

TURNER:

Hello and welcome back to Wisconsin Law in Action, a podcast where we discuss new and forthcoming scholarship with the University of Wisconsin Law school professors. I'm your host, Kris Turner. And my guest today is professor Steph Tai. Professor Tai is here today to discuss two articles that were published in 2020. The first article was titled In Fairness to Future Generations of Eaters and was published in the Georgetown International Environmental Law Review. The second article is called Legalizing the Meaning of Meats and was published in the Loyola University of Chicago Law Review. Both articles focused on different aspects of food law, and the changing dynamic of how the law preserves and defines food as we know it. Thank you for joining the podcast today, Professor Tai.

PROF. TAI:

Thanks so much for having me here, Kris.

TURNER:

Sure. I'm glad it worked out. Before we jump into your two most recent articles. We always like to start the podcast learning more about our guests' background, specifically your research and scholarly writing interests. What got you interested in writing about food law?

PROF. TAI:

I actually never... That wasn't my background in terms of practice, but when I moved to Wisconsin, there were a number of students who were interested in agricultural law. And as I started formulating a class on agricultural law, I started integrating in food elements to it too. And so, I teach a seminar on Food Systems Law, which covers parts of agricultural law, parts of food law, and students write papers on all sorts of topics.

TURNER:

It's a truly fascinating topic that crosses pretty much every boundary of law, in my opinion, that's what makes it so fascinating. Anyone can join in and learn something about it, which I'm really glad that you offer these classes to the students. But with that, let's go ahead and get to your two most recent articles starting with In Fairness to Future Generations of Eaters. It's a bit strange to start our discussing this way, but I want to quote someone that you're talking about in the article, Carlo Petrini, Founder of the International Slow Food Movement, who says, "Food history is as important as a baroque church. Governments should recognize cultural heritage and protect traditional foods. A cheese is as worthy of preserving as a 16th century building." That really grabbed me. I love that quote. How does your article expand on that idea?

PROF. TAI:

It expands on the idea by arguing that we need to take food heritage seriously, and if we are to do so, we need to think about the threat of climate change to the stability of not only the food supply, as having enough food, but also our food heritage. So, in the article, I talk about a number of types of food heritage that are under threat due to climate change, because of, again, changing the ways that they change their agricultural systems, the way that climate change can change precipitation. It leads to a lack of availability of certain types of food products that are essential to certain types of foods.

TURNER:

It sounds to me like the urgency around climate change, especially in recent years, is what motivated you to focus on that topic? Is that true? Or was there anything else that made you want to look at this area, food law?

PROF. TAI:

Well, part of it was this entire symposium issue of the journal, was tribute to a professor of mine from law school, professor Edith Brown Weiss. And she wrote a seminal piece on thinking about intergenerational equity. And so, her piece was, in fairness to future generations, talking about how intergenerational equity is a principle that should inform how we protect the environment. That is, we should think about preserving things, not just simply for ourselves, but so that future generations have the same access to wellbeing that we have ourselves now.

PROF. TAI:

And so, I was expanding upon this and applying it to my area of law food and so the essay talks about applying this intergenerational equity kind of principle to food, and to the extent that there is any great threat to our food supply now and food culture, it's climate change. It's affecting things. I'm actually working on an article about how France and California are taking different approaches to addressing the regulation of wine and the labeling of wine in light of the way that climate change is going to change the kinds of wines that are accessible.

TURNER:

That's really interesting. That should definitely raise some red flags for everybody to say that wine will be possibly less accessible or at least accessible in different ways with climate change affecting it. So, I look forward to talking about that article with you once that's out there. So, that's exciting. You have a series of suggestions in this article, In Fairness to Future Generations of Eaters, about how to potentially protect the future generations. What are the first steps to implementing these protective measures?

PROF. TAI:

So, the kinds of things that I suggest include expanding beyond simply listing individual types of foods as protected as cultural heritage, which is something I go through in the article, that's been done. But the listing part is difficult to, in terms of creating this broader protection, it takes individual countries to offer to list particular types of things, it takes approval. There's a whole process about that. And it feels to [inaudible 00:05:06] a broader vision of cultural heritage and food, that is going step by step saying, "Okay, this one food is listed. This other food is listed."

