

THE REGULATION OF KOSHER SLAUGHTER IN THE
UNITED STATES: HOW TO SUPPLEMENT RELIGIOUS
LAW SO AS TO ENSURE THE HUMANE
TREATMENT OF ANIMALS

By
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It is often argued that one of the most humane methods of killing an animal is through the performance of kosher slaughter. Indeed, the Humane Methods of Livestock Slaughter Act (HMLSA) of 1978 goes so far as to define kosher slaughter, and handling in connection with such slaughter, as humane, and consequently fails to provide any regulation over this method of killing. It is thus concerning that a number of kosher slaughterhouses have, in recent years, been discovered to be using blatantly inhumane practices, which the relevant religious authorities have insisted are completely kosher.

This Article examines the Jewish law concerning kosher slaughter and asks how it is possible for a slaughter that has been performed in an inhumane fashion to remain kosher. The answer, it concludes, is that the religious rules provide little guidance on the handling of animals in connection with slaughter. There thus exists a need for either the religious authorities or the law to supplement the existing religious rules with further requirements aimed at ensuring humane-slaughter practices. After analyzing both comparative law on this issue and the relevant First Amendment considerations, this Article argues that there is a need for Congress to remove the HMLSA's current exemption of handling in connection with kosher slaughter and for regulations to be passed governing this issue. It makes suggestions as to how such regulations could provide for more humane-slaughter practices in a manner that fails to offend either the Free Exercise Clause or the Establishment Clause of the First Amendment.

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I. INTRODUCTION

*[F]or as it has become necessary to eat the flesh of animals, it was intended by [the laws governing kosher slaughter] to ensure an easy death and to effect it by a suitable means . . . the Law enjoins that the death of the animal should be the easiest.*¹

Throughout their lives, many Jews are instilled with the idea that a kosher slaughter necessarily equates to a humane slaughter. In 2004, however, an undercover investigation into the kosher slaughter industry by People for the Ethical Treatment of Animals (PETA)² caused the first in a series of ripples to spread throughout the Jewish community, upsetting the acceptance that “kosher” means humane. The investigation’s focus was the largest glatt kosher³ slaughterhouse in the world:⁴ AgriProcessors, Inc., located in Postville, Iowa. The scenes captured on video during the investigation in no way resemble

¹ Pablo Lerner & Alfredo Mordechai Rabello, *The Prohibition of Ritual Slaughtering (Kosher Shechita and Halal) and Freedom of Religion of Minorities*, 22 J.L. & Religion 1, 10 (2006) (quoting Moses Maimonides, *The Guide for the Perplexed* 371 (M. Friedlander trans., Dover Publications 1956)).

² PETA Undercover: Sacred and Federal Laws Violated at Iowa Slaughterhouse, *What the Investigator Saw*, <http://www.goveg.com/feat/agriprocessors/investigator.asp> (last accessed Mar. 13, 2010).

³ Although technically the term “glatt kosher” describes meat from animals with “smooth or defect-free lungs,” in modern times the term is informally used to refer to a stricter standard of kosher law. Giora Shimoni, *What is Glatt Kosher?*, <http://kosherfood.about.com/od/kosherbasics/f/glatt.htm> (last accessed Mar. 13, 2010).

⁴ Aaron Gross, *When Kosher Isn’t Kosher*, 20 Tikkun 52, 52 (2005).

those usually envisaged by Jews when thinking of the sacred slaughter practices prescribed by their religion. Having been rotated upside down with the use of an inversion pen, cattle are shown having their throats slit and their tracheas and esophagi torn out with a metal hook.⁵ They are then hurled onto a cement floor before having one leg shackled so as to be hoisted to the bleed rail.⁶ Many of the animals caught on video remain conscious throughout this process, struggling for up to three minutes before eventually bleeding to death.⁷ Perhaps the most disturbing aspect of the AgriProcessors debacle was not, however, the gross abuse to which the animals in the establishment were subjected, but rather the stance adopted by both the Orthodox Union (OU)⁸ and the Israeli Rabbinat⁹ in the wake of the investigation. Having examined the PETA footage, their conclusion was simple: Absolutely nothing depicted in the video rendered the slaughters non-kosher.¹⁰

More recently, the spotlight has shifted to the largest offshore suppliers of kosher meat for American consumers: slaughterhouses in South America.¹¹ The majority of South American establishments employ the outdated “shackle and hoist” technique—where fully conscious animals are suspended from a chain shackled around one back leg—to restrain livestock during slaughter.¹² There are a number of

⁵ Michelle Hodkin, Student Author, *When Ritual Slaughter Isn't Kosher: An Examination of Shechita and the Humane Methods of Slaughter Act*, 1 J. Animal L. 129, 134 (2005).

⁶ *Id.*

⁷ *Id.* at 134. See also PETA Undercover: Sacred and Federal Laws Violated at Iowa Slaughterhouse, *supra* n. 2 (“Many cows were still alive and conscious when they came out of the tube and were slammed onto the floor.”).

⁸ The Orthodox Union is the kosher-certification agency that oversees AgriProcessors.

⁹ Adam J. Frank, *Kashrut in the Industrial Age*, The Jerusalem Post 17 (Feb. 3, 2005) (available at http://masorti.org/media/02032005_jp2.php (last accessed Apr. 28, 2010)).

¹⁰ While asserting the importance of avoiding pain to animals during the slaughter process, the rabbis of the OU maintained that “nothing in any . . . post-shechita ‘second cut’ or excision in any way undermines the validity of the shechita [kosher slaughter] itself or the kosher status of the slaughtered animal’s meat.” They similarly stressed that, even where an animal is able to stand up and walk around after the throat cut, this does “not invalidate the shechita if the trachea and esophagus were severed in the shechita cut.” The Orthodox Union, *Statement of Rabbis and Certifying Agencies on Recent Publicity on Kosher Slaughter*, <http://www.ou.org/other/5765/shechita2-65.htm> (last accessed Mar. 13, 2010).

¹¹ Adam Frank, *Kosher Slaughter: Should Shackling and Hoisting Be Permitted? Israel's Kosher Meat and the South American Problem*, http://www.chai-online.org/en/compassion/judaism/heritage_judaism_shackle.htm#south_american_problem (Feb. 2008) (last accessed Mar. 13, 2010) [hereinafter *South American Problem*]; Adam J. Frank, *Why Do the OU and Israel's Rabbinat Condone Barbarity?* http://www.chai-online.org/en/compassion/judaism/heritage_judaism_shackle.htm; *select* Jerusalem Post, 14 February 2008 (last accessed Apr. 28, 2010) [hereinafter *Barbarity*].

¹² Nathaniel Popper, *Widespread Slaughter Method Scrutinized for Alleged Cruelty*, The Jewish Daily Forward, <http://www.forward.com/articles/12666> (Feb. 13, 2008) (last accessed Mar. 13, 2010).

Jewish groups and individuals who have been concerned about this issue for some time.¹³ However, the matter was truly only brought to a head by another PETA investigation, this time into an establishment in Uruguay. Released in early 2008, the investigation's video footage¹⁴ again sent a shockwave throughout the Jewish community, and again, the response of Israel's chief rabbis and the United States kosher-certification agencies was that the cruel nature of the practices used by the establishment did nothing to affect the kosher status of its meat.¹⁵

The investigations described above and the responses that they generated from the relevant religious authorities have made one fact very clear: Jewish rules governing kosher slaughter (*shechita*)¹⁶ are not, on their own, sufficient to protect animals from inhumane treatment. In light of this basic truth, this Article critically examines current regulation of kosher slaughter in the United States and suggests changes in the law that could provide greater protection for animals killed to supply kosher meat. Part II explains that although Jewish laws concerning kosher slaughter were originally intended to promote animal welfare,¹⁷ and although it may be *possible* to perform *shechita* humanely, the religious rules governing this practice are not, on their own, sufficient to ensure that animals experience a swift and painless death. This is essentially because the laws of *shechita* fail to regulate the handling of animals in connection with slaughter. With this problem in mind, Part III contrasts the approach followed in some foreign jurisdictions, where secular laws supplement the laws of *shechita*, with the course adopted by the United States, where the regulation of kosher slaughter is left almost entirely to religious authorities. Having concluded that the latter approach has been ineffective in ensuring that livestock are humanely slaughtered, Part IV examines the constitutional and practical implications of each of the regulatory options available to Congress. It argues that the most appropriate means of handling *shechita* is for the law to continue to allow the practice, but to regulate those aspects of the slaughter process upon which religious law is silent. Part IV proceeds to make recommendations about the type of regulations that may be employed and to comment on the effect

¹³ See Elliot N. Dorff & Joel Roth, *Shackling and Hoisting*, http://www.rabbinicalassembly.org/teshuvot/docs/19912000/dorffroth_shackling.pdf (last accessed Mar. 13, 2010) (the Committee on Jewish Law and Standards of the Rabbinical Assembly taking a public stance against shackling and hoisting).

¹⁴ For a description of the footage, which was filmed in late 2007, see Popper, *Widespread Slaughter Method Scrutinized for Alleged Cruelty*, *supra* n. 12.

¹⁵ Frank, *Barbarity*, *supra* n. 11.

¹⁶ "Shechita is the Jewish religious and humane method of slaughtering permitted animals and poultry for food. It is the only method of producing kosher meat and poultry allowed by Jewish law." Chabad.org, *What is Shechita?* http://www.chabad.org/library/article_cdo/aid/222240/jewish/What-is-Shechita.htm (last accessed Mar. 13, 2010).

