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SACRED COWS, HOLY WARS

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Exploring the Limits of Law in the Regulation of Raw Milk and Kosher Meat

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Introduction

In a free society law and religion seldom coincide comfortably, tending instead to reflect the inherent tension that often resides between the two. This is nowhere more apparent than in America, where the underlying principle upon which the first freedom enunciated by the Constitution's Bill of Rights is based – the separation of church and state – is conceptually at odds with the pragmatic compromises that may be reached. But our adherence to the primacy of individual rights and civil liberties – that any activity must be permitted if it is not imposed upon others without their consent, and if it does not adversely affect others – does not negate the fact that “we are a religious people whose institutions presuppose a Supreme Being.”¹ This is our way of life.

While our national psyche pays homage to the nobility of the First Amendment's mandate for a tolerant society, however, we likewise seek to promote law and order by promulgating rules and regulations – some of which cause more problems than they resolve. Several current and provocative subjects of litigation and legislation, like the regulation of raw milk and the supervision of kosher meat, are amply illustrative. Law reaches into every stage of food

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¹ Justice William O. Douglas, writing for the majority in *Zorach v. Clauson*, 343 U.S. 306 (1952). American notions of civil liberties are often traced to John Stuart Mill, whose famous essay *On Liberty* rests upon two assumptions: (1) that all restraint is an evil and that leaving people to themselves is always better than controlling them, and (2) that the sole end for which mankind may interfere with the liberty of others is for self-protection or to prevent harm to others. Said Mill: “So natural to mankind is intolerance ... that religious freedom has hardly anywhere been practically realized.” JOHN STUART MILL, *ON LIBERTY* (1859).

preparation and delivery, from pasture to market. In the United States, various courts have ruled that kosher butchers may be excluded from collective bargaining units; that a Jewish court of arbitration panel may forbid trade with disapproved butchers; that retail sellers implicitly stipulate their compliance with rabbinic authorities; that a state law may incorporate a rabbinical ruling on kosher labeling; and that kosher symbols may be subject to trade infringement laws.²

That all religions have their sacred cows and holy wars neither demeans nor ennoble them. But the law does not take sides. This article examines the Constitutional difficulties presented by some of them, especially when regulatory schemes bring into play both consumer protection of the public and recognition of individual rights. In the process it provides a broad historical background (describing early civil and criminal litigation in the area), catalogues the presently competing supervisory organizations, and looks at some of the more intriguing cases that have arisen in recent years.

What emerges is a tale of religion, politics, and filthy lucre³ that goes far beyond your father's first food fight: not only a fascinating picture of contemporary life and mores, but a sobering example of the limitations of the law.

² The cases are discussed in detail in Section II *infra*.

³ A popular idiom for money; originally, money obtained dishonestly. For example, *She didn't like the job but loved the filthy lucre in the form of her weekly paycheck*. The term can be traced to the New Testament (Titus 1:11), which refers to those who teach wrongly for the sake of money. In time it came to refer loosely or jocularly to money in general and as slang to the "filthy rich" for "extremely wealthy." See Dictionary.com at <http://dictionary.reference.com/browse/filthy+lucre>

I. Milk and Meat Together: The Historical Backdrop

Thou shalt not seethe a kid in its mother's milk.

– Exodus 23:19

The word “kosher” has been part of the English vernacular for some time, a synonym for correct, genuine, clean, or legitimate. It is derived originally from the Hebrew noun *kashér* -- meaning “fit” or “proper” – but today refers primarily to the set of Jewish dietary laws which dictates strict standards concerning both what is permissible to eat and how the food must be prepared.⁴ The basic rules are found in the Torah, and have evolved through rabbinic interpretation and elaboration over the past fifteen hundred years.⁵

Religious Injunctions

The Jewish dietary laws are first mentioned the Book of Exodus. According to some

⁴ Contrary to what has become something of a popular notion in secular culture, kosher does not mean blessed by a rabbi. *Kashrut* (also *kashruth* or *kashrus*) deals with food that may be consumed according to *halacha* (Jewish law). Food that is not in accordance with Jewish law is called *treif*. The kosher slaughtering process is known as *shechitah*, the slaughterer is a *shochet*; A kosher inspector is called a *mashgiach* (plural *mashgichim*). These terms will be used throughout this article. Kosher can also refer to anything that is fit for use or correct according to *halakha*. See *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 418 (2002) – discussed *infra* at nn.139ff. and accompanying text.

“Kosher” has also insinuated itself into American slang, meaning “acceptable” or “cricket” – such as “Is it kosher to do this?” or “Do you want me to kosher it with the boss for you?” It also has to do with undiluted alcohol, as in “I’ll take mine kosher with a little ice.” RICHARD SPEARS, *DICTIONARY OF AMERICAN SLANG AND COLLOQUIAL EXPRESSIONS* (4th Edition, 2007).

⁵ Leviticus 11:3-31 and 17:10; Deuteronomy 12:21 and 14:12-21; Exodus 22:31. For a comprehensive catalogue of Talmudic references to the dietary laws, see WebShas, available at <http://www.webshas.org/kashrus/index.htm>

Biblical scholars, mankind was originally prohibited from killing animals and eating them, limited instead to the consumption of vegetables. That restriction was relaxed somewhat following the Great Flood, after which animals could be slaughtered (so long as they are used for food).⁶

The rules of *kashrut* can be classified into four categories: (1) permitted and forbidden animals and animal parts; (2) conditions that render ordinarily permitted animals unfit for consumption; (3) forbidden mixtures; and (4) instances when the laws can be superseded by other considerations (nullification).⁷

Scripture provides that all kosher mammals must have split hooves and chew their cud.⁸ Fish must have both fins and scales.⁹ Some twenty-four birds are prohibited.¹⁰ All others are permitted.¹¹ While the Bible does not explicitly enumerate features of non kosher animals, they are provided by oral tradition.¹² One well-known rule is the categorical prohibition against a bird

⁶ Pre-deluvian man craved meat and killing. Prohibited from all meat he made no distinction in his violation of the Law and killed both humans and animals without distinction. *See* CHANAN MORRISON (ed.), *GOLD FROM THE LAND OF ISRAEL: A NEW LIGHT ON THE WEEKLY TORAH PORTION FROM THE WRITINGS OF RABBI ABRAHAM ISAAC HAKOHEN KOOK* (2006). Rabbi Kook predicts that in the future, as we approach Messianic times, Mankind's inner goodness will reassert itself and once again we will not eat meat. In that era of heightened ethical awareness, concern for the welfare of animals will be renewed. *Id.* For an example of nullification, *see, e.g., infra* note 19.

⁷ Leviticus 11:3; Deuteronomy 14:6.

⁸ Leviticus 11:9; Deuteronomy 14:9.

⁹ Thus all manner of shellfish are prohibited. Leviticus 11:13-21; Deuteronomy 14:12-20. *See infra* notes 222-229 and accompanying text.

¹⁰ Leviticus 11:13; Deuteronomy 14:12.

¹¹ Deuteronomy 14:11

¹² Deuteronomy 14:11.

that treats its food like a bird of prey.¹³ Similarly, the Old Testament categorically prohibits the consumption of virtually all insects and rodents. (The solitary exception is one type of grasshopper.)¹⁴

Not all parts of kosher animals are regarded as fit for consumption. For example, the Bible prohibits the eating of the sciatic nerve. Removing the nerve is a difficult process, so that many Jewish communities have adopted the practice of not eating any part of the hind quarters.¹⁵ Similarly forbidden is the consumption of blood from either fowl or mammal,¹⁶ as well as certain organs, under the penalty of excommunication.¹⁷

It is also prohibited to combine certain food types that may otherwise be kosher in and of themselves. The primary example is the mixture of meat and milk. The literal prohibition – Thou shall not cook a kid in its mother’s milk – appears three times in the Bible. According to Sinaitic

¹³ Leviticus 11:41-42.

¹⁴ Leviticus 11:20-22.

¹⁵ Genesis 32:33. See Ari Z. Zivotofsky, “What’s the Truth about ... Nikkur Achoraim?,” OUKOSHER.ORG (explaining background and sources underlying the customs of ‘Nikkur Achoraim,’ not eating from animal’s hindquarters), available at – http://oukosher.org/index.php/common/article/whats_the_truth_about_inikkur_achoraim_i/.

¹⁶ Genesis 9:4; Leviticus 17:10-14; Deuteronomy 12:23.

¹⁷ Babylonian Talmud, Kerisus 20 – 20b. Kosher animals maybe rendered unfit for consumption based on two distinct principles, *treif* and *neveilah*. *Neveilah* refers to any kosher mammal or fowl killed in a method other than the ritually prescribed method of slaughter (*shechitah*). By contrast an animal maybe a kosher animal, ritually slaughtered and still be found *treif*, or non-kosher. *Treif* refers to any animal with a mortal injury. The constitution of a mortal injury is determined by sinaiac tradition. Injuries not recognized as fatal by the Bible even if thought to be mortal injuries by modern medicine will not render an animal *treif*. Generally the eight categories of *treifos* are injuries to: (1) injuries the brain and spine; (2) the jaw bone and food pipes; (3) air pipes and lungs with its organs; (4) heart; (5) liver and gall; milt, kidney and bladder; (7) intestines, four stomachs; and (8) limbs and ribs.

tradition is that the verse is not be read literally, but more generally: the cooking of any; meat and milk items together is prohibited. Further, each verse describes a different prohibition about cooking, eating and deriving benefit from the mixture.¹⁸

Forbidden mixtures may be nullified – that is, rendered fit for consumption – by way of rabbinic rules concerning minimal amounts of a milk or meat ingredient majority.¹⁹

In the mid-1500s, Rabbi Joseph Karo codified many of the laws of *kashrut* – as part of the principal rabbinic compilation of Jewish law, the *Shulchan Aruch*²⁰– according to the type of food that may be consumed, and the method of its preparation. Thus all pork and shellfish products are categorically prohibited. Certain parts of otherwise kosher animals are also forbidden, such as the sciatic nerve located in the hindquarters of meat, as well as eating meat and dairy products together.²¹ The rules governing food preparation are equally strict.²²

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Judaism is not the only religion to have a distinct set of dietary laws.

In Islam, the guidelines are derived from the Qu’ran. As with kosher laws, the

¹⁸ Exodus 23:19 and 34:26, and Deuteronomy 14:21.

¹⁹ *Rov* or simple majority is applicable when there is a problem of identification an example being one piece of non kosher meat being placed among two pieces of kosher meat. By contrast, when there is a transfer of flavor, the mixture is not permitted until the taste is undetectable; this is generally achieved by nullification by a 60:1 ratio. BINYOMIN FORST, THE LAWS OF KASHRUS 54 (1996).

²⁰ Also known as the Code of Jewish Law, the *Shulchan Aruch* is the most authoritative legal code of Judaism. It was compiled in the Israeli town of Safed, and published in 1563 in Venice.

²¹ Exodus 23:19.

²² These rules are discussed in greater detail below, together with certification and supervision requirements. *See infra* notes 97ff. and accompanying text.

restrictions are divided into prohibited types of food and methods of preparation. Halal forbids both animals not slaughtered properly and those not killed in the name of Allah. Also forbidden are carnivorous mammals; pork or its byproducts (e.g., marshmallows, gelatin, jello); animals that were dead prior to slaughtering, blood and its byproducts; birds of prey; and all manner of alcohol.²³

Another similarity between Jewish and Islamic dietary laws is the intention that animals be slaughtered in a way that limits their pain and suffering. This involves severing the jugular vein so that oxygen is cut off to the brain and pain receptors. Blood is then drained from the carcass as much as practical.²⁴

The Hindu dietary code divides food into three categories, all based on the food's effect on the body and the temperament. Tamasic food – leftovers, stale, overripe, spoiled or otherwise impure – is believed to produce negative emotions such as anger, jealousy and greed. Rajasic food is pungent and spicy (including meat, eggs, fish, spices, onions, garlic, hot peppers, pickles), and is believed to produce strong passions and restlessness. The most desirable Hindu food is Sattvic, not irritating to the stomach and purifying to the mind; its fruits, nuts, whole grains and vegetables are believed to produce calmness and nobility – and is said to produce an “increase in

²³ Enunciating this blessing at the point the animal yields its life is the single most important aspect of *halal*. Shaukat A. Ameen, *Halal Meat*, COMETOISLAM.COM, available at – <http://www.cometoislam.com/halalmeat.htm> (citing Quran 6:121).

²⁴ *Id.* Despite the many similarities discussed above between kosher and *halal*, no cases have been reported as challenging the constitutionality of any *halal* fraud statute. See Elijah L. Milne, *Protecting Islam's Garden From the Wilderness: Halal Fraud Statutes and the First Amendment*, 2 J. FOOD L. & POL'Y 61, 72.

one's magnetism."²⁵

Kashrut in Early America

The need for kosher supervision in the United States can be traced back to Colonial times. As early as 1660, a Jew from Portugal applied for a license to sell kosher meat in New Amsterdam.²⁶

In the latter part of the 18th century, an internecine *kashrut* controversy developed between two noted rabbis who had differing views of what constitutes scales on fish. The widely accepted view is that in order to be considered scales they must be removable by hand. In the late 1700's, Rabbi Ezekiel Landau was said to have permitted the eating of sturgeon, whose scales that could be removed through the use of a tool or the soaking in an abrasive liquid.²⁷ That lenient interpretation of the rule was seen by some to be a launching point in the vigorous battle for the spirit of authentic Judaism between the Orthodox and Reform movement.²⁸

The first recorded complaint was in 1771 against the "Shochet Moshe." In 1774, the widow

²⁵ HINDU DIETARY PRACTICES: FEEDING THE BODY, MIND AND SOUL, available at – <http://www.minoritynurse.com/dietic/hindu-dietary-practices-feeding-body-mind-and-soul>.

²⁶ Yehuda Kravitz, *Shechita in America: Past and Present, A Brief Overview*, available at YPERLINK"http://oukoshher.org/index.php/common/article/shechita_in_america_past_and_present_a_brief_overview_by_rabbi_yehuda_kravi/P0/"http://oukoshher.org/index.php/common/article/shechita_in_america_past_and_present_a_brief_overview_by_rabbi_yehuda_kravi/P0/.

²⁷ Responsa Noda B'Yehuda Y.D. 28. See *infra* notes 222-229 and accompanying text.

²⁸ See BOAZ COHEN, *LAW AND TRADITION IN JUDAISM* (1959) at 98, and Jay Berkovitz, *Historicizing Orthodoxy*, *AJS PERSPECTIVES* (Spring 2008) at 12. Ezekiel Landau was seen as the preeminent Jewish legal authority of his time. Rather than confront him on the merits, many orthodox rabbis claimed that he had retracted his ruling before his death. Samuel Landau (Ezekiel's son) wrote a spirited refutation of that assertion, upholding his father's original ruling.

Hetty Hays complained that her *shochet* was selling non-kosher meat. This led to the first court case to involve *kashrut* – and ultimately of the license of a kosher butcher, in 1796.²⁹

As Jewish communities developed in the United States, they followed the European tradition of appointing community *shochtim*, who could easily be removed if they did not follow strict guidelines. This custom changed drastically in 1813, when Avraham Jacobs became the first independent *shochet* in the United States. Many more followed, which led to a rapid decline in the standard of *kashrut* in America.³⁰

In the early part of the Nineteenth Century, a number of Jewish communities were in disarray. Many Jews were relatively ignorant of and indifferent to the laws of *kashrut*. Even in New York, which had over 100,000 Jews in 1887, there was no central Rabbinic authority to guide them.³¹

In 1840 Abraham Rice of Bavaria became the first ordained Rabbi to arrive in the United States. After a brief attempt to revive the Jewish community of Newport, Rhode Island, he was hired as the spiritual leader of Congregation Nidchei Yisroel in Baltimore. He was a rabbi of the old school, known throughout the United States and Germany as a learned Talmudist, and was recognized as an authority in ritual matters. He was an uncompromising opponent of Reform Judaism. In 1845 he established a Hebrew school, one of the earliest in the United States.³²

²⁹ See generally Kravitz *supra* note 26. See also “Is It Kosher?,” available at http://www.kosherquest.org/bookhtml/HISTORY_OF_KOSHER_SUPERVISION.htm [hereinafter “Is It Kosher?”]

³⁰ *Id.*

³¹ *Id.*

³² See <http://www.jewishencyclopedia.com/articles/12738-rice-abraham>. The Touro Synagogue

Rabbi Rice urged upon American Jews “the great importance of selecting a spiritual chief . . . for the purpose of regulating all our spiritual affairs, etc. . . . it is surely necessary to prevent the uninitiated from giving their crude decisions, which are but too well calculated to do permanent injury to our faith.”³³ His constant battle against assimilation and lax observance of the Sabbath and of *kashrut* brought him into conflict with many of his congregants.³⁴

In 1863, a group of laymen and *shochtim* tried unsuccessfully to form an organization that would improve and maintain *kashrut* standards.³⁵ In 1887, the newly created Association of American Orthodox Hebrew Congregations appointed Rabbi Jacob Joseph of Vilna for the same purpose, to implement *kashrut* standards.

In July of 1888 Rabbi Joseph, as the first Chief Rabbi of New York, arrived in the port town of Hoboken, New Jersey.³⁶ Shortly thereafter he began the daunting task of organizing New York’s kosher meat business. To cover the cost of the supervisors (*mashgichim*) he hired, one cent was added to the price of every bird killed in the slaughterhouses under the Chief Rabbi’s purview. To these poultry was affixed a lead seal (*plumba*), which bore his name in Hebrew:

in Newport, Rhode Island, remains the oldest synagogue in America.

³³ See Shmuel Singer, *From Germany to Baltimore: The first Rabbi to hold a position in the United States*, in THE TORAH PERSONALITY, NISSON WOLPIN, ED. (1980).

³⁴ When he decreed that Sabbath-breakers should not be called to the Torah, there was such resistance that he had to back down; but he insisted that while they could be called up, nobody should answer “amen” to the blessings they recited. After an 1842 incident in which he objected to Masonic rites held at a Jewish funeral, some members left the congregation and founded the Har Sinai Verein, the first lasting Reform congregation in the United States. See Yitzchok Levine, *Abraham Rice: First Rabbi In America*, THE JEWISH PRESS, November 4, 2009.

