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## Citation

Emily Ullman, Organic and Kosher Foods: A Tale of Two Certification Systems (May 2009).

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# **Organic and Kosher Foods: A Tale of Two Certification Systems**

**Emily Ullman**  
Class of 2009  
May 2009

This paper is submitted in satisfaction of the course requirements of Food and Drug Law.

## Organic and Kosher Foods: A Tale of Two Certification Systems

### Abstract

Food products may be labeled with respect not only to their ingredients and nutritional content, but also to their adherence to various ethical or religious process-based standards. Because consumers view these claims as desirable, both private organizations and government have sought to ensure that the claims are accurate and meaningful. However, this has been accomplished in very different ways with respect to two particular labels: organic and kosher. Organic food producers are governed by a federal regulatory regime that imposes a minimum standard for organic processes and a maximum with respect to what claims may be made, increasing standardization and consumer education but decreasing consumer choice and effective enforcement. Kosher producers, in contrast, contract with private certification organizations with individual standards and state regulation occurs only with respect to fraud; the effects are opposite. Choosing which regime to apply to future process-based claims requires an analysis of the claim's potential consumer base.

### Introduction

“Organic” food means many things to many people, but it generally signifies that the food has been produced eschewing synthetic or chemical assistance in most or all of its stages; this requires that components like fertilizer, additives, and feed for livestock be similarly free of non-natural products. Over the past several decades, the move toward organically produced food has picked up tremendous speed. Organic food sales accounted for 3.5% of all food sales in the United States by the end of 2008, a \$22.9 billion market.<sup>1</sup> Moreover, the organic sector in general experienced growth of 17.1% in the last year,<sup>2</sup> a rate consistent with those seen over the past decade.<sup>3</sup> Over two-thirds of adult American consumers buy organic products at least occasionally, for reasons ranging from pesticide avoidance to taste to support for environmentally friendly agriculture.<sup>4</sup>

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<sup>1</sup> Press Release, Organic Trade Association, U.S. Organic Sales Grow by a Whopping 17.1 Percent in 2008 (May 4, 2009), *available at* [http://www.organicnewsroom.com/2009/05/us\\_organic\\_sales\\_grow\\_by\\_a\\_who.html](http://www.organicnewsroom.com/2009/05/us_organic_sales_grow_by_a_who.html).

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

<sup>3</sup> See Ching Lee, California Farm Bureau Federation, Growth in Organic Food Sales Continues, at Slower Pace (Mar. 18, 2009), *available at* <http://www.cfbf.com/agalert/AgAlertStory.cfm?ID=1257&ck=CD758E8F59DFDF06A852ADAD277986CA>.

<sup>4</sup> Organic Trade Association, Consumer Profile Facts, <http://www.ota.com/organic/mt/consumer.html> (last visited May 13, 2009).

With the rise in consumer interest has come an increase in regulation; pursuant to a 1989 federal law, the United States Department of Agriculture developed and implemented an extensive set of standards that are mandated for nearly all sizeable organic food producers and manufacturers. Although this certainly increased both regularization and ease of use, it has left the agency open both to charges of watering down the standards and to arguments that new types of labeling should be created to protect other characteristics that consumers have come to care about.

There is, however, an alternative model for standardization and certification of process-based label claims: the system used to regulate kosher food. Market research reports suggest that sales of kosher-certified food topped \$200 billion in 2008 and show an enormous rate of growth.<sup>5</sup> Yet, all kosher certification — outside inspection to ensure that the product is what it claims to be — is performed by various private entities. The food packaging is then labeled with distinctive markers representing both the certification and the entity responsible for it. Consumers may choose foods certified only by agencies that have certifications meeting their standards.

This paper will seek to explore the history of both certification models, the advantages and disadvantages of each, and what we as both consumers and regulators might learn from the workings of the two processes.

## **Organic Food Production and Historical Regulation**

The organic farming movement is not simply a remnant of peasant farming practices, but rather a relatively new agricultural development dating from the 1920s work of several European scholars and activists. Sir Albert Howard and Robert McCarrison performed experiments in India suggesting for the first time that there was a

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<sup>5</sup> LISA SCHINHOFEN, MARKET TREND: KOSHER- AND HALAL-CERTIFIED FOODS IN THE U.S., SUMMARY (2009), *available at* <http://www.reportlinker.com/p0119235/MarketTrend-Kosher--and-Halal-Certified-Foods-in-the-US.html>. Many kosher-certified products are purchased by consumers uninterested in the kosher designation; products purchased explicitly because they were kosher-certified constituted a market somewhere between \$14 billion and \$17 billion. *Id.*

relationship between soil health and plant resistance to disease and pests, as well as between soil health and the health of individuals whose diet was composed of plants from that soil.<sup>6</sup> The Austrian philosopher, scientist, and educator Rudolph Steiner founded the field of “biodynamic agriculture,” a method of organic farming that incorporated assorted spiritual and mystical beliefs.<sup>7</sup> The theories of these men, as well as those of Lady Eve Balfour in the United Kingdom, were brought to a wider audience by *Organic Gardening and Farming*, a United States magazine founded by J.I. Rodale in the 1940s.<sup>8</sup> The birth of modern environmentalism and pesticide awareness. following the publication of Rachel Carson’s *Silent Spring*, brought further popularity to the proposal to move away from industrialized farming methods.<sup>9</sup> By the early 1970s, a full-fledged organic farming movement had begun, dedicated not only to providing pesticide-free food but to such larger goals as creating an alternative to the entire conventional food supply chain.<sup>10</sup>

With the advent of organic farmers came regulation of what was considered “organic.” Presuming that food safety and regulation was the province of the states, Oregon led the way with an organic foods labeling law in 1973.<sup>11</sup> It required that organic agricultural products be grown in fields untouched by chemical fertilizers or herbicides for 24 months, barred drugs and hormones for organic livestock,<sup>12</sup> and allowed the term

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<sup>6</sup> Kate L. Harrison, *Organic Plus: Regulating Beyond the Current Organic Standards*, 25 PACE ENVTL. L. REV. 211, 213–14 (2008).

<sup>7</sup> Paul Kristiansen & Charles Merfield, *Overview of Organic Agriculture*, in ORGANIC AGRICULTURE: A GLOBAL PERSPECTIVE 1, 4 (Paul Kristiansen, Acram Taji & John Reganold eds., 2006). Those who practice biodynamics utilize somewhat eccentric farming techniques — including burying powdered quartz inside a cow horn for six months, digging it up, and then using it in homeopathic quantities as a foliar spray to stimulate growth. Despite their apparent strangeness, however, research has shown that biodynamic compost preparations affect compost and the composting process positively. STEVE DIVER, ATTRA-NATIONAL SUSTAINABLE AGRICULTURE INFORMATION SERVICE, BIODYNAMIC FARMING & COMPOST PREPARATION 3, 5 (1999), available at <http://attra.ncat.org/attra-pub/PDF/biodynam.pdf>.

<sup>8</sup> Harrison, *supra* note 6, at 214; Kristiansen & Merfield, *supra* note 7, at 5; Michael Pollan, *Naturally*, N.Y. TIMES, May 13, 2001, § 6 (Magazine), at 30.

<sup>9</sup> Harrison, *supra* note 6, at 214; Kristiansen & Merfield, *supra* note 7, at 6.

<sup>10</sup> See Pollan, *supra* note 7.

<sup>11</sup> Gordon G. Bones, *State and Federal Organic Food Certification Laws: Coming of Age?*, 68 N.D. L. REV. 405, 410 (1992).

<sup>12</sup> OR. REV. STAT. § 616.406 (1989).

