



Can the FDA Keep Kosher?: Regulation of Kosher Claims on Product Labels

Citation

Can the FDA Keep Kosher?: Regulation of Kosher Claims on Product Labels (1998 Third Year Paper)

Link

<http://nrs.harvard.edu/urn-3:HUL.InstRepos:8846768>

Terms of use

This article was downloaded from Harvard University's DASH repository, and is made available under the terms and conditions applicable to Other Posted Material (LAA), as set forth at

<https://harvardwiki.atlassian.net/wiki/external/NGY5NDE4ZjgzNTc5NDQzMGIzZWZhMGFIOWI2M2EwYTg>

Accessibility

<https://accessibility.huit.harvard.edu/digital-accessibility-policy>

Share Your Story

The Harvard community has made this article openly available.
Please share how this access benefits you. [Submit a story](#)

Caren Gottlieb
Food and Drug Law
Harvard Law School
Mr. Hutt
Feb. 2, 1998

Can the FDA Keep Kosher?
Regulation of kosher claims on product labels

Product labels blast their message through the supermarket aisles, vying to attract the attention of consumers. However, the advertising means available to manufacturers are limited by laws that regulate the claims that they may make. Regulation of kosher claims on food packaging implicates many of these general labeling issues, as well as several unique problems involving freedom of religion. The presence of religious issues provides a stronger justification for State involvement, as well as a stronger reason for keeping a distance. One court defended regulation by arguing that [r]ather than to prohibit the free exercise of religion, the [kosher labeling] ordinance serves to safeguard the observance of its tenets and to prohibit actions which improperly would interfere therewith.¹ Contrast such logic with the core American belief that a union of government and religion tends to destroy government and to degrade religion.² There are convincing and pressing concerns on both sides of every debate that force this paper to progress by arguing itself from one corner into another. The same issues keep recurring, and although resolution may be impossible, it is important to clarify the options and the surrounding debates in order to reach an accommodation that can achieve the goal of consumer protection without compromising individual liberties.

Introduction: The Kosher Food Industry

Over the past several decades, the kosher food industry has become increasingly profitable. In the late 1970's only about 1000 products were certified kosher.³ In 1993, the number of certified products had grown to 23,600~ and by the end of 1996, exceeded 3 i,000.⁵ *Ad Week* has cited kosher food as one of the hottest products in 1989.⁶ Various estimates put the current yearly growth rate at anywhere between eleven and fifteen percent, with consistent increases over the past five years.⁷

Many food conglomerates have been expanding into the kosher market. In 1993, two American food giants, Conagra and Sara Lee, acquired the two largest kosher meat companies, continuing a trend of such acquisitions.⁸ In a similar expansion, thousands of mainstream marketers have begun to target the kosher population. In recent years, Nestle, Hershey, Coca-Cola, Kraft, General Mills and Coors have all added kosher certification.⁹ In late 1997, Nabisco added certification to a wide range of snacks in a move calculated to

io

engender national publicity. The increased interest in the kosher market is part of a

larger marketing movement focusing on specific classes of consumers. John McMillan, a

food industry analyst at Prudential Bache, explains that the food industry as a whole is not growing in either units or prices. As a result, everyone is targeting specialty growth areas. That's what kosher is all about. Investors are hungry for businesses with reliable growth and loyal customers, and because of kosher food's premium prices, investors can expect generous profit margins.

The market has created a unique niche where many sectors of the food industry, including production, distribution, and marketing, must routinely take into account the Jewish dietary laws as they carry out their business activities. Companies are no longer unsophisticated about the meaning of kosher. They no longer define kosher as food having been blessed by a rabbi, but understand that *kashrut* is determined by the means of the manufacture and the ingredients that are used. This has made kosher products available to the kosher consumer on the broadest scale possible.¹² While this joint venture between industry and the religious community has benefited both sides, there is an inherent divergence in focus that has created a need for regulatory enforcement. In part, the problem stems from the tremendous complexity of the dietary laws. While broad principles of law can be formulated, the application is subject to a myriad of fact specific contingencies. This complexity precludes easy answers for industry as well as easy clear standards to determine compliance.

The Laws of Kosher Food

The laws of kosher food, or *kashrut*, regulate both the foods that may be eaten and the methods of preparation that may be used. In one sense, the most concrete issue involves the identity of forbidden foods. Animals which chew their cud and have completely split hooves are permitted.¹³ Fish that have fins and removable scales are permitted.¹⁴ All fruits and vegetables are kosher. However, certain defects or imperfections will render even a kosher animal non-kosher.¹⁵ In addition, specific parts of permitted animals, such as blood,¹⁶ as well as certain nerves¹⁷ and fats¹⁸ are prohibited.

However, the method of preparation is an issue equally as important as the identity of the food. Meat must be ritually slaughtered¹⁹ and then soaked and salted under specific conditions, or roasted over an open flame to remove the blood.²⁰ Even ingredients derived from kosher animals are not kosher if the slaughter was improper. Fruits and vegetables must be scrubbed to remove non-kosher waxes and sprays and thoroughly checked for forbidden insects. Preparation or storage of kosher products in equipment or vessels used in preparation of non-kosher products also renders them unkosher.²¹ A recent Maryland case involved kosher hot dogs placed in a rotisserie next to non-kosher sausages and hot dogs. The grease from the non-kosher food would contaminate the kosher hot dogs, causing them to lose their kosher status.²²

Jewish law also forbids the mixture of meat and dairy products.²³ Such products may not be cooked or eaten together. In order to make this division complete, the rabbis decreed that entirely separate sets of utensils which must not be used washed or stored together are required for meat and dairy foods.²⁴

Although much of the law is widely accepted, there are differences over specific principles as well as debates regarding their application.

Some standards are subject to categorical disagreement. For example, only those birds for which there is a tradition *of kashrta* are permitted.²⁵ Birds such as pheasant,

26

quail, or turkey are not recognized by some Jewish communities. Another area of

dispute relates to determination of the imperfections that would invalidate a kosher animal. In order for meat to be kosher, the lungs must be smooth, without puncture. One opinion permits a finding of certain tissue adhesions, classifying them as independent growths. The higher standard of *glatt*, maintains that any adhesions are evidence of a prior puncture, invalidating the slaughter.²⁷

Orthodox and Conservative authorities also differ on several basic standards. Conservative Judaism accepts sturgeon, swordfish, all cheeses, and all wines as kosher. Orthodox authorities do not accept the *kashru* of sturgeon or swordfish. In addition, Orthodoxy accepts only cheeses and wines that have fulfilled certain legal requirements that the Conservative movement no longer deems applicable. Gelatin made from the bones of non-kosher animals is accepted by Conservative but not Orthodox Jewry.²⁸

Orthodox and Conservative rabbis also disagree on whether dishwashers can be used to clean both meat and dairy utensils. Conservative, and some Orthodox authorities allow warm water to be used to dress slaughtered poultry. Other Orthodox authorities insist on the use of cold water because hot water might cause the blood to coagulate or might slightly cook the meat before it is properly soaked and salted.²⁹

Most often, the key factor in kosher supervision is not the explicit standards that are employed, but the trust in the level of supervisory oversight.

Kosher Supervision

Even if the food itself is kosher, it will not be accepted without the guarantee of a supervisor who oversees both the ingredients and the methods of production that are used. A simple listing of the ingredients is not enough to provide assurance for the kosher consumer. As mentioned above, the laws of *kashrui* extend to the equipment and methods of production that are used, information which does not appear on the food label. The routine cleaning processes that companies employ do not necessarily meet the strictures of kosherization and, thus, products subsequently produced are rendered non-kosher as well. **30**

In addition, the current laws allow for certain ambiguities in labeling. For example, the nomenclature used for listing ingredients often gives no hint of the actual ingredients being used,³¹ Natural cherry flavor, often contains oil of cognac, a derivative of nonkosher wine, as well as animal derivatives. Vegetable shortening is another innocent label that can conceal serious *kashrut* concerns. Many varieties of vegetable shortening contain

considerable percentages of emulsifiers which may be animal derived. Even pure vegetable shortening may be refined on equipment which has been used for the rendering of lard or other animal fats.³²

Some ingredients need not be listed at all.³³ Many processing aids, such as the release agent used in the manufacture of hard candy are often made from fats and oil of animal origin.³⁴ The chutes used to drain pure maple syrup or molasses are often greased with lard to improve viscosity. The wide variety of substances developed to enhance the color or texture of a product create the need for even stricter investigation and monitoring. Meat tenderizers can be diluted or standardized with lactose — a dairy ingredient. Soya flour can be treated with an enzyme isolated from the stomach of a swine, a non-kosher animal.³⁵

