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A RISING STAR?: HALAL CONSUMER PROTECTION LAWS

The business opportunities relating to halal food—the Islamic faith’s analog to kosher food—are on the verge of exploding.¹ In both the United States and Europe, as Islam solidifies its space as the fastest growing religion in both regions, Muslims are beginning to assert their need and desire for halal food. In New Jersey and Minnesota, each of the State legislatures recently passed “halal consumer fraud protection” laws, akin to the kosher versions that had existed for some time in the two states.² The fact that the two laws were passed within a short span of time hints that critical mass is likely to be but a handful of states away, and many speculate that it will not be long until most states have their own version of a similar statute.³ Finally, another testament to this upward trend can be found in some Michigan elementary schools, where parents are demanding that their children be given access to halal food.⁴

However, without a doubt, the single most explosive business opportunity for halal meat stems from the increasing globalization of most consumer goods, including food. As trade barriers and tariffs fall with the incorporation of more nations into the WTO and GATT agreements, the possibility of exporting food to the Muslim world—comprising 1.3 billion people overall—becomes a most tantalizing possibility for players in

¹Differences between kosher and halal are subtle but numerous, and will be explored in further detail later in the piece. For the purposes of introducing the subject matter in a broad brush stroke, equating the two as analogs serves as a convenient shorthand.

²David Gibson, *Jersey Gives Its Blessing to Muslim Dietary Practices*, NEW JERSEY STAR-LEDGER, June 18, 2000, at B5.

³Elizabeth Sabah, *A Raft of Changes* at http://www.religionnews.com/arc00/f_0131.html.

⁴Gibson, *supra* note 2.

the food industry.⁵ Because many companies have realized significant increases in revenue after becoming kosher-certified, those that are eyeing halal-certification project significantly larger jumps in business, given the fact that the raw potential market for halal dwarfs that of its kosher cousin. The prospect that first movers are likely to lock-up long-term relationships with countries with significant Muslim populations—such as Indonesia, Egypt, China, and Malaysia—is adding an element of frenzy to an already fierce race. As these countries begin to adopt stringent tests to determine the acceptability of particular imports, the critical need for American businesses to understand what halal is becomes underscored.

The objective of this paper is to explore the legal aspects of the nascent halal regime in the United States. In Part I, an introduction to halal dietary laws is given. In Part II, a summary history of the halal industry—both business and legal—is explicated. Part III is an in-depth analysis of possible key learnings that can be gleaned from the kosher regime in America. Here, the similarities and differences between kosher and halal, a brief look at kosher developments, and the constitutional issues that have recently been plaguing kosher statutes are explored. Part IV attempts to tie the three previous sections together and considers the practical obstacles a successful halal regime will need to overcome. Finally, Part V concludes with a few suggestions and a look ahead.

Part I: Halal—Islamic Dietary Laws

The rules governing halal food derive—as do all rules and norms that govern the life of a Muslim—from the Koran (the holy book of Muslims, believed to be divinely revealed) and the Sunna (the living practices of Prophet Muhammad (peace and blessings be upon him)).⁶ The laws relating to diet—a small subset

⁵M. M. CHAUDRY, *Islamic Foods Move Slowly Into Marketplace*, in MEAT PROCESSING, 31, 34-38 (1997).

⁶It is customary for authors of works relating to Islam to add the phrase “peace and blessings be upon him” after mentioning the name of any of the prophets described in either the Old Testament, New Testament, or the Koran. Out of respect for this tradition, the present writer will do so throughout this piece.

of these laws and recommendations that touch almost every aspect of a Muslim's life—deal with three main issues: 1. Prohibited and permitted animals, 2. Method of slaughter, and 3. Prohibition of impure substances. We will deal with each one of these in turn.

Prohibited and permitted animals

Meat of pigs, boars, and swine are prohibited, as is that of all carnivorous animals such as lions, dogs, and cats. This applies to birds of prey as well, such as eagles, falcons, and vultures. Herbivores, on the other hands, are completely permissible, e.g. cattle, sheep, goat, and lamb. Birds that don't use their claws to hold down meat are also permissible, such as geese, quails, chickens, turkey, and ducks. Permitted animals that are fed filthy feed (such as that which is mixed with sewage) are required to be quarantined and given clean feed for 40 days in order for their systems to have cleansed. After this period of time, slaughtering may proceed.⁷

All aquatic game except frogs and crocodiles are permitted for consumption. A difference of opinion is shown in one view that holds that game that does not live 100% in the water is permitted, but discouraged for consumption. Hence, lobsters, clam, and crabs are generally eaten, but sometimes frowned upon by some practitioners. Additionally, all milk and eggs from permitted animals are themselves permitted. Finally, it is important to note one marked difference from kosher laws: there is no rule that disallows the mixing of meat and milk.⁸

⁷CAROL J. WASLIEN, *Muslim Dietary Laws, Nutrition, and Food Processing*, in ENCYCLOPEDIA OF FOOD SCIENCE AND TECHNOLOGY, Volume 2, John Wiley and Sons, Inc., New York, 1840, 1848-1850 (1992).

⁸*Id.* at 1851.

Method of slaughter

The requirements for halal slaughtering are remarkably close to those found in a kosher regime.⁹ First, the animal must be in the halal category, i.e. an herbivore or the birds mentioned above. Second, the individual performing the slaughter must be an adult Muslim. Third, the name of God must be pronounced at the moment of slaughter. Finally, the throat must be cut in a manner that brings about complete and fast bleeding which would result in the most rapid death. The agreed-upon method for fulfilling this last condition is to cut three of the four main passages, i.e. jugulars, esophagus, trachea, and carotids.¹⁰ Some of the philosophical and ecological aspects of these four steps will be discussed in greater detail below. For now, it is sufficient to note that these requirements of slaughter are necessary only for land animals. Aquatic game do not need to be slaughtered in any way. Finally, animals that die of disease, strangulation, a fall from a height, natural diseases, or through any other means that does not involve the slaughter described above, are considered unlawful. Stunning an animal to death, a practice that is done with some frequency on non-halal ranches, would make its meat off limits.

Impure Substances

The final issue that halal dietary law deals with is that of impure substances. Under this category are a number of things, including blood, excrement, wine, any liquid intoxicant (namely, alcohol), and the milk of animals that may not be eaten. The two that are most commonly at issue are alcohol and blood. With respect to alcohol, all uses are prohibited, including during the cooking process—despite the fact that most

⁹*Id.* at 1853.

¹⁰NUH KELLER, RELIANCE OF THE TRAVELLER: A CLASSIC MANUAL OF ISLAMIC SACRED LAW 365 (Amana Publications, Beltsville, Maryland) (1994).

of the alcohol evaporates. More will be said about variant opinions relating to alcohol in the section below on differing interpretations.¹¹ Blood is a universally agreed upon impurity in the Islamic context: all blood from meat must be drained, and items such as blood sausage are impermissible. The prohibition against blood in its most common form—as a liquid—would disappoint only Dracula.

Different schools of thought

It should be noted that although Muslim scholars agree on a most issues, Islamic jurisprudence has left a considerable amount of room for differing interpretations of rules and laws.¹² As mentioned near the introduction, Islamic law is based on the directives found in the Koran, as well as those found in the Sunna. These various Sunna were preserved in writing as hadith—written records of a word or deed of the Prophet (peace and blessings be upon him). Later generations of scholars were left with the task of having to determine which of these hadiths were accurate and which were forged, how to read one hadith in light of another, the implications of differing grammatical readings of the hadith, etc. As one might well imagine, a tradition that encourages qualified scholarship to explore additional levels of meaning in a particular text is bound to give rise to multiple interpretations.¹³

Historically, these multiple interpretations have occurred within the context of the four great madhahib (schools of thought), which were formed through the collective effort of successive generations of scholars working in a collaborative fashion. Though the rulings on the vast majority of legal questions were usually similar, there were a number of issues where, for example, something would be permitted in one school

¹¹This is an area of tremendous confusion, even among practicing Muslims in America. Because of the highly detailed nature of the food manufacturing process, the amount of alcohol that evaporates, the percentage that is permissible, and the safeguards necessary to insure compliance with halal standards, scholars have expressed differences of opinion on its permissibility.

¹²MUSTAFA AZAMI, *STUDIES IN EARLY HADITH LITERATURE* 217 (American Trust Publications, Indianapolis, Indiana) (1992).

¹³*Id.* at 223.

of thought, disliked in another, and not allowed in a third. This diversity of views—as long as it was rooted in rigorous methodology exercised by qualified scholars—was considered a blessing.¹⁴ A Muslim, upon confronting a situation that was unbearably difficult to deal with according to the laws derived by his particular school of thought, could take a dispensation and follow the ruling found in another school of thought. The Prophet (peace and blessings be upon him) himself said: “The differences in my community are a manifestation of mercy”.¹⁵ It is this balance between rigorous tradition and a flexibility that allows for lively debate and differences of opinion—which is itself an outgrowth of this rigorous tradition—that has given traditional Islamic jurisprudence its life-force, allowing it to exist and thrive fourteen centuries after the basic principles were laid down. The way these differences of opinion play out can be seen quite markedly in discussions surrounding the permissibility/prohibition of certain foods. Three brief examples will be mentioned, and the discussion will be limited to comparing and contrasting the two most-followed madhabs in the Islamic world: the Shafi’i madhab and the Hanafi madhab.¹⁶

The first example is that of alcohol. According to the Shafi’i madhab, anything which contains alcohol is considered impure, and is consequently not permissible for consumption. However, a number of liquid flavors such as vanilla contain alcohol.¹⁷ In fact, the use of alcohol is quite common for reasons such as flavor extraction and standardization, as well as ingredient precipitation. What is someone who diligently follows the position of the Shafi’i madhab to do? One option is to avoid items that have alcohol in them, which would effectively remove whole categories of food from his menu. Another option is to wait for food manufacturers to respect this restriction, and to use permitted substitute products in the meantime, such as grain or synthetic alcohol instead of the impermissible ethyl alcohol. Unless manufacturers learn of a

¹⁴*Id.*

¹⁵*See id.* at 225.

¹⁶WAFFA SHAQRA, A GLOSSARY OF ISLAMIC TERMINOLOGY, 25 (Ta-Ha Publishers Ltd, London) (1992).

¹⁷Roger Othman, *Alcohol—A Drink/A Chemical*, 1 HALAL CONSUMER, 12, 13 (Fall 2000).

significant market need, it is unlikely that these changes will be implemented any time soon. As such, this wait-and-see approach is not a real option. A third possibility is to look to an alternative school of thought, in this case the Hanafi madhab. According to this school of thought, liquid flavors containing alcohol such as natural vanilla are considered pure because they are neither produced nor intended as intoxicants.¹⁸ Here, the Hanafi scholars use largely the same textual sources available to the Shafi'i scholars, but by employing a different methodology, arrive at a legal ruling that permits this commonly used ingredient.

A second example is that of gelatin. This substance, generally made from pork skins, is a hotly debated issue in the kosher community. Likewise, it is something that is frequently discussed in halal circles. According to the Shafi'i madhab, gelatin is categorically forbidden if it comes from animals that aren't permissible to eat, i.e. pig or unslaughtered cattle or beef. However, Hanafi scholars hold fast to the general methodological principle that something impure which is transformed at the molecular level into a new substance has become pure. A common example is parts of a pig (impure) becoming soap (pure).; the same reasoning applies to gelatin.¹⁹ The chemical process that is undertaken is, according to Hanafi scholars, significant enough that the resultant product—though of pig origin—no longer bears a close resemblance to the original object. As such, it is now considered pure and is acceptable for consumption.²⁰

A third and final example is that of rennet and other animal-based enzymes. The Shafi'i madhab holds that such enzymes that come from unslaughtered animals are impermissible for consumption. However, Hanafis hold that many parts of an unslaughtered dead animal are permissible, including its bones, hair, nails, horns, and rennet.²¹ For this reason, the current industry standard of using rennet and other enzymes

¹⁸*Id.* at 15.