“organic” to be used on labels only on products without pesticide residue in excess of ten percent of the federal Environmental Protection Agency tolerance levels.<sup>13</sup> California followed with a similar program in 1979, using the Oregon model but adding features like public disclosure of farming methods, mandatory package labeling that quoted the relevant standards from the Code, and a definition of “synthetic.”<sup>14</sup> Moreover, private entities began to develop programs to certify organic food products and avoid fraud. California Certified Organic Farmers, founded in 1973, predated California’s state regulations and served as the nation’s first third-party organic certification entity.<sup>15</sup> Finally, there were international components to the regulation of organics. IFOAM, a multinational non-governmental organization dedicated to promoting organic agriculture and propagating organic standards, sprung from a French farmers’ association in 1972. By 1975 it would have fifty member organizations from seventeen countries.<sup>16</sup> Five years later, IFOAM published its “Basic Standards,” guided by seven major principles:

- To work as much as possible within a closed system, and draw upon local resources.
- To maintain the long-term fertility of soils.
- To avoid all forms of pollution that may result from agricultural techniques.
- To produce foodstuffs of high nutritional quality and sufficient quantity.
- To reduce the use of fossil energy in agricultural practice to a minimum.
- To give livestock conditions of life that conform to their physiological needs and to humanitarian principles.
- To make it possible for agricultural producers to earn a living through their work and develop their potentialities as human beings.<sup>17</sup>

Regulation increased gradually from all of these sources throughout the 1980s.

Organic food took a rapid jump into the mainstream in 1989, when the television show *60 Minutes* did an exposé on the use of the chemical daminozide, commonly known

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<sup>13</sup> *Id.* § 616.416 (1989).

<sup>14</sup> Bones, *supra* note 11, at 410 & n.26; see CAL. HEALTH & SAFETY CODE § 26569.13 (1979) (repealed 1990).

<sup>15</sup> CATHY GREENE, ECON. RESEARCH SERV., ORGANIC LABELING 27, *available at* <http://www.ers.usda.gov/publications/aer793/aer793g.pdf>.

<sup>16</sup> Bernward Geier, Int’l Fed’n Organic Agric. Movements, A Look at the Development of IFOAM in Its First 25 Years, at 1, [http://www.ifoam.org/about\\_ifoam/inside\\_ifoam/pdfs/First\\_25\\_Years.pdf](http://www.ifoam.org/about_ifoam/inside_ifoam/pdfs/First_25_Years.pdf).

<sup>17</sup> 1980 IFOAM Principles, *quoted in* Kristiansen & Merfield, *supra* note 7, at 13 tbl. 1.5.

by the brandname Alar, in apple farming to improve the appearance of the fruit and keep it on the tree longer.<sup>18</sup> The Natural Resources Defense Council and other public interest groups stated on the show that Alar degraded into a carcinogen and remained in the flesh of apples regardless of washing, peeling, or processing.<sup>19</sup> Growers of red apples experienced a sharp decline in both prices and sales, with millions of dollars sustained in losses.<sup>20</sup> Demand for organic products produced without these carcinogens, on the other hand, soared.<sup>21</sup> Polls taken in 1989 indicated that eighty-four percent of American consumers were interested in purchasing organic produce and that half of those were willing to pay a premium for such products.<sup>22</sup> By 1990, twenty-two states would have some form of organic regulation.<sup>23</sup> Of these, Washington, Texas, and Colorado had certification programs run directly by the state government; four other states had programs whereby the state government cooperated closely with third-party certifiers, and the remaining fifteen merely promulgated labeling statutes and regulations, leaving third-party certification associations to handle all inspection and certification.<sup>24</sup>

### **Modern Organic Regulation**

As a result of the growth in both demand and state regulation, consumers, organic farmers, and industry groups began to lobby for national regulation of organic food. Organic production standards were different in minor but significant ways in each state, making interstate commerce difficult: the feed for cows producing organic milk, for example, was required to be exclusively organic in New Hampshire, unmedicated in Kansas, and varying by time period in California.<sup>25</sup> Moreover, international export of organic food was problematic, as state standards did not necessarily correspond to

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<sup>18</sup> *Auvil v. CBS “60 Minutes,”* 800 F. Supp. 928, 930 (E.D. Wash. 1992).

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

<sup>20</sup> *Id.* at 930–31.

<sup>21</sup> *See* Pollan, *supra* note 7.

<sup>22</sup> *See* S. REP. NO. 101-357 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 4656, 4943.

<sup>23</sup> Harrison, *supra* note 6, at 215.

<sup>24</sup> Bones, *supra* note 11, at 408.

<sup>25</sup> S. REP. NO. 101-357, *as reprinted in* 1990 U.S.C.C.A.N. at 4943.

national standards in other countries or to the IFOAM guidelines.<sup>26</sup> These concerns were particularly relevant to the large agribusinesses that had gotten into organic farming as a result of the Alar scandal demand;<sup>27</sup> they and their interest groups led the lobbying of Congress to establish national organic standards.<sup>28</sup> In response, Congress passed the Organic Foods Production Act of 1990<sup>29</sup> (OFPA), seeking to give “growers and consumers . . . a clear picture of just what organically grown really means.”<sup>30</sup> The Act claimed as its purposes “(1) to establish national standards governing the marketing of certain agricultural products are organically produced products; (2) to assure consumers that organically produced products meet a certain standard; and (3) to facilitate interstate commerce in fresh and processed food that is organically produced.”<sup>31</sup>

OFPA required the Secretary of Agriculture to develop an organic certification program for “producers and handlers of agricultural products that have been produced using organic methods,”<sup>32</sup> which would be implemented through certifying agents.<sup>33</sup> This use of third-party certifiers was designed to “take advantage of the network of private organic certification organizations that exist in nearly every State,” as both industry groups and states suggested would be efficient.<sup>34</sup> Each state would also be permitted to

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<sup>26</sup> *Id.* at 4944.

<sup>27</sup> Heinz, Gerber’s, ConAgra, and Dole were among the large mainstream food companies that acquired or developed organic brands during the years immediately following Alar. Pollan, *supra* note 7.

<sup>28</sup> Benjamin N. Gutman, *Ethical Eating: Applying the Kosher Food Regulatory Regime to Organic Food*, 108 YALE L.J. 2351, 2371 & n.159 (1999). The United Fresh Fruit and Vegetable Association and American Farm Bureau Federation both sought national regulation, allegedly to preserve a market niche in organic produce for mainstream farmers. S. REP. NO. 101-357, *as reprinted in* 1990 U.S.C.C.A.N. at 4944; Gutman, *supra*, at 2371 n.159.

<sup>29</sup> Organic Foods Production Act of 1990, Pub. L. No. 101-624, § 2101–03, 104 Stat. 3935–51 (codified at 7 U.S.C. § 6501–22).

<sup>30</sup> Gutman, *supra* note 28, at 2371 (quoting 136 CONG. REC. 3078 (1990) (statement of Rep. DeFazio) (internal quotation marks omitted)).

<sup>31</sup> § 2102, 104 Stat. at 3935.

<sup>32</sup> *Id.* § 2104(a).

<sup>33</sup> *Id.* § 2104(d).

<sup>34</sup> S. REP. NO. 101-357 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 4656, 4948. The legislation allowed certifiers to be state entities as well as private organizations, as some state departments of agriculture indicated that they would prefer to handle certification themselves. *Id.*



implement an state organic program, which could be more restrictive in its requirements governing certification and production of organically labeled products than the federal requirements, as long as it did not result in discrimination toward out-of-state organic products and made no claims of superior quality on the labeling.<sup>35</sup> The actual definition of “organic” and related terms was left mostly up to further agency regulation, regulation to be made in conjunction with a National Organic Standards Board composed of representatives from various agricultural constituencies.<sup>36</sup> OFPA itself required only that, with few exceptions, synthetics not be added to organic products, that organic products (excluding agriculture) be produced on soil to which no synthetics or other prohibited substances had been applied in the three preceding years, and that producers and handlers of organic products have an “organic plan” reviewed by the certifying agent and specifying farm management practices that forward appropriate organic goals.<sup>37</sup>

The Department of Agriculture (USDA) did not produce proposed regulations under OFPA until late 1997.<sup>38</sup> While the regulations were mostly uncontroversial in their provisions,<sup>39</sup> the agency did request comments on certain potential agricultural additives that were surprising and alarming to many organic proponents: genetically engineered substances, irradiation, and sewage sludge.<sup>40</sup> In addition, the regulations expanded

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<sup>35</sup> §§ 2104(b), 2108, 104 Stat. at 3939–40; S. REP. NO. 101-357, *as reprinted in* 1990 U.S.C.C.A.N. at 4949. States that created a state organic program would be required to take on enforcement duties for both national and state regulations. National Organic Program, 65 Fed. Reg. 80,548, 80,596 (Dec. 21, 2000).

<sup>36</sup> §§ 2104(c), 2119, 104 Stat. at 3939, 3947–49. The Board was required to include four organic farmers, two organic handlers, one organic retailer, three environmental protection experts, three public interest representatives, two toxicology, ecology, or biochemistry experts, and one certifying agent. *Id.* § 2119.

