of Food Labels*, 72 AM. J. AGRIC. ECON. 460, 463 (1992).

74. Jasper L. Tran, *3D-Printed Food*, 17 MINN. J.L., SCI. & TECH. 855, 875 (2016); *see* 21 U.S.C. §§ 301 *et seq.* (2018).

75. Uwe Dulleck et al., *The Economics of Credence Goods: An Experiment on the Role of Liability, Verifiability, Reputation, and Competition*, 101 AM. ECON. REV. 530, 530 (2011).

76. Caswell & Padberg, *supra* note 73, at 460-68; Srinivasan & Brian D. Till, *Evaluation of Search, Experience and Credence Attributes: Role of Brand Name and Product Trial*, 11 J. PRODUCT & BRAND MGMT. 417, 431 (2002); *see generally* Dulleck et al., *supra* note 75.

77. *See generally* Dulleck et al., *supra* note 75, at 530 n.1 (“Search goods (like clothes) need to be inspected before buying in order to observe their characteristics.”); Winand Emons, *Credence Goods Monopolists*, 19 INT’L J. INDUS. ORG. 375 (2001).

78. *See generally* Dulleck et al., *supra* note 75 (“Experience goods (like wine) have unknown characteristics, but they are revealed after buying or consuming them.”); Emons, *supra* note 77.

79. Dulleck et al., *supra* note 75, at 530-31; Gianfranco Walsh et al., *Examining the Antecedents and Consequences of Corporate Reputation: A Customer Perspective*, 20 BRIT. J. MANAGEMENT 187, 197 (2009).

80. Walsh et al., *supra* note 79, at 193; *see* Srinivasan & Till, *supra* note 76; *see generally* Caswell & Padberg, *supra* note 73.

truly understand the quality of the good.<sup>81</sup> One needs to understand this should be extended for children and their respective food choices.

Even when an average consumer takes a “hasty glance or cursory examination” of the label,<sup>82</sup> there is no regulation ensuring additional mechanisms exist for children to improve their knowledge about food products. Instead, a policy of simplified nutrition labels for any insignificant amounts of calories, total fat, sodium, total carbohydrate, dietary fiber, sugars, protein, vitamins A and C, calcium, and iron on food packages for children under two years of age exists.<sup>83</sup> The regulations on food forget children often have both purchasing power and access to different kinds of food as an autonomous child. Such conventional categorization of food products is rather meaningless as their cognitive abilities differ from adults, and their understanding of quality information is significantly distinctive. For children, naturally, there is less probability of making a correct judgment in purchase and consumption for experience and credence goods. Once we reflect on one’s proposition based on traditional consumer studies, it makes the most sense to understand we only need to classify labels into two groups as an additional protection mechanism. This would work the best when easily distinguishable characters are used: either colors, numbers, or other familiar symbols. When the question is whether the market is giving “full and accurate information to consumers,”<sup>84</sup> it is important to have laws and practices governing children’s food purchasing behavior that reflect upon their understanding and reasoning.<sup>85</sup> As long as children lie somewhere between two sets of subjectivity, it is critical for them to understand what the food they are eating is composed of, whether the ingredients are healthy for them, and to arouse their interest in learning more. Discussing a child’s perspective on food labels, while borrowing fundamental ideas from the theories of asymmetric information and children’s cognitive development, can provide a helpful framework and guideline for revising label regulations.

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81. Srinivasan & Till, *supra* note 76; *see generally* Caswell & Padberg, *supra* note 73, at 57-65.

82. *United States v. Ten Barrels of Vinegar*, 186 F. 399, 401 (E.D. Wis. 1911).

83. 21 C.F.R. § 101.9(f) (2018) (defining an insignificant amount as less than one gram); *Nutrition Labeling and Education Act (NLEA) Requirements*, FDA, <https://perma.cc/U4KP-UFKQ> (Aug. 1994).

84. *See* Caswell & Padberg, *supra* note 73, at 463 (providing a brief overview of works done by Beals, Craswell, and Salop).

85. Todres, *supra* note 5, at 270-71; *see also* M. Aryah Somers et al., *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 U.C. DAVIS J. JUV. L. & POL’Y 311, 325-26 (2010).



Additionally, a discussion on what information a child would expect to find on food products at supermarkets is necessary. When it comes to food safety and quality, ordinary adult consumers could expect information such as microbial food safety, origin, and agricultural or farming practices.<sup>86</sup> Given food selection depends on multivariable, such as advertising, education, income level, and the culture the consumer is embedded in.<sup>87</sup> Children's points of interest would be much more restricted to the amount of sugar or sodium intake, as explained later.

### III. REVIEW OF FOOD NUTRITION FACT LABELS AS UNDERSTOOD BY CHILDREN

In 2016, the Food and Drug Administration (FDA) amended the nutrition labeling requirements to stipulate “[m]anufacturers with \$10 million or more in annual sales must switch to the new label by January 1, 2020 . . . .”<sup>88</sup> And manufacturers with “less than \$10 million in annual sales have until January 1, 2021, to comply.”<sup>89</sup> Considering the changes scheduled to occur in the near future, this article will break down each component of labeling from a child's perspective, hoping to provide better guidance to labeling for children than current regulation.