¹⁹KELLER, *supra* note 10, at 368.

²⁰YUSUF QARADAWI, *THE LAWFUL AND THE PROHIBITED IN ISLAM*, 128 (The Holy Koran Publishing House, Beirut, Lebanon) (1984).

²¹*Id.* at 132.

in the cheese-making process is compatible with the Hanafi position.

It is important to make a distinction here between the Islamic attitudes towards differences of opinion and the closely related but philosophically different ones found in Jewish jurisprudence. In the latter, there is a sense of a hierarchy of strictness: One can expect to find the more ‘conservative’ positions in Orthodox teachings and the more ‘liberal’ positions in Reform circles.²² However, in the Islamic context, one is hard-pressed to guess which school of thought will have the more ‘lenient’ position towards a particular question. This is because what marks the different schools of thought is not so much an attitude of ease or rigorousness, but rather a particular methodology that is used in a case-by-case fashion to arrive at a ruling about something. The fact that the Hanafi position closely matched our intuitions about which of the two rulings was more ‘liberal’ is in large part coincidental. Many other issues of jurisprudence have the Shafi’i position appearing to be the more “liberal”, or have both the Shafi’i and the Hanafi seem ‘strict’ when compared to a third school of thought.²³ Having said this, it is nonetheless fair and accurate to say that it is commonly recognized by jurists that the Hanafi position gives the most flexibility with respect to food issues.

Philosophical Basis of Halal Laws

Before examining the current state of the halal industry in the United States, it would behoove us to briefly throw into high relief some of the principles that drive the halal regime by looking at three concrete examples: the rules of slaughtering, of hunting, and a particular decision calculus that involves eating from impermissible foods.

²²WASLIEN, *supra* note 7, at 1842

²³An example can be found in the prayer-orientation. Muslims must face the direction of Mecca for prayer, but the different schools of thought have a range of acceptable error when using a compass to determine direction. While the Hanafi school permits a range of plus/minus 45 degrees, and the Maliki school permits plus/minus 90 degree, the Shaf’i school permits only a 15 degree difference.

The Islamic rules concerning animals are uncompromising about the need for their humane treatment, particularly those that are to be slaughtered. The default position is that all life is sacred, and that the taking of a life for any reason is an absolute enormity. The elixir that turns this absolute prohibition into something allowable is permission from the Divine. Were it not a fact that the Koran and Sunna allow slaughtering animals for the purpose of food, some scholars have argued that it would be impermissible to eat them at all.²⁴

It is against this backdrop that the meticulous rules of etiquette *vis a vis* ritual slaughter make sense. First, the animal is to be given adequate rest and water. Second, an authentic hadith commands the slaughterman not to sharpen his knife in front of the animal, a commandment rooted in the idea that any harm—physical or emotional—to the animal that is beyond what is strictly necessary is blameworthy. Third, the knife used must be sharp, and the throat must be cut in such a manner that results in complete bleeding and the quickest death. If the blade strikes a chicken through the head or chest rather than neck, it is considered a sin, and the resultant meat is impermissible.²⁵ In an age where machine slaughtering of chicken is far more efficient than traditional hand-slaughtering, such rules serve to incentivize the slaughtermen to honor the humane treatment; if not, the goods of efficiency will come at the cost of the permissibility of the slaughtered meat.

A second manifestation of this uncompromising demand to keep to that which is strictly necessary are the Islamic rules that pertain to hunting. Wild animals like deer and birds such as doves, quails, and pheasants can be hunted only for the purpose of eating; hunting such game for the thrill of the hunt, as it were, is categorically forbidden.²⁶ Though tools such as arrows, trapping equipment, hunting animals, or guns are all permissible, there are constraints in their use. For example, if an arrow hits an animal and then the animal drops into water, the game animal is impermissible to eat. The reasoning here is that since the

²⁴KELLER, *supra* note 10, at 371.

²⁵WASLIEN, *supra* note 7, at 1847.

²⁶*Id.* at 1848.

animal might have died from drowning rather than from being shot, and that the former is a ‘cruel’ means of killing the game, its meat is impermissible. Another instance involves the use of a hunting animal: if the animal used is trained, then the game captured is permissible for consumption; otherwise, the game is not permissible to eat. One explanation given for the logic behind such detailed rules is that they serve to put Muslim hunters on alert: unless specific etiquette is followed, the game captured or killed is impermissible, and the hunter then carries the sin of taking life for no justifiable reason.²⁷ Moreover, such impermissibility serves to incentivize the hunter to be careful about how he goes about his business: if the game he kills is at the end of the day impermissible, his efforts will have gone to waste. Here, the larger Islamic principles of avoiding excess and maintaining balance is displayed by what might otherwise appear to be unnecessary details.²⁸

Finally, a third short rule pertaining to food underlines some of the principles earlier mentioned. If one is forced to eat from an impermissibly slaughtered animal out of fear of losing life or an illness getting worse, then doing so is permitted.²⁹ It is generally understood that this should be accompanied with restraint to limit oneself to the minimum that is necessary. A more revealing hypothetical pits one with a choice between eating a) impermissible meat such as pork or unslaughtered beef, and b) meat that is permissible, but that belongs to someone else. Here, despite the clear prohibition and tremendous sin that are attributed to eating unslaughtered meat—as well as the various warnings in Islamic jurisprudence that such a person’s prayers will not be accepted for a lengthy period of time—the primacy of respect and honor for the property of another human being tips the scale.³⁰

²⁷KELLER, *supra* note 10, at 365.

²⁸*Id.* at 366.

²⁹*Id.* at 368.

³⁰*Id.* at 371.

PART II: Halal dietary laws in america

Having explored some general principles and several specific examples of these halal dietary rules, the next logical move is to examine how these laws are being applied in a U.S. context.

Summary History of Halal in America

The halal industry had a slow, plodding start in the United States. For many years, the industry was characterized by a series of mom-and-pop shops owned and operated largely by immigrant workers.³¹ These shops tended to grow out of and cluster around areas of ethnic concentration. The languages at these shops spoken included Urdu, Malay, Somali, and Arabic, and operated according to a neighborhood-friendly ethos. In this environment, the meat was slaughtered by a local butcher, and the neighborhood imam—religious leader—supervised the process and vouched for its permissibility.³² As the demand for halal increased, store owners found it easier and cheaper to buy from non-local distributors who were able to leverage the economies of scale; one of the trade-offs was that these local store owners became more lax in their monitoring of incoming meat, and did not always take the necessary steps to insure that it was slaughtered in an appropriate manner.³³

One of the leading Muslim newsmagazines in the United States, *The Minaret*, found that up to 65% of Islamic stores in southern California were selling non-halal products as halal.³⁴ The conductors of the survey attributed this to both deception and simple ignorance. Another Muslim non-profit, the Washington-based

³¹ AHMED SAKR, *ISLAMIC DIETARY LAWS AND PRACTICES*, 58 (Bedford Park, Illinois) (1983).

³² *Id.* at 61.

³³ CHAUDRY, *supra* note 5, at 37.

³⁴ Aslam Hathout, *Islamic Food: The Sleeping Giant*, *THE MINARET MAGAZINE*, March 2000, at 28.

Council on American-Islamic Relations, called the status quo a “Wild West”.³⁵ Despite this less-than-optimal health of the halal industry, commentators all agree that the market for halal is on the verge of exploding. This upward trajectory brings with its own blessings and curses; many have suggested that the near-term threat to the already-crippled integrity of halal will come primarily from the large industrial players as these businesses wake to the prospect of this explosive market.³⁶

A number of events indicate that this rapid growth is just around the corner. Two laws were passed recently—within several months of each other—that aimed to protect halal consumers from fraudulent sellers.³⁷ Another incident in 1997 involved the US Department of Agriculture fining a Virginia meat producer \$15,000 for intentionally mislabeling ordinary meat as halal.³⁸ In many ways, the Muslim community is developing along a similar track to that which Jews and kosher tread many decades ago, as well as that of the organic community in its quest for authentic organic food—a period of slow growth and relatively adequate-but-loose community enforcement, followed by a rapid growth and an accompanying sense of mild anarchy with respect to authentication, then a demand for standards and consumer protection, and finally the establishment of consensus-based uniform standards.³⁹ The last two areas will be explored in some detail in a later section of this work.

³⁵ *Id.* at 30.

³⁶ CHAUDRY, *supra* note 5, at 39.

³⁷ Sabah, *supra* note 3.

³⁸ Gibson, *supra* note 2, at B11.

³⁹ Whether or not the halal regime will tread this path to completion is unclear. Kosher and organic foods developed very strong market share, and could command legislation that protect their regimes, albeit not as strongly as the regime proponents would like. Because halal is an-ultra young industry in the American context, how fast it moves along this life-cycle is something that we will have to take a wait-and-see attitude towards.

Why the Halal Regime was Slow in Developing

In order to better think through how the halal industry can best develop in the coming decade, it is valuable to first give some thought to why this halal revolution did not happen sooner. If strategists ignore to study and diagnose historical obstacles, there is a likelihood that these same obstacles will re-appear. The question of “why so long for the halal revolution”, then, is as relevant for the next decade as it was to the past one. There are at least three possible answers that shed light on why the halal industry—despite wide consensus that views it as a latent powerhouse—is as yet woefully underdeveloped.⁴⁰

The first answer places the blame on a fundamental misunderstanding that has plagued Muslims in the United States. The Koran makes permissible the meat of the “People of the Book”, i.e. Jews and Christians.⁴¹ All qualified religious scholars have traditionally interpreted this to mean meat that is slaughtered by Jews and Christians in keeping with their respective religious laws.⁴² Good-hearted Muslim immigrants in the 1960’s, as part of an overall attempt to join America’s melting pot without rocking the boat, took things at face value.

Because America considers itself a Christian country, and individual Christians consider God to be an important part of their life, these early Muslim immigrants gave the benefit of the doubt and concluded that the meat these Christians were slaughtering was, by virtue of their professed adherence to Christianity, acceptable to Muslims. It did not take long for them to realize that the slaughterhouses for Safeway and other national chains—though made up of self-proclaimed religiously-minded individuals—were not being operated according to any religious methodology. The name of God was not recited—an absolute requirement for Muslims. This disqualification of the Christian half of the “People of the Book” left the possibility of Jews

⁴⁰This “sleeping giant” phenomena has bothered those who are deeply involved in the industry. The market is enormous, but foot-dragging seems to keep things from proceeding along a faster track.

⁴¹Muslims are taught to accord people of faith, especially Jews and Christians, unwavering respect. The “People of the Book” designation is meant to be one of nobility and honor.

⁴²Jafar Qaderi, *The Food of Ahlul-Kitab*, 1 HALAL CONSUMER 21 (Fall 2000).

and kosher. Here, though the requirements for slaughter are quite similar, a problem exists in that kosher does not ban alcohol.⁴³ Consequently, foods that contain—for example—vanilla are considered kosher, but not halal. Other more technical considerations exist, but the upshot is that neither kosher nor modern-day Christian dietary rules are an adequate substitute for halal.⁴⁴

Though some of the above facts do not come as a surprise to many learned Muslims, it is still common today to find large numbers of Muslims who are unable to articulate the differences between kosher and halal. In fact, most Muslims in the U.S. are unaware that kosher permits alcohol and would be shocked upon learning of this fact. Detailing how and why knowledge-based traditional Islamic jurisprudence lost its way is beyond the scope of this work.⁴⁵ For our purposes, it is enough to note that because kosher was widely considered to be a perfectly acceptable substitute for halal, many Muslims simply did not feel a pressing need to develop the industry rapidly. The maxim, “Necessity is the mother of invention”, and its corollary (“...mother of industry”), was the prevailing logic: as long as Muslims did not feel that developing halal was a necessity—because of the perception that acceptable substitutes were easily on-hand—no invention/industry followed.⁴⁶ Now, with better consumer awareness that kosher and halal are similar but not synonymous, as well as other reasons that will be explored elsewhere in this piece, Muslims are actively demanding a full-fledged halal industry.