¹⁷ *Id.* ("[T]he rules governing shechita . . . ensure a swift and painless dispatch of the animal.").

that any change in United States law may have on the treatment of animals in South American slaughterhouses.

II. WHAT IS THE PROBLEM WITH KOSHER SLAUGHTER?

Although many Jews believe that the rules governing *shechita* ensure a humane slaughter, PETA's investigations have demonstrated that the practices found in kosher slaughterhouses are not always humane, and that this does not necessarily prevent meat from being regarded as kosher. The following section explores whether it is possible to perform *shechita* in a humane manner, and, after concluding that it is, examines the Jewish rules for *shechita* in an attempt to determine why these rules on their own are not enough to ensure a humane slaughter.

A. Jewish Law, Animal Welfare, and the Potential for Kosher Slaughter to Be Performed Humanely

The Jewish holy text, the Torah, has been described as “the first systematic legislation prohibiting cruelty to animals and mandating their humane treatment.”¹⁸ Indeed, Jewish law (*halakhah*)¹⁹ prescribes numerous rules aimed at ensuring the kind and compassionate treatment of animals by humans.²⁰ Although their religion enjoins Jews to exercise mercy in their relations with animals, Jewish law does permit animal lives to be sacrificed so as to provide humans with food.²¹ In light of this fact, the laws of *shechita* were meant to ensure that animals killed for food experienced as swift and painless a death as possible.²²

For practical purposes, the most significant difference between *shechita* and standard slaughter is that in *shechita*, animals are not stunned prior to the throat cut and thus remain conscious throughout the process.²³ This fact has led some to question whether it is possible to perform *shechita* in a humane manner. According to Dr. Temple Grandin, the leading American scientific expert on kosher slaughter, the answer to this query is a definite “yes.” In a study involving cattle restrained in well-designed upright pens, Dr. Grandin observed the following:

¹⁸ Shechita UK, *A Guide to Shechita* 4, http://www.shechitauk.org/uploads/tx_resources/A_GUIDE_To_SHECHITA_2009_.pdf (May 2009) (last accessed Mar. 13, 2010).

¹⁹ Judaism 101, *Halakhah: Jewish Law*, <http://www.jewfaq.org/halakhah.htm> (last accessed Jan. 25, 2010) (“The word ‘halakhah’ is usually translated as ‘Jewish Law.’”).

²⁰ Hodkin, *supra* n. 5, at 136. There is, for example, a general rule directing Jews not to cause suffering to animals. This is expressed in the Talmudic phrase “*tza’ar ba’alei chayim*.” Shechita UK, *supra* n. 18.

²¹ Hodkin, *supra* n. 5, at 136.

²² *Id.* at 131.

²³ Temple Grandin & Joe M. Regenstein, *Religious Slaughter and Animal Welfare: A Discussion for Meat Scientists*, <http://www.grandin.com/ritual/kosher.slaugh.html> (Mar. 1994) (last accessed Feb. 11, 2010).

[T]he animals had little or no reaction to the throat cut. There was a slight flinch when the blade first touched the throat. This flinch was much less vigorous than an animal's reaction to an eartag punch. There was no further reaction as the cut proceeded. . . . Some animals . . . were held so loosely by the head holder and the rear pusher gate that they could have easily pulled away from the knife. . . . It appears that the animal is not aware that its throat has been cut.²⁴

Indeed, the weight of scientific opinion agrees that kosher slaughter is at least as humane as standard slaughter when performed under appropriate conditions²⁵ and is in fact far *more* humane than improperly applied stunning methods.²⁶ However, while it may be *possible* to perform *shechita* in a humane manner, the insistence by kosher-certification agencies and the Israeli Rabbinat that the clearly inhumane practices of AgriProcessors and South American slaughterhouses satisfy kosher standards suggests that the laws of *shechita*, standing alone, are insufficient to ensure animal welfare. In determining why this is so, it is necessary to examine the religious requirements for *shechita*.

B. *The Laws of Shechita—Where Are Things Going Wrong?*

The laws of *shechita* require that slaughter be performed by a *shochet* (a specially trained Jewish male)²⁷ who must use a *chalef* (a special knife that is both surgically sharp and perfectly smooth)²⁸ to rapidly, and with a continuous motion, sever the frontal structures of

²⁴ *Id.*

²⁵ Similar observations to those documented by Dr. Grandin have, for example, been made in an experiment by Danish veterinarian Dr. Flammig Bager. *Id.*; Shechita UK, *supra* n. 18, at 11. The most recent report to oppose this view was produced by the British Farm Animal Welfare Council (FAWC). Although the report concluded that slaughter without pre-stunning could not be performed in a humane manner, this conclusion was made entirely a priori, without the support of any empirical evidence. The Council's reasoning was as follows:

When a very large transverse incision is made across the neck a number of vital tissues are transected including: skin, muscle, trachea, [esophagus], carotid arteries, jugular veins, major nerve trunks (e.g. vagus and phrenic nerves) plus numerous minor nerves. Such a drastic cut will inevitably trigger a barrage of sensory information to the brain in a sensible (conscious) animal. We are persuaded that such a massive injury would result in very significant pain and distress in the period before insensibility supervenes.

FAWC, *Report on the Welfare of Farmed Animals at Slaughter or Killing—Part 1: Red Meat Animals* 35, <http://www.fawc.org.uk/reports/pb8347.pdf> (June 2003) (last accessed Mar. 13, 2010). See also FAWC, *Report on the Welfare of Farmed Animals at Slaughter or Killing—Part 2: White Meat Animals*, <http://www.fawc.org.uk/pdf/report-090528.pdf> (May 2009) (last accessed Mar. 13, 2010).

²⁶ Grandin & Regenstein, *supra* n. 23.

²⁷ In addition to studying the laws of *shechita*, a person who wishes to become a *shochet* must also study animal anatomy and pathology and must be a "God-fearing person of integrity." Shechita UK, *supra* n. 18, at 6.

²⁸ *Id.* at 3.

the neck²⁹ without tearing the flesh or placing undue pressure on the blade.³⁰ Since the rules of *shechita* require that animals intended for food are healthy and uninjured at the time of slaughter, pre-slaughter stunning is prohibited.³¹ Thus, unlike the livestock killed using standard slaughter methods, animals killed by *shechita* are conscious at the time of slaughter.

Supporters of *shechita* often argue that the prohibition of pre-slaughter stunning is insignificant because by causing “an instant drop in blood pressure in the brain and immediately [resulting] in the irreversible cessation of consciousness,”³² the throat cut required by *shechita* has essentially the same effect as stunning. The trouble with this argument is that, although it is true that animals fall unconscious after the throat cut, this loss of consciousness is not always as rapid as one might hope.³³ Cattle and veal calves, for example, occasionally experience prolonged sensibility that may last for longer than a minute.³⁴ The treatment of animals prior to loss of consciousness thus becomes an important welfare issue. However, nothing in the rules for *shechita* provides any direction as to how an animal should be handled before it becomes unconscious. This makes it possible for establishments to treat conscious animals in an inhumane fashion yet remain within the bounds of the law of *shechita*. Although the requirements for kosher slaughter in no way direct that animals be treated in a cruel manner, the failure of the requirements to regulate the handling of livestock in connection with slaughter does potentially permit cruel practices to occur.

The laws of *shechita* are not only silent as to the handling of conscious animals after the throat cut but also fail to provide any express direction on the interrelated issues of how to position and how to restrain an animal in preparation for the cut. This is hardly surprising when one considers the age of these laws. Historically in Israel, and in the old traditional Jewish method, an animal would be manually restrained and lying on its side during the throat cut.³⁵ It is only in modern times that this method has been forbidden due to sanitation concerns,³⁶ and the design of alternative restraint mechanisms has

²⁹ The frontal structures include the trachea, esophagus, carotid arteries, and jugular veins. *Id.* at 5.

³⁰ Grandin & Regenstein, *supra* n. 23; Hodkin, *supra* n. 5, at 137–38; Gross, *supra* n. 4, at 52; e-mail from Ari Greenspan, trained *shochet* from Jerusalem, to Melissa Lewis, *Re: Kosher Slaughter Requirements* (Mar. 19, 2008) (copy on file with *Animal Law*) [hereinafter Greenspan E-mail].

³¹ *Shechita* UK, *supra* n. 18, at 8.

³² *Id.* at 3.

³³ Grandin & Regenstein, *supra* n. 23.

³⁴ *Id.* However, Dr. Grandin has observed that when *shechita* is performed under the correct conditions, most animals will lose consciousness almost immediately. *Id.*

³⁵ *Jones v. Butz*, 374 F. Supp. 1284, 1290 n. 8 (S.D.N.Y. 1974).