Kashrut observance has always been predicated on a basic policy of trust.³⁶ The rule is that the individual supplying or certifying the kosher article must be trustworthy within the standards of Jewish law. He must be a *ne'eman*, one trusted not to deceive or contravene any kosher law, in addition to maintaining general Jewish law observance and standards of behavior.³⁷ For this reason Orthodox decisors have ruled that ritual slaughter by a Conservative Jew is invalid.³⁸ Similar problems of legal trustworthiness arise with regard to supervision by the manufacturer. Non-Jewish food industry management may understand how these laws specifically affect their own product without understanding the religious significance that they hold for the kosher consumer, the depth of concern for this consumer group or the resulting vocabulary used by these consumers' leaders, the rabbis.³⁹

Some situations may permit a certain amount of leeway in the strictness of the oversight. For example, there is a principle codified in the Code of Jewish law that a craftsman will not damage his integrity by making any false statement.⁴⁰ The late, well-known rabbinic authority, Rabbi Moshe Feinstein, applied this principle, broadening it to include governmental control of a product which adds the dimension of fear of penalty for non-compliance. There was an early rabbiic prohibition on the use of unsupervised milk, out of concern for mixture with, or use of, milk from non-kosher animals.⁴¹ Rabbi Feinstein permits the use of government supervised milk from commercial milk companies because they are regulated and subject to penalties for infraction of any rules concerning substitution of any other type of milk.⁴² However, this leniency is not universally accepted.⁴³

Most often a controversy over supervision will hinge on this type of issue, not the standards that are employed, but trust in the level of oversight. For example, the law in its essential form allows for certain assumptions to be made, however, these presumptions are invalidated in a case of reasonable doubt. In checking an animal for imperfections after slaughter, certain observations might indicate a need for further investigation. Another example of such an issue involves the inspection of vegetables. Most insects are not kosher and vegetables must be rigorously inspected. In some cases, only a representative part of a sample need be checked, yet in a case where questions arise due to results of

other inspections or variation in the amount of pesticide used, the supervisor must make a judgment call

Historically, *kashrut* supervision was in the hands of the local rabbinate and the situation was a relatively uncomplicated one in that the supervising rabbi had within his control the entire complement of ingredients which were used in production. With the growth of the modern food industry, this type of system has become impossible to maintain, and large supervisory agencies have developed. The largest is the Union of Orthodox Jewish Congregations (OU), which supervises seventy to eighty percent of the kosher products in the United States today. *Kashrut* regulations are established by contract between a manufacturer and the OU. The level of supervision is determined by the nature of the product being manufactured. If the product is relatively innocuous, the level of supervision will be limited, but those products whose *kashrui* status is complicated by their special [legal] status, like cheese, wine, and meat, require constant supervision.

Kosher Consumers

As discussed above, the availability of a defined market of repeat customers creates an incentive to market foods as kosher. Because of the increased expense in securing constant supervision, manufacturers can charge more for kosher products, particularly kosher meat. These factors combine to create a situation that rewards fraud in labeling kosher products.

The large national agencies use trademarked symbols to identify their supervisory approval. However, there is no such limitation on the use of the terms kosher or kosher style on the label of a product. Similarly, marks consisting of individual letters such as K cannot be regulated. In the United States there are currently over fifty individual rabbis or organizations which use the letter K to signify their supervision. In addition, large agencies such as the OU are involved only in the supervision of companies that have national or regional distribution. Local food establishments are generally not handled by the OU, whose policy is that such establishments are more effectively and efficiently overseen by the local rabbinate.⁴⁷

Consumers expecting to purchase food that complies with certain standards can easily be deceived. While some areas of the Orthodox community carefully monitor products that represent themselves as kosher, there is a wide range of consumers concerned about the *kashrut* of their food who do not have access to this information.⁴⁸ The market for kosher consumers is estimated to be approaching \$3 billion annually. Currently, more than 75% of certified kosher foods are purchased by non-Jews.⁴⁹

Muslims and Seventh Day Adventists rely on kosher labeling to stay away from religiously prohibited foods. Prohibited substances include meat from a swine, or any meat that is not slaughtered in accordance with specific guidelines, as well as any fermented substance. According to the Center for American Muslim Research and

Information, approximately six million Muslims live in the United States and about 75% of them observe religious dietary restrictions)⁰

Vegetarians provide another rapidly increasing market for kosher foods. Innovative kosher food technologists have developed imitation non-kosher meats such as mock sausage, as well as products that combine dairy and meat such as soy

51

cheeseburgers. The label pareve, used to indicate a product completely free of meat

and dairy products, is a standard that appeals to vegans who morally oppose the use of any products derived from animals. The pareve label is also important to consumers with lactose intolerance or milk allergies.

The vast majority of those who seek out kosher products do so out of health concerns. Articles highlighting kosher food have recently appeared in a wide range of popular publications including *Shape* and *Glamour*. An on-line magazine writes that millions of Americans from all ethnic backgrounds and religions look for the kosher label on foods as a sign of quality. For a food to be labeled 'kosher,' it must meet rigorous rules pertaining to cleanliness, purity and wholesomeness.⁵² Similarly, a supervisory agency advertises its services, noting that along with society's increased interest in health and fitness, comes an awareness that products endorsed with kosher certification must meet standards which exceed government regulations...it endows products with an aura of wholesomeness and quality in the eyes of the educated consumer.⁵³ Marketers have latched on to this trend, hoping that people will pay the fifteen to twenty percent premium for kosher products because they assume these products are produced under exacting, guaranteed controls. Prudential food analyst, John McMillan, observes that in recent years, the kosher seal has become equivalent to what the Good Housekeeping seal meant in the 50's⁵⁴

Many people believe that kosher foods, especially meats, are more sanitary because they are subject to constant supervision. Hebrew National's old slogan we answer to a higher authority taps into this quest for purity. The Barghout court noted that the bulk of kosher shoppers appear to be consumers who believe the kosher certification...means higher quality food. Many members of the public have a notion that the Kosher processes of meat preparation are under closer scrutiny than are those of the general producer, since they are supervised by State and federal health authorities as well as rabbinic personnel.⁵⁵ The court in *People v Atlas* also commented favorably on the caliber of food prepared under such regulations: Kosher meat is selected with great care, and especial cleanliness is observed in the slaughter thereof, from which a reasonable inference follows that it is of superior quality.⁵⁶

Each of these groups of kosher consumers would be harmed by fraudulent labeling of food packages. The Barghout court concluded that [w]hen all these people—pious Jews, Moslems, individuals with health concerns, and quality conscious shoppers—buy products designated 'kosher' they trust the food so described is up to the promise. It is reasonable to assume that generally they

would not want a product contaminated with non-kosher sausage grease.⁵⁷ The problem is compounded by the fact that many

consumers are unaware of the specific requirements of Jewish law and rely completely on the labels and packaging. Unscrupulous manufacturers, taking advantage of this specialized market inflict economic harms by charging more for products that are not what is claimed. More importantly, they create unquantifiable moral harms by tricking consumers into violating their religious or ethical standards.

Government Regulation of Food Labels

In the United States, labeling claims on packaged foods are regulated by the Food

and Drug Administration. The agency's statutory authority is granted by the Federal

Food Drug and Cosmetic Act of 1938, under which, adulteration and misbranding of food are criminal offenses.⁵⁹ Section 403(a) of the act defines a food as misbranded if it is false or misleading in any particular.⁶⁰ Section 201(n)⁶¹ expands the definition of misleading to include not only the representations that are made or suggested, but also material information that is omitted from the label. The provisions regarding misbranding may also implicate the prohibition against economic adulteration in 402(b), concerning a product that is of lesser quality than the label represents it to be.

The Act provides little other guidance as to how to determine if a label is misleading. In many cases, the line between advertising calculated to attract a specific class consumers and misleading labeling can be hard to draw.

