University of Arkansas at Little Rock Law Review

Volume 33 | Issue 1 Article 1

2010

That Ain't Kosher

Robert Steinbuch
resteinbuch@gmail.com

Brett Tolman

THAT AIN'T KOSHER

Robert Steinbuch and Brett Tolman***

Sholom Rubashkin is the former manager of America's largest kosher meat plant, located in Postville, Iowa.[1] Mr. Rubashkin's father started the business that provided kosher meat to Jews and others interested in the standards of glatt kosher meat throughout the Midwest and South.[2] Many of Mr. Rubashkin's former customers are observant Jews who face significant challenges in complying with their biblical dietary obligations, which require very specific methods of choosing and butchering meat.

These restrictions effectively mean that religious Jews may not buy meat in an ordinary supermarket or butcher shop, and they may not eat meat in virtually all restaurants. Compliance with these rules from Leviticus (and repeated in Deuteronomy) consumes a significant portion of the lives and activities of highly observant Jews. It was with this understanding that Mr. Rubashkin agreed to take over the business from his father. While Rubashkin strove to make his business profitable, much like rabbis and other religiously certified individuals, Mr. Rubashkin was also motivated to continue his father's business out of the duty he felt to provide a critically needed service to members of his religious community. In return, the community he served was grateful and pledged to support Mr. Rubashkin's efforts.

---

* Professor of Law, University of Arkansas at Little Rock School of Law. J.D. from, and John M. Olin Law & Economics Fellow at, Columbia Law School. B.A. and M.A. from the University of Pennsylvania. Former judicial clerk for the United States Court of Appeals for the Eleventh Circuit. Former attorney with the United States Department of Justice, the United States Department of Treasury's Internal Revenue Service, and the United States Senate Committee on the Judiciary. The author wishes to thank Professors Frances Fendler and Pearl Steinbuch for their guidance and input, without whom this project could not have been accomplished. The authors also wish to thank the excellent staff of the U.A.L.R. Law Review, including Daniel Haney, Candace Campbell, Robyn Horn, Mickey Stevens, and Seth Williams for their outstanding hard work and dedication. The University of Arkansas at Little Rock, William H. Bowen School of Law provides summer stipends to assist in conducting research such as this article. The paper is dedicated to Michael Shaheen Jr. [*sic* no comma]. For a related discussion, see an earlier discussion that appeared in the August 16, 2010 issue of the National Law Journal. Robert Steinbuch, Brett Tolman, *Justice Denied*, NAT'L L.J. August 16, 2010, at 34..

** Shareholder and co-chair of the Ray Quinney & Nebeker's White Collar Criminal Defense and Corporate Compliance Practice Group, Salt Lake City, Utah. Former United States Attorney for the State of Utah. Former Chief Counsel for Crime and Terrorism, United States Senate Judiciary Committee, Assistant United States Attorney, Law Clerk to Chief Judge Dee Benson, United States District Court, Utah. Adjunct Law Professor, University of Utah. J.D. from J. Reuben Clark Law School, Brigham Young University.

1. *Slaughterhouse Manager Convicted in Fraud Case*, N.Y. TIMES, Nov. 13, 2009, at A21, *available at* http://www.nytimes.com/2009/11/13/us/13verdict.html.

2. Ben Harris, *Ex-Agriprocessors Workers Detail Abuse in Wake of Raid* (May 29, 2008), *available at* http://www.jewishexponent.com/article/16202/.

In May 2008, aware of concerns over the problem of illegal aliens in the food-supplier industry, Mr. Rubashkin, through his attorney, contacted Immigration and Customs Enforcement (ICE) to address perceived concerns about illegal aliens working at his facility.[3] Shortly after, however, several hundred federal agents raided Mr. Rubashkin's business[4] and arrested three hundred and eighty-nine illegal aliens.[5] Although the Department of Homeland Security has since reversed ICE's raid policy such that this raid would never have occurred, Mr. Rubashkin was facing serious charges.[6] Mr. Rubashkin's company went bankrupt, and the Iowa town in which the company operated, Postville, is nearly insolvent.[7]