³⁵ “Is It Kosher?,” *supra* note 29.

³⁶ See Kravitz, *supra* note 26.

“Harav Hakollel R’ Yacov Yoseph.”³⁷

But the new stricter standards were not embraced by many butchers and *shochtim*, and some rabbis feared the loss of income they’d been receiving for *kashrut* supervision. Housewives too were up in arms about the new practice, which was also criticized by the Yiddish press. To them it smacked of price-gouging, like the hated state tax on kosher meat imposed in Pale of the Settlement. Meanwhile, no one paid the tax. “Kosher price gouging” became a slogan in the non-Orthodox and radical press. The weekly “Der Volksadvokat” featured front page coverage, once printing a poem titled “Korobka” which spoke of “Orthodox chickens”...”dancing” whilst “wearing shiny lead plumbas” so “that the Chief Rabbi will live on a fat salary.” Various sects took matters into their own hands. Galician Chassidim appointed their own “Chief Rabbi of America”; Ukrainian Chassidim followed suit; someone else arrived from Moscow in 1893 to pursue the same role.³⁸

Public meetings were staged by “religious officials” against Rabbi Joseph, contending that they had neither chosen nor accepted him as their Chief Rabbi. An “anti-Chief Rabbi” Beth Din supervised thirty one butchers. In the spring of 1895, the retail butchers joined forces to reject entirely the Chief Rabbi’s supervision, leaving him virtually powerless. In 1897 the *shochtim* themselves banded together to form a union called “Melech Hakodesh,” ostensibly to improve both *kashrut* standards but also to advocate higher wages.³⁹ Some Orthodox congregations that

³⁷ *Id.*

³⁸ The Galicians chose Joshua Segal; the Ukrainians, Chaim Vidrowitz. See HOWARD SACHAR, HISTORY OF JEWS IN AMERICA (1992) at 192-193.

³⁹ “Is It Kosher?,” *supra* note 29.

had originally supported the idea of a chief rabbi now declined to pay him. Perhaps as a result of the tensions and pressures, Rabbi Joseph suffered debilitating strokes; according to the the Yiddish paper *Forverts*, he had become a “sacrificial offering to business-Judaism.”⁴⁰

Chicago had a similar experience. In 1903 Rabbi Yacov Dovid Wilowsky became Chief Rabbi of that city. Like Rabbi Joseph in New York, he too immediately embarked upon upgrading the city’s *kashrut* standards. The *shochtim* at Chicago’s four largest slaughtering houses were hired directly by their proprietors, who refused to allow Rabbi Wilowsky to inspect their *shechitah* process. Left with no other alternative, he declared all of the meat unkosher. A predictable uproar followed, together with personal threats that made Rabbi Wilowsky fear for his life. In the summer of 1904, merely a year after he arrived, he resigned his position and left Chicago.⁴¹

From Community Regulation to Big Business

Kashrut in America was now big business. Though kosher meat cost more, the market for it increased dramatically. By 1917 American Jews were consuming well more than 150 million pounds annually. Unlike in Europe, which had a central *kashrut* authority, U.S. slaughterhouses individual butchers engaged their own “rabbis” as supervisors. The arrangement was lucrative for all – but by some estimates possibly half of all meat sold as kosher was in fact not.⁴²

⁴⁰ Sachar, *supra* note 38. After Rabbi Joseph took ill he remained bedridden until his death on July 28, 1902, at the age of 59. See Kravitz, *supra* note 26.

⁴¹ See Kravitz, *supra* note 26.

⁴² Sachar, *supra* note 38. For an interesting snapshot of *kashrut* in New York in the early 20th Century, see THE JEWISH COMMUNAL REGISTER OF NEW YORK CITY 1917-1918 (2nd

By 1918, other kosher products started finding their way into the broader American market. A chemist named Abraham Goldstein was persuaded both importers and domestic food processors (such as the Sunshine Biscuit Company) to add kosher certifications to their products. In 1924, the Union of Orthodox Congregations entered the supervisory business. Goldstein was appointed as its first director – a post he held until 1935, when he founded a new certifying agency, the OK Laboratories.⁴³

In May of 1928, an editorial in a Jewish journal discussed how American *shochtim* had become “commercialized,” comparing them with their European counterparts. The latter were said to be fully dedicated to Torah values. They did not view their positions as simply a means of attaining a livelihood – they were more interested in *kashrut* than in joining a union in order to increase their salaries. They did not want to be under rabbinic control.⁴⁴

Kashrut in America’s major Jewish communities continued to generate great controversies. In 1929, a non-religious butcher was denied kosher certification by the Council of Orthodox Rabbis of Massachusetts. The butcher took the Council to court. The ensuing litigation was protracted, but the rabbis ultimately prevailed.⁴⁵

Tensions between rabbis and private *shochtim* abounded around the country, the former insisting on upgrading standards and the butchers resisting any change to the way they were handling their businesses. As the Chief Rabbi of Cleveland, Yehuda Levenberg, wrote to Rabbi

Edition), Kehillah of New York City, at pp. 312-310.

⁴³ The OU had been established in 1892. *Id.*

⁴⁴ Kravitz, *supra* note 26 at .

⁴⁵ *Id.*

Eliezer Silver of Cincinnati:

Non-Jews stand right next to the *Shochtim*. While the latter ritually slaughtered, the foreman killed the chicken. Time after time the dead chickens are mixed up. Those killed are sold as kosher, while the kosher slaughtered ones are mistakenly considered non-kosher. The salaries of the *Shochtim* vary in accordance with their speed. They average about \$35.00 per week. One *Shochet* actually earns over one hundred dollars a week! This *Shochet* employs his own Rabbi to supervise him!⁴⁶

At the semi-annual convention of the Union of Orthodox Rabbis of America and Canada in November of 1930, a resolution was adopted that prohibited joint ownership of kosher and non-kosher meat companies.⁴⁷ In time things began slowly to improve. In May of 1932, a new Kashrut Association of Greater New York was established. *Shochtim* were to be paid not for animal or chicken slaughtered, but a fixed salary. Rabbinic supervisors were to be hired by the community, not by the butchers themselves.⁴⁸

Nevertheless, progress was hindered by business proprietors and *shochtim* with vested interests, as well as by some corrupt rabbis. In the summer of 1934, a major dispute erupted in New York between *shochtim* and business owners regarding the cost of supervision. The *shochtim* claimed that they had to slaughter too fast, that the supervising Rabbis were not thorough, and that there was no proper identifying mark on the kosher birds slaughtered. New York Mayor Fiorello LaGuardia, appointed an Orthodox Jew (Otto Rosalsky) to mediate. Judge Rosalsky ultimately determined that “all kosher slaughtered poultry offered for sale shall have affixed there to a lead

⁴⁶ The letter was dated September 26, 1932. *Id.*

⁴⁷ *Id.* A quarter-century later, in 1955, this resolution was endorsed by Rabbi Moshe Feinstein, who was generally accepted as the leading *halachic* authority of the time. *Id.*

⁴⁸ *Id.*

seal (plumba) signifying that it is kosher, the same to be placed thereon by a *mashgiach*. The plumba shall be supplied by the Kashrut Association of Greater New York.” A ban was imposed on all those who did not comply.⁴⁹

During and after World War II, another large influx of Eastern-European Jewish immigrants formed a strong consumer base that was interested in upgrading the standard of *shechitah*. Rabbis were able to demand assurances that their predecessors had been denied. Graduates of European yeshivas were recruited as *shochtim* and *mashgichim*. Stricter *kashrut* standards were implemented at the largest kosher poultry plant in the country, Empire.⁵⁰

Over the next several decades small slaughterhouses sprang up in the hinterlands, far from the main cities and Jewish communities. Higher standards could thus be more easily implemented, and consumer-protection law more readily justified.⁵¹

At the same time, however, kosher consumers bore witness to the law being stretched to its limits, and perhaps beyond.

Governmental Intervention and Involvement

Prior to the 20th century there was virtually no federal regulation of domestically produced food. Various colonial and state measures were enacted primarily for trade purposes, such as setting weight standards, providing for inspections of exports like salt meats, fish and flour, and protecting against misrepresentation of ingredients in processed food. Inspection of food items

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* The evolution of kosher certification agencies is discussed *infra* Section III.

was largely the responsibility of the consumer, not the government.⁵²

With the advent of modern agricultural machinery, food production increased exponentially. Packaged cereals, canned goods, and processed foods were much more easily transported as the rail system and interstate trucking were developed and improved. Chemical additives were used to enhance colors, modify flavors, soften textures, and deter spoilage. Farmers felt threatened by unfair competition as processors used adulterated fertilizers, rotten eggs, and rancid butter. Even fruit scraps, glucose, coal-tar dye, and timothy seed could be transmogrified into jams and jellies; producers concerned with quality worried that consumers would not be able to tell the difference between theirs and imitation “spread” substitutes. Processed foods often used chemical additives to camouflage poor-quality wheat, sour milk, or meat gone bad; their producers asserted that it was the consumer’s duty to protect himself from shoddy products.⁵³

Meanwhile, the pure foods movement of the 1870s was merely a coalition of many different groups, often primarily women’s clubs like the Ladies Health Association,⁵⁴ In the

⁵² See Wallace F. Janssen, “The Story of the Laws Behind the Labels.” The Food and Drug Administration. Hauppauge (2003) at 23-35, and Young, James H. “The Long Struggle for 1906 Law.” The Food and Drug Administration. Hauppauge (2003) at 17-22.

⁵³ See John P. Swann, “History of the FDA.” The Food and Drug Administration. Hauppauge: Nova Science, 2003. 9-16; Suzanne W. Junod, *Food Standards in the United States: The Case of The Peanut Butter and Jelly Sandwich*,” Food, Science, Policy and Regulation in the Twentieth Century (2000); and Young, *supra* note 52.

⁵⁴ The LHA was the first women’s group to join. Starting in 1884, they began a campaign to rid New York City of unsanitary slaughter houses. These women were “energized to take legal action almost as much by the attitude of the city bureaucrats [who were apathetic] was by the need to protect their families and the neighborhood.” If the city agency in charge of regulating slaughterhouses had been willing to listen to the Association and clean up the slaughterhouses, the women would have never continued their crusade. However, after a hearing, a slaughterhouse owner refused to clean up his property and this caused the women to pursue the execution of the penalty and continue a “constant vigilance” to keep it from happening again. A number of other

early days of interstate commerce there were few if any attempts to regulate food safety.⁵⁵ The first court case involving adulterated products was in 1886, in which farmers pitted butter (“the reigning champion”) against oleomargarine. Butter won and margarine was taxed.⁵⁶

It was not until the beginning of the Twentieth Century that the federal government became involved in food safety in any meaningful way, and even then it took the efforts of a muckraking journalist to spur action. Upton Sinclair was shocked by the filthy conditions of slaughterhouses in Chicago. His book *The Jungle* (1906) quickly became a best seller, and the resultant public outcry prompted President Theodore Roosevelt to send officials to investigate. Their report underscored what Sinclair had found, and concluded that it would “be well-nigh ruinous to our export trade in meat” – stressing the need for “a drastic and thoroughgoing federal inspection of all stockyards, packinghouses and their products.”⁵⁷

The Jungle spurred creation of the first federal food regulation law in the United States: the Pure Food and Drug Act of 1906. The law did not define food standards, but did prohibit the “adulteration of food by the removal of valuable constituents, the substitution of ingredients so as to reduce quality, the addition of deleterious ingredients and the use of spoiled animal and vegetable products.” It also forbade “interstate and foreign commerce in adulterated and

city health protective associations sprung up around the country, recognizing the need to clean up stockyards and slaughterhouses. LORINE S. GOODWIN, *THE PURE FOOD AND DRINK CRUSADERS* (1999).

⁵⁵ See JOHN A. GARRATY AND MARK C. CARNES. *AMERICAN NATION*. 12th ed. Vol. 1(2005), and Young, *supra* note 52.

⁵⁶ Young, *supra* note 52.

⁵⁷ See Garraty, *supra* note 55, and Goodwin, *supra* note 54.

misbranded food and drugs.” Misbranding – misleading or false labeling – was now illegal. If a product was found to be in violation, it could be seized and condemned; sellers could be fined and jailed.⁵⁸

But over the next three decades the 1906 act proven to be largely ineffective. Following the Great Depression the law was substantially revamped, and became the Federal Food, Drug and Cosmetic Act of 1938.⁵⁹ Besides more effective oversight of the burgeoning drug industry, the new law sought to ensure the ‘value expected’ of consumers.” Defective foodstuffs were subject to seizure. The new act prohibited the interstate transport of food which had been “adulterated” – that is, whose quality had been reduced by the addition of fillers, coloring to conceal damage or inferiority, or other additives deemed “injurious to health” – as well as the use of “filthy, decomposed, or putrid” substances. Safe tolerances were authorized for residues of insect parts or pesticides. Factory inspections were specifically authorized.

Food standards were now required “to promote honesty and fair dealing in the interest of consumers.” Injunctions in federal court could be imposed, in addition to product seizures and criminal prosecutions. The Department of Agriculture’s Bureau of Chemistry was given

⁵⁸ Young, *supra* note 52.

⁵⁹ Aided by Eleanor Roosevelt, the “American Chamber of Horrors” helped illuminate the deficiencies in the old 1906 Act. In 1933 the U.S. Food and Drug Administration (FDA) put on an exhibit to illustrate the need for a new law, including a display of jars with deceptive labeling and packaging. (For example, containers of chicken were packed to hide the dark meat and seemed larger than they actually were.) Eleanor Roosevelt went on a lecture tour to help elevate its status as a public relations tool. A book was published entitled *100,000,000 Guinea Pigs* (written by Arthur Kallet and Frederick J. Schlink) which illustrated deceptive labeling and packaging. See Swann, *supra* note 53.

responsibility for examining food and drugs for such adulteration or misbranding.⁶⁰

The most recent effort to regulate food safety was the Food Safety Modernization Act, which was signed into law in January of 2011. For the first time, the FDA was given authority to order a recall of food products. (Prior to passage of the act, with the exception of infant formula, the FDA had had to rely on food manufacturers and distributors to recall food voluntarily.) The law also calls for more frequent inspections and for those inspections to be based on risk. Foods and facilities that pose a greater risk to food safety will get the most attention. It enhances the FDA's ability to oversee food produced in foreign countries and imported into the United States. The law establishes science-based standards for the safe production and harvesting of fruits and vegetables.⁶¹

The most recent regulations also authorized factory inspections and expanded enforcement powers, set new regulatory standards for foods, and brought cosmetics and therapeutic devices under federal regulatory authority. This law, though extensively amended in subsequent years, remains the central foundation of FDA regulatory authority to the present day.⁶²

⁶⁰ A History of the FDA, available at <http://www.fda.gov/AboutFDA/WhatWeDo/History/Origin/ucm054819.htm>. See also Junod, *supra* note 57.

⁶¹ The official and authoritative source of the FSMA is the version offered by the Government Printing Office (GPO), available at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ353/pdf/PLAW-111publ353.pdf>. See also Margaret A. Hamburg, *What Does the New Food Safety Law Mean for You?*, FoodSafety.gov. (January 2011), available at <http://www.foodsafety.gov/blog/fsma.html>. Dr. Hamburg is the Commissioner of Food and Drug Administration. }

⁶² ⁶⁵ Most federal laws concerning the FDA are part of the Food, Drug and Cosmetic Act,[21] (first passed in 1938 and extensively amended since) and are codified in Title 21, Chapter 9 of the United States Code. Other significant laws enforced by the FDA include the Public Health Service

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According to anthropologists humans didn't drink milk regularly until the domestication of animals during the Neolithic period in Eurasian prehistory, or upon the invention of agriculture. These developments occurred independently in several places around the world from as early as 9000–7000 B.C. to 3500–3000 B.C. in the Americas.⁶³ The most important dairy animals – cattle, sheep and goats – were first domesticated in Southwest Asia,⁶⁴ where dairying was

Act, parts of the Controlled Substances Act, the Federal Anti-Tampering Act, as well as many others. In many cases these responsibilities are shared with other federal agencies. Important enabling legislation for the FDA includes:

- 1902 – Biologics Control Act
- 1906 – Pure Food and Drug Act
- 1938 – Federal Food, Drug, and Cosmetic Act
- 1944 – Public Health Service Act
- 1951 – 1951 Food, Drug, and Cosmetics Act Amendments PL 82–215
- 1962 – 1962 Food, Drug, and Cosmetics Act Amendments PL 87–781
- 1966 – Fair Packaging and Labeling Act PL 89–755
- 1976 – Medical Device Regulation Act PL 94–295
- 1987 – Prescription Drug Marketing Act
- 1988 – Anti–drug Abuse Act PL 100–690
- 1990 – Nutrition Labeling and Education Act PL 101–535
- 1992 – Prescription Drug User Fee Act PL 102–571
- 1994 – Dietary Supplement Health and Education Act
- 1997 – Food and Drug Administration Modernization Act 105-115
- 2002 – Bioterrorism Act 107-188
- 2002 – Medical Device User Fee and Modernization Act (MDUFMA) PL 107-250
- 2003 – Animal Drug User Fee Act PL 108-130
- 2007 – Food and Drug Administration Amendments Act of 2007
- 2009 – Family Smoking Prevention and Tobacco Control Act
- 2010 – FDA Food Safety Modernization Act

See Swann, supra note 53.

⁶³ Peter Bellwood, “The Beginnings of Agriculture in Southwest Asia,” *FIRST FARMERS: THE ORIGINS OF AGRICULTURAL SOCIETIES* (2005).

⁶⁴ Beja-Pereira, A.; Caramelli, D.; Lalueza-Fox, C.; Vernesi, C.; Ferrand, N.; Casoli, A.; Goyache, F.; Royo, L. J. et al. (2006). “The Origin of European Cattle: Evidence from Modern and Ancient DNA.” *Proceedings of the National Academy of Sciences* 103 (21): 8113–8118.

practiced by at least the 7th millennium B.C.⁶⁵

Dairy farming spread to Europe (beginning around 7000 B.C. and reached Britain and Scandinavia by 4000 B.C.⁶⁶ The first farmers in central Europe and Britain milked their animals.⁶⁷ Camels, domesticated in central Arabia in the 4th millennium B.C., have also been used as a dairy animal in North Africa and the Arabian Peninsula.⁶⁸

In the rest of the world – East and Southeast Asia, Australia, and the Americas – milk and dairy products were historically not a large part of the diet. Milk consumption became common in these regions comparatively recently (over the last 500 years), probably as a consequence of

DOI:10.1073/pnas.0509210103 (2006).

