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## Fraud in the Market

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# FRAUD IN THE MARKET

*Samuel R. Wiseman\**

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## INTRODUCTION

Consumers in the United States are flocking to local food. The number of farmers' markets around the country—many of which purport to sell only locally grown produce—has rapidly grown in recent years.<sup>1</sup> The allure of producers' markets<sup>2</sup> is easy to understand. *Locavores*<sup>3</sup>

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<sup>1</sup> LYDIA OBERHOLTZER & SHELLY GROW, PRODUCER-ONLY FARMERS' MARKETS IN THE MID-ATLANTIC REGION: A SURVEY OF MARKET MANAGERS 2 (2003).

<sup>2</sup> *Id.* at 3 (noting that the term "producer-only" market is relatively recent and defining it as meaning that vendors "produce the goods that they sell directly to retail customers").

<sup>3</sup> A *locavore* is defined as "a person whose diet consists only or principally of locally grown or produced food." NEW OXFORD AMERICAN DICTIONARY 1025 (Angus Stevenson & Christine A. Lindberg eds., 3d ed. 2010); see also Stephanie Tai, *The Rise of U.S. Food*

prefer small farms to massive, distant agribusiness for freshness, environmental, social, and safety-based reasons, and they assume, when so assured by the market, that the food at the market is in fact local. Beyond the health and safety benefits that some consumers believe flow from knowledge of food production practices,<sup>4</sup> buyers enjoy the quality and taste of just-picked produce,<sup>5</sup> and they derive substantial utility from the knowledge that they have supported local agriculture.<sup>6</sup> Many also believe that fresh, local produce is healthier and less environmentally damaging.<sup>7</sup> Producers are equally pleased by the trend toward local food and farmers' markets—local food often sells at a premium,<sup>8</sup> and direct sales to consumers reduce packaging and marketing costs,<sup>9</sup> an important consideration for small producers.

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*Sustainability Litigation*, 85 S. CAL. L. REV. 1069, 1074–1080 (2012) (describing the “modern sustainable food movement”).

<sup>4</sup> Shermain D. Hardesty, *Role of Direct Marketing in California*, 10 AGRIC. & RESOURCE ECON. UPDATE Jan.–Feb. 2007, at 5 (noting consumers' “sense of food safety” associated with local produce comes from their familiarity with the source); see also RICH PIROG & ANDY LARSON, CONSUMER PERCEPTIONS OF THE SAFETY, HEALTH, AND ENVIRONMENTAL IMPACT OF VARIOUS SCALES AND GEOGRAPHIC ORIGIN OF FOOD SUPPLY CHAINS 2, 10 (2007) (concluding, from a survey that produced 500 usable responses, that “[e]ighty-five percent indicated that local produce was ‘somewhat’ or ‘very’ safe, with 74 percent indicating they perceived the national food supply chain to be safe.”).

<sup>5</sup> KIM DARBY ET AL., WILLINGNESS TO PAY FOR LOCALLY PRODUCED FOODS: A CUSTOMER INTERCEPT STUDY OF DIRECT MARKET AND GROCERY STORE SHOPPERS 6, 10 (2006) (finding, based on a survey of 530 consumers, that “[f]reshness was the most frequently cited” reason for buying local produce and that “[t]aste also ranked high”); Kynda R. Curtis, *Are All Direct Market Consumers Created Equal?*, 42 J. FOOD DISTRIBUTION RES. 26, 28, (2011), (showing “taste” as the most important produce attribute cited by community supported agriculture (“CSA”) and farmers' market customers); Hardesty, *supra* note 4, at 5 (“Consumers have reported that quality is the number one reason they shop at farmers' markets; they are attracted by the fresh-picked, and vine- and tree-ripened produce.”).

<sup>6</sup> Kim Darby et al., *Decomposing Local: A Conjoint Analysis of Locally Produced Foods*, 90 AM. J. AGRIC. ECON. 476, 485 (2008).

<sup>7</sup> See, e.g., Curtis, *supra* note 5, at 26–28, 31 (noting that although both farmers' market and CSA customers “rated product taste as the most important attribute” they sought in produce, CSA customers also cared about whether the produce was “organic,” high “quality,” and “local”—more so than farmers' market customers).

<sup>8</sup> See, e.g., DARBY ET AL., *supra* note 5, at 25 (concluding that “consumers are willing to pay more for locally produced foods”); see also OBERHOLTZER & GROW, *supra* note 1, at 2 (citing TIM PAYNE, U.S. DEP'T. OF AGRIC., U.S. FARMERS MARKETS—2000: A STUDY OF EMERGING TRENDS, at iv (2002) (describing broad economic benefits to farmers, and noting that, in 2000, more than 19,000 farmers “exclusively” sold their produce at farmers' markets)). But see JAKE CLARO, VERMONT FARMERS' MARKETS AND GROCERY STORES: A PRICE COMPARISON 23 (2011) (finding that “prices at farmers' markets are in many cases competitive with prices at grocery stores”); RICH PIROG & NICK MCCANN, IS LOCAL FOOD MORE EXPENSIVE? A CONSUMER PRICE PERSPECTIVE ON LOCAL AND NON-LOCAL FOODS PURCHASED IN IOWA 7–11 (2009) (comparing local and non-local prices for zucchini,

Consumer demand for localism, with the price premiums that follow, creates an incentive for fraud—passing off non-locally-produced food as farm-raised.<sup>10</sup> It is difficult for both consumers and market managers to distinguish between a carrot grown at the farm down the road and a carrot plucked from the shelves of a chain grocery store and resold on market day.<sup>11</sup> The threat of farmers’ market fraud is not merely theoretical. Investigations by a news station in California uncovered numerous incidents of farmers selling produce that they had not grown.<sup>12</sup> Market managers around the country have similarly found farmers selling purportedly local food out of season<sup>13</sup> and, when visiting farms, have observed piles of dirt rather than crops.<sup>14</sup> Although the extent of the fraud is not currently known—and the great majority of sellers are very likely honest—the number and variety of incidents so far suggests that it could be fairly widespread. Farmers’ markets will likely continue to grow,<sup>15</sup> and as demand for local produce increases,<sup>16</sup> the

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summer squash, cucumbers, string beans, cabbage, sweet onions, tomatoes, corn, eggs, and certain meats and noting that in terms of statistical significance only string beans were more expensive at farmers’ markets).

<sup>9</sup> See, e.g., Nina W. Tarr, *Food Entrepreneurs and Food Safety Regulation*, 7 J. FOOD L. & POL’Y 35, 36, 46–47 (2011) (noting that if a “farmer had bagged . . . lettuce before taking it to market, she would have engaged in ‘processing’” and would have been “subject to more regulation,” but also noting that even farmers who sell raw produce at markets already must comply with a variety of safety-related regulations, although this varies by state).

<sup>10</sup> For examples, see *infra* Part II.

<sup>11</sup> As shown by recent scandals relating to mislabeled fish and olive oil, this problem is not confined to farmers’ markets. See, e.g., Kirk Johnson, *Survey Finds That Fish Are Often Not What Label Says*, N.Y. TIMES, Feb. 21, 2013, at A13, available at [http://www.nytimes.com/2013/02/21/us/survey-finds-that-fish-are-often-not-what-label-says.html?\\_r=0](http://www.nytimes.com/2013/02/21/us/survey-finds-that-fish-are-often-not-what-label-says.html?_r=0); Elizabeth Weise, *Study: Imported Extra Virgin Olive Oil Often Mislabeled*, USA TODAY, (July 16, 2010, 12:16 PM), [http://usatoday30.usatoday.com/money/industries/food/2010-07-15-Oliveoil15\\_ST\\_N.htm?csp=34](http://usatoday30.usatoday.com/money/industries/food/2010-07-15-Oliveoil15_ST_N.htm?csp=34).

<sup>12</sup> Joel Grover & Matt Goldberg, *False Claims, Lies Caught on Tape at Farmers Markets*, NBC L.A. (Sept. 23, 2010, 11:28 AM), <http://www.nbclosangeles.com/news/local/Hidden-Camera-Investigation-Farmers-Markets-103577594.html>.

<sup>13</sup> See *infra* notes 66–67 and accompanying text.

<sup>14</sup> See *infra* text accompanying note 58.

<sup>15</sup> In addition to the benefits to consumers, producers, and communities, the Food Safety Modernization Act also might encourage more direct sales to consumers as, under the Act, farmers are exempt from certain stricter food safety standards if they can show that during a three-year period they had a higher “average annual monetary value of the food . . . sold *directly to qualified end-users*” than the average annual monetary value of all “food manufactured, processed, packed, or held” at the facility and “the average annual monetary value of all food sold by such facility” during the three-year period was less than \$500,000. FDA Food Safety Modernization Act, sec. 103, § 418(l)(1)(C)(ii), Pub. L. No. 111-353, 124 Stat. 3892 (2011) (codified as amended at 21 U.S.C. § 350g(l)(1)(C)(ii) (2012)) (emphasis added).

problem may become more acute. If so, it could undermine legitimate local food sellers through direct competition as well as by threatening consumer confidence in producer-only markets as a whole.<sup>17</sup>

Public and private responses to the problem vary. Current market and government anti-fraud efforts range from the non-existent to the highly involved, but even careful attempts to ensure the produce is truly local sometimes fail. Farm visits, a measure commonly included in market rules,<sup>18</sup> can only verify produce that is growing at the time of the visit, and in some cases not even that—produce stored on site and observed by the market manager was not necessarily produced on site.<sup>19</sup> Programs that rely on farmer self-certification, including descriptions and maps of crops, can be gamed, particularly in larger markets where peer monitoring is less likely to be effective. And although state regulatory or criminal penalties can be significant, the few states that have attempted to implement a relatively comprehensive anti-fraud regulatory regime at markets lack the resources to fairly and consistently enforce these rules.<sup>20</sup>

To ensure that consumers get what they think they are buying, and to protect honest producers' businesses, more effective efforts to curb farmers' market fraud may be necessary, at least in some areas. But if enough consumers can distinguish genuine from fraudulent local food, and there is sufficient competition among local food outlets, markets may have the necessary incentives to police themselves. Any proposed solution must be sensitive to the need to minimize costs to market participants (in dollars, time, and effort) to ensure that farmers' markets remain attractive to consumers and producers, as well as to the many competing demands on police and regulatory agencies. This Article identifies the problem of farmers' market fraud, explores existing efforts to prevent it, and makes some tentative suggestions as to how markets and governments can better address the problem.

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<sup>16</sup> LINDSAY DAY-FARNSWORTH ET AL., *SCALING UP: MEETING THE DEMAND FOR LOCAL FOOD*, at i (2009).

