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# SACRED COWS, HOLY WARS: Exploring the Limits of Law in the Regulation of Raw Milk and Kosher Meat

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**SACRED COWS, HOLY WARS**  
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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.”<sup>1</sup> 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, 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

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<sup>1</sup> *Zorach v. Claiborn*, 343 U.S. 306, 318 (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* 5(1859).

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 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 trademark infringement laws.<sup>2</sup>

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 lucre<sup>3</sup> that goes far beyond your

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<sup>2</sup> See *infra* Section II.

<sup>3</sup> “Filthy lucre” is 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 “Filthy Lucre,” DICTIONARY.COM <http://dictionary.reference.com/browse/filthy+lucre> (last visited Feb. 10, 2013).

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.

### 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.<sup>4</sup> The basic rules are found in the Torah, and have evolved through rabbinic interpretation and elaboration over the past fifteen hundred years.<sup>5</sup>

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<sup>4</sup> 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 *halacha*. See *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 418 (2d Cir. 2002). “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 ed. 2007).

<sup>5</sup> *Leviticus* 11:3–31 & 17:10; *Deuteronomy* 12:21 & 14:12–21; *Exodus* 22:31. For a comprehensive catalogue of Talmudic references to the dietary laws, see

### *Religious Injunctions*

The Jewish dietary laws are first mentioned in the Book of Exodus. According to some 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 were used for food).<sup>6</sup>

The rules of *kashrut*, or the food that may be consumed under Jewish law, 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).<sup>7</sup>

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*Kashrut/Dietary Laws, tary Laws*, WEBSHAS, <http://www.webshas.org/kashrus/index.htm> (last visited Feb. 10, 2013).

<sup>6</sup> 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, *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. See generally *id.* In that era of heightened ethical awareness, concern for the welfare of animals will be renewed. See generally *id.* For an example of nullification, see for example *e.g.*, *infra* note 20.

<sup>7</sup> *Leviticus* 11:3; *Deuteronomy* 14:6.

<sup>8</sup> *Leviticus* 11:9; *Deuteronomy* 14:9

<sup>9</sup> Thus, all manner of shellfish are prohibited. *Leviticus* 11:12–21; *Deuteronomy* 14:12–20.

Scripture provides that all kosher mammals must have split hooves and chew their cud.<sup>8</sup> Fish must have both fins and scales.<sup>9</sup> Some twenty-four birds are prohibited<sup>10</sup> – all others are permitted.<sup>11</sup> While the Bible does not explicitly enumerate features of non-kosher animals, they are provided by oral tradition.<sup>12</sup> One well-known rule is the categorical prohibition against a bird that treats its food like a bird of prey.<sup>13</sup> Similarly, the Old Testament categorically prohibits the consumption of virtually all insects and rodents, with the solitary exception of one type of grasshopper.<sup>14</sup>

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.<sup>15</sup> Similarly forbidden is the consumption of blood from either fowl or mammal,<sup>16</sup> as well

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<sup>9</sup>Thus, all manner of shellfish are prohibited. *Leviticus* 11:12–21; *Deuteronomy* 14:12–20.

**Error! Main Document Only.**<sup>10</sup>*Leviticus* 11:13–21; *Deuteronomy* 14:12.

<sup>11</sup>*Deuteronomy* 14:11.

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

<sup>13</sup>*Leviticus* 11:41–42.

<sup>14</sup>*Id.* at 11:20–22.

<sup>15</sup>*Genesis* 32:32. See also Ari Z. Zivotofsky, *What's the Truth about . . . Nikkur Achoraim?*, OUKOSHER <http://oukosher.org/blog/consumer-kosher/whats-the-truth-about-nikkur-achoraim/>

as certain organs, under the penalty of excommunication.<sup>17</sup>

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.<sup>18</sup> According to Sinaitic tradition, the verse is not to 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

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(last visited Feb. 10, 2013) (explaining the background and sources underlying the customs of NikkurAchoraim, not eating from animal’s hindquarters).

<sup>17</sup> JUDITH J. SLOTKI, THE BABYLONIAN TALMUD (Rabbi Dr. I. Epstein ed., 1st ed. 1952). Babylonian Talmud, Kerisus 20 – 20b. Kosher animals may be 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 may be 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 Sinaitic 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) the brain and spine; (2) the jaw bone and food pipes; (3) air pipes and lungs, with their organs; (4) heart; (5) liver and gall, milt, kidney and bladder; (7) intestines, and four stomachs; and (8) limbs and ribs. See OXFORD DICTIONARY OF THE JEWISH RELIGION, 732–33 (2d. 2011).

<sup>18</sup> *Exodus* 23:19 & 34:26; *Deuteronomy* 14:21.

<sup>19</sup> *Id.*

cooking, eating, and deriving benefit from the mixture.<sup>19</sup>

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.<sup>20</sup>

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 *ShulchanAruch*,<sup>21</sup> according to the type of food that may be consumed and the method of its preparation. Certain parts of otherwise kosher animals are forbidden, such as the sciatic nerve located in the hindquarters of meat, as well as eating meat and dairy products together.<sup>22</sup> Moreover, pork all pork and shellfish products are categorically prohibited. There are also rules governing food preparation, which are equally strict.<sup>23</sup>

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<sup>20</sup> *Rov*, or simple majority, is applicable when there is a problem of identification. For example, when one piece of non-kosher meat is placed among two pieces of kosher meat, it is considered to be kosher. 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 (Nosson Scherman & Meir Zlotowitz ed. 1993).

<sup>21</sup> Also known as the Code of Jewish Law, the *ShulchanAruch* is the most authoritative legal code of Judaism. It was compiled in the Israeli town of Safed, and published in 1563 in Venice. See *SchulchanAruch*, TORAH.ORG, <http://www.torah.org/advanced/shulchan-aruch/>. See also SCHULCHANARACH.COM, <http://www.shulchanarach.com/> (last visited Jan. 25, 2013).

<sup>22</sup> *Exodus* 23:19.

<sup>23</sup> These rules are discussed in greater detail below with certification and supervision requirements. See *infra* note 96 and accompanying text.

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

In Islam, the guidelines are derived from the Qur'ān. As with kosher laws, the 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.<sup>24</sup>

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.<sup>25</sup>

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*, which is purifying to the mind and not irritating to the stomach. *Sattvic* food consists mostly of

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<sup>24</sup> Enunciating this blessing at the point the animal yields its life is the single most important aspect of *halal*. Shaukat A. Ameen, *Is the meat of Ahl-al-Kitab Halal?*, COMETOISLAM.COM, <http://www.cometoislam.com/halalmeat.htm> (citing Qur'an 6:121) (last visited Feb. 10, 2013).

<sup>25</sup> *Id.* Despite the similarities discussed above *between* kashrut 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 (2006).

fruits, nuts, whole grains, and vegetables, which are believed to produce calmness and nobility, and are said to produce an “increase in one’s magnetism.”<sup>26</sup>

### *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 Portuguese Jew applied for a license to sell kosher meat in New Amsterdam.)<sup>27</sup>

In the latter part of the Eighteenth Century, an internecine *kashrut* controversy developed between two noted rabbis who had differing views of what constitutes scales on fish. The widely accepted view was 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 could be removed through the use of a tool or the soaking in an abrasive liquid.<sup>28</sup> That lenient

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<sup>26</sup> See SURESH CHANDRA, *ENCYCLOPEDIA OF HINDU GODS AND GODDESS* 124 (Sarup & Sons, eds. 1998). See also Gihan El Gindy, *Hindu Dietary Practices: Feeding the Body, Mind and Soul*, MINORITY NURSE, <http://www.minoritynurse.com/dietic/hindu-dietary-practices-feeding-body-mind-and-soul> (last visited Feb. 10, 2013).

<sup>27</sup> E. EIDLITZ, *IS IT KOSHER?: ENCYCLOPEDIA OF KOSHER FOODS, FACTS AND FALLACIES* 31–33 (5TH ED. 2004).

<sup>28</sup> See SOLOMON B. FREEHOF, *THE RESPONSA LITERATURE* 161–66 (1955). 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. See *id.* 161–66 (1955 Jewish Publication Society of America).

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.<sup>29</sup>

The first recorded complaint regarding the sale of non-kosher meat against a *shochet*, or ritual slaughter, was in 1771 against the “*Shochet Moshe*.” There was another complaint that a *shochet* was selling non-kosher meat in 1774. This led to the first court case involving *kashrut*, which resulted in the invalidation of the license of a kosher butcher.<sup>30</sup>

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 suit, which eventually led to a rapid decline in the standard of *kashrut* in America.<sup>31</sup>

In the early part of the Nineteenth Century, a number of Jewish communities were in disarray as 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.<sup>32</sup>

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<sup>29</sup> See BOAZ COHEN, LAW AND TRADITION IN JUDAISM, 98 (1959); see also Jay Berkovitz, *Historicizing Orthodoxy*, AJS PERSPECTIVES (Spring 2008) at 12–14.

<sup>30</sup> See Eidlitz, *supra* note 27 at 31.

<sup>31</sup> See *supra* note 27 and accompanying text.

<sup>32</sup> See generally TIMOTHY D. LYTTON, KOSHER: PRIVATE REGULATION IN THE AGE

In 1840 the first ordained rabbi, Abraham Rice of Bavaria, arrived 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 NidcheiYisroel in Baltimore. He was a learned old-school rabbi and an uncompromising opponent of Reform Judaism.<sup>33</sup>

Rabbi Rice urged upon American Jews “the great importance of selecting a spiritual chief . . . for the purpose of regulating our spiritual affairs’ [because 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.”<sup>34</sup> His constant battle against assimilation and lax observance of the Sabbath and of *kashrut* brought him into conflict with many of his congregants.<sup>35</sup>

In 1863, a group of laymen and *shochtim* tried unsuccessfully to form an organization that

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OF INDUSTRIAL FOOD (Harvard University Press, 2013).

<sup>33</sup>See generally generally HAROLD SHARFMAN, *THE FIRST RABBI* (Pangloss Press, 1988). See also Rice, Abraham, JEWISH ENCYCLOPEDIA, <http://www.jewishencyclopedia.com/articles/12738-rice-abraham> (last visited Feb. 10, 2013). (The Touro Synagogue in Newport, Rhode Island, remains the oldest synagogue in America. See *History & Learnings*, TOUROSYNAGOGUE.COM, <http://www.tourosynagogue.org/index.php/history-learning/synagogue-history>).

<sup>34</sup>See Shmuel Singer, *From Germany to Baltimore: The First Rabbi to Hold a Position in the United States*, in *THE TORAH PERSONALITY* 250 (Nisson Wolpin ed. 1980).

<sup>35</sup>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 (Nov. 4, 2009).

would improve and maintain *kashrut* standards.<sup>36</sup> By 1887, however, several Orthodox congregations had joined together, and the newly created Association of American Orthodox Hebrew Congregations appointed Rabbi Jacob Joseph of Vilna, Lithuania for the same purpose, to implement *kashrut* standards in America.<sup>37</sup>

In July of 1888 Rabbi Joseph, as the first Chief Rabbi of New York, arrived in the port town of Hoboken, New Jersey. Shortly thereafter he began the daunting task of organizing New York's kosher meat business, which he felt needed more supervision and stricter standards. To cover the cost of the supervisors (*mashgichim*) he had hired to implement these changes, one cent was added to the price of every bird killed in the slaughterhouses under the Chief Rabbi's purview. In order to indicate the chicken had been approved by a kosher supervisor, these supervisors also affixed a lead seal (*plumba*) to the poultry, bearing the Chief Rabbi's name: "Harav Hakollel R' Yacov Yoseph."<sup>38</sup>

But the new stricter standards were not embraced by many butchers and *shochtim*, and some rabbis feared the loss of income they had been receiving for *kashrut* supervision. The practice was also criticized by the Yiddish press, claiming it smacked of price-gouging, like the hated state tax on kosher meat imposed in Pale of the Settlement.

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<sup>36</sup> Eidlitz, *supra* note 27 at 31.