⁶⁵ Vigne, D.; Helmer, J.-D., “Was Milk a ‘Secondary Product’ in the Old World Neolithisation Process? Its Role in the Domestication of Cattle, Sheep and Goats,” *Anthropozoologica* 42 (2): 9–40 (2007); Evershed, R. P.; Payne, S.; Sherratt, A. G.; Copley, M. S.; Coolidge, J.; Urem-Kotsu, D.; Kotsakis, K.; Özdogan, M. et al, “Earliest Date for Milk Use in the near East and Southeastern Europe Linked to Cattle Herding,” *Nature* 455 (7212): 528–531. DOI:10.1038/nature07180 (2008).

⁶⁶ See Price, T. D., “Europe's First Farmers: An Introduction,” in T. D. Price, *EUROPE'S FIRST FARMERS* (Cambridge University Press, 2000) at pp. 1–18, and R.H. Meadow, “The origins and spread of agriculture and pastoralism in northwestern South Asia,” in D. R. Harris, *THE ORIGINS AND SPREAD OF AGRICULTURE AND PASTORALISM IN EURASIA* (UCL Press, 1966) at pp. 390–412.

⁶⁷ See Oliver E. Craig, John Chapman, Carl Heron, Laura H. Willis, László Bartosiewicz, Gillian Taylor, Alasdair Whittle and Matthew Collins, “Did the First Farmers of Central and Eastern Europe Produce Dairy Foods?,” *ANTIQUITY* 79 (306) (2005) at 882–894, and Copley, M. S.; Berstan, R.; Mukherjee, A. J.; Dudd, S. N.; Straker, V.; Payne, S.; Evershed, R. P., “Dairying in Antiquity. Iii. Evidence from Absorbed Lipid Residues Dating to the British Neolithic,” *JOURNAL OF ARCHAEOLOGICAL SCIENCE* 32 (4): 523–546 (2005).

⁶⁸ J. PETERS, *THE DROMEDARY: ANCESTRY, HISTORY OF DOMESTICATION AND MEDICAL TREATMENT IN EARLY HISTORIC TIMES*, *Tierärztliche Praxis. Ausgabe G, Grosstiere/Nutztiere* 25 (6): 559–565 (1997).

European colonialism and political domination over much of the world during that period.⁶⁹

In today's world there are more than six billion consumers of milk and milk products, the majority of them in developing countries. Over 750 million people live within dairy farming households. In 2010 the world's dairy farms produced about 720 million tons of milk.⁷⁰

Cattle are considered sacred in various world religions, most notably Hinduism, Jainism, Buddhism, Zoroastrianism as well as the religions of Ancient Egypt, Ancient Greece, and Ancient Rome.⁷¹ In some regions, especially India, the slaughter of cattle may be prohibited and their meat (but not their milk) may be taboo. India, with the world's largest Hindu population, is also the world's largest producer and consumer of milk, though it neither imports nor exports dairy items.⁷²

The three largest exporters of milk and dairy products are New Zealand, the European Union, and Australia; the largest importers are China, Mexico, and Japan. Milk is an important nutritional component in developing countries. Some say that improvements in livestock, dairy technology and milk quality offer the most promise for reducing poverty and malnutrition.⁷³

Vegans and some other vegetarians do not consume milk, for a variety of reasons. They may object to features of dairy farming including the necessity of killing almost all the male

⁶⁹ See generally entry in WIKIPEDIA: MILK, <http://en.wikipedia.org/wiki/Milk>.

⁷⁰ Total, World Production, Livestock Primary data, Food and Agriculture Organization of the United Nations, 2010.

⁷¹ See generally "Cattle in Religion," available at – http://en.wikipedia.org/wiki/Cattle_in_religion.

⁷² 2011-2012 ANNUAL REPORT, DEPARTMENT OF ANIMAL HUSBANDRY, DAIRYING & FISHERIES MINISTRY OF AGRICULTURE GOVERNMENT OF INDIA NEW DELHI, available at – <http://dahd.nic.in/dahd/WriteReadData/Annual%20Report%20English%202011-12.pdf>.

⁷³ Hemme and Otte, "Status and Prospects for Smallholder Milk Production: A Global Perspective," Food and Agriculture Organization of the United Nations (2010).

offspring of dairy cows (either by disposal soon after birth, for veal production, or for beef), the routine separation of mother and calf soon after birth, other perceived inhumane treatment of dairy cattle, and culling of cows after their productive lives.⁷⁴

In 1863 Louis Pasteur, a French microbiologist, invented a method of killing harmful bacteria in beverages. It involved heating the liquid to a particular temperature for a set time, and was first used as a means of preventing wine and beer from going sour. In 1884, an American doctor named Hervey Thatcher invented the first glass milk-bottle (called “Thatcher’s Common Sense Milk Jar”) which was sealed with a waxed paper disk.⁷⁵

But by the early 20th century there was still virtually no government regulation of dairy products, either on the farm or at the market. Farmers would take raw milk from the cow and, usually after separating the cream to make butter, sell it to consumers. Then pasteurization of milk became the norm, and the law.⁷⁶

Nowadays virtually all food consumed by the public, both in grocery stores and in restaurants, is subject to federal regulations. As food providers, modern farms are inspected under laws governed generally by the FDA. Milk has been regulated in some way for over 100 years, most importantly with laws regarding pasteurization and homogenization, as well as

⁷⁴ PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, *The Dairy Industry*, available at – <http://www.peta.org/issues/animals-used-for-food/dairy-industry.aspx>. For a definition of “kosher milk,” see *infra* note 82 and accompanying text.

⁷⁵ Later, in 1932, plastic-coated paper milk cartons, an invention of Victor W. Farris, were introduced commercially. See “The History of Milk,” available at About.com.

⁷⁶ See Carlisle, Rodney (2004), SCIENTIFIC AMERICAN INVENTIONS AND DISCOVERIES 357 (2004); see also Wendy Cole, *Got Raw Milk? Be Very Quiet*, TIME HEALTH (Tuesday, Mar. 13, 2007), <http://www.time.com/time/health/article/0,8599,1598525,00.html> (describing pasteurization process and detailing legal troubles of raw milk producers).

regulations regarding the transport of milk and milk products.⁷⁷

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Kosher consumers once had to rely on their own level of commitment to keeping the dietary laws – and ultimately still do. Early on they were aided by their religious leaders and purveyors of meat and dairy products whom they trusted, usually co-religionists. With the advent of processed and packaged goods foods, they followed rabbinical guidelines but in the end used their own best judgment. In America, food labeling regulations helped them make informed decisions.

As the complexity of manufacturing processes and the need for kosher certification increased, so did the number of agencies and individuals interested in meeting the need, Today the OU and the OK remain the largest of the kosher supervision agencies, certifying hundreds of thousands of products and ingredients that kosher consumers have become accustomed to using daily. But others were quick to capitalize on the growing demand for kosher food – including VHM, the Chof K, Kehilloh, Star K and others. Individual rabbis have also re-entered the field, often using their own kosher symbol (or just a plain “K” on the label) to designate a product’s

⁷⁷ “Pasteurization and Regulation of Milk in History,” Living History Farms Blog (September 24, 2011), available at <http://livinghistoryfarms.wordpress.com/2011/09/24/pasterization-and-regulation/>. See also Jim Phillips and Michael French. “State Regulation and the Hazards of Milk, 1900–1939,” *Social History of Medicine* (May 2012) at 371-388, available at <http://shm.oxfordjournals.org/content/12/3/371.short>; Andy Weisbecker, *A Legal History of Raw Milk in the United States*, Legal Briefs (April 2007), available at <http://www.marlerclark.com/pdfs/raw-milk-jeh.pdf>; and Daniel A. Sumner and Joseph V. Balagtas, *United States Agricultural Systems: An Overview of U.S. Dairy Policy*, Encyclopeida of Dairy Sciences, available at http://aic.ucdavis.edu/research1/DairyEncyclopedia_policy.pdf.

kosher status.⁷⁸

This phenomenon brought with it a good deal of confusion, to the point that determining which supervisor is involved and what his standards are may take a great deal of detective work. Consequently, many modern consumers prefer to rely only on the best-known certifying agencies, rather than risk the chance that a product may not meet their personal standards.⁷⁹

The evolution of kosher certification agencies is reflective of the sweeping commercialization that has become a prime mover of the kosher food industry over the last century and a half. The production of both milk and meat have become big business – as have private supervisions and government regulations.

Kosher supervision agencies were created and began to proliferate in the mid-twentieth century. Only in the past few decades have the common law of fraud and the enactment of statutory regulations, and the litigation that has ensued, come to assist in assuring that food labeled as kosher is indeed so.⁸⁰

As noted earlier, Karo's codification of the laws of *kashrut* fall into two general categories: rules governing the type of food that may be consumed, and rules governing the method of food preparation. All pork and shellfish products are categorically forbidden, as are certain parts of otherwise kosher animals. It is likewise prohibited to eat meat and dairy products together.⁸¹

⁷⁸ See "History of Kosher Certifications," KasherQuest, available at <http://www.kosherquest.org/symbols.php>.

⁷⁹ *Id.*

⁸⁰ A more detailed discussion of kosher certification agencies can be found in Section III *infra*.

⁸¹ Exodus 23:19.

Milk from animals who are deemed *treif* (unclean) – that is, those that are ill or injured, or specifically prohibited by the Torah (such as pigs) – is not kosher. The *Shulchan Aruch* (Code of Jewish Law) says that one may consume only *cholov yisroel*, or milk produced with a Torah-observant Jewish person present, a restriction endorsed by many Orthodox rabbis.⁸² However, some recent American rabbinical authorities, most notably Rabbi Moshe Feinstein, have ruled that the protection provided by *cholov yisroel* is unnecessary because the regulations imposed on the US milk industry by the USDA are so focused and strict that the milk industry can be trusted to regulate itself (i.e. when they label an item “cow’s milk” to not include milk from any other animal).⁸³

The rules governing food preparation are equally strict. The most important aspect of kosher meat preparation is the process of ritual slaughter, or *shechitah*. Orthodox Torah law requires that all animals and poultry be slaughtered in a very precise fashion. *Shechitah* entails using a single swift knife stroke to sever the animal’s trachea and esophagus. The regulations for *shechitah* are complex and minute. The actual slaughter must be carried out by a trained and

⁸² Code of Jewish Law, Yoreh De'ah 115:1 (Igros Moshe YD 1:47); *See also* Rabbi Avrohom Gordimer, *Rav Moshe Zt'l's Heter of Cholov Stam Revisited*, OU KOSHER.ORG, available at – http://www.oukosher.org/index.php/common/article/rav_moshe_ztls_heter_of_cholov_stam_revisited.

⁸³ *See* “25th Yahrzeit of Harov Moshe Feinstein,” available at <http://www.thefivetowns.info/today/12434-25th-yartzeit-of-harov-moshe-feinstein.html>. Rabbi Hershel Schachter, a prominent rosh yeshiva at Yeshiva University, has made the bold claim that, because with modern dairy farm equipment milk from the minority of non-kosher cows is invariably mixed with that of the majority of kosher cows, no milk from a large dairy operation is kosher. The Orthodox Union, however, rejects this point of view. *See* “How Kosher Is Your Milk?,” Jewish Journal.com, available at http://www.jewishjournal.com/socialjusticerav/item/rabbi_herschel_schacters_chumra_on_milk_abuse_in_the_dairy_industry_201206.

rabbinically licensed individual, a *shochet*, who must then examine the organs. If the *shochet* finds any imperfections, the entire animal is considered unclean and prohibited for consumption.⁸⁴

The process emphasizes the traditional Jewish respect for the dignity of life. Thus great care is taken to use a knife that has been properly sharpened: the blade must be flawless, without a nick, and perfectly smooth, in order to assure that the kill will be quick, clean and painless to the animal.⁸⁵

⁸⁴ The laws pertaining to the *kashrut* of animals and *shechitah* are codified in the *Shulchan Aruch* [Yoreh De'ah 1-25]. See generally Forst, *supra* note 19. *Shechitah* is comprised of five major elements: a) there should be no interruption of the incision (*Shehiya*); b) there should be no pressing of the *chalaf* against the neck (*Derasa*), this would exclude use of an axe, hatchet or guillotine; c) the *chalaf* should not be covered by the hide of cattle, wool of sheep or feathers of birds (*Chalada*), and therefore the *chalaf* has to be of adequate length; d) the incision must be at the appropriate site to sever the major structures and vessels at the neck (*Hagrama*); e) there must be no tearing of the vessels before or during the *shechitah* process (*Ikkur*). See generally http://www.shechitauk.org/uploads/tx_resources/A_Guide_to_Shechita_2009__01.pdf (citing *Shulchan Aruch* Y.D 23).

⁸⁵ Below is a summary of the kosher slaughtering process, according to “Is It Kosher?,” *supra* note 29:

The process begins with the *shochet* (ritual slaughterer) inspecting the knife for possible flaws and nicks. He does this by running the edge of his fingernail and finger up and down the blade. The slightest nick means that the knife must be resharpened. After this, he recites a short prayer. This knife (*chalaf*) is usually about 6 inches long for chickens and 18 inches long for larger animals. The knife has no point at the end of it, and is of equal width from top to bottom. These precautions are necessary in order to guarantee that the neck of the animal will not be torn. The *shochet* must cut through the trachea and esophagus to the jugular vein very quickly and in a clean fashion. He must not kill the animal by stabbing it. The animal's neck is first washed thoroughly to remove any sand particles in the fur which could cause a nick in the knife during slaughter. The *shochet's* hand must be very steady, and he must employ one continuous movement, carefully avoiding the spine. This cut only takes a few seconds and is a much more humane method of killing an animal than are such common practices as smashing the head, shooting the animal or scalding it while it is still alive. See David I. Macht, *An Experimental Pharmacological Appreciation of Leviticus XI and Deuteronomy XIV*, BULLETIN OF THE HISTORY OF MEDICINE 27 (1953).

At this point the major blood vessels, nerves and forbidden fats will be removed. The carcass is then divided into primal cuts. The next step is soaking the meat in water

After soaking and salting, a kosher seal is either attached or stamped onto the meat or chicken. A large slaughterhouse, when operating full time, may be able to slaughter 60 to 150 animals per hour. Of all animals slaughtered only about thirty percent qualify for certification as kosher.⁸⁶

Because the number of people needed to work in a kosher slaughtering and packing house is many times greater than in a non-kosher establishment, the cost of kosher meat is considerably higher than non-kosher. Likewise, most butcher shops are relatively small businesses and must operate at a higher mark-up than do large-chain supermarkets.

for 30 minutes. It is then salted for one hour, and then washed another three times. Following the slaughter, the carcass is hung upside down so that the blood can drain properly. Then the *shochet* checks for adhesions on the lungs, which would indicate an abscess. If one is found, the animal is rejected as unkosher. “Is It Kosher?,” *supra* note 29.

⁸⁶ In addition to the strict selectivity applied to kosher animals before they are slaughtered, there are five ways in which the slaughter itself could render them unkosher:

- 1) There must not be the least pause during the process of *shechitah*.
- 2) The process of slaughtering must be done by moving the knife back and forth — not through downward pressure. The knife, therefore, must be long enough to allow slaughtering without too much pressure. Moreover, the animal must be in such a position that undo pressure will not be placed on the knife.
- 3) The *shechitah* knife must be uncovered during the entire process of *shechitah*. For this reason, the knife for *shechitah* has a long and broad blade without a thin sharp end at the front or back.
- 4) The cut must be performed on the throat, between the level of the larynx and the lower part of the trachea and esophagus.
- 5) The trachea and esophagus must be cut through and not ripped out. The knife, therefore, must be very sharp and very smooth. The smallest nick in the blade will cause tearing. For this reason, the knife is checked for smoothness and sharpness before and after each *shechitah*.

In addition, there are eight types of mortal injury that render an animal unfit to be eaten. They include: (1) when a poisonous substance introduced into the body by an animal of prey hacking with its claws; (2) when organ walls perforated; (3) when complete organs or parts of them are lacking; (4) when organs or parts of them have been removed; (5) when walls or covers of organs torn; (6) when limbs have been shattered by a fall; (7) when pipes are split; and (8) when bones have been fractured. *Id.*

The recent boom in the kosher market probably has less to do with the growing Orthodox Jewish population than with the increasing number of consumers who view kosher food as a healthier choice.⁸⁷ This perception is largely due to the high regulatory process which kosher food goes through. The preparation of kosher meat, for example, requires multiple stages of salting to remove the blood from the flesh. Additionally the hind quarters and certain fats of the animal are degraded. Both the process and the exclusion of certain parts of the animal are thought to reduce contamination of e coli bacteria and diseases such as trichinosis a disease usually found in pigs, an animal prohibited by Jewish law.⁸⁸ Regardless of the debate of the inherent wisdom of the bible in regards to health benefits, many consumers seem to feel that the extra set of eyes in the form of *kashrut* inspectors serves to ensure a cleaner product.⁸⁹ Thus the phenomenon that kosher is no longer for Jews alone.⁹⁰

⁸⁷ Karen Barrow, *More People Choosing Kosher for Health*, available at <http://well.blogs.nytimes.com/2010/04/13/more-people-choosing-kosher-for-health>, <http://www.mintel.com/press-centre/press-releases/321/3-in-5-kosher-food-buyers-purchase-for-food-quality-not-religion>.

⁸⁸ Penne Cole, *The Health Benefits of a Kosher Diet*, available at <http://www.helium.com/items/1543396-health-benefits-of-kosher-food>.

⁸⁹ Barrow, *supra* note .