<sup>17</sup> See NEIL D. HAMILTON, NAT'L. CTR. FOR AGRIC. LAW RESEARCH & INFO., *FARMERS' MARKETS: RULES, REGULATIONS AND OPPORTUNITIES* 28 (2002), available at [http://www.nyfarmersmarket.com/pdf\\_files/fmruleregs.pdf](http://www.nyfarmersmarket.com/pdf_files/fmruleregs.pdf) ("There is widespread agreement among public officials, market advocates, and farmers that allowing other products to be sold can be detrimental to both the value of the market for farmers and to the quality of the market experience for shoppers. . . . The sale of produce by those who did not raise it defeats the idea of a 'farmers' market, is deceptive for consumers who may not realize the distinction, and creates unfair competition for local farmers at the market.").

<sup>18</sup> See, e.g. *infra* Part III.A.2.

<sup>19</sup> See *infra* text accompanying note 104.

<sup>20</sup> See *infra* notes 59, 127 and accompanying text.

Part I describes the rise of the local food movement and why direct sales to consumers through farmers' markets are so popular with both farmers and consumers. Part II, however, shows that some consumers might not be getting the produce they believe they are purchasing and how seller fraud can damage honest farmers' businesses by both undercutting them in the short term and potentially eroding consumer trust in the long term. Part III of this Article explores solutions, including market and seller agreements, regulatory approaches, and criminal penalties. It concludes that where consumers are able to differentiate between locally-grown and distant produce and where there is healthy competition among markets in a region, markets will likely be adequately incentivized to police themselves by heightening rules and enforcement. For markets that lack these competitive incentives, however, state regulations implemented by market boards and managers (taking advantage of their local knowledge) would likely be an attractive approach. With more attention to the potential for fraud, markets and governments can better protect both consumers and farmers.

#### I. THE VALUE OF LOCAL FOOD

Farmers' markets are increasingly popular, rising from 1,755 markets operating in 1994 to 8,144 in 2013.<sup>21</sup> Consumers demand local food to fulfill various environmental and social values<sup>22</sup>—or simply to find better-tasting produce<sup>23</sup>—and farmers benefit from opportunities for high-priced sales to loyal buyers.<sup>24</sup> There is no widely-accepted definition of “local,”<sup>25</sup> but this Article addresses the type of local food that consumers think they are buying at producer-only farmers' markets: produce that was grown at a farm somewhere nearby.<sup>26</sup> These producer-

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<sup>21</sup> Agric. Mktg. Serv., *National Count of Farmers Market Directory Listing Graph: 1994–2013*, U.S. DEP'T AGRIC., <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateS&leftNav=WholesaleandFarmersMarkets&page=WFMFarmersMarketGrowth&description=Farmers%20Market%20Growth> (last modified Aug. 8, 2013).

<sup>22</sup> See *supra* note 7 and accompanying text.

<sup>23</sup> See Curtis, *supra* note 5, at 28.

<sup>24</sup> See *supra* note 8 and accompanying text.

<sup>25</sup> STEVE MARTINEZ ET AL., U.S. DEP'T OF AGRIC., *LOCAL FOOD SYSTEMS: CONCEPTS IMPACTS AND ISSUES*, at iii (2010) (observing that “[t]hough ‘local’ has a geographic connotation, there is no consensus on a definition in terms of the distance between production and consumption,” and noting that the 2008 Food, Conservation, and Energy Act defines “locally and regionally produced” food as food that is transported “less than 400 miles from its origin or within the state in which it is produced”); Megan Galey & A. Bryan Endres, *Locating the Boundaries of Sustainable Agriculture*, 17 NEXUS: CHAP. J.L. & POL'Y 3, 5 (2012) (noting different definitions used by states, “grocery stores, restaurants, and farmers' markets” and in the Farm Bill).

<sup>26</sup> See *supra* note 2 for a definition of producer-only farmers' markets.

only markets are popular, comprising more than 60% of all farmers' markets.<sup>27</sup> The sources of their popularity are explored briefly below.

### A. Consumers

A diverse, incompletely overlapping set of consumer values drives the steadily growing demand for local food. Alice Waters, Michael Pollan, and other leaders of the U.S. slow food movement believe that “cooking should be based on the finest and freshest seasonal ingredients that are produced sustainably and locally”<sup>28</sup> and view the movement as embodying a “set of cultural practices” and “even a way of life.”<sup>29</sup> These connoisseurs of local produce tie together taste and social values, demanding delicious produce and a “food economy that is ‘good, clean, and fair,’”<sup>30</sup> and, increasingly, consumers share some or all of these values. Buyers looking for freshness and flavor are drawn to producer-only markets for obvious reasons. Consumers seeking fairness in food derive substantial utility from the knowledge that they are supporting a local farmer, whom they may know,<sup>31</sup> rather than a large, faceless agribusiness. Agribusiness nearly always wins out in the national market for food, with its economies of scale and government subsidies, but some consumers of local food hope to tilt the scales in favor of the family farmer.

The values of “clean” and “fair food” also connote environmental concerns. Large factory farms send massive quantities of pollution into interstate rivers,<sup>32</sup> and many consumers view family farms—particularly

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<sup>27</sup> U.S. DEP'T OF AGRIC., NATIONAL FARMERS MARKET MANAGER SURVEY 2006, at 20 (2009) (showing that 60.1 percent markets involve direct retail sales only). It is not clear that all retail sales involve sales directly from the producer, but the same report indicates that on average nationwide, more than 70% of vendors “reported to be producers selling goods they had grown and/or produced themselves.” *Id.* at 51.

<sup>28</sup> Stella Lucia Volpe, *The Slow Food Movement*, ACSM'S HEALTH & FITNESS J., May–June 2012, at 29, 29; CHEZ PANISSE RESTAURANT, <http://www.chezpanisse.com/about/alice-waters> (last visited Mar. 17, 2014).

<sup>29</sup> Michael Pollan, *Cruising on the Ark of Taste*, MOTHER JONES, May–June 2003, at 75, 76.

<sup>30</sup> CHEZ PANISSE RESTAURANT, *supra* note 28.

<sup>31</sup> DARBY ET AL., *supra* note 5, at 6, 10 (concluding from a survey of 530 respondents that, after freshness, “[s]upporting local businesses was the next most frequently cited reason” for purchasing local produce); Curtis, *supra* note 5, at 30 (noting the “high importance” that CSA members, in particular, place on “supporting local farmers”).

<sup>32</sup> U.S. ENVTL. PROT. AGENCY, NATIONAL WATER QUALITY INVENTORY 2000 REPORT, at ES-3, 65, 74, 80, 82, 96, 140 (2002) (noting that states reported that agricultural nonpoint source (“NPS”) pollution was the leading source of water quality impairment and that the use of animal feeding operations, pesticides, irrigation water and fertilizer, among other activities, can cause this pollution).

those they can visit and thus experience first-hand—as more benign.<sup>33</sup> Some vendors at farmers’ markets also offer organic or “pesticide-free” produce,<sup>34</sup> which can reduce harmful pollution and potentially provide health benefits to consumers.<sup>35</sup> Locavores further point to the shorter transport distances required for local produce,<sup>36</sup> although some studies suggest that local agriculture does not have a smaller carbon footprint than its centralized counterpart.<sup>37</sup> Beyond pollution, some local food enthusiasts prefer the non-genetically modified “heirloom” produce that some small farms offer, favoring plant diversity and traditional agriculture over the engineered monocultures that tend to dominate large farms and their perceived health and environmental risks.<sup>38</sup> Finally, meat consumers prefer free-range chicken and pasture-fed beef not only for taste but also to avoid supporting inhumane conditions on factory farms.<sup>39</sup> And as introduced above, consumers of local food like knowing where their food came from and how it was grown for safety reasons.<sup>40</sup> In a world of e-coli scares and growing distrust of the government’s ability to protect the food supply, local food plucked fresh from the fields seems safer and more predictable.

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<sup>33</sup> See, e.g., PIROG & LARSON, *supra* note 4, at 2 (noting that consumers in one survey placed “high importance” on “pesticide use on fresh produce they purchase”).

<sup>34</sup> Cf. *Organic Market Overview*, U.S. DEPT AGRIC., <http://www.ers.usda.gov/topics/natural-resources-environment/organic-agriculture/organic-market-overview.aspx#.UuPeTfQo6c9> (last updated June 19, 2012) (noting that “7 percent of U.S. organic food sales occur through farmers’ markets, foodservice, and marketing channels other than retail stores”).

<sup>35</sup> PIROG & LARSON, *supra* note 4, at 3 (explaining that a majority of survey respondents perceived organic and locally-grown food to be healthier than conventionally sourced food, and noting that although there are few studies linking organics to better health, such studies are growing in number). *But cf.* Crystal Smith-Spangler et al., *Are Organic Foods Safer or Healthier than Conventional Alternatives?*, 157 ANNALS INTERNAL MED. 348, 359 (2012) (finding few health benefits from eating organic in lieu of conventional produce).

<sup>36</sup> See PIROG & LARSON, *supra* note 4, at 2, 7 (noting, based on a survey with 500 usable responses, that 50% responded that the “distance traveled” (by the produce) was “somewhat” or “very” important,” although higher percentages of respondents cared about “pesticide use,” “date harvested,” and “food safety inspection”).

<sup>37</sup> Christopher L. Weber & H. Scott Matthews, *Food-Miles and the Relative Climate Impacts of Food Choices in the United States*, 42 ENVTL. SCI. & TECH. 3508, 3508 (2008).

<sup>38</sup> See, e.g., Pollan, *supra* note 29, at 75 (noting that members of the local food movement “aimed to save endangered domestic plants and animals”).

<sup>39</sup> Cf. Kelli Boylen, *Marketing Animal Welfare with Certification*, HAY & FORAGE GROWER (Aug. 10, 2012), <http://hayandforage.com/beef/marketing-animal-welfare-certification> (describing increasingly popular “Animal Welfare Approved” (“AWA”) certification and an AWA-certified farmer who sells grass-fed beef at a farmers’ market); *Standards*, ANIMAL WELFARE APPROVED, <http://animalwelfareapproved.org/standards> (last visited Mar. 20, 2014) (describing standards for the humane treatment of farm animals).

<sup>40</sup> See *supra* note 4 and accompanying text.