<sup>37</sup> See SUE FISHKOFF, *KOSHER NATION: WHY MORE AND MORE OF AMERICA'S FOOD ANSWERS TO A HIGHER AUTHORITY* 60 (2010). See also HOWARD SACHAR, *HISTORY OF JEWS IN AMERICA* 191 (1992).

<sup>38</sup> See SACHAR, *supra* note 37, at 60.

Meanwhile, no one paid the tax. “Kosher price gouging” thus became a slogan in the non-Orthodox and radical press. The weekly *Der Volksadvokat* published a poem on its front page which spoke of “Orthodox chickens . . . dancing [while] wearing shiny lead plumbas [so] that the Chief Rabbi will live on a fat salary.”<sup>39</sup> Chassidim from Galicia appointed their own “Chief Rabbi of America”; Ukrainian Chassidim followed suit.<sup>40</sup>

Public meetings were staged against Rabbi Joseph by unhappy “religious officials,” contending that they had neither chosen nor accepted him as their Chief Rabbi. In the spring of 1895, the retail butchers joined forces to reject entirely the Chief Rabbi’s supervision, leaving him virtually powerless.<sup>41</sup> Two years later the *shochtim* themselves joined together to form a union called “Melech Hakodesh,” ostensibly to improve *kashrut* standards and to advocate for higher wages.<sup>42</sup> Some Orthodox congregations that 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 Yiddish paper *Forverts*, he had become a “sacrificial offering

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<sup>40</sup> See Shmuel Singer, A Chief Rabbi for New York, <http://tzemachdovid.org/gedolim/jo/tpersonality/rjj.html> (last visited April 29, 2013).

<sup>41</sup> *Id.* See also Sachar, *supra* note 37 at 192.

<sup>42</sup> The Galicians chose Joshua Segal; the Ukrainians chose Chaim Vidrowitz. See Sachar, *supra* note 37 at 192.

<sup>43</sup> Sachar, *supra* note 37, at 193. After Rabbi Joseph took ill he remained bedridden until his death on July 28, 1902, at the age of 59.

to business-Judaism.”<sup>43</sup>

Despite Rabbi Yosef’s efforts, *Kashrut* supervision soon fell into the hands of food processors and distributors, butchers, and slaughterhouse owners, not to mention “rabbis” of dubious qualifications who were clearly more interested in profits that could be had at the hands of the kosher consumer. The industry was also infiltrated by corrupt labor-union bosses as well as organized crime. For the few honest rabbis who struggled to maintain *kashrut* in their communities, it was often a bruising and losing battle.<sup>44</sup>

Chicago had a similar experience. In September 1903, Rabbi Jacob David Wilowsky was publicly installed as Chief Rabbi of the Chicago Orthodox Congregations. Like Rabbi Joseph in New York, Rabbi Wilowsky was critical of the kosher butchering practices he saw in Chicago and immediately embarked upon upgrading the city’s *kashrut* standards. In short order he got into a big dispute with the reigning *kashrut* supervisor in Chicago; a predictable uproar followed, . In the summer of 1904, just a year after he arrived, Rabbi Wilowsky resigned his position and left Chicago.<sup>45</sup>

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<sup>44</sup> See Beryl Wein, *The Voice of Jewish History*, at RabbiWein.com, <http://www.rabbiwein.com/blog/rabbi-alexander-rosenberg-the-truly-kosher-jew-357.html>.

<sup>45</sup> See generally Aaron Rothkoff, *The American Sojourns of Ridbaz*, 57 AJHS QUARTERLY 557 (1968).

*From Community Regulation to Big Business*

*Kashrut* in America had by now become big business. Though kosher meat cost more, the market for it increased dramatically in the early Twentieth Century. By 1917 American Jews were consuming well over 150 million pounds of kosher meat annually. Non-meat products labeled as kosher were also beginning to appear in the broader American market. A chemist named Abraham Goldstein was instrumental in persuading both importers and domestic food processors to add kosher certifications. In 1924 the Union of Orthodox Congregations (or “OU,” which had been founded in 1892 as a national Jewish outreach organization) entered the supervisory business. Goldstein was appointed as its first director.<sup>46</sup>

Unlike in Europe, however, which had a central *kashrut* authority, U.S. butchers and slaughterhouses engaged their own “rabbis” as supervisors. The arrangement was lucrative for all, but standards were lax. By some estimates possibly half of all meat sold as kosher was in fact not kosher.<sup>47</sup>

In May of 1928, an editorial in a Jewish journal discussed how American *shochtim* had

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OF NEW YORK CITY, THE JEWISH COMMUNAL REGISTER OF NEW YORK CITY 1917-1918, 312–17 (2d ed.).

<sup>46</sup> **Error! Main Document Only.**EIDLITZ, *supra* note 27 at 32. Goldstein held his post until 1935, when he started a new certifying agency, the Organized Kashrut Laboratories (“OK”). *Id.*

<sup>47</sup> SACHAR, *supra* note 37 at 192. Unlike the governments of Europe, federal and local governments in the U.S. would not attempt to interfere with these religious affairs. *See id.* For an interesting snapshot of *kashrut* in New York in the early Twentieth Century, *see* **Error! Main Document Only.**OF NEW YORK CITY, THE JEWISH COMMUNAL REGISTER OF NEW YORK CITY 1917-1918,312–17 (2d ed.).

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.<sup>48</sup>

Tensions between rabbis and private *shochtim* continued to abound 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 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!<sup>49</sup>

Rabbi Levenberg experienced great difficulties in trying to enforce the traditional rules of *kashrut*, becoming embroiled in an ugly battle of greed and power, especially when evidence emerged of racketeering among local butchers. After the bombing of a local poultry market he was wrongly arrested and briefly jailed. The Cleveland City Council eventually apologized for the

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<sup>48</sup> Sachar, *supra* note 37 at 390.

<sup>49</sup> AARON RAKEFFET-ROTHKOFF, *THE SILVER ERA* (1981) at 136. **Error! Main Document Only.**The letter was dated September 26, 1932. *Id.* at 153.

mistake, but the experience left Rabbi Levenberg ill and depressed.<sup>50</sup>

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. Over time, things slowly began 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.<sup>51</sup>

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 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

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<sup>50</sup> *Id.* at 147.

<sup>51</sup> *Id.* at 137-139. **Error! Main Document Only.** 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.*

on all those who did not comply.<sup>52</sup>

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.<sup>53</sup>

Organized supervision under the OU did not begin to reach its full flower until the mid-Twentieth Century, with the advent of Rabbi Alexander Rosenberg as the group's rabbinic administrator. According to one Jewish historian, Rabbi Rosenberg "combined within himself old-world charm, a shrewd understanding of people and their true motives, an uncanny business sense, unimpeachable integrity, enormous compassion for individuals and a sense of public service that always allowed him to see the big picture and not just the narrow case in front of him."<sup>54</sup>

Descended from a long line of distinguished Hungarian rabbis, Rabbi Rosenberg was an accomplished scholar who envisioned the day that a Jew could walk into almost any supermarket in North America and purchase kosher food, supervised by the OU. He understood the problems of mass food production, but would not allow compromises in kosher standards. It was he who

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<sup>52</sup> *Id.* at 147.

<sup>53</sup> Beryl Wein, *Rabbi Alexander Rosenberg, The Truly Kosher Jew*, RabbiWein.com, <http://www.rabbiwein.com/blog/rabbi-alexander-rosenberg-the-truly-kosher-jew-357.html>.

impressed upon major American food companies such as Colgate-Palmolive, H.J. Heinz, Rich's, Procter and Gamble, Best Foods and others the positive possibilities for them in kosher production and supervision – not the least of it the result of his “aristocratic manner, his handsome appearance and immaculate dress, his integrity, his wisdom and his faith that most persuaded these non-Jewish businessmen to allow qualified rabbis to control their inventories and suppliers. To them the rabbis were “blessing their machinery.”<sup>54</sup>

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.<sup>55</sup> At the same time, however, kosher consumers bore witness to the law being stretched to its limits, and perhaps beyond.

#### *Governmental Intervention and Involvement*

Although various colonial and state laws, such as setting weight standards and inspecting exports of salted meats, were enacted to regulate trade, prior to the Twentieth Century, there was virtually no federal oversight of domestically produced food. Ensuring the safety of food items was left largely to the states.<sup>56</sup>

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* The evolution of kosher certification agencies is discussed *infra* Section III.

With increasing American industrialization, technological advances had a substantial effect on the food industry.<sup>57</sup> Chemical preservatives enabled the processing of food that could then be transported across the country quickly and in large quantities.<sup>58</sup>

Meanwhile, in the 1870's, a "Pure Food Movement" advocated for laws to protect consumers against adulterated food.<sup>59</sup> But it was not until the beginning of the Twentieth Century that the federal government became seriously involved in regulating food. Even then it took the efforts of a muckraking journalist, Upton Sinclair, to stir public sentiment. His groundbreaking book, *The Jungle*, which described in graphic detail the filthy conditions of slaughterhouses in Chicago, spurred the government to action.<sup>60</sup>

Although the Pure Food and Drug Act of 1906 did not define food standards, it did prohibit the addition of "any ingredients that would substitute for the food, conceal damage, pose a health

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<sup>56</sup> See John P. Swann, *History of the FDA*, in *THE FOOD AND DRUG ADMINISTRATION* 10 (Meredith A. Hickmann ed., 2003).

<sup>57</sup> James Harvey Young, *The Long Struggle for 1906 Law*, *THE FOOD AND DRUG ADMINISTRATION* 17 (Meredith A. Hickmann ed., 2003).

<sup>59</sup> *Id.* at 17–18.

<sup>59</sup> See Wallace F. Janssen, *The Story of the Laws Behind the Labels*, in *THE FOOD AND DRUG ADMINISTRATION* 24 (Meredith A. Hickmann ed., 2003).

<sup>60</sup> **Error! Main Document Only.** LORINE S. GOODWIN, *THE PURE FOOD AND DRINK CRUSADERS* (McFarland.1999) (noting that President Theodore Roosevelt ordered "a drastic and thoroughgoing federal inspection of all stockyards, packinghouses and their products" as a result of Sinclair's book).

hazard, or constitute a filthy or decomposed substance.”<sup>61</sup> Misbranding – making “false or misleading label statements regarding a food” – was now illegal.<sup>62</sup> This law, though extensively amended in subsequent years, remains the central foundation of FDA regulatory authority to the present day.<sup>63</sup>

The 1906 Act quickly became obsolete with the rapid advances of food science and technology.<sup>64</sup> The law was amended throughout the first half of the century,<sup>65</sup> eventually coalescing into the Food, Drug and Cosmetic Act of 1938.<sup>66</sup>

The most recent effort to regulate food safety was the Food Safety Modernization Act, which was signed into law in January of 2011.<sup>67</sup> It gave the FDA authority to order a recall of food products, which (with the exception of infant formula) it had not been able to do. It allowed for more frequent inspections, thus enhancing the government’s oversight of imported foods. The law also established “science-based standards for the safe production and harvesting of fruits and

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<sup>62</sup> Swann, *supra* note 56 at 11.

<sup>62</sup> Young, *supra* note 57 at 21. The Act also prohibited “interstate and foreign commerce in adulterated and misbranded food and drugs.” *Id.*

<sup>63</sup> Most of the federal laws concerning food regulation are part of the Food, Drug and Cosmetic Act, codified in Title 21, Chapter 9 of the United States Code. Arvind Pardeshi, *Role and Function of Drug Regulatory Authorities in the Backdrop of Good Governance* 13, (Jan. 26, 2011) (unpublished LL.B. paper, Ragiv Gandhi School of Intellectual Property Law), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1748629](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1748629). See Swann, *supra* note 56.

<sup>66</sup> **Error! Main Document Only.** See Janssen, *supra* note 59, at 28.

