

# *Historical and Contemporary Role of Consumer in the Regulation of Food Labeling*

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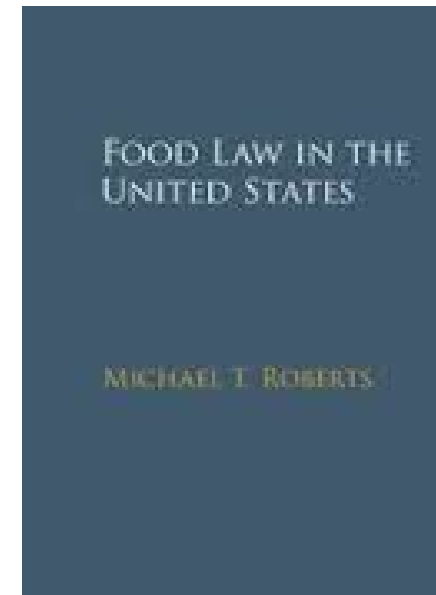
RESNICK PROGRAM  
FOR FOOD LAW AND POLICY



UCLA | SCHOOL OF LAW

# UCLA Program

- Inception: August 1, 2013
- Mission: Seeks legal and policy solutions for a more transparent, equitable, and sustainable food system that yields improved health outcomes for all
- What we do:
  - Law and policy research and education
  - Leadership development and student training
  - Service (clinic)



# Law and Policy Research and Education

- Focus: Public Health and Consumer Deception (2016-17)
  - Children - 3<sup>rd</sup> Annual UCLA-Harvard Food Law and Policy Conference – *Food Marketing to Children: The Current Reality and What Can Be Done*
  - Fraud: *The Pursuit of Food Authenticity: Recommended Legal and Policy Strategies to Eradicate Economically Motivated Adulteration (Food Fraud)*
    - China Roundtable – China FDA: new rule, food fraud
  - Anti-biotics in food producing animals: *Contagion Without Relief: Democratic Experimentalism and Regulating the Use of Antibiotics in Food-Producing Animals*, 64 UCLA Law Review 550 (2017)
  - Sugar consumption – role of litigation in reducing sugar consumption
  - Food insecurity on campus – UCLA



# Food Labeling Chaos

*The case for reform*



CENTER FOR  
Science IN THE  
Public Interest

# Food acts: the role of the consumer



# First of two modern federal food laws





# The paddock bill

“The devil has got hold of the food supply of this country”



# 1906 Pure Food & Drug Act

- Sec. 8. That the term "misbranded," as used herein, shall apply to all . . . articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food . . . product which is falsely branded . . . .





# Continued . . . .

- For the purposes of this Act an article shall also be deemed to be misbranded:
- First. If it be an imitation of or offered for sale under the distinctive name of another article.
- Second. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin, alpha or beta eucane, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any substances contained therein. . . .
- Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular.

# Question

- How does the 1906 Act protect consumers?
- How is the consumer not protected? What are the limitations of the 1906 Act in terms of protecting public health?



# Basis for regulating labeling

- Although consumers were protected from deceptive labeling, they were otherwise free to eat whatever they chose to eat
- The 1906 Act was based on the old maxim of caveat emptor: “let the buyer beware”
- The burden on the consumer via the 1906 Act was even more pronounced with the decision by the Act to regulate food product labeling in commerce rather than require premarket approval



# The role of the consumer

- Interpreter
- Decision-maker
- Has this role changed or evolved over time?
  - 1938 Federal Food, Drug, and Cosmetic Act
  - Amendments to 1938 Act
  - 1990 Nutrition Labeling and Education Act

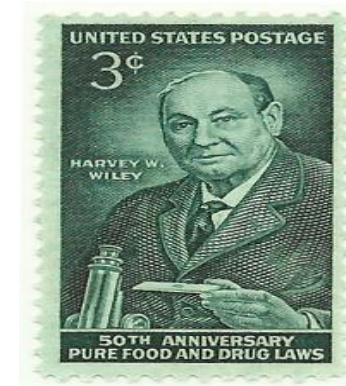


# Alternative?

- Ban instead of disclosure
- Outlaw products
  - Coca-Cola 1909 – excessive caffeine content (replacement for cocaine); *United States v. Forty Barrels and Twenty Kegs of Coca-Cola* (Coca-Cola had right to use caffeine); appeal filed to Supreme Court triggers settlement to reduce the caffeine amount.
  - Today: portion control of soft drinks – NYC
  - Trans fat
    - 2006, FDA labeling law requires that trans fat be listed on the Nutrition Facts panel of foods and some dietary supplements
    - NYC and California bans

# Wrinkle: “Pure”

- “Pure” – moral meaning = righteous, honest
- Unique Era
  - Victorian
  - Progressive/Gilded Age
- Wiley: “Pure” meant merely labeled with scrupulous accuracy”
- Assertion of moral values - oversimplification of complex issues?  
Unrealistic expectations about the redeeming value of accurate labeling?