While the area of misbranded drugs has often been spotlighted, the regulation of misbranded food was marked for years by a lack of enforcement. This hands-off attitude led to a proliferation of false claims. A study of marketing strategies in *Adweek* explains this trend in the context of the stagnating food industry and the glut of copycat retail consumer goods. It became more difficult to create and sustain a unique point of difference.,the result was that advertisers were pushed to create that difference and it was harder to substantiate it. Companies desperate to distinguish their products turned away from traditional advertising methods focusing on building long-term brand loyalty and switched to short term bottom line sales pitches. Without any guidelines, companies saw a window of opportunity to increase sales without a lot of capital. Consumers backed them up with their wallets, buying into the myriad health and environmental claims.⁶²

Part of the reason behind FDA non-enforcement is that the agency must work with limited resources, using about 1000 inspectors in the field to police the entire country. Misabeled food often implicates purely economic concerns and is therefore a less urgent enforcement priority than issues of public health. One important case involved Manischewitz matzos labeled Diet Thins.⁶³ FDA contended that the name Diet Thins prominently displayed on the label's front panel conveyed to consumers the misleading impression that the matzo crackers

were lower calorically than other matzos and therefore useful in weight control diets.⁶⁴ The court emphasized that it is not necessary to show that anyone was actually misled or deceived, or even that there was any intent to

65

deceive. The standard of analysis used was that of the weight conscious consumer,

S

part of a group of purchasers of diet products who are often pathetically eager to obtain a

66

more slender figure and thus are especially susceptible to misleading claims.

Early in 1991, FDA embarked on a highly publicized policy of enhanced enforcement of the FDCA in an effort to restore the credibility and the integrity of the agency. Efforts were focused on widely-known companies and consumer products. The first evidence of the new commitment to stronger enforcement was the seizure of 12,000 gallons of Proctor & Gamble's Citrus Hill Fresh Choice orange juice in April, 1991, because the label of the processed juice allegedly was misleading to consumers. This marked the first time in years that a seizure was prompted by complaints about a product's label.⁶⁷

In general, however, enforcement of misbranded food has been limited to cases of outright fraud. Apart from the lack of resources, there tend to be few reported court decisions regarding misbranding due to the difficulty in defining a standard for comparison.⁶⁸ The inability in most cases to use a factual standard for comparison moves the debate into the realm of consumer perceptions. One option in such a case is to apply the standards used in common law and statutory false advertising cases, analyzing the likelihood that consumers would be misled on a material factor that would affect their purchasing decision. Although the decision in the Diet Thins case essentially laid the groundwork for such an approach, these issues basically turn on judgment calls by the courts⁶⁹ and it is logical that the agency would not want to get involved in such risky legislation on a regular basis.

In many cases, FDA has chosen to create identity standards for various common products.⁷⁰ In a sense, this approach attempts to take care of the prospective litigation within the administrative hearings used in setting the standard. The hearings on the bread standard, for example took 10 years to resolve and amassed a record of 17,000 pages.⁷¹ The peanut butter standard took even longer to develop. Overall, FDA has promulgated nearly 300 standards of identity, which at one time covered close to 45 percent of the wholesale value of food shipped in interstate commerce.⁷²

The Nutrition Labeling and Education Act of 1990⁷³ addresses the problem of misleading labeling by setting mandatory standards for nutrition labeling and strictly regulating the health claims that are permitted. In 1994, the FDA issued regulations pursuant to the NLEA which are considered by some to be the greatest changes to food labeling and advertising regulation in over fifty years.⁷⁴

Even under the Nutrition Labeling Act, considerable ambiguity remains.⁷⁵ For example, in recent years, marketers have been targeting the health food market, another growing specialty niche, with claims such as natural and organic. FDA prohibits the term natural only on products containing artificial colors, flavors, or chemical additives.⁷⁶ Generally, natural foods are considered to be those foods in their original state, or those which have undergone minimal refinement and processing.⁷⁷ Advocates of natural foods proclaim that such

products are safer and more nutritious than

conventionally grown foods, but no scientific evidence exists for such claims. Although such descriptions misrepresent products as superior to non-natural foods, manufacturers eager to charge more for their products or reach a specialized target audience continue to capitalize on these beliefs. Products previously devoid of additives now boast, all natural, no additives, no preservatives! Often advertising by association is employed, and a product is deceptively pictured among scenes of a natural environment. One manufacturer used the words natural lemon flavored creme pie, where the cream consisted of sodium propionate, certified food colors, sodium benzoate, and vegetable gum, explaining that the word natural described the lemon flavor which contained oil from lemon rinds.

FDA's reluctance to define such terms anticipates the controversy that would arise in attempting to agree on a single standard, as well as problems in the subsequent application and enforcement. The FDCA continues to prohibit misbranding, but without explicit standards to give it meaning, enforcement will be limited.⁷⁸

Regulation of Kosher Labeling

Similar problems arise in the agency's attempt to deal with the term kosher. Through August 1997, FDA's informal agency policy regarding the terms kosher and kosher style in labeling was codified in the Code of Federal Regulations (CFR).⁷⁹ Section 101.29 recommended that the term 'kosher' should be used only on food products that meet certain religious dietary requirements, but did not provide any guidance as to what comprise these requirements. In addition, because the term kosher style would lead purchasers to think that a product is kosher, the agency discourages its use on products that do not meet the religious dietary requirements.

In 1997, as part of an initiative to develop a more efficient regulatory regime and simplify the CFR, the kosher labeling provision was repealed, to be replaced with a compliance policy guide.⁸⁰ FDA believes that some statement on kosher labeling is needed to prevent confusion and misinformation in the kosher food industry which could lead to a proliferation of misbranded products.⁸¹ However, the agency feels that regulation in the CFR is superfluous, because [t]he use of the terms kosher, kosher-style, and any other term suggesting that a food has been prepared in accordance with certain religious practices is subject to the general misbranding provisions of section 403(a) of the act....Aside from providing this basic level of protection, FDA has no role in determining what food is kosher.⁸² It is hard to see how the agency's statement provides any guidance to the industry. The protection to consumers provided under 403 is also murky, since there must be some general idea of what is kosher, in order to determine that there has been misleading deviation from this accepted definition.

Marketers continue to capitalize on the ambiguity of the law. Once company used the words pure beef salami in Hebrew letters to imply that the product was kosher, with some success. New Jersey, which has some of the most extensive kosher regulations in the country, regulates the inscription on food of any sign, emblem, insignia, six pointed

star, menorah, symbol or mark in simulation of the word kosher, or the use in advertising of the words kosher style, kosher type, Jewish Hebrew, holiday (Jewish) foods, traditional (Jewish) Bar Mitzvah, Bat Mitzvah,⁸³ all of which are techniques employed to attract consumers looking for kosher food.

Regulatory Options

Unlike the use of ambiguous terms such as organic or fresh, there is an even greater need to regulate use of the term kosher because of the possibility of not only economic, but also moral harm. Several approaches are possible. FDA could enforce the 403(a) provision against misleading labels. The agency could also adopt the approach taken by many states and create a substantive standard to aid in enforcement. Many have suggested that FDA could regulate in a more hands-off way, through disclosure requirements. Alternatively, the government could choose to delegate oversight to the states or attempt to privatize enforcement. It is important to remember that there is no regulatory void. The agency's decision not to police this type of fraud is itself a decision that allows it to continue.⁸⁴

Enforcement under the FDCA

FDA could initiate rulemaking that would go beyond policy suggestions, and police the industry using its authority under 403(a). One comment regarding the repeal of 101.29 argued that the proper course for FDA is not to remove from the CFR its only pronouncement on kosher labeling, but to assume a higher profile and initiate rulemaking that explicitly states its enforcement authority with regard to use of the terms 'kosher' and 'kosher style,' thereby providing the kosher consumer with effective and meaningful protection. As discussed above, it is difficult to see how this could be an effective solution without involving a substantive standard defining *kashria*.

FDA could provide such a substantive standard. This approach has been taken by many of the individual states. In the absence of comprehensive federal legislation, states have often acted to protect their consumers from fraud. Maine, for example, has instituted all inclusive legislation pertaining to the words natural, organic, and health foods.⁸⁵ Similarly, many states have created a substantive definition for the term kosher. However, because such definitions implicate religious concepts, the State's involvement raises the specter of unconstitutional interference with religion. The state statutes and the subsequent litigation surrounding them provide guidance as to a possible federal approach to the issue.