A second set of reasons that account for the slow development of this industry are purely tactical, and relate to issues of organization and coordination for Muslims in America that go far beyond food. Few non-profits exist, the ones that do tend to overlap in much of their work, centralization and joint projects are few, and community funds are poorly spent.⁴⁷ There is a general lack of authority, which has given rise to numerous

⁴³Othman, *supra* note 17, at 14.

⁴⁴Qaderi, *supra* note 42, 22.

⁴⁵This phenomena has lead some to state that an “American Islam” is developing, one that mirrors the early evolution of Protestantism in America. However, it does seem as though the pendulum is swinging back in the direction of a classical, school-of-thought-based understanding of the religion.

⁴⁶Gibson, *supra* note 2, at B11.

⁴⁷Masood Uthman, *Muslim Politics in America*, THE MINARET MAGAZINE, January 2001, at 12.

splinter groups. The sheer diversity of Muslims in America—a combination of immigrants from Ethiopia to Indonesia to Bosnia and China—joining with American-born converts is daunting, and makes community coordination difficult to achieve. Obviously, any efforts to watchdog agri-business or push for legislative reform to protect halal consumers requires political savvy rooted in a strong voting base.⁴⁸ Consequently, the absence of these things has—at least until quite recently—created a sense of stagnation.

A third possible reason, similar to the one just explicated, has little to do with food-specific factors as such. Simply put, immigrant Muslims in America have been transitioning to life in the West, and the issues that greet immigrants are complicated and numerous. Because of the wide perception of kosher-as-substitute, as well as the serious concerns that Muslims in America faced as a developing minority over the past two decades, halal was simply relegated to the bottom of the agenda.⁴⁹ Given this prioritization scheme of immigrant Muslims, it is not surprising that the real push for authentically halal products and related halal consumer fraud laws has come from a number of American-born converts to Islam.⁵⁰

Where the Industry Stands Today

Putting aside these past failings, it is clear that halal is poised to explode. Already mentioned as evidence of this market growth are the large-scale producers who are entering the game, the two recent state consumer fraud laws, and the visibly increased demand for halal products. In addition, countries with large Muslim populations have become increasingly discriminating about products that purport to be halal. For example, analytic laboratories have been set up at their ports-of-entry to test for precise alcohol contents in food.⁵¹

⁴⁸*Id.* at 15

⁴⁹Hathout, *supra* note 34, at 29.

⁵⁰Uthman, *supra* note 47, at 15.

⁵¹ALAN SAMS, POULTRY MEAT PROCESSING 115 (2001).

The halal industry has reached a sort of ‘fork in the road’: This sudden explosion in market size against a backdrop of two decades of checkered success in developing the right business and legal infrastructure entails that a great deal of work needs to be done in an accelerated fashion.

Part III: Lessons from the Kosher Regime

Throughout the descriptive portion of this piece, references have on occasion been made to the kosher industry. In thinking about next steps for the halal industry, particularly with respect to suggesting a workable legal structure that can help direct and foster this inevitable growth, it is well worth our time to examine the related kosher system. In assessing its business efficacy and legal strength, much can be gained for developing a halal blueprint. We will first explore some of the similarities and differences between halal and kosher. Next, we will give a brief history of kosher in America. Finally, we will devote a fairly extensive amount of thought to the constitutionality issues that are facing kosher, and by association, halal.

Similarities and Differences in Kosher/Halal Dietary Laws

The kosher legal regime provides the closest analog to what a halal fraud statute might look like. The similarities between halal and kosher are remarkable: both are religiously-based statutes, are part of a larger life-transaction code of conduct, have a number of adherents in the United States, and involve both product and process-based restrictions.⁵² Some of the specific guidelines with respect to process and product are even more striking, such as the impermissibility of gelatin, the need for a humane ritual slaughter, and the

⁵²Qaderi, *supra* 42, at 23.

notion of sanctity with respect to food.⁵³ Among the differences are that Muslims can mix meat and milk, need only to clean the utensils that are used interchangeably between halal and non-halal food, and are categorically forbidden from using wine in either food or alone as a beverage.⁵⁴

Stepping back to compare the two systems in a U.S. context shows additional differences. While halal is in its embryonic stages in the U.S., and food manufactures have been slow to adopt it as a standard, kosher is a well-known and wildly popular reality in the food industry. Halal food is currently purchased primarily by Muslim consumers, while kosher has spilled over to the mainstream in a significant way. Some estimates place the total number of non-Jewish purchasers of kosher food products at 75%.⁵⁵ This last distinction will be revisited and discussed in some depth below when exploring how much of the learnings from the kosher experiences can be borrowed by the developing halal regime. The final bird's-eye-view difference is that while kosher laws are being stricken on constitutional grounds and revised, halal laws are being written with these constitutional challenges in mind, and are consequently being embraced by a number of states.⁵⁶

Summary History of Kosher in America

Having explored some of the specific similarities and differences between kosher and halal, it is best to now turn our attention to examining how the kosher regime developed. By definition, kosher products are more expensive than non-kosher counterparts, mainly due to the increased costs of supervision and labor required in the kosher food production process.⁵⁷ Because of religious/health needs, consumers have demonstrated

⁵³J. Awan, *Islamic Food Laws: Philosophy of the Prohibition of Unlawful Foods*, in SCIENCE AND TECHNOLOGY IN THE ISLAMIC WORLD 133, 137 (1984).

⁵⁴*Id.* at 138.

⁵⁵Gibson, *supra* note 2, at B11.

⁵⁶*Id.* at B5.

⁵⁷Jonathan Slonim, *Kosher Certifiers Say Violations Are on the Rise*, FORWARD, June 27, 1997, at 2.

a willingness over the last century to pay a significantly higher amount for a kosher product versus a non-kosher one, all other things being equal. Because it is difficult, if not outright impossible to determine from the appearance of the end product whether or not something is kosher, this—along with the higher margins mentioned above—incentivizes dishonest merchants to sell their less-costly goods as higher-margin kosher items.⁵⁸

Consequently, before any laws were passed, lawlessness was the rule of the day. Fraud was all-too common, and relatively little could be done about it. Many Jewish immigrants were still in the process of getting to know their new homes, and local merchants—“kosher crooks” —took advantage of these newcomers.⁵⁹ Though states like New York and Massachusetts tried to do away with some of this disorder by appointing a “Chief Rabbi”, opposition from the kosher food industry killed the proposals.⁶⁰ In one famous letter often quoted in kosher-history surveys, a Hungarian Jewish immigrant to the US wrote his rabbi in 1887 bemoaning the miserable state of the kosher food industry.⁶¹ Finally, in 1891 New York passed the first kosher food law. Though it was a bare-bones version of a statute that was to be heavily revised and expanded, it was a symbolic first step. Massachusetts passed its own similar law one year later.⁶²

The 1922 New York revisions to its 1891 kosher fraud law marked the real beginning of consumer protection. Among other things, it forbade the sale of non-kosher meat as kosher. Further, it required stores that sold both kosher and non-kosher to label each section accordingly. Punishment for violations included a fine or jail term for small violations, and being charged with a felony for larger violations.⁶³ Of course, as with legislation in general, the effects took some time to be felt. It was estimated that in 1925, 40% of the meat sold as kosher in New York City was in fact not kosher.⁶⁴ The fact that internal information dynamics in this

⁵⁸*Id.* at 4.

⁵⁹Marc Stern, *Kosher Food and the Law*, 39 JUDAISM 389, 389 (1990).

⁶⁰HAROLD GASTWIRT, FRAUD, CORRUPTION, AND HOLINESS: THE CONTROVERSY OVER THE SUPERVISION OF JEWISH DIETARY PRACTICE IN NEW YORK CITY 1881-1940 102 (James Shenton ed., 1974).

⁶¹*Id.*

⁶²Stern, *supra* note 59, at 391.

⁶³GASTWIRT, *supra* note 60, at 108.

⁶⁴*Id.* at 110.

large concentration-center of Jewish individuals was not enough to keep fraudulent vendors from operating successfully indicates that fraud rates were higher in less-organized Jewish centers.⁶⁵ The statute was supported by many Orthodox and Conservative Jewish groups, including the New York division of the United Synagogue of America, the Union of Orthodox Rabbis and the Assembly of Orthodox Rabbis. Opposition came from other Jewish groups, notably the Progressive Hebrew Butchers Protective Association, which objected to defining “kosher” as “Orthodoxy”. Despite their protests, the New York law was successfully revised, and a similar law in California was passed in 1931.⁶⁶ Once California and New York set the standard, other states looked to these statutes and drafted their own, essentially using the New York law as a template.⁶⁷

What helped the New York statute replicate itself in form across several states was the fact that it was able to withstand several legal challenges. In 1918, in *People vs. Atlas*, the challenging parties argued that “kosher” was unconstitutionally vague; because rabbinical law determining what was or was not “kosher” was ambiguous and imprecise, a specific definition was impossible to arrive at.⁶⁸ The court rejected this argument, and argued that the regulations in place required that a merchant have the intent to defraud a consumer in order for a violation to be found. In other words, if a merchant believed in good faith that he was selling kosher, he was immune to consequences under the New York statute. In 1922, the US Supreme Court in *Hygrade Provisions* reiterated *Atlas*’ finding, arguing that the term kosher had a sufficiently well-defined meaning in trade, such that merchants would know what kosher meant.⁶⁹ The fact that a great deal of rabbinical disagreement was likely posed no constitutional problems, because of the intent to defraud requirement of the statute. It should be noted that no Establishment Clause challenge was made in *Hygrade*, largely because the First Amendment’s Establishment Clause was thought to be inapplicable to state laws

⁶⁵*Id.*

⁶⁶ELI SCHLOSSBERG, *THE WORLD OF ORTHODOX JUDAISM* 58 (1996).

⁶⁷*Id.* at 65.

⁶⁸*People v. Atlas*, 130 N.E. 921, 928 (N.Y. 1921).

⁶⁹*Hygrade Provision Co., Inc. v. Sherman*, 266 U.S. 497 (1925)

at the time the decision was made.⁷⁰

The clear ruling by courts in *Hygrade* and *Atlas* kept challengers at bay for almost four decades.⁷¹ Other challenges to New York-style statutes launched in other states were likewise unsuccessful. In *Ehrlich v. Municipal Court*, a California court rejected the challengers' claims that "no two rabbis could agree on the meaning of the term kosher".⁷² The threshold requirement of intent to defraud was again offered as a defense to the statute. Eleven years later, in *Sossin Systems v. City of Miami Beach*, the defendant took a different approach, arguing that an ordinance similar to New York's was in violation of the Establishment Clause.⁷³ The court dismissed the claims in cursory fashion: "We are unable to view this ordinance as a legislative enactment establishing or respecting the establishment of religion".⁷⁴ A second major case dealing with a possible Establishment Clause violation was Maryland's *Barghout v. Mayor*. Not surprisingly, the court repeated the same standard arguments about the good faith provision of its New York-style ordinance. It argued that Maryland's constitution did not forbid "establishment" of the religion in a way like the US Constitution did.⁷⁵ The question of whether or not this latter constitution was contravened was a question that the Maryland courts left to the federal courts.

The impressive several-decade invincibility that kosher statutes enjoyed began to crack with the 1992 *Ran-Dav's County Kosher* decision. By a four-to-three vote, the New Jersey Supreme Court held that the use of kosher standards was unconstitutional under Establishment Clause analysis.⁷⁶ The *Barghout* suit followed on the heels of *Ran-Dav*, and in 1995, the Fourth Circuit declared unanimously that the Baltimore kosher

⁷⁰Catherine Beth Sullivan, Comment, *Are Kosher Food Laws Constitutionally Kosher?*, 21 BOSTON COLLEGE ENVIRONMENTAL LAW REVIEW, 201, 205 (1993).

⁷¹*Id.* at 211.