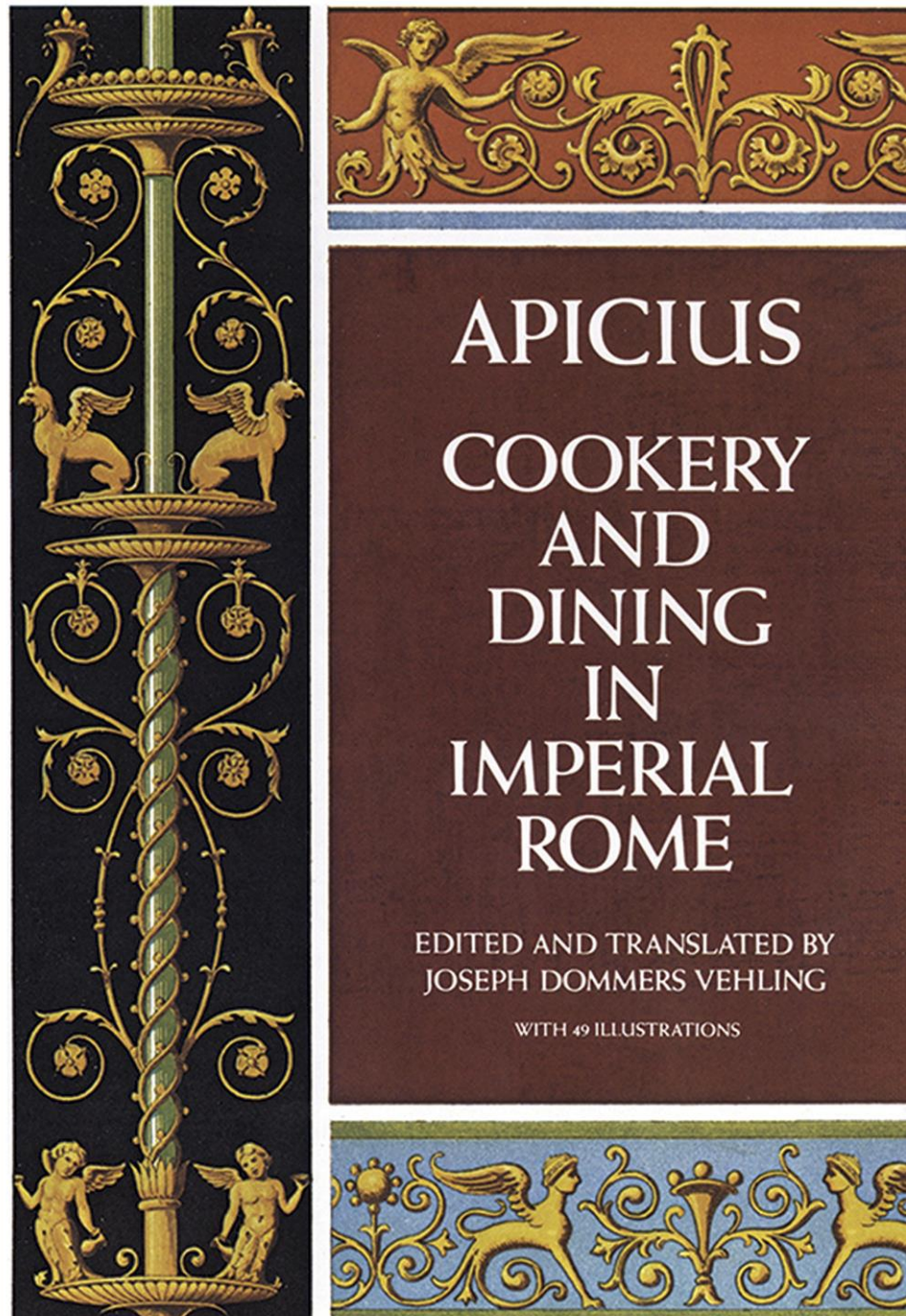


# Change?

- 1938 FDCA

- Section 401: “definitions and standards”
- Section 403: “misbranded food”
- Prevent consumer deception – recipe standards
- Fell out of favor: honey - “to the extent that consumers are confused about what honey is and what it contains, the food label provides the relevant information to alleviate consumer confusion”
- Prevent deceptive credence value claims in food
  - Does this approach change the formula? Interpreter and decision maker based on information provided?





- Honey: English translation of a 4th or early 5th century Roman cookbook:
  - “Spoiled Honey Made Good - How bad honey may be turned into a saleable article is to mix one part of the spoiled honey with two parts of good honey”

# Evaluation of Consumer Role

- Essential to economic system – free enterprise?
- Compatible with public health mission of FDA?
- Value of personal responsibility?
  - Tension: nanny state vs. dietary diseases
- Effective set up?
  - Delivery of information to consumer?
  - Help consumer in making decisions?



# US Supreme Court: Pom Wonderful and Coca-Cola

- Counsel for Coca-Cola: “[W]e don't think that consumers are quite as unintelligent as POM must think they are . . . They know when something is a flavored blend of five juices ... the non-predominant juices are just a flavor.”
- Justice Kennedy: "Don't make me feel bad, because I thought this was pomegranate juice.”
- Justice Scalia: “He sometimes doesn’t read closely enough”



But she who laughs last, laughs best



THANK YOU