<sup>37</sup> *Id.* §§ 2105, 2114.

<sup>38</sup> National Organic Program, 62 Fed. Reg. 65,850 (Dec. 16, 1997).

<sup>39</sup> *See, e.g.*, Consumers Union, Comments on Docket No. TMD-94-00-2, National Organic Program, Apr. 10, 1998, *available at* [http://www.consumersunion.org/pub/core\\_food\\_safety/002315.html](http://www.consumersunion.org/pub/core_food_safety/002315.html) (“[W]e believe the NOSB process preceding the proposed rule was sound, adhered closely to the letter and spirit of the law, was conducted with great thoughtfulness, attention to detail and sound science, and involved the required constituencies.”). *But see* Pollan, *supra* note 7 (calling the standards “watery” and “oblig[ing to] agribusiness clients”).

<sup>40</sup> 62 Fed. Reg. at 65,875 (genetically engineered organisms), 65,884 (ionizing radiation), 65,892–93 (municipal sludge).

allowed synthetic additives, both active and inert, to include compounds not approved by the Board — in violation of OFPA’s requirement that synthetics be Board reviewed and approved.<sup>41</sup> In total, the agency received over 275,000 comments on the proposed rule, the largest number in USDA history.<sup>42</sup> Those comments were nearly unanimous in their opposition to genetic engineering, irradiation, and sludge.<sup>43</sup> Driven to revisit the regulations by this outburst of public opinion, the agency did not return with a new proposal until 2000. The revised proposal barred all three controversial methods,<sup>44</sup> and the new regulations took effect on October 21, 2002.<sup>45</sup>

The final regulations, which were lengthy and detailed, established the National Organic Program (NOP). They included provisions governing certification, labeling (determined by organic percentage of the product), the accreditation of certifying agents, the creation and modification of the National List (which controls which synthetic items may be added to organic products), and pesticide residue testing.<sup>46</sup>

The regulations set forth four categories of products encompassing all levels of organic ingredients. A product composed entirely of organic ingredients may label itself as “100% organic.”<sup>47</sup> Products that are between 95% and 100% organic (calculated either by weight or fluid volume of the ingredients) may bear the label “organic,” and, if the manufacturer so desires, the appropriate percentage. They must also indicate which of their ingredients are organic.<sup>48</sup> Both 100% organic products and organic products may bear the USDA seal, a circular green, brown, and white logo with the text “USDA

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<sup>41</sup> Consumers Union, *supra* note 39.

<sup>42</sup> National Organic Program, 65 Fed. Reg. 13512, 13512 (Mar. 13, 2000).

<sup>43</sup> *Id.* at 13513–15.

<sup>44</sup> *Id.*

<sup>45</sup> Harrison, *supra* note 6, at 220.

<sup>46</sup> See National Organic Program, 65 Fed. Reg. 80,548, 80,637–63 (Dec. 21, 2000) (codified at 7 C.F.R. § 205 et seq). For a detailed analysis of the final regulations, see Jessica Ellsworth, *The History of Organic Food Regulation, Winter 2001*, available at <http://leda.law.harvard.edu/leda/data/383/Ellsworth.pdf>.

<sup>47</sup> 65 Fed. Reg. at 80,578–79.

<sup>48</sup> *Id.*

Organic.”<sup>49</sup> Products that are between 70% and 95% organic may only state on their packaging that they are “made with organic ingredients” and may not carry the USDA seal.<sup>50</sup> Finally, products that wish to make an organic claim but contain less than 70% organic content may only provide the relevant percentage and identify which ingredients are organic; they also may not be labeled with the USDA seal.<sup>51</sup>

Certifying agents, both state and private, must be accredited; each accreditation lasts for five years but annual review by staff or outside auditor is required.<sup>52</sup> Accredited certifiers must have “sufficient expertise in organic production or handling techniques” to properly implement NOP as designed, including using sufficient properly trained personnel.<sup>53</sup> Moreover, they must avoid conflicts of interest by not providing advice or consulting services to applicants.<sup>54</sup> Although states were able to require compliance with their more restrictive standards as a condition of certification by any certifier, governmental or private, within that state (presuming that the standards complied with the OFPA non-discrimination and consistency requirements as described above), no individual certifying agent was permitted to institute a more stringent certification regime.<sup>55</sup>

### **Recent Organic Controversies**

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<sup>49</sup> *Id.*; National Organic Program, The Organic Seal, <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?&template=TemplateC&navID=NationalOrganicProgram&leftNav=NationalOrganicProgram&page=NOPOrganicSeal&description=The%20Organic%20Seal&acct=nopgeninfo> (last visited May 13, 2009).

<sup>50</sup> 65 Fed. Reg. at 80,579.

<sup>51</sup> 65 Fed. Reg. at 80,579–80.

<sup>52</sup> 7 C.F.R. § 205.500–.501 (2008).

<sup>53</sup> *Id.* § 205.501(a).

<sup>54</sup> *Id.* § 205.501(a)(11).

<sup>55</sup> *Id.* § 205.501(b); 65 Fed. Reg. at 80,603. Numerous commenters had requested this ability in order to “raise the bar” with respect to ecological or social goals not addressed in the regulations. Nonetheless, the USDA believed that such a provision would be “inconsistent with . . . a stated purpose of the [OFPA,] to assure consumers that organically produced products meet a consistent national standard.” 65 Fed. Reg. at 80,607. Although accredited certifying agents are able to establish other standards than those of the NOP, they may not be referred to as organic standards, nor may the certifier’s mark be withheld from producers who do not meet those optional standards. *See id.* at 80,608.

Despite the thoroughness of the federal organic program and the extensive time spent in its development, consumers, advocates, and the regulated entities themselves have still found much to complain about in the intervening years. One controversy arose as a result of Congressional interference with organic standards via amendment to OFPA. The spending bill passed by Congress in February 2003 contained a provision, inserted in a closed-door session the night before the bill was passed, that allowed livestock labeled organic to be fed on conventionally grown feed unless the Secretary of Agriculture certified that organic feed was available at less than twice the price of conventional.<sup>56</sup> The provision was added at the behest of Representative Nathan Deal of Georgia and prompted by the lobbying of a single Georgia poultry farm that wished to be allowed to feed its chickens a mixture of organic and conventional feed.<sup>57</sup> Representative Deal had received \$4000 in contributions from the farm in question during his prior campaign.<sup>58</sup> The provision was repealed mere months later amidst outcry from the public and other legislators.<sup>59</sup>

Other controversies have resulted from regulation at the agency level. For instance, Arthur Harvey, a producer and handler of organic blueberries, sued the USDA in 2003 for promulgating in violation of the OFPA a variety of regulations, including a provision exempting non-organic products not commercially available in organic form from the standard National List review procedures, a provision permitting the use of synthetic ingredients in processing, and a provision allowing dairy animals being converted to organic production to be fed 80% organic feed in the year prior to sale of

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<sup>56</sup> Consolidated Appropriations Resolution of 2003, Pub. L. No. 108-7 § 771, 117 Stat. 11, 49; Marian Burros, *Late Addition to Spending Bill Would Dilute Organic Rules*, N.Y. TIMES, Feb. 14, 2003, at A24.

<sup>57</sup> Burros, *supra* note 56.