Mr. Rubashkin was initially charged with one violation of immigration law for the illegal aliens arrested at his plant.[8] Rubashkin was required to provide a $1 million bond and to wear an ankle bracelet.[9] "No other employer accused of violating the immigration laws has *ever* [had such restrictions]."[10] Mr. Rubashkin complied and was released from prison.[11]

On the day following his release on these terms, the prosecutors had Mr. Rubashkin arrested again—this time for two reasons. First, the prosecutors claimed that in the routine certifications that Mr. Rubashkin's company made to its bank since his original arrest, the company falsely said that it was in compliance with the law.[12] So the question is what was the alleged lack of compliance with the law? And the answer—the immigration issues on which he was just arrested. If it sounds circular, that is because it is. However, the prosecutors apparently believed that notwithstanding that Mr. Rubashkin had pled not guilty and maintained his innocence to the immigration charges, Mr. Rubashkin should have told the bank that he had broken the law—so much for the judicial system actually allowing a man to have his day in court.

Of course, the arrests of Mr. Rubashkin and of the illegal aliens were well known to the bank and the public. So, the bank to which Rubashkin

---

3. *Disparity Memo*, EQUAL AND FAIR JUSTICE FOR SHOLOM RUBASHKIN (Mar. 28, 2010), *available at* http://justiceforsholom.org/disparity-memo.

4. *See Kosher Meat Plant Owner Wages Behind-the-Scenes Campaign to Limit Jail Time* (Apr. 26, 2010), http://abcnews.go.com/Blotter/kosher-meat-plant-owner-wages-scenes-campaign-limit/story?id=10458624&page=1.

5. *Id.*

6. *Disparity Memo*, *supra* note 3, at 1.

7. *Id.*

8. Paul Berger, *Meat-Plant Boss Rubashkin Faces Life After Kosher Fraud*, THE JEWISH CHRONICLE (Apr. 29, 2010), *available at* http://www.thejc.com/news/world-news/31195/meat-plant-boss-rubashkin-faces-life-after-kosher-fraud.

9. Wayne Drash, *Former Manager of Largest U.S. Kosher Plant Arrested*, CNN (Oct. 30, 2008), http://www.cnn.com/2008/CRIME/10/30/kosher.plant.arrest/index.html.

10. *Disparity Memo*, *supra* note 3, at 3 (emphasis added).

11. Drash, *supra* note 9.

12. *Disparity Memo*, *supra* note 3.

made the allegedly false statements was fully aware of these facts. To add insult to already significant injury, the prosecutors later *dropped* the immigration charges that the prosecutors claimed Rubashkin should have said he was guilty of in his bank certification documents.[13] Thus, prosecutors charged and later convicted Mr. Rubashkin of failing to *disclose* a violation of law that, in the end, he was *never* found to have violated.

The second group of the new charges was that Mr. Rubashkin's company did not deposit all checks it received from customers in the account that was security for the bank loan, that the accounts receivable used to continue to qualify for his line of credit was inflated after his initial arrest, and that he had used (but repaid) money for a store and school in Postville that Mr. Rubashkin's company was administering.[14] To be clear, Rubashkin's efforts to prove that his business could pay the bank on the company's revolving line of credit after his initial arrest—as he *always* did prior to his initial arrest—were alleged to be, well, not kosher. But here is where it gets even more unfortunate.

Mr. Rubashkin's business suffered *as a result of his initial arrest.* Consequently, he could not show the accounts receivable sufficient to sustain his loan. Mr. Rubashkin believed that the crisis in his business caused by the arrest would abate: he relied on the fact that prior to his arrest he had sufficient income to make payments on his line of credit, coupled with his understanding in the highly religious Jewish community that if a critical service provider (like a kosher food supplier, a rabbi, a synagogue, etc.) needed temporary assistance, it got it from community members. The problem for Mr. Rubashkin was that he had no way of evidencing this form of potential assistance. That certainly does not excuse the use of false documents to the bank if he did so, but it does show that such actions were neither done for self-interest, nor destined to produce any loss to the bank or to anyone else.