### B. Farmers and Communities

Small farmers have responded enthusiastically to the steadily rising demand for local foods. Some accommodate consumers' desire for a connection with their food source by posting pictures of their goats and cows at their sales booths and offering farm tours. They pile oddly-shaped heirloom tomatoes and purple carrots into baskets, offer free samples to highlight the flavor of freshly-picked produce, and suggest recipes for experimenting with new seasonal vegetables that consumers might not have previously encountered. And in exchange, they collect a healthy price for their wares. Farmers are often able to set prices that are comparable to, if not higher than,<sup>41</sup> those found in grocery stores while avoiding shipping costs and more stringent labeling and packaging requirements.<sup>42</sup> Cutting out the middleman can also generate substantial savings—farmers in California, for example, make “less than 20 cents on the consumer’s full dollar” when selling through wholesalers.<sup>43</sup> Studies of farmer revenues from farmers’ markets show average annual sales per farmer ranging from \$7,000 to more than \$11,000 annually,<sup>44</sup> and that a substantial percentage of farmers at markets rely solely on these venues for produce sales.<sup>45</sup>

Farmers’ markets also benefit communities—creating direct economic impacts and sometimes pulling shoppers to downtown areas and causing spending beyond the food sector. In terms of direct impact, the City of Portland, Oregon, for example, estimates that “[i]n 2007, the 14 farmers’ markets in Portland sold goods totaling an estimated aggregate of nearly \$11.2 million,”<sup>46</sup> which created “just under 100 direct jobs,” “over \$1.3 million in employee compensation,” and “induced” contributions—such as “personal spending done by the farmer . . . or her market worker”—of more than \$1.8 million.<sup>47</sup> More broadly, farmers’

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<sup>41</sup> See *supra* note 8 and accompanying text.

<sup>42</sup> See *supra* note 9 and accompanying text.

<sup>43</sup> See Hardesty, *supra* note 4, at 5.

<sup>44</sup> Cheryl Brown & Stacy Miller, *The Impacts of Local Markets: A Review of Research on Farmers Markets and Community Supported Agriculture (CSA)*, 90 AM. J. AGRIC. ECON. 1296, 1297 (2008). Some states had lower sales, though. In Iowa, only 30% of market vendors had “annual sales greater than \$5,000.” *Id.* (citing Theresa Varner & Daniel Otto, *Factors Affecting Sales at Farmers’ Markets: An Iowa Study*, 30 REV. AGRIC. ECON. 176, 185 (2008)).

<sup>45</sup> *Id.* (showing that in 2006, 25% of vendors relied on farmers’ market sales for their “sole source of farm income”).

<sup>46</sup> Memorandum from Bonnie Gee Yosick to Clark Worth (Sept. 23, 2008), available at <http://www.portlandoregon.gov/bps/article/236588>.

<sup>47</sup> *Id.*

markets can drive economic and social interactions that “create the basis for the emergence of new local food systems.”<sup>48</sup>

## II. THE THREAT OF FRAUD

In light of the growth of farmers’ markets, and the opportunity to resell certain mass-produced produce at a premium<sup>49</sup> without dealing with labeling, packaging and middlemen,<sup>50</sup> there are reasonably strong incentives for farmers’ market fraud. And fraud detection is difficult: A local carrot may be nearly identical to a “foreign” carrot. Fraud harms both consumers, who do not get what they pay for, and honest farmers, who are undercut by more cheaply-produced produce masquerading as local.<sup>51</sup> As one Wisconsin farmer complained with respect to resellers, “We sell four cucumbers for \$1 and they sell eight for \$1.”<sup>52</sup>

Equally troublingly, an erosion of consumer trust in farmers’ claims that they grew the food they sell could damage the entire enterprise, harming both consumers and farmers. Although there appear to have been no empirical studies of the extent or degree of fraud, anecdotal evidence suggests that it is a common concern among market organizers and, in some cases, governments and consumers.

In California, where the state has certified certain markets as local since 1977<sup>53</sup> and boasts the largest number of farmers’ markets in the country,<sup>54</sup> there have been numerous recent allegations of fraud. A Los Angeles television station conducted an undercover investigation in 2010 and found one seller “loading up his truck, with boxes of produce from big commercial farms as far away as Mexico.”<sup>55</sup> The seller indicated that “everything” he sold at the farmers’ market came from his field, but when the NBC crew investigated his farm, he could not show the investigators “most of the produce he was selling, such as celery, garlic, and avocados.”<sup>56</sup> When asked about the lack of avocados on his property,

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<sup>48</sup> Brown & Miller, *supra* note 44, at 1300.

<sup>49</sup> See *supra* note 8.

<sup>50</sup> See *supra* note 9.

<sup>51</sup> See *supra* note 17 and accompanying text.

<sup>52</sup> Lauren Etter, *Food for Thought: Do You Need Farmers for a Farmers Market?*, WALL ST. J., Apr. 29, 2010, at A1.

<sup>53</sup> See *Certified Farmers Market Program*, CAL. DEP’T FOOD & AGRIC., [http://www.cdfa.ca.gov/is/i\\_c/cfm.html](http://www.cdfa.ca.gov/is/i_c/cfm.html) (last visited Mar. 20, 2014).

<sup>54</sup> Press Release, U.S. Dep’t of Agric., USDA Celebrates National Farmers Market Week, August 4–10 (Aug. 5, 2013), available at <http://www.usda.gov/wps/portal/usda/usdamediafb?contentid=2013/08/0155.xml&printable=true&contentidonly=true> (showing 759 markets in California, followed by 637 in New York and 336 in Illinois).

<sup>55</sup> Grover & Goldberg, *supra* note 12.

<sup>56</sup> *Id.*

the seller responded, “That I’ll be honest. That stuff came from somewhere else.”<sup>57</sup> In other field visits, the journalists “found farms full of weeds, or dry dirt, instead of rows of the vegetables that were being sold at the markets.”<sup>58</sup> The investigation stoked enough concern among farmers, market managers, and consumers to cause the state’s Farmers’ Market Advisory Committee to propose a new enforcement program with higher fees and closer enforcement.<sup>59</sup> An attorney for the California Federation of Certified Farmers’ Markets suggested that there was “a growing trend of misrepresentations in all forms . . . of agricultural product marketing.”<sup>60</sup> From August 2012 through August 2013, the state issued nine suspensions, revocations, or fines to sellers for “selling product not of [their] own production,”<sup>61</sup> and sixty-six notices of noncompliance to sellers selling products not listed on their state producer certifications.<sup>62</sup>

In a separate California investigation in 2012, San Diego County’s Department of Agriculture, Weights, and Measures, through undercover agents, found one seller who “wasn’t even growing the broccoli or Brussels sprouts he was selling.”<sup>63</sup> The seller later “pleaded guilty to a violation of Business and Professions Code section 17500 [false/misleading advertising].”<sup>64</sup>

Anecdotal evidence of fraud is not limited to California. According to a state newspaper, the manager of the Coventry Regional Farmers Market in Connecticut notes that “constant rumbling” about fraud is a

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Kate Campbell, *Farmers Market Enforcement Fees Could Increase*, AG ALERT (Mar. 16, 2011), <http://www.agalert.com/story/?id=1889> (noting that “interest was heightened” following Southern California media reports of conventional produce being sold at farmers’ markets).

<sup>60</sup> *Id.*

<sup>61</sup> CAL. DEP’T OF FOOD & AGRIC., CERTIFIED FARMERS MKT. PROGRAM, REVOKED, SUSPENDED, AND/OR FINED LIST (2013), *available at* [www.cdff.ca.gov/is/pdfs/CPC\\_Suspension\\_2013\\_2nd\\_quarter.pdf](http://www.cdff.ca.gov/is/pdfs/CPC_Suspension_2013_2nd_quarter.pdf).

<sup>62</sup> CAL. DEP’T OF FOOD & AGRIC., CERTIFIED FARMERS MKT. PROGRAM, CFM NON-COMPLIANCE WORKSHEET JANUARY–DECEMBER 2013, *available at* [http://www.cdff.ca.gov/is/pdfs/CFM\\_Noncompliance\\_List.pdf](http://www.cdff.ca.gov/is/pdfs/CFM_Noncompliance_List.pdf).

<sup>63</sup> Clare Leschin-Hoar, *When Fraud Hits the Farmers Market*, VOICE OF SAN DIEGO, (Apr. 9, 2013), <http://voiceofsandiego.org/2013/04/09/when-fraud-hits-the-farmers-market/>.

<sup>64</sup> Letter from Kathryn Lange Turner, Deputy City Attorney, Office of the City Attorney, City of San Diego, to Mark Lyles, Inspector, Dep’t of Agric., Weights & Measures (Mar. 13, 2013) (alteration in original), *available at* <http://voiceofsandiego.org/wp-content/uploads/2013/05/51644b41b3233.pdf>.

“huge concern,”<sup>65</sup> and at least one seller in Shelton “had strawberries, an early crop, in late summer.”<sup>66</sup> In Milwaukee, Wisconsin, a seller had out of season zucchinis with “wax on them”—a tip-off that the zucchinis had not been plucked fresh from the field.<sup>67</sup> And in Michigan, a well-known, local organic farmer was accused of buying produce from wholesalers.<sup>68</sup> Furthermore, a Virginia study found that “[s]ome farmers seem to be buying a great volume of the produce they sell,”<sup>69</sup> and an organization in Pennsylvania believes that resellers of produce “capture over 90 percent” of the value of Farmers’ Market Nutrition Program vouchers, through which certain individuals can use government-issued checks to purchase produce at farmers’ markets.<sup>70</sup> The problem does not appear to be limited to the United States—in the United Kingdom, market managers observed: “The markets are only supposed to stock ‘local produce,’ but last week we discovered spinach from Portugal and Spain—produced by another supermarket supplier—being sold at a farmers market . . . even legitimate stallholders are ‘topping up’ their locally grown produce with vegetables bought from Britain’s wholesale markets.”<sup>71</sup>

It is difficult to assess the scope of the fraud problem. Much fraud may be undetected, and much detected fraud may be unreported. Nonetheless, market managers and sellers worry that even a few incidents can have potentially large impacts on markets. In one West Virginia survey with 102 vendor respondents, when asked about the “largest obstacles to their success,” 20 vendors “indicated an obstacle with vendors who sold products they did not produce themselves, many of them charging lower prices making it difficult to compete.”<sup>72</sup> And,

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<sup>65</sup> Jan Ellen Spiegel, *Fraud Happens at Connecticut’s Farmers’ Markets—but Not Often*, CT. MIRROR (Aug. 3, 2012), <http://www.ctmirror.org/fraud-happens-connecticuts-farmers-markets-not-often/>.

<sup>66</sup> *Id.*

<sup>67</sup> Etter, *supra* note 52.