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

<sup>59</sup> Emergency Wartime Supplemental Appropriations Act of 2003, Pub. L. No. 108-11 § 2104, 117 Stat. 559, 589; *see also* Jean M. Rawson, *Organic Agriculture in the U.S.: Program and Policy Issues*, in *ORGANIC AGRICULTURE IN THE U.S.* 1, 8 (Alison J. Wellstone ed., 2007). Senator Patrick Leahy, one of the original proponents of OFPA, had attempted to remove the Deal provision even before it was passed, and had put forth in the Senate by late February the somewhat hyperbolically named Organic Restoration Act of 2003. Organic Restoration Act of 2003, S. 457, 108th Cong. (2003).

their products as organic.<sup>60</sup> The First Circuit found in Harvey’s favor with respect to the second two provisions in 2005.<sup>61</sup> The response from organic stakeholders was mixed; consumer groups and some food retailers welcomed the imminent tightening of the regulations, while larger manufacturers worried that their products would have to be removed from shelves or would no longer be eligible to bear the organic designation.<sup>62</sup> To address the industry concerns, Congress chose to amend OFPA in a way that provided statutory support for the contested provisions and mooted the First Circuit’s order.<sup>63</sup> The amendments permitted the use of synthetic ingredients as long as they were appropriately placed on the National List<sup>64</sup> and provided a statutory basis for the dairy feed regulations.<sup>65</sup> Unsurprisingly, the USDA chose not to further revise the regulations to comply with the court’s original order on synthetics; a district court affirmed this decision as appropriate in 2006.<sup>66</sup>

Consumer groups have also complained about the USDA’s failure to properly enforce its regulations. Over a period of two years, Cornucopia, a Wisconsin farm policy group, filed formal complaints with the agency about Aurora Organic Dairy, a large organic “factory-farm” operation. Cornucopia alleged that Aurora was not allowing animals to graze on pasture as required and was inappropriately using conventional animals as replacements for organic ones in its dairy herd, selling the resultant non-

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<sup>60</sup> *Harvey v. Veneman*, 396 F.3d 28, 32–33 (1st Cir. 2005).

<sup>61</sup> *Id.* at 45–46. With respect to the first provision mentioned, the court found that the regulation was permissible as long as it was construed narrowly to require individualized review of the non-organic products, and instructed the district court to enter a declaratory judgment accordingly. *Id.* at 35–36, 45.

<sup>62</sup> Rawson, *supra* note 59, at 12.

<sup>63</sup> *Harvey v. Johanns*, 462 F. Supp. 2d 69, 74 (D. Me. 2006); Jocelyn Rita Rood, How the Organic Program Came to Be, Current Debates, and Future Application to other “Natural” Food Terms, April 2007, available at [http://leda.law.harvard.edu/leda/data/838/Rood\\_07\\_\[redacted\].html](http://leda.law.harvard.edu/leda/data/838/Rood_07_[redacted].html); *see also* Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2006, Pub. L. No. 109-97, 119 Stat. 2120 (2005).

<sup>64</sup> *Harvey*, 462 F. Supp. 2d at 72 (citing 7 U.S.C. § 6510).

<sup>65</sup> Rood, *supra* note 63.

<sup>66</sup> *See Harvey*. 462 F. Supp. 2d at 70–71.

organic milk as organic.<sup>67</sup> During that time, the USDA took no responsive action. Finally, in 2007, Cornucopia indicated that it intended to sue the agency for failure to investigate complaints and to enforce the regulations, as well as for ignoring recommendations made by the National Organic Standards Board for remedying these types of violations.<sup>68</sup> This spurred the USDA to send Aurora a “Notice of Proposed Revocation,” noting that it had found multiple, willful violations of the regulation. At this point, rather than proceed through the standard NOP enforcement process, which might have required revocation or suspension of certification and the imposition of significant fines, the agency and Aurora came to a deal: Aurora would stop its violations within a given time period and in return would keep its certification.<sup>69</sup> NOP argued that this was the most expeditious way of resolving the conflict; litigation would have taken considerably longer and the violations might not have been corrected for years.<sup>70</sup> Evidence obtained by Cornucopia suggested that the enforcement action had been the subject of political maneuvering by Aurora for as long as eighteen months prior to the final decision.<sup>71</sup>

Even today, battles rage on over appropriate certification and labeling standards. The American Farmers for the Advancement and Conservation of Technology group is seeking to have states ban labeling with absentee claims like “pesticide free” on the grounds that such labels mislead consumers and has obtained a ban in Ohio on providing

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<sup>67</sup> A. Christine Green, *The Cost of Low-Price Organics: How Corporate Organics Have Weakened Organic Food Production Standards*, 59 ALA. L. REV. 799, 822–23 (2008); Press Release, Mark Kastel, The Cornucopia Institute, Cornucopia Update on USDA Crack Down on Aurora Dairy’s Factory Feedlots & Certifier Complicity (Aug. 31, 2007), available at [http://www.organicconsumers.org/articles/article\\_6912.cfm](http://www.organicconsumers.org/articles/article_6912.cfm).

<sup>68</sup> Green, *supra* note 67, at 823.

<sup>69</sup> *Id.* at 823–24.

<sup>70</sup> *See id.* at 824. NOP has a stated enforcement policy of trying to “address . . . violations as quickly as possible so consumers are not victims of fraud.” Enforcement & Integrity of the National Organic Program: Q&A’s for Consumers, <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRD3106940> (last visited May 13, 2009). The program encourages the filing of complaints but provides no information about ongoing investigations in order to protect businesses from unwarranted harm and to avoid hampering the investigation. *See id.*

<sup>71</sup> Green, *supra* note 67, at 825–26; Press Release, Kastel, *supra* note 67.

milk labels with information about synthetic growth hormone use; it is opposed by the Organic Trade Association and other organic advocacy groups.<sup>72</sup> The Organic Consumers Association is leading a boycott of organic milk that comes from cows kept on factory farm feedlots rather than allowed to graze on pasture.<sup>73</sup> The salmonella outbreak from peanuts processed in a certified organic facility in February 2009 spurred the USDA to issue a directive to all certifiers to take into account potential health violations when performing inspections, and to report those violations to health and safety agencies.<sup>74</sup> Nonetheless, some certifiers noted that food safety was not a true part of their brief under the federal standards, and even the directive itself acknowledged that “NOP is not a health and safety program.”<sup>75</sup>

Finally, even the valuation of the “organic” label by some of organic food’s core constituency is beginning to decline. With the growing concern in environmentalist circles over the contribution of carbon emissions to global warming, for example, many food advocates are suggesting that locally grown produce may be environmentally superior to organic produce that has to be internationally imported.<sup>76</sup> So-called “locavores” seek to eat foods that come from as close to their homes as possible (some

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<sup>72</sup> See CCOF, CCOF Supports OTA in Battle to Protect Organic Labeling, <http://www.ccof.org/actionalerts.php> (last visited May 13, 2009); Press Release, Organic Trade Association, Organic Left Standing as the Gold Standard for Consumers Looking to Avoid Food Produced with Synthetic Growth Hormones (Mar. 31, 2009), available at [http://www.organicnewsroom.com/2009/03/organic\\_left\\_standing\\_as\\_the\\_g.html](http://www.organicnewsroom.com/2009/03/organic_left_standing_as_the_g.html).

<sup>73</sup> Organic Consumers Association, Boycott the Shameless Seven — Organic Outlaws Labeling Factory Farm Milk as “USDA Organic,” [http://www.democracyinaction.org/dia/organizationsORG/oca/campaign.jsp?campaign\\_KEY=4756](http://www.democracyinaction.org/dia/organizationsORG/oca/campaign.jsp?campaign_KEY=4756) (last visited May 13, 2009).

<sup>74</sup> Kim Severson & Andrew Martin, *It’s Organic, But Does That Mean It’s Safer?*, N.Y. TIMES, Mar. 4, 2009, at D1.

<sup>75</sup> Notice from Barbara C. Robinson to all USDA Certifying Agents, Reporting Health & Safety Violations, Feb. 25, 2009, available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5075516&acct=nopgeninfo>; Severson & Martin, *supra* note 74.

<sup>76</sup> See Pollan, *supra* note 7.

even restrict themselves to a 100-mile radius for all food consumption), including organic and sustainable principles as a part but not the whole of their food consumption criteria.<sup>77</sup>

Many of the debates over organic regulation are as much about the philosophy of organic agriculture as they are about statutory interpretation or consumer confusion. Consumers and farmers concerned about the addition of synthetic ingredients during processing have a different take on what it may mean to be organic from those who would rather focus only on the environmental impact of the agricultural process; those who want organic food to be safer and healthier may not be concerned about access to pasture for dairy animals as long as no synthetic growth hormones or antibiotics are used in treating the livestock. And those who buy into some of the original values of organic agriculture — small farms, sustainable methodologies, and freedom from industrial supply chains — may be profoundly disappointed by the current set of organic standards. The intersection of interest group politics and lobbying with these philosophical constructs has produced continual concern over both whether organic standards are being appropriately accommodating to a variety of farmers nationwide and whether the standards are being watered down and becoming meaningless. One set of organic standards is having a great deal of difficulty in fitting all.