Professor Frank Bowman of the University of Missouri School of Law, former federal prosecutor, Special Counsel to the U.S. Sentencing Commission, academic advisor to the Criminal Law Committee of the United States Judicial Conference, one of the authors of the *Federal Sentencing Guidelines Handbook* and an editor of the *Federal Sentencing Reporter*, rightly distinguishes between "[a] defendant who consciously sets out to steal or cause economic loss" and a defendant "who acts dishonestly but without the desire to steal or cause loss."[15] Mr. Rubashkin was never alleged to have

13. Jannay Towne, *Charges Dismissed: Judge Dismisses 72 Immigration Charges Against Former Agriprocessors CEO* (Nov. 19, 2009), http://www.whotv.com/news/who-story-rubashkin-charges-dropped-111909,0,4002466.story.

14. *Disparity Memo*, *supra* note 3, at 3.

15. Letter from Brett Tolman, Former U.S. Attorney, & Paul Cassell, Professor of Criminal Law, Univ. of Utah to Chief Judge Reade, N.D. Iowa (Apr. 19, 2010) (on file with au-

pocketed profits. The allegations against Mr. Rubashkin clearly fall into the latter category.

After bringing these new charges, the prosecutors sought to revoke bail alleging that Jews pose a unique flight risk as a consequence of the laws set up in Israel after World War II allowing members of the decimated Jewish community to go to Israel after their near extermination.[16]

At the time of the bail hearing, Mr. Rubashkin was a forty-nine-year-old married man and was the father of ten; he was a citizen of the United States, was born in Brooklyn, New York, and had no prior criminal record.[17] Mr. Rubashkin is not an Israeli citizen: he has no bank accounts, property or assets in Israel, he has no Israeli passport or visa, and his wife, children and parents reside in the United States and are United States citizens.[18]

The prosecutors argued that Israel's Law of Return, which allows Jews who move to Israel the right to become citizens, makes Jews a greater flight risk.[19] Of course, defining Jews as a greater flight risk is not only repugnant, but it is contrary to the Bail Reform Act, which does not permit ethnicity or religion to be considered as a bail-risk factor.[20] Even more troubling is that Magistrate Jon Stuart Scoles, who was handling the matter, accepted the prosecutors' repeated argument—ruling for the prosecution.[21]

Equally, Magistrate Scoles adopted the prosecutors' argument that if Mr. Rubashkin did not intend to flee, he would have kept certain valuables in a lock box, rather than in a tote bag that *his wife* put them in to keep them from getting mishandled by their autistic child.[22] The tote bag was kept in the same closet that contained the apparently critical lock boxes.[23] How can that matter? Moreover, the lockboxes were actually fireboxes that were never locked and were used to keep items safe from fire, not for storing cash.[24] One of the boxes had videos of the highly esteemed previous religious leader of the Lubavitch community, Rabbi Menachem M. Schneerson

---

thor).

16. Lynda Waddington, *Rubashkin Detention Subject of Letter to Attorney General*, THE IOWA INDEPENDENT (Dec. 26, 2008), http://iowaindependent.com/10019/rubashkin-detention-subject-of-letter-to-attorney-general.

17. Letter from Guy R. Cook & F. Montgomery Brown, Attorneys for Defendant, to Chief Judge Reade, N.D. Iowa (Dec. 8, 2008) (on file with the court case 2:08-cr-01324-LRR, Doc. 134-2).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Reply to Government's Resistance to Defendant's Bail Appeal, United States v. Rubashkin, No. 08-cr-01324-LRR (N.D. Iowa).

23. *Id.*

24. *Id.*

and family, and one had never been used and contained the original receipt.[25]

The prosecutors made various unsupported claims.[26] Even though the government never counted the cash in Mr. Rubashkin's home, prosecutors argued that it amounted to $20,000.[27] However, it was far less.[28] Indeed, it included silver coins traditionally used on the Feast of Esther (Purim) for acts of charity[29] and a stack of one dollar bills used for daily charity—a practice started by the previous religious leader of the Lubavitch community.[30] Agents found cash throughout the house, not just in one "stash."[31]

After Mr. Rubashkin was in jail for seventy-six days, the district judge ultimately rejected the prosecutors' biased argument that would have created a unique bail standard for 5,300,000 American Jews.[32] Contrary to the assertions of the prosecutors and the belief of Magistrate Scoles, Mr. Rubashkin never fled to Israel or to anywhere else.