<sup>68</sup> Kimberley Willis, *Fraud at the Farmers Market*, EXAMINER.COM (Sept. 22, 2010), <http://www.examiner.com/article/fraud-at-the-farmers-market>.

<sup>69</sup> VA. DEP’T FOR THE AGING, SENIOR FARMERS’ MARKET NUTRITION PROGRAM 4 (2012).

<sup>70</sup> SHELLY GROW & LYDIA OBERHOLTZER, THE USE OF FARMERS’ MARKET NUTRITION PROGRAMS IN THE MID-ATLANTIC 6 (2003).

<sup>71</sup> Jonathan Ungoed-Thomas & Claire Newell, *Focus: Farmers’ Markets Sell ‘Supermarket’ Foods*, SUNDAY TIMES (Apr. 8, 2007), [http://www.thesundaytimes.co.uk/sto/news/uk\\_news/article62830.ece](http://www.thesundaytimes.co.uk/sto/news/uk_news/article62830.ece).

<sup>72</sup> Stacy Miller et al., *Educational Needs and Perceived Obstacles Identified by Farmers’ Markets in West Virginia*, in 2006 NORTH CENTRAL AGRICULTURAL EDUCATION RESEARCH CONFERENCE 122, 130 (Neil A. Knobloch ed. 2006), available at <http://aged.caf.wvu.edu/Research/AAAE-NC-2006/2006%20North%20Central%20Research%20Conference%20Proceedings.pdf#page=131>.

although they believe that the fraud is not widespread,<sup>73</sup> Connecticut farmers worry that “[y]ou’re one news story away from ruining it for everyone”<sup>74</sup> by eroding consumer trust. Indeed, fear of losing customers may have driven at least one farmers’ market to try to cover up fraud allegations: A market manager who worked for an organization that ran 18 Southern California markets alleged that the organization discouraged her from reporting fraud “violations to authorities” and “retaliated against her after she did so anyway.”<sup>75</sup> This demonstrates that although competition among markets to attract locavores will often inspire careful monitoring of producer-only claims, it could also lead to a damaging tendency to cheat on a market level.

### III. PREVENTING FRAUD

To combat the threat of fraud, markets, local governments, and states have experimented with a variety of approaches, including contractual, regulatory, and criminal solutions. This Part explores these approaches to fraud and suggests that where consumers can adequately differentiate local and non-local produce and there is market competition in the area, markets will be adequately incentivized to enhance and enforce producer-only rules. Conversely, where these conditions are not present, a hybrid model in which a state-mandated enforcement regime is carried out by local market managers may be a cost-effective solution. This will be particularly important for larger markets, which cannot simply rely on norms and vendor monitoring to address fraud concerns.<sup>76</sup>

#### A. Contractual Approaches

Market managers and farmers’ market boards—and the participant sellers—are closest to the problem, and many markets already attempt to regulate fraud through various provisions in market rules and seller agreements. Indeed, producer-only markets that fear losing discerning customers to other competing markets will be highly incentivized to expand these protections. The most common approaches include

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<sup>73</sup> See Spiegel, *supra* note 65.

<sup>74</sup> *Id.*

<sup>75</sup> David Karp, *Market Watch: Farmers Market Cheating Alleged*, L.A. TIMES, Nov. 10, 2010, <http://articles.latimes.com/2010/nov/10/food/la-fo-marketwatch-20101105>.

<sup>76</sup> See, e.g., GARRY STEPHENSON ET AL., UNDERSTANDING THE LINK BETWEEN FARMERS’ MARKET SIZE AND MANAGEMENT ORGANIZATION 13 (2007), available at [http://smallfarms.oregonstate.edu/sites/default/files/small-farms-tech-report/eesc\\_1082-e.pdf](http://smallfarms.oregonstate.edu/sites/default/files/small-farms-tech-report/eesc_1082-e.pdf) (quoting one market manager: “You can’t be everywhere and you don’t know what’s happening at that other end of the market now. . . . When it’s a smaller market you have a much closer relationship. And so vendor problems are part of it; you have more vendor problems with a large market.”).

requiring producer commitments to sell only producer-grown produce, mandating submission of lists of products to be sold throughout the upcoming market season, and conducting farm inspections to verify production, backed by sanctions including expulsion. A 2002 survey of market managers at Mid-Atlantic producer-only markets found that “[t]hirty-seven percent of managers used an application or contract that spells out the producer-only rule,” with two of these managers requiring plans describing what producers will sell.<sup>77</sup> Forty-seven percent of respondents indicated “that they do farm inspections, either personally or by committee,” although not always regularly.<sup>78</sup>

### 1. Matching Crop Lists and Acreages with Products Sold

Market agreements between market managers and sellers often require sellers to provide, before the selling season, lists of the crops that they will sell or acreages of crops and, in some cases, how much of which crop they will sell.<sup>79</sup> Actual sales must then match these lists.<sup>80</sup> Descriptions of acreages indicate the amount of food that farmers can realistically sell; if a farmer with a half-acre comes to market with 500 watermelons, market managers will likely be suspicious. Based on the author’s non-scientific survey of market rules, requirements for crop lists and acreages are common among producer-only markets. Washington, DC’s FRESHFARM Markets provide, for example,

Only items listed in your completed application can be sold at the FRESHFARM Markets. You must list all food and products that you plan to bring to market. Items not listed will be allowed for sale only with advance approval by the FRESHFARM Markets’ management.

If you want to bring additional or new products to market that are not on your original market application, you must let market management know in writing what those products are and get prior approval from market management before bringing these products to market.<sup>81</sup>

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<sup>77</sup> OBERHOLTZER & GROW, *supra* note 1, at 15.

<sup>78</sup> *Id.*; see also HAMILTON, *supra* note 17, at 28 (noting that “[t]o accomplish the ‘producer only’ goal, markets typically have rules defining what can and cannot be sold at the market and creating extensive processes for determining the eligibility of products and producers to participate in the market” and providing examples of market rules).

<sup>79</sup> See, e.g., Market Agreement, Urban Harvest, Inc., Urban Harvest Farmers Market Vendor Application, available at <http://urbanharvest.org/documents/118591/226131/market+vendor+application.pdf/>.

<sup>80</sup> See, e.g., *id.*

<sup>81</sup> Market Rules, FRESHFARM Markets., FRESHFARM Markets Rules and Procedures 13 (2013–2014) [hereinafter FRESHFARM Market Rules], available at [http://www.freshfarmmarket.org/pdfs/2013\\_rules\\_and\\_regulations.pdf](http://www.freshfarmmarket.org/pdfs/2013_rules_and_regulations.pdf).

The City of Chicago, which prohibits vendors from selling “products from another farm without full transparency,” asks vendors to “list all sites including a map” for each farm or orchard site, showing “farm boundaries, growing areas, crop locations, and storage sheds, packing/processing facility locations,” as well as the number of acres on the farm and acres in production.<sup>82</sup>

The Putnam Farmers’ Market in West Virginia similarly requires that producers only sell food they have produced, although they may resell other local farmers’ food under a “provisional arrangement.”<sup>83</sup> Putnam also requires vendors to submit a “product plan with their application,”<sup>84</sup> which must list the products they grow,<sup>85</sup> just as the Brownsville, Texas market, which requires that “[a]ll vendors’ farms or production areas must be located within the state of Texas,”<sup>86</sup> mandates that vendors “list all items that you would like to sell” and, if they sell shrimp, to show that they “own the boats that caught the shrimp.”<sup>87</sup>

The Hernando, Mississippi Farmers Market indicates that its market managers “believe strongly in the origin of a product and promote our market as a place where customers can buy LOCAL products.”<sup>88</sup> The vendor application also asks the seller: “Do you grow all your produce and/or raise all your animals . . . ?” and indicates that if the seller “anticipate[s] purchasing any crops/product from, or selling for, a local farmer,” she must have a certificate for these crops.<sup>89</sup> Sellers at the

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<sup>82</sup> Market Agreement, City of Chicago, City of Chicago Farmers Markets Application 2013 (Nov. 2012) (on file with the Regent University Law Review).

<sup>83</sup> Market Rules, Putnam Farmers’ Market, Market Rules of the Putnam Farmers’ Market 2012, at 1–2 (2012) [hereinafter Putnam Market Rules], *available at* [http://putnamfarmersmarket.weebly.com/uploads/6/9/6/4/6964545/market\\_rules\\_of\\_the\\_putnam\\_farmers.pdf](http://putnamfarmersmarket.weebly.com/uploads/6/9/6/4/6964545/market_rules_of_the_putnam_farmers.pdf).

<sup>84</sup> *Id.* at 2.

<sup>85</sup> Market Application, Putnam Farmers’ Market, 2014 Vendor Application of Interest (2014), *available at* [http://putnamfarmersmarket.weebly.com/uploads/6/9/6/4/6964545/vendor\\_application\\_2014.pdf](http://putnamfarmersmarket.weebly.com/uploads/6/9/6/4/6964545/vendor_application_2014.pdf) (requiring the applicant to indicate which items they are interested in selling).

<sup>86</sup> Market Agreement, Brownsville Farmers’ Market, Brownsville Farmers’ Market Vendor Contract (2009–2010), *available at* [http://www.brownsvillefarmersmarket.com.php5-13.dfw1-1.websitetestlink.com/wp-content/uploads/2010/07/Vendor\\_Contract\\_2009-2010-Season.pdf](http://www.brownsvillefarmersmarket.com.php5-13.dfw1-1.websitetestlink.com/wp-content/uploads/2010/07/Vendor_Contract_2009-2010-Season.pdf).

<sup>87</sup> Market Application, Brownsville Farmers’ Market, Produce Vendor Application Form, *available at* <http://www.brownsvillefarmersmarket.com.php5-13.dfw1-1.websitetestlink.com/wp-content/uploads/2010/07/Produce-Vendor-Application-Form.pdf>.

<sup>88</sup> Market Application, Hernando Farmers Market, Hernando Farmers Market 2013 Vendor Application (2013) [hereinafter Hernando Market Application], *available at* <http://cityofhernando.org/wp-content/uploads/2012/02/2013-Hernando-Farmers-Market-application-packet.pdf>.