### **Kosher Law and Practice**

The Jewish tradition of kashrut, or kosher law, is a system of religious teachings and beliefs that governs both the types of food and the preparation of food that observant Jews may eat. The laws followed are extensive and complex, derived from a variety of biblical verses and rabbinical writings both ancient and modern.<sup>78</sup> One of the most

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<sup>77</sup> See Marian Burros, *Preserving Fossil Fuels and Nearby Farmland by Eating Locally*, N.Y. TIMES, Apr. 25, 2007, at F25. Of course, the mainstream agricultural industry has already begun using some of the tenets of locavorism to promote its conventionally grown product; Lays potato chips, for example, are being marketed as locally grown and produced through advertising featuring a farm in the state in which the ad runs. See Kim Severson, *When Local Makes It Big*, N.Y. TIMES, May 13, 2009, at D1.

<sup>78</sup> ZUSHE YOSEF BLECH, *KOSHER FOOD PRODUCTION* xxiii (2d ed. 2008).



influential codifications of kosher law, for example, is contained in the *Shulchan Aruch* (“the prepared table”), a sixteenth-century text by Rabbi Yosef Karo; yet modern food technology requires constant contemporary rabbinic interpretation and analysis, such that Israel has two chief rabbis whose position is to pronounce on new issues.<sup>79</sup> There are two major strains of kashrut based on ethnicity: Ashkenazi Jews, whose ancestors come from Europe, have different customs from Sephardic Jews, whose ancestors come from areas around the Mediterranean.<sup>80</sup> American customs are usually based on those of the Ashkenazim.

The basic laws of kashrut can be broken into two categories: product rules and process rules.<sup>81</sup> Product rules are categorical bars on certain types of food and approvals for other types. All fresh fruits and vegetables, for example, are categorically kosher.<sup>82</sup> On the other hand, many types of animals are forbidden as food. Of mammals, only those that have split hooves and chew their cud may be eaten;<sup>83</sup> all others are not kosher. Fish must have fins and scales to be kosher, hence shellfish are prohibited.<sup>84</sup>

In contrast, process rules govern the ways in which food may be prepared and eaten. Even animals that are not categorically barred must be slaughtered in a particular way: the animal’s trachea, esophagus, carotid arteries, and jugular veins must be slit in a continuous slice with a particularly sharp knife free of imperfections.<sup>85</sup> An individual who performs this slaughter (called a “shochet”) must have years of training and particular authorization because the ritual is so complex.<sup>86</sup> After the slaughter, the animal’s lungs are inspected for lesions; different Jewish traditions have varying rules

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<sup>79</sup> *Id.* at xxiv–xxv.

<sup>80</sup> *Id.*

<sup>81</sup> Gutman, *supra* note 28, at 2363.

<sup>82</sup> BARRY M. LEVENSON, *HABEAS CODFISH: REFLECTIONS ON FOOD AND THE LAW* 185 (2001).

<sup>83</sup> Gutman, *supra* note 28, at 2363 (citing *Leviticus* 11:3–7).

<sup>84</sup> *Id.* (citing *Leviticus* 11:9–12).

<sup>85</sup> BLECH, *supra* note 78, at 139.

<sup>86</sup> *Id.* at 139–40.

about how many and what types of lesions may disqualify the animal.<sup>87</sup> Finally, some parts of the animal are prohibited and must be removed, including the blood, some types of fat, and the sciatic nerve. In order to remove the blood, the meat is generally salted and soaked.<sup>88</sup> Another process rule is that forbidding the consumption of milk and meat (as well as any of their derivatives) together.<sup>89</sup> Any inadvertent combination of these products may render the whole non-kosher. Moreover, the utensils and equipment used to prepare one type of food may not generally be used to prepare the other type without ritual cleansing.<sup>90</sup>

Finally, there is an entirely separate set of kosher standards that come into play on the holiday of Passover, when leavening must be avoided. Wheat, rye, oats, barley, and spelt — or any of their derivatives — are prohibited unless they are made into unleavened bread called matzah.<sup>91</sup> Other types of food are precluded depending on ethnic custom: Ashkenazi Jews are prohibited from eating quasi-grains and legumes like corn, beans, soy, rice, lentils, and peanuts.<sup>92</sup>

The potential variation in the kosher practice of individuals is, unsurprisingly, enormous. As discussed above, Ashkenazi and Sephardic Jews have varying traditions on points like the status of legumes during Passover and the acceptability of lesions in the lungs of slaughtered animals. Moreover, Orthodox Judaism and Conservative Judaism, both of which promote following the laws of kashrut, differ on the degree to which non-

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<sup>87</sup> *Id.* at 142–43. In the Ashkenazi tradition, cattle may have lesions as long as those lesions are easily removable and no punctures are found in the lung; in the Sephardic tradition, cattle must be entirely free of lesions (“Bait Yosef Glatt”). Some Ashkenazi Jews prefer to maintain a standard where there must be no more than two minor lesions (“Glatt”). *Id.*

<sup>88</sup> *Id.* at 143–44.

<sup>89</sup> *Id.* at 27.

<sup>90</sup> *Id.* Some of the ways in which equipment may be ritually cleansed include immersion in boiling water, heating to 450°F, or heating to 900°F depending on the item to be cleansed and the manner in which it was contaminated. *Id.* at 41–45.

<sup>91</sup> *Id.* at 71–72.

<sup>92</sup> *Id.* at 72.

Jews may be involved in cooking and handling wine, among other doctrinal issues.<sup>93</sup> Some segment of the observant population insists on following standards generally regarded as preferred but not required; kosher food produced to meet this level of stringency generally requires full-time rabbinic supervision and cannot come into contact with equipment that requires ritual cleansing.<sup>94</sup> Besides these doctrinal disputes, many Jews, particularly those who identify as members of Reform or Conservative traditions, observe the laws of kashrut to an individualized extent based on personal preference. Some who cheerfully consume bacon cheeseburgers nonetheless observe the strictures of Passover; some who regularly avoid mixing milk and meat will nonetheless eat shellfish and vice versa.

### **The Kosher Certification and Regulation System**

Kosher food is certified as such by any one of hundreds of private certifiers, with reaches that range from the local to the international.<sup>95</sup> Some certifiers are specialized organizations, both for-profit and non-profit; some are communal entities responsible for general Jewish needs that perform local kosher certification as a portion of their portfolio, and some are private individuals.<sup>96</sup> The largest private certifier, Orthodox Union Kosher, supervises more than 500,000 products in 80 countries;<sup>97</sup> in fact, over 60% of kosher-certified products in the United States are certified by Orthodox Union.<sup>98</sup> Each certifier

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<sup>93</sup> Gutman, *supra* note 28, at 2365 nn.106–07. Another commonly referenced distinction between Orthodox and Conservative rulings on kashrut is whether swordfish is kosher: Conservative rabbis believe that it is, Orthodox rabbis believe that it is not. (The controversy, incidentally, arises from the fact that swordfish have scales only in a juvenile state.) *Id.* at 2363 n.96. Gelatin derived from animals generates a similar doctrinal split. *Id.* at 2366.

<sup>94</sup> BLECH, *supra* note 78, at 22–23, 51 n.125.

<sup>95</sup> Gutman, *supra* note 28, at 2376; Elijah L. Milne, *Protecting Islam's Garden from the Wilderness: Halal Fraud Statutes and the First Amendment*, 2 J. FOOD L. & POL'Y 61, 66 n.28 (2006) (noting that there are over 400 certifiers in the United States and Canada).

<sup>96</sup> BLECH, *supra* note 78, at 8–9.

<sup>97</sup> Orthodox Union, What is the OU?, [http://www.oukosher.org/index.php/basics/about\\_ou](http://www.oukosher.org/index.php/basics/about_ou) (last visited May 13, 2009).

<sup>98</sup> Orthodox Union, Tracking Down OU Imposters, [http://oukosher.org/index.php/common/article/tracking\\_down\\_the\\_ou\\_impsters/](http://oukosher.org/index.php/common/article/tracking_down_the_ou_impsters/) (last visited May 13, 2009).

places its trademark symbol on the packaging of products under its supervision; Orthodox Union's symbol is the familiar U inside a circle.<sup>99</sup> The certifiers go to great lengths to protect these certification marks, as misuse is not only a trademark infringement but can lead to the consumption of non-kosher food by the observant.<sup>100</sup> Some manufacturers may put simply the letter "k" on their packaging. Because letters of the alphabet may not be trademarked, the "k" standing alone is a representation by the manufacturer alone that the food is kosher; it is not necessarily backed by any certifying agency.<sup>101</sup> Many observant consumers, unsurprisingly, will not accept "k"-marked foods as kosher.