⁹⁰ The laws of *kashrut* would be binding on members of the Jewish faith regardless of whether or not it was indeed healthier. Whereas Maimonides subscribed the opinion that all non-kosher food was unwholesome (Maimonides, *Guide to the perplexed* part 3 chapter, 48) Many other leading rabbis disagreed, chief among them was Don Issac Abarbenel in his commentary on the bible to Leviticus chapter 11. Maimonides himself hold that the health benefit of *kashrut* is not a reason to keep kosher but rather just a tangential benefit. This view is supported by Maimonides elsewhere in his code of Jewish law where he states: “It is appropriate that one mediate, according to his intellectual capacity, regarding the laws of the torah to understand their deeper meaning. Those laws which he finds no reason should nevertheless not be treated lightly” (Maimonides, *Hilchot Mt’ilah* 8:8), Forst, *supra* note 19 at 21, 24.

II. Sacred Cows: Legal Controversies over Regulating Meat and Milk

*“Where are you going, my pretty maid?”
“I’m going a-milking, sir,” she said.
“Dear maiden, I’d like to disclose the fact,
That I’m an inspector under the Act.
So pray remain, for I want to know
A thing or two before you go.”⁹¹*

In Western society, law reaches into every stage of food preparation and delivery, from the production of milk to the slaughtering of livestock, from pasture to market.

As noted earlier, various American courts have ruled that kosher butchers may be excluded from collective bargaining units;⁹² that a Jewish court of arbitration panel may forbid trade with disapproved butchers;⁹³ that retail sellers implicitly stipulate their compliance with rabbinic authorities;⁹⁴ that a state law may incorporate a rabbinical ruling on kosher labeling;⁹⁵ and that

⁹¹ Excerpt from “Inspector Under the Act,” *Harvest, an Anthology of Farm Writing* by Wheeler McMillen, Creamery Journal, 1907. The poem may have been written in reference to the Pure Food and Drug Act passed the year previous (1906). The rest of the poem:

*Nay, pretty maiden, you must not weep; / How far away are the pigs you keep?
And what percentage of butter-fat / Does your moo-cow yield? Pray tell me that.
And how is the health of your pretty pet; / Has it anthrax, cancer, blackleg, garget?
Has your sister measles or whopping cough; Is the water clean in the drinking trough?
I pray thee answer these questions of fact, / For I’m an inspector under the Act.
With the fierce bacilli also I cope / By means of my powerful microscope.
Excuse me, I must examine your hand, / Purely official, you understand.”*

Because this is serious business to both consumer and regulator alike, the Author has chosen not to invoke a somewhat briefer ditty from Ogden Nash (American poet, 1902-1971), to wit: *The cow is of the bovine ilk; One end is moo, the other, milk.*

⁹² *Aurora Packing Co. v. National Labor Relations Board*, 904 F. 2d 73 (D.C. Cir. 1990).

⁹³ *S.S. & B. Live Poultry Corp. v. Kashrut Ass'n of Greater NY*, 158 Misc. 358, 285 N.Y.S. 879 (Sup. Ct. N.Y. City, 1936).

⁹⁴ *Cohen v. Silver*, 277 Mass 230, 178 NE 508 (Supreme Judicial Court, 1931).

⁹⁵ *People v. Gordon*, 14 NYS2d 333, 172 Misc 543 (Sp.Sess. 1939).

kosher symbols may be subject to trade infringement laws.⁹⁶

The complex laws of *kashrut* prescribe not only which animals are kosher but also mandating the requisite slaughter and preparation.⁹⁷ Non-kosher animals, before they are slaughtered, are usually stunned by a blow to the head with a bolt gun (often killing them animal instantly) – an act which is strictly prohibited by Jewish law.⁹⁸

Any slaughtering process is gory, but kosher *shechitah* is thought to be more humane than the conventional methods.⁹⁹ Nevertheless, from time to time various groups have tried to prohibit ritual slaughter. The kosher food industry has successfully challenged any such regulations as an infringement on religious freedom. In particular the Humane Slaughter Act (7 U.S.C. section 1901) exempts ritual slaughter and this exemption has been upheld as constitutional.¹⁰⁰

But over the centuries many religious dietary laws have been challenged by states,

⁹⁶ *Levy v. Kosher Overseers Association of America, Inc.*, 104 F. 3d 38 (2d Cir. 1997).

⁹⁷ *See supra* notes 22ff. and accompanying text.

⁹⁸ A blow to the head may mortally wound the animal rendering it a “*treif*” (not kosher). Any animal suffering a mortal wound or injuries thought to be mortal wounds by the rabbis of the Talmud would render the animal unfit for consumption. Forst, *supra* note 19 at 37 (citing Maimonides, *Hilchot Shechitah* 10:11). *See also* Macht, *supra* note 85 and *infra* note 109.

⁹⁹ *See, e.g., Shechitah – The Jewish Ritual Slaughter of Animals*, available at – <http://micahbooks.com/shechitah-the-jewish-ritual-slaughter-of-animals-34.html>. *See generally* Ronit Gurtman, *Shehitah, Jewish Ritual Slaughter* (2005) at 24, Scholarship at Harvard available at <http://dash.harvard.edu/handle/1/8852091>.

¹⁰⁰ *Jones v. Butz*, 374 F. Supp. 1284 (S.D.N.Y. 1974); *aff'd*, 95 S.Ct. 22 319 US 806, 42 L.Ed.2d 806 (1974). *See also* *Church of Lukumi Babalu Aye v. City of Hialeah* (in which the Supreme Court of the United States ruled unconstitutional a local Florida ban on Santeria ritual animal sacrifice), and Gerald F. Masoudi, *Kosher Food Regulation and the Religion Clauses of the First Amendment*, 60 THE UNIVERSITY OF CHICAGO LAW REVIEW 667 (1993).

legislatures, and courts. Indeed kosher wars are still being fought today on an international level. and ritual slaughter is forbidden in various other countries around the world – none of which have anything like American constitutional prohibitions against mixing matters of church and state.

Such bans are not new. In 1860, the Society for the prevention of Cruelty to Animals in Switzerland essentially stopped *shechitah* by successfully lobbying the government to require that all cattle be stunned before slaughter.¹⁰¹ In 1894 the Swiss Constitution was amended as follows: “The slaughter of animals without prior stunning before the withdrawal of blood is prohibited without exception for every type of species of animal.”¹⁰² By the time World War II broke out, the importing of kosher meat had become impossible. The local board of rabbis petitioned the Swiss government for a temporary stay of the ban; the Government responded by stating the need for the animal to be drugged before slaughter. At first the rabbis felt this procedure would render the animals unfit and therefore unkosher. They changed their minds several times before finally deciding against the process – further illustrating a lack of consensus, even among the Orthodox, as to what should be the proper standard for *kashrut*.¹⁰³

¹⁰¹ Moshe T. Schuchman, *A Cut Above: Shechitah in the Crosshairs, Again*, KASHRUT KURRENTS (Fall 2012) [a publication of Star-K Kosher Certification, author’s files].

¹⁰² See <http://www.swissjews.ch/en/religioeses/koscherfleisch/schaechtverbot.php>

¹⁰³ This procedure was initially rejected by the rabbis as it was thought to make the animal unfit. Latter a push by Dr. Lowenstein, Chief Orthodox Rabbi of Zurich almost succeeded in finding a compromise. Lewenstein arranged an experiment whereby animals were drugged unconscious and only slaughtered when shown signs of reawakening. This arrangement was approved by the Rabbinical Assembly after receiving approval from nine of the greatest Talmudic authorities living worldwide at that time. The following conditions were instated: (1) this method only be employed in Switzerland; (2) it would be understood that this method was instituted because of special conditions in Switzerland at that time; (3) it would be followed only as long as meat could not be imported from abroad; (4) it would be followed only as long as the present approved shohetim and the present rabbis were functioning in their present posts; and (5) it would be

For a brief period in the mid-Twentieth Century, Swiss legislators considered rescinding the religious articles of the national constitution, but they were adopted in their entirety and eventually incorporated into the Animal Protection Act of 1978. This remains the law in Switzerland today.¹⁰⁴ Whether the Swiss restriction on kosher meat was a reflection of antisemitism is a matter of speculation, but there is little such uncertainty in the case of Germany. *Shechitah* in that country was outlawed as part of the infamous Nuremberg Laws beginning in 1933.¹⁰⁵ The prohibitions were removed by the Allied Command when Europe was liberated in 1945.

The other modern-day countries that currently ban ritual slaughter are Iceland, Lithuania, New Zealand, Norway, and Sweden. Norway banned religious slaughter without pre-stunning in

employed only as long as no three of these rabbis forbade it. However, because of a change in circumstances, this allowance never became effective and several days after the first *shechitah* was scheduled to be performed three rabbis of the Rabbinical Assembly forbade the procedure. Gurtman, *supra* note 99 at 27.

¹⁰⁴ See <http://www.swissjews.ch/en/religioeses/koscherfleisch/schaechtverbot.php>. The Swiss ban on kosher meat is not total: poultry and imported beef are permitted. See Schuchman, *supra* note 101 at 3.

¹⁰⁵ German Animal Welfare Act, §III Art. 4a (2)2; available at <http://www.animallaw.info/nonus/statutes/stdeawa1998.htm>. In 2002 the German Constitutional court allowed muslims and exception for ritual slaughter. Section 4a(2)(2) of the Tierschutzgesetz provides for an exception from this rule for religious associations that (1) require ritual slaughter, or (2) prohibit the consumption of meat that is not *halal*, that is, that does not come from animals slaughtered in accordance with their religious prescriptions.¹⁶ The 2002 exception to religious slaughter came to remedy a larger problem. In 1995 the German Muslims were prohibited from performing *hallal* slaughter. A federal court held that there was no mandatory need for Islamic slaughter there by failing the second prong of section 4a of the Tierschutzgesetz. The Court held that its rulling was not a violation of the right to religious freedom gaurenteed by articles 4(1) and (2) of the constitution because Muslims could still eat fish. Additionally , the court favoring one opinion in disagreement among Islamic scholars held that kosher meat was acceptable in lieu of *hallal* meat. See Gurtman, *supra* note 99 at 39-40, and Schuchman, *supra* note 101 at .

1930. Sweden did the same in 1937, Poland in 1939.¹⁰⁶

The fact that many Western nations still permit *shechitah* does not necessarily mean they consider the practice humane. Most allow it as an exemption from the statutory regulations on slaughter. In fact most countries only exempt ritual slaughter from the law rather than attest to it being humane.¹⁰⁷ A notable exception to this rule is Great Britain, which continues to abide by a 1925 House of Commons report that found *shechitah* to be “practically and physiologically the best method” of slaughter. Religious slaughter in England has not changed to this day.¹⁰⁸

In fact the scientific evidence supports this finding. Several early studies found that the

¹⁰⁶ New Zealand: Animal Welfare (Commercial Slaughter) Code of Welfare 2010, 3.4 Stunning of Large Mammals - Minimum Standard No. 6; 4.2 Stunning of Small Mammals – Minimum Standard No. 12.

<http://www.biosecurity.govt.nz/files/regs/animal-welfare/req/codes/commercial-slaughter/commercial-slaughter-code-of-welfare.pdf>. Norway - Norwegian Animal Welfare Act §12 Killing of Animals, <http://www.animallaw.info/nonus/statutes/stnoapa1995.htm#s12>.

Sweden: The Animal Welfare Act [Sweden], §14(1), <http://www.government.se/content/1/c6/09/03/10/f07ee736.pdf>.

Lithuania: The law in Lithuania appears to leave room permitting *shechitah*. See Republic of Lithuania Law on the Care, Welfare, and Use of Animals, Art. 9(4) Slaughtering of Animals (Slaughter of animals in accordance with religious rituals, without prior anaesthetisation shall be permitted only by having a license issued by the State Food and Veterinary Service.)

<http://www.eswacares.org/laws/lithuanian-animal-welfare-law.pdf>.

Poland: Also appears to allow for *shechitah*, See Polish Animal Protection Act, Art. 34(5). http://www.animallaw.info/nonus/statutes/stpoapa1997.htm#Chapter_10.

¹⁰⁷ *Id.*

¹⁰⁸ The Welfare of Animals (Slaughter or Killing) Regulations (1995), SCHEDULE 4 RESTRAINT OF ANIMALS BEFORE STUNNING, SLAUGHTER OR KILLING (2)(3), PART IV SLAUGHTER BY A RELIGIOUS METHOD SLAUGHTER BY A RELIGIOUS METHOD (22), <http://www.legislation.gov.uk/uksi/1995/731/contents/made>. (The 2012 amendments did not change religious slaughter exemptions. See “The Welfare of Animals (Slaughter or Killing) (Amendment) (England) Regulations 2012,” available at <http://www.legislation.gov.uk/uksi/2012/501/contents/made>. In the United States this idea is reflected in the Humane Slaughter Act of 1901, P.L. 85-765; 7 U.S.C. 1901 et seq., also known as the Humane Methods of Livestock Slaughter Act. See also Gurtman, *supra* note 99 at 36.

toxicity levels in the blood of animals slaughtered according to the Biblical rules of *shechitah* were considerably less than in those that were not.¹⁰⁹

Statutory Regulation of Kosher Fraud

The misrepresentation of non-kosher food as kosher, whether intentional or not, has probably existed for as long as the dietary laws have been around. Kosher fraud in America is nearly as old as the nation itself.¹¹⁰ During the 18th century, the Shearith Israel Congregation in New York employed the city's only slaughterer of kosher meat. The Congregation profited from shipping its kosher meat, accompanied by certificates and labeled with the Congregation's seal, throughout the Americas. In 1796 and 1805, two unscrupulous meat vendors were found to have affixed the Congregation's seal on meat that was not kosher.¹¹¹ As early as 1885 rabbinic organizations began to affix a unique label to foods the organization certified as kosher. For more than a century thereafter, many U.S. jurisdictions have had statutes in effect regulating the use of

¹⁰⁹ See, e.g., David I. Macht and Helen M. Cook, *Toxicity of Muscle Extracts after Arteriotomy, Asphyxiation, Injuries to the Brain and Electrocutation*, AMERICAN JOURNAL OF PHYSIOLOGY 97 (1901); David I. Macht and M.E. Davis, *Quantitative Comparison of Some Muscle and Nerve Reactions after Decerebration and Decapitation*, 102 AMERICAN JOURNAL OF PHYSIOLOGY (1932); and David I. Macht, *An Experimental Pharmacological Appreciation of Leviticus XI and Deuteronomy XIV*, 27 BULLETIN OF THE HISTORY OF MEDICINE (Vol. 27, No. 5, September-October 1953) at 444-450. {In the interest of full disclosure, Dr. Macht was the author's paternal grandfather.} See generally I.M. LEVINGER, MEDICAL ASPECTS OF SHECHITA (1976).

¹¹⁰ See Kravitz, *supra* note 26.

¹¹¹ JEREMIAH J. BERMAN, SHECHITAH: A STUDY IN THE CULTURAL AND SOCIAL LIFE OF THE JEWISH PEOPLE (1941) at 275-285. The estimated Jewish population was 1000-3000 during the Revolutionary Era. AM. JEWISH HIST. SOC'Y, AMERICAN JEWISH DESK REFERENCE 35 (1999).

the term “kosher” in the food industry.¹¹²

The fraudulent sale of non-kosher food as kosher is not easily detectable by the average consumer seeking to observe the dietary laws.. It is even more difficult to prove that the sale or substitution of a non-kosher item was an intentional act. The financial incentive to commit kosher fraud rests primarily in the fact that false labeling allows the purveyor to increase profits; certification can be expensive. But victims of kosher fraud do have recourse in the courts. They can sue alleged violators at common law, in either contract (the *kashrut* of the food was a material part of the sale) or tort (misrepresentation of a material fact). Consumers who win damage awards can be reimbursed for medical costs and compensated for pain and suffering.¹¹³

Once caught, perpetrators of a kosher fraud (as opposed to an honest mistake) seldom if ever get a second chance. They are likely to be decertified immediately and thus lose whatever reputation they may have once enjoyed among kosher consumers.¹¹⁴

It was not until after substantial Jewish immigration and technological advances in the food industry that kosher fraud became an increasing problem. A primary actor in the campaign to enact the kosher fraud statutes was the Union of the Orthodox Jewish Congregations of America

¹¹² Most such laws in force today, however, if subjected to strict-scrutiny review, would likely be found unconstitutional. *See infra* notes 120ff. *See generally* Shayna Sigman, *Kosher without Law: The Role of Nonlegal Sanctions in Overcoming Fraud within the Kosher Food Industry*, 31 FLA. ST. U.L. REV. 509, 548, 558 (2004). *See also* Mark Popovsky, *The Constitutional Complexity of Kosher Food Laws*, 44 COLUM. J.L. & SOC. PROBS. 75 (Fall, 2010).

¹¹³ *See* RESTATEMENT (SECOND) OF CONTRACTS §162; RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 9 (1997).

¹¹⁴ *See* Sigman, *supra* note 112 at 548ff/.

(popularly known as the OU), which was created in 1898.¹¹⁵

In 1915, New York enacted the first kosher fraud statute in the United States, the primary purpose and effect of which were to prohibit falsely advertising as kosher food that in fact was not. The legislation contained a series of provisions dictating what standards must be met in order legally to advertise packaged food or food establishments as kosher.¹¹⁶

¹¹⁵ See HAROLD P. GASTWIRT, *FRAUD, CORRUPTION, AND HOLINESS: THE CONTROVERSY OVER THE SUPERVISION OF JEWISH DIETARY PRACTICE IN NEW YORK CITY 1881-1940*, at 124-46 (1974). See also brief history of Orthodox Union at OU website, available at http://www.ou.org/about_us/.