State Kosher Laws

New York enacted the first kosher food law in 1915, in response to the chaotic state of the kosher food industry—its charlatans, profiteers and outright crooks—which, coupled with the huge influx of immigrants who were unfamiliar with local circumstances, made any assurance of *kashru* all but impossible.⁸⁶

Today, twenty two states and at least two cities have enacted kosher food laws.⁸⁷ The extent of enforcement and agency responsibility for enforcement differs among the states. In nine states, state officials, either alone or together with local officials, are responsible for enforcement. In other states, enforcement of kosher food statutes rests with local prosecuting attorneys or local boards of health.⁸⁸

The principle provision of the current New York statute provides that a person who with intent to defraud, sells or exposes for sale any meat or meat preparations, article of food or food products and falsely represents the same to be kosher or kosher for Passover ... or as having been prepared under, and of a product or products sanctioned by the orthodox Hebrew religious requirements.. is guilty of a class A misdemeanor.⁸⁹ Subsequent litigation has indicated that in spite of the disjunctive phrasing, the statute intends to identify kosher with Orthodox Hebrew requirements. Other states have similarly defined kosher, not by a list of specific requirements, but with reference to an entire body of religious law. New Jersey, with a very strong kosher regulatory regime, defines kosher food as prepared and maintained in strict compliance with the laws and customs of the Orthodox Jewish religion. California's statute adopts an almost identical standard, defining kosher as a strict compliance with every Jewish law and custom, but expanding it to include the use of tools, implements, vessels, utensils, dishes and containers that are used in the manufacture and treatment of such meats and other products..⁹⁰

Some states have tried to include more specific requirements in their statutes. The Illinois statutes attempt to take a more specific approach, defining kosher as having been prepared under and of a product or products sanctioned by the Code of Jewish Laws.⁹² Maryland has recently revised its statutes which similarly defined kosher as prepared under and consisting of products sanctioned by the Code of Jewish Laws, namely in the Shulehan Aruch.⁹³ Michigan compromises by defining kosher as prepared or processed in accordance with orthodox Hebrew requirements by a recognized orthodox religious council.⁹⁴ Minnesota uses similar language of prepared or processed in accordance with orthodox Hebrew religious requirements sanctioned by a recognized rabbiic council.⁹⁵

Other states adopt a broad, general definition, without explicit reference to a particular sect of Judaism. Arizona, for example, defines kosher as prepared under the traditional Hebrew rules and requirements or dietary laws.⁷ Pennsylvania similarly defines both kosher and kosher style as a food product having been prepared, processed, manufactured, maintained, and vended in accordance with the requisites of traditional Jewish law.⁹⁷

Only a small number of prosecutions have been brought under the kosher food laws. One interpretation of this statistic is that the statutes are ineffectual. Particularly in states where the major state officials enforce the kosher food laws, the statutes may have minimal effect because state budgets fail to allocate funds specifically for kosher food law.

enforcement.⁹⁸ In questioning the need for such legislation altogether one comment notes that such legislation is little more than a desire by various groups to appear to be solving a problem... for politicians, kosher food legislation is a cheap way to do 'something' for the Jewish community. ~ Alternatively, the very small number of prosecutions brought could indicate that the statutes serve a deterrent function, thus reducing the necessity of prosecution. The mere existence of kosher food legislation might act as a deterrent to fraudulent kosher purveyors who fear the personal and economic ramifications of an investigation, not to mention a prosecution.¹⁰⁰ Ideally, this is the way FDA enforcement should work under the Food Drug and Cosmetic Act.

A more likely reason that few prosecutions have been brought is the fact such laws are inherently unenforceable.¹⁰¹ The definition of traditional Jewish law varies infinitely depending on who is asked. The substance that these laws attempt to create no more provides a baseline standard than the original FDA policy guideline. The majority of the states use some form of the phrase Orthodox Hebrew requirements. Yet, as discussed above, even among Orthodox authorities, there is no absolute consensus regarding many of the particulars of the dietary laws. Any enforcement authority is forced to create its own substantive standards in order to carry out its functions. For example, the New York statute creates a kosher advisory board to assist the Commissioner of the Department of Agriculture and Markets.¹⁰² One factor in the recent New Jersey cases was the existence of a similar state kosher advisory committee composed of ten rabbis, nine Orthodox and one Conservative.¹⁰⁴ The attempt to refer to a concrete set of standards, as in the Illinois statute, also falls short. The Code of Jewish Law is unlike a secular legislative code; it includes various opinions without laying down the final rule that is observed today.

The ambiguity of these standards repeatedly led to litigation. Initially, challenges to the kosher food laws based themselves on claims of unconstitutional vagueness, and such claims are routinely raised today as part of any challenge to the validity of the laws. The issue was considered resolved by the United States Supreme Court ruling in *Hygrade Provision Co. v Sherman*,¹⁰⁵ holding that the term 'kosher' has a meaning well enough defined to enable one engaged in the trade to correctly apply it. Recently, in *Barghout*,¹⁰⁶ the plaintiff argued that sellers are at the mercy of individual inspectors licensed to apply personal standards on what is correctly kosher. The court observed that *Barghout*, himself, implied that he understood the term when he advertised that he sold 'kosher' hot dogs. He should realize that customers desiring 'kosher' products would understand the term.¹⁰⁷ The New Jersey court in *Ran-Day's* made a similar observation: It is actually somewhat disingenuous for plaintiffs to say that kosher is an indefinite term. They hold themselves out to be purveyors of kosher food. They know that their many customers rely upon them and their supervising rabbi to be knowledgeable concerning the various requirements to designate their products as 'kosher' within the generally accepted meaning of the word.¹⁰⁸

Although the definition of kosher may be clear enough to prevent arbitrary

enforcement, the State is still involved in determining and applying a religious standard.

Because of the inherent inability of the legislatures to define explicit standards, some degree of State involvement is unavoidable, and raises serious constitutional questions.

The Establishment Clause

The United States Constitution provides that Congress shall make no law respecting an establishment of religion.¹⁰⁹ Because kosher is a term with religious implications, state regulation has led to a line of cases challenging the kosher laws under the Establishment Clause. Recently, the New Jersey supreme court became the first to overturn one of the laws as an unconstitutional establishment of religion.¹¹⁰ In light of these challenges several basic requirements emerge which would inform any government attempt to draft such a statute. The law must not favor one sect over another, it must not directly advance religion, it must not create excessive government entanglement with religion, and it cannot question the truth of sincerely held religious claims.¹¹¹

Denominational Preference

The Supreme Court has said that [t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another. In a later case, the court again stated that whatever else the Establishment Clause may mean. . . it certainly means at the very least that government may not demonstrate a particular preference for one particular sect or creed.² In their attempt to provide a substantive definition of *kashrut*, states may have created such a preference. States that define kosher as compliance with Orthodox Hebrew requirements categorically excludes well accepted Conservative standards of *kashrid*. The existence of advisory boards consisting almost exclusively of Orthodox rabbis involved in enforcement exacerbates the problem. However, denominational preference challenges to the kosher food laws have not been sustained in court.³ The recent ruling by the Maryland Court of Appeals rejected such a challenge. The court reasoned that the term kosher means fit according to Orthodox principles, not according to the standards or any other system of belief within Judaism. Barghout was guilty because by claiming the hot dogs he sells are kosher [he] implies that his hot dogs meet the Orthodox standards.¹¹⁴

Consumer expectations are often invoked to explain the constitutionality of such a preference. Proponents argue that Orthodox Hebrew requirements are what most people who keep kosher understand by the term. Since a clear definition of kosher is necessary for the law to operate validly at all, and the Orthodox Hebrew requirements most often represent the understanding and wish of the kosher consumer, it's use in the statute should be acceptable.¹¹⁵

Consistent with this approach, the Barghout court noted that the city ordinance at issue was drafted to protect people from unscrupulous vendors who try to lure them into buying something less than what they are entitled to expect.⁶

The Lemon Test

Since 1970, the Supreme court has analyzed challenges under the Establishment Clause using the three prong test developed in *Lemon v Kurtzman*,⁷ the single most influential Establishment Clause case.⁸ In order to pass Constitutional muster, a regulatory scheme must have a secular purpose, its primary effect must be one that neither advances nor inhibits religion, and it must not create excessive government entanglement with religion.⁹ The kosher laws clearly have a the secular purpose of preventing fraud, or misleading representations. Similarly, when viewed in the context of general consumer protection legislation, it is difficult to conclude that the primary effect of these laws is to advance religion. One possible objection argues that since the reason for targeting kosher fraud in particular is the moral harm it inflicts on people attempting to maintain religious standards, the law serves to advance religion.