Are we really surprised by this? It is no secret that some prosecutors will seek to prevent bail not for the allowed reasons—whether the crime is violent, drug related, or involves minors, whether the defendant will potentially obstruct justice, intimidate witnesses or jurors, or whether the defendant presents a serious flight risk[33]—but to exert leverage on defendants. It is even more troubling when such actions convince the decision makers.

Moreover, while the prosecutors held Mr. Rubashkin in jail and tried to prevent the court from awarding bail, the prosecutors began increasing the charges against Rubashkin.[34] They did this *seven times*.[35] Mr. Rubashkin was convicted on the financial charges.[36]

Without Mr. Rubashkin, his company went bankrupt, and the line of credit that had been consistently and timely paid went—for the first time—

---

25. *Id.*

26. *Id.*

27. *Id.*

28. Reply Brief for Defendant, *supra* note 22.

29. *Holy Days, Feasts & Festivals*, http://www.derech.org/purim.html (last visited Aug. 7, 2010).

30. *Living Torah*, http://www.chabad.org/therebbe/livingtorah/player_cdo/aid/372586/jewish/Sunday-Dollars.htm (last visited Aug. 7, 2010).

31. *Id.*

32. Chaim Dovid Zwiebel et al., *Rabbis Seek Release of Sholom Rubashkin* (Jan. 26, 2010), http://gazetteonline.com/local-news/2010/01/26/rabbis-seeks-release-of-sholom-rubashkin.

33. 18 U.S.C.S. § 3142(f) (2006 & Supp. 2008).

34. *See* Lynda Waddington, *99 and Counting: More Charges Filed Against Rubashkin*, THE IOWA INDEPENDENT (Jan. 17, 2009), http://iowaindependent.com/10658/99-and-counting-more-charges-filed-against-rubashkin.

35. Edwin Black, *Is Life for Rubashkin Overkill?*, ISRAEL NATIONAL NEWS (June 23, 2010), http://www.israelnationalnews.com/Articles/Article.aspx /9564.

36. *Slaughterhouse*, supra note 1.

into default.[37] The irony is palpable. The prosecutors said that after his arrest on the immigration claims, Mr. Rubashkin inflated his ability to pay on the loan that he had always paid. The prosecutors effectively shut down Mr. Rubashkin's business. It was only then that he could not pay on the loan. Absent the prosecutors' actions, Mr. Rubashkin's business likely would have continued successfully. This is not the kind of government assistance that banks want or need. Shutting down a going concern that is satisfying its financial obligations, with the resulting collapse of the local area, is not good for Americans in any economy, no less the weak one we encounter now.

Following Mr. Rubashkin's conviction, the prosecution sought a life sentence. However, it later revised its recommendation and sought a twenty-five-year sentence for Mr. Rubashkin—a man with no criminal history—on charges that he inflated his ability to pay a loan that he was consistently paying.[38]

Advocacy for a twenty-five-year sentence (reduced from the proposed life sentence) was not just—especially given its disparity from other sentences for similar convictions. The prosecutors' "reduced" proposal called for the Court to impose a sentence on Mr. Rubashkin equal to or longer than he could "receive for second-degree murder, kidnapping, rape of a child, or providing weapons to terrorist organizations."[39] Courts, of course, must impose sentences that reflect "the seriousness of the offense," but not one that is vindictive.[40] Whatever may be said about the offenses of which Mr. Rubashkin was convicted, it is not fair to say that they are as or more serious than second degree murder, rape, kidnapping, or arming foreign terrorist organizations.

Tragically, the District Judge, Linda Reade—a former federal prosecutor in Iowa—imposed a sentence of twenty-seven years.[41] This sentence is two years *longer* than the already exaggerated sentence sought by the prosecutors.[42] This sentence is drastically disproportionate to those imposed on others convicted of similar crimes and inappropriate for the crimes for which Mr. Rubashkin was convicted.

Judge Reade's sentence is even more problematic when viewed with the knowledge of her recently disclosed contacts and involvement in the

---

37. *See* Julia Preston, *Large Iowa Meatpacker in Illegal Immigrant Raid Files for Bankruptcy*, N.Y. TIMES, Nov. 6, 2008, at A21, *available at* http://www.nytimes.com/2008/11/06/us/06immig.html.