Certification procedures vary by organization, site, and type of food produced, but generally begin with an initial inspection to reveal any issues with manufacturing or production that would pose a barrier to certification. A thorough ingredient and records examination occurs as well.<sup>102</sup> To officially institute the certification, elaborate contracts are drawn up between the certifier and the manufacturer specifying, among other terms, which products are to be certified, the ingredients that may be used in their production, and the process and equipment agreed upon and approved.<sup>103</sup> Finally, the manufacturing facility will be subject to regular inspections throughout the certification period of all operations related to the manufacturing process, as well as a review of ingredients, records, and labels.<sup>104</sup>

Because kosher products often command a premium in price, concerns about fraud and dilution of standards have existed for hundreds of years. As early as 1796, a Christian butcher in New York City attempted to fraudulently purvey his meat as kosher by labeling it with the symbol of the shochet. The New York Council of the time

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<sup>99</sup> LEVENSON, *supra* note 82, at 189.

<sup>100</sup> *See, e.g.*, Tracking Down OU Imposters, *supra* note 98.

<sup>101</sup> LEVENSON, *supra* note 82, at 190. Companies may choose to use a "k" rather than a certifying agency mark even if a certifier is involved in order to maintain the flexibility to switch certifiers without redesigning packaging. *Id.*

<sup>102</sup> BLECH, *supra* note 78, at 12–13.

<sup>103</sup> *Id.* at 14–15.

<sup>104</sup> *Id.* at 1–2. Certain types of food, like meat, wine, and cheese, require full-time supervision by rabbinic inspectors; the periodic inspection process described above is more common. *Id.* at 2–5.

suspended his butcher's license in response.<sup>105</sup> Nearly 150 years later, New York State, which had a growing population of recent Jewish immigrants, would pass America's first kosher fraud law. It stated that "[a] person, who, with intent to defraud . . . [s]ells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements . . . is guilty of a misdemeanor."<sup>106</sup> Modified slightly in the 1920s, the statute survived nearly unchanged through the 1990s.<sup>107</sup> Twenty-one other states have also enacted kosher fraud statutes.<sup>108</sup>

Kosher fraud statutes phrased like the above New York statute have been attacked in both state and federal court as violations of the Establishment Clause.<sup>109</sup> The difficulty is related to the definition of kosher as food conforming to Orthodox religious practices — in order to be enforced, the laws require the state government to refer to religious authorities and to take a position on points of religious doctrine when sects differed (as they do even within the bounds of Orthodox Judaism). They also have the effect of promoting one religious sect over others by requiring consumers of kosher food to adhere to Orthodox custom, courts have found.<sup>110</sup> In response to the *Commack Self-Service Kosher Meats* decision, in which the Second Circuit declared New York's kosher fraud statute to be in violation of the Establishment Clause, the state rewrote the law to emphasize labeling regulations and consumer education rather than religious

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<sup>105</sup> LEVENSON, *supra* note 82, at 191.

<sup>106</sup> 1915 N.Y. Laws ch. 233, *quoted in* Mark A. Berman, *Kosher Fraud Statutes and the Establishment Clause: Are They Kosher?*, 26 COLUM. J.L. & SOC. PROBS. 1, 15 & n.65 (1992).

<sup>107</sup> *See* LEVENSON, *supra* note 82, at 191; Berman, *supra* note 106, at 15 & n.65.

<sup>108</sup> Arizona, Arkansas, California, Connecticut, Georgia, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Texas, Virginia, and Washington all had kosher fraud statutes on the books as of 2006; Tennessee and the District of Columbia have repealed theirs. *See* Milne, *supra* note 95, at 63 n.11, 66–67.

<sup>109</sup> *Id.* at 67–69; *see* *Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337 (4th Cir. 1995); *Ran-Dav's County Kosher, Inc. v. State*, 608 A.2d 1353 (N.J. 1992).

<sup>110</sup> *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 419 (2d Cir. 2002).

observance:<sup>111</sup> it required that any food sold as kosher be labeled appropriately and have its certifying agent registered with the state. In addition, advertising for kosher products must identify the certifier in the advertisement itself.<sup>112</sup> The state registry has been placed on the website of the Department of Agriculture and Markets and can be searched by certifier, brand name, store, or food establishment.<sup>113</sup> New Jersey, which had a kosher fraud statute struck down by a state court,<sup>114</sup> now requires that dealers who represent food to be kosher “disclose the basis upon which that representation is made.”<sup>115</sup>

As mentioned above, private enforcement of kosher standards exists in conjunction with that of the state. Certifiers will sue both to protect their own trademarks from unauthorized use and under the contracts that are signed as part of the certification procedure if they believe that their clients are not complying with the contract requirements.<sup>116</sup> Moreover, religious organizations not affiliated with any certifier spread news to the observant community of fraudulent or unauthorized kosher markings on particular products, as well as particular production lots of ordinarily kosher products that have been made non-kosher. *Kashrus Magazine*, for example, provides “kosher alerts” both in its bimonthly publication and on its website.<sup>117</sup> The *Kosher Supervision Guide*, published by Yeshiva Birkas Reuven of Brooklyn, lists all known kosher-certifying

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<sup>111</sup> 2004 N.Y. Sess. Laws A.9041-A § 2 (“The legislature finds that a significant number of consumers within the state seek to purchase food products that are kosher, and that many of those consumers do so for reasons unrelated to religious observance. The legislature further finds that it is essential that consumers be provided clear and accurate information about the food they are purchasing, and that this goal is furthered by requiring vendors of food and food products represented as kosher to make available to consumers the basis for that representation.”).

<sup>112</sup> N.Y. AGRIC. & MKTS LAW § 201(a) (McKinney’s 2009).

<sup>113</sup> See Kosher Law Enforcement, Department of Agriculture and Markets, New York’s Kosher Registry, <http://www.agmkt.state.ny.us/kosher/search.aspx> (last visited May 13, 2009).

<sup>114</sup> *Ran-Dav’s County Kosher*, 608 A.2d 1353.

<sup>115</sup> N.J. STAT. ANN. 56:8-63 (West 2009). This formulation was suggested by the *Ran-Dav* court, which did not invalidate the state’s original disclosure requirements. *Ran-Dav’s County Kosher*, 608 A.2d at 1366–67.

<sup>116</sup> Gutman, *supra* note 28, at 2378 & nn.213–14.

<sup>117</sup> *Kashrus Magazine*, Consumer Alert Online, <http://www.kashrusmagazine.com/alerts.php> (last visited May 13, 2009). The kosher alerts also encompass notices of certification discontinuation and explanatory notes on category-wide kosher issues. See *id.*

organizations, their symbols, and basic information about them, including the rabbinical authorities in charge and their specialties.<sup>118</sup> It notes, however, that individual consumers should check with their local rabbis or trusted agencies to determine the reliability and competency of any individual organization.<sup>119</sup> Because so many of the smaller certifying agents only certify local products, reputation within a particular community can be an effective method of both disseminating what standards a certifying agent has and ensuring that the certifier does not decrease those standards.

### **Comparative Advantages of the Model Systems**

Although both organic and kosher certification systems strive to provide consumers with comprehensive, accurate, and appropriate information about the products and processes that affect their food composition, the systems are in key ways diametrically opposed. The standards for organic certification are set almost entirely by the federal government with some limited state contribution, and private organizations are prohibited from requiring either more or less rigorous standards; in contrast, the government is actually barred by the Establishment Clause from setting any kosher certification standards and so private organizations must do so. Although both systems rely on private certifiers for the task of evaluating and monitoring producers, the organic system requires those certifiers to meet an elaborate set of qualifications, while the kosher system prescribes at the most registration of very basic information with the state.

The benefits of the federal standards-setting system are clear, as Congress noted in its initial enactment of the OFPA. The system of state regulation during the early 1990s was extremely difficult to navigate for any producer wishing to sell organic food across state lines; not only did each state have different standards for its own producers, but states would not permit out-of-state products that did not meet those standards.