Entanglement

The aspect of the Lemon test that creates the greatest problem for the kosher laws is the entanglement test. According to the Lemon court, government action is prohibited by the Establishment Clause if it creates excessive administrative entanglement between church and state, or if it turns over traditionally governmental powers to religious institutions. This administrative entanglement sometimes arises when religious and public employees must work closely together in order to carry out the legislative plan.²⁰

The key case in this area is *Larkin v Grendal's Den*,²¹ where the court considered a Massachusetts statute that gave churches and schools veto power over liquor licenses for establishments within 500 feet of their grounds. The Court overruled the statute because it delegated traditional governmental powers to a religious institution: [the law] substitutes the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body. The Court also emphasized the excessive administrative entanglement involved, commenting that the statute enmeshes churches in the processes of government.

The Court was troubled by the possibility that the secular power granted to these groups could be employed for explicitly religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith. An additional concern was that the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred.

The Court's concern about misuse of power is not necessarily a problem in the cases of kosher food regulation, since the decisions of the religious authorities are prescribed by Jewish law. However, even the legitimate use of enforcement power will have the effect of favoring specific sects, implicating the problem raised above.

Because the kosher statutes refer to a body of law that is not laid out as statutory code but is subject to interpretation and application, there is an unavoidable need for

rabbinic advisement in enforcing the regulatory scheme. However, the involvement of religious authorities automatically implicates the entanglement problem highlighted in Larkin.

In *Ran-Day*’s the enforcement authorities were assisted by the State Kosher Advisory Committee, a body appointed by the New Jersey Attorney General, consisting of ten rabbis. The court held that the Attorney General’s selection of rabbis to hold positions of criminal law enforcement violated the entanglement test: Because [the committee members] are being used by and for the State in their religious capacity to interpret and enforce state law, the religious and civil authority possessed by them is virtually indistinguishable.¹²² Although the committee acted in a purely advisory manner, and did not wield broad discretionary powers, it was an official government entity, and the Larkin court warned of the mere appearance of a joint exercise of legislative authority by Church and State. Although the legislature and the Attorney General might have asked the rabbinate only for advice on how to draft and enforce the law effectively, Larkin would seem to prevent the creation of a standing governmental entity made up entirely of religious figures.’²⁷

Judicial Involvement in Religious Disputes

A greater concern related to entanglement is the involvement of the courts in resolving religious disputes. The determination of what is kosher is inherently a religious question. As discussed above, early challenges to the kosher laws based themselves on the difficulty of determining a sufficiently definite and clear standard that would allow for secular implementation. Traditionally, courts have brushed off this problem by alluding to a well accepted industry standard or by assuming a general uniformity.²⁴

In addressing the question of vagueness, courts relied on a generally accepted industry standard, and this assertion is also used to minimize the issue of State involvement in religious disputes. Reliance on industry norms is a well established legal principle in whole areas of the law such as contracts, and has been routinely applied in construing the kosher laws. For example, the standard of strict compliance with every law and custom adopted in the California statute was interpreted by the courts to refer to compliance with general industry norms.¹²⁵ One article assumes that [i]f a butcher misrepresented whether a piece of meat is from a cow or a pig, or whether an animal was slaughtered properly, these issues could sustain an action for fraud without constitutional difficulty. The use of the word kosher is simply a shorthand for such factual statements. While there is certainly much unclarity at the edges of the laws of *kashrut*, certain principles are sufficiently clear—particularly to people in the trade—and sufficiently

„126

factual that there ought to be no constitutional difficulty in regulating them.
... The

deviant who flaunts these norms oversteps the bounds of consumer expectations and should be reachable for the fraud that he is perpetrating on unknowing customers.

Those who argue for industry norms as an applicable standard concede that there are problematic gray areas. Stern develops a case where the overwhelming consensus of

legal opinion is to require a certain practice, but a minority rabbinic opinion permits a more relaxed practice. The consumer may reasonably assume that a butcher follows the majority practice, and hence is, in a sense, defrauded when the butcher, perhaps because it is cheaper to rely on the minority opinion, does so. But allowing the State to insist on the majority rule is to allow the state to control decisionmaking under Jewish law. . . .¹²⁷

Initially, the State in *Ran-Day*'s maintained that there could be one uniform interpretation of *kashrut*. In an argument similar to those raised above regarding denominational preference, the State maintained that disputes would be infrequent and inconsequential because all branches of Judaism recognize and agree that there is a single historical standard of kosher determination.²⁸ The supreme court rejected this analysis, asserting that [b]ecause of varying doctrinal interpretations, varying degrees of trust that members of some sects place in the food supervisors of other sects, and varying 'shades of observance' undertaken by individual Jews, no one practice can be called 'the only true Judaism.' Disputes may occur infrequently, but when they do, they are ineluctably religious in tenor and content.¹²⁹

The definition of the term kosher as prepared in accordance with Orthodox requirements, does not provide a uniform standard that would resolve this question. The legislature has only forced the courts to resolve disputes regarding the Orthodox approach. In *Ran-Day*'s itself, the store was supervised by an Orthodox rabbi.

Even if a reliable industry norm existed, fatal ambiguity is injected by the question of sincerely held variant beliefs. Traditionally, the harshness of decisions holding vendors to the State's interpretation of Orthodox requirements was mitigated by judicial assertions that sincerely held beliefs regarding *kashrut* would not be challenged. The Hygrade approach, cited repeatedly down through the line of cases, held that whatever difficulty there may be in reaching a correct determination as to whether a given product is kosher, appellants are unduly apprehensive since they are not required to act at their peril but only to exercise their judgment in good faith. . . . By engaging in the business of selling kosher products they in effect assert an honest purpose to distinguish to the best of their judgment between what is and what is not kosher.³⁰ *United States v Ballard*, a famous case dealing with religious fraud, established that a court may look only to the sincerity rather than the truth of the defendant's beliefs.³¹

The kosher laws address this problem by explicitly or implicitly requiring knowledge or intent to defraud.³² The Maryland court recently provided an expansive definition of intent to defraud: an untrue representation has been 'knowingly' made if by one who knows it is untrue, believes it is untrue or is quite aware that he has not the slightest notion whether it is true or not. 'n Practically, however, the intent requirement is a standard that is almost impossible to apply, since the only one who has true knowledge of the defendant's beliefs is the one on trial. As much as the exception for sincerely held beliefs is a necessity to prevent unconstitutional state interference in religious disputes, when it goes beyond the industry norms that form the basis for State regulation, it seriously

handicaps the State's ability to protect consumer expectations.

In *Ran-Day's*, the State initially adhered to the Hygrade approach and took the position that government involvement in disputes over meaning could be avoided by the simple expedient of not deciding them, writing that 'where Orthodox Jewish authorities dispute the force or requirement of a particular definition of kosher, the State is precluded from choosing one interpretation over the other'; the bureau would not enforce the regulations against a purveyor who had adopted a variant interpretation of *kashrut* based on sincerely held beliefs.⁴ However, if the term kosher is to have any substantive meaning, there must be some limit to the variance that is accepted. The State in *RanDay's* would impose such a limit in the name of consumer expectations. The court found that the State had changed its initial position to hold that because of consumer expectations, a merchant's or his supervising rabbi's variant, albeit good faith religious belief that under Orthodox Jewish law, pork is kosher, may be regulated by the State. u

Because the State insists on setting its own substantive standard, courts will inevitably become involved in litigating these standards. As the New Jersey court explained, [t]he Attorney General has acknowledged that the Bureau of Enforcement would be obligated under the kosher regulations to obtain injunctions against merchants adhering to their own understandings of Jewish law in general and Jewish Orthodoxy in particular. The conclusion is inescapable that if a merchant did not adhere to Jewish Orthodoxy, as perceived by the Bureau of Enforcement, and the State legally challenged the merchant's right to sell his or her products as kosher, a court would have to resolve whether the merchant's view of *kashru*/ diverged from the State's definition of Orthodoxy. It is difficult to envision a civil controversy stamped more indelibly with religious doctrine.'~'6

Federal Approaches

After progressing through all the possible defenses, it appears that a Federal standard modeled on those of the states would not survive Constitutional scrutiny. Many of the problems raised in the state law cases arise because the government is unable to apply a definitive factual standard to the case. One obvious solution is to create such explicit factual standards. As discussed above, there are practical problems involved in creating a precise definition for the word kosher. The provisions of Jewish law are too complex to be codified in a food identity standard; even hearings as extensive as those on the bread standard would not resolve the issue. However, limited regulation of terms is more feasible. For example, the use of the words kosher style have been treated separately in legislation. The FDA policy statement discourages the term because it will mislead consumers into thinking the product is kosher.~r The New Jersey³⁸ and New York¹³⁹ allow such a label, but it is subject to the same conditions under which the state permits the use of term kosher. At the other extreme, the Georgia regulations provide that nothing contained in this Code section shall prohibit the use of the words Kosher type or Kosher style food.⁴⁰ More specific terms of this type are easier to regulate than the general kosher rubric.