<sup>67</sup> Food Safety Modernization Act, Pub. L. No. 111-353 (2011).

vegetables.<sup>68</sup>

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According to anthropologists, humans did not 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 9000–7300 B.C. to 3500–3000 B.C. in the Americas.”<sup>69</sup> “The most important dairy animals were first domesticated in Southwest Asia,”<sup>70</sup> where dairying was practiced “by at least the 7th millennium B.C.”<sup>71</sup>

Dairy farming spread to Europe beginning around 7000 B.C. and reached Britain and

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<sup>68</sup> Margaret A. Hamburg, *What Does the New Food Safety Law Mean for You?*, FOODSAFETY.GOV. (Jan. 5 2011), <http://www.foodsafety.gov/blog/fsma.html>. Dr. Hamburg is the Commissioner of Food and Drug Administration. The official and authoritative source of the FSMA is the version offered by the Government Printing Office (G PO), *available at* <http://www.gpo.gov/fdsys/pkg/PLAW-111publ353/pdf/PLAW-111publ353.pdf>.

<sup>69</sup> PETER BELLWOOD, *The Beginnings of Agriculture in Southwest Asia*, in *FIRST FARMERS: THE ORIGINS OF AGRICULTURAL SOCIETIES* (2005).

<sup>70</sup> Albano Beja-Pereira et al., *The Origin of European Cattle: Evidence from Modern and Ancient DNA*, 103 *PROCEEDINGS OF THE NAT’L ACAD. OF SCI.* 8113-18 (2006).

<sup>71</sup> See J.-D. Vigne & D. Helmer, *Was Milk a “Secondary Product” in the Old World Neolithisation Process? Its Role in the Domestication of Cattle, Sheep and Goats*, 42 *ANTHROPOZOLOGICA* 9–40 (2007), *available at* [www.mnhn.fr/museum/front/medias/.../12514\\_009\\_040.pdf](http://www.mnhn.fr/museum/front/medias/.../12514_009_040.pdf); R.P. Evershed et al., *Earliest Date for Milk Use in the Near East and Southeastern Europe Linked to Cattle Herding*, 455 *NATURE* 528–531 (2008), *available at* <http://www.readcube.com/articles/10.1038/nature07180>; Erika Check, *Ancient DNA Solves Milk Mystery*, *NATURE* (Feb. 26, 2007), <http://www.nature.com/news/2007/070226/full/news070226-4.html>.

Scandinavia by 4000 B.C.<sup>72</sup> “The first farmers in central Europe and Britain milked their animals.”<sup>73</sup> “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.”<sup>74</sup>

In the rest of the world, the consumption of milk and dairy products did not become common until relatively recently (probably over the last 500 years).<sup>75</sup> Today there are more than six billion milk drinkers, the majority of them in developing countries. In 2010 the world’s dairy farms produced about 720 million tons of milk.<sup>76</sup>

Cattle are considered sacred in a number of major religions, most notably Hinduism, Jainism, Buddhism, and Zoroastrianism. In some countries the slaughter of cattle is prohibited and

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<sup>72</sup> See T. Douglas Price, *Introduction to EUROPE’S FIRST FARMERS* 1, 1–18 (Cambridge University Press 2000), available at [catdir.loc.gov/catdir/samples/cam032/99015477.pdf](http://catdir.loc.gov/catdir/samples/cam032/99015477.pdf); Richard Meadow, *The Origins and Spread of Agriculture and Pastoralism in Northwestern South Asia*, *THE ORIGINS AND SPREAD OF AGRICULTURE AND PASTORALISM IN EURASIA* 390, 390–412 (David Harris ed., 1996).

<sup>73</sup> See Oliver E. Craig et al., *Did the First Farmers of Central and Eastern Europe Produce Dairy Foods?*, 79 *ANTIQUITY* 882–94 (2005); see also M.S. Copley et al., *Dairying in Antiquity. III. Evidence from Absorbed Lipid Residues Dating to the British Neolithic*, 32 *JOURNAL OF ARCHAEOLOGICAL SCIENCE* 523–546 (2005).

<sup>74</sup> J. Peters, *The Dromedary: Ancestry, History of Domestication and Medical Treatment in Early Historic Times*, 25 *TIERÄRZTLICHE PRAXIS. AUSGABE G, GROSSTIERE/NUTZTIERE* 559-65 (1997).

<sup>75</sup> *Historical Timeline: A Brief History of Cow’s Milk, from the Ancient World to the Present*, PROCON.ORG (Aug. 25, 2011), <http://milk.procon.org/view.resource.php?resourceID=000832>.

<sup>76</sup> *Food Outlook: Global Market Analysis*, FOOD & AGRICULTURE ORG. OF

their meat [(but not their milk) may be] taboo.<sup>77</sup> 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.<sup>78</sup>

Vegans do not consume dairy products. They may object to what they perceive to be inhumane treatment of cattle, such as the slaughter of the male offspring of dairy cows, the routine separation of mother and calf soon after birth, and the culling of cows after their productive lives.<sup>79</sup>

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, Dr. Harvey Thatcher of Pottsdam, New York, invented an all-glass milk bottle, which was marketed as "Thatcher's Common Sense Milk Jar." Thatcher became known as "the father of the milk bottle."<sup>80</sup>

But by the early Twentieth Century there was still virtually no government regulation of

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THE U.N. 57 (Nov. 2012), available at <http://www.fao.org/docrep/016/a1993e/a1993e00.pdf>.

<sup>77</sup> See, e.g., *The Karnataka Prevention of Cow Slaughter and Cow Preservation Act of 1964*, [http://dpal.kar.nic.in/.%5C35%20of%201964%20\(E\).pdf](http://dpal.kar.nic.in/.%5C35%20of%201964%20(E).pdf) (last visited Feb. 21, 2013).

<sup>78</sup> DEP'T OF ANIMAL HUSBANDRY, DAIRYING & FISHERIES MINISTRY OF AGRICULTURE GOVERNMENT OF INDIA NEW DELHI, ANNUAL REPORT (2011-2012), available at <http://www.dahd.nic.in/dahd/WriteReadData/Annual%20Report%20English%202011-12.pdf>.

<sup>79</sup> *The Dairy Industry*, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, <http://www.peta.org/issues/animals-used-for-food/dairy-industry.aspx> (last visited March 7, 2013).

<sup>80</sup> See Bill Lockhart, *DATING MILK BOTTLES* 11-44, 13 (2011),

dairy products in the United States, 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. Pasteurization of milk thus became the norm, and the law.<sup>81</sup>

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 regulations regarding the transport of milk and milk products.<sup>82</sup>

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Fledgling Jewish communities in the United States originally followed the European tradition of appointing kosher slaughterers – *shochtim* – who could be removed if they failed to

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available at <http://www.sha.org/bottle/pdf/oterochap2a.pdf>.

<sup>81</sup> See RODNEY CARLISLE, SCIENTIFIC AMERICAN INVENTIONS AND DISCOVERIES: ALL THE MILESTONES IN INGENUITY FROM THE DISCOVERY OF FIRE TO THE INVENTION OF THE MICROWAVE OVEN 284-85 (2004); see also Wendy Cole, *Got Raw Milk? Be Very Quiet*, TIME HEALTH & FAMILY (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).

<sup>82</sup> See *Pasteurization and Regulation of Milk in History*, LIVING HISTORY FARMS BLOG (Sept. 24, 2011), <http://livinghistoryfarms.wordpress.com/2011/09/24/pasteurization-and-regulation/>. See also Jim Phillips & Michael French, *State Regulation and the Hazards of Milk, 1900–1939*, 12 SOCIAL HISTORY OF MEDICINE 371-388 (1999), available at <http://shm.oxfordjournals.org/content/12/3/371.full.pdf+html>; Andy Weisbecker, *A Legal History of Raw Milk in the United States*, 69 JOURNAL OF ENVIRONMENTAL HEALTH 62 (April 2007), available at <http://www.marlerclark.com/pdfs/raw-milk-jeh.pdf>; Daniel A. Sumner & Joseph V. Balagtas, *United States' Agricultural Systems: An Overview of U.S. Dairy Policy*, ENCYCLOPEDIA OF DAIRY SCI

follow the strict rules laid down by the Torah as interpreted by the rabbis. In 1813 a man named Avraham Jacobs became the young nation's first independent *shochet*; many more followed in his footsteps. One result of this entrepreneurship was a decline in the standards required to ensure that 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*.<sup>83</sup> Kosher consumers once had to rely on their own level of commitment to adhere to the dietary laws – and ultimately still do. Early on they were aided by religious leaders and purveyors of meat and dairy products whom they trusted, usually co-religionists. With the advent of processed and packaged foods they followed rabbinical guidelines, but in the end had to use their own best judgment. In America, food-labeling regulations helped them make informed decisions.

As the processed food industry burgeoned, the ability to check for non-kosher ingredients became considerably more difficult. In 1924 the Union of Orthodox Rabbis (the "OU," which had been established in 1892) entered the kosher supervision business. 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

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ENCES (2002), available at [http://aic.ucdavis.edu/research1/DairyEncyclopedia\\_policy.pdf](http://aic.ucdavis.edu/research1/DairyEncyclopedia_policy.pdf).

<sup>83</sup> See generally *History of Kosher Certification & Introduction to Kosher Certification*, KOSHERQUEST, <http://www.kosherquest.org/symbols.php> (last visited Mar. 20, 2013).

certified kosher.<sup>84</sup>

By the mid-Twentieth 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.”<sup>85</sup>

Such informal guidelines were gradually replaced by required symbols, the trademarks of kosher certification agencies, which made the kosher consumer’s task much easier by assuring them that virtually all processed foods labeled as “kosher” could be bought with confidence that they truly abided by the Jewish dietary laws.<sup>86</sup>

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. The first agencies to offer supervision and certification, the OU and the OK, remain the largest, 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, the Star K and others. Individual rabbis have also

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re-entered the kosher supervision business, often using their own symbols to certify a product's *kashrut*.<sup>87</sup>

This phenomenon has brought with it a good deal of confusion, to the point that determining which supervisor is involved and his standards may take a good deal of detective work. Consequently, many modern consumers prefer to rely only on the best-known certifying agencies, rather than take the risk that a product may not meet their personal standards.<sup>88</sup>

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.

In the latter part of the Twentieth Century, common-law fraud cases and the enactment of statutory regulations – as well as the litigation that has ensued therefrom – have come to help ensure the authenticity of food labeled as kosher.<sup>89</sup>

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<sup>87</sup> *Id.*

<sup>87</sup> *Id.*

<sup>87</sup> *See id.*

<sup>87</sup> *See* Sue Fishdoff, *supra* note 37 47–51 (2010). *See also History of Kosher Certification*, KOSHERQUEST, <http://www.kosherquest.org/symbols.php> (last visited Feb. 22, 2013).

<sup>89</sup> *See History of Kosher Certification*, *supra* note 83.

<sup>89</sup> *See* Fishkoff, *supra* note 37 at 50–51. *See also infra* Part III (providing a more detailed discussion of kosher certification agencies).

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.<sup>90</sup> This perception is largely due to the thorough 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.<sup>91</sup>

As noted earlier, Rabbi 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.<sup>92</sup>

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<sup>90</sup> Karen Barrow, *More People Choosing Kosher for Health*, NY TIMES, (April 13, 2010) <http://well.blogs.nytimes.com/2010/04/13/more-people-choosing-kosher-for-health>. See also "3 in 5 Kosher Food Buyers Purchase for Food Quality, Not Religion," MINTEL, (Feb, 2009). <http://www.mintel.com/press-centre/press-releases/321/3-in-5-kosher-food-buyers-purchase-for-food-quality-not-religion>.

<sup>91</sup> Penne Cole, *The Health Benefits of a Kosher Diet*, <http://www.helium.com/items/1543396-health-benefits-of-kosher-food>.

<sup>92</sup> *Exodus* 23:19 ("The choicest of the first fruits of your soil you shall bring to the house of the Lord, your God. You shall not cook a kid in its mother's milk.").

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.<sup>93</sup> The *ShulchanAruch* (Code of Jewish Law) says that one “may consume only *cholovyisroel*, or milk that is produced when a “Yisroel watches the milking, verifying that milk from non-kosher animal species is not incorporated,” a restriction endorsed by many Orthodox rabbis.<sup>94</sup> However, one of the most respected *halachic* scholars of the Twentieth Century, Rabbi Moshe Feinstein, ruled that the designation *CholovYisroel* is unnecessary because the regulations imposed on the U.S. milk industry by the USDA are so strict that when the milk industry labels an item “cow’s milk” it can be fully trusted.<sup>95</sup>

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

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<sup>93</sup> See *ShulchanAruch: Part II: YorehDe’ah, Chapter 2 – Life and Death; Sources; Body Parts*, TORAH.ORG, <http://torah.org/advanced/shulchan-aruch/classes/chapter2.html> (last visited Feb. 22, 2013). See also notes 20-22 and accompanying text.