⁷²*Ehrlich v. Municipal Court of Beverly Hills Jud. Dist.*, 360 P.2d 334 (1961)

⁷³*Sossin Sys., Inc. v. City of Miami Beach*, 262 So. 2d 28, 42 (Fla. Dist. Ct. Apl. 1972).

⁷⁴*Id.* at 40.

⁷⁵*Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337, 1343 (4th Cir. 1995).

⁷⁶*Ran-Dav's County Kosher, Inc. v. New Jersey*, 608 A.2d 1353 (N.J. 1992).

fraud ordinance was unconstitutional.⁷⁷ The proverbial nail in the coffin came when the Court in New York—birthplace of the original kosher fraud laws and home to one of the largest population of Jews in the world—echoed the sentiments of the previous two courts and declared that the New York statute was itself unconstitutional.⁷⁸ Commentators have pointed out that these three rulings in rapid succession are likely to accelerate the pace that other state statutes are challenged and struck down. Until at least one court stops this hemorrhaging by defending the constitutionality of these provisions, it is likely that the momentum will claim more casualties.⁷⁹

Evaluating the Constitutionality Issues

Because of the similarities between kosher and halal, and the modeling of the latter's statute-implementation strategy on the former's, this change in legal attitude towards New York-style kosher statutes is most worthy of attention for our purposes. Examining some of the Establishment Clause arguments presented by the courts in the three aforementioned decisions will help in forecasting the future direction that courts are likely to take. The *Ran-Dav* court made its decision by the slimmest of margins, indicating that there is a possibility that future courts may go the other direction.⁸⁰ Perhaps the best way to proceed is to examine the arguments made by the anti-statute courts—using the *Ran Dav* Court's arguments as the model—and to balance this with a defense of the constitutionality of these statutes. After getting a sense of the relative merits of each position, we can then consider our conclusions in the specific context of a halal legal regime.

⁷⁷Stephen Rosenthal, *Food for Thought: Kosher Fraud Laws and the Religion Clauses of the First Amendment*, 65 GEORGE WASHINGTON LAW REVIEW, 951, 962 (1997).

⁷⁸Benjamin Gutman, *Ethical Eating: Applying the Kosher Food Regulatory Regime to Organic Food*, 108 YALE LAW JOURNAL 2351, 2355 (1999).

⁷⁹*Id.* at 2359.

⁸⁰Shelly Meacham, Note and Comment, *Answering to a Higher Source: Does the Establishment Clause Actually Restrict Kosher Regulations as Ran-Dav's County Kosher Proclaims?*, 23 SOUTHWESTERN UNIVERSITY LAW REVIEW, 639, 641 (1994).

A.

Secular purpose

One of the key elements of Establishment Clause analysis is that a statute must have a secular purpose. Because this secular purpose prong requires only that the statute not be one that is “wholly motivated by religious considerations”, the vast majority of courts have permitted statutes that have a “plausible secular purpose.”⁸¹ With respect to kosher cases, such secular purposes have included, among other things, the protection of “consumers who, for reasons of religion, conscience, quality or health, intend to purchase kosher foods,” and “to protect people from unscrupulous vendors who try to lure them into buying something less than what they are entitled to expect.”⁸² However, Judge D’Annunzio, the influential New Jersey Superior Court Appellate Judge, argued that “almost every attempt by the State to police religious practice can be justified as a legitimate attempt to prevent fraud.” He then goes on to compare kosher protection laws to a hypothetical regulation that “prohibits a church from designating itself as Christian unless it professes and teaches the divinity of Jesus Christ.”⁸³

B.

Denominational Preference

A central concern of Establishment Clause analysis is that the state apply strict scrutiny to laws that “facially differentiate among religions,” so as to prevent the benefiting of one religion over another. One

⁸¹I am indebted to Stephen Rosenthal (*supra*, note 77) for helping to crystallize the structure for this section of the paper, helping to analyze the sometimes unclear issues addressed by the court.

⁸²*Ran-Dav*, 608 A.2d at 1358.

⁸³*Id.* at 1359.

possible weakness in the kosher laws is that eighteen out of twenty-two states with kosher laws equate kosher with Orthodox standards.⁸⁴ Given that there are three major schools of thought in Judaism—Orthodox, Conservative, and Reform—one may well wonder whether or not this privileging of the Orthodox standard harms those in the other two camps. However, this remains in the background as a theoretical issue, given that none of the three courts struck down the kosher laws based on this particular ground. More worrisome is the doctrinal entanglement argument described at length below.

C.

Doctrinal Entanglement

The strongest challenge to the kosher food laws coming from the New Jersey Supreme Court centered around the issue of doctrinal entanglement.⁸⁵ Under the famous *Lemon* rule, a particular statute must not encourage “an excessive government entanglement with religion.”⁸⁶ The Court argued that the kosher laws “inextricably intertwined Jewish Law prescribing religious ritual and practice with the secular law of the state.” This intertwining of secular and religious law was inevitable because the kosher statute imposed religious standards, and then went on to authorize the State to verify compliance with these religious-based standards. Responding in advance to a possible response that the kosher standards could be recast in secular terms, the Court argued that the regulations were troublesome because they attempted to monitor not the “nutritional quality or sanitary purity of kosher food, but only its religious purity.”⁸⁷ Finally, the Court argued that the religious determination of “kosher” was open to dispute; the inevitable application and

⁸⁴Kristin Morgan, casenote, *The Constitutionality of New Jersey Kosher Food Regulations Under the Establishment Clause*, 62 UNIVERSITY OF CINCINNATI LAW REVIEW, 247, 263 (1993).

⁸⁵Karen Ruth Lindsay, *Can Kosher Fraud Statutes Pass the Lemon Test?: The Constitutionality of Current and Proposed Statutes*, 23 UNIVERSITY OF DAYTON LAW REVIEW 337, 356 (1998).

⁸⁶*Lemon v. Kurtzman*, 403 U.S. 602, 610 (1971).

⁸⁷*Ran-Dav*, 608 A.2d at 1363.

interpretation of Jewish law would be problematic as the State could not lend its power to a particular side of a religious argument. Accordingly, the Court concluded that the regulation violated the Establishment Clause under a *Lemon* entanglement test.⁸⁸

Each of the objections mentioned above will be dealt with in turn. The most troublesome of these can be stated plainly as follows: Because every accusation of kosher fraud requires the government to prove that the vendor's representation was false, i.e. not kosher, the government would inevitably have to turn to religious sources to prove its case. A simplistic analysis of "separation of church and state" would seem to argue against this partnership, but case law seems to have carved out an area where this type of inquiry by a secular, government court can be made.⁸⁹

In *Jones v. Wolf*, the "neutral principles" approach was established by the Supreme Court, guiding civil courts in how to properly construe church documents. The basic holding was to scrutinize a document in secular terms, while abstaining from interpreting provisions that inherently involved "religious concepts."⁹⁰ Harvard University's John Mansfield expands on this point by making a distinction between inherently religious terms, such as being "saved" or "holy water"—which rely on a "reference beyond human experience to an extrahuman source of value"—and facts that are "of this world", such as whether or not particular water in question in fact comes from the Dead Sea, or if an artifact is composed of wood or stone.⁹¹ The neutral principles approach thus advocates a two-step approach: first is to comb through a particular religious document and make a clear distinction between inherently religious language and language that is "of this world"; second is to interpret the latter, and to simply punt on the former.⁹²

⁸⁸Sullivan, *supra* note 70, at 209.

⁸⁹Rosenthal, *supra* note 77, at 955.

⁹⁰*Id.* at 958.

⁹¹*Id.*

⁹²*Id.* at 964.

Just as courts have used the neutral principles approach helpful in the context of church documents crafted with secular language, it is entirely reasonable to suppose that civil courts can likewise read kosher fraud laws, whose wording can be likewise be characterized as largely secular in tone. Kosher rules for the most part deal with things that are “objectively ascertainable”, such as whether or not the meat has been soaked and salted for the proper length of time, whether or not milk and meat have mixed, how an animal is slaughtered, and the like.⁹³ To make the distinction clear, an example of a kosher rule that uses inherently religious concepts is one that holds a particular piece of meat to be non-kosher because the slaughterer is “impious”.⁹⁴ In such a case, a civil court could not resolve such an issue, but it would be free to examine other process-related facts, such as whether or not this “impious slaughterer” severed the trachea in one knife-stroke. Thus, the neutral principles approach seems to give courts a way to deal with regulations whose impulse and wording are religious, but whose interpretation can be done in a straightforwardly secular manner.

One of the assumptions in the approach advocated above is that the religious standard that courts are applying are unanimously agreed to. What happens if there is a genuine religious difference of opinion as to whether a particular factor affects a product’s status as kosher? One example is that of the prayer said before slaughtering an animal: one school of thought holds that saying the prayer is an absolute prerequisite for kosher, another says that its preferable, but an omission does not affect the kosher status.⁹⁵ In such a case, a civil court is not permitted by any of the authorities discussed above to resolve this dispute. Rather, it would have to simply pass on the question, and could not prosecute a particular merchant for violating what turns out to be something that Judaism’s religious scholars themselves have active disagreements about.⁹⁶

⁹³6 ENCYCLOPEDIA JUDAICA 31 (1972).

⁹⁴Rosenthal, *supra* note 77, at 943.

⁹⁵ISSAC KLEIN, A GUIDE TO JEWISH PRACTICE 215 (1979).

⁹⁶Rosenthal, *supra* note 77, at 949.

Given that there are a number of areas where the meaning of kosher is disputed within Jewish religious circles, the question for us is how significant this lack of unanimity has to be in order to judge the rule unconstitutional.⁹⁷ A dissent in the *Ran-Dav* decision, Justice Stein, argued that, “A statute or regulation is facially unconstitutional only if the guiding constitution is necessarily violated every time the law is enforced.”⁹⁸ In other words, if there is unanimous consensus about what kosher means with respect to a majority of factors—even if this falls short of unanimity on ALL factors—then there is an argument that the statute should survive. This then becomes an empirical investigation. While the anti-statute courts seemed eager to use a handful of graphic examples that showed differences of opinion, all reliable sources acquainted with even the most basic knowledge of Judaism point to the fact that on the vast majority of questions of kosher standards, there is agreement among Jews.⁹⁹ One common way of expressing this has been to plot all possible kosher issues on a line from A-Z. Factoring for both differences of opinion with the Orthodox Jewish community as well as other Jewish denominations, the range of consensus can be thought to lie somewhere along A-V.¹⁰⁰

This *ex ante* investigation is bolstered by data that can be mined from a study of kosher food regulation in New York. First, the study found that in situations where there were rabbinical disagreements over whether or not something was kosher, “neither the Department of Markets nor the Kosher Law Enforcement Bureau were likely to bring the issue to court.”¹⁰¹ Second, in the case of *Brach’s Meat Market, Inc. v. Abrams*, the court dismissed the case altogether when the testimony of two rabbis conflicted with respect to whether deveining

⁹⁷Mark Berman, *Kosher Fraud Statutes and the Establishment Clause: Are They Kosher*, 26 COLUMBIA JOURNAL OF LAW AND SOCIAL PROBLEMS, 1, 17 (1992).

⁹⁸*Ran-Dav*, 608 A.2d at 1358.

⁹⁹ALAN UNTERMAN, *JEWIS: THEIR RELIGIOUS BELIEFS AND PRACTICES* 184 (1981).

¹⁰⁰*Id.* at 189.

¹⁰¹Slonim, *supra* note 57, 394.

tongues was necessary for kosher.¹⁰² Third, the best articulation of this “neutral approach” was expressed in *Korn v. Rabbinical Council*: “Jurisdiction will be proper if, after the application of traditional Judaic law to the facts surrounding the preparation of the specific food in question, Jewish religious authorities do not dispute the characterization of the food as kosher.”¹⁰³

The upshot of the foregoing is that the anti-statute courts were hasty and simplistic in their dealing with the entanglement issue. Case law, via the “neutral” approach, has carved out a well-established space where civil courts could refer to religious standards under certain conditions, but the anti-statute courts preferred to ignore this. Instead, they appealed to hypothetical examples and simply dismissed the realities of kosher laws.