¹¹⁶ The statute sought to penalize any person who with intent to defraud sells any meat or meat preparation and falsely represents the same to be kosher, or as having been prepared under orthodox Hebrew religious requirements, or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon. N.Y. PENAL LAW § 435(4), Laws of 1915, c. 233. These provisions no longer appear in the Penal Law, but are now contained in the kosher-fraud statutes detailed below.. See also Stephen F. Rosenthal, *Food For Thought: Kosher Fraud Laws and the Religion Clauses of the First Amendment*, 65 GEO. WASH. L. REV. 951, 956 (1997). Violation of the New York statute constituted a misdemeanor. A brief summary of its pertinent provisions:

Article 17 of New York State's Agriculture and Markets Law is entitled "Adulteration, Packing, and Branding of Food and Food Products." Section 201-a therein provides that a person who, with intent to defraud, sells any meat and falsely represents it as having been prepared under the orthodox Hebrew religious requirements is guilty of a class 'A' misdemeanor. Section 201-b(1) is identical to section 'a' except it applies to sale of food in hotels and restaurants. Section 201-c(1) prohibits willfully marking food as having been prepared in accordance with the Hebrew orthodox religious requirements if in fact it was not prepared in that manner. Section 201-c(2) forbids defacement or alteration of labels to indicate that they are "kosher or have been prepared in accordance with the Hebrew orthodox religious requirements" when the food is not actually kosher. Section 201-c(3) makes illegal the sale, possession, or disposal of any food product without its original slaughterhouse label, or of any food product to which such label has been fraudulently affixed.

Section 201-e(2a) mandates that if non-prepackaged fresh meat or poultry is sold and delivered off-premises as kosher, the meat or poultry and the bill of sale rendered at the time of delivery shall have affixed a label or the printed words 'not soaked and salted' or 'soaked and salted.' Section 201-e(3-c) requires slaughterhouses that sell kosher food products to maintain records "regarding the time, place, date, person or organization supervising the slaughter of . . . and the number of animals slaughtered in accordance with orthodox Hebrew religious requirements."

Since passage of the New York statute, twenty-one other states have enacted similar legislation. Most states have deceptive business trade acts that prohibit false advertising and misrepresentation, which might be applied to the sale of unkosher food advertised as kosher. n236 Twenty-two states have specific kosher fraud laws.¹¹⁷

Section 201-f-(1) provides that all meat or poultry represented as having been prepared in accordance with orthodox Hebrew religious requirements, but which has not been soaked and salted immediately after slaughter, must have a tag affixed to it stating the date and time of day of slaughter, and must be washed in accordance with orthodox Hebrew religious requirements within seventy-two hours after slaughter. Subsection (2) dictates that no person shall sell any meat or poultry which is represented as having been prepared in accordance with orthodox Hebrew religious requirements unless it conforms to the requirements of subsection one.

Section 201 -h prohibits labeling food with the word “pareve” or in any way indicating that the food may be consumed indiscriminately with meat, poultry or dairy products according to Orthodox-Hebrew requirements when such food is not permissible for such consumption.

Finally, Section 26-a(4), establishes a nine-person advisory board on kosher law enforcement to advise on policy in connection with the administration and enforcement of kosher fraud laws.

¹¹⁷ See ARIZ. REV. STAT. §§ 36-941 to -942 (2003) (“Kosher Foods”); ARK. CODE ANN. § 20-57-401 (Michie 2005) (“Kosher Foods”); CAL. PENAL CODE § 383b-c (Deering 2003) (listing kosher meats and meat preparations, sale and labeling regulations, false representations, punishment, defining kosher); CONN. GEN. STAT. ANN. § 53-317 (West 2003) (“Fraudulent sale of kosher meat, meat products, and other food”); GA. CODE ANN. § 10-1-393.11; § 10-1-392 (16.1); 410 ILL. COMP. STAT. ANN. 645/1-2 (West 2003) (“Kosher Food Act”); KY. REV. STAT. ANN. § 367.850 (Banks-Baldwin 2002) (“Kosher Meats or Meat Preparations”); LA. REV. STAT. ANN. § 40:608.2 (West 2003) (“Unlawful practices in sale of kosher food; penalty”); MD. CODE ANN. COMM. LAW § 14-901 to -907 (“Kosher Products”) (disclosure statute); MASS. ANN. LAWS ch. 94, § 156 (Law. Co-op. 2003) (listing kosher food, labeling, sale and display, and civil penalties); MICH. COMP. LAWS § 750.297e (2003) (“Kosher food products; definition [of kosher]”; fraudulent sale and marking of foods; investigation; penalty); MINN. STAT. §§ 31.651--661 (2002) (“Kosher Foods”); MO. lineANN. STAT. § 196.165 (West 2003) (“Falsely representing food to be kosher prohibited, penalty--kosher defined”); N.J. STAT. ANN. § 2C:21-7.3 to -7.4 (West 2003) (False representation by oral or written statement to make person believe nonkosher food or food product is kosher; presumptive evidence; defense); N.Y. AGRIC. & MKTS. LAW § 201-a to -i (Gould 2003) (“Sale of kosher meat and meat preparations, kosher articles of food and food products”); OHIO REV. CODE ANN. § 1329.29 (Anderson 2003) (“Misrepresentation in sale of kosher foods”; warning before prosecution); 18 PA. CONS. STAT. ANN. § 4107.1 (West 2003) (“Deception relating to kosher food products”); R.I. GEN. LAWS § 21-16-1 (2002) (“Violations or deception as to religious dietary laws by dealers in meats”);

Most kosher fraud statutes are written in a similar fashion: they define what they mean by kosher, identify the intent required for a violation, and provide for an enforcement mechanism. Nearly all such laws define kosher in reference to “the orthodox Hebrew religious requirements” or those “sanctioned by the Code of Jewish Laws.” In addition, there must be evidence of a specific intent to defraud, or knowledge of the misrepresentation.¹¹⁸

The authority to inspect whether food retailers are complying with the law is vested variously in the attorney general, a state commission or special agency, or with local rabbis. The penalty for violating the statutes vary from state to state; most allow for the imposition of fines, but can even provide for imprisonment.¹¹⁹

http://www.lexis.com/research/buttonTFLink?_m=9d8d05bb9cdd102932f7db87b5b5d78a&_x TEX. BUS. & COM. CODE ANN. §§ 17.821 to .826 (Vernon 2003) (“Labeling, Advertising, and Sale of Kosher Foods”); VA. CODE ANN. § 3.2-5124; WASH. REV. CODE ANN. §§ 69.90.010 to .90.900 (West 2003) (“Kosher Food Products”); WIS. STAT. § 97.56 (2002) (“Kosher meat”). However, Tennessee and the District of Columbia have repealed such kosher fraud statutes. D.C. CODE ANN. §§ 22-5204 to -5206 (2003) (repealed 1982); TENN. CODE ANN. §§ 53-6-101 to -6-102 (2003) (repealed 1983).

¹¹⁸ Many of the statutes not only prohibit nonkosher food falsely represented to be kosher but also require that the name and address of the local kosher supervisory agency be registered, and that signs be posted differentiating between kosher and nonkosher meat where both are sold. n253 {*See, e.g.*, WIS. STAT. ANN. § 97.56(2)(c) (West 2002) (prohibiting the sale of both kosher and nonkosher food unless there are signs stating, “in block letters at least 4 inches in height, ‘Kosher and Nonkosher Meat Sold Here’”). The New York statute also states that, “possession of non-kosher meat and food, in any place of business advertising the sale of kosher meat and food only, is presumptive evidence” that the vendor sells nonkosher food with intent to defraud.n255 N.Y. AGRIC. & MKTS. LAW § 201-a(1) (Gould 2003); *see also* N.J. ADMIN. CODE tit. 13, § 45A-21.6 (2003).

¹¹⁹ *See, e.g.*, 410 ILL. COMP. STAT. ANN. 645/2 (West 2003) (violation of the act constitutes either a Class C or a Class A misdemeanor); ARK. CODE ANN. § 20-57-401(3) (Michie 2003) (violation “is guilty of a misdemeanor and punishable by a fine of not more than five hundred dollars (\$ 500) or by imprisonment of not less than thirty (30) days or not more than six (6) months”); MASS. GEN. LAWS ANN. ch. 94, § 156(3)(h) (West 2003) (“civil penalty or fine of not less than five hundred dollars and not more than two thousand dollars”); MASS. GEN. LAWS

Kashrut and the Courts

As might be expected, the constitutionality of all such laws has been challenged in subsequent litigation. Among the questions that quickly came to the fore were whether the so-called “Kosher Fraud” statutes are inherently unconstitutional. Does the concept of regulating kosher meat impermissibly entangle church and state functions? Does such legislation violate sound public policy by granting state subsidies to private kosher consumers?

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The first constitutional challenge to a kosher fraud statute came in 1925, in *Hygrade Provision Co. v. Sherman*.¹²⁰ The case was not brought on First Amendment grounds, but rather on the argument that the term “kosher” as used was impermissibly vague in violation of the Due Process Clause of the Fourteenth Amendment. The Supreme Court of New York disagreed, and upheld the state’s kosher fraud statute.¹²¹

In 1983 the Baltimore City Council enacted an ordinance that made it a misdemeanor to offer for sale any food labeled kosher “with intent to defraud,” or to indicate compliance “with the orthodox Hebrew religious rules and requirements and/or dietary laws” when the food does not in

ANN. ch. 94, § 156(3)(g) (West 2003) (granting the attorney general the power to investigate during business hours); and MICH. COMP. LAWS § 750.297(e)(5) (2003) (granting the department of agriculture the power to “investigate, inspect and supervise”).

¹²⁰ 266 U.S. 497, 501 (1925).

¹²¹ *Id.* See also *Erlich v. Mun. Court*, 360 P.2d 334 (Cal. 1961) (upholding the California kosher fraud statute against a void for vagueness challenge); *Jones v. Butz*, 374 F.Supp. 1284 (1974) (challenging Humane Slaughter Act, 7 U.S.C. § 1901 et seq. (1970), particularly provisions relating to ritual slaughter); *Sossin Systems, Inc. v. City of Miami Beach*, 262 So.2d 28, (1972).; *People v. Gordon*, 172 Misc. 543, (1939); *Erlich v. Municipal Court of Beverly Hills Judicial Dist.*, 55 Cal.2d 553, (1961).

fact comply with those laws.¹²² To aid in its enforcement the ordinance created a Bureau of Kosher Meat and Food Control, which was composed of three duly ordained Orthodox Rabbis and three laymen selected by the mayor from a list submitted by the Council of Orthodox Rabbis of Baltimore and the Orthodox Jewish Council of Baltimore. The Bureau was charged with inspecting kosher food establishments in order to enforce the laws relating to sale of kosher meat to ensure compliance with the orthodox Hebrew religious rules and requirements. Though members of the Bureau are not paid, they are authorized to employ a paid inspector to report violators to law enforcement authorities.¹²³

The Baltimore ordinance was challenged in *Barghout v. Bureau of Kosher Meat and Food Control*.¹²⁴ At the trial level, the federal district court struck down the law as facially unconstitutional, finding that “it fosters excessive entanglement of religious and secular authority by vesting significant investigative, interpretive, and enforcement power in a group of individuals based on their membership in a specific religious sect.”¹²⁵

The court in *Barghout* thus took issue with the fact that secular authorities are relying on members of the Orthodox Jewish faith to determine compliance with the ordinance. In so doing it relied upon *Board of Education v. Grumet*, which makes it “clear that a legislature not only may not expressly delegate governmental functions to the governing body of a church, but also may not otherwise identif[y] . . . recipients of governmental authority by reference to doctrinal

¹²² Baltimore City Code art. 19, §§ 49–52 (1983).

¹²³ *Id.* at §§49(a)(e)(g) and (h).

¹²⁴ 66 F.3d 1337 (1994).

¹²⁵ *Id.*

adherence.”¹²⁶ It is this “fusion of governmental and religious functions,” whereby a state delegates its “civic authority to a group chosen according to a religious criterion,” that *Barghout* stresses as prohibited under the Establishment Clause. Even “the mere appearance of a joint exercise” of authority between religious and secular authorities, according to the *Barghout* court, still “creates a symbolic benefit for the religious sect, in this case Orthodox Judaism.”¹²⁷

Contributing to this appearance is the fact that the kosher food ordinance is listed in the code under a separate section entitled “Kosher Meat,” which is devoted exclusively to fraud in the sale of kosher food products. No other type of consumer fraud is similarly singled out for separate treatment. Thus, although the Baltimore City Council may have had a valid secular purpose for the ordinance, the fact that it is dealt with such exclusivity serves to strengthen the conclusion that its primary effect is the advancement and endorsement of the Jewish faith, in particular the Orthodox view.¹²⁸

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In late 1987, a Jewish employee contacted the OU with a tip that Shelat Kosher Foods, one of its clients and among the nation’s largest suppliers of kosher chicken, was packaging and selling nonkosher food items. A surprise inspection verified the charge. Kosher consumers in as many as twenty-two states were affected by the fraud. An OU supervisor said that “something of this magnitude has never happened before in certification history.”¹²⁹

¹²⁶ 512 U.S. 687 (1994).

¹²⁷ *Barghout*, *supra* note 124 at .

¹²⁸ *Id.*

¹²⁹ See MaryAnn Galante, *Suit Says Shelat Falsely Labeled Foods Kosher*, L.A. TIMES, Nov. 6,

Although the State of Illinois had a “Kosher Food Act,”¹³⁰ the case was brought under the Illinois Consumer Fraud and Deceptive Business Act, a general consumer protection statute.¹³¹ The head of the state’s Consumer Protection Division, explaining his rejection of the kosher fraud statute, said that he doubted the constitutionality of that law and did not want to lose an easy case on constitutional grounds or expend vast resources litigating the meaning of “kosher.”¹³²

In *Shelat Kosher Foods, Inc., United Poultry, Inc., and Aspen Foods, Inc.*, the state sought a permanent injunction against Shelat, as well as a large fine. The Attorney General’s office estimated that Shelat made about \$250,000 in profits from its fraud.¹³³ In November of 1987 the Cook County Circuit Court ordered a nationwide recall of approximately 350,000 pounds of meat and poultry and issued a temporary injunction shutting down the Shelat plant that processed kosher poultry. Three weeks later, Shelat entered into a consent decree where it stipulated its fault and agreed not to sell kosher food products in the future. Its officers were fined \$ 236,000 to \$ 250,000

1987, at B4, available at 1987 WL 2252467; and William C. Hidlay, *Companies Accused in Kosher Fraud Agree to Settlement*, ASSOCIATED PRESS, Feb. 26, 1988, available at 1988 WL 3770784.

¹³⁰ The Illinois Act provides that anyone who acting “with intent to defraud . . . falsely represents any food product” to be kosher is guilty of a Class C misdemeanor. A Class C misdemeanor is punishable with a fine of \$ 1500; Class A is the greater of \$2500 or the amount of the offense. Class C is punishable with up to thirty days in prison; Class A is less than a year. 410 ILL. COMP. STAT. ANN. 645/1 (West 2003); 730 ILL. COMP. STAT. ANN. 5/5-9-1 and 5/5-8-3 (West 2003).

¹³¹ 815 ILL. COMP. STAT. ANN. 505/2 (West 2003).

¹³² William Hidlay, *Companies Accused In Kosher Fraud Agree To Settlement*, A,P, NEWS ARCHIVE, Feb. 26, 1988.

¹³³ *Id.*

in restitution paid to the OU and \$ 14,000 in civil penalties.¹³⁴

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In *Ran-Dav's County Kosher, Inc. v. State*,¹³⁵ the plaintiff was supervised and certified by a private agency, which maintained that the business establishment was kosher despite alleged violations of New Jersey law. In evaluating the constitutionality of the state's kosher fraud statute, the New Jersey Supreme Court applied the three-prong test presented in *Lemon v. Kurtzman*: Under this test, in order for a statute to be deemed constitutional, it (a) must have a secular legislative purpose; (b) must not have the primary effect of either advancing or inhibiting religion; and (c) must not result in an "excessive government entanglement" with religion.¹³⁶

The court said that because the regulations provide both substantive standards prescribing religious practices and procedures for their enforcement, the facts could be appropriately analyzed under *Lemon's* excessive-entanglement prong. The State argued that the term "kosher" assumed a secular connotation indicating a more sanitary and healthy product. The court rejected that argument, finding that the statute mandated "strict compliance with the laws and customs of the Orthodox Jewish religion," and noting that enforcement of the statute by a panel of ten rabbis (nine Orthodox and one Conservative) "underscored the theological or religious nature of the State's

¹³⁴ Though consumers were directed to the retailers from whom they purchased Shelat products, none of the court award went to consumers or consumer groups. See "Bogus Kosher Food Firm Ordered Closed," CHI. SUN-TIMES, Nov. 25, 1987, at 18, available at 1987 WL 4122141.

¹³⁵ 579 A.2d 316 (N.J. Super. Ct. App. Div. 1990), rev'd, 608 A.2d 1353 (N.J. 1992).

¹³⁶ 403 U.S. 602 (1971). In so doing the Court avoided a strict-scrutiny standard for "explicit and deliberate distinctions between different religious organizations," because the record suggested "uncertainty concerning both the precise meaning and the enforcement standards of the regulations." *Id.*

regulatory endeavors.” The court held the fraud statute dictate excessive government entanglement.¹³⁷

Besides finding the statute “inextricably” bound with religion, the court analyzed it under Lemon’s second prong – whether the state gives the appearance of favoring or advancing one religion or denomination – and held that the law was based on religious tenets and acted as “both a constraint and inducement on merchants who must abide by them,”

Finally, applying Lemon’s last prong (the secular purpose test, the Court noted that a statute would fail only if “there was no question that the statute was or regulation wholly motivated by religious considerations.” Making mention of the States contention that the statute’s purpose was to prevent consumer fraud, the Court again pointed to the mention of Orthodox doctrine as being “unavoidably religious in character.”¹³⁸

*

The landmark case challenging the constitutionality of kosher-fraud statutes came in 2002. At the heart of the dispute in *Commack Self-Service Kosher Meats, Inc. v. Weiss*,¹³⁹ Commack was whether, by defining “kosher” to mean food that is “prepared in accordance with the orthodox Hebrew religious requirements,” a New York statute violated the Establishment Clause of the First Amendment.¹⁴⁰

The problem is that not all Orthodox Jews follow the same standards. The plaintiffs in

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ 294 F.3d 415 (2002).

¹⁴⁰ “Congress shall make no law respecting an establishment of religion. . . .”