#### A. Serving Information

Serving information, as an example, would read: 8 Servings per container and 2/3 cup (55g).<sup>90</sup>

On the nutrition facts label, the number of possible servings (8) from a given container of the food product and the size of each serving (2/3 cup) appears at the top. The positioning of the serving information at the top helps ensure the information is apparent and easily detectable to anyone looking at the wrapper.<sup>91</sup> This information is especially important because it serves as the measuring standard for all the following information appearing in the food nutrition facts label, such as the number of calories and nutrients depending on the serving size. The serving size is shown using units (2/3 cup), followed by a metric amount unit

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86. Caswell & Padberg, *supra* note 73 (discussing the controversy of labels describing dietary practices, microbial food safety, pesticide residue, use of irradiation, and agricultural practices).

87. See *id.*; France Bellise, *The Factors That Influence Our Food Choices*, EUFIC, <https://perma.cc/E2RF-G33X> (archived Oct. 22, 2019).

88. *Changes to the Nutrition Facts Label*, *supra* note 67.

89. *Id.*

90. *Id.* (explaining examples from FDA changes to the nutrition facts label).

91. See *How to Understand and Use the Nutrition Facts Label*, FDA, <https://perma.cc/5PUC-KXBB> (archived Aug. 24, 2019).

such as grams (55g).<sup>92</sup> The FDA states that familiar units allow ordinary consumers to quickly grasp the number of servings a food product provides.<sup>93</sup> However, this information is often strictly based on adult standards and consumption patterns,<sup>94</sup> regardless of whether or not the snack was primarily intended for consumption by children. Despite the updates made to the drafting of the serving information, the standard measurement used prior to the 2016 regulations reflects the actual consumption level of an adult female consumer.<sup>95</sup> The revisions made in 2016 now refer to a serving of ice cream as two-thirds of a cup, which is equivalent to a female adult's consumption level in one sitting.<sup>96</sup> There is no separate serving information for children on labels, although scientific research now shows the serving size for children older than four years of age is only half a cup, and children between ages two and three have a serving size as low as a third of a cup.<sup>97</sup> Therefore, all serving information for food products targeting children should be revised accordingly.

It is important to note this revision failed to take into account the child's perspective. This is not only because the standard is set to an adult woman's consumption pattern.<sup>98</sup> Rather, applying a child's perspective allows a deeper understanding of the flaw that is deeply embedded in the system. In short, the above includes too many abstract concepts for a young child to fully understand—even if they manage to read it. For a six-year-old child in Kindergarten, the child is just beginning to “[u]nderstand the relationship between numbers and quantities.”<sup>99</sup> While the child may be able to read the numerical code of “8” or “55,” the concept is comprehensible merely at the stage of knowing one number may be larger than another.<sup>100</sup> Generally, it is only when a child goes to Grade 1 do they learn that “two digits of a two-digit number represent amounts of tens and ones.”<sup>101</sup> Children at age eight learn multi-digit numbers (beyond two digits) and

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92. *Changes to the Nutrition Facts Label*, *supra* note 67.

93. *Food Serving Sizes Get a Reality Check*, FDA, <https://perma.cc/L6F9-ACQM> (archived Aug. 24, 2019).

94. *See generally* Kris Gunnars, *How Many Calories Should You Eat Per Day to Lose Weight?*, HEALTHLINE (July 6, 2018), <https://perma.cc/8XHP-Q69U>.

95. *See generally id.*

96. *Food Serving Sizes Get a Reality Check*, *supra* note 93.

97. Gidding et al., *supra* note 40, at 2063.

98. *See generally* Gunnars, *supra* note 94.

99. *See Kindergarten: Counting & Cardinality*, COMMON CORE, <https://perma.cc/23YK-49RE> (archived Aug. 24, 2019).

100. *See id.*

101. *Grade 1: Number & Operations in Base Ten*, COMMON CORE, <https://perma.cc/7GEA-K45H> (archived Aug. 24, 2019).

are presented thousands, hundreds, tens, and ones.<sup>102</sup> At age six, children are likely only able to compare the physical attributes of two objects as being bigger or smaller.<sup>103</sup>

In addition, young children are not able to fully understand the idea of food portions. The problem is more serious than one might reasonably speculate. Only in Grade 1 do children learn about cutting down objects and rectangles into equal shares in math class—much less of an abstract concept than what is provided in the current food nutrition label as serving information.<sup>104</sup> The number of possible servings information, as drafted prior to the 2016 changes, is overly complicated to read and understand for children. It is not until a child reaches Grade 6, do they understand the concept of unit rates and simple fractions as “ratio relationship between two quantities.”<sup>105</sup> This means only at Grade 6 do children understand ratios and fractions of a unit to “solve real-world and mathematical problems,” such as finding the amount of liquid when distributed equally into other containers.<sup>106</sup> Until then, the serving information means little to nothing to a child.