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<sup>118</sup> Kashrus Magazine, About the Kosher Supervision Guide, [http://www.kashrusmagazine.com/ksg/Old%20and%20deleted/ksg\\_index.html](http://www.kashrusmagazine.com/ksg/Old%20and%20deleted/ksg_index.html) (last visited May 13, 2009).

<sup>119</sup> *Id.*

Working on what was far from a blank slate, Congress succeeded in imposing an almost-uniform set of standards on the organic industry, and the non-discrimination provisions of OFPA ensured that states could not hinder interstate commerce as they had previously done.

In addition, as a result of the USDA certification process, consumers struggle less with various types of organic labeling. The USDA organic seal provides a simple clue as to products that are almost entirely organic, and those with significant organic components can provide a standardized percentage characterization to indicate that. Although some consumer groups and scholars initially worried that shoppers would be confused by the multiple levels of organic classification,<sup>120</sup> studies have shown that, only a year after the implementation of NOP, 38% of consumers were aware of the USDA seal, and that consumers had an increased willingness to pay for larger quantities of organic content.<sup>121</sup> By 2006, 42% of “mid-level consumers,” those only somewhat involved with organic foods, specifically preferred products with the USDA seal to than those described with more generic labels like “natural.”<sup>122</sup> On the other hand, only 10% of consumers knew that products that bear the USDA seal must be at least 95% organic; 27% thought that such products were entirely organic and a full 43% admitted that they were unaware of the seal’s meaning.<sup>123</sup> Understanding of the standards, unsurprisingly, decreased with the involvement level of the consumer in the organic world.<sup>124</sup>

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<sup>120</sup> Ellsworth, *supra* note 46, at n.79.

<sup>121</sup> Jeremy Jay Beaverson, *Consumer Understanding of Organic Food Labels Under the National Organic Program and Their Willingness To Pay of Processed Organic Foods* 32, 40 (2004) (unpublished M.S. thesis, Ohio State University), *available at* <http://www-agecon.ag.ohio-state.edu/Programs/VanBuren/pdf/BeaversonThesis.pdf>.

<sup>122</sup> Laurie Demeritt, *Consumer Awareness and Understanding of the USDA Organic Seal*, *ORGANIC PROCESSING MAGAZINE*, Jul.–Sept. 2006, *available at* <http://www.organicprocessing.com/opjs06/opjs06market.htm>.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* 42% of “core” consumers reported a clear or clearer understanding of organic standards, while only 28% of mid-level and 21% of periphery consumers did so.



On the other hand, allowing the federal government to set what is basically the only standard for all organic food in the United States<sup>125</sup> has some significant downsides. The economic impact of any given regulatory change is felt nationwide, and the pressure to craft the standards to benefit the largest constituencies is therefore intense. Because the standards can be changed by either Congress or the USDA, individual companies or lobbying organizations have multiple points on which to press for beneficial regulations or alterations to existing regulations. As the controversies of the past seven years have shown, those impacts have indeed been felt. The feed controversy sparked by Representative Deal is emblematic of the threat that legislators can pose to a carefully crafted program: the change was made at the last minute, to benefit a single company, and without consideration of the large-scale impact that it might have. In addition, the nature of many of congressional bills allows amendments like this to be passed without necessarily garnering the support of a majority of the legislature; the feed amendment was placed in a massive, multi-pronged spending bill that congressmen might have supported in the whole despite disagreeing with the amendment (and judging by the repeal that quickly followed, such was the case). On the other hand, regulatory capture of the USDA by the groups it regulates is perhaps a more insidious and relevant concern. Although the *Harvey* case is so far the only one in which the courts have been involved, consumer groups and associations of some of the more traditional organic organizations continue to argue that standards should be toughened in order to accord with Congress's dictates. As *Harvey* shows, however, the agency is not particularly interested in responding to those concern — and when the courts are included, Congress appears

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<sup>125</sup> Although states have the option to institute a more restrictive program, the NOP website lists only Utah and California has having done so; both states had those programs approved in 2004, shortly after the regulations were implemented. National Organic Program, USDA-Approved State Programs, <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateA&topNav=NationalOrganicProgram&leftNav=NationalOrganicProgram&page=NOPSOPsUSDAApproved&description=Approved%20State%20Programs&acct=nopgeninfo> (last visited May 13, 2009). The fact that states with SOPs must take over enforcement duties from the federal government serves as a disincentive to the implementation of such programs.

happy to come to the USDA's defense. Moreover, appointees to the National Organic Standards Board, the USDA's independent advisory committee, have in recent years been individuals who, while they technically filled the professional requirements for their seats, had significant ties to large industry players.<sup>126</sup>

Even when there is no legislative or agency political maneuvering going on, the bureaucratization of the standard-setting process nonetheless poses issues for many consumers. For those with deep involvement in the alternative food production world, the organic standards outlined by OFPA nearly two decades ago simply do not reflect many of the production requirements that they would prefer to see. With the rise of the local food movement, for example, consumers are choosing to value a decrease in "food miles" — distance traveled from farm or pasture to plate — over a decrease in pesticide residue. Indeed, small local farmers, the very individuals that shoppers often associate with organic foods, may be particularly unable to meet the extra expenses and difficulties associated with strict organic production as federally defined. Moreover, producers who hold themselves to higher standards and have organic production that far exceeds the USDA's requirements have no way of distinguishing themselves in the marketplace for the segment of dedicated, core consumers. Some scholars have suggested standardizing and regulating other process-based labeling claims like "natural" or "free-range" in order to meet these concerns,<sup>127</sup> but such actions are inevitably lengthy (as suggested by the fifteen year path from statute to implemented regulations for organic) and may result in the same problems with watered-down standards.

The great benefit to the kosher system of private standards setting, on the other hand, is that it can easily encompass the variety of practices desired in kosher products by consumers both observant and non-observant. Although some combination of tradition,

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<sup>126</sup> See Green, *supra* note 67, at 826–27 & n.214 (2008). By the end of 2006, twelve of the fifteen board members had interests related to those of the regulated industries. *Id.* at 827.

<sup>127</sup> See, e.g., Harrison, *supra* note 6; Kimberly Ong, *A New Standard: Finding a Way To Go Beyond Organic*, 17 N.Y.U. Env't'l L.J. 883 (2008), Rood, *supra* note 63.

kosher fraud statutes, and marketplace demand has settled the general standard of kosher certification at that demanded by Orthodox traditions,<sup>128</sup> those who are particularly observant or demanding can choose to purchase food certified only by agents who uphold higher, optional traditions. Those who belong to denominations with looser restrictions, on the other hand, can find items like sturgeon certified by Conservative organizations, and thereby still be assured that no non-kosher contaminants have been present in its preparation. Moreover, kosher certification agents can and have required as a condition of certification that manufacturers conduct themselves in ways that are congruent with Jewish values, even if the conduct at issue, like Sabbath observance or the content of an accompanying comic, is unrelated to the kosher status of the product.<sup>129</sup>

The downside of all of this choice, naturally, is the difficulty for consumers of appropriately evaluating the kosher certification on any given product. The symbol carried by the product, particularly if it is one of a smaller or local certifier, may be unfamiliar to the shopper. Although products like the Kosher Supervision Guide are available for some level of guidance, only those who observe the laws of kashrut for religious reasons — a small percentage of the overall purchasers of kosher products — are likely to have or even to be aware of such manuals. In addition, disclosure of exactly which standards each organization follows can be difficult to find. The Kosher Supervision Guide is mostly a directory of kosher certifiers; it contains no reliability information and notes that “[y]ou must ask your rabbi which agencies to rely upon.”<sup>130</sup> Because kosher certification is carried out via private, case-by-case contract arrangements between the certifier and manufacturer, even a customer familiar with the certifier cannot ensure that particular techniques have been mandated on a given product. Moreover, any particular certifier is only as stringent as the given inspector charged with

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<sup>128</sup> Gutman, *supra* note 28, at 2382.

