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# WHY A DUCK?<sup>1</sup>

## CALIFORNIA POKES A HOLE IN THE “IRON CURTAIN” OF FACTORY FARMING

*Sidney H. Storozum*<sup>†</sup>

*The reason for the prohibitions [against cruelty to food animals] is to teach us the trait of compassion and that we should not be cruel, for cruelty proliferates in the human soul.*<sup>2</sup>

-Nahmanides

### I. INTRODUCTION

In 1962, the motion picture-viewing public got its first glimpse of the torturous practice of force-feeding birds for the production of foie gras<sup>3</sup> in the Italian “shockumentary” film *Mondo Cane*.<sup>4</sup> The practice depicted was not on American soil and was apparently soon forgotten, for the film yielded no tangible benefit for the welfare of farm animals in the United States. Indeed, “factory farming”<sup>5</sup> has successfully avoided legal and moral scrutiny for many years, and the force-feeding of ducks and geese is but one of many questionable practices that now pass for “animal husbandry” as a matter of custom and law.<sup>6</sup>

However, on September 29, 2004, California Governor Arnold Schwarzenegger signed a bill prohibiting the force-feeding of any bird for the purpose of enlarging its liver beyond normal size and prohibiting the sale of

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1. For the uninitiated, the title is derived from the word banter made famous in the 1939 Marx Brothers motion picture romp, “The Cocoanuts.” The author does intend to move the reader towards an understanding of an answer to the title question.

2. This observation comes from the thirteenth century sage Moshe ben Nahman, also known by the names “Ramban” and “Nahmanides.” RAMBAN (NAHMANIDES), COMMENTARY ON THE TORAH: DEUTERONOMY 271 (Charles B. Chavel trans., Shiloh Publishing House 1976).

3. The French translation for “fatty liver.” The swollen, fat-laden bird livers are used to make pâté and other “delicacies.”

4. MONDO CANE (Woodhaven Entertainment 1962).

5. The term is metaphorically used to suggest that farm animals being raised to produce or become food are treated with no more deference than inanimate objects of manufacture, ignoring or disregarding their social structures and their ability to feel, among other things, pain and grief.

6. For a review of modern animal agriculture practices and the relative lack of legal constraints to protect farm animals from abuse and cruelty see David J. Wolfson, *Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production*, 2 ANIMAL L. 123 (1996).

foie gras in California.<sup>7</sup> The application of the bill is limited, however, by a seven-and-one-half-year delay in implementation for existing producers and sellers.<sup>8</sup> It is only the second time in United States history that a state has acted to prohibit a cruel farm animal husbandry practice previously deemed customary and acceptable. The first was the result of a successful voter initiative to amend the Constitution of Florida to limit the confinement of sows in small crates during gestation,<sup>9</sup> after industry lobbying had twice defeated legislative efforts.<sup>10</sup>

The significance of this legislation goes beyond the potential benefit sought on behalf of the feathered victims of force-feeding. It was initiated as an expression of moral outrage, but the measure's backers soon found themselves entangled in the political web created by a multitude of interested parties.<sup>11</sup> What appears, on its face, to be a clear victory for a biblically protected constituency<sup>12</sup>—the innocent and powerless animals raised for food—proves to be more an exercise in moral relativism and artful political compromise.<sup>13</sup> Moreover, there are tactical pitfalls to be overcome when the law is chosen as the instrumentality to enshrine the demarcation between right and wrong.<sup>14</sup>

This Note will consider the merits and shortcomings of the California statute, alongside the process employed to reach the final result. It will briefly review the legal and empirical status of farm animals from a historical, pragmatic and philosophical (including religious) perspective. Finally, it will suggest and evaluate some strategies to build upon the modest gains realized from the force-feeding legislation. Certain recurring themes are offered as being self-evident,<sup>15</sup>

7. CAL. HEALTH & SAFETY CODE § 25980 *et seq.* (West 1999 & Supp. 2005).

8. CAL. HEALTH & SAFETY CODE § 25984 (West 1999 & Supp. 2005) (making the legislation operative on July 1, 2012, for persons and entities currently engaged in the raising and selling of force fed birds).