³⁶ *Id.*

thus been necessitated. The ultra-Orthodox movement³⁷ (to which Israel's chief rabbis belong) has taken this change of circumstances into account and currently mandates that animals be slaughtered in an inverted position.³⁸ Although this is not technically necessary in order for a slaughter to be considered kosher, it is a "stringency" insisted upon by the ultra-Orthodox in an attempt to ensure adherence to the requirement that undue pressure not be placed upon the knife.³⁹ The reasoning is that, by insisting that the *shochet* use a downward cutting motion and that the animal be in a position in which it is unable to press its neck down against the blade, undue pressure will not be applied.⁴⁰

This argument ignores observations that, when cattle "are held [upright] in a pneumatically powered head restraint which they can easily move, the animals pull their heads upwards *away* from the knife during a miscut,"⁴¹ thereby *reducing* pressure on the blade. The argument has also been rejected by the Jewish Conservative movement's Committee on Jewish Law and Standards (CJLS), which has unanimously ruled that the slaughtering of animals in an inverted position violates the Jewish law that prohibits the unnecessary infliction of pain (*tza'ar ba'alei chayim*).⁴²

Insofar as restraint methods are concerned, it is significant that although some forms of restraint subject animals to substantial pain and stress, other restraint methods have the potential to facilitate a slaughter as humane as one resulting from non-kosher practices. By far the worst restraint technique currently available is the shackle-and-hoist method, in which an animal is hoisted into the air by a chain shackled around one of its rear legs. Particularly, insofar as large animals are concerned, this form of restraint produces a tremendous level of suffering.⁴³ Apart from the general stress induced by such an archaic restraint method, serious injuries can result from the shackle-and-hoist process.⁴⁴ This problem, combined with concern for worker

³⁷ The three principal movements within Judaism are: (1) the Orthodox movement, which regards Jewish law as binding and incapable of change; (2) the Conservative movement, which believes that Jewish law, while binding, is able to evolve; and (3) Reform Judaism, which does not regard Jewish law as binding and instead encourages individuals to decide which laws are religiously meaningful for them. Hodkin, *supra* n. 5, at 130–31.

³⁸ E-mail from Adam J. Frank, rabbi, Congregation Moreshet Yisrael in Jerusalem, to Melissa Lewis, *Re: Kosher Slaughter* (Mar. 11, 2008) (copy on file with *Animal Law*) [hereinafter Frank E-mail].

³⁹ *Id.*

⁴⁰ *Id.*; Greenspan E-mail, *supra* n. 30. See also Grandin & Regenstein, *supra* n. 23.

⁴¹ Grandin & Regenstein, *supra* n. 23 (emphasis added). Note, however, that an upright slaughter may still make it more difficult for a *shochet* to achieve a perfect cut. Greenspan E-mail, *supra* n. 30.

⁴² Dorff & Roth, *supra* n. 13; Frank, *Kashrut*, *supra* n. 9.

⁴³ Dorff & Roth, *supra* n. 13.

⁴⁴ *Id.*

safety,⁴⁵ has led to a phasing out of the shackle and hoist of adult cattle in most North American kosher slaughterhouses.⁴⁶ However, especially in small-scale slaughterhouse, little concern is reserved for the welfare of smaller animals, with many veal calves, sheep, and lamb still being shackled and hoisted while conscious.⁴⁷ Furthermore, the vast majority of meat being imported from South America still comes from animals that were slaughtered using this method. This is partially due to the Israeli chief rabbis' insistence that slaughter be performed upon inverted animals.⁴⁸ Since the major market for South American kosher meat exists in Israel, the chief rabbis have been able to dictate the standards of meat production in South America.⁴⁹

Although it is possible to avoid the shackle and hoist of small animals by restraining them manually, when large cattle are involved the only alternative means of achieving an inverted slaughter is through the use of an inversion (or "casting") pen.⁵⁰ Incidentally, due to its use of such technology, the only kosher slaughter establishment in the United States permitted to export meat to Israel is AgriProcessors.⁵¹ Inversion pens rotate animals onto their backs and hold them in this position during the throat cut.⁵² While these pens represent a substantial improvement upon the shackle-and-hoist procedure, they are by no means problem-free. Since the pen restrains cattle in an unfamiliar and uncomfortable position, animals tend to resist inversion and will twist their necks in an attempt to right their heads.⁵³ The inverted

⁴⁵ When they are shackled and hoisted, animals become scared and are often violent. *Id.* This results in serious danger to workers in kosher slaughterhouses. *Id.*

⁴⁶ *Id.*

⁴⁷ Temple Grandin, *Improving Religious Slaughter Practices in the U.S.*, *Anthropology of Food* 5, <http://aof.revues.org/index93.html> (May 2006) (last accessed Mar. 13, 2010).

⁴⁸ Popper, *Widespread Slaughter Method Scrutinized for Alleged Cruelty*, *supra* n. 12.

⁴⁹ See Nathaniel Popper, *New Kosher Food Certification May Be Most Detailed in the Industry*, *The Jewish Daily Forward*, <http://www.forward.com/articles/113750> (Sept. 9, 2009) (last accessed Mar. 13, 2010). Note, however, that the problems inherent in the shackle-and-hoist technique have been recognized by the Israeli Rabbinat, which has directed that pressure be placed upon South American establishments to phase out this restraint method. Press Release, CHAI Online, *Israel's Chief Rabbis Grant CHAI's Request to End Cruel Slaughter Method* (Feb. 19, 2008) (available at http://www.chai-online.org/en/news/press_releases/pr_judaism_shackle2.htm (last accessed Mar. 13, 2010)) (Israeli charity praised the decision of the Chief Rabbis to phase out shackling and hoisting in Israeli and South American slaughterhouses); see also Neta Sela, *Jewish Slaughter in Danger, Chief Rabbi Tells Reporters*, <http://www.ynetnews.com/articles/1,7340,L-3514610,00.html> (Mar. 4, 2008) (last accessed Mar. 13, 2010). This issue is discussed in greater depth in this Article.

⁵⁰ Grandin & Regenstein, *supra* n. 23.

⁵¹ E-mail from Joe Regenstein, Prof. of Food Science, Cornell University, to Melissa Lewis, *Re: Questions Regarding Kosher Slaughter* (Nov. 20, 2007) (copy on file with *Animal Law*) [hereinafter Regenstein E-mail]; Frank E-mail, *supra* n. 38.

⁵² Dorff & Roth, *supra* n. 13. Note that not all casting pens rotate cattle a full 180°. Some, such as the Facomia pen, tilt animals to a 135° angle. *Id.*

⁵³ Grandin & Regenstein, *supra* n. 23.

position also causes animals slaughtered using this restraint method to aspirate blood after the incision.⁵⁴ Nonetheless, some casting pen designs are considered more humane than others. While the old-fashioned Weinberg pen has been documented as inducing stress levels almost 300% higher than levels resulting from the use of an upright pen,⁵⁵ the Facomia pen used by AgriProcessors is said to cause less stress.⁵⁶ According to Dr. Joe Regenstein, Dr. Grandin almost gave her approval to a new Irish inversion pen.⁵⁷ Both experts, however, continue to maintain that the most humane way to restrain livestock during slaughter is with the use of an upright restraint system.⁵⁸ Upright restraint can be achieved with the use of a restraint “box” or a conveyor restrainer system.⁵⁹ Basic upright restraint devices for small livestock are also easy to construct for use at small-scale plants.⁶⁰ When properly designed and operated, upright restraints cause minimal stress.⁶¹ They may also offer the added advantages of improved bleed out and more rapid onset of unconsciousness.⁶²

Despite the animal welfare implications that accompany the choice of a particular restraint technique, the laws of *shechita* themselves are silent as to the appropriate manner of restraining an animal. Indeed, nothing in the requirements for *shechita* so much as touches upon the way in which animals should be handled before they lose consciousness. It follows that the laws of *shechita*, on their own, are insufficient to guarantee that animals experience humane slaughter. To ensure that humane kosher slaughter is achieved, the rules of

⁵⁴ *Id.*

⁵⁵ Stress levels are determined through the measurement of cortisone (a stress hormone). Dorff & Roth, *supra* n. 13.

⁵⁶ Grandin & Regenstein, *supra* n. 23.

⁵⁷ Regenstein E-mail, *supra* n. 51.

⁵⁸ Grandin & Regenstein, *supra* n. 23.

⁵⁹ Temple Grandin, *Proper Cattle Restraint for Stunning*, <http://www.grandin.com/humane/restrain.slaughter.html> (last accessed Mar. 13, 2010). Currently, two types of conveyor restraints are available: the V restrainer, which restrains livestock between two angled conveyors; and the center track system, in which livestock ride upon a moving conveyor. *Id.*

⁶⁰ See Spirit of Humane, *Ordering Spirit of Humane Products*, <http://www.spiritofhumane.com/order> (last accessed Mar. 13, 2010) (Adjustable restraint devices for small-scale establishments can be ordered for \$1,250.).

⁶¹ Note, however, that poorly designed upright restraints can be very stressful. An example is the American Society for the Prevention of Cruelty to Animals (ASPCA) restraint box, which applies excessive pressure in restraining the animal. Grandin & Regenstein, *supra* n. 23. Dr. Grandin and Dr. Regenstein recommend that, in order to ensure a calm and humane slaughter, upright restraint equipment should be fitted with pressure-limiting devices and properly designed head holders with solid barriers around the animal's head to prevent it from viewing distractions. Upright restraints should also be illuminated to encourage animals to enter and should be engineered so that noise is reduced and all parts move in a slow, steady motion. Equipment should be used only by trained operators, and the animal handlers must treat the animals gently and calmly. *Id.* For more detail, see *id.* under the section regarding upright restraint equipment design.

⁶² *Id.*

shechita need to be supplemented in some way. A question, however, arises concerning *who* should be tasked with supplementing these rules. In other words, who should be given the responsibility of “filling the gaps” in the Jewish laws governing kosher slaughter?