<sup>89</sup> *Id.*

Hernando market must submit an Affidavit/Grower Certificate that describes the total acreage of the farm and the acreage of “fruits, vegetables, or flowers for sale” as well as a list of all of the produce the farmer “intend[s] to sell” during the year.<sup>90</sup>

Not all markets are so stringent, however. In Walpole, New Hampshire, market guidelines provide that “[g]rowers may sell only what they grow or raise on their own farms,” and “[e]ach vendor must agree, in writing, to comply with the letter and spirit of these guidelines,” with “fraudulent or dishonest practices” prohibited.<sup>91</sup> Vendors also must list “what [they]’d like to sell” and the location of their land, but crop lists and acreages are not required.<sup>92</sup> Other markets similarly do not request specific produce lists but demand certification, in writing, that sellers will grow the produce they propose to sell. The City of Parkersburg, West Virginia Downtown Farmers’ Marketplace rules and regulations provide that “[a]ll products for sale at the Marketplace must be produced by the vendor”<sup>93</sup> and require vendor applicants to verify that they are “the actual producers of the specifi[c] items which they intend to sell.”<sup>94</sup>

Even for markets that require a list of produce to be sold or acreage of the crops that will produce vegetables and fruits to be sold, or a written certification showing that produce is local, it is not clear how carefully or how often market managers compare lists and acreages with the types and quantities of produce sold. And even with careful checking, quantities are very difficult to verify; if a grower has indicated a particular acreage or listed a particular type and amount of produce she will sell, the amount actually sold at market weekly can only be roughly compared with the amount of produce the farmer claimed she would produce. Verifying whether produce is locally grown is also difficult from a seasonal perspective—although a farmer might list strawberries as a type of fruit to be sold at market, managers should be suspect if a farmer in New England sells strawberries, an early summer crop, in August. Within market rules and vendor agreements many market managers

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<sup>90</sup> *Id.*

<sup>91</sup> Market Rules, Walpole Farmers Market, Walpole Farmers Market Guidelines 5–6 (2013) [hereinafter Walpole Market Rules], *available at* <http://walpolenfarmersmarket.files.wordpress.com/2013/06/walpole-farmers-market-guidelines-2013.pdf>.

<sup>92</sup> *Market Admin*, WALPOLE FARMERS MARKET, <http://walpolefarmersmarket.com/market-admin> (last visited Mar. 20, 2014).

<sup>93</sup> Market Rules, City of Parkersburg, Downtown Farmers’ Marketplace 2013 Market Rules and Regulations 2 (2013) [hereinafter Parkersburg Market Rules], *available at* <http://downtownfarmersmarketplace.com/downloads/2013-Market-Rules-and-Regulations-Final.pdf>.

<sup>94</sup> *Id.* at 3.

have some options for enforcement, however, as discussed in the following section.

## 2. Inspections and Peer Monitoring

Some farmers' markets stop at requiring crop lists. The Hernando, Mississippi Farmers' Market, for example, lists as a possible violation of the rules "[s]elling items not within the guidelines of the market," but does not include other mechanisms for identifying violations.<sup>95</sup> Many farmers' markets, however, use inspections by a market manager or board as an enforcement mechanism. In Putnam, West Virginia, "[a]ll new [vendor] applicants will be visited by the Verification committee" to confirm that they are producers "of the specified items that they intend to sell."<sup>96</sup> In the same state, the Parkersburg market rules provide: "By submitting an application, vendors agree that the Farmers Market Manager or their designee may inspect the vendor's farm or facilities to insure [sic] compliance."<sup>97</sup> In California, the North San Diego Certified Farmers Market ("NSDCFM") is even more explicit in granting market managers permission to inspect: "Producer/seller grants permission to the NSDCFM manager or other NSDCFM staff to enter the seller's premises for the reasonable inspection of land, facilities, product(s) and records in order to determine whether the seller is in compliance with Market regulations and permit conditions."<sup>98</sup>

Several Texas markets have similar provisions. The Brazos Valley Farmers' Market indicates that "[m]embers are allowed to sell farm products that are grown and/or made by themselves,"<sup>99</sup> and growers, in submitting membership applications, agree to permit farm inspections and to "sell only items as specified" by the market rules.<sup>100</sup> The San Antonio Farmers' Market appoints a market board member-at-large to chair the "Produce Verification" committee, which conducts an "initial land verification" and presents its "findings to [the] membership

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<sup>95</sup> Hernando Market Application, *supra* note 88.

<sup>96</sup> Putnam Market Rules, *supra* note 83, at 4.

<sup>97</sup> Parkersburg Market Rules, *supra* note 93, at 6.

<sup>98</sup> Market Rules, North San Diego Certified Farmers Market, 2013–2014 Market Rules 9 (2013) [hereinafter NSDCFM Market Rules], available at <http://docs.nsdcfm.com/MarketRules.pdf>.

<sup>99</sup> Market Rules, Brazos Valley Farmers' Market Association, Rules and Regulations 1, available at <http://brazosvalleyfarmersmarket.com/wp-content/uploads/2013/01/2009-Rules-and-Regulations.pdf>.

<sup>100</sup> Market Application, Brazos Valley Farmers' Market Association, 2014 Application for Membership 1 (2014), available at <http://brazosvalleyfarmersmarket.com/wp-content/uploads/2013/01/Brazos-Valley-Farmers-Market-application-form-2008-1.pdf>.

committee.”<sup>101</sup> And the Barton Creek Farmers Market in Austin, Texas, provides for farm inspections “by a professional inspector or a Market Manager” or “participating growers,” and farmers must be prepared for “surprise inspections immediately following (but not limited to) the market day.”<sup>102</sup> Chicago also allows inspection without notification, and “[f]ailure to allow such an inspection will constitute a violation of market rules.”<sup>103</sup>

Inspections, of course, are not foolproof mechanisms for enforcement. Produce might be simply sitting on site, not growing, thus failing to indicate whether it was produced in state, or the produce might not be the type of crop it appears to be in the field. As a Milwaukee, Wisconsin manager noted when she inspected a watermelon farm, “all of the melons were . . . in a pile under a tree,” and “[i]t was impossible to tell whether they had bought them and stored them there, or whether they had grown and harvested them.”<sup>104</sup> Other monitors in Connecticut indicated that a farmer “‘showed us a large planting of corn and said, ‘There’s my sweet corn,’ . . . . Later we learned that he showed us a field of cow corn.”<sup>105</sup>

Other markets explicitly rely on peer monitoring in addition to or in lieu of direct farm inspections. Under Walpole, New Hampshire’s market guidelines, “Any vendor who becomes aware of a violation of these guidelines is responsible to report that violation, in writing, to a Coordinator.”<sup>106</sup> In some cases, at least, producers do appear to monitor each other—too much so, in fact. In East Granby, Connecticut, farmers who accuse peers of cheating must pay a fee for doing so; if they are correct, the fee is returned, but they forfeit the fee if the accusation is meritless.<sup>107</sup>

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<sup>101</sup> Market Rules, San Antonio Farmer’s Market Association, By-Laws 2010, at 4–5 (2010), *available at* [http://www.sanantoniofarmersmarket.org/S\\_A\\_Farmers\\_Mkt\\_by-laws.pdf](http://www.sanantoniofarmersmarket.org/S_A_Farmers_Mkt_by-laws.pdf).

<sup>102</sup> Market Rules, Barton Creek Farmers Market, Rules 9 (2011) [hereinafter Barton Creek Market Rules], *available at* <http://www.bartoncreekfarmersmarket.org/wp-content/uploads/vendorrules.pdf>.

<sup>103</sup> Market Rules, City of Chicago, 2014 Chicago Farmers and Community Market Program Rules & Regulations for Growers, Food Producers, and Non-Food Vendors (2014) [hereinafter Chicago Market Rules] *available at* <http://www.cityofchicago.org/content/dam/city/depts/dca/Farmers%20Market/FarmersMarketRulesRegs2014.pdf>.

<sup>104</sup> Sarah Johnson, *Defining and Defending a Producer-Only Market*, MARKET BEET (Farmers Mkt. Coal., Kimberton, Pa.), Winter 2010, at 3, 4, *available at* [http://ecbiz71.inmotionhosting.com/~farmer8/wp-content/uploads/2010/01/FMC-Market-Beet-Winter-2010\\_w\\_links.pdf](http://ecbiz71.inmotionhosting.com/~farmer8/wp-content/uploads/2010/01/FMC-Market-Beet-Winter-2010_w_links.pdf).

<sup>105</sup> Spiegel, *supra* note 65.

<sup>106</sup> Walpole Market Rules, *supra* note 91, at 7.

<sup>107</sup> Spiegel, *supra* note 65.

### 3. Sanctions

Whether producer fraud is revealed through an inspection or a peer complaint, sanctions appear to be similar around the country. Many market rules provide that sellers will be suspended for one day from the market if a violation is found, or for several weeks.<sup>108</sup> If repeat violations occur, or a particularly egregious deviation from rules is found, the vendor might be suspended from the market for the season.<sup>109</sup> Under “three strikes” provisions or sanctions for the worst violations, vendors are permanently suspended from selling at the market.<sup>110</sup> Fines are, in some cases, issued for any of these violation stages, and vendors typically may appeal the violation to a market board designated for this purpose.<sup>111</sup> The North San Diego Certified Farmers’ Market shows how violations depend on the frequency with which they occur or, for each violation, the level of egregiousness of the violation: “The severity of any penalty or discipline imposed by the Market Manager shall be directly related to the gravity or repetition of the violation.”<sup>112</sup> Producers who for the first time “sell products not of their own production” are suspended from the market for 30 days, whereas a second violation of the producer-only requirement “shall result in permanent disqualification from the market.”<sup>113</sup> Identical language with respect to gravity and repetition of the violation is used in Chicago,<sup>114</sup> and if the city’s Department of Cultural Affairs and Special Events “repeatedly suspects a vendor of re-selling product, this is grounds for suspension or dismissal from market. It is the vendor’s responsibility to provide proof of production in a

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<sup>108</sup> *E.g.*, Barton Creek Market Rules, *supra* note 102 (explaining the market manager may suspend vendors who violate the rules); Chicago Market Rules, *supra* note 103 (reserving the right to refuse any vendor who does not keep the rules); Hernando Market Application, *supra* note 88 (providing that penalties range from one day suspension to permanent expulsion); NSDCFM Market Rules, *supra* note 98, at 10 (providing for a thirty day suspension for selling produce grown by others).

<sup>109</sup> *E.g.*, NSDCFM Market Rules, *supra* note 98, at 10 (noting that penalties for violations can include suspension for up to eighteen months).

<sup>110</sup> *See, e.g.*, Market Rules, Noblesville Main Street, Noblesville Farmers Market 2014 Agreement 4–5 (2014), available at [http://www.noblesvillemainstreet.org/uploads/Farmers\\_Market\\_Agreement\\_2014\\_final2.6.14\\_.pdf](http://www.noblesvillemainstreet.org/uploads/Farmers_Market_Agreement_2014_final2.6.14_.pdf); NSDCFM Market Rules, *supra* note 98, at 10.