Commack had obtained private supervision and certification from a Conservative rabbi, who asserted that the procedures the state alleged to be violations of the statute (some technical rules of soaking/salting meat) were permissible under Jewish law.¹⁴¹

In resolving this dispute, the court applied the three-pronged test established by the Supreme Court in *Lemon*. The first prong's did not raise much discussion because neither of the parties disputed that the laws were "enacted for the secular purpose of protecting consumers from fraud in the kosher food market."¹⁴² However, the court found that the New York statute did violate the second prong, in that it served to inhibit religion by preferring dietary restrictions of Orthodox Judaism over those of other branches of the faith. The court further ruled that by defining kosher according to the Orthodox view, the challenged laws "symbolically plac[e] the government's official seal of approval on one religious view."¹⁴³

In addition, said the court, New York's kosher fraud statutes ran afoul of the third prong in *Lemon* by excessively entangling government and religion:

It appears to us that the challenged laws excessively entangle government and religion because they (1) take sides in a religious matter, effectively discriminating in favor of the Orthodox Hebrew view of dietary requirements; (2) require the State to take an official position on religious doctrine; and (3) create an impermissible fusion of governmental and religious functions by delegating civic authority to individuals apparently chosen according to religious criteria. The Court further cited to considerable disagreements within the Jewish community as to what standards must be met for food to be 'kosher' rejecting the contention that "no one disputes the meaning of the term 'kosher.'"¹⁴⁴

¹⁴¹ *Id.* On the other hand, for example, the chassidic Lubavitch sect adheres strictly to its own *shechitah*, which is not accepted by other groups.

¹⁴² *Commack*, 294 F.3d at 431.

¹⁴³ *Id.* See also Popovsky, *supra* note 112 at .

¹⁴⁴ *Id.* Every other state with a kosher fraud statute has adopted language to this effect, specifically

While New Jersey simply replaced the kosher-fraud statute that had been invalidated in *Ran-Dav* with a new kosher-disclosure regulation, the *Commack* decision created a more substantial uproar in New York. Within a week after the Supreme Court denied the state's petition for certiorari, the Governor proposed an "Emergency Kosher Law Protection Act") to replace the old kosher fraud statute – combining the disclosure model with a requirement that kosher be defined by "the reasonable expectations" of consumers of kosher products as well as generally accepted standards in the trade.¹⁴⁵

The court in *Commack* may have drawn the correct conclusion under the first prong, but its analysis under the others is troublesome. Its conclusion that the statutes in question define kosher as being in "accordance with the Hebrew Orthodox view" is inaccurate. Nowhere in the law is any such definition provided; what is prohibited is "to advertise food as being in accordance with the Hebrew Orthodox view" if it does not actually comply with those standards. The legislature has not thereby taken a position as to religion, nor does it "prefer dietary restrictions of Orthodox Judaism over those of other branches." It is merely spelling out the simple legal characteristics of

invoking the Jewish or "Hebrew" religion. *Id.*

¹⁴⁵ Pataki stated: "I am deeply disappointed that the U.S. Supreme Court has failed to review the decision of the U.S. Court of Appeals for the Second Circuit declaring certain provisions of New York's kosher laws unconstitutional. Our State's kosher laws are vitally important to tens of thousands of New Yorkers of all faiths and have protected generations of consumers from fraudulently packaged and misbranded products. I remain strongly committed to protecting New Yorkers who consume kosher products, and will promptly seek remedial legislation to ensure that those who purchase products labeled as kosher receive the full protection of our laws." Press Release, N.Y. Gov. George E. Pataki (Feb. 24, 2003), available at – http://www.state.ny.us/governor/press/year03/feb24_03.htm.

fraud. The law's primary effect thus neither advances nor inhibits religion.¹⁴⁶

The most controversial language in the original NY statute was its definition of kosher by reference to “the orthodox Hebrew religious requirements.”¹⁴⁷ Courts and commentators who have considered the constitutionality of these laws have almost unanimously found that, in defining kosher by reference to “the orthodox Hebrew requirements,” they violate the Establishment Clause.¹⁴⁸

Those defending the constitutionality of kosher fraud statutes refer to the usage of kosher standards by those who are not religious as proof of the laws' secular purpose. That is, everyday consumers (whether Jewish or not) who buy kosher products for what they perceive to be reasons of health and purity – vegans, for example – might well find kosher products to be more attractive.¹⁴⁹

Although the kosher food industry has burgeoned over the past three decades, enforcement of kosher-fraud statutes remains a local phenomenon – limited mostly to the large Jewish communities in the New York/New Jersey metro area, Baltimore, and southern Florida. n384After

¹⁴⁶ The New York Court of Appeals has defined fraud as “a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury.” *See* *Centro Empresarial Cempresa S.A. v. America Movil, S.A.B.*, 17 N.Y.3d 269, 276 (2011).

¹⁴⁷ *Id.*

¹⁴⁸ The current New York statute removes the offending language. *See* N.Y. AGRIC. & MKTS. LAW § 201-a to -I, (effective 2005) (curing constitutional defect by removing references to “orthodox Hebrew requirements.”).

¹⁴⁹ Some courts are not moved by this argument. *See, e.g.,* *Ran-Dav's County Kosher, Inc. v. State*, 608 A.2d 1353, 1364 (N.J. 1992) (“We remain unpersuaded by the repeated contention that the laws of *kashrut* have become secular norms”).

constitutional challenges have struck down key provisions of those statutes, states have been forced to reformulate their kosher fraud laws along the lines of the current New Jersey disclosure model.¹⁵⁰

In sum, the government can pursue its legitimate interest in protecting kosher consumers from fraud by adopting a more narrowly tailored option – such as mandatory disclosure laws. Such rules would require a vendor who claims that a product is kosher to show the basis for that claim. The consumer can then, upon his own initiative, determine whether or not the product satisfies his particular religious requirements. The state thus need not involve itself in deciding the theological questions inherent in determining whether a particular food is kosher.¹⁵¹

Indeed, the rabbis themselves often appear to find that a difficult issue to resolve.¹⁵²

*

Inmates of the American penal system are not entitled to the same constitutional rights as other citizens. Yet (as the Supreme Court has noted) “prison walls do not form a barrier separating prison inmates from the protections of the constitution.” In *Turner v. Safley*, the Court examined two Missouri Division of Correction regulations, the first a rule restricting mail correspondence between inmates, the second permitting inmates to marry only with the permission of the prison superintendent (who would grant permission contingent on a compelling reason). In holding that

¹⁵⁰ According to some industry insiders, enforcement of kosher fraud statutes has been of limited value, because offenders simply view the penalties as “the cost of doing business.” The problem might be that the fines and penalties are not sufficiently high to have a deterrent effect. See Sigman, *supra* note 112 at 571-575.

¹⁵¹ See Popovsky, *supra* note 112 at .

¹⁵² See *infra* section III concerning the private policing of kosher dietary laws.

the lower court of appeals had erred in overturning the regulations on a strict-scrutiny test, the Court formulated its own rational basis test: (1) is the government objective legitimate and rational? (2) is there an alternative to exercise the right despite the regulation? (3) what effect accommodating that right would have on prison officials and other prisoners? and (4) how difficult would it be to implement alternatives exist that would accommodate prisoner rights?¹⁵³

A few months after deciding *Turner*, the Court applied its four-part test in regard to restrictions on the Free Exercise Clause. In *O’Lone v. Estate of Shabbaz*,¹⁵⁴ Islamic prisoners who had been barred from attending the Jumu’aha Friday congregational service on Friday afternoons brought suit in district court alleging a violation of their First Amendment rights. Accepting the argument that prison officials’ objective of reducing tensions and violence due to overcrowding in the prison building justified restricting inmates to their outdoor work stations by reducing crowded conditions was reasonably related to furthering a legitimate interest. The court went on to observe that the prison officials allowed those of the Islamic faith to gather at other times for expression or religion, and even provided alternatives for those wishing to adhere to a religious diet.¹⁵⁵

In *Williams v. Morton*,¹⁵⁶ the Third Circuit Court of Appeals ruled that the New Jersey State prison did not violate the free exercise rights of its prisoners by refusing to provide *halal* meat to Muslim prisoners. The court held that providing vegetarian food rather than *halal* was

¹⁵³ *Turner v. Safley*, 482 U.S. 78 (1987) at 82.

¹⁵⁴ 482 U.S. 342 (1987).

¹⁵⁵ *Id.*

¹⁵⁶ 343 F. 3d 212 (3rd Circuit 2003).

rationality connected to the state's objective to provide a simplified meal service while operating under budgetary constraints, while not additionally compromising prison security by allowing in meals from outside providers.¹⁵⁷

In *LaFevers v. Saffle*,¹⁵⁸ the Tenth circuit Court of Appeals rejected the lower court's finding that the prison was within its rights to reject Lafevers' request for a vegetarian meal plan because it had reasoned that vegetarianism was only recommended rather than mandated by the Seventh-Day Adventist religion.¹⁵⁹

The same conclusion would likely be reached in a court test of the kosher-fraud statutes.¹⁶⁰

The Raw Milk Controversy

As noted earlier, before the 20th century there was virtually no governmental regulation of dairy products. Before pasteurization of milk became the norm, then the law, farmers would take raw milk from the cow and, usually after separating the cream to make butter, sell it to consumers.¹⁶¹

Even today, however, there is much debate over the concept of raw milk. Its regulation is

¹⁵⁷ *Id.* The court rejected out of hand the prisoners' contention that all administrative burdens could be alleviated if the entire meal program would switch to *halal*; to do that would create the impression that the state favored the Muslim religion and would thereby violate the Establishment Clause. See generally Benjamin Pi-wei Liu, *A Prisoner's Right to Religious Diet Beyond the Free Exercise Clause*, 51 UCLA L. REV. 1151, 1185 (2004).

¹⁵⁸ 936 F.2d 1117 (10th Cir. 1991).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* See also Pi-wei Liu, *supra* note 157 at 1185.

¹⁶¹ See Carlisle, Rodney (2004), SCIENTIFIC AMERICAN INVENTIONS AND DISCOVERIES 357 (2004).

at a state-by-state level. In Iowa, for example, the sale of raw milk is illegal. It is allowed in other states to some extent, but there are strict rules that govern these sales. In Illinois one can buy raw milk so long as he provides his own container.¹⁶²

Even chefs have come to the defense of those who want their milk unadulterated. “When you take milk or cream and pasteurize it and homogenize it,” said one, “you’ve killed the originality.”¹⁶³

Modern health-conscious consumers are familiar with buzz-words created by the food-marketing industry: “all natural,” “organic,” “low sodium,” “0% trans-fat,” “no cholesterol,” “low sodium,” “fat-free,” “sugar-free,” “gluten-free,” “chemical-free.” Some who consider themselves more sophisticated may regard such slogans as illusory.¹⁶⁴

Many of the latter group have taken up the udders for raw milk – contending that pasteurization saps milk of many of its nutrients and unique health benefits. Some consumers claim to have cured themselves of multiple cancers primarily through their consumption of raw milk.¹⁶⁵ However the health benefits of raw milk and other raw products are strongly disputed by the Food and Drug Administration, which contends that not only is raw milk a less healthy choice

¹⁶² 410 ILCS 635/8 (1983).

¹⁶³ Quoted in an account of the raw-milk controversy. See Dana Goodyear, *Raw Deal*, NEW YORKER, April 30, 2012 at p. 33.

¹⁶⁴ See “Promoting safe, nutritious food for everyone,” Center for Science in the Public Interest, available at www.cspinet.org/about/pdf/CSPI_40th_AR.pdf.

¹⁶⁵ See, e.g., “My Anti-Cancer Treatments: Unpasteurized Raw Milk and Raw Milk Cheese,” available at <http://danaherbert.blogspot.com/2009/01/my-anti-cancer-treatments-raw-milk-and.html>.

but in fact is highly dangerous.¹⁶⁶

Raw milk distributors and co-ops do not dispute the increased likelihood of pathogens. In fact many co-ops require participants and customers to sign forms stating that they *want* the *E. coli* bacteria for its health benefits.¹⁶⁷ While consumers often assert their right to choose what they eat regardless of the risk to health, the government contends that it has a compelling interest to ensure the public's health and welfare. The government bolsters its argument by pointing out that the risk of contaminated milk is increasingly likely due to the sheer volume of milk consumed by people of all ages, but especially by children.

To date, the lack of hard scientific evidence corroborating the proffered health benefits of raw milk, as well as the right to choose milk that is allegedly more flavorful, has been outweighed by the government's stated claim of a compelling interest to protect public health.

¹⁶⁶ According to the Center for Disease Control there have been 2,659 cases of illnesses, 269 hospitalizations, 3 deaths due to the consumption of raw products. Unpasteurized milk is 150% more likely to contain pathogens such as *E. coli* and *Listeria monocytogenes* among others. See FDA Bulletin on Food Safety, available at <http://www.fda.gov/food/foodsafety/product-specificinformation/milksafety/ucm122062.htm>.

¹⁶⁷ See, e.g., Pure Food Co-op LLC Membership Form, available at <http://purefoodco.org/PF-membership.pdf>.

III. Holy Wars: Law, Politics and Filthy Lucre

*Laws are like sausages. It is better not to see them being made.*¹⁶⁸

*“I’m a holy cow,” said the rabbi. “Oh, come on,” said Mrs. Goldstein.
“You’re a lot of strange things, but I know you’re not a holy cow.”
– William Wilson, *The Study of Mormon Folklore**

Over the past half-century the constitutionality of various kosher fraud statutes has captured the attention of governments, courts, scholars, and the growing community of kosher consumers. As kosher food production has burgeoned, its satellite industries – certifiers, supervisors, marketers, and others – have created legal and practical problems of their own.

Specialized consumer-protection statutes are based upon criminal-law theories of public interest or social welfare. They are thus currently treated as traditional state functions, such as punishing fraud and protecting the right to practice one’s religion freely and openly. On the other hand, such regulatory powers are often shared with small, cohesive interest groups, like kosher consumers, who can act within the political process to obtain special protection through statutes and regulations.¹⁶⁹

But there is relatively little evidence that the enactment of kosher-fraud statutes plays a significant role in preventing willful kosher fraud. Nor do enforcement efforts address all of the

¹⁶⁸ “The making of laws is like the making of sausages – the less you know about the process the more you respect the result” is another of several iterations of this famous quotation, which has most often been attributed to the aristocratic 19th-Century German Chancellor Otto von Bismarck (1815-1898). But its provenance and exactitude have been widely debated. *See, e.g.*, Wikiquote, available at http://en.wikiquote.org/wiki/Talk:Otto_von_Bismarck; BrainyQuote, at <http://www.brainyquote.com/quotes/quotes/o/ottovonbis161318.html>, and QuotationsBook, at <http://quotationsbook.com/quote/22577/>.

¹⁶⁹ *See* Karen Ruth Lavy Lindsay, *Can Kosher Fraud Statutes Pass the Lemon Test?: the Constitutionality of Current and Proposed Statutes*, 23 DAYTON L. REV. 337 (Winter, 1998).

problems facing kosher consumers today.

“Something Isn’t Kosher Here”

Purchasers of kosher food are generally sophisticated buyers many of whom exercise special vigilance to identify instances of mistake or fraud. In fact a good deal of kosher fraud enforcement originates with a consumer’s observation or question – what to them is a serious rendering of the slang expression, “Something Ain’t Kosher Here.” Perhaps even more important are the actions that kosher consumers can impose on wrongdoers, such as announcements and postings in synagogues that disseminate information about questionable food manufacturers and retailers.¹⁷⁰

The larger kosher certifiers aggressively pursue unauthorized use of their trademarks, even against other supervising agencies. The agencies will generally avoid court, however, instead choosing to publicize unauthorized usages in commonly-read Jewish publications and to recall mislabeled products.¹⁷¹ Moreover, observant Jews often follow a religious dictate that discourages or prohibits Jewish parties from suing one another in secular court rather than bringing the matter before a rabbinical arbitration panel (*beis din*).¹⁷²

¹⁷⁰ *Id.* at 566.

¹⁷¹ *But see* Levy v. Kosher Overseers Ass’n of Am., Inc., 104 F.3d 38 (2d Cir. 1997), in which the O-K Laboratories brought suit to enjoin the Kosher Overseers Association (KOA) from using its encircled K symbol. (The court granted the injunction but awarded no damages.)

¹⁷² *See* Ira Yitzchak Kasdan, *A Proposal for P’Sharah: A Jewish Mediation/Arbitration Service*, JEWISH ACTION 6 at 22, 22-26 (Spring 1990) (discussing the prohibition and presenting alternatives to the rabbinical courts), available at <http://www.jlaw.com/Articles/psharah1.html>.

Kosher Certification Agencies

There was a time when housewives prepared all their families' meals in their own kitchens. They knew the rules like the backs of their hardworking hands. Some foods were clearly kosher (fruits and vegetables, virtually all dairy products, common condiments), some were not (pigs, shellfish, insects). The only meat they would use came from a kosher butcher. Over the past few decades, however, modern marketing has revolutionized what we eat. Almost 90 percent of our food is now processed before reaching consumer households. With synthetic meats and exotic food additives, the observant housewife can serve kosher varieties of anything from bacon to cheeseburgers to crab salad – while at the same time having to check the *kashrut* of things like vegetables (lettuce, brocolli, strawberries), dairy items (ice cream, sour cream, whipped cream), popular drinks (water, wine, whiskey).¹⁷³

As Jewish communities developed in the United States, they originally followed the European tradition of appointing kosher slaughterers – *shochtim* – who could be removed if he failed to abide by the strictures laid down. In 1813, a man named Avraham Jacobs became the first independent *shochet* in the United States, and many more came forward to offer their services. The result was a rapid decline in the standards required to ensure that the meat was kosher. It was not until 1897 that the *shochtim* themselves banded together to form a union (called “Melechesh Hakodesh”), whose goals were to improve both *kashrut* standards and the wages of the *shochtim*.¹⁷⁴

¹⁷³ See “History of Certification,” KosherQuest, available at – <http://www.kosherquest.org/symbols.php>.