D.

Vesting Entanglement

Another potential area of Establishment Clause concern deals with the manner in which governments enforce the kosher fraud laws. In *Larkin v. Grendel’s Den, Inc.*, the Court held that the Establishment Clause disallows the state from delegating “discretionary governmental powers to religious institutions”.¹⁰⁴ Questionable enforcement activity can range from New Jersey’s “State Kosher Advisory Committee”—a formalized consultation between state and a religious body—all the way down to a “mere standard” that inevitably requires the active participation of individuals of a particular faith for its interpretation and enforcement. What is the extent of permissible involvement, beyond which we run into genuine Establishment Clause concerns?

¹⁰²Meacham, *supra* note 80, 645.

¹⁰³UNTERMAN, *supra* note 99, 188.

¹⁰⁴Morgan, *supra* note 84, at 255.

First, it seems reasonable that no entanglement concerns are present when informal consultations occur between the state and a religious body. The New Jersey group mentioned above—whose every appointee was a rabbi—may be more problematic. However, even in its situation, if the rabbis are merely advisors, and no government power inheres in them, it is not obvious that there is much of a threat.¹⁰⁵ This is different from, for example, the *Larkin* case, in which the government handed over to churches complete discretionary power to veto liquor licenses in a particular neighborhood. The New Jersey group—by virtue of the fact that it was given very limited real power—functioned more like the “Neighborhood Watch for kosher food” than a substitute for a powerful branch of the civil government.¹⁰⁶

Second, something should be said about the necessary prerequisites for individuals wishing to be involved in this effort to curb kosher fraud. Because the laws of kosher are accessible to most people of average intelligence, this accessibility lends itself to the possibility that the kosher enforcers making up these boards, etc., are not required to be rabbis, or even Jewish.¹⁰⁷ As one commentator put it explicitly, “The job of kosher inspector and law enforcers requires a strong knowledge of the laws of kashrut, not a religious belief in their origin.”¹⁰⁸ Thus, though states with kosher fraud statutes typically have appointed rabbis to sit on these groups, there is nothing that compels future selection to be limited to members of the Jewish faith.¹⁰⁹

Thus, it seems fair to conclude that though the presence of rabbis on a government board has the appearance of impropriety, observing a few simple safeguards is likely to be enough to keep Establishment Clause concerns from spoiling the day. The most critical point is that no real, discretionary power be given over to a group composed of religious officials. Advisory committees, quasi-neighborhood watch groups, and other such

¹⁰⁵Lindsay, *supra* note 85, at 343.

¹⁰⁶*Id.* at 344.

¹⁰⁷Sullivan, *supra* note 70, at 211.

¹⁰⁸KLEIN, *supra* note 95, at 219.

¹⁰⁹Meacham, *supra* note 80, at 649.

collectives that do not limit their membership to only rabbis should all be considered acceptable.

E.

Effects analysis

The final area of Establishment Clause concern is that of effects. The basic tests that have been established, known as the *Lemon* tests, make unconstitutional a particular piece of legislation that strongly benefits or endorses religion.¹¹⁰ This “effect” is usually measured and observed under three different theoretical lenses: the endorsement test, the primary effects test, and the coercion test.¹¹¹ Each of these will be explained briefly, and then discussed in light of the kosher fraud laws.

The first test is the endorsement test, which seems to have captured the heart of both the Supreme Court and lower courts.¹¹² Stated at its most basic level, the test argues that “endorsement of religion sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”¹¹³ Anything that sends such a message of endorsement is thus judged to be unconstitutional. One area that kosher laws have been accused of falling into endorsement problems is through the use of “Orthodox Hebrew” standards in statutes’ definition of kosher, bringing charges that this effectively codifies Jewish law. A second area, one that the New Jersey Court found problematic—in that it created a symbolic union between church and state—was the use of religious personnel.¹¹⁴

The best response to these accusations begins by noting that the Supreme Court has made clear the need

¹¹⁰Lindsay, *supra* note 85, at 345.

¹¹¹*Id.* at 348.

¹¹²*Id.*

¹¹³*Lemon*, 403 U.S. at 610.

¹¹⁴Lindsay, *supra* note 85, at 348.

to evaluate each “government practice...in its unique circumstances”. In other words, a theoretical, hypothetical determination is not enough; an on-the-grounds, contextual, case-by-case analysis is called for. The *Barghout* court attempted to use public-display-of-symbols reasoning to the kosher fraud laws, arguing that their codification in a separate section of the City Code rather than included as part of the general ordinances that deal with fraud and misrepresentation signaled that the kosher issue was of special significance.¹¹⁵ However, it is enough to note that the only person likely to be aware of this subtlety is an attorney or highly-trained legal staff member, the very type of person who would not be likely to make a “lay mistake” and draw wild conclusions from a simple legal categorization.

Secondly, as a way to eradicate any ambiguity, a public-notice articulation of these kosher fraud laws or notices of their violation, etc., can carry with them a disclaimer to the effect that “these laws do not endorse any particular religious doctrine; their primary intention is to protect consumers.”¹¹⁶ This sentiment can be communicated both in public-notice environments as well as on official government inspection forms; the first communicates to the lay public, while the latter makes the same point to those involved in the food industry. The final point is a practical one. Given Judaism’s minority status and relatively low “conversion rate” among non-Jews, it is highly unlikely that a kosher fraud law would send strong signals of endorsement or the like. Unless these fraud laws were coupled with other laws that were perceived to give Jews special protection, as they stand by themselves these laws do not appear to give the impression of endorsement.

A second test concerned with the constitutionality of the effects of kosher fraud legislation is the primary effect test, which demands that a law’s “principal or primary effect...neither advance...nor inhibit...religion.”¹¹⁷

One obvious benefit of the kosher laws is that religious consumers are better able to abide by their religious requirements. However, it is entirely reasonable to argue that this benefit is only secondary, and rides on top of the logically precedent benefit of limiting fraud. While it does have the effect of benefiting religious

¹¹⁵*Barghout*, 66 F.3d at 1339.

¹¹⁶Berman, *supra* note 97, at 20.

¹¹⁷*Lemon*, 403 U.S. at 614.

Jews, it should be noted that it is individuals that are benefiting rather than institutions, i.e. synagogues and the like. This is relevant to the extent that typical Establishment Clause cases dealing with this point usually involve money or services going directly to religious institutions.¹¹⁸ Furthermore, a mere reference to religion does not automatically make a statute's main effect a religious one. As long as the religious definition of kosher serves a secular purpose—in this case protecting against consumer fraud—then one can still reasonably conclude that the main effect is a secular one, rather than the constitutionally impermissible one of advancing religion.¹¹⁹ A related example can be found in the case of *County of Allegheny v. ACU Greater Pittsburgh Area*, where the Court ruled that a menorah displayed in public during Hanukkah did not violate the Establishment Clause, because it is a symbol with both religious and secular dimensions. This argument about the hybrid nature of kosher fraud laws is equally persuasive.¹²⁰

A second factor in primary effect analysis asks how broad the benefited class is. A number of industry reports claim that only 25% of kosher consumers are Jewish; the 75% majority are made up of individuals of other religious faiths with similar dietary standards, those who eat kosher for health reasons, those who believe that kosher is nutritionally/hygienically superior, and those who simply buy kosher without being entirely aware that they are doing so.¹²¹ This empirical fact is absolutely crucial in determining the effects of the kosher laws. Those who argue that government should stay out of this area and let the Jewish community police on its own have little to respond with here. Even if Jewish communities did their own monitoring, what about the 75% of kosher consumers who are not Jews? This empirical data demonstrates quite vividly that the benefit extends far beyond Jews interested in abiding by their religious requirements, and that the vast majority of these fraud laws' beneficiaries are non-Jews whose interest in kosher is non-religious.

This argument becomes particularly powerful when considering the fact that the direct/indirect benefit test

¹¹⁸Rosenthal, *supra* note 77, at 951.

¹¹⁹*Id.*

¹²⁰Morgan, *supra* note 84, at 253.

¹²¹*Consumer Alert* 68, KASHRUS MAGAZINE, February 1996, at 16.

alluded to earlier has fallen out of favor with courts employing the primary effects test.¹²² Because the breadth analysis is increasingly becoming the analytical weapon of choice for courts, and because the kosher fraud laws pass the breadth analysis with flying colors, it is reasonable to conclude that there is not much of a constitutionality issue here.

The third and final test concerned with the constitutionality of the effects of kosher fraud legislation is the coercion test, which argues that, “government involvement in religion that has the effect of coercing or appearing to coerce agreement or association with beliefs one does not share is an affront to personal dignity and to liberty”.¹²³ The constitutionality of any statute found to have this effect is suspect. Although the New Jersey Court alluded to the kosher law having some coercive flavor, no one has launched a serious challenge to the laws on these grounds.¹²⁴ Ultimately, the fact remains that any vendor who feels ‘coerced’ by having to abide by particular standards is doing so of his own choosing; the decision to sell kosher products is an unpressured decision, and one whose conditions a vendor is imposing on himself.

F.

Conclusions on the Constitutionality Debate

The upshot of the above is that the jury is still out on whether or not the present kosher fraud legal regime passes constitutional muster, especially with respect to issues of Establishment Clause analysis. What is important to note is that the seminal decision by the New Jersey Court was a close 4-3 split, and that many of the issues used as a basis for the decision were themselves closely decided.¹²⁵ Having explored several of these close issues at a fairly detailed level, it is fair to conclude that it is not at all clear that similar state

¹²²Lindsay, *supra* note 85, at 347.

¹²³*Lemon*, 403 U.S. at 618.

¹²⁴Gutman, *supra* note 78, 2360.

¹²⁵*Id.* at 2362.

fraud laws will soon be condemned to the legal scrapyard. At best, as legal observers, we can note that with three state laws recently being overturned because of similar constitutional concerns, there seems to be a momentum—no matter how tenuous—in favor of abandoning these decade-old laws in favor of something less overtly religious.¹²⁶ The New Jersey model seems to be the blueprint of the future, so it may behoove us to say a few words about this before concluding the discussion about the New York-style fraud laws by contextualizing our findings above in a halal context.

The New Jersey-style Statutes

New Jersey’s kosher fraud statutes part from the New York-model in a number of ways. Here, a vendor of kosher food goes to a private, third-party group and attempts to win their endorsement.¹²⁷ If the vendor passes their certification standards, he becomes entitled to use their mark on his products. If a vendor’s use of an organization’s mark is legitimate, there are no legal problems to resolve. However, if the vendor’s use of the mark is false, the certifying organization can enforce its rights to the mark under trademark and/or contract theory; additionally, the State can prosecute such a manufacturer/vendor for falsely using a certifying mark under theories of fraud.¹²⁸ Effectively, this law functions as a sunshine law, in that disclosure of one’s claims to kosher is the single most important aspect of abiding by the law. This is quite different from the New York laws. First, all references to Orthodox standards are removed. Instead, the laws are “basis-based”, in that they demand of vendors and manufacturers of kosher products to inform consumers of the basis for their kosher label use.¹²⁹ Second, the state’s need for rabbis becomes obsolete. Third, the

¹²⁶ *Id.*

¹²⁷ Slonim, *supra* note 57, 395.

¹²⁸ *Id.* at 396.

¹²⁹ Lindsay, *supra* note 85, at 349.

New Jersey statute is part of a larger scheme of consumer protection, and is located in a section of the legal code that reflects this rather than sitting as a stand-alone kosher fraud law.¹³⁰

The chief advantage of the New Jersey law is that it captures many, if not all, of the New York-style law's advantages without running into the same damning questions of constitutionality.¹³¹ Specifically, entanglement is no longer an issue. In the New Jersey laws, there is no determination of what kosher is; this is left to the private certifying organizations to decide, and any symbolic link between Orthodox Judaism and the State is done away with.¹³² Further, there is no longer a need for state employees to make religious decisions; rabbis with religious expertise are simply not needed because the important standard under this alternate scheme is whether a vendor is doing what the mark he has voluntarily worn claims he is doing. The only two steps necessary here—rather than a complicated kosher analysis that dives into religious standards and the like—are to determine if a certifying mark is being used, and to then determine whether the use of the mark is valid.¹³³ This is much like a government scheme that penalizes people in the medical profession for practicing without a license.