Similarly, both New York and New Jersey have regulations regarding the label pareve, which under Jewish law is a claim to be completely free of meat or dairy. As mentioned above, the integrity of such a claim is of special concern to several secular groups such as vegetarians and those with milk allergies. The New York statute provides:

It shall be unlawful to label food or food products with the words parve or pareve or in any way to indicate that the food or food product may be used or consumed indiscriminately with meat, poultry, or dairy products according to Orthodox-Hebrew requirements when such food or food products are impermissible of such use or consumption¹⁴¹ A similar Illinois statute, again attempts to be more specific, making it unlawful to use the label knowing that such food or food products contain milk, meat, or poultry products rendering such food products impermissible to be used or eaten according to the Code of Jewish Laws.¹⁴² The definition of pareve is tricky only as regards the equipment used in manufacture. However, technically such a definition would be vastly easier to develop than one for the much more all encompassing term, kosher. One consumer advocate argues that keeping kosher would be a lot easier if all products were clearly and consistently marked as to their kosher status, and the symbols used did not lead to so much confusion for the consumer. Legislative assistance [could help] achieve a system that specifically labels each kosher product pareve, dairy, meat, dairy equipment (pareve products that have been manufactured on equipment that retains its dairy gender) meat equipment, fish (so as to avoid using such products with meat) and Passover. One proposal for standardization uses an English language based system where pareve would be designated N for neutral, while P would be reserved for Passover, eliminating the confusion that results when the same letter is used to represent both terms¹⁴³

Disclosure

A recent New York Times editorial describes the advantages of disclosure laws as an alternative to direct regulation. If regulation is chosen, disclosure is often the best method. With it, taxpayers save the cost of the bureaucracy that regulation often brings, the public gets more information to make purchasing and job decisions, and companies avoid the cost and coerciveness of traditional regulation.¹ In the realm of kosher regulation, such provisions would have the added benefit of avoiding constitutional charges. The idea would be to force manufacturers claiming *kashrui* supervision to disclose the basis for such supervision, either on the label or in a public filing.

The New Jersey supreme court in *Ran Day's* noted that the state clearly has an interest in regulating the advertising and labeling of kosher products, and that this task can be accomplished effectively within the limits of the Constitution. The regulation could require those who advertise food products as kosher to disclose the basis on which the use of that characterization rests..., indicating the form of rabbinical supervision. Such an approach would thus make use of the kosher foods industry's existing scheme of selfregulation.¹⁴⁵

The state would simply be enforcing the truth of a factual representation. Just as the state may bar promotion of products ads having been tested by a certain testing laboratory when they have not been so tested, and just as the State may bar promotion of products as having been endorsed by a certain consumer magazine when they have not been so endorsed, so may the State bar promotion of products as having been prepared under the supervision of a particular rabbi or group of rabbis when they have not been so prepared. Such a consumer protection law would be based on neutral, secular principles, and would be perfectly compatible with the constitutional strictures against governmental establishment of religion.¹⁴⁶

Many of the state statutes have taken this route, relying on both public registration and disclosure measures to supplement or replace more substantive enforcement. Under the New Jersey regulations, any dealer claiming to be under rabbinical supervision must file a letter from the supervising rabbi or rabbinical agency including the name and address of the person providing the certification, the date the letter was issued, the date it becomes effective, the date it expires, the name and address of the dealer receiving certification and the type of establishment certified. At the same time, any individual giving rabbinical supervision to any dealer located in New Jersey must annually file a document listing the name, address and type of each establishment that is supervised.¹⁴⁷ Such regulations balance the requirements between the manufacturers, the supervising authorities and the kosher consumers who must then investigate the claims.

New York statutes require registration of all products making kosher claims. The regulations provide: Any food commodity in package form which is certified by an organization, identified by any symbol, or is marked as being kosher for Passover shall not be offered for sale by the producer or distributor of such food commodity until thirty days after such certifying organization, producer or distributor shall have registered the name, current address and telephone number of the supervising rabbi with the ¹⁴⁸ Illinois has virtually identical regulations requiring registration.¹⁴⁹ Similar New York regulations require that, all advertisements for food or food products sold as kosher under Rabbinical supervision must identify the name of the rabbi or organization, if any certifying such food or food product as being kosher.¹⁵⁰ Other states, including Ohio and Maryland also require disclosure in advertising.

Following litigation challenging the constitutionality of its laws, Maryland has rewritten its state statutes during the past year. The substantive requirement that use of the term kosher conform to the Code of Jewish law has been replaced by mandatory disclosure statements and advertising regulations. **151**

Unfortunately, this simple and definitive solution does not really address the problem that kosher laws were designed to target. Under general principles of fraud, the state could always prosecute a vendor who claimed to be under supervision and was in fact under none at all. However, supervision at issue is not merely a question of having someone watch the food while it is being prepared. Kosher consumers are being harmed by supervision that represents

itself as meeting certain principles of Jewish law. For many

consumers who don't understand the intricate details of *kashrul* regulation, the disclosure that a product is in fact under some type of supervision will not prevent deception about substantive standards. For example, in Ran-Day's itself, the store was under the supervision of an Orthodox rabbi, yet inspectors found several deviations from mainstream Jewish law that the State felt confounded consumer expectations. It may be that Constitutionally, the government should have no role in this determination, but it is wrong to pretend that disclosure could protect consumers as completely.

Federal Disclosure Laws

In comments regarding the repeal of § 101.29 from the CFR, one comment requested that as part of a new compliance policy guide, FDA create and maintain a certificate for domestic and imported products that would contain information regarding the manufacturer, certifying rabbi and organization, effective dates of the certificate, and symbols used in product labeling. [Such a certificate, publicly available upon request, could greatly assist consumers in deciding whether the food in question meets their personal needs, because they would have access to information identifying not only the manufacturer but also the certifying organization.]¹⁵²

In 1990, Representative Stephen Solarz introduced a bill to amend the Federal Food Drug and Cosmetic Act to require the filing of certain consumer information pertaining to religious dietary certification symbols on food labels.¹⁵³ Such legislation would accommodate concerns about both kosher labeling, and labels certifying Muslim food as halal.

The proposed bill was based on congressional findings that more and more labels bear symbols indicating products have been under religious dietary supervision, and consumers seeking foods that have been so certified, whether for religious reasons, health reasons, or any other reasons, are entitled to assume that the foods bearing religious dietary certification symbols have in fact been certified as represented and to have access to certain basic information concerning such religious dietary certification symbols.¹⁵⁴

The bill would require a copy of a certification letter and a public disclosure statement to be kept on file with the secretary. The certification letter would be a written statement signed by a certifying authority declaring that the food conforms to religious dietary standards. The disclosure statement would be a form including the name of the food, the name, address and telephone number of the manufacturer, the address of the plant, a copy of the certification symbol, the name address and phone number of the certifying authority, and any other information the secretary prescribes, including the religious affiliations and educational qualifications of the certifying authority.¹⁵⁵

Any false disclosure claims could be prosecuted under the federal fraud laws.¹⁵⁶ Again, however, such an approach does not provide comprehensive regulation of statements or representations that are merely misleading. An immediately available, well presented label claim has an overwhelming advantage against a public filing that in itself

provides no guidance to many consumers unfamiliar with the various supervisory authorities.

An alternative approach might combine disclosure with the idea of limited substantive standards discussed above. Rather than working with the term kosher which is fraught with religious controversy, the agency could create arbitrary markings or terms that will be correlated with specific standards. The letter A could indicate compliance with a specific standard of Jewish law, B could accommodate certain variations, C could signify still others. Manufacturers would still be able to use the term kosher, but kosher A, would provide some meaningful disclosure to consumers on the label itself. This approach of designating random labels to represent specific standards, is consistent with the government development of identity standards for food, but by moving away from definitions of kosher it shifts the debate to the secular realm.

Delegation of Enforcement

Given the limited enforcement ability of the FDA, an alternative to a federal solution, would be to create systematic government regulation, but delegate enforcement to the state or local authorities, or agencies such as local boards of health.¹⁵⁷

Privatization

A second alternative to government regulation is privatization. Options include private civil suits, as well as regulation within the existing framework of private supervisory agencies and independent industry organizations.