<sup>94</sup> Code of Jewish Law, YorehDe'ah 115:1 (Igros Moshe YD 1:47); Rabbi Avrohom Gordimer, *Rav Moshe Zi'l's Heter of CholovSta m Revisited*, OUKOSHER.ORG, (citing YorehDeah 115:1, from Maseches Avodah Zarah daf 35b).

<sup>95</sup> See *25th Yahrzeit of Harov Moshe Feinstein*, THEFIVETOWNS, <http://www.thefivetowns.info/today/12434-25th-yartzeit-of-harov-moshe-feinstein.html> (last visited March 7, 2013). 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. *How Kosher Is Your Milk?*, JEWISH JOURNAL (June 7, 2012), <http://www.jewishjournal.com/socialju>

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 rabbinically licensed individual, a *shochet*, who must also examine the organs. If the *shochet* finds any imperfections, the entire animal is considered unclean and prohibited for consumption.<sup>96</sup>

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.<sup>97</sup>

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 sixty to one

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sticerav/item/rabbi\_herschel\_schachters\_chumra\_on\_milk\_abuse\_in\_the\_dairy\_industry\_201206.

<sup>96</sup> The laws pertaining to the *kashrut* of animals and *shechitah* are codified in the *Shulchan Aruch* [YorehDe'ah 1-25]. See *supra* note 23 and accompanying text. *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*).

*A Guide to Shechita*, SHECHITA UK, (May 2009), available at [http://www.shechitauk.org/uploads/tx\\_resources/A\\_Guide\\_to\\_Shechita\\_2009\\_\\_01.pdf](http://www.shechitauk.org/uploads/tx_resources/A_Guide_to_Shechita_2009__01.pdf) (citing *ShulchanOruch*, YorehDe'ah: 23).

<sup>97</sup> EIDLITZ, *supra* note 27 at 76–77 (citing David I. Macht, *An Experimental Pharmacological Appreciation f Leviticus XI and Deuteronomy XIV*, 27 BULLETIN OF THE HISTORY OF MEDICINE 444–50 (1953)).

hundred and fifty animals per hour. Of all animals slaughtered only about thirty percent qualify for certification as kosher.<sup>98</sup>

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.<sup>99</sup> This has led to the phenomenon that kosher is no longer for Jews alone.<sup>100</sup>

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<sup>98</sup> Besides 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) *shehiya* (there must not be the least pause during the process of shechita); (2) *derassa* (the slaughtering must be done by moving the knife back and forth – not through downward pressure); (3) *chalada* (the knife must be uncovered during the entire process); (4) *hagrama* (the cut must be performed on the throat, between the level of the larynx and the lower part of the trachea and esophagus); and (5) *ikkur* (the trachea and esophagus must be cut through and not ripped out).

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

<sup>100</sup> Barrow, *supra* note 90.

<sup>100</sup> 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 Isaac Abarbenel in his commentary on the bible to Leviticus chapter 11. Maimonides himself held 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 meditate, according to his intellectual capacity, regarding the laws of the torah to understand their deeper meaning. Those laws for which he finds no reason and knows no purpose should nevertheless not be

## 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.”<sup>101</sup>

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;<sup>102</sup> that a Jewish court of arbitration panel may forbid trade with

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treated lightly.” Forst, *supra* note 20 at 21, 24 (quoting Maimonides, *Laws of Me’ilah* 8:8).

<sup>101</sup> Excerpt from “*Inspector Under the Act*,” in *HARVEST, AN ANTHOLOGY OF FARM WRITING* (Wheeler McMillen ed., Creamery Journal, 1907 1964), available at <http://livinghistoryfarms.wordpress.com/2011/09/24/pasterization-and-regulation/>. 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.”*

*Id.*

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 poet, 1902-1971*), to wit: “*The cow is of the bovine ilk; One e poet, 1902-1971*), to wit: “*The cow is of the bovine ilk; One end is moo, the other, milk.*”

disapproved butchers;<sup>103</sup> that retail sellers implicitly stipulate their compliance with rabbinic authorities;<sup>104</sup> that a state law may incorporate a rabbinical ruling on kosher labeling;<sup>105</sup> and that kosher symbols may be subject to trade infringement laws.<sup>106</sup>

The complex laws of *kashrut* prescribe not only which animals are kosher, but also mandate the requisite slaughter and preparation.<sup>107</sup> Non-kosher animals, before they are slaughtered, are usually stunned by a blow to the head with a bolt gun (often killing the animal instantly) – an act strictly prohibited by Jewish law.<sup>108</sup>

Today, the U. S. Department of Agriculture is responsible for overseeing all American slaughter operations. It employs 7,500 inspectors throughout the country. Without a USDA stamp, meat cannot leave a slaughterhouse. In recent years a consensus has grown that the

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<sup>103</sup> *Aurora Packing Co. v. NLRB*, 904 F. 2d 73 (D.C. Cir. 1990).

<sup>103</sup> *S.S. & B. Live Poultry Corp. v. Kashrut Ass'n of Greater N.Y.*, 285 N.Y.S. 879 (N.Y. Sup.Ct. 1936).

<sup>105</sup> *Cohen v. Silver*, 178 N.E. 508 (Mass. 1931).

<sup>105</sup> *People v. Gordon*, 14 N.Y.S.2d 333 (Kings Cnty. Spec. Sess. 1 939), *rev'd*, 16 N.Y.S.2d 833 (N.Y. App. Div. 1940), *aff'd mem.*, 28 N.E.2d 717 (N.Y. 1940).

<sup>107</sup> *Levy v. Kosher Overseers Ass'n of Am., Inc.*, 104 F.3d 38 (2d Cir. 1997).

<sup>108</sup> *See supra* note 22 and accompanying text.

<sup>108</sup> 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 20 at 37 (citing Maimonides, *Hilchot Shechitah* 10:11). *See also* Macht, *supra* note 97; Macht, *infra* note 120.

USDA's regimen of visual, carcass-by-carcass inspection – enshrined by the 1906 laws – places too much manpower on the killing floor and not enough in testing laboratories and meat-grinding plants to test beef for *E. coli*, poultry for *Campylobacter*, and pork for *Toxoplasma*. (“Splash enough chemicals on,” said one meat inspector, “and you can call anything safe.”)<sup>109</sup>

Meanwhile, footnote: Any slaughtering process is gory, but kosher *shechitah* is thought to be more humane than the conventional methods.<sup>110</sup> 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,<sup>111</sup> which exempts ritual slaughter, has been upheld as constitutional under the First Amendment.<sup>112</sup>

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<sup>109</sup> For a vivid description of a modern slaughterhouse killing floor, see Ted Conover, “The Way of All Flesh,” HARPER’S MAGAZINE (May 2013) at 31-49. See also KENNETH, PRIVATE LIVES OF PUBLIC SERVANTS (Indiana University Press, 1978) at pp. 3-41. In 2011, President Obama signed the Food Safety Modernization Act. A cooperative effort between the USDA’s Food Safety and Inspection Service (FSIS) and the poultry industry has set the stage for vast reductions in the number of on-site inspectors. *Id.*

<sup>110</sup> See, e.g., *Shechitah—The Jewish Ritual Slaughter of Animals*, MICAH PUBL’NS., INC., <http://micahbooks.com/shechitah-the-jewish-ritual-slaughter-of-animals-34.html> (last visited March 7, 2013). See generally RONIT GURTMAN, SHECHITAH: JEWISH RITUAL SLAUGHTER (2005) (unpublished Harvard Law paper), available at <http://dash.harvard.edu/handle/1/8852091>.

<sup>111</sup> 7 U.S.C. § 1901 et seq. (2006).

<sup>112</sup> See *Jones v. Butz*, 374 F. Supp. 1284 (S.D.N.Y. 1974); *aff’d*, 319 U.S. 806 (1974); see also *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993); Gerald F. Masoudi, *Kosher Food Regulation and the Religion Clauses of the First Amendment*, 60 U. CHI. L. REV. 667 (1993).

But over the centuries, states, legislatures, and courts have challenged many of the religious dietary laws. 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.<sup>113</sup> In 1894 the Swiss Constitution was amended to read as follows: “The slaughter of animals without prior stunning before the withdrawal of blood is prohibited without exception for every type of slaughter and every species of animal.”<sup>114</sup> 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*.<sup>115</sup>

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<sup>113</sup> Moshe Schuchman, *A Cut Above: Shechitah in the Crosshairs, Again*, 33 KASHRUT KURRENTS 1, 4 (Fall 2012), available at <http://www.star-k.org/kashrus/kk-Fall12.pdf>.

<sup>114</sup> *The Ban on Shechita in Switzerland*, SCHWIEZERISRAELITISCHER GEMEINDEBUND, <http://www.swissjews.ch/en/religioeses/koscherfleisch/schaechtverbot.php> (last visited Mar. 6, 2013).

<sup>115</sup> See Gurtman, *supra* note 110 at 28 (This arrangement was first approved by the Rabbinical

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.<sup>116</sup>

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.<sup>117</sup> 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,

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Assembly, but never became effective.) *Id.*

<sup>116</sup> See The Ban on Shechita in Switzerland, *supra* note 114. See also Schuchman, *supra* note 113, at 3.

<sup>117</sup> See Tierschutzgesetz [TierSchG] [German Animal Welfare Act], May 18, 2006, BGBl. I at 1206, last amended by Gesetz [G], Dec. 9, 2010, BGBl. I at 1934, art. 4a, § III, available at <http://www.animallaw.info/nonus/statutes/stdeawa1998.htm>; see also Gurtman, *supra* note 110, at 39–42. In 2002, the German Constitutional court allowed Muslims an exception for ritual slaughter. *Id.* at 39. “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.” *Id.* (citation omitted). The 2002 exception to religious slaughter came to remedy a larger problem. In 1995, the German Muslims were prohibited from performing *halal* slaughter. *Id.* at 39. A federal court held that there was no mandatory need for Islamic slaughter; thereby, failing the second prong of section 4a of the Tierschutzgesetz. *Id.* at 39–40. The Court held that its ruling was not a violation of the right to religious freedom guaranteed by articles 4(1) and (2) of the Basic Law 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 *halal* meat. *Id.* at 40. See Gurtman, *supra* note 110 at 39–40, and Schuchman, *supra* note 113.

New Zealand, Norway, and Sweden. Norway banned religious slaughter without pre-stunning in 1930. Sweden did the same in 1937, and Poland did as well in 1939.<sup>118</sup>

The fact that many Western nations still permit *shechitah* does not necessarily mean they consider the practice humane. Most countries only exempt ritual slaughter from the law rather than attest to it being humane. 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.<sup>119</sup>

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<sup>118</sup> New Zealand: Animal Welfare (Commercial Slaughter) Code of Welfare 2010, 1, 15-16, 22-23, *available at* <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, *available at* <http://www.animallaw.info/nonus/statutes/stnoapa1995.htm#s12>; Sweden: The Animal Welfare Act (SFS 2009:303) (Swed.), §14(1), *available at* <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) (“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.”), *available at* <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](http://www.animallaw.info/nonus/statutes/stpoapa1997.htm#Chapter_10).

<sup>119</sup> See The Welfare of Animals (Slaughter or Killing) Regulations, 1995, c. 2, 3, 22, sch.4, *available at* <http://www.legislation.gov.uk/uksi/1995/731/contents/made>; The Welfare of Animals (Slaughter or Killing) (Amendment) Regulations, 2012 (Eng.), *available at* <http://www.legislation.gov.uk/uksi/2012/501/contents/made> (It is clear that the 2012 amendments to the Regulations did not change religious slaughter exemptions); Humane Methods of Livestock Slaughter Act, 7 U.S.C. § 1901 et seq. (2012) (reflecting the same idea as the slaughter regulations in England); see also Gurtman, *supra* note 110, at 38-39. The Welfare of

In fact the scientific evidence supports this finding. Several early studies found that the toxicity levels in the blood of animals slaughtered according to the Biblical rules of *shechitah* were considerably less than in those that were not.<sup>120</sup>

### *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. 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. During the Eighteenth 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

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Animals (Slaughter or Killing) Regulations, 1995, c.2,3,22, sch.4, <http://www.legislation.gov.uk/uksi/1995/731/contents/made>. (The 2012 amendments did not change religious slaughter exemptions).