A second constitutional challenge that this type of statute overcomes is that of effects. Because references to religious standards have been removed, the law looks and feels like a purely secular one. As such, any idea that this New Jersey-style law promotes Judaism becomes untenable. Consumer protection becomes the emphasized goal of the law, and specifically Jewish consumer protection is de-emphasized.¹³⁴ The primary effect of the law is plain disclosure and reliable labeling, rather than helping Jewish practitioners achieve their goals of abiding by the laws of kosher. Furthermore, the fact that the New Jersey law is contextualized in a larger scheme of fraud in advertising/sale of merchandise emphasizes this point. This contextualization—

¹³⁰*Id.* at 351.

¹³¹Rosenthal, *supra* note 77, at 954.

¹³²*Id.*

¹³³Joe Regenstein and Carrie Regenstein, *Looking in on Kosher Supervision of the Food Industry*, 39 JUDAISM, 208, 208 (1990).

¹³⁴*Id.* at 214.

rather than sitting alone—underscores this point about applicability beyond just the Jewish community.¹³⁵

The appeal to legislatures of the New Jersey-style law should be emphasized. The possibility of passing a law that protects the integrity of kosher food and that simultaneously avoids the constitutionality issues is the chief draw.¹³⁶ When the Maryland Senate was considering adopting a New Jersey-style law, David Conn wrote in the *Baltimore Jewish Times*, “A Senate committee last week unanimously approved legislation to rewrite Maryland’s kosher products law, only seconds after hearing testimony on the bill. Usually, a committee will take days or weeks to vote on a bill after its hearing.”¹³⁷ Further, the fact that at least three states have replaced their New York-style laws with New Jersey-style ones seem to indicate that the rationale for abandoning decades-old legislation is linked to the availability of an alternative.¹³⁸

The Constitutionality Issues and Halal

Having duly noted that the New Jersey regime seems to be on the ascent, it would be appropriate to bring closure to the discussion of New York-style law by making a few comments about how the constitutionality issues bear on a developing halal regime. One of the fundamental questions—if not the fundamental question—facing proponents of halal fraud statutes is which of the two existing models should be used as a template: New York’s or New Jersey’s? For reasons that are strategic, practical, and philosophical, it seems more advantageous to aggressively pursue the latter at the expense of the former.

First, it is useful to recall the three recent court decisions that declared New York style statutes unconstitu-

¹³⁵Gutman, *supra* note 78, 2363.

¹³⁶Lindsay, *supra* note 85, at 349.

¹³⁷*Id.*

¹³⁸Rosenthal, *supra* note 77, at 957.

tional. Though a great deal of the analysis of the above suggested that courts may have been too hasty, that the decisions were themselves too close to call, and that certain philosophical trends in individual judges were responsible for the outcome, the fact at the end of the day is that the courts' hammer came out against kosher fraud laws.¹³⁹ Had this phenomena been isolated to New Jersey and/or Baltimore, one could have argued persuasively that the continuation of the California and New York regimes would serve as a bulwark against further intrusions into the present regime.

However, the legal coup that occurred in New York—the home state of the country's first kosher fraud statute—suggests in both a symbolic and concrete fashion that it may be a matter of time before the New York-style laws are discarded in favor of the less-problematic New Jersey ones.¹⁴⁰ It is the conviction of the present writer that had New Jersey not developed an alternative, the New York-style laws would continue to stand—constitutional problems or not.¹⁴¹ The reason for this turn against New York-style laws is that a far less problematic, more sensible, less restrictive approach seems to be available. It is only through the availability of such a substitute that courts are coming to feel comfortable with abandoning the decade-old laws.¹⁴² Again, the upshot here for halal lawmakers is that it does not make much sense to devote time and energy lobbying for a type of protection that is getting struck down in a similar kosher context. The argument here is purely strategic, and encourages halal lawmakers to not go along with a dying trend (New York statute) and instead pursue a rising trend (New Jersey statute).

Second, even if the halal regime could pursue the New York-style statute without strategic or administrative costs, there does not seem to be any compelling reasons for it to do so. Not much is gained from the New York-style statutes; from our exploration above it certainly does not seem that they add much above and beyond those of New Jersey, other than some symbolic value in language.¹⁴³ It seems that the only reason

¹³⁹Lindsay, *supra* note 85, at 354.

¹⁴⁰*Id.*

¹⁴¹*Id.* at 358.

¹⁴²Rosenthal, *supra* note 77, at 955.

¹⁴³*Id.* at 949.

that friends of the New York-style statute are mourning its death is because of inertia—they have been on the books for decades—rather than for any specific substantive reasons. The fact that the halal regime has never had a New York-style statute in place makes this “emotionally” less taxing, in that there is a sense of building towards New Jersey rather than tearing down New York. Because the New Jersey law was suggested by the New Jersey court in the same breath as its old New York-style law was being struck down, and crafted by lawmakers who wanted to preserve the advantages of kosher protection without the constitutional problems, it has the perceived effect among judges of throwing out the proverbial water, while keeping the baby.

Third, there is some aesthetic/symbolic value in aggressively pursuing the New Jersey model. It is fitting that the first state to strike down the old kosher model was the same state to adopt the country’s first halal fraud laws. In a sense, both regimes—one dying, one rising—are on the cutting edge.¹⁴⁴ There is a sense of “baton passing” in the manner these things transpired on the legislative scene. Rather than halal lawmakers try to begin from point zero and build towards a coherent halal regime, they were able to pick up at the precise point where the kosher regime left off. Much of the literature—especially the law review articles—that discuss the developments in the kosher regime reference halal similarities and the needs of Muslim consumers.¹⁴⁵ Now that the two systems are getting similar legal attention, there may be exponential value in promoting their development along similar lines. In other words, if both regimes aggressively pursue the New Jersey-style statutes, best/worst practices learned in the context of halal can be applied to a kosher setting, and vice versa. This “sibling” approach to legal development seems a logical step to take, given the striking similarities between the two systems.

Fourth, aside from the strategic and philosophical reasons pointed out above, logistical and administrative reasons seem to compel halal lawmakers with moving forward with the New Jersey-style laws. Put as simply

¹⁴⁴Gibson, *supra* note 2.

¹⁴⁵Morgan, *supra* note 84, 257.

as possible, because New Jersey was the first halal fraud law to be passed, institutional momentum is on the side of the New Jersey-style laws. Group behavior theorists argue that templates of success and failure are easily repeated. In this case, the same organization that headed the effort in New Jersey is likely to help coordinate efforts in other states. This theory was borne out in fact. The American Muslim Council (AMC), the non-profit group largely responsible for the New Jersey statute, worked through its local offices in Minnesota to achieve a similar halal fraud law there.¹⁴⁶ In interviews with AMC's halal correspondent, it is clear that they are intending to replicate this success story everywhere they happen to have a state chapter.¹⁴⁷ Even in areas where no state chapter exists, they have made it clear that they are available to work with other local non-profits and lawmakers to set up similar statutes.¹⁴⁸ Obviously, each time that AMC is helpful in getting one of these New Jersey-style laws passed, the more it will be entrenched—not that entrenchment is necessarily negative—in its New Jersey-style strategy. All of its key learnings, data points, and legislative familiarity will tilt lopsidedly with the New Jersey-style statutes, making a New York-style strategy more unlikely with each passing success story.

The final reasons to pursue exclusively New Jersey-style statutes are psychological. Muslims in America exist as a minority group. The *modus operandi* of minority groups in America, historically, has been to aim for small victories—legislative, media-oriented, and the like—and to use these as building blocks for larger victories. Here, the package is too tempting to pass up. Three state-level laws were passed, largely by the efforts of an underfunded, undermanned nonprofit group operating in an at-the-seat-of-its-pants manner.¹⁴⁹ Momentum is in place for more, and legislative bodies seem almost anxious to reward both kosher and halal lawmakers with New Jersey-style laws in exchange for forgoing the New York-style strategy.¹⁵⁰ In this environment, it makes perfect sense for Muslims, as a minority group, to accumulate these successes—and

¹⁴⁶Telephone Interview with Sharif Ali, Vice President, American Muslim Council (AMC) (October 14, 2000).

¹⁴⁷*Id.*

¹⁴⁸*Id.*

¹⁴⁹*Id.*

¹⁵⁰Hathout, *supra* note 34, at 27.

in the process learn more of the nuts and bolts about the legislative process. What does not make any sense whatsoever is why halal proponents would be so cavalier to turn away from these all-but-guaranteed statute adoptions, and instead pursue a New York-style strategy that is being summarily torn down against a group—Jewish consumers in America—that has far more legal clout.¹⁵¹

Another psychological reason for New Jersey-style laws is one of perspective. Because New Jersey and Minnesota were the first halal statutes to be passed, there is a sense that these are the “norm” and standard. The same cannot be said about the kosher laws, where the New Jersey statute is seen to carry—as a matter of perception—less protection than the decades-old New York laws.¹⁵² Given our discussion of the substantive similarities between the two templates, it is fair to conclude that this difference in perception is rooted more in psychology than in substantive reality. For Jewish lawmakers, New Jersey is seen as a step-down; theoretically, had they been offered the New Jersey statute back in 1933 instead of the New York-style one, chances are they would have been quite pleased.¹⁵³ However, because of this step-down perception, there is a mild bitterness associated with the trend towards overthrowing the New York regime. Halal lawmakers do not have similar baggage: New Jersey and Minnesota defined the limits and set the standard. Any future statute in other states that is based on these will be judged a success.

The upshot of the forgoing analysis is that it is eminently sensible for halal lawmakers to pursue an exclusively New Jersey-style strategy. Though there would be some minimal aesthetic value for one minority group to get what another minority group has enjoyed for decades—i.e. Muslims getting a New York-style law—resources are better spent in the path of achieving real victories rather than historically symbolic ones. There are little if no substantive differences between the New Jersey and New York regimes, and the momentum in favor of

¹⁵¹*Id.* at 25.

¹⁵²Regenstein, *supra* note 133, at 215.

¹⁵³Slonim, *supra* note 5, at 396.

the former seems quite strong. Moreover, the halal regime is young in America, and meeting the protection needs of halal consumers can be accomplished with a New Jersey-style law; anything pursued beyond this is a misdirected effort likely to be met with little returns on time and energy spent.

PART IV – An Emerging Model for Halal Statutes

Having determined that the New Jersey basis-based system seems the better of two approaches for both the kosher and halal regimes, we are now required to more fully explore in some detail the promises and perils of such a basis-based system for halal laws. First, we will briefly examine how basis-based systems have performed in New Jersey over the past two years. Second, we will explore the likely differences between kosher and halal basis-based approaches, and ask what challenges might be posed to the latter. Finally, we will discuss alternative approaches that address some of the problems presented by a pure basis-based system.

The Kosher Experience in New Jersey

The last official count put the number of registered kosher symbols currently in use in the United States at 200.¹⁵⁴ Each symbol represents a unique certifying group, many with differing standards on what is required to earn certification. As discussed earlier in the paper, different sects of Judaism have differing notions of what kosher is; some of these kosher symbols inform that the food item in question is acceptable by, for example, Reform standards but not Orthodox, or Reconstructionist but not Reform.¹⁵⁵ Some of these certifying groups go further than just making a claim about the food itself. For example, some certifiers do not give

¹⁵⁴*Id.* at 397.