III. WHO FILLS THE GAPS?

There are essentially two sources from which the humane handling requirements needed to supplement the rules of *shechita* could emanate: legal authorities or religious ones. This Section begins with a discussion of foreign jurisdictions that use secular law to regulate kosher slaughter practices. It then contrasts this approach with that used in the United States, where the regulation of *shechita* is left to religious bodies that appear to have given little thought to animal welfare issues.

A. Comparative Law

In determining the best way to incorporate humane safeguards into the practice of *shechita*, guidance can be drawn from the manner in which this issue is handled by foreign legal systems. The approach taken by the European Union (EU) and some of its Member States is particularly instructive in this regard. Within the EU, minimum standards for the protection of animals at the time of slaughter are currently enumerated in Council Directive 93/119 of 22 December 1993 on the Protection of Animals at the Time of Slaughter or Killing, which requires that animals are spared any “avoidable excitement, pain, or suffering” during, *inter alia*, restraint and slaughtering.⁶³ While permitting un-stunned slaughter for religious purposes,⁶⁴ the Directive requires that all bovines killed by religious methods be restrained using “a mechanical method intended to avoid any pain, suffering or agitation and any injuries or contusions to the animals”⁶⁵ The shackle and hoist of conscious livestock is also prohibited.⁶⁶ EU Member States are directed to enact the laws, regulations, and administrative provisions necessary to ensure that slaughter adheres to these standards.⁶⁷ In January 2013, a new Council regulation on the protection of animals at the time of killing will replace Council Directive 93/119. One of the most significant ways in which the new regulation will diverge from the current Directive is that Member States will no

⁶³ Council Directive 1993/119/EC, Protection of Animals at the Time of Slaughter or Killing, 1993 O.J. (L. 340) 21 (EC) (replacing Council Directive 1974/577/EEC, On the Stunning of Animals before Slaughter, 1974 O.J. (L. 316) 10 (EEC)).

⁶⁴ *Id.* at § 2.

⁶⁵ *Id.* at Annex B(2). The Directive fails to specify whether the animal should be restrained in an upright or inverted position.

⁶⁶ *Id.* at § 18.

⁶⁷ *Id.* at 5.

longer have the option of refusing to exempt religious slaughter from pre-cut stunning requirements.⁶⁸

The various members of the EU have taken diverse approaches to the regulation of kosher slaughter. For example, Sweden has chosen to completely prohibit un-stunned slaughter,⁶⁹ although after 2013 it will no longer be able to do so under the new Council regulation. It is far more common, however, for states to permit *shechita* but subject the process to legal regulation. This approach is taken by both Denmark and Britain.⁷⁰ The Danish rules on the slaughter and killing of animals⁷¹ provide that, during religious slaughter, cattle are to be restrained in an upright holding pen that has been fitted with appropriate pressure-limiting devices. The throat cut is to occur as soon as the animal has been restrained, and immediate post-cut stunning must be performed using a captive bolt gun. The entire process must occur under veterinary supervision.⁷² In Britain, the Welfare of

⁶⁸ European Parliament Legislative Resolution on the Protection of Animals at the Time of Killing, A6-0185/2009, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2009-0369> (May 6, 2009) (last accessed Feb. 12, 2010) [hereinafter A6-0185/2009]. The regulation was proposed by the European Commission in 2008 and was accepted by the European Parliament (EP) through a political agreement in May 2009. *Id.* The regulation was approved by the Council of the EU in June 2009. Press Release, 2952nd Agriculture and Fisheries Council, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/agricult/108682.pdf (June 22–23, 2009) (last accessed Apr. 1, 2010). It will come into effect on January 1, 2013. EUROPA, *The New Regulation in 6 Questions and Answers*, http://ec.europa.eu/food/animal/welfare/slaughter/proposal_6_qanda_en.htm (last accessed Jan. 24, 2010). It will continue to exempt religious slaughter from pre-cut stunning requirements and will not give Member States the discretion not to apply this derogation. A6-0185/2009, *supra* at Amendment 28. The result is that, as of 2013, all EU countries will be required to allow kosher slaughter. The EP also rejected a proposal by the European Commission that EU states be prohibited from allowing bovines to be restrained in an inverted position. *Id.* at Amendment 81. That said, the new regulation will include a number of welfare requirements that are not found in the current Directive. These include a requirement that animals not be restrained until the slaughterer is ready to make the throat cut, as well as a requirement that no dressing procedure or electrical stimulation be performed on animals until bleeding has ended, and, in any event, not until the expiry of specified periods of time which vary for each species. *Id.* at Amendment 44, Amendment 95.

⁶⁹ Lerner & Rabello, *supra* n. 1, at 14–15. Other countries with bans on *shechita* include Switzerland (which prohibited the practice as far back as 1893), Norway, Liechtenstein, and Iceland. *Id.* In 2003, the British FAWC recommended the complete prohibition of slaughter without pre-stunning. FAWC, *Report on the Welfare of Farmed Animals at Slaughter or Killing—Part 1: Red Meat Animals*, *supra* n. 25, at 36. The British government rejected this recommendation in March 2004. Hodkin, *supra* n. 5, at 139; Jeff Welty, *Humane Slaughter Laws*, 70 L. & Contemp. Probs. 175, 203–04 (2007).

⁷⁰ Lerner & Rabello, *supra* n. 1, at 12–13.

⁷¹ These rules were published by the Minister of Justice in Declaration 583 of June 6, 2007 (*Bekendtgørelse om slagting og aflivning af dyr*), <https://www.retsinformation.dk/Forms/R0710.aspx?id=2649> (last accessed Apr. 11, 2010). The Minister is authorized to make rules of this nature by § 13(2) of Denmark's Animal Protection Law, 1343 of 2007 (*Bekendtgørelse af dyrevaernsloven*), <https://www.retsinformation.dk/Forms/R0710.aspx?id=2714> (last accessed Apr. 11, 2010).

⁷² Section 7 Declaration 583 of June 6, 2007.

Animals (Slaughter or Killing) Regulations of 1995⁷³ similarly dictate that bovines being slaughtered without pre-stunning must be restrained in an upright pen⁷⁴ that must be of a design that prevents any avoidable pain.⁷⁵ The throat cut must be performed immediately after restraint.⁷⁶ Smaller animals—including sheep, goats, and veal calves—may be restrained manually on a table or cradle, but no shackle and hoist of conscious livestock is permitted.⁷⁷ Once the throat cut has been performed, an animal must not be moved before unconscious and, in any event, before the passing of twenty seconds in the case of sheep and goats and thirty seconds in the case of bovines.⁷⁸ Although the regulations do not prescribe immediate post-cut stunning, they do require that a captive bolt gun be kept on hand in case of emergency and that an animal must be immediately stunned if “subjected to any avoidable pain, suffering or agitation or [if it] has any injuries or contusions.”⁷⁹

Outside of Europe, the developed countries with laws protecting the welfare of animals during kosher slaughter include Canada, where no “food animals,” other than birds and domesticated rabbits, may be shackled and hoisted while still conscious.⁸⁰ Also, Australia, like Denmark, requires immediate post-cut stunning.⁸¹

⁷³ Office of Public Sector Information, *The Welfare of Animals (Slaughter or Killing) Regulations 1995*, Sched. 12, http://www.opsi.gov.uk/si/si1995/Uksi_19950731_en_1.htm (last accessed Mar. 14, 2010).

⁷⁴ *Id.* at ¶ 3. From 1958 to 1992, the British regulations mandated the use of a Weinberg casting pen during *shechita*. In 1985, however, the FAWC recommended that this method of restraint be prohibited and that the use of an upright pen be required. Chanoch Kesselman, *Shechita Conformity and Confrontation*, <http://www.shechitauk.org/news-resources/resources/resources/article/shechita-conformity-confrontation.html> (Mar. 20, 2005) (last accessed Mar. 14, 2010).

⁷⁵ *The Welfare of Animals (Slaughter or Killing) Regulations 1995*, *supra* n. 73, at ¶ 3(1)–(2).

⁷⁶ *Id.* at ¶ 5(a).

⁷⁷ *Id.* at ¶ 5(b)–(c).

⁷⁸ *Id.* at ¶ 7.

⁷⁹ *Id.* at ¶ 5(d). Interestingly, the British regulations not only cover the slaughter of “red meat” animals, but also lay down requirements for the kosher slaughter of birds. Although the regulations do not specify the manner in which birds are to be restrained during *shechita*, they do require that no dressing procedure be performed on birds until they are unconscious. *Id.* at ¶¶ 9, 10. In any event, no dressing is to occur before the elapse of specified time periods. *The Welfare of Animals (Slaughter or Killing) Regulations 1995*, *supra* n. 73, at ¶¶ 6, 10.

⁸⁰ Department of Justice Canada, *Meat Inspection Regulations, 1990*, Reg. 78, <http://laws.justice.gc.ca/PDF/Regulation/S/SOR-90-288.pdf> (Mar. 9, 2010) (last accessed Apr. 1, 2010).

⁸¹ *Australian Standard for the Hygienic Production and Transportation of Meat and Meat Products for Human Consumption 21–22* (CSIRO Publ. 2007) (available at <http://www.publish.csiro.au/Books/download.cfm?ID=5553> (last accessed Mar. 14, 2010)).