### B. Calories

Calorie information, as an example, would read: Amount per serving  
Calories 230.

Calories are essential as an energy source, and calorie information explains to the consumers how much energy they can gain with each serving of the product.<sup>107</sup> Yet, this information fails to serve a purpose to children for various reasons. First, the number of servings that is the baseline standard determines the actual amount of calorie intake. As mentioned above, an average adult woman needs to consume 2,000 calories each day to maintain a stable body weight.<sup>108</sup> Although, this number can vary depending on biological factors such as age, height, metabolic health, et cetera.<sup>109</sup> Therefore, children lack information on how

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102. *Grade 2: Introduction*, COMMON CORE, <https://perma.cc/ZW7P-J47J> (archived Aug. 24, 2019).

103. *See Kindergarten: Measurement & Data*, COMMON CORE, <https://perma.cc/59WE-V232> (archived Aug. 24, 2019).

104. *See Grade 1: Geometry*, COMMON CORE, <https://perma.cc/D73Q-ZWX3> (archived Aug. 24, 2019).

105. *See Grade 6: Ratios & Proportional Relationships*, COMMON CORE, <https://perma.cc/545M-M7NG> (archived Apr. 10, 2020).

106. *See id.*

107. *How to Understand and Use the Nutrition Facts Label*, *supra* note 91.

108. Gunnars, *supra* note 94.

109. *Id.*

much energy or calories exist in their servings because the servings are based on a female adult's consumption patterns, which differ greatly from young consumer consumption patterns.

A lack of serving sizes specifically for children defeats the purpose of the 2016 revisions when calorie information was newly required to appear in larger fonts for consumers' convenience.<sup>110</sup> While larger fonts may help in catching children's attention, calorie information may be difficult for younger children to digest. As is the case with serving information, numerical guidelines on calories appear too vague and abstract for children between Kindergarten and Grade 2. For children this young, they have merely started to understand that numbers can be composed and decomposed into smaller units such as ones and tens.<sup>111</sup> They often need to use objects to articulate numerical units.<sup>112</sup> It is not until a child is in Grade 2 that they fully understand that a three-digit number represents the number of ones, tens, and hundreds and be able to compare different numbers.<sup>113</sup> The current calorie information on nutrition facts labels, despite its growth in size, has not improved from a child's perspective. We have failed to provide the necessary tools to allow children to make an educated guess.

### C. The Nutrients

Nutrients information, as an example, would read: Total Fat 12g, Saturated Fat 3g, Trans Fat 3g, Cholesterol 30mg, and Sodium 470mg.

The list of nutrients is the heart of the nutrition facts label. It includes the list of nutrients contained per serving—again based on the portion for a female adult consumer. The 2016 revisions introduced a color scheme to the nutrition facts label, which marks in yellow the nutrients adult Americans should limit.<sup>114</sup> Nutrients such as fat, saturated fat, *trans* fat, cholesterol, or sodium fall under this category, and highlighting this information helps an average adult consumer readily identify the amount of each nutrient by using widely accepted units.<sup>115</sup> Adult consumers are warned to consume nutrients in yellow cautiously as they can increase the risk of chronic diseases, such as heart disease and cancer.<sup>116</sup> The

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110. *Changes to the Nutrition Facts Label*, *supra* note 67.

111. *See Kindergarten: Number & Operations in Base Ten*, COMMON CORE, <https://perma.cc/6ZED-ZD2T> (archived Aug. 24, 2019).

112. *See id.*

113. *See Grade 2: Number & Operations in Base Ten*, COMMON CORE, <https://perma.cc/V245-4WT4> (archived Aug. 24, 2019).

114. *How to Understand and Use the Nutrition Facts Label*, *supra* note 91.

115. *See id.*

116. *Changes to the Nutrition Facts Label*, *supra* note 67.

essential nutrients most adult Americans do not gain enough of are deficient in are color-coded in blue.<sup>117</sup> Dietary fiber, vitamin A, vitamin C, iron, and Calcium all fall in this category.<sup>118</sup> Actual amounts of nutrients are now to be included under the revisions made to the nutrition facts label in 2016.<sup>119</sup>

While studies find diet, content is similarly recommended for children and adults from two years of age onwards,<sup>120</sup> the information provided in the nutrition facts label is still too abstract and overwhelming for young children to fully comprehend. Even when children fully know how to read by six or seven,<sup>121</sup> it goes without saying they have difficulty understanding the implications of advanced terms on labels. Despite the usage of familiar household measuring units such as grams and milligrams, the information on nutrients loses its intended functionality when viewed by younger children who have yet to learn measuring units. Until Grade 4, when measurement concepts are used and compared, children cannot easily convert different units of measurement.<sup>122</sup> While children in Grade 3 can measure and estimate the amount of solid or fluid material with one set of a standard unit, even this is a challenge for younger children.<sup>123</sup> Younger children mostly can only measure lengths of bars and compare the lengths and sizes of objects using different kinds of physical measuring tools they are familiar with.<sup>124</sup>

#### D. Percent Daily Value

Percent daily value, as an example, would read: Total Fat 12g 18%, Saturated Fat 3g 15%, Cholesterol 30mg 10%, and Sodium 470mg 20%.