<sup>120</sup> See, e.g., David I. Macht & Helen M. Cook, *Toxicity of Muscle Extracts After Arteriotomy, Asphyxiation, Injuries to the Brain and Electrocutation*, 97 AMERICAN JOURNAL OF PHYSIOLOGY 602 (1931); David I. Macht & Mary E. Davis, *Quantitative Comparison of Some Muscle and Nerve Reactions after Decerebration and Decapitation*, 102 AMERICAN JOURNAL OF PHYSIOLOGY 138 (1932); Macht, *supra* note 97 at 444-50. See generally I.M. LEVINGER & E. MUNK, MEDICAL ASPECTS OF SHECHITA (ote 108, at 38 (quoting from the House of Commons report).

seal on meat that was not kosher.<sup>121</sup> 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 the term “kosher” in the food industry.<sup>122</sup>

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. 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.<sup>123</sup>

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<sup>121</sup> JEREMIAH J. BERMAN, *SHEHITA: A STUDY IN THE CULTURAL AND SOCIAL LIFE OF THE JEWISH PEOPLE*, 275–85 (1941). The estimated Jewish population was 1000 to 3000 people during the Revolutionary Era. *AMERICAN JEWISH DESK REFERENCE: THE ULTIMATE ONE-VOLUME REFERENCE TO THE JEWISH EXPERIENCE IN AMERICA* 35 (1999).

<sup>122</sup> Most such laws in force today, however, if subjected to strict-scrutiny review, would likely be found unconstitutional. *See infra* notes 130–76 and accompanying text. *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, Note, *The Constitutional Complexity of Kosher Food Laws*, 44 *COLUM. J.L. & SOC. PROBS.* 75 (2010).

<sup>123</sup> *See* Restatement (Second) of Contracts § 347 (1981); Restatement (Third) of Torts: Products Liability § 9 (1998).

Once caught, perpetrators of a kosher fraud – (as opposed to an honest mistake – seldom if ever are allowed to remain in business. They are likely to be decertified immediately and thus lose whatever reputation they may have once enjoyed among kosher consumers.<sup>124</sup>

It was not until after substantial Jewish immigration and technological advances in the food industry that kosher fraud became an increasing problem. The OU was a primary actor in the campaign to enact the kosher fraud statutes.<sup>125</sup>

In 1915, New York enacted the first kosher fraud statute in the United States, the primary purpose and effect of which was 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 to legally advertise packaged food or food establishments as kosher.<sup>126</sup>

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<sup>124</sup> See Sigman, *supra* note 122 at 547.

<sup>125</sup> 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).

<sup>126</sup> See Popovsky, *supra* note 122 at 83 (quoting N.Y. PENAL LAW § 435(4), Laws of 1915, c. 233). 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. *Id.* 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) (discussing the history of kosher fraud laws). Violation of the New York statute constituted a misdemeanor. NY AGR&MKTSC. 69, Art. 17.

A brief summary of its pertinent provisions:

Since the passage of the New York statute, twenty-one other states have enacted similar

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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.”

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.

legislation. Other 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.<sup>127</sup>

Most kosher fraud statutes are written in a similar fashion: they define what kosher means, identify the intent required for committing kosher fraud, 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.<sup>128</sup>

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

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<sup>127</sup> Sigman, *supra* note 122 at 551. *See also* Rosenthal, *supra* note 126 at 956, and “A Meaty Question,” THE ECONOMIST, February 9, 2013, <http://www.economist.com/news/international/21571419-who-should-regulate-kosher-and-halal-food-meaty-question>.

<sup>128</sup> Many of the statutes not only prohibit non-kosher 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 non-kosher meat where both are sold. *See, e.g.*, WIS. STAT. ANN. § 97.56(2)(c) (West 2012) (prohibiting the sale of both kosher and non-kosher food unless there are signs stating, “in block letters at least 4 inches in height, ‘Kosher and Nonkosher Meat Sold Here’”); N.J. STAT. ANN. § 2C:21-7.4 (c)(1) (West 2013) (A person commits a disorderly persons offense if while conducting business he “sells, offers for sale, prepares, or serves in or from the same place of business both unpackaged non-kosher food and unpackaged food he represents to be kosher unless he posts a window sign at the entrance of his establishment which states in block letters at least four inches in height: ‘Kosher and Non-Kosher Foods Sold Here,’ or ‘Kosher and Non-Kosher Foods Served Here,’ or a statement of similar import.”)

some even provide for imprisonment.<sup>129</sup>

### *Kashrut and the Courts*

As might be expected, the constitutionality of such laws has been challenged in subsequent litigation. Among the questions that quickly came to the fore as to whether the so-called “Kosher Fraud” statutes are inherently unconstitutional were: 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*.<sup>130</sup> The case was not brought on First Amendment grounds, but rather on the argument that the term “kosher” as used in the New York statute, was impermissibly vague in violation of the Due Process Clause of the Fourteenth Amendment. The Supreme Court disagreed, and upheld the state’s kosher fraud statute.<sup>131</sup>

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<sup>129</sup> See, e.g., 410 ILL. COMP. STAT. ANN. 645/2 (West 2003) (stating violation of the act constitutes either a Class C or a Class A misdemeanor); ARK. CODE ANN. § 20-57-401(3) (West 2003) (stating that a violator “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(h) (West 2003) (requiring a “civil penalty or fine of not less than five hundred dollars and not more than two thousand dollars”); MASS. GEN. LAWS ANN. ch. 94, § 156(g) (West 2003) (granting the attorney general the power to investigate during business hours).

<sup>130</sup> *Id.* at 498.

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 fact comply with those laws.<sup>132</sup> 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 were not paid, they were authorized to employ a paid inspector to report violators to law enforcement authorities.<sup>133</sup>

George Barghout, a food business owner, challenged the Baltimore ordinance as a violation of the Establishment Clause of the First Amendment in *Barghout v. Bureau of Kosher Meat &*

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<sup>131</sup> *Id.* at 503. *See also* Jones v. Butz, 374 F. Supp. 1284 (S.D.N.Y. 1974) (challenging the Humane Slaughter Act, 7 U.S.C. § 1901 et seq. (1970), particularly provisions relating to ritual slaughter); Erlich v. Beverly Hills Judicial Dist. Mun. Ct., 360 P.2d 334 (Cal. 1961) (upholding the California kosher fraud statute against a void for vagueness challenge); Sossin Sys., Inc. v. City of Miami Beach, 262 So. 2d 28, 29–30 (Fla. Dist. Ct. App. 1972) (“We are unable to view this ordinance as a legislative enactment establishing or respecting the establishment of a religion, or as one prohibiting the free exercise of religion to which it has reference.”).

<sup>132</sup> **Error! Main Document Only.** Baltimore City Code art. 19, §§ 49–52 (1983).

<sup>133</sup> *Id.*

*Food Control*.<sup>134</sup> The Fourth Circuit struck down the law as facially unconstitutional under the First Amendment, 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.”<sup>135</sup>

The court in *Barghout* thus took issue with the fact that secular authorities were 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*,<sup>136</sup> which made 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 adherence.”<sup>137</sup> 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* stressed as violative of the Establishment Clause.<sup>138</sup> 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.”<sup>139</sup>

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<sup>134</sup> 66 F.3d 1337 (4th Cir.1995).

<sup>135</sup> *Id.* at 1342.

<sup>136</sup> 512 U.S. 687 (1994).

<sup>137</sup> *Id.* at 1343 (internal quotation marks omitted).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 1345 (quoting *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116,125(1982)).

Contributing to this appearance was the fact that the kosher food ordinance was listed in the code under a separate section entitled “Kosher Meat,” a section 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, to protect consumers from fraud, the fact that it was treated with such exclusivity served to strengthen the conclusion that its primary effect was the advancement and endorsement of the Jewish faith and in particular the Orthodox view, a clear violation of the Establishment Clause.<sup>140</sup>

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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 non-kosher 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.”<sup>141</sup>

The case was brought under the Illinois Consumer Fraud and Deceptive Business Act, a

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<sup>140</sup> *Id.*

<sup>141</sup> See MaryAnn Galante, *Suit Says Shelat Falsely Labeled Foods Kosher*, L.A. TIMES, Nov. 6, 1987, [http://articles.latimes.com/1987-11-06/businesses/fi-12838\\_1\\_kosher-chicken-products](http://articles.latimes.com/1987-11-06/businesses/fi-12838_1_kosher-chicken-products); see also William C. Hidlay, *Companies Accused in Kosher Fraud Agree to Settlement*, ASSOCIATED PRESS, Feb. 26, 1988, [http://www.apnewsarchive.com/1988/Companies-Accused-In-Kosher-Fraud-Agree-To-Settlement/id-17a7f5e5127e79cc5dac8dc5f0ab1148?SearchText=companies%20accused%20in%20kosher%20fraud%20agree%20to%20settlement;Display\\_](http://www.apnewsarchive.com/1988/Companies-Accused-In-Kosher-Fraud-Agree-To-Settlement/id-17a7f5e5127e79cc5dac8dc5f0ab1148?SearchText=companies%20accused%20in%20kosher%20fraud%20agree%20to%20settlement;Display_).

general consumer protection statute.<sup>142</sup> The head of the Illinois' Consumer Protection Division, explaining why the case was not brought under 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.”<sup>143</sup>

In *Shelat Kosher Foods, Inc.*, the Illinois Attorney General's office, estimating that the processor made about \$250,000 in profits from its fraud, sought both a permanent injunction against the processor as well as a large fine. In November of 1987 the Cook County Circuit Court ordered a nationwide recall of more than 375,000 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. The company was also ordered to pay \$250,000 in restitution and fines, and its president was ordered to sell his stock in United Poultry, a company that distributed Shelat's products and other kosher foods.<sup>144</sup>

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In *Ran-Dav's County Kosher, Inc. v. State*,<sup>145</sup> Ran-Dav's County Kosher, charged with violating New Jersey consumer protection regulations, claimed that such regulations violated the

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<sup>142</sup> Sigman, *supra* note 122 at 569.

<sup>143</sup> *Id.*

<sup>144</sup> Hidlay, *supra* note 141.

<sup>145</sup> 608 A.2d 1353 (N.J. 1992).

Religion Clauses of the First Amendment. In evaluating the constitutionality of the state’s kosher fraud statute, the New Jersey Supreme Court applied the three-prong test presented by the U.S. Supreme Court 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.<sup>146</sup>

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) “underscore[d] the theological or religious nature of the State’s regulatory endeavors.”<sup>147</sup> The court held the fraud statute to be excessive government

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<sup>146</sup> **Error! Main Document Only.** *Id.* at 1358–59 (citing *Lemon v. Kurtzman*, 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 suggest[ed] uncertainty concerning both the precise meaning and the enforcement standards of the regulations.” *Ran-Dav’s*, 608 A.2d at 1359 (quoting *Larson v. Valente*, 456 U.S. 228, 246 (1982)).

<sup>147</sup> *Id.* at 1361 (citation omitted). **Error! Main Document Only.** See also Popovsky, *supra* note 122 at 107.

entanglement.<sup>148</sup>

Under *Lemon*'s second prong, whether the state gives the appearance of favoring or advancing one religion or denomination, the court held that the law was based on religious tenets and acted "both as a constraint and as an inducement on merchants who must abide by them."<sup>149</sup>

Finally, applying *Lemon*'s third prong, the secular purpose test, the court noted that a statute would fail only if "there is 'no question that the statute or activity was motivated wholly by religious considerations.'" Making mention of the State's 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."<sup>150</sup>

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A momentous case challenging the constitutionality of kosher-fraud statutes came in 2002 from the Second Circuit Court of Appeals. At the heart of the dispute in *Commack Self-Service Kosher Meats, Inc. v. Weiss*,<sup>151</sup> 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.<sup>152</sup>

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<sup>148</sup> *Ran-Dav's*, 608 A.2d at 1355.