PROF. TAI:

And so one thing that I argue is that we could expand this more by extending more resources to protect foods relevant to cultural heritage instead of focusing on individual protected foods. So, that's one thing that I bring up. And I draw from the work of the Native American Food Sovereignty Alliance, which works with youth groups to provide access to traditional foods. And that is something that seems to be successful in certain areas. And I would say that the main groups that have been highly successful in protecting and expanding food heritage has been indigenous groups, because they've been focused on food sovereignty. And so, a lot of my suggestions revolve around modeling between some of these successful elements of their advocacy.

TURNER:

Right. It seems like a big part of that is education of the younger generations, the newer generations about why this food is important to their culture and why it has been maintained for literally hundreds, thousands of years in many ways. How would some of the modeling go for a country like, say, let's just pick on France again, since you've mentioned it, how would France go about modeling something off of the tribal sovereignty of food culture?

PROF. TAI:

Well, I would say that actually France is maybe also an example of a country that does it well. They actually do a lot in terms of having their agencies promote traditional types of French food. So, actually, they devote a lot of resources to that already. I would say some of the countries, which we don't necessarily see that done well is, for instance, the United States, where we don't have really much state governmental force devoted to that, there's a lot of different nonprofit groups, for instance, the Slow Food Movement. But also, yeah, Southern Foodways Alliance, which is also a nonprofit that studies and celebrates the different food cultures of the American South. And so, there's a lot of individual kind of nonprofits, but there's not a more dedicated force for that.

TURNER:

Right. So maybe get that dedicated force, either at the state, federal, local government level to provide more heft to the movements. Sounds like a good positive way to do this. Okay, great. Thanks for answering that. I actually enjoyed your article leaving the reader with some questions, since they are questions I haven't really considered before. Any thoughts on how to best balance food culture with food that may affect climate change? It does seem like a balancing act to me.

PROF. TAI:

Yeah. And I think it is. I think one thing that it takes is actually a lot of public response, that is thinking through how eaters would want their food to be, I mean, right. There's this individual kind of, I would say, sovereignty element to it, to figure out what should this type of food look like in the future? And I don't think that there should be any single entity that dictates this. But these should all be considered.

TURNER:

That is a very fascinating aspect of it. It is the sovereignty of the culture and of the nation to decide how this food looks like into the future. It's a developing thing. Just to freeze it in time is not the solution necessarily if the sovereign decides that it's not the way they want to go with their own food culture. But as you can tell, I really, I enjoyed the article, because it really opened my eyes to aspects of food law I hadn't considered before. So, I really encourage people to read this article and dig into this as a new aspect of it. And we'll link out to it, of course, on the podcast page. But now let's move on to your other article, and considered the burger, Legalizing the Meaning of Meat examines labeling regulations for non-livestock meat products. Why is this a controversy or a concern?

PROF. TAI:

Well, it's a concern partly because, as I put it in my paper, there's a battle for the center of the plate. So in the much of US cuisine, we center our cuisine around what we call meat. Although it's not necessarily, as I say in my article, as clear-cut what meat is. And what we think of dishes is having some centerpiece that is either chicken or pork or veggie burger. And the concern of much of the livestock industry is that this is going to cut into their own business. As people shift away from livestock-based meats to more plant-based meats, their concern is right, this is going to cut down on their dollars.

PROF. TAI:

And so, the claim is that this is leading to consumer confusion that is, so they're using consumer confusion claim to argue that, "No, these things shouldn't be called meat." And the underlying motive behind that is presumably that if people don't see these things as being labeled as burgers or as cutlets or whatever, then they won't choose to buy these products, because otherwise patties maybe doesn't sound as appealing in some kind of way.

TURNER:

Right. When I was in law school, I had to represent, in a class, the dairy industry saying that almond milk is not a correct label, because of the term milk is, it's not from dairy. And it was really fascinating to try to dig into the dairy aspect of it and say, "Well, they are just using the term milk to attract consumer attention," which sounds very similar to what's happening here with labeling cutlets and burgers in the same way.

PROF. TAI:

What's interesting though, is although the claim is that this is leading to consumer confusion. If you look at the history of many of these types of plant-based products, they've been called meats forever. So, it's not a new thing. It is a new thing now that there's more plant-based meat products that simulate livestock-based meats pretty well. But in the past, they hadn't simulated quite as well. But there's been, and as I talk about in my history, there's been soy-based meats for a long time. They've been talked about as meats. Same thing with milk too. If you look at old French cookbooks from, I forget which century I listed, but they're also... they talk about almond milk as milk, they've talked about it for centuries. So it's not an unusual thing the way that it's being characterized by the livestock industry.