The idea of a self-policing industry is an attractive one. The legitimate kosher industry that is willing to spend the time and money to acquire qualified supervision has a strong interest in preventing fraud. The industry also has technical expertise and specialized knowledge regarding feasibility and cost effectiveness in devising solutions. One advocate uses the model of the National Advertising Division which serves as a source of guidance to the food advertising industry and also investigates and resolves disputes. **158**

Independent food commissions provide another forum for industry regulation. A classic model is the actions of the Florida Citrus Commission during a recent citrus freeze. When the price of orange juice escalated due to limited supply, fraudulent adulteration of orange juice became widespread. The Florida Citrus Commission responded by appropriating funds for the investigation of adulterated orange juice. By protecting its own economic interests in maintaining standards of quality, the Commission also protected

'59

unwary consumers.

Other forms of religious labeling have adopted the self-regulatory approach. Foods formulated and processed for the rapidly expanding Islamic food market may contain the special wording halal or according to Islamic laws or Muslim food.

The Islamic Food and Nutrition Council of America (IFANCA) and the Muslim Consumer Group for Food Products provide consultancy services. These organizations help food technologists to develop products that conform to Islamic food laws. They also offer supervision and certification for foods and meat slaughtered according to halal standards. The symbol lvi enclosed in a crescent signifies that the product has been certified as halal by IFANCA.⁶⁰

Another example of an independent body with goals of consumer protection is the New York State Kosher Food Advisory Council. The Council was created by Governor Cuomo in 1985, to address issues of concern to the kosher consumer. One of the main thrusts of this Council's activities has been the examination of kosher food pricing.⁶¹

Several people have argued that kosher supervision should be left entirely to the religious community. [T]he worst aspect of the kosher food laws is not the doubts about their constitutionality, but the fact that they lessen the responsibility of the rabbinate for kosher food enforcement, because it is easier to refer matters to the State kosher food officer than publicly to challenge the decisions of some other rabbi or challenge a local merchant.⁶²

Another article takes a long range view, observing that [t]he American Jewish community will be best served by managing the problems of contemporary Judaism on their own, and not by providing the opening through which government can interject itself into the nation's religious affairs. „163

Supporters of full privatization still concede that very sophisticated criminal frauds may be beyond the power of an individual rabbi to detect, as would be the case of a slaughter house under kosher supervision doubled its production by operating a shadow non-kosher plant but using the same kosher packaging. It is as legitimate for government to put a stop to this type of fraud as to stop fraud regarding the labeling of natural or organic foods.⁶⁴

A more prevalent problem with this degree of privatization is that it provides no protection for the kosher consumers outside the Orthodox Jewish community.⁶⁵ As reiterated throughout this paper, these groups without technical knowledge of the dietary laws are the ones most in need of protection from fraudulent claims.

Education

The most hands-off' approach involves education concerning truthful food labels. One study suggests that the government, as an objective source, is the proper vehicle to

166

ited resou

disseminate non-biased information. Limiting resources make this approach impractical.

Alternatively, trade associations could publish educational information about products which their members produce.⁶⁷

A number of organizations have adopted this approach. The New York Council recently prepared a consumer booklet in conjunction with the Governor's office, entitled *A Shopping Guide for the Kosher Consumer*, to assist consumers in making wiser decisions concerning kosher food purchases and to provide information about what to do in case of problems. Topics include: how to know when a product is kosher, are all kosher products marked with a kosher certification? how to determine if a product is meat, dairy or pareve kosher meat and poultry and their prices, and kosher food and health considerations.⁶⁸

Trade associations have also seen the benefits of education. The Beef Industry Council of the National Livestock and Meat Board has produced an information and recipe booklet for the kosher consumer. The booklet should provide the kosher consumer with additional information about important aspects of dealing with kosher meat, such as kosher slaughter and proper kashering of meat procedures. The association benefits because the booklet should also provide kosher butchers with a useful tool for marketing their merchandise.⁶⁹

The educational approach is especially relevant since the key problem with privatization is the unavailability of ready information to the consumer. Any alternative to direct regulation must compete with a glaring label that appears professional and authoritative. If information is not provided on the label it must be just as accessible in order to be effective.

Conclusion

The analysis in this paper has see-sawed back and forth, repeatedly confronting the same legal and logistical constraints. The State wants to protect consumers whose religious or ethical beliefs make them susceptible to kosher claims (like the weight-conscious consumers in the *Diet Thins* case). On one hand, any regulatory scheme must provide a substantive standard in order to have some baseline to determine noncompliance. However, because the dietary laws are so complex and situation specific, it is impossible to create a single list of requirements. The standards that have been developed have been forced to rely on generalized assumptions. These generalities in turn raise Constitutional problems by enmeshing the State in determination and application of religious principles. Although consumers may have expectations based on certain religious standards, manufacturers who want to capitalize on such expectations, can hide behind a claim of divergent religious beliefs protected by the Constitution. The only way the State can create a non-invasive, neutral standard is through mere investigation of disclosure claims, yet such an approach does not directly confront the original problem of consumer expectations.

Under the circumstances, the best short range solution is the combination of disclosure with some sort of limited substantive regulation as described above—if not of the word kosher itself, at least of some of the closely identified terms and symbols. However, because of the government resources that would be required, such a regulatory

approach is unlikely to proceed. At the same time, the steps taken toward education are very encouraging. Education by industry groups and consumer advocates presents the most practical approach, with the greatest potential for ultimately curbing the market by empowering the consumer. Such an approach also alerts the consumer to take responsibility for investigating products and claims, making pure disclosure a more effective option for the future.

¹ Sossins Systems, Inc. v City of Miami Beach, 262 So.2d 28 (1972)

²

Engel v Vitale, 370 U.S. 421, 431 (1962)

³ Beatrice Trum Hunter, More Consumers Ask: Is it Kosher?, Consumers' Research Magazine, Apr. 1997, at 10

David Hochman, You Don't Have to be Jewish to Love This Business, New York Times, Apr. 4, 1993, at F9

<<http://www.kosherfest.com>> (the official internet site of the U.S. kosher food industry)

⁶

Joe M Regenstein and Carrie Regenstein, Looking in on Kosher Supervision of the

food industry, 39 Judaism 408 (1990)

Joshua Hammerman, The Forbidden Oreo, New York Times Magazine, Jan. 11, 1998

⁸ Hochman, supra note 4, at F9

⁹Id.

¹⁰ Hammerman, supra note 7

¹¹ Hochman, supra note 4, at F9

¹² Menachem Genack, Industrial *Kashrut* Supervision, 39 Judaism 402, 407 (1990)

¹³ Shulhan Arukh, Yoreh Deah §§ 79-80

The Shulhan Arukh (literally, set table) is the Code of Jewish Law. Written by Rabbi

Yoseph Karo in the 16th century, it defines Jewish law in light of centuries of study and

debate and is accepted as authoritative throughout the Jewish world. Citations are to

chapters in the section entitled Yoreh Deah which deals with permitted and forbidden

substances.

¹⁴ Yoreh Deah § 83 Id., at §§ 29-60

¹⁶ Id., at §§ 65-68

¹⁷

Id., at § 65

¹⁸

Id., at § 64

¹⁹ Id., at §§ 1-27

²⁰

- Id., at §§ 69-78
- 21** Id., at §§ 98-111
- 22** *Barghout v Mayor and City Council*, 325 Md. 311
- 23** *Yoreh Deah*, supra note 13, at §§ 87-97
- 24** Id.
- 25** Id., § 82
- 26** Gerald Masoudi, *Kosher Food Regulation and the Religion Clauses of the First Amendment*, 60 U.Chi.L.Rev. 667 (1993)
- 27** Id., 36-39

25

28 Mark Berman, *Kosher Fraud Statutes and the Establishment Clause*, 26 *Colum.J.L. & Soc.Probs.* 1, 8-10 (1992). See notes 32-43 and accompanying text

29 *Id.*

30 Genack, *supra* note 12, at 404

31 Generic declaration of flavors in the ingredient statement is permitted by section

403(i)(2) of the Federal Food Drug and Cosmetic Act.

32 *Id.*, at 402

Incidental additives that are present in a food at insignificant levels and do not have any

technical or functional effect in the food are exempt from declaration in ingredient labeling

under 21 C.F.R. § 101.100(a)(3)

Genack, *supra* note 12, at 405

See also Kof-K kosher supervision (visited Jan. 13, 1998) [Khttp://www.kofk.com/label.htm](http://www.kofk.com/label.htm)

33 *Id.*

36 Gedaliah Dov Schwartz, *Kashruth—Problems and Solutions*, 39 *Judaism* 427 (1990)

Id.