While the percent daily value is provided with the purpose of helping every consumer's understanding, the percent daily value information is provided on the basis of a 2,000-calorie diet. For children, daily estimated calorie intake differs by age groups: 900 kcal (1 year), 1000 kcal (2-3 years), 1200 kcal and 1400 kcal for

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117. *How to Understand and Use the Nutrition Facts Label*, *supra* note 91.

118. *See id.*

119. *Id.*

120. Gidding et al., *supra* note 40, at 2062.

121. *See* AM. ACAD. OF PEDIATRICS, HELPING YOUR CHILDREN LEARN TO READ 2, <https://perma.cc/LSY3-3ARV> (archived Aug. 24, 2019).

122. *Grade 4: Measurement & Data*, COMMON CORE, <https://perma.cc/SY2Y-YGRP> (archived Apr. 10, 2020) (this can slightly vary depending on school curriculum); *see Understanding mass (grams and kilograms)*, KHAN ACAD., <https://perma.cc/M4AM-B7HF> (archived Oct. 22, 2019).

123. *See Grade 3: Measurement & Data*, COMMON CORE, <https://perma.cc/BA2R-BUJZ> (archived Aug. 24, 2019).

124. *See Grade 2: Measurement & Data*, COMMON CORE, <https://perma.cc/F3GU-8ERL> (archived Aug. 24, 2019).

girls and boys respectively (4-8 years), 1600 kcal and 1800 kcal for girls and boys respectively (9-13 years).<sup>125</sup> Without children's estimated daily calories being lower than 2,000, they are left to guess what is deemed an "appropriate" calorie intake. Ironically, children consumers are the most vulnerable population society should want to protect. In essence, an adult woman who consumes a food product will have a better understanding of the amounts of nutrients by keeping track of how to take more or less on a given day.<sup>126</sup> Children are not provided with such tools. When the daily value is calculated according to the latest research and scientific evidence from the Institute of Medicine and other related agencies, such a blanket approach fails to meet these important developments in science.<sup>127</sup> Food labels are not only difficult for children to read, but importantly, difficult to apply to themselves. As one example, the daily recommended intake level for calcium for a female adult consumer with a 2,000-calorie diet is 1,300mg,<sup>128</sup> while for girls, the recommended consumption amount ranges from 700mg–1,300mg.<sup>129</sup> A careful revisiting of what information is provided using which method is necessary.

#### IV. BENEFITS OF LEAVING CHILDREN IN THE SHADOWS: IGNORING THE COMPLEX WEB OF INTERESTS

##### A. Thwarting Administrative Burdens

The United States Court of Appeals for the Fourth Circuit, in *Chocolate Manufacturers Ass'n of the United States v. Block*, well articulated the administrative costs associated with redrafting regulations for food programs.<sup>130</sup> When the term "supplemental foods" was redefined with the extension of the Special Supplemental Food Program for Women, Infants, and Children (WIC) related work on redrafting regulations on the food packages for the program itself took almost four years to complete.<sup>131</sup> Public hearings were held in seven different cities, and testimonies were taken in which "governors and chief health officers of every state, the House Education and Labor Committee, the Senate Select

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125. Gidding et al., *supra* note 40, at 2063.

126. See *Changes to the Nutrition Facts Label*, *supra* note 67.

127. See *Developing the Dietary Guidelines for Americans*, HEALTH.GOV: DIETARY GUIDELINES, <https://perma.cc/ZB92-27ZU> (archived Aug. 24, 2019).

128. *How to Understand and Use the Nutrition Facts Label*, *supra* note 91.

129. USDA, DIETARY GUIDELINES FOR AMERICANS 2015–2020, at 98 (8th ed. 2015) (showing a calcium daily nutritional goal of 700mg for children ages one to three, 1,000mg for females ages four to eight, and 1,300mg for females age nine to eighteen).

130. See *Chocolate Mfrs. Ass'n of the U.S. v. Block*, 755 F.2d 1098, 1100-01 (4th Cir. 1985).

131. *Id.* at 1100; see also 42 U.S.C. § 1786(14) (2018).

Committee on Nutrition Evaluation, state WIC coordinators, industry representatives, and professional and advocacy groups” attended.<sup>132</sup> Furthermore, the United States Department of Agriculture (USDA) “received periodic reports from the National Advisory Council on Maternal, Infant, and Fetal Nutrition, as well as recommendations from a Food Package Advisory Panel . . . .”<sup>133</sup> Both the level and scope of participation were justifiably extensive.