¹⁷⁴ *Id.*

In 1924, the Union of Orthodox Rabbis (O/U), which had been established in 1892, decided to enter the field of *kashrut*. Its first director was Abraham Goldstein, who had been instrumental in importing kosher products into the American Market as well as convincing some domestic processors (notably the Sunshine Biscuit Company) to become certified kosher.¹⁷⁵

As the processed food industry burgeoned, the ability to check for non-kosher ingredients has become considerably more difficult. By mid-20th century rabbis had begun to issue guidelines as to ingredients – which at least in the United States had to be listed on every packaged food. At one point it was satisfactory to check these lists. A product was not considered kosher if it contained “shortening,” but was if it contained “vegetable shortening.” As processors developed other additives, governmental standards evolved accordingly. In short order the rabbinic guidelines changed, so that the key ingredient had to be “pure vegetable shortening,” then “100% pure vegetable shortening.”¹⁷⁶

Such informal guidelines were gradually replaced by required symbols, which in turn made the kosher consumer’s task much easier. The symbols were those of kosher certification agencies, which arose to assure consumers that all virtually all processed foods labeled as “kosher” could be bought with confidence that they were truly so.¹⁷⁷

Nowadays in the kosher food industry, monitoring of both packaged and prepared products is done by certification agencies. Currently there are at least a hundred of them, each with a

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* Neither kosher-fraud statutes nor kosher certification is enforceable when only the letter K appears on packaged food to signify that a product is kosher. For an example of how this could be fraudulent, see *KosherQuest*, *supra* note 78 at .

distinctive symbol appearing on packages or wrappers. They come in all shapes (Circle K, Diamond K, Heart K, Triangle K) and from far and wide (California K, Florida K, Earth K). They apply their seals of approval to everything from hidden ingredients that need supervision (like chemicals and colorings) to products that, according to most rabbinic authorities, don't (like aluminum foil, bottled water and peaches). They cover specialty confection stores (like Cinnabon) to franchises of international restaurant chains (like Dunkin' Donuts and Subway sandwich shops).

By far the largest certification agency is the Orthodox Union (O-U), which supervises more than 500,000 products and visits processing plants on every continent in the world. It employs close to 1,000 supervisors and 50 rabbinic coordinators.¹⁷⁸

It is estimated that as many as a full third of all products on supermarket shelves are certified kosher. This makes the kosher industry in the U.S. a 30-billion dollar-a-year business. A relatively small amount of this market (about \$2 billion) is made up of Orthodox Jewish consumers, but the interest in kosher food is rapidly growing. Some adhere to dietary laws from religious conviction (such as Seventh-Day Adventists and Muslims); some for health reasons (e.g., vegetarians); and some (perhaps the majority) who feel that kosher certification is their best guarantee that the products and its ingredients are being carefully processed. Many large corporations have found it profitable to acquire kosher companies. According to a recent study there appear to be at least 5 million people who buy products based on their being kosher.¹⁷⁹

Although the O-U has always been a non-profit organization, others recognized the huge

¹⁷⁸ See Orthodox Union website, at <http://www.oukosher.org/>. See also SUE FISHKOFF, *KOSHER NATION*, Schocken Books (2010) at 155; and E. EIDLITZ, *IS IT KOSHER?* *ENCYCLOPEDIA OF KOSHER FOODS FACTS & FALLACIES* (1992) at 13.

¹⁷⁹ *Id.*

business potential in kosher supervision. Over the past half-century, over 100 new agencies around the world have entered the field – each with its own distinctive symbol.¹⁸⁰

Kosher supervision usually benefits both the food processor or manufacturer as much as it does the consumer. As with their general corporate goals, a profit-motive is generally the driving force in their quest for kosher supervision. The cost of certification is often met by increased sales. (The O/U claims that, in its half-century of supervising, fewer than a dozen companies have discontinued their certification because sales did not increase. The O/U provides certification only upon application by a food manufacturer. Other supervising agencies solicit companies.¹⁸¹

The processor must supply a detailed list of every ingredient in the product, including preservatives, release agents, stabilizers or other inert ingredients. In addition, every step in the manufacturing process – every cleansing agent used on the equipment and all other products produced on the same premises require close investigation and supervision – must be reviewed and evaluated.¹⁸²

The certifying agency must track down each ingredient to its source. No meat product is kosher if the animal or slaughtering process did not meet strict rabbinic standards. Wine and cheese present a similar problem. Oils that may have been used in the manufacture of foodstuffs must be traced back to their origin. Some otherwise kosher products may be declared non-kosher because the Food and Drug Administration allows for “tolerance levels” of insects or rodent

¹⁸⁰ See *infra* note 191 and accompanying text.

¹⁸¹ KosherQuest, *supra* note 78.

¹⁸² *Id.*

parts.¹⁸³ Ingredients that are apparently innocuous – such as “natural colors,” “softeners,” and “artificial flavors” – may in fact be derived from insects or non-kosher animals or fish.¹⁸⁴

Once all the ingredients and manufacturing processes are approved by rabbinic supervisors, the agency determines how much in-plant supervision is needed. This information is written into a contract, which also specifies that the manufacturer agrees to make no changes of ingredients or suppliers without prior written consent of the agency. The on-site inspector (*mashgiach*) will verify that the company is in compliance.¹⁸⁵

A kosher certification agency that finds its symbol unauthorized or misused can either bring a cause of action under trademark law or seek an injunction to prevent future unauthorized usage, as well as damages to compensate for any harm from the infringement.¹⁸⁶ Some courts have allowed restitution based upon the profits of the infringing party.¹⁸⁶

When certifiers discover instances of mistake or fraud (whether accidental, negligent,

¹⁸³ See David Bistricher, *Here's the Buzz on Certifying Veggies as Insect Free*, available at OU Website: <http://www.oukosher.org/index.php/common/article/6110>.

¹⁸⁴ See “Is It Kosher?”, *KosherQuest*, available at http://www.kosherquest.org/book.php?id=FOOD_ADDITIVES.htm.

¹⁸⁵ *Id.* The individual supervisor is generally paid by the supervising agency for each visit he makes to the processing plant. *Id.*

¹⁸⁶ Certification marks are protected under 15 U.S.C. § 1127 (2002); 15 U.S.C. §1117(a)-(b) (2002). If the damages are either inadequate or excessive, the court may affix “such sum as the court shall find to be just.” *Id.* at § 1117(a). This statute provides statutory damages for counterfeit marks as well. *Id.* at § 1117(d). See generally *Donel Corp. v. Kosher Overseers Ass’n of Am., Inc.*, No. 92 Civ. 8377, 2001 WL 228364 (S.D.N.Y. Mar. 8, 2001) (permanently enjoining the KOA from using the letter K inside of a circle). See also *Int’l Star Class Yacht Racing Ass’n v. Tommy Hilfiger, U.S.A., Inc.*, 80 F.3d 749, 752 (2d Cir. 1996); *Badger Meter, Inc. v. Grinnell Corp.*, 13 F.3d 1145, 1157 (7th Cir. 1994); *X-It Prods., LLC v. Walter Kidde Portable Equip., Inc.*, 227 F. Supp. 2d 494, 528 (E.D. Va. 2002).

reckless, or willful), they can order immediate corrective action or drop their certification. The public is generally notified by way community newspapers, trade publications, and product recalls.¹⁸⁷

Willful fraud generally merits harsh penalties. For example, when an OU supervisor caught one of its clients, the owners of two New York City restaurants, hiding non-kosher chicken in the kitchens, the agency immediately ceased its supervision and dropped its certification. n304 Rarely if ever would certification be picked up by another kosher supervising agency.¹⁸⁸

In 1990, when the supervisor for the Rabbinical Council of Greater Washington discovered allegedly non-kosher ducks and receipts for them at one of the facilities it supervises – Moshe Dragon, a Chinese restaurant in Silver Spring, Maryland. Although the evidence was disputed and the Council eventually cleared the restaurant owner of any wrongdoing and fired its own supervisor, word of the dispute spread nevertheless. The restaurant owner claimed that he lost over \$ 30,000 as a result of the rumors, and decided to sell the business.¹⁸⁹

Because it is often difficult to ascertain whether a product mislabeled as kosher resulted from an honest mistake or from intentional misrepresentation, certifiers rarely invoke the term “fraud.” Moreover, given the ambiguity of the term kosher and the potential for legal liability, a supervising agency will usually not declare a product or food establishment as unkosher. Instead, it will announce that it no longer certifies the product or restaurant. Retroactive decertification is

¹⁸⁷ See Sigman, *supra* note 112 at 562-3.

¹⁸⁸ *Id.*

¹⁸⁹ Ruth Sinai, *Is Everything Kosher with Moshe Dragon's Duck?*, ASSOCIATED PRESS, July 4, 1990, available at 1990 WL 6012694.

mostly limited to the packaged-food industry. In neither instance (prospective or retroactive decertification) is the agency likely to confirm or deny that the food is actually kosher, instead choosing euphemistic code phrases like “not recommended.”¹⁹⁰

Law and Politics in the Business of Kashrut

There can be no mistaking that kosher supervision is a gargantuan business. Besides the O-U, there are at least 100 other agencies worldwide that certify a huge variety of products, from food to vitamins to liquor and beyond.¹⁹¹ Many of them operate as non-profit agencies, some more transparent than others.¹⁹² Those which do not claim tax-free status are clearly profit-making enterprises.¹⁹³

It is also a fact of modern life that kosher supervision nowadays has considerably less to do with *halachic* principles than with personalities and business considerations – egos, the politics of control, and profit motives – in short, lots of dollars changing hands. Rabbis and administrators of kosher certification agencies often appear to be engaged in a war for minds and money, each with differing standards of what’s kosher and what isn’t. Caught in the middle is the kosher consumer.

¹⁹⁰ See *infra* note 209 and accompanying text.

¹⁹¹ Most are in the United States. Canada has at least three, England seven, and Israel ten. Others can be found in Argentina, Australia, Brazil, China, France, and Mexico. See list of “Reliable Certifications” at KosherQuest.com, <http://www.kosherquest.org/symbols.php>.

¹⁹² The Orthodox Union, the largest kosher supervisory agency, plows all of its profits back in to its many communal programs. Some of its competitors, such as Star-K Kosher Certification, are less clear about their charitable beneficiaries.

¹⁹³ A prime example is O-K Kosher Certification. See <http://www.ok.org/Content.asp?ID=2>.

Rabbinic skirmishes over what's kosher and what isn't are not confined to the United States. Virtually everywhere there are kosher consumers, there are kosher controversies.¹⁹⁴

Current Skirmishes

One of the more serious recent debates is taking place in Israel, where a dozen Jerusalem restaurants have confronted the state's religious authorities by claiming kosher credentials without the government's official *imprimatur*. The restaurants challenge the Orthodox Rabbinate's monopoly over kosher supervision, especially where supervisors seldom inspect their premises. They claim that they enforce *kashrut* in their kitchens on their own – without any rabbis or inspectors – and that they will offer an alternative certificate based on opening their kitchens for anyone to inspect but that are checked regularly by rabbinical students.¹⁹⁵

*Dogma*¹⁹⁶

Hot dogs are as American as apple pie on the Fourth of July. In fact they're consumed around the world, from Australia to Zambia, and have become a major part of the increasingly

¹⁹⁴ See, e.g., Sarah Kessler, *Kosher Controversy at the Olympics*, JEWISH DAILY FORWARD, July 26, 2012 (difficulties with kosher food at 2012 London Olympics), and “Kosher Food and Shechita Controversy in Norway,” available at http://www.kosherdelight.com/Norway_Kosher_Food.shtml (continuing battle over ritual slaughter in Norway).

¹⁹⁵ In 2011 Israel's Ashkenazi chief rabbi went on record as agreeing that supervisors were not doing their jobs. Nathan Jeffay, *Jerusalem Eateries Spark A Kosher Coup*, JEWISH DAILY FORWARD, November 16, 2012 at 1.

¹⁹⁶ Parts of this section are adapted from Kenneth Lasson, *Dogma*, BALTIMORE JEWISH TIMES, July 10, 2009.

capitalistic fast-food business in communist China and Russia. We bite into more than 20 billion of them a year in this country alone – some 818 every second from Memorial Day to Labor Day, according to the National Hot Dog & Sausage Council.¹⁹⁷ The 2013 Super Bowl in New Orleans’ Superdome will feature “Glatt Kosher” hot dogs and other food for the first time.¹⁹⁸

It’s a \$4 billion-a-year business, a large share of which is the kosher market (preferred by 6 million Americans, according to the NHD& SC, only a quarter of whom are Jewish). And that number is growing at twice the rate of consumption of all other kosher foods. Little wonder, then, that the controversy surrounding the Hebrew National brand – which was recently rated by Consumer Reports as the best in overall quality among all hot dogs, is mushrooming by the day.¹⁹⁹

But the most fascinating fact may be that many Orthodox Jews will not eat any Hebrew National meat products. The underlying reasons for this irony are a hodgepodge of *halachah* (Jewish law) and rabbinic infighting – power, profits and politics – much of it as juicy and spicy as what goes into the common sausage.

From whence the wiener? One of the oldest forms of processed food, the common sausage can be traced as far back as the Roman Empire.²⁰⁰

¹⁹⁷ Yes, there is such a group, which also lists things like the biggest hot dog-selling cities – Baltimore/ Washington is third behind New York, Los Angeles, and Baltimore/Washington – as well as even more arcane trivia. See National Hot Dog and Sausage Council website, available at <http://www.hot-dog.org/ht/d/sp/i/38567/pid/38567>.

¹⁹⁸ Tzvi Ben Gedalyahu, *Super Bowl to be “Glatt Kosher,”* ARUTZ SHEVA (October 22, 2012), available at <http://www.israelnationalnews.com/News/News.aspx/161258>.

¹⁹⁹ See CONSUMER REPORTS (June 2007). Oscar Mayer, the largest producer, came in eighth.

²⁰⁰ Sausages were mentioned early on in history. See, e.g., Homer’s “Odyssey” (XX: 24-27), written in the ninth century B. C.

The origin of the term “hot dog” is in some dispute. Visitors to the 1893 Columbian Exposition in Chicago consumed large quantities of the sausage sandwiches, which in the same year became the standard fare at baseball parks. They were also current at Yale as early as 1894, when “dog wagons” sold them at the dorms – the name a sarcastic comment on where the meat came from. (“A hot dog is a cartridge filled with the sweepings of abattoirs,” H. L. Mencken said years later. “I devoured them in Baltimore way back in 1886, and they were then very far from newfangled.”) Various urban legends link the first hot dogs to baseball games -- at either Sportsman’s Park in St. Louis (home of the Browns) or the Polo Grounds in New York. The latter is said to be where a sports cartoonist named Tad Dorgan was covering a Giants game there on a cold day in 1902, when he heard a vendor cry out, “Get your dachshund sausages while they’re red hot!” He hastily sketched some barking dachshunds tucked into warm rolls and captioned the drawing with a simpler reference to “hot dogs.”²⁰¹

In 1871, a German butcher named Charles Feltman opened up the first Coney Island stand, selling some 3, 684 dachshund sausages in rolls during his first year in business. Nathan’s Famous Frankfurters, which didn’t start until 1916, sold more than 360 million in 2008.²⁰²

²⁰¹ The cartoon, however, has never been found - so the story might be little more than, well, baloney. The edible “dachshund” or “little dog” was created in the late 1600s by Johann Georghehner, a butcher in Coburg, Germany, who later traveled to Frankfurt-am-Mein to promote it. The American version probably made its first appearance in the 1860s, when German immigrants sold sausages with milk rolls and sauerkraut from pushcarts in New York City’s Bowery neighborhood. *See* “History and Legends of Hot Dogs,” available at <http://whatscookingamerica.net/History/HotDog/HDIndex.htm>.

²⁰² Another German peddler named Antonoine Feuchtwanger began selling hot frankfurters during the St. Louis “Louisiana Purchase Exposition” in 1904. He provided a white glove with each purchase so that his customers’ hands would not be burned. His wife suggested that he cut costs by putting the sausages in an elongated bun, which his brother-in-law, a baker, dutifully supplied. *See* “Hot Dog History,” available at <http://www.hotdogchicagostyle.com/history.php>.

The Hebrew National Kosher Sausage Factory processed kosher meats for New York's numerous delicatessens. A true immigrant success story, the Hebrew National saga began in 1905, in a six-story walk-up on East Broadway in the Lower East Side of Manhattan. In 1928, a Romanian immigrant butcher named Isadore Pinckowitz (later Pines), who had begun peddling meat from the back of a horse-drawn wagon, bought the Hebrew National plant and landed a contract with Waldbaum's, the city's largest grocery chain catering to Jewish households. By the middle of the 20th century, Hebrew National had become the largest, most recognized kosher brand in the United States.²⁰³

In 1965, the company launched its famous "We Answer to a Higher Authority" advertising campaign. The slogan quickly achieved its purpose, morphing into a symbol for quality and appealing to both Jews and non-Jews alike. In 1993, National Foods was acquired by huge food conglomerate ConAgra, which sought to capitalize on the Hebrew National reputation for using pure beef and disdaining artificial coloring and flavoring additives. In 2004 the company moved to a state-of-the-art kosher processing plant in Quincy, Mich. Today, with a work force of 500 people in the U. S., Hebrew National is the largest kosher meat processor in the world, producing 720 million hot dogs a year.²⁰⁴

More than one prominent Orthodox rabbi has suggested that modern *kashrut* "is two percent *halachah* and 98 percent ego and money and politics." – which might explain why many of the people interviewed for this article spoke on condition of anonymity. One of them was a small

²⁰³ See Hebrew National website, <http://www.hebrewnational.com/history/100-years.jsp>.

²⁰⁴ *Id.*

kosher caterer who said, “You’ll never get the full skinny on *kashrut* supervision,” thus intimating that political and monetary considerations are paramount to candor.²⁰⁵

Insuring the *kashrut* of meat is a complicated process, from the relatively simple strictures provided in the Torah to the detailed practices that have been interpreted and promulgated by rabbinic scholars over the centuries. Although disputes among Orthodox authorities about precise interpretations of *halachic* parameters have existed for ages, most will agree that there is a well-defined objective standard. Meat below this baseline is un-kosher; above it, kosher.²⁰⁶

By the 1930s there were hundreds of butchers in every major American city who called themselves kosher. But some religious historians view this time period as “a golden era for cheaters.” Rabbis in Baltimore took out an ad in the local Jewish newspaper appealing to Jewish housewives not to rely on the Hebrew sign on a butcher shop that read “Kosher.” At the bottom of the notice was a message in Yiddish: “Koift nisht fun die chislars!” (“Don’t buy from the cheaters!”). In one incident, “genuine” kosher hot dogs were imported from New York and widely consumed, until it was discovered that they were not kosher at all.²⁰⁷

In fact, there seemed to be a never-ending series of *kashrut* scandals at the time, many involving leading rabbis. Much of this was reported in the New York Times and later catalogued in a book by Harold Gastwirt titled *Fraud, Corruption, and Holiness: The Controversy Over The Supervision of Jewish Dietary Practice in New York City, 1881-1940* – a kosher version of Upton

²⁰⁵ {Interviews with Author.}

²⁰⁶ See Judaism 101, “Kashrut: Jewish Dietary Laws,” available at – <http://www.jewfaq.org/kashrut.htm>.