<sup>149</sup> *Id.* at 1364.

<sup>150</sup> *Id.* at 1366.

<sup>151</sup> 294 F.3d 415 (2nd Cir. 2002).

<sup>152</sup> "Congress shall make no law respecting an establishment of religion. . . ."U.S. CONST. amend

The plaintiffs in *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 and salting meat) were permissible under Jewish law.<sup>153</sup> The problem was that not all Orthodox Jews follow the same standards.

In resolving this dispute, the court applied the *Lemon* test. The first prong 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.”<sup>154</sup> 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.”<sup>155</sup>

In addition, the court found that 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

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I. *Id.* at 418.

<sup>153</sup> *Commack*, 294 F.3d at 420. On the other hand, for example, the chassidic Lubavitch sect adheres strictly to its own *shechitah*, which is not accepted by other groups.

<sup>154</sup> *Id.* at 431.

<sup>155</sup> *Id.* (quoting *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)). See also Popovsky, *supra* note 122 at \_\_\_\_.

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.’”<sup>156</sup>

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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 misled consumers and charged premium prices.<sup>157</sup>

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<sup>156</sup> *Commack*, 294 F.3d at 425. Every other state with a kosher fraud statute has adopted language to this effect, specifically invoking the Jewish or “Hebrew” religion. Berman, *supra* note 121 at 956.

<sup>157</sup> The case is *Wallace et al v. ConAgra Foods Inc, U.S. Dist. Court, Dist. of Minn., 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

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 no 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.”<sup>158</sup>

“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.”<sup>159</sup>

In early 2013 the suit against Hebrew National was dismissed by a federal court in Minnesota. The judge ruled that because kosher is a religious standard, it is a subject for rabbinic debate -- not a federal court ruling.<sup>160</sup>

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of monies that consumers in the class paid for Hebrew National meat products.

<sup>158</sup> 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 anonymous allegations on former slaughterhouse employees who had been fired for cause. Neither Triangle K nor AER were named in the lawsuit.

<sup>159</sup> Audrey Yoo, *Hebrew National’s Hot Dogs Aren’t Actually Kosher, Claims Lawsuit*, TIME NEWSFEED, (June 19, 2012), <http://newsfeed.time.com/2012/06/19/hebrew-nationals-hot-dogs-arent-actually-kosher-claims-lawsuit/>.

<sup>160</sup> “The definition of the word ‘kosher’ is intrinsically religious in nature, and this court may not entertain a lawsuit that will require it to evaluate the veracity of Defendant’s representations that its Hebrew National products meet any such religious standard. Because all of Plaintiffs’ claims derive from Defendant’s alleged misrepresentation that its Hebrew National products are ‘100%

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While New Jersey replaced the kosher-fraud statute that had been invalidated in *Ran-Dav's* with a simple kosher-disclosure regulation, in New York the *Commack* decision created more of an uproar. The Governor proposed an “Emergency Kosher Law Protection Act” to replace the old kosher fraud statute – combining a disclosure regulation model with a requirement that kosher be defined by “the reasonable expectations” of consumers of kosher products, as well as by generally accepted standards in the trade.<sup>161</sup>

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

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kosher,' all counts of the Amended Complaint are barred by the First Amendment.” *Lawsuit Against Hebrew National Dismissed*, THE JEWISH PRESS, Feb. 2, 2013, <http://www.jewishpress.com/news/breaking-news/lawsuit-against-hebrew-national-dismissed/2013/02/02/>. See “Lawsuit Against Hebrew National Dismissed,” JEWISH PRESS, Feb. 2, 2013.

<sup>161</sup> Sigman, *supra* note 122 at 556; *see also id.* at 556 n.276 (noting that the governor 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.”) (quoting Press Release, N.Y. Gov. George E. Pataki (Feb. 24, 2003)).

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 fraud. The law’s primary effect thus neither advances nor inhibits religion.<sup>162</sup>

The most controversial language in the original New York statute was its definition of kosher by reference to “the orthodox Hebrew religious requirements.”<sup>163</sup> Courts and commentators who have considered the constitutionality of these laws have almost unanimously found that, statutes that defining kosher by reference to “the orthodox Hebrew requirements” violate the Establishment Clause.<sup>164</sup>

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.<sup>165</sup> 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

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<sup>162</sup> See Popovsky, *supra* note 122 at 95ff. 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.” *Centro Empresarial Cempresa S. A. v. America Movil, S.A.B.*, 17 N.Y.3d 269, 276 (N.Y. 2011)(internal quotations omitted).

<sup>163</sup> **Error! Main Document Only.** *Commack*, 17 N.Y.3d -at 418.

<sup>164</sup> See, e.g., Marci Ciesla, *New York Kosher Food Labeling Laws Violate the Establishment Clause*, [http://org.law.rutgers.edu/publications/law-religion/new\\_devs/RJLR\\_ND\\_61.pdf](http://org.law.rutgers.edu/publications/law-religion/new_devs/RJLR_ND_61.pdf). The current New York statute removes the offending language. See N.Y. AGRIC. & MKTS. LAW § 201-a to -d, (McKinney 2013) (curing constitutional defect by removing references to “orthodox Hebrew requirements”).

attractive.<sup>166</sup>

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 City metropolitan area, Baltimore, and southern Florida.<sup>167</sup> After 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.<sup>168</sup>

Under this kind of statute, a vendor who claims that a product is kosher must be able 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. The consumer can thereby more easily determine whether the product satisfies his particular religious standards.<sup>169</sup>

As we shall see, the rabbis themselves often appear to find that a difficult issue to

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<sup>165</sup> See, e.g., Popovsky, *supra* note 122 at n.71 and accompanying text.

<sup>166</sup> 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.”).

<sup>167</sup> **Error! Main Document Only.** Sigman, *supra* note 122 at 572.

<sup>168</sup> 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.” *Id.* at 571–75. The problem might be that the fines and penalties are not sufficiently high to have a deterrent effect. *Id.*

resolve.<sup>170</sup>

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Inmates of the American penal system are not entitled to the same constitutional rights as other citizens. Yet as the U.S. Supreme Court has noted “[p]rison walls do not form a barrier separating prison inmates from the protections of the constitution.”<sup>171</sup> In *Turner v. Safley*,<sup>172</sup> the Court examined two Missouri Division of Correction regulations; the first was a rule restricting mail correspondence between inmates and the second permitted inmates to marry only with the permission of the prison superintendent who would grant permission contingent on a compelling reason. In holding that the Eighth Circuit 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 that would accommodate prisoner rights?<sup>173</sup>

A few months after deciding *Turner*, the Court applied its four-part test in regard to

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<sup>169</sup> See Popovsky, *supra* note 122 at 107.

<sup>170</sup> See *infra* section III concerning the private policing of kosher dietary laws.

<sup>171</sup> *Turner v. Safley*, 482 U.S. 78, 84 (1987).

<sup>172</sup> 482 U.S. 78 (1987).

<sup>173</sup> **Error! Main Document Only.***Id.* at 89-91.

restrictions on the Free Exercise Clause. In *O’Lone v. Estate of Shabbaz*,<sup>174</sup> 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. The Court accepted the argument that prison officials’ objective of reducing tensions and violence due to overcrowding in the prison building by restricting inmates to their outdoor work stations 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 of religion, and even provided alternatives for those wishing to adhere to a religious diet.<sup>175</sup>

In *Williams v. Morton*,<sup>176</sup> the Third Circuit 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 rationally 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.<sup>177</sup>

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**Error! Main Document Only.** <sup>174</sup> 482 U.S. 342 (1987).

Error! Main Document Only. <sup>175</sup> *Id.* at 352.

<sup>176</sup> **Error! Main Document Only.** 343 F.3d 212 (3d Cir. 2003).

**Error! Main Document Only.** <sup>176</sup> 343 F.3d 212 (3d Cir. 2003).

<sup>177</sup> *Id.* at 218. 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

In *LaFevers v. Saffle*,<sup>178</sup> 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 where the lower court had reasoned that vegetarianism was only recommended rather than mandated by the Seventh-Day Adventist religion.<sup>179</sup> The same conclusion would likely be reached in a court test of the kosher-fraud statutes.<sup>180</sup>

### *The Raw Milk Controversy*

For some consumers dairy products often carry as many dietary restrictions as meat. Prior to the Twentieth Century, when there was virtually no governmental regulation of milk, cheese, and butter. Farmers would take raw milk from the cow and (usually after separating the cream in order to make butter) sell it to consumers.<sup>181</sup>

Although pasteurization of milk has since become the norm the law, there is still much debate over the concept of raw milk. Its regulation is at a state-by-state level. In Iowa, for

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Establishment Clause. *See generally* Benjamin Pi-wei Liu, Comment, *A Prisoner's Right to Religious Diet Beyond the Free Exercise Clause*, 51 UCLA L. REV. 1151,1185 (2004).

<sup>178</sup> **Error! Main Document Only.** 936 F.2d 1117 (10th Cir. 1991).**Error! Main Document Only.**

**Error! Main Document Only.**<sup>179</sup> **Error! Main Document Only.***Id.* at 1120. *See also* Pi-wei Liu, *supra* note 177 at 1185.

<sup>180</sup> **Error! Main Document Only.***Id.* *See also* Pi-wei Liu, *supra* note 177 at 1185.  
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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.<sup>182</sup>

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.<sup>183</sup>

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.<sup>184</sup> 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, but it in fact is highly dangerous.<sup>185</sup>

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<sup>182</sup> See RODNEY CARLISLE, *SCIENTIFIC AMERICAN INVENTIONS AND DISCOVERIES* 357 (2004).

<sup>182</sup> See, e.g., 410 ILL.COMP. STAT. 635/8 (1983). 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.” See Dana Goodyear, *Raw Deal*, *NEW YORKER*, April 30, 2012, at 32–33.

<sup>183</sup> See generally CENTER FOR SCIENCE IN THE PUBLIC INTEREST, *PROMOTING SAFE, NUTRITIOUS FOOD FOR EVERYONE* (2011), available at [www.cspinet.org/about/pdf/CSPI\\_40th\\_AR.pdf](http://www.cspinet.org/about/pdf/CSPI_40th_AR.pdf).

<sup>184</sup> See, e.g., Dana Herbert, *My Anti-Cancer Treatments: Unpasteurized Raw Milk and Raw Milk Cheese*, (Jan. 1, 2009), <http://danaherbert.blogspot.com/2009/01/my-anti-cancer-treatments-raw-milk-and.html>.

<sup>185</sup> According to the Center for Disease Control there have been "2,659 cases of illnesses, 269

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.<sup>186</sup> 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

### III. Holy Wars: Law, Politics, and Filthy Lucre

*Laws are like sausages. It is better not to see them being made.*  
– Otto von Bismarck<sup>187</sup>

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hospitalizations, [and] 3 deaths” due to the consumption of raw products. *See Questions and Answers: Raw Milk*, FDA, <http://www.fda.gov/Food/FoodborneIllnessContaminants/BuyStoreServeSafeFood/ucm122062.htm> (last updated Nov. 1, 2011). Unpasteurized milk is 450% more likely to contain pathogens such as *E. coli* and *Listeria monocytogenes* among others.

<sup>186</sup> *See, e.g., Pure Food Co-op LLC Membership Form*, a compelling interest to protect public health. *See generally* Goodyear, *supra* note 182.

<sup>187</sup> QUOTATIONSBOOK, <http://quotationsbook.com/quote/22577/> (last visited Mar. 20, 2013) (quoting Otto von Bismarck). “[T]he 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 Nineteenth-Century German Chancellor Otto von Bismarck (1815-1898), but its provenance and exactitude have been widely debated. *See, e.g.,* BRAINYQUOTE,

*“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 A. Wilson, *The Study of Mormon Folklore*<sup>188</sup>

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.

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.<sup>189</sup> 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

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<http://www.brainyquote.com/quotes/quotes/o/ottovonbis161318.html> (last visited Mar. 20, 2013).; and Quote Investigator, <http://quoteinvestigator.com/2010/07/08/laws-sausages/>.