An attempt to provide a nutrition facts label specifically designed for children would require a similarly burdensome, if not more difficult, task of first defining the scope of the requirement. This might begin by fundamentally defining the term “children’s food” and then identifying the agencies needed to set the nutritional standards, and design and further implement regulation changes. This would be much more complicated than simply redefining the term “supplemental food” because of the potentially large impact. The burden comes from meeting Constitutional requirements and statutes such as the Administrative Procedure Act, the Federal Advisory Committee Act, and the Freedom of Information Act. These statute requirements imply costs not merely related to rulemaking, but also to adjudication, judicial review, and to undeniable debates on free speech. Public hearings should be held, and each draft of the label would be open for comments from any interested party.<sup>134</sup>

To make it more perplexing many agencies have been vague in the area of food regulation for children. Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks, requires the Environmental Protection Agency (EPA) works on an “environmental health risk or safety risk that an agency has reason to believe may disproportionately affect children.”<sup>135</sup> Such risks may include those related to food that children consume, and to promulgate a rule on such risks, the EPA “must evaluate the effects of the planned regulation on children . . . .”<sup>136</sup> The FDA manages the anaphylaxis in consultation with the Secretary of Education to “(i) . . . develop plans for individuals to manage the risk of food allergy and anaphylaxis in schools and early childhood education programs; and (ii) make such guidelines available to local educational agencies, [and] schools . . . .”<sup>137</sup> Each product, ranging from poultry to

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132. *Block*, 755 F.2d at 1101.

133. *Id.* at 1101; *see also* JACOB E. GERSEN ET AL., *FOOD LAW: CASES & MATERIALS* (1st ed. 2018).

134. *See* Administrative Procedures Act, 5 U.S.C. §§ 553, 556 (2018).

135. Exec. Order No. 13,045, 62 Fed. Reg. 19,885, 19,885 (Apr. 21, 1997).

136. *Summary of Executive Order 13045*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/HQ28-RKT4> (archived Aug. 24, 2019).

137. 21 U.S.C. § 2205(b)(1)(A)(i)-(ii) (2018).

red meat, has a fine line of regulatory rules assigning which agency is responsible for the product's regulation.<sup>138</sup>

One could easily argue that leaving children out from being a separate consumer group artfully mitigated the problems of overlapping jurisdictions and conflicting roles of agencies as well. Agency coordination issues, overlapping jurisdictions, and underlapping jurisdictions have often been an uphill challenge in the food law realm.<sup>139</sup>

### B. Education

Another surprising benefit that arises from the vagueness of current food regulations is we have, in effect, encouraged active training and learning in children. With increasing information circulated on social networking services and in the media, people are told to stay alert on information being provided by food producers. Examples include documentaries such as *Food Inc.*<sup>140</sup> and *Super Size Me*,<sup>141</sup> which have gained recognition and popularity. As Denis W. Stearn writes, "large-scale food producers are adept at turning food safety regulations to their advantage" and have managed to reinterpret the situation to their interest.<sup>142</sup> In particular, Stearn argues these food producers have managed to create a framework that allows the public to improperly believe that once regulations are in place—food is safe.<sup>143</sup> And this is the reason regulations have been built throughout the supply chain on a global scale. He further argues, in fact, the opposite of what we should be pursuing, taking away the opportunity to genuinely educate people about the reality of the food chain.<sup>144</sup> As one example, Stearns posits that we could educate people that processed and bagged produce carry higher health risks rather than incurring the cost of USDA inspection.<sup>145</sup> Lack of regulations per se allows more room for deeper thinking of the basic nature of the food law system. To a certain extent, this is a reasonable approach to understanding how the regulatory framework has influenced our perception of children protection.

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138. *Importing Meat, Poultry & Egg Product to the United States*, FOOD SAFETY & INSPECTION SERV., <https://perma.cc/RGZ4-FLGZ> (archived Aug. 24, 2019).

139. See generally JACOB E. GERSEN, UNIV. OF CHIC. LAW SCH., OVERLAPPING AND UNDERLAPPING JURISDICTION IN ADMINISTRATIVE LAW (2007).

140. *FOOD INC.* (Participant media 2008).

141. *SUPER SIZE ME* (The Con 2004).

142. Denis W. Stearns, *A Continuing Plague: Faceless Transactions and the Coincident Rise of Food Adulteration and Legal Regulation of Quality*, 2014 WIS. L. REV. 421, 441 (2014).

143. See *id.*

144. *Id.* at 442.

145. *Id.*



Over the decades, we have learned to adjust and accept current food nutrition facts labels, habitually using labels primarily designed for adult consumers to apply to children individually. Both the federal and state governments have failed to actively review the conventional approach to nutrition labels and take time to consider how children might misread and misinterpret them.

In the end, by choosing not to see children as a subset in food law and maintaining the conventional macroscopic perspective on food law as a general superset for the general consumer population, we reap the unintended benefits of preventing complications to the administrative system and pursuing active learning as a whole.