¹⁵⁵Regenstein, *supra* note 133, at 214.

their nod of approval to vendors who fail to observe the Sabbath.¹⁵⁶ Another certifier—the highly influential OU—changed content in Bazooka Gum’s accompanying comic strip because some of the content reflected “ideas that are not in keeping with Judaism.”¹⁵⁷ Because the relationship between vendor/manufacturer of kosher food and these certifying organizations does not have government-as-middle-man, virtually any standards can be set by the certifying organizations—even blatantly religious ones such as the Sabbath observance requirement—because the relationship is governed by private contract law. In short, each organization is free to set its own standards based on the particular demographic it aims to serve.

The foundation of this certification scheme is based on trust and knowledge of members of the community. Endorsement by other like-minded organizations is usually a first-step in getting consumer trust. A certifying brand that is endorsed by a number of Jewish publications, prominent individuals, etc., is more likely to enjoy wide currency and trust than a local brand who few people know much about. Over the years, various groups of Jews have come to learn quite intimately the different standards of different groups. For example, Orthodox Jews generally stay away from candies that are imported from Israel because of the latter’s general acceptance of gelatin use.¹⁵⁸ Ashkenasic Jews—out of concern over legumes and rice—will skip on buying Sephardic-supervised food for Passover.¹⁵⁹ This type of knowledge is relatively free-flowing and widely disseminated in the Jewish community. Tight-knit groups will often be informed by their local rabbis and other members of their congregation. For those with slightly looser connections to a local Jewish community, magazines such as *Kashrus*—which is published five times a year and informs Jewish consumers about mislabeled products, the supervision industry, and unauthorized use of kosher symbols—disseminate much-needed and helpful information.¹⁶⁰ While these information networks help Jewish consumers stay abreast of much-needed information about kosher, they do not do much to help non-Jewish individuals who

¹⁵⁶KASHRUS, *supra* note 121.

¹⁵⁷*Id.*

¹⁵⁸MOSES WEINBERGER, *JEWS AND JUDAISM IN NEW YORK*, 114 (Holmes and Meir Publishers, Inc.) (1982).

¹⁵⁹*Id.* at 118.

¹⁶⁰SCHLOSSBERG, *supra* note 66, 64.

either by definition are not part of the religious community or who do not subscribe to such specialized magazines.

Putting this asymmetry to the side for a moment, it is worthwhile to note that while private certifiers make up the bulk of this New Jersey-style system, public law does play a critical role, particularly in the context of enforcement. Contract law is the very linchpin of the relationship between vendor and certifier, while organizations guard against brand-dilution through trademark law.¹⁶¹ Moreover, the New Jersey law requires that vendors disclose “the basis upon which the representation is made”, i.e. the representation that a product is kosher.¹⁶² Others have suggested a whole host of modifications to this basic public-private scheme, including a federally-defined minimum kosher standard and a requirement that certifiers register with the state. Effectively, this public-private hybrid combines the best of both worlds: it allows the market, via quick and nimble private certifiers, to cater to a large number of different demographic groups within the Jewish community; at the same time, it gives these private individuals the protection and legitimacy of public law in order to enforce these rights and trust-based relationships.¹⁶³

Applying Best Practices in a Halal Regime

How much of this so-far successful model can be replicated in the context of halal regime? At first glance, based on the many similarities between halal and kosher, it seems as though the answer would be quite a bit: there are different schools of thought; there is a fair amount of internal communication within the Muslim community in the United States; a number of groups seem poised to enter the certification world. However, a more in-depth look reveals some sharp differences with the kosher regime.¹⁶⁴ Whether these differences

¹⁶¹Rosenthal, *supra* note 77, at 952.

¹⁶²Lindsay, *supra* note 85, at 357.

¹⁶³Gutman, *supra* note 78, 2360.

¹⁶⁴Gibson, *supra* note 2.

are great enough to make the public-private hybrid model that works so well for kosher untenable in a halal context is something that is open to exploration. One of the main issues concerns the make-up of the Muslim community in America, and whether this group constitutes a large enough, well-defined market that can command quality halal products. A second issue deals with the sophistication and professionalism of the existing certifiers. Finally, a short case study of Al-Safa—the leading certifier for halal products in North America—should throw into sharp relief some of these practical difficulties.

Dynamics of the Muslim Community in America

One of the most important things to note about the Muslim community in America is the absence of authority. Recall in the early parts of this paper the discussion about differing schools of thought in Islam. Though the vast majority of Muslims have historically followed one of the four classical schools of jurisprudence, the 20th century has witnessed whole populations of Muslims discarding their affiliation to a particular school of thought.¹⁶⁵ The reasons are complex, and have as much to do with intellectual trends in the West as they do with historical trends in the East. The end result is that American Muslims for the most part do not derive their knowledge about Islamic law from one of the four schools of thought. Rather, individuals will, for the most part, assign to themselves the task of interpreting passages from sacred texts, ask local scholars, and generally “go with” ideas that seem to enjoy consensus-of-the-moment.¹⁶⁶

This hard-to-pin-down approach makes certification a tricky matter. In the kosher context, there are fairly well-defined understandings of kosher. Within the Muslim context, this definition tends to be more conservative than need be, because the tendency tilts towards scrupulousness rather than permissiveness. As was pointed out earlier, almost all discussions around gelatin conclude that gelatin is impermissible, despite the

¹⁶⁵Uthman, *supra* note 47, at 14.

¹⁶⁶*Id.* at 14.

fact that the Hanafi school of thought declares it to be absolutely permissible.¹⁶⁷ A conscientious Muslim, noting that most medicine gelcaps contain gelatin, may deny herself much-needed relief out of sheer ignorance that the product is permitted according to one of the great schools. A respect for these four schools of thought, and an awareness of their different standards of halal, would allow at least one group that certifies according to Hanafi methodology to make this product acceptable to Muslims. This is an example of the claim that the more Muslims learn about the classical, rigorous schools of thought, the more products previously off-limits will become acceptable for use.¹⁶⁸

The opposite extreme caused by this lack of school-of-thought affiliation is a devil-may-care attitude towards halal in general. It is well-established that many—if not most—Jews do not observe kosher.¹⁶⁹ This same problem of lackluster adherence is more pronounced among Muslims in America. The lack of authority has led to a proliferation of historically- untenable positions concerning halal, including the most blatant example of many religious figures giving “official” religious opinions that eating unslaughtered meat is acceptable.¹⁷⁰ This sort of trend emphasizes that because Muslims are living as a minority in America, “pragmatism” should be the rule the day; consequently, much is accepted that historically has been off-limits. Because of this, Muslim consumers that would otherwise have demanded a halal industry to spring up in America are instead complacent, believing that unslaughtered meat and the like are acceptable. An industry made up of certifiers and vendors can only grow around a strong market need. Without an active campaign educating American Muslims of the absolute religious need for a halal regime, a healthy privately-driven industry will be hard pressed to come into being.

Problems With the Halal Certifiers

¹⁶⁷KELLER, *supra* note 10, at 372.

¹⁶⁸*Id.* at 381.

¹⁶⁹Gutman, *supra* note 78, at 2353.

¹⁷⁰SAKR, *supra* note 31, at 61.

A second set of problems with the New Jersey private-public hybrid applied in a halal context concerns the certifiers themselves. First is the problem of qualification. A peek at a kosher certifying group reveals a well-oiled machine with a great deal of expertise and specialization.¹⁷¹ Halal certifying groups such as Islamic Food and Nutrition Counsel of America (IFANCA), however, run a distant second.¹⁷² The senior officers have backgrounds that do not necessarily relate to the food industry, and their command of authoritative religious knowledge of Islam is nowhere equivalent to that of a rabbi's knowledge of Judaism. Moreover, there is a pervasive perception given off that the organization is constantly underfunded and undermanned. A look at IFANCA's website further gives the impression of less-than-total professionalism, while a phone call confirms some of these impressions.¹⁷³

A second problem with the certifiers centers around the issue of transparency. Because the Jewish community has managed to hold on to at least some consensus idea of kosher, and because many groups compete for market share, these various certifying groups go to great lengths to describe in painful detail their methodology, approach, and definition of kosher. The same, unfortunately, cannot be said about the current crop of halal certifiers.¹⁷⁴ A quest to find detailed, rigorous methodology for what these groups mean by "halal" was fruitless.¹⁷⁵ Most seemed to oscillate between the "most restrictive" and "devil-may-care" definitions of halal. Any reference to the notion of legitimate, mutually-recognized and respected differences of opinion were regularly lacking.¹⁷⁶ A product declared not in keeping with halal standards was often not accompanied by an explanation describing why it failed to earn certification. Any notion of process-based criteria—i.e. similar to the kosher standards of kosher equipment not interacting with non-kosher

¹⁷¹Gutman, *supra* note 78, at 2365.

¹⁷²Though the professionalism leaves much to be desired, we should bear in mind that these various halal certifiers have only existed for a short period of time. For them, much is to be learned in the coming years.

¹⁷³In trying to find material for this project, I called places such as IFANCA to request literature. The slow response in returning my phone calls, being passed on from one secretary to the next, and the less than total engagement in helping to bring me up to speed in the field evinced an under-enthusiastic attitude towards the work at hand.

¹⁷⁴Hathout, *supra* note 34, at 31.

¹⁷⁵I looked at the websites of the three most well-known certifiers and was unable to find anything more than a summary description of their methodology.

¹⁷⁶Hathout, *supra* note 34, at 31.

equipment/utensils—was totally and completely absent from any of these certifying groups.¹⁷⁷ Overall, this reductive, black-box approach to defining and certifying products as halal—needless to say—is less than satisfactory for consumers who are willing to pay a premium for something that is authentically halal.

Problems Inherent in the Industry

A third problem with the certifiers has to do with the financial logic of certification industries as a whole. Running a certifying body by definition entails mid-to-high start-up costs.¹⁷⁸ Because the only way to generate revenue is via certification, some certifying groups may lower their standards in order to get a foothold in the industry.¹⁷⁹ In the context of the kosher industry, this is not a likely problem. There are a few brand-leading certifying organizations, and any newcomers need to compete against this established background of trust. Vendors have an obvious incentive to get the endorsement of a well-trusted, well-known group, and they are willing to pay a premium for a premium endorsement. In the context of halal, however, because there is no clear brand leader, and because of the lack of transparency issues pointed out above, there is virtually no incentive for a vendor to go to a rigorous but mid-priced certifier as opposed to a low-standard, fire-sale-prices certifier. There have been anecdotal cases where one certifier was undercut by another certifier on nothing other than price: the latter lured the vendor away from the former by promising bargain-priced certification.¹⁸⁰ According to those involved in this particular scenario, the standards of the less-expensive certifying group were—not coincidentally—less rigorous.

A third and final concern returns us to the characteristics of the market for halal. Assuming for the moment that all of the problems above were somehow to be fixed, where would things stand? In a largely privately-run

¹⁷⁷*Id.* at 32.

¹⁷⁸Mansur Riaz, *Halal Food—An Insight into a Growing Food Industry Segment*, INTERNATIONAL FOOD MARKETING AND TECHNOLOGY, January 2000, at 42.

¹⁷⁹*Id.* at 44.

¹⁸⁰Gibson, *supra* note 2, at B11.

certification scheme for Jews, non-Jews simply do not have the same access to the all-important information network. The same problem applies in the halal context. Non-Muslim consumers of halal would likely be locked out of the information networks based out of mosques and specialty-interest newsletters. Moreover, it should go without saying that a not insignificant number of Muslims are likewise—for one reason or another—out of this information loop.¹⁸¹ Relying on a totally private-run certification system that relies on a well-versed, knowledgeable community of consumers is one thing; doing the former without the latter is a recipe for failure.

The Al-Safa Case Dilemma

At this point, there may be tremendous value in illustrating many of the preceding points with a case-study of one of the most controversial developments in the young history of halal in America. The saga began when the government of Malaysia approached the Islamic Society of North America (ISNA), Canada—a highly respected national organization—to certify halal meat products that would be imported into Malaysia.¹⁸² ISNA in turn approached several local beef producers. After extensive discussions with one company in particular—MGI Packers Inc.—and after MGI agreed to abide by the halal standards set by ISNA, the latter agreed to grant MGI halal certification.¹⁸³ As MGI become acclimated to the halal beef market, it saw a tremendous opportunity in the area of producing and distributing halal chicken. A subsidiary called Al-Safa (in Arabic, “The Pure”) was formed specifically for this task. Because of the already-existing relationship with MGI, ISNA proceeded on good faith with Al-Safa.¹⁸⁴

At the beginning of 1999, the relationship between ISNA and Al-Safa hit a snag. According to ISNA, Al-Safa

¹⁸¹Uthman, *supra* note 47 at 13.