<sup>111</sup> *E.g.*, Barton Creek Market Rules, *supra* note 102 (explaining the market manager’s authority to impose fines for violations and the corresponding appeal process); NSDCFM Market Rules, *supra* note 98, at 2 (explaining an appeals process).

<sup>112</sup> NSDCFM Market Rules, *supra* note 98, at 10.

<sup>113</sup> *Id.*

<sup>114</sup> Chicago Market Rules, *supra* note 103 (“The severity of any penalty or discipline imposed by DCASE will be directly related to the gravity or repetition of the violation.”).

written appeal.”<sup>115</sup> At Crescent City Farmers’ Market in New Orleans, individuals tasked with enforcement provide written notification to vendors for the first four violations, followed by allowing the vendor to stay at the market on the day of the fourth strike but suspending her the following week, a similar action but a two-week suspension for the fifth strike, a month-long suspension for strike six, and permanent suspension beyond this.<sup>116</sup>

#### 4. Advantages and Disadvantages of Contractual Approaches

Most farmers’ markets take on primary responsibility for setting rules and enforcing them, although some are more diligent than others in ensuring that violations will be noticed and enforced. There are substantial advantages to this dispersed system, which relies on those closest to the farmers to ensure that produce sold at markets is produced nearby. This system takes advantage of local knowledge—in small towns, market managers might happen to drive by farms even when not formally inspecting them. Local decision-making also allows markets to adapt rules, inspections, and enforcement policies to local conditions and needs; in states where crops can be grown in several seasons, for example, market managers might not need to make as many inspections during the year to confirm that the produce sold week-to-week is local. Markets in small towns without much farmer entry and exit might also be able to impose relatively light rules, as norms likely will prevail within these relatively closed communities. Farmers in these communities know their neighbors and will impose various shaming mechanisms and other informal modes of punishment if cheating occurs at the market. Additionally, competition for locavores will drive both vendors and market managers to closely monitor grower behavior.

Despite the many advantages of relying primarily on markets to set their own rules and enforce them, the system has substantial downsides similar to those observed in a federal-state regulatory system. Markets—particularly relatively new ones that are just establishing a presence in a community—might lack the resources to hire managers and other officials and pay them to conduct regular and thorough inspections.<sup>117</sup> And the number of inspections or other mechanisms needed to verify that produce is local will often require too much time and effort for

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<sup>115</sup> *Id.*

<sup>116</sup> HAMILTON, *supra* note 17, at 22.

<sup>117</sup> See KARL FOORD, UNIV. OF MINN. EXTENSION SERV., MANAGING THE FARMERS’ MARKET 9–10 (n.d.), available at <http://mfma.le3.getliveedit.com/files/283.pdf> (suggesting that Minnesota farmers oppose a system like California’s certification of producer’s only markets, as inspection fees associated with certification—\$250 annually—would be viewed negatively).

volunteers. Further, as shown by the allegations that one market organization discouraged a manager from publicizing fraud,<sup>118</sup> internal politics could prevent market managers from consistently and fairly enforcing rules. Managers want markets to succeed and might be hesitant to encourage strict policing; they might also favor certain sellers over others, thus leading to inconsistent and unfair enforcement. Both norms and more formal policies can lead to unpalatable conduct. In Tomah, Wisconsin, a local farmer who asked the city council to consider banning resellers reported that “a vendor who grows his apples but also resells pumpkins[] made ‘verbal threats to bash my head in while swinging a cane in my direction.’”<sup>119</sup>

### *B. Regulatory*

Rather than rely on markets to police themselves, some state and local governments have deployed regulatory schemes to address farmers’ market fraud. This regulation occurs at the city, county, or state level, and it often mimics rules, enforcement mechanisms, and penalties imposed by markets, although it sometimes takes a more stringent approach.

#### 1. County and State Laws

California appears to have one of the most aggressive farmers’ market regulatory programs. State laws allow county agricultural commissioners to issue “[a] certified farmers’ market certificate,” which is valid for twelve months after it is issued.<sup>120</sup> This certificate guarantees that only local produce is sold at the farmers’ market, and the state provides various mechanisms to fund county enforcement of provisions that ensure localism.<sup>121</sup> Agricultural commissioners “may charge a certification and inspection fee up to a maximum rate of sixty dollars (\$60) per hour.”<sup>122</sup> Although the rules do not specify that producers at the markets must be certified, they have provisions for certifying individual producers and require markets to pay “a fee equal to the number of certified producer certificates and other agricultural producers participating on each market day.”<sup>123</sup> For each certified producer at each market, the commissioner must “perform at least one annual onsite inspection” of the site(s) listed on each seller’s certificate “to verify

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<sup>118</sup> See Karp, *supra* note 75.

<sup>119</sup> Etter, *supra* note 52.

<sup>120</sup> CAL. FOOD & AGRIC. CODE § 47020(a) (Westlaw through 2013 Reg. Sess.).

<sup>121</sup> *E.g.*, *id.* § 47020 (Westlaw) (providing that fees may be charged for inspections).

<sup>122</sup> *Id.* § 47020(a) (Westlaw).

<sup>123</sup> *Id.* § 47021(a) (Westlaw).

production of the commodities listed on the certificate or the existence in storage of the harvested production, or both.”<sup>124</sup> Enforcing officers also “may seize and hold as evidence” produce if a violation is suspected,<sup>125</sup> and the produce may be used as evidence in actions taken by counties.<sup>126</sup>

These inspection rules do not solve the problems experienced by many markets with similar inspection provisions, as they allow inspectors to simply verify that the product is on site, rather than actually growing. (This is of course acceptable for certain storable products, which farmers might legitimately keep on site, but it fails to directly verify that the products were grown on site.) The required inspections also do not confirm produce within each growing season. In addition to the substantive limitations of these annual site visits, California lacks adequate numbers of inspectors.<sup>127</sup>

Sanctions under the certified program are also similar to those issued by markets that run their own programs in that they increase in severity with repetition and seriousness. The sanctions are somewhat more serious, however, in that they involve defined civil penalties in addition to suspensions. “Serious . . . repeat or intentional violations” receive a civil penalty between \$401 and \$1,000, “moderate” repeat violations receive \$151–\$400 penalties, and “minor” procedural violations are subject to \$50–\$150 penalties.<sup>128</sup> Sellers charged with violating the rules are entitled to written notice and may request a hearing at which the sellers may present their own evidence.<sup>129</sup> Sellers are also entitled to make written appeals to the Secretary of Food and Agriculture.<sup>130</sup>

Connecticut has a similar state certification program through which the Connecticut Department of Agriculture Certifies certain markets as selling only locally-grown produce.<sup>131</sup> Farmers participating in certified

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<sup>124</sup> *Id.* § 47020(b) (Westlaw).

<sup>125</sup> *Id.* § 47005.2 (Westlaw).

<sup>126</sup> *Id.* § 47005.3 (Westlaw).

<sup>127</sup> *See, e.g.,* Campbell, *supra* note 59 (noting requests by “farmers, market managers[,] and consumers” for enhanced enforcement).

<sup>128</sup> § 47025(b) (Westlaw) (defining “serious” as “repeat or intentional violations”, “moderate” as “repeat violations or violations that are not intentional,” and “minor” as “violations that are procedural in nature”).

<sup>129</sup> *Id.* § 47025(c) (Westlaw).

<sup>130</sup> *Id.* § 47025(d) (Westlaw).

<sup>131</sup> *See* Market Agreement, Connecticut Department of Agriculture, Memorandum of Understanding (2012), *available at* [http://www.ct.gov/doag/lib/doag/marketing\\_files/2012\\_fm\\_mou\\_fillable.pdf](http://www.ct.gov/doag/lib/doag/marketing_files/2012_fm_mou_fillable.pdf) (showing a memorandum of understanding form through which the state recognizes the market as offering Connecticut farm products “with a traceable point of origin within Connecticut”); *see also* CONN. GEN. STAT. ANN. § 22-6r (Westlaw through 2013 Jan. Reg. Sess.) (defining certified farmers’ markets).

markets must provide a crop plan to the Department describing total acres on the farm, “[t]otal [a]cres [c]ultivated,” and specific numbers of acres, rows per foot, greenhouse square feet, or number of trees for various types of produce grown.<sup>132</sup> The head of the farmers’ market certification program reports that farms new to certified markets are inspected but that re-certifications are done only every three years, and typically without visits.<sup>133</sup> “The Commissioner of Agriculture may impose civil penalties for” violations of the certification requirement up to a maximum of \$2,500 for each violation.<sup>134</sup>

Mississippi offers a voluntary certification of markets by the Mississippi Department of Agriculture and Commerce.<sup>135</sup> To qualify, at least half of the products at the market must be grown by the grower or a representative in Mississippi, and the grower or a representative must be present at the market.<sup>136</sup> The state provides that it may deny a market’s application or revoke certification for failure to meet market criteria.<sup>137</sup> The state does not, however, appear to have formal rules regarding inspection to verify that fifty percent of products are local or associated sanctions for fraud. On the market certification application, the state asks the market to identify “the process by which your growers/vendors are certified to sell at your market,” with options of “[o]n-site inspection,” “[t]elephone verification,” “[w]ritten confirmation,” and “[o]ther.”<sup>138</sup> Certification of crop lists by agricultural extension agents is another fraud prevention strategy. The Hernando, Mississippi Farmers Market, discussed above, requires that the crop list affidavit be

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<sup>132</sup> CONN. DEPT OF AGRIC., BUREAU OF AGRIC. DEV. & RES. PRES., 2012–2014 CROP PLAN (2011), available at [http://www.ct.gov/doag/lib/doag/marketing\\_files/2012-2014\\_-crop\\_plan\\_fillable\\_.pdf](http://www.ct.gov/doag/lib/doag/marketing_files/2012-2014_-crop_plan_fillable_.pdf).

<sup>133</sup> Spiegel, *supra* note 65.

<sup>134</sup> CONN. GEN. STAT. ANN. § 22-7 (Westlaw through 2013 Jan. Reg. Sess.).

<sup>135</sup> 02-001-212 MISS. CODE R. § 100 (LEXIS through Jan. 3, 2014); *Mississippi Certified Farmers Markets Program*, MISS. DEPT AGRIC. & COM., [http://www.mdac.state.ms.us/departments/ms\\_farmers\\_market/certified-markets.htm](http://www.mdac.state.ms.us/departments/ms_farmers_market/certified-markets.htm) (last visited Mar. 20, 2014).