#### V. DEVELOPING A HOLISTIC MANAGEMENT STRATEGY WHERE THE TWO SETS OF SUBJECTIVITY MEET

In order to properly reconfigure children in food law by identifying them as a separate consumer group, there are several critical questions to ask, but most importantly: How would it be possible to undergo legal reforms for the benefit of children's health? Until now, given that drafters have failed to adequately address health issues, how accurate is it to say law reforms indicate improvement in food safety? And to precisely measure improvement in children's health, how can scholars go beyond simple textual comparisons of the changing law? With these questions in mind, it is important to loop back into the notion of "gaz[ing] inward"<sup>146</sup> and see what can be done by what is commonly known as "targeted transparency."<sup>147</sup>

In what appears an increasingly popular option for policymakers,<sup>148</sup> companies can be required to disclose and provide targeted transparency information in a standardized format.<sup>149</sup> Targeted transparency is beneficial for the policymakers because it is "cheaper and—politically—less controversial than standards-based regulatory requirements."<sup>150</sup> It is, at the same time, effective in

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146. *Paradox of Lawyering for the Poor*, *supra* note 3.

147. Drew Lerer, *Big Things in Small Packages: Evaluating the City of Berkeley's Nanotechnology Ordinance Effectiveness as a Model of Targeted Transparency*, 30 PACE ENVTL. L. REV. 523, 530-31 (2013) (defining targeted transparency as the "use of publicly required disclosure of information in a standardized format to achieve a clear public purpose."); David Weil et al., *Targeting Transparency*, SCI., June 21, 2013, at 1410, 1410.

148. Lerer, *supra* note 147.

149. *Id.*

150. *Id.* (citing ARCHON FUNG ET AL., FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 19-20 (2007)).

placing more burden on the market players than the government.<sup>151</sup> By requiring market participants to look for the information they need from the standardized format provided by companies, there is much less paternalistic government intervention throughout the food supply chain—especially in Space B+C, where two sets of subjectivity meet.<sup>152</sup> Unlike the 1966 Freedom of Information Act and the “open-government” initiative, targeted transparency takes a leap from merely requiring information disclosure to making it easier to comprehend.<sup>153</sup> It is focused on ensuring an adequate amount of information is provided in a standardized way to maximize consumers’ understanding of the information.<sup>154</sup> Such an approach may be particularly helpful for children. This is because the idea behind targeted transparency rests on the belief in the “power of information rather than on enforcement of rules and standards or financial inducements.”<sup>155</sup> Since the 1906 Pure Food and Drug Act, increasing transparency has been viewed as one way to strengthen food safety.<sup>156</sup> From font size to substantive content in the nutrition label, policy changes focused on providing comprehensible and necessary information should be considered.<sup>157</sup> This will not only continue to prevent agency jurisdiction challenges of both underlapping and overlapping jurisdictions but also encourage children’s active participation in educating themselves to proactively read food nutrition labels.

#### *A. Sugar and Sodium Challenge*

Children’s consumption of food high in sugar and salt increases risks of high cholesterol, high blood pressure, and atherosclerosis,<sup>158</sup> and other problematic health complications. Given that targeted transparency policy succeeds when the information being provided is narrowly focused, it would be most useful to have a separate section on the food packaging just for children. Allowing a sharper, more narrow focus, it will make it easier for children to understand and make food selections accordingly.

In first determining the scope of children’s food, it is important to realize children’s food is more than puree baby food and infant formula. It would be

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151. *Id.*

152. *See id.*

153. Weil et al., *supra* note 147.

154. *Id.*

155. *Id.*

156. *Id.*

157. *See Lerer, supra* note 147.

158. Healthwise Staff, *Healthy Eating in Children: Problems Caused by Poor Nutrition*, ALBERTA, <https://perma.cc/X8TP-82UL> (archived Aug. 24, 2019).

important to include foods that have advertisement, promotion events, packaging involving cartoon characters, young children involved, or any texts appealing to children under the legal age of majority.<sup>159</sup> These foods increase propensity for children to consume because they are appealing and, on many occasions, designed specifically to be more attractive to young consumers.

In considering the standardized format to transfer critical information related to sugar and sodium levels, two factors should primarily be considered: children's understanding and interpreting capacity, and the substance of the information being provided. While White uses a "new meta-theory of power" in one of her works in the context of lawyering, in particular, it is meaningful for scholars and advocates in the area of food law to reflect on these lawyering considerations to redefine the relationship and interaction between market participants and children.<sup>160</sup> Food nutrition labels must be designed in a way children can comfortably read them and make better consumption choices according to their health situation. It is an extra protection measure and, at the same time, an opportunity to recognize children as dignity holders. As described above, the current nutrition facts label is extremely difficult, if not impossible, for young children to read and understand. This tells us that the nutrition facts label needs to be significantly revised to appear both simpler and easier for children.

#### *B. Simpler Nutrition Facts Label (Substantive Reformation)*

For the extra nutrition facts label in the food packaging on children's food, it would be not only onerous but also meaningless to cram in all related nutrient information. As mentioned before, it is not only difficult for children to understand complex terms but also one cannot run the risk of having children quickly losing interest in checking the information.