<sup>129</sup> *Id.* at 2377 n.207. The Orthodox Union requested as a condition of certification that Bazooka Gum, a brand of bubblegum that comes wrapped in a short comic, ensure that its comics not be at odds with Jewish values. *Id.*

<sup>130</sup> Kashrus Magazine, *supra* note 118.

oversight of a manufacturer. In essence, then, a consumer who chooses a product based on the certifier is relying mostly on the certifier's community reputation and voluntary pronouncements. This is an easier process for observant Jews than for other types of kosher consumers, who may not have rabbis to consult or other types of community resources available to them, but nonetheless find it important for various reasons that kashrut be strictly observed.<sup>131</sup>

Enforcement issues, too, are a regular item of concern for both certification systems. As discussed above, the kosher system combines private trademark protection and contract enforcement with, in nearly half of the states, public fraud protection and disclosure requirements. This “belt and suspenders” approach allows the regulators to work hand in hand with industry players to ensure that kosher standards are protected. In fact, many certifiers will refer potential cases of fraud to state investigators.<sup>132</sup> In the organic system, on the other hand, NOP maintains sole responsibility for enforcement except in the few states where additional regulations have been instituted. Given resource constraints — NOP has fewer than ten staffers — and concerns about agency capture by regulated industries, many argue that NOP is significantly underenforcing many organic regulations.<sup>133</sup>

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<sup>131</sup> American Muslims, for example, are frequent consumers of kosher food because they have their own religious standards for meat products, and products certified as kosher dairy or parve (neutral) are guaranteed not to contain meat. Those with dairy allergies may choose to purchase kosher products for similar reasons.

<sup>132</sup> Gutman, *supra* note 28, at 2378–79.

<sup>133</sup> Paula Lavigne, *USDA Does Not Always Enforce Organic Label Standards*, DALLAS MORNING NEWS, July 25, 2006, available at <http://listproc.ucdavis.edu/archives/organicfarm/log0607/0004.html>; Press Release, Mark Kastel, Cornucopia Institute, Message to Obama: Please Fix the USDA's Organic Mess (Feb. 24, 2009), available at <http://www.reuters.com/article/pressRelease/idUS204725+24-Feb-2009+PRN20090224>. One of the most pressing enforcement concerns for organic advocates is the large number of organic products currently being made with ingredients from China. Although these ingredients are allegedly organic, the USDA has very little direct oversight in China to ensure that this is the case. The agency made its first enforcement visit to China in 2008, and the country still has no certifying agents directly accredited by the USDA. See National Organic Program, USDA-Accredited Certifying Agents, <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateJ&navID=ListofCertifiersNOPNationalOrganicProgramHome&rightNav1=ListofCertifiersNOPNationalOrganicPr>

## Certification Regimes in the Future

Before the institution of the federal organic regulations, at least one scholar called for the organic certification system to be run along the same lines as the kosher certification system: private standards with limited government fraud enforcement and disclosure provisions.<sup>134</sup> This would likely have been a difficult task; one of the reasons that private standard-setting works so well in the kosher setting is that states are legally barred from substantively regulating based on religious standards.<sup>135</sup> Before the federal regulations, in contrast, states had taken an active role in setting standards for all organic products marketed in their territories, hindering expansion of the organic industry and perhaps unduly privileging single-state producers. With this type of regulatory regime already in place, federal legislation seemed the natural solution to institute uniformity and standardization.

Nonetheless, it seems plausible that the organic regime might still be tweaked to address some of the problems that have come up since the implementation of federal regulations and to take advantage of some of the features of the kosher model. For instance, the USDA could reconsider its ban on additional requirements by private certifiers. This would permit some of the market differentiation sought by more dedicated organic consumers, while still maintaining a federally mandated baseline to ensure quality for consumers who have neither the resources nor the inclination to educate themselves in the niceties of organic techniques. This change, however, would be unlikely to affect enforcement issues; companies not in compliance with federal

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ogramHome&topNav=&leftNav=NationalOrganicProgram&page=NOPACAs&resultType=&acct=nopgeninfo (last visited May 13, 2009).

<sup>134</sup> Gutman, *supra* note 28, at 2832.

<sup>135</sup> Even before courts began to strike down kosher fraud laws due to constitutional concerns, states did not require more in their statutes than that products be “sanctioned by the Code of Jewish Laws, namely in the Shulcan Aruch” or be “prepared or processed in accordance with orthodox Hebrew religious requirements by a recognized orthodox rabbinical council.” Berman, *supra* note 106, at 19 (quoting MD. CODE ANN. COM. LAW. § 14-901 (West 1990); MICH. COMP. LAWS § 750.297e (1991)).

organic regulations would be more likely to mislabel using the USDA seal than a private trademark not recognized by the mass market. On that front, Congress may choose to consider making states joint partners in organic enforcement in the hope of increasing resources and local commitment to these standards.<sup>136</sup>

There are an enormous number of labeling claims related to food processing and manufacture that currently have no federal regulation: hormone-free, local, free-range, and natural, just to name a few. Rather than proceeding directly to the conclusion that setting federal standards would be the best manner of handling these claims, policymakers might want to consider something more along the lines of the hybrid model suggested above, or even simply a version of the kosher model. Many of the concerns about implementing the kosher model on a wider scale revolve around consumer confusion and standard devaluation — if any private organization can “certify” a product as free-range when it passes a standard far below what consumers might expect that label to mean, and consumers are uneducated about which certifications are meaningful, then the certification system is essentially useless. The kosher model is thought to work as effectively as it does because of the tight-knit observant community; certifiers who do not meet the basic communal expectations lose the most dedicated portion of their consumer base.

Consumers interested in other types of process-based labeling like organics, however, may not be as disorganized as often believed. A boycott led by the Organic Consumers Association of organic milk produced by factory farms had a significant impact; major organic retailers dropped the questionable products and stock prices fell for

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<sup>136</sup> Of course, it is unclear how well-enforced regulations are in the states that already bear the responsibility for that enforcement. *See, e.g.*, Phil Wayne, Spotty Oversight of Organic Foods May Prove Toxic, *The Lookout News*, Feb. 8, 2005, *available at* [http://www.surfsantamonica.com/ssm\\_site/the\\_lookout/news/News-2005/Feb-2005/02\\_08\\_08\\_05--Spotty\\_Oversight\\_of\\_Organic\\_Foods\\_May\\_Prove\\_Toxic.htm](http://www.surfsantamonica.com/ssm_site/the_lookout/news/News-2005/Feb-2005/02_08_08_05--Spotty_Oversight_of_Organic_Foods_May_Prove_Toxic.htm) (noting that the California Department of Food and Agriculture planned to perform only twelve “spot checks” of organic produce at farm stands and grocery stores in Los Angeles County during the 2004–05 fiscal year and that records statutorily required to be available to the public were not).

the corporate owners.<sup>137</sup> Given that the market for products with niche label claims like free-range is smaller (and likely more homogenous in values) than that of the organic market at large, purveyors of those products may not be able to afford to alienate their core consumer base. These niche, animal husbandry–related claims may also be more controllable by kosher-fraud-type enforcement mechanisms because standardizing meaning is less difficult; “hormone-free” is a factual claim that is either true or false. On the other hand, label claims like “natural” or “pure,” which have very little inherent content, might be better served by federal regulation. Because no one set of consumer or activist groups would have values particularly closely aligned with these terms, community enforcement becomes more difficult.<sup>138</sup>

## **Conclusion**

Process-based labeling will continue to raise issues of accuracy, informativeness, and intelligibility for consumers, and the problem is only likely to increase as shoppers raise their awareness about food production methodologies. The coexistence of the organic and kosher certification models indicates that the public and private systems can have very different reactions to the same set of concerns. As is clear from the models’ common use of third-party certifiers, no one organization can authenticate a nationwide swath of food production. However, policymakers can choose from systems ranging between highly centralized certification systems, like that for organic food, and highly decentralized ones, like that for kosher. In order to come to the most appropriate choice, the values of consumer accessibility and choice, standardization, and enforceability must

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<sup>137</sup> Green, *supra* note 67, at 825. Nonetheless, the boycott continues on to this day, and the products have not been removed from the market. *See* CCOF, *supra* note 72.

<sup>138</sup> “Local” is an interesting label claim under this analysis; it has very little inherent content but a small base of consumers who are interested in the marking. It is possible that the local claim would be best served by state regulation (ideally with cooperation between some neighboring states); such regulation would provide content but allow for localized standard setting and enforcement. Since the entire concept of local food is that it not travel far from producer to consumer, interstate commerce concerns are less pressing than they might be for other labeling claims.

be carefully weighed. In the end, it may turn out that a policy system taking elements from both known models produces the best results for consumers, producers, and regulators.