TURNER:

So what has changed recently that is becoming much more of a concern for the meat industry or for the dairy industry?

PROF. TAI:

I think it's that many of, well, especially with respect to the meats, they've just started tasting and feeling a lot more like meats. And so, there seems to be a real threat of substitution, as opposed to, before, when pretty much it was a more niche product, you wouldn't see people who primarily eat meats delving into getting veggie burgers. It's starting to happen more. You're seeing more consumers, who are generally on [inaudible 00:11:47] doing more substitution without being a vegetarian.

TURNER:

That makes sense. The threat seems much real to these industries now that someone could potentially pick up a veggie burger and say, "I can't tell the difference." And then that's the bottom line finance-wise to these industries. So, what are some of the legal challenges out there about labeling meats?

PROF. TAI:

So, there's been a lot of... So, the legal challenges have mostly been from the plant-based meat industries. Because what's happened is that in many states, the livestock lobby has gotten states to pass different labeling laws saying that certain types of "meat terms," either meat or burgers or whatever can't be used for plant-based meats. And so, the challenges have been primarily on First Amendment

and certain narrow tailoring grounds. And so far, they've been fairly successful coming from the plant-based meat industry. So, that's part of what's going on already in the plant-based products.

PROF. TAI:

It's more complicated when you get into other types of non-livestock-based meats. So, one thing is that we're starting to see more insect-based products on the market. So far, they haven't been formulated to resemble meat products. They've been mostly coming in the form of energy bars and things like that. But it's a possibility that, as the insect-based food industry grows, that this can encroach upon the livestock-based industry. And then, the largest one is the cell-culture meats, which is something that the US is still tackling and [inaudible 00:13:29] of developing a regulatory framework for it. But again, to the extent that you are in the livestock industry, this could be a real threat once cell-cultured meats become more affordable.

TURNER:

That's really interesting. I hadn't considered the insect meat aspect of it before to see like right now, it does not seem like a threat to these industries, but it could be potentially in the future just as the veggie patties and other foods have been recently. So, as you mentioned, the labeling battle seems pretty closely entwined with free speech concerns often, free to name your product as you see fit versus misleading or confusing terms on the label. How do you see that untangling in the future?

PROF. TAI:

Well, I think, I look at a bunch of consumer studies to suggest that there's not really that much consumer confusion going on. And I think that the courts have generally seen that to be the case as well, that especially with plant-based meats, people are buying them because they are plant-based, they're not confused that this is really secretly livestock-based meats at all. So, to the extent that there's this claim of consumer confusion, it doesn't seem to be supported by the reasoning of people in terms of buying these products in the first place.

TURNER:

When I had to do my hypothetical Dairy milk v. Almond milk in law school. I had a tough time finding consumer confusion, because I was representing the dairy industries. So, I came to the same rough conclusion on my own limited research. I had an uphill battle on my end for the dairy industry. So, that makes sense. What steps can sustainable food advocates take in helping to shape the labeling question?

PROF. TAI:

Well, I think that one thing that sustainable food advocates can do is to realize what's underlying these labeling claims. But the real battle isn't about whether or not consumers are being confused, but about what things consumers should be buying. Should they be buying more livestock-based products? Which have a lot of concerns regarding climate change effects, water effects, et cetera. Or are there things that they [inaudible 00:15:35] with a lighter carbon footprint, a lighter environmental footprint, and that sometimes what seems to be on the surface, just labeling product concern, is really a battle for what to eat. This doesn't mean that sustainable food advocates need to necessarily have products marketed as meat though. I'm not suggesting that that necessarily needs to be the battle, but rather that they should understand that this is what's going on behind this battle.

TURNER:

One topic that runs through both articles, and you've alluded to this already, is how food and culture and law interact with climate change. How do you see food law and especially supply chains, especially in this time of COVID, where supply chains were threatened or at least had developed a concern, developing to take climate change in consideration?

PROF. TAI:

I think it's going to be tricky. So, I think that one thing that we need to recognize is the multiple effects that food, the multiple ways in which the effects run. So, on one hand, climate change can affect the availability of particular types of food. For example, as areas dry up, certain areas dry up, you get too little precipitation to raise certain types of crops. Like for instance, the Midwest, I think they're supposed to actually have more flooding, that can also destroy certain types of crops. So, climate change can affect the availability of food, but at the same time, the agricultural industry itself can be a large contributor to climate change. And so, I think the first part is recognizing that the effects run both ways. It's both affected by and affecting climate change.