<sup>188</sup> William A. Wilson, *The Study of Mormon Folklore: An Error! Main Document Only. Uncertain Mirror for Truth*, *DIALOGUE: A JOURNAL OF MORMON THOUGHT*, Winter 1989, at 95, 105.

<sup>189</sup> Karen Barrow, *supra* note 90. *See also* 3 in 5 Kosher Food Buyers Purchase for Food Quality, *Not Religion*, MINTEL (Feb. 2009), <http://www.mintel.com/press-centre/press-releases/321/3-in-5-kosher-food-buyers-purchase-for-food-quality-not-religion>.

animal prohibited by Jewish law.<sup>190</sup>

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.<sup>191</sup>

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 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

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<sup>190</sup> Penne Cole, *The Health Benefits of a Kosher Diet*, HELIUM, <http://www.helium.com/items/1543396-health-benefits-of-kosher-food> (last updated March. 15, 2010).

<sup>191</sup> See Karen Ruth Lavy Lindsay, *Can Kosher Fraud Statutes Pass the Lemon* **Error! Main Document Only.** *Test?: The Constitutionality of Current and Proposed Statutes*, 23 U. DAYTON L. REV. 337 (1998).

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.”<sup>192</sup>

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.<sup>193</sup> 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 (a *Bet Din*).<sup>194</sup>

### *Kosher Certification Agencies*

There was a time when Jewish family meals were completely prepared by housewives in their own kitchens. To them the dietary rules were second nature: some foods were clearly kosher (fruits and vegetables, virtually all dairy products, common condiments), some were not (pigs, shellfish, insects). Their meat was most often supplied by a kosher butcher shop. Over the past

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<sup>193</sup> Sigman, *supra* note 122 at 566.

<sup>193</sup> *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.

<sup>194</sup> *See* Ira Yitzchak Kasdan, *A Proposal for P’sharah: A Jewish Mediation/Arbitration Service*, JLaw.COM, <http://www.jlaw.com/Articles/psharah1.html> (last visited Mar. 2

few decades, however, modern marketing has revolutionized the kosher kitchen. Processed foods are ubiquitous. The observant housewife can serve kosher varieties of anything from bacon to cheeseburgers to crab salad; at the same time she knows how to check the *kashrut* of vegetables (lettuce, broccoli, strawberries), dairy items (ice cream, sour cream, whipped cream), and popular drinks (water, wine, whiskey).<sup>195</sup>

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 assured consumers that virtually all processed foods labeled as "kosher" could be bought with confidence that they truly abided by the Jewish dietary laws.<sup>196</sup>

As noted earlier, 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 such services, each with a distinctive mark appearing on packages or wrappers. The symbols come in all shapes (Circle K, Diamond K, Heart K, Triangle K) and from far and wide (California K, Florida K, Earth K). Certification companies 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, do not, such as aluminum foil, bottled water, and peaches. They cover specialty confection stores, such as Cinnabon, to franchises of international restaurant

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0, 2013) (discussing the prohibition and presenting alternatives to the rabbinical courts).

<sup>195</sup> See generally History of Kosher Certification, *supra* note 83.

chains, like Dunkin' Donuts and Subway sandwich shops.<sup>197</sup>

By far the largest certification agency is the OU, 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.<sup>198</sup>

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 United States a \$30 billion a year business. A good part of this market (about \$2 billion) is made up of Orthodox Jewish consumers, but the interest in kosher food is rapidly growing among other groups.

Some may adhere to dietary laws out of religious conviction (such as Seventh-Day Adventists and Muslims), others for health reasons (e.g., vegetarians).<sup>199</sup> And still others; and some – perhaps the majority – feel that kosher certification is their best guarantee that the products and their ingredients are being carefully processed. Additionally, many large corporations have found it profitable to acquire kosher companies. According to a recent study, at least five million people buy products based on their being kosher.<sup>200</sup>

Although the OU has always been a non-profit organization, others have recognized the

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<sup>197</sup> See, e.g., <http://kosherdunkindonuts.com/podstrony/kosher%20products.htm>.

<sup>198</sup> See EIDLITZ, *supra* note 27,

<sup>199</sup> See *supra* note 190 and accompanying text.

**Error! Main Document Only.** <sup>200</sup> *History of Kosher Certification & Introduction to Kosher Certification, supra* note 83.

huge business potential in kosher supervision. Over the past half-century, more than a hundred new agencies around the world have entered the field – each with its own distinctive symbol.<sup>201</sup>

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. “[T]he cost of certification is [often] met by increased sales.”<sup>202</sup> The OU claims that, in its half-century of supervising, “fewer than a [dozen] companies [have] discontinued their certification because sales did not increase.”<sup>203</sup> The OU “provide[s] certification only upon application by a food manufacturer.”<sup>204</sup> Other supervising agencies solicit companies.<sup>205</sup>

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

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>205</sup> See David Bistricher, *Here’s the Buzz on Certifying Veggies as Insect Free*, ORTHODOX UNION, <http://oukosher.org/blog/industrial-kosher/heres-the-buzz-on-certifying-veggies-as-insect-free/>. (last visited Mar. 20, 2013).

produced on the same premises require close investigation and supervision” – must be reviewed and evaluated.<sup>206</sup>

“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 parts.<sup>207</sup> 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.<sup>208</sup>

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.”<sup>209</sup> The on-site inspector (*mashgiach*)

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<sup>206</sup> See David Bistricher, *Here’s the Buzz on Certifying Veggies as Insect Free*, ORTHODOX UNION, <http://oukosher.org/blog/industrial-kosher/heres-the-buzz-on-certifying-veggies-as-insect-free/>. (last visited Mar. 20, 2013).

<sup>207</sup> See EIDLITZ, *supra* note 27 and accompanying text.

<sup>208</sup> See EIDLITZ, *supra* note 27

will verify that the company is in compliance.<sup>210</sup>

A kosher certification agency that finds its symbol unauthorized or misused can either bring a cause of action under trademark law, seek an injunction to prevent future unauthorized usage, or seek damages to compensate for any harm from the infringement. Some courts have allowed restitution based upon the profits of the infringing party.<sup>211</sup>

When certifiers discover instances of mistake or fraud (whether accidental, negligent, 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.<sup>212</sup>

Willful fraud generally merits harsh penalties. “For example, when an O-U 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.”<sup>213</sup>

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<sup>209</sup> *History of Kosher Certification & Introduction to Kosher Certification*, *supra* note 83.

<sup>210</sup> *Id.* The individual supervisor is generally paid by the supervising agency for each visit he makes to the processing plant. *Id.*

<sup>211</sup> Certification marks are protected under 15 U.S.C. §§ 1117(a)-(b), 1127 (2006) (providing for the right of recovery for violation of a registered mark). If the damages are either inadequate or excessive, the court may affix “such sum as the court shall find to be just....” *Id.* § 1117(a). This statute provides statutory damages for counterfeit marks as well. *Id.* § 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 Pr ods., LLC v. Walter Kidde Portable Equip., Inc., 227 F. Supp. 2d 494, 528 (E.D. Va. 2002).

Rarely if ever would certification be picked up by another kosher supervising agency.<sup>214</sup>

In 1990, when the supervisor for the Rabbinical Council of Greater Washington discovered “allegedly nonkosher ducks and receipts”<sup>215</sup> 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 owner claimed that, because of the rumors and innuendo, he had lost over \$30,000. He decided to sell the business.<sup>216</sup>

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,

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<sup>212</sup> See Sigman, *supra* note 122 at 562–63.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 536.

<sup>215</sup> *Id.*

<sup>216</sup> See Ruth Sinai, *Is Everything Kosher with Moshe Dragon’s Duck?*, ASSOCIATED PRESS, July 4, 1990.

it will announce that it no longer certifies the product or restaurant.<sup>217</sup> 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.”<sup>218</sup>

### *Law and Politics in the Business of Kashrut*

There can be no mistaking that kosher supervision is a gargantuan business. Besides the OU, numerous other agencies worldwide certify a gargantuan variety of food products, wines and liquors, vitamins, and chemical additives.<sup>219</sup> Many of them operate as non-profit agencies, although some considerably more transparent than others.<sup>220</sup> Those which do not claim tax-free status are clearly profit-making enterprises.<sup>221</sup>

It is also a fact of modern life that kosher supervision nowadays has considerably less to do

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<sup>217</sup> Retroactive decertification occurs mostly in the packaged-food industry. Sigman, *supra* note 122 at 565.

<sup>218</sup> *See id.* *See also infra* note 209 and accompanying text.

<sup>219</sup> 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 Reliable Certifications*, KOSHERQUEST.COM, <http://www.kosherquest.org/symbols.php>.

<sup>220</sup> The Orthodox Union, the largest kosher supervisory agency, plows all of its profits back in to its many communal programs. *See* GlassDoor rating, <http://www.glassdoor.com/Reviews/Orthodox-Union-Reviews-E369014.htm>. Some of OU’s competitors, such as Star-K Kosher Certification, are less clear about their charitable beneficiaries. *See generally* Lytton, *supra* note 32 at .

<sup>221</sup> A prime example is O-K Kosher Certification. *See OK in Brief*, OK KOSHER CERTIFICA

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 is kosher and what is not. Caught in the middle is the kosher consumer.

Rabbinic skirmishes over what is kosher and what is not are not confined to the United States. Virtually everywhere there are kosher consumers, there are kosher controversies.<sup>222</sup> This is certainly the case in Israel where, for example a dozen Jerusalem restaurants recently confronted the state’s religious authorities by claiming kosher credentials without the government’s official *imprimatur*. The restaurants challenged the Orthodox Rabbinate’s monopoly over kosher supervision, especially where supervisors seldom inspect their premises. They claimed that they enforce *kashrut* in their kitchens on their own – without any rabbis or inspectors – and that though they are checked regularly by rabbinical students, they will offer an alternative certificate and open their kitchens for anyone to inspect.<sup>223</sup>

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TION, <http://www.ok.org/Content.asp?ID=2>.

<sup>222</sup> See, e.g., Sarah Kessler, *Kosher Controversy at the Olympics*, JEWISH DAILY FORWARD, July 26, 2012 (describing difficulties with kosher food at 2012 London Olympics). See also *Kosher Food and Shechita Controversy in Norway*, KOSHER DELIGHT, [http://www.kosherdelight.com/Norway\\_Kosher\\_Food.shtml](http://www.kosherdelight.com/Norway_Kosher_Food.shtml) (detailing the continuing battle over ritual slaughter in Norway) (last visited Mar. 20, 2013).

<sup>223</sup> In 2011, Israel’s Ashkenazi chief rabbi went on record as agreeing that supervisors were not doing their jobs. Nathan Jeffay, *Kosher Restaurant Revolt Bres in Jerusalem*, THE FORWARD,

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*Dogma*<sup>224</sup>

Hot dogs are as American as apple pie on the Fourth of July. They are consumed around the world, from Australia to Zambia and have become a major part of the increasingly 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 (“NHD& SC”).<sup>225</sup>

The question for our purposes, though, is this: Are kosher hot dogs really kosher? Though the term “kosher hot dog” may have assumed a generic cast, its *halachic* authenticity is of great importance to those who observe the Jewish dietary laws, and of even more significance to those who eat only *glatt* kosher products.<sup>226</sup>

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Nov. 16, 2012, at p. 1.

<sup>224</sup> Parts of this section are adapted from an article by the author entitled “Hebrew National and Kosher Politics: What’s Kosher About Answering to a Higher Authority?,” which first appeared as a cover story in the BALTIMORE JEWISH TIMES (July 10, 2009), then spread quickly over the Internet (*see, e.g.*, “Hebrew National and Kosher Politics: When being Kosher Isn’t Kosher Enough,”

Failed Messiah.com, [http://failedmessiah.typepad.com/failed\\_messiahcom/2009/07/hebrew-national-and-kosher-politics-234.html](http://failedmessiah.typepad.com/failed_messiahcom/2009/07/hebrew-national-and-kosher-politics-234.html).)