B. The Approach of the United States

In the United States, livestock slaughter is governed by the Humane Methods of Livestock Slaughter Act of 1978 (HMLSA).⁸² The Act declares it “to be the policy of the United States that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods.”⁸³ It then proceeds to define two methods of slaughtering and handling as humane: (1) the slaughtering of livestock that have been stunned prior to being “shackled, hoisted, thrown, cast, or cut”;⁸⁴ and (2) the slaughtering of livestock “in accordance with the ritual requirements of the Jewish faith . . . and handling in connection with such slaughtering.”⁸⁵ Thus, as long as slaughter satisfies the laws of *shechita*, it is automatically considered humane.

Insofar as standard slaughter is concerned, the HMLSA directs the United States Department of Agriculture (USDA) to determine and designate which methods of slaughter and handling are humane.⁸⁶ However, “in order to protect freedom of religion,” the Act provides that “ritual slaughter and the handling or other preparation of livestock for ritual slaughter are exempted from the terms” regarding standard slaughter.⁸⁷ The result is that although the USDA’s Food Safety and Inspection Service (FSIS) has issued regulations aimed at generally ensuring the humane slaughter and pre-slaughter handling of livestock,⁸⁸ these regulations are silent as to the treatment of animals immediately before and during *shechita*. The role to be played by the USDA in overseeing establishments that perform kosher slaughter was clarified in a 2003 FSIS Directive.⁸⁹ The Directive states that before slaughter occurs, USDA inspectors must request that plant managers inform them about the type of ritual slaughter that will be performed (e.g. kosher or halal) and to provide information concerning when and by whom the slaughter will be performed.⁹⁰ Inspection personnel are also required to ensure that animals are handled in a hu-

⁸² 7 U.S.C. §§ 1901–1907 (2006). This Act is sometimes referred to as the Humane Slaughter Act (HSA).

⁸³ *Id.* at § 1901.

⁸⁴ *Id.* at § 1902(a).

⁸⁵ 7 U.S.C. §§ 1901, 1902(b) (2006). Slaughtering in accordance with the requirements of other religious faiths which prescribe methods of slaughter whereby the animal “suffers loss of consciousness by anemia of the brain caused by the instantaneous severance of the carotid arteries with a sharp instrument” is also permitted. *Id.*

⁸⁶ 7 U.S.C. § 1904.

⁸⁷ 7 U.S.C. § 1906 (2006).

⁸⁸ 9 C.F.R. § 313 (2009).

⁸⁹ *Humane Handling and Slaughter of Livestock*, FSIS Directive 6900.2 Rev. 1 (USDA Nov. 25, 2003) (available at <http://www.fsis.usda.gov/oppde/rdad/fsisdirectives/6900.2rev1.pdf> (last accessed Mar. 14, 2010)).

⁹⁰ *Id.* at 7.

mane manner prior to being prepared for ritual slaughter⁹¹ and that after the throat cut has been performed, “no dressing procedure (e.g., head skinning, leg removal, ear removal, horn removal, opening hide patterns) . . . is performed until the animal is insensible.”⁹² Even if inspection personnel have concerns regarding the treatment of livestock before or during *shechita*, the Directive states that they are not to interfere with the ritual slaughter in any manner but are merely to “call the [FSIS District Office] through supervisory channels.”⁹³

In European countries, kosher slaughterhouses are legally obliged to ensure the humane treatment of animals passing through their production lines. This approach differs drastically from the approach taken in the United States, where the HMLSA fails to provide for any meaningful legal regulation over either kosher slaughter itself or handling in connection with such slaughter (which is not even touched upon by the laws of *shechita*). The text of the HMLSA makes one thing patently obvious: Congress has decided to leave the “filling of the gaps” in the rules of *shechita* not to legal authorities but to religious ones. In practice, this means that the sole responsibility for ensuring that kosher slaughter is performed in a humane manner lies with kosher slaughterhouses themselves and the agencies that certify meat products as having been produced in accordance with the laws of *shechita*. Unfortunately, the religious authorities have failed dismally in preventing even extreme cases of abuse.⁹⁴ Although kosher-certification agencies are beginning to accept that the humane treatment of animals is an issue deserving greater attention,⁹⁵ no steps have yet been taken by the Orthodox Movement to ensure the widespread improvement of animal welfare conditions in kosher slaughterhouses.⁹⁶

⁹¹ For example, inspectors must verify that animals are provided with water (and, if held for more than twenty-four hours, food) are not subject to excessive use of electric prods, canvas slappers, etcetera. 9 C.F.R. § 313.2 (2009).

⁹² *Humane Handling and Slaughter of Livestock*, *supra* n. 89, at 7.

⁹³ *Id.* at 8. It is interesting to compare this approach to the approach to be taken by inspection personnel who identify problems with standard slaughter practices. Where slaughterhouses fail to comply with the FSIS regulations governing standard slaughter, resulting in the inhumane treatment of animals, inspectors are mandated to take “regulatory control action,” which may include the halting of meat production lines. 9 C.F.R. § 500.1–500.2 (2009).

⁹⁴ See Gross, *supra* n. 4, at 52 (“[T]he OU has indicated that, in their view, Judaism’s dietary laws are not violated when animals are ‘systematically mutilated, shocked, and left to languish at the hands of sloppy slaughterers.’”).

⁹⁵ See OU, *Meeting of Kosher Organizations at the OU Tackles Monsey Scandal and Humane Slaughter Controversy*, http://www.ou.org/news/article/meeting_of_kosher_organizations_at_the_ou_tackles_monsey_scandal_and_humane (Nov. 20, 2006) (last accessed Mar. 14, 2010) (reporting on a conference of kosher organizations that addressed the importance of dealing with the controversy of animal welfare in kosher slaughter).

⁹⁶ Note, however, that the Conservative movement (which does not hold as great an influence over the kosher-food industry as the Orthodox movement currently does) has taken this issue very seriously. As mentioned above, the Conservative movement’s Committee on Jewish Law and Standards has unanimously rejected the slaughtering of animals in an inverted position.

Indeed, in August 2008, when PETA conducted another undercover investigation into AgriProcessors, it discovered that abuse is *still* occurring behind the establishment's doors.⁹⁷ In light of the clear inadequacy of the current position, a reexamination of the HMLSA is necessary.

IV. HOW SHOULD CONGRESS DEAL WITH THE KOSHER SLAUGHTER ISSUE?

The regulatory framework within which kosher slaughterhouses currently operate does a poor job of furthering the United States' policy that "the slaughtering of livestock and handling of livestock in connection with slaughter shall be carried out only by humane methods."⁹⁸ It has thus become necessary for Congress to reconsider the various approaches available for handling kosher slaughter. The following section explores these approaches against the backdrop of the First Amendment.

More recently, in September 2009, rabbis from the Conservative movement released draft evaluation criteria for the new Magen Tzedek service mark, a certification program intended to start this year. Joe M. Regenstein, *Standards for the Magen Tzedek Service Mark; Draft for Public Comment*, http://magentzedek.org/wp-content/uploads/2009/09/Magen_Tzedek_Draft_Standards_Public_Review_090909.pdf (Sept. 9, 2009) (last accessed Apr. 1, 2010). The program is meant to provide a comprehensive ethical certification for kosher products and, rather than restricting its focus to the strict requirements of Jewish law, aims to "assure consumers that kosher food products were produced in keeping with the best possible Jewish ethical values and ideals for social justice." *Id.* at 4. It is not intended that this service mark will replace the supervision or certification mark of traditional kosher-certification agencies (which tend to be Orthodox in nature), but rather that it shall be *in addition to* kosher certification and shall focus on the social justice aspects of the preparation of kosher products. *Id.* at 6, 10. The program will evaluate social justice in terms of five major topic areas, one of which is animal welfare. *Id.* at 12. According to the draft criteria, products or product ingredients coming from animals that have been slaughtered religiously can only achieve the Magen Tzedek service mark if the slaughterhouse adheres to the American Meat Institute guidelines for religious slaughter. Temple Grandin, *Recommended Animal Handling Guidelines and Audit Guide* 35–36 (American Meat Institute Foundation 2007). Such adherence is to be validated by a third party auditor on at least an annual basis. Regenstein, *Standards for the Magen Tzedek Service Mark*, *supra* at 64. Bonus animal welfare points, which may result in a product being categorized as "Magen Tzedek with Distinction," can be gained by plants that use video cameras so that welfare issues can be monitored by a third party auditor at all times. *Id.* at 13, 67. While adherence to these standards would clearly improve conditions for animals in kosher slaughterhouses, there is some skepticism about how much of an impact the initiative will have on the average Jewish consumer. The extent to which it will affect U.S. kosher slaughter practices thus remains to be seen. Popper, *New Kosher Food Certification May be Most Detailed in the Industry*, *supra* n. 49.

⁹⁷ PETA, *Demand That Video Cameras Be Installed in Slaughterhouse*, http://getactive.peta.org/campaign/agriprocessors_investigation_2008 (last accessed Mar. 13, 2010). Similar findings occurred in mid-2007, when a kosher slaughterhouse under the same ownership as AgriProcessors was investigated. *Undercover at Rubashkin's . . . Again!*, <http://www.goveg.com/undercover-agri.asp> (last accessed Mar. 13, 2010).

⁹⁸ 7 U.S.C. § 1901.

A. *The Interplay between Kosher Slaughter Regulation and the First Amendment*

Congress may essentially choose from three options: (1) completely remove the religious slaughter exemption from the Humane Methods of Livestock Slaughter Act (HMLSA), thereby prescribing the pre-slaughter stunning of all livestock and effectively outlawing *shechita*; (2) defer to religious authorities insofar as kosher slaughter and handling in connection with slaughter are concerned by leaving the Act as is; or (3) forge a route between these two extremes and continue to permit *shechita* while subjecting the handling of animals upon which it is performed to more stringent legal regulation.