TURNER:

How has COVID affected food law in the past year or so?

PROF. TAI:

So, that's been interesting. One thing that happened during the pandemic was, and this was somewhat controversial, was that the FDA decided to lower its enforcement actions against certain types of labeling kind of things. Because partly the idea was that companies shouldn't be held to as rigorous a standard, given that we're just scrabbling to get food across to people.

PROF. TAI:

This was a concern because one of the things that was affected was allergen labeling. And so, folks with specific types of allergies we're quite concerned about that in terms of what happens if something is labeled as allergen free, but actually contains those allergens, and there's nothing really stopping that. So, that's one thing.

PROF. TAI:

Another thing that's been really... Another thing too is the emergency order, where meat processing facilities were included under as an emergency industry kind of thing. And so, some folks raised concerns about that, because the concern was that having that emergency order meant that the facilities would keep operating in the same kind of way that they were operating before, which is a bunch of workers working in close quarters. And so, that would lead to increased risk of getting COVID. So, that was another major thing that happened.

PROF. TAI:

Yet another major thing that's been interesting too, and this steps outside of food law, and this is more the food industry as a whole, as we started seeing larger reliance on delivery services and things. And that has been controversial too in that a number... There's been a lot of exposes over the summer that a number of the food delivery services weren't actually working with the restaurants to get the foods listed. The restaurants didn't even know they were being listed. And so, they were adding on this additional markup, thus drawing away from the restaurants' profits. That was also a controversial thing.

And so, some states had started looking into regulating that more. And so, these are just a few of the things that happened during the pandemic.

TURNER:

Just a personal side for me is I once used one of the food delivery services and I ordered something from a restaurant. It turns out the restaurant had closed and had moved. And I had given money to the company and I said, "They are no longer open." And it took a little bit of a battle just to get that, it was almost on principle, it wasn't much money. But I was like, "You cannot take my money for a restaurant that is no longer open that you are listing as open right now." Very interesting about what kind of regulations may come down the pike to make sure that this kind of stuff doesn't happen too frequently, especially possibly after COVID and the loosening of regulations tighten back up a little bit.

PROF. TAI:

Yeah. Yeah. I think it'll be interesting to see what happens with all that.

TURNER:

What do you hope researchers take away from your work, particularly these two articles?

PROF. TAI:

One thing is that I hope researchers understand that food, as an element of regulation, is complicated by the ways in which consumers approach food. Unlike many other things that are being regulated, we kind of need food to survive. There's a lot of other things that are being regulated where you don't necessarily need that. And we don't just need food to survive, but everyone has their own individual relationship with food, that is complicated by cultural meanings, by diet, by all sorts of things.

PROF. TAI:

And that these kinds of debates, I think, often complicate the regulatory process for food. One example I gave is how difficult it was to first start regulating insects as a food product, because traditionally insects we're regarded as a contaminant. And so, you have all these things and FDA's code about the percentage of insects that are allowable on certain types of processed food. And now suddenly people are trying to market insects as food. And so, you had to detangle some of that. So, it's these cultural shifts can sometimes lead to complicated elements of food law.

TURNER:

Right. And food law to me, it seems much less esoteric in how the law really affects your day-to-day life. As you said, food is something everyone is interacting with on a daily basis, at least two or three times a day. Whereas, something like contracts law or torts law, you're like, "Oh, I know that exists, but it's not something that I'm dealing with on a day-to-day basis." So, I think that's very important to keep this in mind about how that affects the food you are taking from the grocery store or ordering out from Uber or DoorDash or whatever it might be. So, fascinating stuff.

TURNER:

Thank you very much, Professor Tai. As always, we'll link to Professor Tai's scholarship on our podcast page, we've been discussing two of Professor Tai's most recent articles, In Fairness to Future

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TURNER:

You can find a list of Professor Tai's scholarship on their SSRN page or the University of Wisconsin Law School Repository. As I mentioned earlier, links to both these resources are posted along with this podcast at [wilawinaction.law.wisc.edu](http://wilawinaction.law.wisc.edu). Thank you again for joining us, Professor Tai. And I hope that all of you out there are now subscribed to our Wisconsin Law in Action Podcast, but if you're not, find us on the Apple iTunes Store, Stitcher, or listen to our full archive at [wilawinaction.law.wisc.edu](http://wilawinaction.law.wisc.edu). Thank you all for listening and happy researching.