<sup>225</sup> Yes, there is such a group, which also lists things like the biggest hot dog-selling cities – Baltimore/Washington is third behind New York, and Los Angeles – as well as even more arcane trivia. *See* NATIONAL HOT DOG AND SAUSAGE COUNCIL, <http://www.hot-dog.org/ht/d/sp/i/38567/pid/38567> (last visited Mar. 20, 2013).

<sup>226</sup> For a more detailed discussion of *glatt* kosher, *see infra* at note 237 and accompanying text. At the 2013 Super Bowl in New Orleans, the Superdome featured a kosher food stand that featured

It is a \$4 billion-a-year business, a large share of which is the kosher market (preferred by six 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.<sup>227</sup>

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.<sup>228</sup>

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“Glatt Kosher” hot dogs for the first time. Tzvi Ben Gedalyahu, *Super Bowl to be ‘Glatt Kosher’*, ARUTZSHEVA (October 23, 2012, 5:46 PM), available at <http://www.israelnationalnews.com/News/News.aspx/161258>.

<sup>227</sup> See CONSUMER REPORTS (June 2007), <http://www.fitsugar.com/Consumer-Reports-Ranks-Hot-Dogs-Light-Beer-298948>. Oscar Mayer, the world’s largest producer of hot dogs, came in eighth.

<sup>228</sup> 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. Sausages were mentioned early on in history. See, e.g., HOMER, “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. . .” Hot Dog Food Quotes, FOODREFERENCE.COM, <http://www.foodreference.com/html/qhotdogs.html> (last visited Mar. 20, 2013). For a more complete history of hot dogs, see “History and Legends of Hot Dogs,” WHAT’S COOKING AMERICA, <http://whatscookingamerica.net/History/HotDog/HDIndex.htm> (last visited Mar. 20, 2013); and JOHN A. JAKLE & KEITH A. SCULLE, KEITH A., FAST FOOD: ROADSIDE

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.<sup>229</sup>

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 a 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, Michigan. Today, with a work force of 500 people in the United States, Hebrew National is the largest kosher meat processor in the world.<sup>230</sup>

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RESTAURANTS IN THE AUTOMOBILE AGE (Johns Hopkins Press 1999) at p. 163.

<sup>229</sup> See "More than 100 Years of Premium Quality," HEBREW NATIONAL, [ewnational.com/history/100-years.jsp](http://ewnational.com/history/100-years.jsp) (last visited Mar. 20, 2013).

<sup>230</sup> See "Times: Hebrew National Kosher Hot Dogs on the Fourth of July," The Talmudic Blog, <http://tzvee.blogspot.com/2010/07/times-hebrew-national-kosher-hot-dogs.html>.

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 whom the author interviewed spoke on condition of anonymity. One of them was a small 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.

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.<sup>231</sup>

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: “*Koiftnisht fun die chislers!*” (“Don’t buy from the cheaters!”).<sup>232</sup> In one incident, “genuine” kosher hot dogs were imported from New York and

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<sup>231</sup> See *Kashrut: Jewish Dietary Laws*, JUDAISM 101, <http://www.jewfaq.org/kashrut.htm> (last visited Mar. See also *supra* note 62 and accompanying text. *Dietary Laws*, JUDAISM 101, <http://www.jewfaq.org/kashrut.htm> (last visited Mar. See also *supra* note 23 and accompanying text.

widely consumed, until it was discovered that they were not kosher at all.<sup>233</sup>

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 Sinclair’s classic 1906 muckraking of the meatpacking industry, *The Jungle*.<sup>234</sup>

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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 has 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*.<sup>235</sup>

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<sup>235</sup> Lasson, *supra* note 224.

<sup>235</sup> *Id.*

<sup>235</sup> *See supra* note 23 and accompanying text.

<sup>235</sup> For the credential-minded – who seem to make up a large part of the observant Orthodox

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 is a huge operation. To 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.<sup>236</sup>

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

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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 EtzChaim and MerkazHarav. Rabbi Ralbag is proud to note that he received rabbinical ordination “with the highest honors (Yore YoreYodinYodin),” by the most pious rabbis of the Holy Land: Rabbi IserZalman Meltzer (rosh yeshiva of Yeshivas EtzChaim); Rabbi Yacov Moshe Charlap (dean of Yeshiva MerkazHarav); 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 “*SeferImreYehosef*,” 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 TzviRalbag). Like his father, AryehRalbag received a high-order ordination in Jerusalem. He heads the *beit din* (rabbinical court) on the AgudathHaRabbonim, the Union of Orthodox Rabbis of the United States and Canada, and is also chief rabbi of the Orthodox community in Amsterdam.

<sup>236</sup>“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

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, they say, truly meet the standard.<sup>237</sup>

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

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and work three-day weeks, with substantial rest periods,” he said. Lasson, *supra* note 224.

<sup>237</sup> See *What Is Glatt?*, INNOVATION WITHIN TRADITION: RABBI MEIR GERSHON RABBI

into a significant increase in sales.”<sup>238</sup> 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.<sup>239</sup> “Many people follow the higher *glatt* standard,” says Rabbi Moskowitz, “but there’s nothing wrong with Rabbi Ralbag’s *shashgachah*. Hebrew National has to overcome some problems with its historical reputation.”<sup>240</sup> 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.<sup>241</sup>

Kosher meat is considerably more expensive than meat found in a regular supermarket because of the extra supervision and inspections required. Mixing *glatt* kosher meat with non-kosher meat, or even kosher meat of a lesser quality could help drive down prices if it was falsely

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, <http://www.kosherveyosher.com/old-world-kashrus-1263.html> (last visited Mar. 20, 2013).

<sup>238</sup>Miriam Colton and Steven I. Weiss, *Hebrew National Certified Kosher – But Not Kosher Enough h for Some*, THE JEWISH DAILY FORWARD, June 11, 2004.

<sup>241</sup> See Lasson, *supra* note 224.

<sup>241</sup> *Id.*

<sup>241</sup> 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. See Josh Nathan-Kazis, *Kosher Meat Still Slaughtered Inhumanely*, JEWISH DAILY FORWARD, (Oct. 10, 2011), <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.}

advertised.<sup>242</sup>

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

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Queried about the *kashrut* of Hebrew National, a spokesperson for the O-U said that “we do not comment on other kosher certifications.” The response was different, however, from the

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<sup>242</sup> More recently, in April of 2013, the U.S. Department of Agriculture launched an investigation into a Los Angeles store named DohenyGlatt Kosher Meat, after its owner was accused of selling “glatt kosher” meat that was not in fact glatt. A consumer had filed a class-action lawsuit against the market, alleging fraud and false advertising and seeking unspecified damages. (This was not the first time a secular agency has stepped in during a kosher meat crisis in Los Angeles. In 1990 Emes Kosher Meats, at the time the biggest kosher retailer in Los Angeles, had its kosher certificate suspended by the same council of rabbis that yanked Doheny’s. In the wake of the scandal, the Rabbinical Council of California adopted toughened rules governing the eligibility of butchers for kosher certification and expanded their inspections. Like Doheny, Emes Kosher attracted many customers because of its wide variety and low prices. In an advertisement in a Jewish weekly, the owner of Emes blamed closure of his market on “suppression received from the Rabbinical Council of California.”) The current allegations have once again roiled Los Angeles’ Jewish community. Some supporters said they believed Doheny’s owner had been set up by other distributors who grew frustrated by his success. They labeled the RCC as politically motivated. Meanwhile, video recordings released to a local television channel purported to show a Doheny employee loading his car with repacked glatt kosher boxes at an unsupervised warehouse. See Matt Stevens, “Kosher market targeted in USDA probe, class-action lawsuit,” L.A. Times, April 2, 2013. See also “How Haredi Rabbis Helped To Unwittingly Destroy Kosher In Israel,” Failed Messiah.com, [http://failedmessiah.typepad.com/failed\\_messiahcom/2013/04/how-haredi-rabbis-helped-to-unwittingly-destroy-kosher-in-israel-678.html](http://failedmessiah.typepad.com/failed_messiahcom/2013/04/how-haredi-rabbis-helped-to-unwittingly-destroy-kosher-in-israel-678.html).; and Pini Herman, “Israel’s Own DohenyGlatt Kosher Scandal,” JewishJournal.com, April 4, 2013, <http://www.jewishjournal.com/demograph>

“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.”<sup>243</sup>

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.<sup>244</sup>

Rabbi Aron Abadi, who publishes an influential website about *kashrut*,<sup>245</sup> 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 Ralbag? 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?”<sup>246</sup>

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[ic\\_duo/item/israels\\_national\\_doheny\\_glatt\\_kosher\\_scandal.](#)

<sup>244</sup>See Lasson, *supra* note 224.

<sup>244</sup> See “When is not approved not kosher?,” PITPUTIM (Mar. 26,2012)–  
<http://pitputim.wordpress.com/2012/03/26/when-is-not-approved-not-kosher/>.

<sup>245</sup>Error! Main Document Only. **Error! Main Document Only.**See KASHRUT.ORG.

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<sup>246</sup>**Error! Main Document Only.** 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.”<sup>247</sup>

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.”<sup>248</sup>

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 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 Star-K are currently forbidden to serve several brands of hot dogs that are under OU supervision.<sup>249</sup>

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<sup>247</sup> *Id.*

<sup>248</sup> **Error! Main Document Only.**{Interview with Author.}

<sup>248</sup> *Id.*

## *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.<sup>250</sup>

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, that the insects found inside the flesh should be prohibited because they are organic creatures 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.<sup>251</sup>

The conflict has generated considerable debate among modern rabbis. One argument is that, because the source of the insects cannot be determined, all fish with them should be

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<sup>249</sup> **Error! Main Document Only.** 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.”

<sup>250</sup> Mature insects swallowed by fish are considered *sheratzehayam* and are prohibited, while insects grown inside the flesh are not considered *sheratzehayam* 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 *Is This Worm Kosher? The Kashrus of Tola'im in Fish*, OUKOSHER, <http://oukosher.org/blog/consumer-kosher/is-this-worm-kosher-the-kashrus-of-tolayim-in-fish/> (last visited Mar. 20, 2013).

avoided.<sup>252</sup> 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.<sup>253</sup>

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.<sup>254</sup>

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

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<sup>252</sup> *Id.*

<sup>252</sup> This argument, proposed by Shmuel Vosner (ShevetHaLevi 4:83), speculates that perhaps the Talmud is referring to a specific type of insect. Since nowadays we cannot distinguish precisely which insects are considered unkosher we should assume that they are all prohibited, even when found in the flesh of fish. Although some modern rabbis would accept the testimony of marine biologists as to different species, the general practice is to refrain from eating any insects. See DovidBistricher, *Is This Worm Kosher?*, **Error! Main Document Only**.THE DAF HAKASHRUS (Dec. 2006), [http://oukosher.org/wp-content/uploads/2013/02/Daf\\_15-3.pdf](http://oukosher.org/wp-content/uploads/2013/02/Daf_15-3.pdf).

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> **Error! Main Document Only**.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 *Check for Insects*, STAR-K ONLINE, <http://star-k.org/cons-vegdetail.php?ID=74> (last visited Mar. 20, 2013).

seafood, leading prominent Israeli rabbis to prohibit their consumption in the absence of thorough prior inspections. Most *kashrut* agencies internationally have been lenient on this topic, consistent with the simple reading of the *ShulchanAruch*. To date, however, *kashrut* authorities have yet to issue policies and procedures for proper inspections.<sup>255</sup>

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.<sup>256</sup>

The Orthodox Union (O-U) 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.

### **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 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

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<sup>256</sup> *Id.*

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 should not become involved in deciding the theological questions at the basis of determining whether a food product is kosher.”<sup>257</sup>

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. In any event, legislatures and courts must treat disputes about kosher certification as matters of consumer protection, requiring full disclosure in processing, packaging, advertising – and, if they are to adhere to First Amendment values, must refrain from applying religious law to determine what is kosher and what is not.

Even with such guidelines in place, we should recognize the reality that sacred cows have given way to holy wars – the resolution of which may have to wait for Messianic times.

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<sup>257</sup> *Id.*

<sup>257</sup> **Error! Main Document Only.** See Popovsky, *supra* note 122 at 75.