38. Nigel Duara, *Feds Back Off From Life Sentence for Slaughterhouse Fraud Case* (May 3, 2010), http://www.law.com/jsp/article.jsp?id=1202457537495.

39. Letter from Tolman & Cassell, *supra* note 15.

40. *Id.*

41. *See* Black, *supra* note 36.

42. *Id.*

case leading up to Mr. Rubashkin's arrest.[43] Prior to Mr. Rubashkin's trial, his attorneys made a Freedom of Information Request from ICE seeking documents concerning Mr. Rubashkin.[44] When ICE didn't produce the documents, Mr. Rubashkin's attorneys sued.[45] Over a year later, Mr. Rubashkin received the documents.[46] They show that Judge Reade had ongoing interaction with the U.S. Attorney's Office and ICE about the matter starting a half year prior to Mr. Rubashkin's arrest.[47] These meetings involved operational and strategic topics far greater than the mere "logistical cooperation" that Judge Reade had claimed was her level of involvement when she denied a recusal motion from another defendant in the case.[48]

The documents reveal that: Mr. Rubashkin's arrest seems timed to accommodate Judge Reade's personal vacation; Judge Reade and the U.S. Attorneys office "surveyed" the locale where detainees would be put and their trials held; Judge Reade expressed her personal commitment "to support the operation in any way possible"; Judge Reade was involved in meetings that covered "an overview of charging strategies"; and Judge Reade demanded on her own from the U.S. Attorneys "a final gameplan in two weeks" and a "briefing on how the operation will be conducted."[49]

Judge Reade never disclosed her involvement in these meetings.[50] Mr. Rubashkin's attorneys have moved to have Judge Reade recused retroactively.[51] The motion requests that another judge decide the question.[52] Mr. Rubashkin's attorneys are also considering filing complaints with the U.S. Justice Department against the prosecutors in the case for failing to disclose their communications with Judge Reade.[53]

To add further insult to injury, the Attorney General of Iowa, aware of the celebrity that federal prosecutors garnered as a result of the case against Mr. Rubashkin, brought charges against Mr. Rubashkin for knowingly hir-

---

43. Defense Lawyers in Rubashkin Case Question Federal Judge's Ties to Prosecution, August 5, 2010, available at http://legaltimes.typepad.com/blt/2010/08/defense-lawyers-in-rubashkin-case-question-federal-judges-ties-to-prosecution.html;, Memorandum of Law in Support of Defendant's Motion for a New Trial, U.S. v. Rubashkin, No. 2:08-cr-01324-LRR, Doc. 942-1 (N.D. Iowa filed August 5, 2010).

44. Memorandum of Law, *supra* note 43.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. Memorandum of Law, *supra* note 43.

51. *Id.*

52. *Id.*

53. *Id.*

ing employees under the age of eighteen.[54] The Attorney General charged Mr. Rubashkin with 9311 counts of violations of Iowa's labor laws. He dropped 9228 counts before trial and an additional sixteen after all of the evidence was presented—evidencing an abuse of process in the first place. To the chagrin of the Attorney General, however, the jury found Mr. Rubashkin not guilty.[55]

Several months ago, the then Deputy Attorney General, David Ogden, sent a memo to all federal prosecutors repeating a well-known seventy-five-year-old quote from the Supreme Court, explaining the obligations of prosecutors:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor–indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[56]

The logic applies to both the state and federal prosecutors in this case. Too many foul balls have been struck here. This case deserves a fresh look. Mr. Rubashkin's counsel have stated their intention to appeal. Hopefully, Mr. Rubashkin will get the reasoned reflection that is needed on appeal.

---

54. Nathan Lewin, *Rubashkin's Reputation* (June 9, 2010), http://www.jewishpress.com/pageroute.do/44067.

55. *Id.*

56. Memorandum from David W. Ogden, Deputy Attorney Gen., U.S. Dep't of Justice (Jan. 4, 2010) (on file with author), *available at* http://www.justice.gov/dag/dag-memo.pdf.