¹⁸²ISNA-Canada, *ISNA Statement on Al-Safa Reaction*, at www.isnacanada.com/alsafstm.htm.

¹⁸³*Id.*

¹⁸⁴*Id.*

was stalling in tying up outstanding contractual details.¹⁸⁵ At about the same time, ISNA's suspicions about Al-Safa grew as a result of inconsistent answers to questions sent to Al-Safa and its suppliers. Numerous attempts were made to resolve the existing differences, but the relationship ended with ISNA refusing to certify Al-Safa because of doubts as to its ability to conform to its halal standards.¹⁸⁶ Al-Safa responded with press releases of its own, claiming that the revocation had nothing to do with substance and everything to do with politics.¹⁸⁷ A short time later, Al-Safa won certification from another competing certifier—IFANCA—previously mentioned in this piece.¹⁸⁸

While this short history reveals nothing more than that Al-Safa's journey to certification was somewhat bumpy, the real story is found in how Al-Safa became the leading producer of halal products in North America. The most surprising fact to note is that Al-Safa is a 100% non-Muslim owned business.¹⁸⁹ Recall the description from the earlier part of this paper of the halal industry in America as a fragmented, heterogeneous community with no single, dominant player. Henry and David Muller—two individuals of non-Muslim faith—were already involved in the meat packing industry when they realized the tremendous market opportunity that the halal industry represented.¹⁹⁰ To throw their hat into the ring, they formed Al-Safa, and pursued an aggressive customer-oriented marketing strategy. Among the tactics involved were getting a Muslim name and Arabic logo with a mosque picture, hiring just a handful of visible Muslim employees, and operating a voice mail message that began with the traditional Muslim greeting of peace in Arabic and English.¹⁹¹ By any outside observer's best guess, this was a Muslim company from top to bottom.¹⁹²

It did not take much time for Al-Safa's well-honed marketing and distribution practices to pay-off, vaulting

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Hathout, *supra* note 34, at 32.

¹⁸⁸ ISNA, *supra* note 182.

¹⁸⁹ Hathout, *supra* note 34, at 37.

¹⁹⁰ Ahmed Surty, *Al-Safa and ISNA Break Ties*, at www.soundvision.com/halalhealthy.

¹⁹¹ *Id.*

¹⁹² According to those closely involved with this issue, it was this perceived deception more than anything else that earned Al-Safa a bad name.

into the single biggest player in the young halal industry.¹⁹³ With increased exposure came increased scrutiny, and it soon became the “talk of the town” that this company—by all appearances a Muslim owned and operated venture—was not even partially owned by any Muslim businessmen.¹⁹⁴ What caused the greatest uproar was not the issue of ownership; it is a widely acknowledged fact that after Jews, Muslims make up the largest buyers of kosher food; they do so willingly, consciously, and somewhat happily, knowing that while the two standards are not identical, there is much overlap in some areas. The aspect of Al-Safa’s behavior that incensed the Muslims who learned of its ownership structure was not the manner in which it went out of its way to relate to Muslim consumers, but the perception that this marketing crossed the line into the realm of unacceptable deception. Al-Safa made it a point to sponsor local community events that were 100% religious in nature, giving the appearance of a company that endorsed the contents and purposes of the gatherings.¹⁹⁵ It goes without saying that such endorsing companies typically tend to be of the same religious persuasion. A further problem was the answering machine message, which first lists two Muslim-sounding names—who are in fact merely minimum-wage employees—and mentions the Anglo-name of the main financier/owner almost as an afterthought.¹⁹⁶ The indignant reaction to this reality of ownership can almost be predicted: when someone finds out, their jaws drop incredulously, and they point to the logo, the sponsorships, and the Arabic script—all as a way of trying to rebut a bomb-shell of a revelation. Once the feeling of having being duped settles in, the reaction is one of resentment. The groundswell of opposition to Al-Safa has proceeded mostly by these means.¹⁹⁷

The increased scrutiny applied to Al-Safa has produced a few other criticisms. One competitor, Misom Halal, has alleged that Al-Safa has engaged in unsavory anti-competition practices, such as cutting out suppliers

¹⁹³Surty, *supra* note 190.

¹⁹⁴*Id.*

¹⁹⁵Sabah, *supra* note 3.

¹⁹⁶*Id.*

¹⁹⁷Because of the poor communication channels in the Muslim community, this sentiment about Al-Safa is slow to spread. Their products can be found at many of the local mom-and-pop halal stores in the Boston area.

to Misom via exclusivity contracts with particular suppliers.¹⁹⁸ The owner of Misom, Mansur Hojjatian, points out that this forced cut in its relation with its supplier happened despite a two-year, healthy business relationship. Misom argues that because of Al-Safa's scale, it can afford to offer glowing terms to suppliers in the short run to drive the competition out of business.¹⁹⁹ The fear that owners of until-now successful small and mid-sized halal businesses like Misom have is that Al-Safa, through its aggressive distribution and anti-competitive practices, will eventually dominate the market and do away with any need for Muslims to deal with mom-and-pop shops.

While this is a trend plaguing small businesses in America more generally, it is particularly enraging to concerned Muslims because of the religious dimension of the business that is being severed. Recall that some Jewish certifying organizations will refuse to endorse companies that do not observe the Sabbath. The fact that the company is Jewish is taken as a given, and here the level of religious observation is held to be of paramount importance. In the case of Al-Safa, not only is a company not at all owned by Muslims—and therefore by definition not practicing—but this company is by all accounts the leading player in this space. Muslim community developers fear that this domination by an outside player will do much to strangle an industry that by all accounts should be something that is operated by and for people of similar religious persuasions.

The obvious retort to much of the above sentiment is that while it is understandable why many Muslims were initially misled, it does not make sense why this revelation has not led to an anti-al-Safa boycott campaign to drive the company out of business, or at minimum, demands to make the ownership structure more transparent.²⁰⁰ In fact, according to Al-Safa's own accounts, business has never been better, and it is readying itself to launch a bulk-order business in addition to its retail distribution practices.²⁰¹ All of

¹⁹⁸Surty, *supra* note 190.

¹⁹⁹*Id.*

²⁰⁰I've alluded to the fact that poor communication is one factor. Others are indifference and a sense that other matters take precedence.

²⁰¹Hathout, *supra* note 34, at 28.

these seeming negatives beg the question: why does a Muslim-operated non-profit (IFANCA) agree to certify Al-Safa? It is this more than anything else that throws into full relief the theoretical problems of certifiers discussed at the outset of this section of the paper.²⁰²

ISNA—in so many words—has alleged that IFANCA has certified Al-Safa in order to collect large certification fees.²⁰³ In fact, by Al-Safa’s own slip-of-the-tongue, it admitted to being in the final stages of a deal with IFANCA only three days after being ousted by ISNA.²⁰⁴ Less than a year later, Mazhar Hussaini, a co-founder and the executive director of IFANCA, resigned, citing disagreements over the company’s mandate. Hussaini charged, in quite explicit terms, that: “Given the direction that IFANCA has taken, I personally do not think I can continue to be a part of this organization any longer. They are interested in charging fees and certifying products (as Halal) and getting the commission.”²⁰⁵ Others have pointed to the fact that while it may have made logistical sense for ISNA to supervise Al-Safa because of their geographical proximity—the two are both close to Toronto, approximately 30 minutes away from one another—the idea of having a Chicago-based company (IFANCA) that has been perpetually undermanned and underfunded raises too many flags. Observers have serious doubts that IFANCA’s monitoring of Al-Safa will be at all rigorous.²⁰⁶

The issues mentioned in theoretical tones earlier in the paper can all be seen manifesting themselves in this case study. First, with respect to the troublesome financial logic of certification, Al-Safa played its cards correctly—one certifier leaves, another rushes to take its place. By all accounts, IFANCA was a

²⁰² *Id.*

²⁰³ ISNA, *supra* note 182.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Surty, *supra* note 190.

small, unknown certifier before taking on Al-Safa as a client.²⁰⁷ Its star rose with Al-Safa's, and has led many insiders to murmur that perhaps attractive promises were made from Al-Safa to IFANCA about wider business opportunities and exposure that would come with certification. Hussaini's resignation seems to give much of these whisperings strong legitimacy. Second, the issue of transparency is in this context double-edged. Al-Safa had been able to—and for the larger part of the Muslim community continues to—give an arguably deceptive impression of who and what it is. However, the deeper level of transparency problems exist with IFANCA itself. Neither its relationship with Al-Safa, how it goes about inspecting facilities in another country with a skeleton crew that is underpaid and overworked, its commission and rate structure, and its standards for halal—none of these things are close to being made clear to consumers.²⁰⁸ As one writer puts it: “The claim of ‘open door policy’ by Al-Safa and the claim of “strict standards for halal food processing and marketing” by IFANCA seems nothing more than empty slogans.”²⁰⁹ Finally the third problem mentioned earlier was one of qualification: The directors of IFANCA are neither religious scholars nor food technology experts.²¹⁰

PART V: CONCLUSION

What the above example of Al-Safa illustrates is that the concerns mentioned earlier have in fact happened and continue to happen. The fact that these problems involve the most visible halal food company and the most visible halal certifier borders on disastrous. Finally, the additional fact that nothing seems to be in the works to address these problems—if anything, both IFANCA and Al-Safa seem to be on the ascent—shows that the current model of certification needs to be modified in order for a halal regime to flourish in America.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Uthman, *supra* note 47, at 17.

²¹⁰ One is former civil engineer, and the other served as a local-area teacher. See *id.*

A few broad-brush stroke suggestions should help to paint the contours of what a more successful halal regime can look like. The first has little to do with legal strategy and everything to do with education. Muslim educators and religious centers need to step up their efforts in informing those who share their faith that halal food is an absolute necessity, explaining that the substitute products consumed thus far do not meet the religious requirements as explicated by the consensus, four-schools-of-thought approach.

Second, better coordination needs to take place between the organizations that are pushing for halal consumer fraud laws and the local retail shops. Not much is achieved if protection laws are passed, but ordinary consumers are not given access to purchasing quality halal food products. In other words, the legal developments and the business/market-and-need developments should proceed along similar timelines.

Third, there is a need to certify the certifiers. Because of poor communication and less-than-stellar coordination, the average Muslim consumer is sometimes left in the dark on developments that are happening at higher levels. The fact that Al-Safa is growing—despite the indignant reactions evinced by the overwhelming number of Muslims who learn of the happenings—show that it is very likely that a large number of Muslims are still unaware that a controversy even exists. *Consumer Reports*-like publications need to be developed, so that consumers can have access to a third-party intermediary who can give reliable information about the methodologies and reliability of the certifiers themselves. The kosher New Jersey regime has shown that the public-private hybrid is successful in Jewish practice. Until the Muslim community has a way of creating, monitoring, and evaluating the brand of halal certifiers, similar success will only be had in principle. This policing function, either by a new organization or an existing one, is an absolute prerequisite for success.

Finally—relating to the suggestion above—these third-party “police of the police” have to zealously guard their independence. The groups will ideally be non-profit, comprised of both professionals who have experience working in the food industry, and well-trained scholars who can give convincing answers to sophisticated

questions about the use of new food technologies in manufacturing and distribution.

In many respects, the hard work has already been accomplished. Muslim public interest groups have captured the attention of State legislatures in passing a handful of halal consumer protection laws. In a sense, the public half of the private-public hybrid has moved along rapidly. What is left to be done is a systematic effort to bring market need up to speed with legislative victories.