²⁰⁷ Lasson, *supra* note 192.

Sinclair's classic 1906 muckraking of the meatpacking industry, *The Jungle*.

Which kosher agency is considered the most reliable? It's hard to get a definitive answer from anyone who has a stake in the business – but most will agree that what it boils down to is a matter of trust. The faith that many strictly Orthodox kosher consumers rely upon is that vested in their local rabbis, many of whom in turn appear to be more subject to peer pressure than knowledgeable about the technicalities of *kashrut*.

It's been almost a decade since Hebrew National decided to change from its longtime in-house kosher quality control to an independent supervisory authority. It chose the Triangle K, to put into place the strict standards required by *halachah*.²⁰⁸

Of the major brands under Triangle K supervision (which include Sunmaid, Minute Maid, Wonder Bread, Del Monte, Frito-Lay, Mogen-David, Birds Eye, Ocean Spray, Hawaiian Punch and Mott's), Hebrew National presents the most complicated logistics. It took Rabbi Ralbag two years to set up Triangle K's certification process for Hebrew National. It's a huge operation. To

²⁰⁸ For the credential-minded – who seem to make up a large part of the observant Orthodox community – Triangle K is operated by the Ralbag Family. Rabbi Jehoseph H. Ralbag, the chief kosher supervisor of the organization, was born in Jerusalem, where he studied at the Yeshivas Etz Chaim and Merkaz Harav. Rabbi Ralbag is proud to note that he received rabbinical ordination “with the highest honors (Yore Yore Yodin Yodin),” by the most pious rabbis of the Holy Land: Rabbi Iser Zalman Meltzer (rosh yeshiva of Yeshivas Etz Chaim); Rabbi Yacov Moshe Charlap (rosh yeshiva of Merkaz Harav); and Rabbi Hirsh Pesach Frank (chief rabbi of Jerusalem). Rabbi Ralbag is presently the spiritual leader of Congregation Bnai Israel in New York City. He is the author of the “Sefer Imre Yehosef,” a scholarly book on Jewish law, and has published numerous articles on various Torah subjects. He is also the kashrut consultant of the magazine *The Synagogue Light*, and is an executive member of the Union of Orthodox Rabbis of the United States and Canada.

The everyday operations of Triangle K Kosher Supervision and Certification are currently overseen by Rabbi Aryeh L. Ralbag and his two sons (Rabbis Eliezer and Tzvi Ralbag). Like his father, Aryeh Ralbag received a high-order ordination in Jerusalem. He heads the *beit din* (rabbinical court) on the Agudath HaRabbonim, the Union of Orthodox Rabbis of the United States and Canada, and is also chief rabbi of the Orthodox community in Amsterdam.

keep the supply of meat flowing requires four slaughtering houses, one salting facility and a central processing plant – all under round-the-clock rabbinical supervision.²⁰⁹

Soon after Triangle K took over in 2004, the top lawmaking body of the Conservative movement issued its seal of approval for all Hebrew National meat products. The decision was supposed to have a large impact on religiously observant Conservative Jews, especially those living in smaller communities with limited access to kosher food. The number of Conservative customers account for only a small share of the kosher market.

Orthodox Jews, however, continued to stay away in droves, for reasons that appear to be largely bound up in rumor, innuendo, and ambiguity. Many ostensible adherents to strict halachah consider Triangle K to be “unreliable.” Others refrain from buying Hebrew National because its meat is not “*glatt* kosher.”

“Glatt” or Not?

The literal meaning of “glatt” is “smooth.” The term “glatt kosher” is used to describe a more expensive and complicated form of rabbinical supervision that requires the lungs of a ritually slaughtered animal to be smooth, and carefully scrutinized for imperfections. If none are found, the animal is considered “glatt.” Minor imperfections, however, do not render it unkosher. This too is a subject of some controversy: a number of rabbinic experts feel that the term *glatt* is overused and has become more a marketing tool than guarantee of superior purity. Relatively few animals,

²⁰⁹ “Our *mashgichim* are carefully selected, scrutinized and regularly tested for their knowledge of constantly changing technology,” according to Rabbi Ralbag. “They are all God-fearing men who learn every night; all are well-paid and work three-day weeks, with substantial rest periods,” he said. {Interview with author.}

they say, truly meet the standard.²¹⁰

At the time Hebrew National switched to Triangle K, the Jewish newspaper *The Forward* editorialized that, although the stricter glatt standards “could help put an end to the string of urban legends and sordid explanations for why Orthodox Jews won’t consume [Hebrew National’s products], for a variety of sociological and religious reasons, the decisions are unlikely to translate into a significant increase in sales.” That prediction has proven largely accurate.

But *glatt* continues to mean different things to different people. “What’s glatt in Cleveland might not be glatt in Baltimore,” according to one Orthodox *mashgiach* who works for several kosher certification organizations. “Many people follow the higher glatt standard,” says Rabbi Moskovitz, “but there’s nothing wrong with Rabbi Ralbag’s hashgachah. Hebrew National has to overcome some problems with its historical reputation.” Moreover, there are many Orthodox Jews – especially in smaller Jewish communities around the country – who do not limit themselves to glatt kosher meat but still consider themselves strictly kosher.²¹¹

In fact the term “glatt” has become diluted into a marketing tool, and is now applied to all manner of food having nothing whatever to do with smooth lungs in kosher cattle. So the consumer may see a “Glatt Kosher” label on everything from airline meals that contain no meat to

²¹⁰ See “What Is Glatt?,” available at <http://www.kosherveyosher.com/old-world-kashrut-1263.html>.

²¹¹ The head of the Orthodox Union’s kashrut department, Rabbi Menachem Genack, told *The Forward* that while the OU once certified both *glatt* and non-*glatt* meat, in the 1970s “market conditions” caused the organization to limit its supervision only to the former. Josh Nathan-Kazis, “Kosher Meat Still Slaughtered Inhumanely,” available at – <http://forward.com/articles/144037/kosher-meat-still-slaughtered-inhumanely/>, “I’d love to make Hebrew National all glatt kosher,” says Rabbi Ralbag, “but there simply isn’t a large enough supply of meat in the world that would satisfy the traditional truly glatt standard and demand.” {Author’s files.}

pizza (“Glatt Dairy”) and fruits and vegetables (“Glatt Pareve).”²¹²

Queried about the *kashrut* of Hebrew National, a spokesperson for the OU said that “we do not comment on other kosher certifications.” The response was different, however, from the “Kashrut Hotline” of the Baltimore-based Star-K organization. “You should not eat Hebrew National.” When asked why, she said the Triangle K “is not considered reliable.”

The standard tag-line placed by Star-K and others on products they deem unkosher is “Not Recommended” – a term ostensibly used to avoid corporate lawsuits for restraint of trade or defamation of trademark.²¹³

Rabbi Aron Abadi, who publishes an influential website about *kashrut*,²¹⁴ speaks bluntly about the multimillion-dollar kosher supervision business. “You want to do business in this industry, you need to follow the rules of the ‘Kashrut Mafia,’” he said. “Most are just businesses with a touch of religion. Just enough to use it to bully us into following their program. Ask anyone in the food industry. They know. Try getting an outside *hashgachah* in an area that is already someone’s turf.

“Do you remember when Drakes [a widely marketed brand of snack cakes] was under Rabbi Rabbag?” asks Rabbi Abadi. “It was *treif* [unkosher] according to some of these guys. Then the establishment organization got the account, now it’s kosher. Do you think they went out and kashered the whole plant [and] changed all the ingredients?”²¹⁵

²¹² Samples of such packaging are in Author’s files.

²¹³ See “When Is Not Approved Not Kosher?” at Pitputim, available at – <http://pitputim.wordpress.com/2012/03/26/when-is-not-approved-not-kosher/>.

²¹⁴ Kashrut.org., available at <http://kashrut.org/>

²¹⁵ The intimation, of course, was no. *Id.*

He is likewise dismissive of the case against Hebrew National. “I will ignore the lawsuit. As long as Rabbi Ralbag or any of his sons are involved there, you can be sure it is no problem. They never wanted him to succeed in the *kashrut* industry. This is an old war.”²¹⁶

Indeed various Orthodox authorities summarily banned Coca-Cola when it was supervised by Triangle K in the early 1990s – but immediately accepted it as kosher the moment it was taken over by the OU (without any change in formula or processing). For his part, Rabbi Ralbag has nothing negative to say about other kosher authorities, except to refer obliquely them with an old quote: “I think it’s sometimes more important what comes out of someone’s mouth than what goes into it.”²¹⁷

A small kosher caterer who requested anonymity said, “You’ll never get the full skinny on *kashrut* supervision” – intimating that political and monetary considerations are paramount to candor. But trustworthiness can be very subjective. The same Orthodox Baltimoreans who believe that the Triangle K is not reliable because of past indiscretions broadly accept the Star-K, even though that agency once certified a local non-Jewish caterer that served *treif* food on a “kosher” cruise.

The OU and Star-K have had numerous disputes over specific products. Each, for example, has had a policy prohibiting caterers under its supervision from using meats certified by the other. Fans of kosher hot dogs might find this policy particularly egregious. Caterers under the Star-K are

²¹⁶ *Id.*

²¹⁷ {Interview with Author.}

currently forbidden to serve several brands of hot dogs that are under OU supervision.²¹⁸

In May of 2012 ConAgra Foods was sued by a group of former employees who contended that hot dogs and other products sold under its Hebrew National brand are not kosher. According to the complaint, packages with a “Triangle K” symbol represent that the contents are kosher “as defined by the most stringent Jews who follow Orthodox Jewish law.” The lawsuit alleged that the slaughtering process used fell short of the standards necessary to label Hebrew National products as kosher. As a result, said the plaintiffs, ConAgra had misled consumers and was able to charge premium prices.²¹⁹

In August 2012 ConAgra moved to dismiss the suit. “The allegations in the complaint regarding AER are completely and utterly false,” said a spokesman for the company. Besides claiming that the lawsuit had not factual merit, ConAgra’s motion argued that the word kosher is “exclusively a matter of Jewish religious doctrine,” and that under the First Amendment, “federal courts may not adjudicate disputes that turn on religious teachings, doctrine and practice.”²²⁰

²¹⁸ Star-K also bans sauerkraut marketed with the OU seal – although it will use sauerkraut that is under KAJ supervision. Consumers calling the Star-K’s kosher hotline are told that “we don’t have information” on those products. When asked if they can be used, the receptionist says, “I guess not,” or “We don’t recommend them.”

²¹⁹ The case is *Wallace et al v. ConAgra Foods Inc*, U.S. District Court, District of Minnesota, No. 12-01354. The class-action suit, filed by consumers who do not keep kosher and many of whom appear to be non-Jews, is based solely on the premise that the beef used in Hebrew National products is not “100% kosher.” Zimmerman Reed, an Arizona-based law firm with offices in Minnesota, solicited consumers through its website. The firm advertised a free case review for anyone who purchased Hebrew National hot dogs in the past two years or had information about the preparation of the products. The suit is seeking monetary damages equal to the total amount of monies that consumers in the class paid for Hebrew National meat products.

²²⁰ Triangle-K, the Brooklyn, N.Y.-based supervising agency that certifies Hebrew National products as kosher, and AER, which provides the kosher slaughtering services at Hebrew National facilities in the Midwest, including in Minnesota, also rejected the allegations, blaming the

“This is an invisible fraud,” said a lawyer for the plaintiffs. “How does a consumer who thinks he is buying kosher meat really know he is buying kosher meat? It’s a very, very difficult thing for a consumer to detect, unless someone investigates.”²²¹

{add result of hearing on motion to dismiss consumer fraud case against Hebrew National, scheduled for Nov. 30 in U.S. District Court in Minneapolis?}

Fish

The Talmud states that insects and worms that are found in the bellies of fish are prohibited, while those found in the flesh are permitted. Early commentators have explained that insects found in stomachs are presumed to have been swallowed by the fish; those found inside the flesh itself, though, are grown inside the fish.²²²

Recent studies by marine biologists, however, suggest that insects found in the flesh of fish were initially swallowed by smaller fish and later eaten by the larger fish; the insects eaten by the smaller fish subsequently penetrate the flesh of the larger fish. According to this analysis it would seem that the insects found inside the flesh should be prohibited since they are organic creatures

anonymous allegations on former slaughterhouse employees who had been fired for cause. Neither Triangle K nor AER were named in the lawsuit.

²²¹ See Audrey Yoo, *Hebrew National’s Hot Dogs Aren’t Actually Kosher, Claims Lawsuit*, TIME NEWSFEED, available at <http://newsfeed.time.com/2012/06/19/hebrew-nationals-hot-dogs-arent-actually-kosher-claims-lawsuit/>.

²²² Mature insects swallowed by fish are considered *sheratzei hayam* and are prohibited, while insects grown inside the flesh are not considered *sheratzei hayam* and are permitted until they exit the fish into the ocean. The Shulchan Aruch (Yoreh Deah 84:16), in accordance with these principles, rules that all insects found in the *bellies* of fish are prohibited, while those found inside the *flesh* are permitted. See Tractate Chullin (67b), http://oukosher.org/index.php/common/article/is_this_worm_kosher_the_kashrus_of_tolayim_in_fish/.

not originating from inside the flesh of the fish – thus creating a factual conflict with the Talmudic rule permitting insects found in the flesh of the fish.²²³

The conflict has generated considerable debate among modern rabbis. One argument is that, since the source of the insects cannot be determined, all fish with them should be avoided.²²⁴ But many rabbis, both in Israel and the United States, have taken the position that current scientific evidence cannot be accepted if it conflicts with Talmudic teachings.²²⁵

But Rabbi Moshe Feinstein, perhaps the leading decisor of the Twentieth Century, took a more lenient position. He reasoned that insects found in the flesh of fish are very small and are often not noticeable to the naked eye; thus they would still not be considered prohibited until they exit the fish into the ocean.²²⁶

In recent years there has been much controversy among kosher supervisory agencies concerning fish parasites. Specifically, a worm called *anisakis* has been found in certain species of seafood, leading prominent Israeli rabbis to prohibit their consumption in the absence of

²²³ *Id.*

²²⁴ This argument, proposed by Shmuel Vosner (Shevet HaLevi 4:83), speculates that perhaps the gemara's mention of "darna" is referring to a specific type of insect. Nowadays though since we cannot distinguish which insects are considered "darna" we should assume that they are all prohibited, even when found in the flesh of fish. Nevertheless, Rabbi Vosner acknowledges that neither the Tur nor the Shulchan Aruch distinguish between different species permitting all insects found inside the flesh without restriction ²²⁴ Rabbi Vosner's explanation thus does not fully resolve the seeming contradiction. However, in 1997, Rabbi Yosef Shalom Elyashiv was quoted as accepting the testimony of marine biologists, but limited only to very specific instances when scientific evidence supports that the insects entered the fish from the ocean. This would not contradict Chazal, since Chazal never stated that it is impossible for insects from the ocean to become lodged in the flesh of fish (see Bedikas HaMazon KeHalacha Volume I, pp. 112). *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

thorough prior inspections. Most kashrus agencies internationally have been lenient on this topic, consistent with the simple reading of the *Shulchan Aruch*. To date, however, *kashrus* authorities have yet to issue policies and procedures for proper inspections.²²⁷

Modern technology has generated even more intense scrutiny, which has ostensibly created a whole new range of foods Orthodox Jews can or cannot eat -- but only through paying inflated prices for special kosher brands.²²⁸

The Orthodox Union (OU) brought samples of canned sardines to a parasitologist at the American Museum of Natural History to determine through DNA testing if worms found in those cans come from the intestinal tracts of the fish or from worms located in the flesh itself. The testing concluded that the worms originated in the flesh of the fish. The OU thus now regards canned sardines with proper supervision to be kosher.²²⁹

Summary and Conclusion

Prior to the Twentieth Century adherence to the Biblical dietary laws presented relatively few quandaries for the observant consumer. Milk and meat were taken directly from the farm, and were separated in the kitchen and dining room. But with the advent of packaged food and the

²²⁷ Star-K Kosher Certification issued a list of species that are “not recommended” (i.e., not considered kosher). They include butterfish, cod, flounder, hake, halibut, pollack, red perch, red snapper, sable, and turbot, as well as certain kinds of smoked salmon, sardines, scrod, sole. Those that are deemed acceptable, even without special inspection, include specific brands of carp, flounder, fluke, herring, pike, pollock, salmon, sardines, sea bass, striped bass, tilapia, trout, tuna, whitefish, and whiting. See <http://star-k.org/cons-vegdetail.php?ID=74>.

²²⁸ *Id.*

²²⁹ *Id.*

development of refrigeration and transportation systems, the rules became harder to apply. Supervision by individual rabbis and slaughterers eventually gave way to oversight by large certification agencies. The government stepped in to prevent fraudulent advertising and sales of kosher products, by way of legislation and litigation, eventually pursuing its legitimate interest in consumer protection by adopting narrowly-tailored mandatory disclosure statutes – which require vendors who claim that a product is kosher to show the basis for that claim. The state thus need not involve itself in deciding the theological questions inherent in determining whether a particular food is kosher.²³⁰

The consumer should be able to determine, upon his own initiative, whether or not the product satisfies his particular religious requirements. That task is made more difficult, however, by the big-business culture of modern kosher certification, with its attendant aspects of competition, control, clashing egos, and profits.

Sacred cows have given way to holy wars – the resolution of which may have to wait for Messianic times.

²³⁰ See Popovsky, *supra* note 112 at .