For school-aged children, limiting added sugar to less than six teaspoons a day is seen as both healthy and realistic.<sup>161</sup> Anything more would lead to an increased risk of obesity and higher blood pressure. To make it worse, children who have sweetened food may lose interest in consuming healthier food such as vegetables and fruits. While current regulations allow 56 different names for sugar, such as caramel, florida crystals, fruit juice, honey, refiner's sugar, agave nectar,

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159. See Alipio Ramos Veiga Neto & Larissas Grace Nogueira Serafim de Melo, *Factors Influencing children's Food Purchasing Behavior*, 22 SAÚDE E SOCIEDADE 122, 123 (2013).

160. See *Seeking the Faces of Otherness*, *supra* note 7, at 1510.

161. Melissa Jenco, *AHA: Limit children's sugar consumption to 6 teaspoons per day*, AAP NEWS (Aug. 23, 2016), <https://perma.cc/46F9-V3ZY>.

and high-fructose corn syrup,<sup>162</sup> all these terms should fall under one big category of sugar—particularly for children’s convenient understanding.

Currently, approximately 9 out of 10 children are known to consume more sodium than recommended and are at risk of high blood pressure as they grow up.<sup>163</sup> In the United States, 1 out of 6 children between the ages of eight and seventeen had higher blood pressure, which is one of the largest risk factors for heart disease and stroke.<sup>164</sup> Given the importance of this study, the World Health Organization provides recommendations on sodium intake for children between two and fifteen and states, “The recommended maximum level of intake of 2 g/day sodium in adults should be adjusted downward based on the energy requirements of children relative to those of adults.”<sup>165</sup> At the same time, the recommended sodium intake varies depending on the energy requirements for each age group of children.<sup>166</sup> Any percent value information appearing on the nutrition facts label should be presented based on a different calorie diet, most conveniently six teaspoons a day, rather than most accurately relating to a female adult’s intake.

*C. Improved Legibility of Nutrition Facts Labels (Targeted Transparency Applied)*

Nutrition facts labels must also be visually attractive. Before the child reaches Grade 3 and learns standard units such as grams and liters, they may not understand what “g” means or its implication in terms of quantity calculation.<sup>167</sup> At Grade 1, they learn to compare different lengths but become more advanced by Grade 2 by learning to use units such as inches, feet, and centimeters to describe the difference in lengths.<sup>168</sup> While different tools can be considered to convey information on the amount of sugar and sodium to children, it would be most effective to use tools already familiar to children.

Because processing nutrient information that will have an impact on their consumption behavior requires causal reasoning, designing the labels that can

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162. Adda Bjarnadottir, *The 56 Most Common Names for Sugar*, HEALTHLINE (June 3, 2017), <https://perma.cc/29JV-GPPC>.

163. *Vital signs: Reducing Sodium in Children’s Diets*, CENTERS FOR DISEASE CONTROL & PREVENTION (Sept. 2014), <https://perma.cc/98NG-4DM5>.

164. *Id.*

165. WORLD HEALTH ORG., GUIDELINE: SODIUM INTAKE FOR ADULTS AND CHILDREN 2 (2012), <https://perma.cc/6BUV-DAVH>.

166. *Id.*

167. *See Grade 3: Measurement & Data*, *supra* note 123.

168. *Grade 1: Measurement & Data*, COMMON CORE, <https://perma.cc/7NA6-VS7V> (archived Aug. 24, 2019); *Grade 2: Measurement & Data*, *supra* note 124.

easily allowing children to make this logical connection will be the most helpful for them. As well known in science, “the child’s capacity to make accurate cause-effect judgments depends upon his familiarity with the given situation.”<sup>169</sup> Given some children start to read by four and others by six or seven, using two words, either “SUGAR or “SALT” followed by any of smiling, frowning, or a sad face symbol would be helpful. For example, any amount containing more than 30% of the recommended sugar intake could be written: SALT [sad face]. For those containing between 20%–30%, a frowning face could be used, and for those under 20%, a smiling face can be considered. Facial expressions are easy to understand for children of all ages and are a very straightforward message because of their familiarity. Smiles, as a direct message, have been tested in China’s restaurant for food safety signaling.<sup>170</sup> While there was much concern regarding its implementation at the introduction stage, it has been rather successful.<sup>171</sup> Such efforts using smiles will bring demonstrative changes even if some may raise questions regarding children’s ability to show self-constraint. Recent psychological studies have supported the idea that even very young children do have the capability to self-regulate and understand rules when sufficiently taught.<sup>172</sup> Additionally, children should be able to easily locate the standard format information. It must be located at a spot where it is easy to find, such as the lid of the container or the package. Given dietary guidelines are revisited and updated every five years, the same must be done for these nutrition facts labels for children.<sup>173</sup>

#### IV. CONCLUSION

Historical development of food law shows better reform in laws, regulations, and policies are necessary.<sup>174</sup> In law, there is much work to be done on “gaz[ing] inward, to the world that she makes with the [child] as they work together”<sup>175</sup> while

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169. Perrochet & Colella, *supra* note 39, at 1340.