Congress's decision is complicated by the fact that the practice of kosher slaughter is religious in nature. Thus, concerns about violating the First Amendment⁹⁹ immediately arise. As expressly asserted by the HMLSA, the reason that the Act exempts kosher slaughter practices from its terms is to "protect freedom of religion."¹⁰⁰ That religious freedom factored strongly into the drafting of the Act is also clear from the Act's legislative history. Even though Congress exempted ritual slaughter from the stunning requirement, Jewish groups adamantly opposed early versions of the bill. It was argued that the Act, if passed, would "undoubtedly [result in] a campaign waged by the confused and overzealous against Jewish ritual slaughter,"¹⁰¹ thereby paving the way for the eventual prohibition of *shechita*.

The Constitution's protection of the free exercise of religion is not, however, the only First Amendment issue that factors into the regulation of kosher slaughter. By either completely exempting religious slaughter from its terms or regulating *shechita* in a manner that entangles the government with religion, Congress risks violating the Establishment Clause.¹⁰² Examination of the First Amendment issues potentially invoked by any Congressional stance on *shechita* is thus essential in determining the best way for Congress to regulate this practice.

⁹⁹ See U.S. Const. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . .").

¹⁰⁰ 7 U.S.C. § 1906.

¹⁰¹ Welty, *supra* n. 69, at 202. In making this argument, reliance was placed on the fact that in 1933, after the British House of Commons prescribed that, apart from in cases of ritual slaughter, pre-slaughter stunning was to be performed on all livestock, the British humane societies attempted to have religious slaughter abolished altogether. *Id.* The reliance upon this example is interesting when one considers that more than seventy years after the stunning requirement was laid down, animal welfare groups in Britain have still been unsuccessful in obtaining a ban on ritual slaughter. See also Jones, 374 F. Supp. at 1289 n. 7 (Some orthodox Jewish members were concerned about possible anti-Semitic propaganda.).

¹⁰² U.S. Const. amend. I. ("Congress shall make no law respecting an establishment of religion . . .").

B. *The Complete Prohibition of Shechita*

As noted *supra*, Section III(A), some countries completely prohibit the practice of kosher slaughter. The question is whether this approach is permitted by the United States Constitution. The First Amendment provides, *inter alia*, that “Congress shall make no law . . . prohibiting the free exercise” of religion.¹⁰³ If Congress wishes to avoid violating the Free Exercise Clause, it must refrain from interfering with an individual’s religious beliefs or practices.¹⁰⁴ However, even where government conduct does burden the free exercise of religion, it may still be permissible under the Religious Freedom Restoration Act of 1993¹⁰⁵ (RFRA) if the application of the burden is: (1) in furtherance of a compelling governmental interest, and (2) the least restrictive means of furthering that interest.¹⁰⁶

Assuming that the promotion of humane methods of slaughter is compelling enough a governmental interest to justify interference with religious practices,¹⁰⁷ the fact remains that kosher slaughter can be performed in a manner that is equally humane to standard slaughter. To the extent that it is currently possible for cruel practices (such as shackle and hoist) to accompany the performance of *shechita*, these practices can be regulated or prohibited without outlawing *shechita* itself. Any attempt to completely ban *shechita* will thus likely fail the second prong of the RFRA test and will consequently be regarded as unacceptably interfering with the free exercise of religion. That this would be a court’s probable conclusion was demonstrated in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,¹⁰⁸ in which the United States Supreme Court addressed the constitutionality of various city ordinances aimed at preventing the ritual slaughter of animals by members of the Santeria religion.¹⁰⁹ The Court held, *inter alia*, that the complete prohibition of ritual sacrifice was not necessary to ad-

¹⁰³ *Id.*

¹⁰⁴ *See Sch. Dist. of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 222–23 (1963) (stating that a person alleging violation of the Free Exercise Clause must “show the coercive effect of the enactment as it operates against him in the practice of his religion”).

¹⁰⁵ Codified at 42 U.S.C. § 2000bb-1(b) (2006).

¹⁰⁶ *Id.*

¹⁰⁷ While it has yet to be held that the government has a compelling interest in preventing the cruel killing of animals, the Supreme Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* suggested that such an interest may exist. 508 U.S. 520, 538–39 (1993). Although the court in *Hialeah* struck down as unconstitutional ordinances that prohibited ritual slaughter, Justice Blackmun stressed in his concurring opinion that the outcome of the case did “not necessarily reflect [the Supreme] Court’s views of the strength of a State’s interest in prohibiting cruelty to animals.” *Id.* at 580. He proceeded to comment that “[t]he number of organizations that . . . filed amicus briefs on behalf of this interest . . . demonstrate[d] that [the prevention of animal cruelty] is not a concern to be treated lightly.” *Id.*

¹⁰⁸ 508 U.S. 520 (1993). Note, however, that this case was decided before the enactment of the RFRA and consequently did not apply the test laid out in the Act.

¹⁰⁹ *Id.* at 538.

dress the city's interest in preventing cruelty to animals; this interest could be achieved by simply regulating the treatment of animals.¹¹⁰ Although the Court suggested that it might be possible to restrict the method of slaughter itself, it is clear from the opinion that this could only be done if the method of slaughter used in Santeria sacrifices was determined to be inhumane.¹¹¹ Where, as in the case of kosher slaughter, the evidence shows that the method of slaughter can be performed in a humane fashion through improved government regulation, a complete prohibition of such slaughter is not necessitated by the government's interest in ensuring the humane killing of animals.

C. *Revisiting Jones v. Butz: The Constitutionality of the Current Religious-Slaughter Exemption*

When Congress enacted the HMLSA, it decided to completely exempt religious slaughter and handling in connection with such slaughter from the Act's requirements. When considering the constitutional implications of regulating kosher slaughter, one must ask whether this approach itself is constitutionally flawed. In addressing this query, another aspect of the First Amendment becomes relevant: namely, the Establishment Clause. In addition to disallowing interferences with free exercise, the First Amendment prohibits Congress from making any law "respecting an establishment of religion"¹¹² Courts have interpreted this clause as prohibiting the government from promoting or affiliating itself with any religious doctrine or organization.¹¹³ In *Lemon v. Kurtzman*,¹¹⁴ the United States Supreme Court held that, to avoid violating the Establishment Clause, a law must: (1) have a secular purpose, (2) neither advance nor inhibit religion in its principal or primary effect, and (3) not foster an excessive entanglement with religion.¹¹⁵

In the 1974 case of *Jones v. Butz*,¹¹⁶ a challenge was mounted against the HMLSA's religious-slaughter exemption. The plaintiffs did not challenge the exemption of *shechita* itself, but instead argued that

¹¹⁰ Another issue in this case was that even if the ordinances in question were aimed at preventing cruelty to animals, they were underinclusive in achieving this aim because they permitted many other kinds of animal deaths for non-religious purposes. The ordinances thus pursued "the city's governmental interests only against conduct motivated by religious belief" and consequently violated the First Amendment. *Id.* at 543–46. If kosher slaughter can be performed in as humane a manner as slaughter involving pre-cut stunning, a similar argument could surely be raised against legislation that completely prohibited kosher slaughter but permitted slaughter with stunning.

¹¹¹ *Id.* at 539. Interestingly enough, this required a determination that Santeria sacrifice was less humane (because it was less reliable) than kosher slaughter, which the Court noted has been approved by Congress as a humane method of slaughter. *Id.*

¹¹² U.S. Const. amend. I.

¹¹³ *Co. of Allegheny v. Am. Civil Liberties Union, Greater Pitt. Ch.*, 492 U.S. 573, 590 (1989).

¹¹⁴ 403 U.S. 602 (1971).

¹¹⁵ *Id.* at 612–13. This three-part analysis is often called the *Lemon* test.

¹¹⁶ *Jones*, 374 F. Supp. 1284.

by exempting pre-slaughter handling—thus permitting the shackling and hoisting of conscious animals—the humane purposes of the Act were frustrated, and deference was given to the tenets of one religious group in contravention of the First Amendment.¹¹⁷ The Court rejected both of these assertions. The basis for its holding was the congressional finding, expressed in the HMLSA, that handling in connection with religious slaughter is humane.¹¹⁸ Because Congress had determined as a general policy that shackling and hoisting conscious animals is humane, the exemption did not hinder the purposes of the Act. The exemption could also be regarded as furthering a secular legislative purpose (the establishment of humane standards for the slaughter of livestock) and as having the principal effect of providing for humane slaughter (rather than advancing religion). Thus, the Act satisfied the *Lemon* test and failed to violate the Establishment Clause.¹¹⁹

The fundamental flaw in *Jones v. Butz* is that the judgment is based entirely upon the assumption that the shackle and hoist of conscious animals is humane. By deferring to the findings of Congress, the Court managed to completely sidestep the most fundamental issue raised by the plaintiffs: the fact that this practice is *not* humane. If one accepts that the current HMLSA religious slaughter exemptions permit the inhumane treatment of livestock, it becomes obvious that the exemptions were motivated wholly by religious considerations. If this is the case, the religious slaughter exemptions fail the first leg of the *Lemon* test.