38 Berman *supra* note 28, at 8

Regenstein and Regenstein, *supra* note 6, at 408

Yoreh Deah, *supra* note 13, at § 98

41 *Id.*, at § 115

42 Igros Moshe, *Yoreh Deah I*, 47-49 (responsa containing legal decisions)

Schwartz, *supra* note 36, at 428

Genack, *supra* note 12, at 403

Id.

46 *Id.*

Id.

48 Shelley Meacham, *Answering to a Higher Source—Does the Establishment Clause*

Actually Restrict Kosher Regulations as Ran-Day's County Kosher Proclaims? 23

Sw.U.L.Rev. 639, 647, 648

Hunter, *supra* note 3, at 10

50 Hunter, *supra* note 3, at 14

51 Hochman, *supra* note 4, at F9

52 *Keeping Foods Kosher, Healthy!*, Mar. 1997 (visited Jan. 22, 1998)

<http://www.treeoflife.com/9703.htm>

<http://www.primenet.com/A-kosher/about.htm>

Hunter, *supra* note 3, at 11

Barghout, *supra* note 22, at 326

56 *Id.* (citation)

Id.

58 The USDA regulates labels on meat and poultry
~~21 U.S.C. § 331
6021U5C §343(a)
61 21 U S C § 321(n)

26

62

Fara Warner, What Happened to the Truth? Adweek's Marketing Week, Oct. 1991, 4-

5

63 United States v An Article of Food ... Manischewitz ... Diet Thins, 377 F.Supp. 746

64

Id., at 748

65 Id.

66 Id. at 749

67 Nicole Imamshah and Nicole Rao, Federal Food and Drug Act Violations, 34

AmCrim.L.Rev. 645, notes 97-99 and accompanying text

68 Peter Barton Hutt and Richard A. Merrill, Food and Drug Law, 53 (1991)

69 See court analysis in United States v Ninety-five barrels of ... Apple Cider Vinegar,

265 U.S. 438

70 21 U.S.C. § 341 provides: XWhenever in the judgment of the Secretary such action will

promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food., a reasonable definition and standard of identity....

71 Hutt and Merrill, supra note 68, at 96

72 Id., at 107

~ 104 Stat. 2353 (1990) (codified as amended at 21 USC §§ 301, 321, 337, 343, 343-1, 345, 371

~ Bruce Silverglade, Food Labeling: Rules You Can Live By, LEGAL TIMES, July 17,

1995, at 21

(examination of consumer, industry and agency responses to FDA regulation of food

labels under NLEA, cited in Imamshah and Rao)

~ Beatrice Trum Hunter, Food for Thought: Legal, but....., Consumers' Research

Magazine, Nov. 1995

76 See Hutt and Merrill, supra note 68, at 59

See also Suzanne Hamlin, Free Range? Natural? Sorting Out Labels, New York Times,

November 13, 1996, at LI

~ This summary is based on Roseann Termini, The Prevention of Misbranded Food Labeling, 18 Ohio N.U.L.Rev. 77 (1991), notes 137-144 and accompanying text

78

Id., at 93

- ⁷⁹21C.F.R § 101.29
- ⁸⁰ 62 FR 43071
- ⁸¹ Id., at 43072
- ⁸² Id.
- ⁸³ N.J.Admin.Code tit.13, §45A-21
- ⁸⁴ Peter Barton Hutt, Class discussion, Harvard Law School, January 1998
- ⁸⁵ cited in Termini, supra note 77, notes 143 and 144
- ⁸⁶ cited in Masoudi supra note 26, note 30
- ⁸⁷ Barghout, supra note 22, at 319
- ⁸⁸ Catherine Beth Sullivan, Kosher Food Laws and the Establishment Clause,
- 21 B.C.Env'tl.Aff.L.Rev. 201, at 210
- ⁸⁹NYAgric & Mkts.Law § 201-a
- ~ See Commack Self-Service Kosher Meats v Rubin, 1997 WL 774763 (E.D.N.Y.)

27
 ~ Cai.Penal Code § 3 83(b)
 92 410 ILCS 645/1
 For an explanation of the Shulchan Aruch see supra note 13
 ~ Md ComL s 14-901
 ~ Mich.Comp.Laws F 750.297e
 ~ Minn.Stat. §§ 3 1.651
 ~ Ariz.Rev.Stat.Ann. §§ 36-94 1
 ~ 18Pa.Cons.Stat. § 4107.1
 98 Sullivan, supra note 88 at 211
 ~ Marc Stern, K kosher Food and the Law, 39 Judaism 389 (1990).
 at 397 100 Sullivan, supra note 88 at 211
 ~01 Sullivan raises this issue as well, see supra note 88, at 212
 102 Eighteen states (Arkansas, California, Connecticut, Georgia, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, Ohio, Rhode Island, Texas, Virginia, and Wisconsin) explicitly incorporate the Orthodox requirements into their statutes.
 103 NY Agri. & Mkts § 26-a
 104 Ran-Day's County Kosher v State, 608 A.2d 1353, at 1361 (1992)
 105 266 U.S. 497 (1925)
 106
 see supra note 18
 107 Id., 846-847
 108 Id., 847 (citation)
 109 US Const, Amend I
 110 See supra note 104
 ~ See Masoudi, supra note 26, at 696
 112 Cited in Masoudi, supra note 26, at 674
 113 Id., at 676
 ' Barghout, supra note 22, at 325
 ~ Stern, supra note 99, at 399
 116 Supra note 22, at 320
 ' 403 US 602, 612-13 (1971)
 118 Berman, supra note 28, at 30
 119 Cited in Masoudi, supra note 26, at 679
 120 Id., at 683
 121 459 US 116 (1982) The discussion of this case is paraphrased from Masoudi, Id., at 683-88
 122 Ran-Day's, supra note 104, at 1364-5
 123 Masoudi, supra note 28, at 688
 124 See Hygrade Provision Co. v Sherman 266 U.S. 497, 501 (the term 'kosher' has a

meaning well enough defined to enable one engaged in the trade to correctly apply it) **125** *Erlich v Municipal Court of Beverly Hills Judicial Dist.* 360 P.2d 334 (1961)
cited in 52 A.L.R. 959 (1974)
126 Stern, *supra* note 99, at 398
127 *Id.*, at 397

- 28
- 128 Ran-Day's, supra note 104, at 1362
- 129 Id.
- 130 Hygrade, supra note 124, at 501-2
- 131 130 U.S. 78(1944), at 81
- 132 Berman, supra note 28, at 20
- 133 Barghout, supra note 22, at 320
- 134 Ran-Day's, supra note 104, at 1362-63
- 135 Id., at 1363
- 136 Id.
- 137
- see supra note 80
- 138 NJ Statute, supra note 83
- 139 NY Statute, supra note 89
- 140 Ga. Stat. 26-2-331
- N.Y.Aгри. & Mkts. § 201-h
- 142 IL Statute, supra note 92
- 143 Regenstein and Regenstein, supra note 6, at 419-420
- Josh Feltman, Disclosure Laws Can Regulate Gently, New York Times, October, 3, 1993, F9
- 's Ran-Day's, supra note 104, at 1366
- 146 Id.
- Supra note 83
- 148 N.Y.Aгри. & Mkts. §201-e
- 149 Supra note 92
- 150 Supra note 148
- 151 1997 Maryland Laws Ch. 376, 377 (SB. 630)
- 152 Supra note 80, at 43072-3
- 153 HR. 5447 (1990)
- 154 Id.
- Id.
- 156 Id., reference to 18 U.S.C. § 1001
- Sullivan, supra note 88, at FN1 23 (State agencies currently responsible for enforcing
- state kosher laws include the state agricultural department, the state department of public
- health, or a designated segment of the state attorney general's office)
- 158 Termini, supra note 77, at 106
- 159 Id., at 107
- 160
- Hunter, supra note 3, at 14
- 161 Regenstein and Regenstein, supra note 6, at 417-418
- 162 Stern, supra note 99, at 400
- 163 Berman, supra note 28, at 75
- 164 Stern, supra note 99, at 397
- 165 Meacham, supra note 48, at 647-8

166 Termini, *supra* note 77, at 107

167 *Id.*, at 108

168 Regenstein and Regenstein, *supra* note 6, at 418

29

169 Id., at 418