<sup>136</sup> § 102 (LEXIS); see also MISS. DEPT OF AGRIC. & COMMERCE, CERTIFIED FARMERS MARKET PROGRAM REGULATIONS (2013) [hereinafter MISSISSIPPI CERTIFIED FARMERS MARKET PROGRAM REGULATIONS], available at [http://www.mdac.state.ms.us/departments/ms\\_farmers\\_market/pdf/CFM\\_regs.pdf](http://www.mdac.state.ms.us/departments/ms_farmers_market/pdf/CFM_regs.pdf).

<sup>137</sup> §§ 102, 104 (LEXIS); MISSISSIPPI CERTIFIED FARMERS MARKET PROGRAM REGULATIONS, *supra* note 136.

<sup>138</sup> Market Application, Mississippi Department of Agriculture and Commerce, Mississippi Certified Farmers Market Membership Application, available at [http://www.mdac.state.ms.us/departments/ms\\_farmers\\_market/pdf/CFM\\_app.pdf](http://www.mdac.state.ms.us/departments/ms_farmers_market/pdf/CFM_app.pdf).

signed by an agricultural extension agent, as do Washington, D.C.'s FRESHFARM Markets.<sup>139</sup>

Consumer protection divisions are another potential option to protect locavores against market fraud. In Texas, for example, the Consumer Protection Division may seek a restraining order against “causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services.”<sup>140</sup>

Although a few states have taken steps toward certifying food localism, most leave this responsibility to the markets themselves, in some cases loosely regulating them as required by the federal Farmers' Market Nutrition Program,<sup>141</sup> in which consumers may use food assistance funds to purchase local produce.

## 2. Federal Laws

The majority of responsibility for specifically defining and enforcing localism falls to markets, or to local and state governments, but the federal government initially drove the definition of “local” food and the means of enforcing it. The WIC Farmers' Market Nutrition Program (“FMNP”)<sup>142</sup> provides federal funds specifically for purchases of “fresh, nutritious, unprepared, locally grown fruits, vegetables and herbs for human consumption.”<sup>143</sup> It also directs state agencies, which administer the program, to “consider locally grown to mean produce grown only within State borders,” although a state may also “include areas in neighboring States adjacent to its borders.”<sup>144</sup> To enforce the “locally grown” mandate, the USDA requires states to create a system for

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<sup>139</sup> Hernando Market Application, *supra* note 88; FRESHFARM Market Rules, *supra* note 81, at 13. The FRESHFARM market rules also allow for another “3rd party inspector (i.e., USDA Organic, Food Alliance).” *Id.*

<sup>140</sup> TEX. BUS. & COM. CODE ANN. §§ 17.46–47 (Westlaw through 2013 3d Called Sess.).

<sup>141</sup> 7 C.F.R. § 248.4 (2012).

<sup>142</sup> There is also a Senior FMNP. *Senior Farmers' Market Nutrition Program*, U.S. DEP'T AGRIC., <http://www.fns.usda.gov/sfmnp> (last visited Mar. 20, 2014); *see also* Marne Coit, *Jumping on the Next Bandwagon: An Overview of the Policy and Legal Aspects of the Local Food Movement*, 4 J. FOOD L. & POL'Y 45, 63–66 (2008) (discussing the Farmers' Market Nutrition Program and the Senior Farmers' Market Nutrition Program, created by the Child Nutrition Act of 1996 and the Farmer-to-Consumer Direct Marketing Act of 1976, respectively); Jason J. Czarnezki, *Food, Law & the Environment: Informational and Structural Changes for a Sustainable Food System*, 31 UTAH ENVTL. L. REV. 263, 273 (2011) (describing the extension of SNAP and WIC to farmers' markets).

<sup>143</sup> 7 C.F.R. § 248.2 (defining “[e]ligible foods”); *see also* § 248.1 (stating one purpose of the FMNP is “[t]o provide resources in the form of fresh, nutritious, unprepared foods (fruits and vegetables) from farmers' markets to women, infants, and children who are nutritionally at risk”).

<sup>144</sup> § 248.2.

“identifying high risk farmers, farmers’ markets [if the state chooses to certify markets], and roadside stands and ensuring on-site monitoring, conducting further investigation, and sanctioning of” these businesses “as appropriate.”<sup>145</sup> As part of this system, states must “conduct annual, on-site monitoring for at least 10 percent of farmers and 10 percent of farmers’ markets” that participate in the program, with the highest risk farmers and markets being included within this 10 percent.<sup>146</sup>

In states that certify markets, certification of a market as WIC FMNP shows all consumers—not just those using federal assistance—that the food at that market is local. To fulfill the federal requirements of risk ranking, inspection, and sanctions, participating states must write and follow state plans,<sup>147</sup> and these plans often go beyond the minimum federal requirements to define and enforce localness. As Connecticut defines its WIC FMNP, “[t]he program shall supply Connecticut-grown fresh produce to participants of the special supplemental food program through the distribution of vouchers that are redeemable only at designated Connecticut farmers’ markets.”<sup>148</sup> Vendors at these markets must be certified by the state and as part of certification must agree “to maintain only Connecticut-grown fresh produce on display in a certified vendor stall.”<sup>149</sup> Vendors also must submit “a completed application and crop plan to the department.”<sup>150</sup> Most penalties outlined by the state are for vendors’ failure to comply with requirements for properly submitting vouchers to the state. There are no precertification requirements for farm inspections to verify that produce was locally grown, but the refusal to allow an inspection when the point of origin is in question is a violation.<sup>151</sup>

Massachusetts similarly provides that “[o]nly locally grown produce from local farms is eligible” for the FMNP, although some FMNP-certified markets in the state are allowed to sell produce from border states.<sup>152</sup> Massachusetts also conducts some farm inspections under its

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<sup>145</sup> *Id.* § 248.10(e).

<sup>146</sup> *Id.* § 248.10(e)(2).

<sup>147</sup> *Id.* § 248.4; The plans contain a number of guidelines unrelated to verifying localism; these include, for example, provisions for coupon reimbursement and price posting. *Id.*

<sup>148</sup> CONN. GEN. STAT. ANN. § 22-6h (Westlaw through 2013 Jan. Reg. Sess.).

<sup>149</sup> *Id.* § 22-6l (Westlaw).

<sup>150</sup> *Id.* (Westlaw).

<sup>151</sup> *Id.* § 22-6n (Westlaw).

<sup>152</sup> MASS. DEPT OF AGRIC. RES., 2013 MASSACHUSETTS FARMERS’ MARKET COUPON PROGRAM GUIDELINES FOR FARMERS AND FARMERS’ MARKETS 2 (2013) [hereinafter MASSACHUSETTS FARMERS’ MARKET GUIDELINES] (on file with the *Regent University Law Review*).

FMNP program, as do market managers.<sup>153</sup> Growers receiving more than \$1,000 in WIC farmers' market coupons in a year are required to file acreage reports (a "crop plan") the following year, and they may only sell food included on these lists.<sup>154</sup> Through this program, the state suspended several farmers who sold non-local produce to FMNP customers and has issued warnings.<sup>155</sup>

Other states have similar requirements. For farmers' markets to participate in the New York FMNP, they must submit a market application showing that the market will be comprised of at least fifty percent "*bona fide* New York State farmers . . . who grow and harvest [at least fifty percent of their] fresh fruits and vegetables on land owned or leased by them and who sell directly to consumers."<sup>156</sup> To certify farmers, markets are to use crop plans "with specific farm location(s) and a list of the vegetables and/or fruits expected to be grown for sale at the market."<sup>157</sup> Market managers and the state also may conduct farm inspections to "verify Crop Plans," and a failed inspection results in immediate disqualification of the farmer from the FMNP program.<sup>158</sup> Arizona's FMNP agreement mandates a crop plan and that farmers at approved farmers' markets must "[b]e subject to both overt and covert monitoring for compliance with AZ FMNP requirements," including "[m]arket visits, compliance buys and inspections of food production areas."<sup>159</sup>

Florida does not certify markets as FMNP-approved, but rather identifies markets with participating farmers<sup>160</sup> and certifies individual

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<sup>153</sup> *Id.* ("ALL certified farmers must agree to allow on-farm inspections by MDAR to verify product sources and acreage under production."); E-mail from David Webber, Farmers' Mkt. Program Coordinator, Mass. Exec. Office of Energy & Env'tl. Affairs, to author, (Nov. 21, 2013, 15:29 EST) (on file with the Regent University Law Review) (explaining that market managers also conduct inspections).

<sup>154</sup> MASSACHUSETTS FARMERS' MARKET GUIDELINES, *supra* note 152, at 2; Webber, *supra* note 153.

<sup>155</sup> Webber, *supra* note 153.

<sup>156</sup> N.Y. STATE DEP'T OF AGRIC. & MKTS., PARTICIPATION REQUIREMENTS FOR FARMERS' MARKETS (2013), available at [http://www.agriculture.ny.gov/AP/agsservices/fmnp/FMNP\\_Farmers\\_Market\\_Package.pdf](http://www.agriculture.ny.gov/AP/agsservices/fmnp/FMNP_Farmers_Market_Package.pdf).

<sup>157</sup> *Id.* (emphasis omitted).

<sup>158</sup> *Id.* at 4.

<sup>159</sup> ARIZ. DEP'T OF HEALTH SERVS., MANUAL FOR GROWERS AND FARMERS' MARKET MANAGERS 20 (2014), available at [http://www.azdhs.gov/azwic/documents/local\\_agencies/az-fmnp-growers-manual.pdf](http://www.azdhs.gov/azwic/documents/local_agencies/az-fmnp-growers-manual.pdf).

<sup>160</sup> See Attachment E, FMNP Market Locations and WIC Sites Maps and Proximities, provided by Carl Penn, Development Representative II, Fla. Dep't of Agric. & Consumer Servs. (Jan. 23, 2014) (on file with the Regent University Law Review).

farmers<sup>161</sup> to sell to FMNP coupon customers at markets around the state. Under the state's FMNP plan, state officials must "[c]onduct compliance buys" to verify that farmers are selling only "eligible products (i.e., locally grown Florida fresh fruits and vegetables)" to FMNP customers.<sup>162</sup> Farmers must also "allow on-farm visits by the local county extensive agents to verify product sources and acreage under production."<sup>163</sup>

Although the WIC FMNP certification is a somewhat indirect means to certifying compliance, as it only applies to certain participating markets and farmers and contains many standards unrelated to certifying localness, it shows that federal regulations for local food could be implemented if there was sufficient demand for them. Just as the USDA produced a regulatory definition of organic food and established a certification program,<sup>164</sup> the USDA could extend its FMNP definition of local foods, or create a new one, and administer a local certification program directly or through the states. As discussed in the following section, generally-applicable consumer protection laws are another avenue for addressing farmers' market fraud, albeit one that does not appear to be widely used.