Failing the *Lemon* test would, on its own, usually be enough for the exemptions to have violated the Establishment Clause. However, another legal principle has bearing on this discussion. As noted by the Court in *Jones*, laws that would otherwise violate the Establishment Clause may remain constitutionally acceptable if they are necessary to *accommodate* religious practices and thereby satisfy free exercise rights.¹²⁰ For example, religious exemptions from statutory obligations have been upheld in Sunday-closing and conscientious-objector

¹¹⁷ *Id.* at 1289–90. As highlighted by the plaintiffs, the exemption as it stands leads to the absurdity that while un-stunned shackle and hoist is considered inhumane during standard slaughter practices, it is considered humane for the purposes of religious slaughter. The only possible explanation for this approach, so the plaintiffs argued, is that Congress was deferring to the beliefs of a particular religious group and thereby violating the Establishment Clause. *Id.* at 1290.

¹¹⁸ *Id.* at 1291.

¹¹⁹ *Id.* at 1293.

¹²⁰ *Id.* at 1292. See also *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Sts. v. Amos*, 483 U.S. 327, 334–37 (1987) (holding that applying an exemption to the secular activities of religious organizations under § 702 of the Civil Rights Act of 1964 does not violate the Establishment Clause); *Walz v. Tax Commn. of the City of N.Y.*, 397 U.S. 664, 668–70 (1970) (concluding that granting property tax exemptions to religious organizations does not violate the Establishment Clause); *Zorach v. Clauson*, 343 U.S. 306, 310–14 (1952) (deciding that permitting public schools to release students during school hours to attend religious instruction does not violate the First Amendment).

cases.¹²¹ If the current exemption in the HMLSA is necessary to accommodate *shechita*, the Act may thus remain within the bounds of the First Amendment. However, an exemption of this breadth (i.e., an exemption that extends to practices upon which Jewish law is completely silent) is *not* necessary to accommodate *shechita*. As explained in the next section, a less permissive exemption would serve this purpose equally well. Thus, the HMLSA, as it stands, arguably violates the Establishment Clause.

D. Finding a Constitutionally Permissible Middle Ground

In light of the constitutional problems that accompany both the complete prohibition of *shechita* and the complete exemption of religious slaughter from legal regulation, the constitutionality of an approach that runs between these two extremes must be explored. The question is essentially whether it would be acceptable for Congress, while still permitting *shechita*, to follow the lead of other developed countries (such as Denmark, England, Canada, and Australia, discussed *supra* Section III(A)) and subject kosher slaughter to more stringent legal regulation. At this point, it must again be emphasized that the laws of *shechita* fail to specify how animals are to be handled in connection with slaughter. Most notably, they are completely silent as to how animals must be restrained for slaughter or treated during the period between the throat cut and loss of consciousness. If Congress was to step in and regulate these aspects of the slaughter process, it would not be requiring Jews to modify their behavior in a way that violated their religious beliefs; all of the religious requirements governing the performance of *shechita* could still be met. Jews would thus not be prevented from practicing their religion, and their constitutional right to free exercise would not be unduly restricted.

Regulation of this nature would also surely be consistent with the Establishment Clause. By ensuring the humane handling and slaughter of livestock, the regulation would have a primary effect other than the advancement of religion and would further the secular purpose that motivated the very enactment of the HMLSA. Since it would only cover those aspects of *shechita* on which religious law is silent, it would also avoid impermissibly entangling the government in religious issues.¹²² Such laws would thus satisfy the three-part *Lemon* test.

¹²¹ *Jones*, 374 F. Supp. at 1292–93.

¹²² In this regard, laws regulating kosher slaughter can be distinguished from the New York kosher fraud laws that were struck down in *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415 (2d Cir. 2002). In that case, the laws in question were aimed at prohibiting and punishing fraud in the sale of kosher meat. *Id.* at 418. The laws defined “kosher” to mean food that is “prepared in accordance with Orthodox Hebrew religious requirements.” *Id.* The laws also established an advisory board on kosher law and enforcement within the New York State Department of Agriculture and Markets. *Id.* at 419. The court regarded these laws as excessively entangling government and religion because they

The above analysis demonstrates that, from a purely constitutional viewpoint, taking the middle of the road—by permitting, but regulating, the practice of *shechita*—may well be the best route for Congress to follow. The same conclusion can be supported by purely practical considerations: The current approach, involving no legal oversight whatsoever, has proved ineffective to ensure that animals are treated humanely before and during *shechita*. The opposite extreme—a complete ban on kosher slaughter—is, however, completely politically infeasible. This point was demonstrated in 2003 by the reaction of Jewish and Muslim groups to an attempt to prohibit religious slaughter in Great Britain. The proposed ban generated so much controversy that it was eventually rejected by the British government.¹²³ Unlike either of these options, the middle-of-the-road approach would have a positive impact on animal welfare yet would be difficult for religious groups to oppose.¹²⁴ If anything, it could be argued that this approach ensures compliance with the Jewish prohibition against causing pain to animals (*tza'ar ba'alei chayim*)¹²⁵ rather than inhibiting the practice of Judaism.

E. Suggested Changes to the Current Law

Accepting that greater legal regulation of kosher slaughter practices is appropriate, it is suggested that Congress make the following changes to the current law in the United States. At a bare minimum, the current exemption of handling in connection with slaughter should be removed from the HMLSA, and the shackle and hoist of any conscious animal should be completely prohibited. Although the Act, since its inception, has outlawed the shackle and hoist of conscious animals, Congress exempted religious slaughter from this prohibition. When the HMLSA was originally enacted in 1958, the exemption was included because it was the only way of satisfying the Jewish require-

(1) t[ook] sides in a religious matter, effectively discriminating in favor of the Orthodox Hebrew view of dietary requirements; (2) require[d] the State to take an official position on religious doctrine; and (3) create[d] an impermissible fusion of governmental and religious functions by delegating civic authority to individuals apparently chosen according to religious criteria.

Id. at 425.

Criticisms of this nature could not be leveled against regulations that in no way required the government to interpret, or take a position on, matters of religion. By targeting conduct that religious law failed to govern instead of attempting to codify and enforce religious law itself, the kind of regulations advocated by this Article would surely steer clear of an Establishment Clause violation.

¹²³ Welty, *supra* n. 69, at 204. This was despite the conclusion reached by the FAWC that slaughter without pre-stunning could not be performed in a humane manner. FAWC, *Report on the Welfare of Farmed Animals at Slaughter or Killing—Part 1: Red Meat Animals*, *supra* n. 25, at 36.

¹²⁴ Welty, *supra* n. 69, at 205.

¹²⁵ Judaism 101, *Treatment of Animals*, <http://www.jewfaq.org/animals.htm> (last accessed Mar. 14, 2010).

ment that animals be conscious at the time of slaughter¹²⁶ and the requirement of the U.S. Pure Food and Drug Act of 1906¹²⁷ that animals not be slaughtered on the ground falling into the blood of another animal.¹²⁸ Ironically, the 1906 Pure Food and Drug Act was once strongly resisted by the Jewish community due to the animal welfare concerns surrounding the use of the shackle-and-hoist method.¹²⁹ In light of the existence of more humane methods of restraining conscious animals, there is no excuse for allowing kosher slaughterhouses to continue to shackle and hoist animals prior to slaughter.¹³⁰

Were the exemption of handling in connection with religious slaughter to be removed from the HMLSA, the USDA would be able to enact kosher slaughter regulations similar to those it has created for standard slaughter. Indeed, if the humane handling of livestock before and during slaughter is to be fully achieved, there is a need for either the HMLSA, or the regulations promulgated thereunder, to do more than simply prohibit the shackle and hoist of conscious animals. Insofar as small livestock is concerned, the use of special restraint pens need not be prescribed, as manual restraint of these animals is possible. In the case of large cattle, however, the use of USDA-approved mechanical restraint devices should be mandated. A similar approach to that taken by the British could be adopted: The USDA could be directed to only approve a restraint device if the device is “of such a size and design, and is able to be so operated, as to protect [bovines] from any avoidable pain, suffering, agitation, injuries or contusions while confined in it or while entering it.”¹³¹

Although the most humane means of restraint currently available are the various upright designs, the insistence by the ultra-Orthodox upon an inverted slaughter would, in all likelihood, sentence to failure any proposed law that required the exclusive use of upright devices. By preventing the ultra-Orthodox from performing *shechita* in accordance with their religious beliefs, such a law would interfere with free exercise rights. Additionally, in light of constant improvement in casting-pen designs, it is questionable whether a law permitting only upright restraint would pass the tests laid out by the RFRA. Even if a law

¹²⁶ Shechita UK, *supra* n. 18, at 5.

¹²⁷ 34 Stat. 768 (June 30, 1906).

¹²⁸ Dorff & Roth, *supra* n. 13.

¹²⁹ *Id.*

¹³⁰ Much of the current debate concerning the shackle-and-hoist method used during *shechita* has focused on the treatment of cattle. Due to their size and weight, fully grown bovines are likely to experience more severe injuries from being shackled and hoisted than will likely be experienced by smaller animals. However, this is no reason for the shackle and hoist prohibition to apply only to large cattle. By insisting, insofar as *standard* slaughter is concerned, upon the stunning of *all* livestock prior to shackle and hoist, Congress recognized that smaller animals may also suffer if conscious during this process. If the prohibition of shackling and hoisting conscious animals is extended to kosher slaughter, it is difficult to imagine why all livestock should not similarly be covered.