170. *China plans to grade restaurant service with cartoon faces*, CHINA DAILY, (Sept. 18, 2011), <https://perma.cc/4RCA-PGEP>.

171. *Id.*

172. Perrochet & Colella, *supra* note 39, at 1341-43 (based on dietary recommendations made by American Heart Association); see *Dietary Recommendations for Healthy Children*, AM. HEART ASS’N, <https://perma.cc/SEQ3-SXSX> (archived Aug. 24, 2019).

173. See *Developing the Dietary Guidelines for Americans*, *supra* note 127.

174. See Jesse D. Lyon, *Coordinated Food Systems and Accountability Mechanisms for Food Safety: A Law and Economics Approach*, 53 FOOD & DRUG L.J. 729, 743-44 (1998).

175. *Paradox of Lawyering for the Poor*, *supra* note 3.

acknowledging children as rights holders.<sup>176</sup> Modern food law is an unbalanced superset failing to include all essential subsets. In legal studies related to social change, many academic attempts have been made to understand the importance of applying a new “lens” to understand and interpret problems,<sup>177</sup> while acknowledging children as rights holders. Relatedly, in food law, targeted transparency used by the Obama Administration resonates with how this can be partially done.<sup>178</sup> Targeted transparency aims to clearly and narrowly provide essential information, which can be efficient and effective in the era of overabundant information and marketing. Unnecessary complexity has to be eliminated, allowing people and children to have simplified choices.

Regulators and lawmakers have only focused on regulating the behavior and conduct pertaining to labeling, misbranding, advertising, and polluting the environment. This has created a disparity between what current regulations aspire to do and a child’s health situation. For example, regulations do not sufficiently consider a child to be an autonomous child with purchasing access to different kinds of food. However, the conventional understanding of food products and consumer groups are meaningless as the cognitive ability, and psychobiological aspect of children differ from adults. In addition, there is much less probability in making a correct judgment in the purchase and consumption of food goods for children, and this has to be acknowledged. Once we set this as our fundamental starting point, it makes the most sense to recognize the need to view children as a separate consumer group, or subset in food law. Therefore, it is important to revisit the food nutrition facts label framework and consider different forms of labels designed specifically for children as a special consumer group. Using easily distinguishable characters, such as smiling, frowning, and sad faces would be accessible to children. When the question is, whether the market is giving “full and accurate information to the consumers,”<sup>179</sup> it is important to reflect on the laws and practices govern children’s food purchasing behavior founded upon their understanding and reasoning.<sup>180</sup>

We have also not made much effort to actively designing laws for children directly, which is a common phenomenon around the world. It is an unaddressed mistake to assume parents and legal guardians are the only channels reaching

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176. See *In re Gault*, 387 U.S. 1, 13 (1967) (“[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.”).

177. *Paradox of Lawyering for the Poor*, *supra* note 3.

178. See Weil et al., *supra* note 147.

179. Caswell & Padberg, *supra* note 73, at 463 (describing an overview of works done by Beals, Craswell, and Salop).

180. Somers et al., *supra* note 85; Todres, *supra* note 5, at 270-71.

children.<sup>181</sup> With this flawed assumption, food laws and regulations are written as if parents are the only decision makers.<sup>182</sup> This is often not realistic. Children spend much of a day as autonomous children and are subject to advertisements, purchasing choices, and consume food appearing attractive. We must recognize children as another existing consumer group separate from the adult group.

The value of this study is a systematic approach to identify children as a separate and distinguishable consumer group. While this may seem like a minor development when compared to other studies in law, it is a very critical change in food law. There have been empirical studies done outside of the law to understand the impacts of television advertisements and junk food on children. Proposals for legislative changes must be made to categorizing children as a distinct subset consumer group in law, even if it implies heavy reconstruction of the way food law is drafted. This approach is rather novel. However, it is important to acknowledge there were unintended benefits we were able to reap by our conventional method of lumping children and adult consumers together. For example, the formalistic regulatory structure could be viewed as more complicated and fragmented with more consumer groups. Another benefit from the increased opportunity of educating children and the public food was unsafe with vague laws and regulations in place.

From a broader perspective, we need to continue bringing closer and connecting two worlds that are seemingly disconnected. Bringing social change by “gaz[ing] inward, to the world she makes with the [child] as they work together”<sup>183</sup> is an idea and a philosophy rarely discussed in relation to food law. By acknowledging children as rights holders,<sup>184</sup> this paper attempts to move beyond the current age of food law. Going beyond history and contributing to developing food law for other consumer groups than those that exist today. In the end, these efforts, when successful, will reconceptualize the black letter food law in important ways.

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181. See Todres, *supra* note 5 (discussing the “helping hand of law” reaching children through parents and legal guardians).

182. See Ezer, *supra* note 6; see Barbara Bennett Woodhouse, “Who Owns the Child?”: Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1043 (1992).

183. *Paradox of Lawyering for the Poor*, *supra* note 3.

184. See *In re Gault*, 387 U.S. 1, 13 (1967).