### 3. Advantages and Barriers to Regulatory Enforcement

In some cases, producers are so concerned about fraud that they have demanded more regulation or certification. Some, for example, have requested that "a sting operation be conducted in order to 'bust those liars and cheats,'"<sup>165</sup> which, according to at least one study, "is consistent with the feeling reported by many vendors that specific regulations should prevent . . . re-sellers from participating in markets."<sup>166</sup> Moving the responsibility for ensuring localism from individual markets to a local, state, or federal regulatory body would centralize expertise that is currently dispersed. It would also provide a forum through which consumers, farmers, and market managers could focus on and agree

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<sup>161</sup> See FLA. DEP'T AGRIC. & CONSUMER SERVS., GROWER'S HANDBOOK 2 (2012) [hereinafter GROWER'S HANDBOOK] (on file with the Regent University Law Review) (describing farmer certification "by the Florida Department of Agriculture and Consumer Services to participate in the program").

<sup>162</sup> State of Florida Farmers Market Nutrition Program, Memorandum of Understanding between the Fla. Dep't of Agric. & Consumer Servs. and the Fla. Dep't of Health 3 (Oct. 31, 2013) (on file with the Regent University Law Review).

<sup>163</sup> GROWER'S HANDBOOK, *supra* note 161, at 2.

<sup>164</sup> 7 U.S.C. § 6501 (2012) ("It is the purpose of this chapter . . . to establish national standards governing the marketing of certain agricultural products as organically produced products . . ."); see generally §§ 6501–23.

<sup>165</sup> Miller et al., *supra* note 72, at 130–31.

<sup>166</sup> *Id.* at 131.

upon standards that would better ensure that local food was in fact local. Further, it would provide economies of scale in administering standards; inspections and enforcement are not likely to be a full-time job in all but the biggest markets, and it would be more efficient for well-trained inspectors to operate in more areas. As these inspectors gained experience through incidents at a variety of farms and markets, they would also better know which problems to look for, and the times and types of inspections that were most effective.

There are, however, substantial obstacles to a regulatory proposal. As with any effort to protect the values of a large and dispersed group of stakeholders, it will be difficult to expand the regulatory state to address fraudulent sales of local produce. In California, following the NBC investigation that revealed relatively egregious fraud, a bill was introduced to increase market operator fees in order to pay for better inspections.<sup>167</sup> The bill died in committee because “[a]ccording to legislative insiders, the bill’s great many provisions and complex language, including new penalties and mandates, did not work in its favor.”<sup>168</sup>

Even if expanded regulatory oversight of localism were feasible, it is not in all cases advisable. Market managers and farmers likely have the most knowledge about the type of fraud that occurs and how to best address it given the culture and norms within particular communities, and uniform regulation threatens to drown these nuances. In many cases, regulation therefore will not be needed: consumer discernment and competition among markets to prove “localness” will often be enough. Particularly where markets are small, farmers can police themselves; indeed, they might not be able to afford anything else.<sup>169</sup> Relying on self-policing, however, sometimes leads to friction<sup>170</sup> that is

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<sup>167</sup> David Karp, *Bill Targeting Cheaters at Farmers Markets is Put Off Another Year*, L.A. TIMES, May 24, 2013, <http://www.latimes.com/features/food/dailydish/la-dd-bill-cheaters-farmers-markets-20130524,0,2483274.story>.

<sup>168</sup> *Id.*

<sup>169</sup> See GARRY STEPHENSON ET AL., WHEN THINGS DON’T WORK: SOME INSIGHTS INTO WHY FARMERS’ MARKETS CLOSE 9 (2006), available at [http://smallfarms.oregonstate.edu/sites/default/files/small-farms-tech-report/eesc\\_1073.pdf](http://smallfarms.oregonstate.edu/sites/default/files/small-farms-tech-report/eesc_1073.pdf) (noting “situations in which a high level of effort is required to manage a market but the market administrative revenue is insufficient for adequate salary” for a manager, and that this can occur for small markets).

<sup>170</sup> RAMU GOVINDASAMY ET AL., FARMERS MARKETS: MANAGERS CHARACTERISTICS AND FACTORS AFFECTING MARKET ORGANIZATION, at v, 8 (1998), available at <http://ageconsearch.umn.edu/bitstream/36723/2/pa980898.pdf> (noting that “rivalry among vendors” sometimes “threatens to hinder the continuity and efficiency of these marketing venues” and “that open hostility, negative remarks, false accusations about the origin of the produce and problems with respect to the acceptance of food stamps or WIC vouchers put a strain on the normal development of the markets’ activities”).

best solved by a more formal and predictable regulatory regime.<sup>171</sup> As one market manager notes, as markets get larger, enforcement becomes more important: “You can’t be everywhere and you don’t know what’s happening at that other end of the market now. You have to trust more, have more structure, and have systems for enforcement of rules.”<sup>172</sup> But this is not to say that these rules must be imposed through regulation, rather than by the markets themselves. With adequate competition for localness, market managers will write and enforce rules themselves—as they currently do: “A lot of regulation is put on managers” in modern large markets.<sup>173</sup>

### C. Criminal

In addition to expanding the administrative state to localism, governments could, and sometimes do, criminally punish farmers’ market fraud. This approach, with its threat of more severe sanctions, would likely deter more individuals from defrauding customers given the same odds of detection. This section explores this somewhat extreme approach to addressing the problem of dishonest produce sales.

#### 1. Extension of Existing Laws to Market Fraud

Many state consumer protection laws cover agricultural fraud. Virginia’s code provision labeled “Misrepresentation as to agricultural products” provides that “[m]isrepresentation by advertising in the press or by radio or by television, or misrepresentation by letter, statement, mark representing grade, quality or condition, label or otherwise in handling, selling, offering or exposing for sale any agricultural commodities is hereby prohibited.”<sup>174</sup> In Texas, “[a] person commits an offense if in the course of business he intentionally, knowingly, [or] recklessly” sells “an adulterated or mislabeled commodity.”<sup>175</sup>

In states like California, where incidents of market fraud have been highly publicized (and criticized), governments are beginning to use criminal laws to enforce localism—in conjunction with regulatory schemes.<sup>176</sup> As introduced in Part II, after undercover state agents noticed that a seller was selling produce he did not grow and that

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<sup>171</sup> FOORD, *supra* note 117, at 9 (noting that certification “eliminates a potential friction point among vendors, who might suspect other vendors of selling products they have purchased rather than products that they have produced”).

<sup>172</sup> STEPHENSON ET AL., *supra* note 76, at 13.

<sup>173</sup> *Id.* at 12.

<sup>174</sup> VA. CODE ANN. § 18.2-225 (LEXIS through 2013 Spec. Sess. I).

<sup>175</sup> TEX. PENAL CODE ANN. § 32.42 (Westlaw through 2013 3d Called Sess.).

<sup>176</sup> David Karp, *Produce Inspectors Keep Farmers Markets Honest*, L.A. TIMES, Dec. 26, 2013, <http://www.latimes.com/local/la-me-farmers-market-20131227,0,2801845.story>.

contained pesticides, the city attorney of San Diego charged the seller for a violation of a section of the state's Business and Professions Code.<sup>177</sup> The Code provides that it is unlawful for persons disposing of real or personal property to "disseminate" information that "is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading."<sup>178</sup> The defendant received three years' probation and "was ordered to violate no law; not to sell or offer for sale produce at certified farmers markets in San Diego County; and to pay a \$1,000 fine."<sup>179</sup>

## 2. Advantages and Barriers to Criminal Enforcement

Criminally punishing a farmer for selling produce he did not grow may seem an extreme approach to market fraud, but it is a relatively cheap one from the perspective of the state. An enforcement apparatus already exists for crime, and police would simply have to investigate a few additional incidents. And as shown by the California guilty plea, the sanctions for criminal approaches to market fraud can involve penalties higher than those imposed by a regulatory scheme, including jail time. Prison terms for consumer fraud tend to be light, but states that were serious about addressing market fraud could increase jail time. Criminal penalties also generally create more stigma than their civil counterparts, thus punishing past behavior by shaming individuals for bad acts and further deterring future fraud by the stigmatized individuals.

A criminal approach, despite being cheap from an administrative perspective and deterring greater amounts of fraud for the same amount of enforcement, has disadvantages. Police are unlikely to prioritize food fraud in all but the biggest cases or the safest towns. Prosecutors and judges also may view criminal penalties for this type of fraud as unusually harsh and will be hesitant to charge defendants, particularly in light of other prosecutorial priorities. Criminal sanctions would likely be quite effective at improving seller honesty if uniformly implemented and strictly enforced, but relating to harshness, and the many other problems that already burden the criminal justice system, make it a less than perfect solution to farmers' market fraud.

## CONCLUSION

As farmers' markets become more lucrative, fraud may become a larger problem. Maintaining consumer confidence is critical, and the

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<sup>177</sup> *Supra* notes 63–64 and accompanying text.

<sup>178</sup> CAL. BUS. & PROF. CODE § 17500 (Westlaw through 2013 Reg. Sess.); *supra* note 64 and accompanying text (describing the charge and the guilty plea).

<sup>179</sup> Turner, *supra* note 64.

honest farmers have the most to lose—one bad apple can spoil the whole bunch.

For small markets and towns where farmers and consumers know each other (and who is growing what), informal mechanisms may be sufficient. For big markets and cities, if enough consumers are able to discern the difference between local and fraudulent produce, markets may be well advised to adopt more rigorous enforcement measures—and to advertise it when they do. In the long run, if consumers demand greater assurance that they are getting what they pay for, the market(s) should respond. On the other hand, if there is insufficient competition among local food outlets, or consumers are not able to adequately distinguish between local and non-local foods, more government intervention may be necessary. If so, direct government enforcement is likely to be limited, but requiring more rigorous self-regulation in certification processes may be a possibility. Given that most jurisdictions are probably unlikely to create an adequate regulatory enforcement regime, the markets themselves may be the best bet, with criminal enforcement of chronic or widespread fraud. Requiring, perhaps, unannounced farm visits, documentation of plantings and sales, and ensuring adequate oversight of market supervisors would be a logical place to start, and, as outlined above, the framework for such a requirement already exists. But perhaps the most effective step would be educating consumers: In the long run, if consumers learn to demand greater assurance that their local avocado is what it says it is, fraud will be less profitable.