¹³¹ The Welfare of Animals Regs., at Sched. 12 ¶ 3(2).

could pass these tests, the resistance that such a law would invoke in certain sectors of the Jewish community may well make a requirement of this nature politically infeasible. Even in countries such as England, where the inverted slaughter of bovines is prohibited, meat from animals that have been killed in an inverted position is available through import.¹³²

In addition to regulating the method of restraint, a number of other legal requirements should be put in place to spare animals any avoidable pain during the slaughter process. As is the case in both England and Denmark, the law should require that the throat cut be performed immediately after the animal has been restrained. The post-cut moving of an animal (including the removal of its head from restraint so that the incision is able to close over itself or drag against other objects)¹³³ should be permitted only once the animal has lost consciousness. The removal of internal organs, such as the trachea and esophagus, as well as the performance of any other dressing procedure or disturbance of the incision, should similarly be prohibited unless the animal is insensible. Although some countries require immediate post-cut stunning, this practice is not accepted by Orthodox Jews.¹³⁴ Any law in the United States that required post-cut stunning would thus likely face the same hurdles that would confront a law mandating upright slaughter.¹³⁵ Given these difficulties, it may be inappropriate for the law to insist upon post-cut stunning at this time, especially since such stunning appears to be unnecessary if *shechita* is performed

¹³² The importation of meat into England is only permitted if it complies with EU import conditions. These conditions require that meat come only from approved countries and establishments and be accompanied by an attestation certifying that animals were slaughtered under conditions that are at least as humane as those required in the EU. For the detailed requirements, see DEFRA, *International Trade: Importer Information Notes—Red Meat Products*, <http://www.defra.gov.uk/foodfarm/animaltrade/imports/iins/meat/mp05.htm> (last updated Dec. 14, 2009) (last accessed Mar. 13, 2007); Council Directive 93/119/EC of 22 December 1993, *supra* n. 63, at 2. Because the general EU legislation does not insist upon the use of upright restraints, meat from animals that were inverted at the time of slaughter may be imported into EU Member States. However, because the EU prohibits the shackle and hoist of conscious animals and, in the case of bovines, mandates that animals be restrained using a mechanical method intended to avoid pain or injury, meat may not be imported into the EU from places like South America, where cruel, outdated methods of restraint are used.

¹³³ Dr. Temple Grandin has observed that, while cattle that are held in appropriate restraint devices throughout slaughter do not react to the throat cut (thus seemingly experiencing little pain), cattle react vigorously to any disturbance of the incision (i.e. when they are removed from restraint before losing consciousness). Grandin & Regenstein, *supra* n. 23.

¹³⁴ Frank E-mail, *supra* n. 38; Orthodox Union, *Message from Rabbi Dr. Tzvi Hersh Weinreb, OU Executive Vice President, and Rabbi Mennachem Genack, OU Kashrut Rabbinic Administrator* <http://www.ou.org/other/5765/shechita65.htm> (Jan. 29, 2010); Grandin, *Improving Religious Slaughter Practices in the U.S.*, *supra* n. 47.

¹³⁵ See *Jones*, 374 F. Supp. 1284 (illustrating the challenge to the HMLSA on the grounds that it authorized inhumane treatment through improper deference to religion by permitting the shackle and hoist of conscious animals).

under the appropriate conditions.¹³⁶ A more significant yet less contentious requirement may be one that prescribes that a captive-bolt gun be kept on hand and used where problems with the slaughter have left animals in pain or experiencing prolonged periods of consciousness.

F. The Impact That Changes in United States Law Are Likely to Have on the South American Problem

The final question to be addressed concerns the effect that any changes to existing laws in the United States are likely to have on the treatment of animals in South American slaughterhouses. Before answering this question, it must be noted that regardless of the United States' position on the matter, it is possible that South American establishments will at some point be forced to alter their slaughter practices. While still maintaining that slaughter methods used in South America do nothing to render South American meat non-kosher, Israel's chief rabbis have decided it is necessary to phase out the shackle-and-hoist method for large cattle.¹³⁷ In February 2008, they directed Israeli importers of kosher meat to exert pressure on South American slaughterhouses to replace the shackle-and-hoist method with mechanical restraint devices.¹³⁸ One major problem, however, is that the chief rabbis set no deadline by which these changes must be made.¹³⁹ Indeed, no progress has been made in the past two years, and requests that the Rabbinates address the issue have thus far gone unanswered.¹⁴⁰

At present, U.S. kosher-certification agencies continue to certify meat produced in South American establishments as being kosher, and the law as it stands permits this to happen. Would this position

¹³⁶ Grandin, *Improving Religious Slaughter Practices in the U.S.*, *supra* n. 47.

¹³⁷ Press Release, CHAI Online, *supra* n. 49. Unfortunately, this decision does not appear to have been made so much out of genuine concern for animal welfare as concern over defending *shechita* from Judaism's enemies. Frank E-mail, *supra* n. 38; Sela, *supra* n. 49. The decision was essentially a response to the controversy surrounding PETA's release of undercover video footage of a South American slaughterhouse.

¹³⁸ Sela, *supra* n. 49. Note that because the chief rabbis have not backed down on their insistence upon an inverted slaughter, the restraint devices likely to be installed in most South American establishments will take the form of casting pens. Frank e-mail, *supra* n. 38.

¹³⁹ This was in spite of the fact that groups such as Concern for Helping Animals in Israel (CHAI) urged the OU and Israeli Rabbinates to establish a committee to set a fixed timeframe for changes and to supervise the phase out of shackle and hoist throughout the kosher slaughter industry. Press Release, CHAI Online, *supra* n. 49.

¹⁴⁰ Email from Adam J. Frank, rabbi, Congregation Moreshet Yisrael, Jerusalem, to Melissa Lewis, *The Use of Shackle and Hoist in Shechita* (Oct. 1, 2009) (copy on file with Animal Law). A 2007 investigation by People for the Ethical Treatment of Animals (PETA) revealed that South American slaughterhouses were still using the shackle-and-hoist method on conscious livestock, leading PETA to urge the Rabbinates to address this slaughter method. PETA, *Urge the Rabbinates to Uphold Promise to Phase Out "Shackle and Hoist,"* <https://secure.peta.org/site/Advocacy?cmd=display&page=UserAction&id=3052> (last accessed Apr. 17, 2010).

change if Congress subjected kosher slaughter to more stringent legal regulation? The answer lies in the regulations governing the import of meat into the United States.¹⁴¹ The regulations provide that foreign countries and establishments can only become eligible to import meat into the United States following an equivalence determination by the Food Safety Inspection Service (FSIS). The FSIS must be satisfied that the foreign country's meat-inspection system ensures compliance with requirements equivalent to those governing slaughterhouses in the United States.¹⁴²

One result of the equivalence-determination requirement is that meat can only be imported from countries that require humane handling practices that equate to those required in the United States.¹⁴³ Since the HMLSA permits kosher slaughterhouses to handle and slaughter animals in any manner accepted by kosher-certification agencies, U.S. law does nothing to prevent the importation of kosher meat that has been produced in an inhumane manner. Again, the task of ensuring the humane treatment of animals has been left to kosher-certification agencies, and these agencies have failed to insist that livestock is killed in a humane manner. If, however, kosher slaughterhouses in the United States were legally obliged to adhere to certain humane handling requirements, meat could only be imported from countries that insisted upon similar requirements. If, for example, the shackling and hoisting of conscious animals were completely outlawed in the United States, no meat produced from an animal that was killed using this method could be legally imported into the country. A change in the current legal approach to kosher slaughter in the United States would thus have the side effect of requiring South American slaughterhouses to alter their slaughter practices (should they wish to continue exporting meat to this country). This is yet another practical consideration supporting the amendment of the HMLSA to provide for greater regulation of *shechita*.

V. CONCLUSION

In ancient times, it may well have been the case that the practice of *shechita* represented the most humane method by which slaughter could be performed. Even by modern standards, many accept that this practice can be performed at least as humanely as the more recently developed methods of slaughter. However, with the slaughterhouses of today striving to mass-produce meat in as expedient and cost-effective a manner as possible, slaughter practices that are performed on conscious animals require significant oversight to safeguard animal wel-

¹⁴¹ 9 C.F.R. § 327.2 (2009).

¹⁴² 9 C.F.R. § 327.2(a)(1).

¹⁴³ E-mail from U.S. Food Safety and Inspection Service to Melissa Lewis, *Equivalence Determinations* (Mar. 21, 2008) (copy on file with *Animal Law*). See also 9 C.F.R. § 500 (2009) (allowing the FSIS to regulate and rescind approval for products inhumanely slaughtered).

fare. Although religious authorities in both the United States and Israel have tentatively begun to recognize the need to ensure humane treatment of animals during slaughter, no definitive steps have been taken to make this happen. In light of the failure of kosher-certification agencies to effectively police slaughterhouses in either this country or countries from which kosher meat is imported for American consumers, it has become necessary for Congress to step in and create a legal framework within which the practices of kosher slaughterhouses can be appropriately regulated. United States law currently assumes a passive role with respect to the regulation of kosher slaughter. This approach lies in stark contrast to that taken in many other parts of the world, where religious slaughter practices are heavily regulated so as to spare animals any avoidable pain. As this Article has demonstrated, the Humane Methods of Livestock Slaughter Act's current approach—namely, its exemption of not only ritual slaughter itself, but also handling in connection with such slaughter—is additionally unnecessary for the protection of religious freedom. In light of these facts, the time has come for Congress to stop paying mere lip service to the United States' policy concerning the humane treatment of livestock and to do something to ensure that this policy is actually achieved in practice.