9. FLA. CONST. art. X, § 21. *See also* Animal Rights Found. of Fla., *Floridians Use Citizen Initiative Process to Ban Abusive Factory Farming Method*, <http://animalrightsflorida.org/initiative.html> (last visited Dec. 18, 2006).

10. Ballot initiatives are both an expensive and inefficient means of changing public policy in an area as broad as farm animal abuse. Furthermore, such initiatives are not even permitted in twenty-six states. *See* David J. Wolfson & Mariann Sullivan, *Foxes in the Henhouse*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 205, 225–26 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

11. *See* discussion *infra* Part II.C.

12. *See* discussion *infra* Part II.B.4.

13. *See* discussion *infra* Part III.C.

14. *See* discussion, *infra* Part II.B.

15. 1) Societies want to be perceived as being morally righteous, 2) agribusiness interests want to make money and will support politicians who assist them, 3) agribusiness interests may use their influence to obfuscate and neutralize potential moral impediments to their profitability,

and they help explain the legislative compromises that often yield bills departing significantly from their sponsors' objectives. The delayed implementation component of the force-feeding ban is consistent with these themes, and will be the focus of some "heightened scrutiny."<sup>16</sup>

A variety of presuppositions, with respect to the inherent value of animal life, will be considered in the context of the philosophical arguments that inform the continuing debate on factory farming, ranging from animals as mere property, to animals as sentient beings, to animals as an integral part of the created order, all the way to animals entitled to quasi-human rights based upon their comparative levels of mentation.<sup>17</sup>

## II. BACKGROUND

### *A. The Practice of Force-Feeding Birds*

The goal of foie gras producers is to alter the metabolism of ducks and geese in a manner that causes their livers to swell to approximately ten times their normal size and to become heavily infiltrated with fat. They accomplish this by forcing a ten to twelve inch metal or plastic tube through the mouth and into the esophagus of the restrained bird, and then injecting under pressure an abnormally large meal of energy-rich grain products into the stomach.<sup>18</sup> Over the two to three week course of force-feeding, the amount of each meal is gradually increased from five to fourteen ounces. The forced feedings begin at the age of twelve to fifteen weeks, and are conducted two or three times daily. The birds are typically housed in very confined and darkened quarters, in order to keep them calm and inactive.<sup>19</sup> They develop hepatic lipidosis,<sup>20</sup> and frequently also suffer perforations and other wounds and infections of the esophagus, asphyxiation from improper tube placement, and secondary effects

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and 4) politicians must successfully court both the voting general public and the financial contributions of business and other interests in order to acquire and maintain power.

16. CAL. HEALTH & SAFETY CODE § 25984 (West 1999 & Supp. 2005).

17. See STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS 180–214 (2000). This author's bias towards animal welfare notwithstanding, there is no intent herein to elevate the cause of ducks and geese to that of mistreated classes of people, such as dispossessed American Indians or enslaved African-Americans. However, the broader public sense of morality, both secular and religious, should be loath to permit the status of animals to sink to the level of widgets.

18. *Force Fed Birds: Hearing on S.B. 1520 Before the S. Comm. On Buisness & Professions*, 2004 Leg. (Cal. 2004) [hereinafter *Senate Hearing*].

19. *Id.*

20. That is, "fatty liver syndrome," the pathological condition that is being intentionally induced.

of the overfeeding, such as liver hemorrhages and the inability to walk.<sup>21</sup> Most would soon die of their afflictions if they were not then immediately slaughtered. In fact, many do not survive to be slaughtered.<sup>22</sup>

The newly enacted statute affects only one producer, Sonoma Foie Gras, which produces approximately ten percent of the foie gras consumed in the U. S. market.<sup>23</sup> They utilize only Muscovy/domestic crossbred ducks and ship between 1,000 and 1,500 ducks each week.<sup>24</sup> The livers of these ducks, which weigh between one and two pounds, mostly sell for between \$20 to \$30 per pound in the wholesale market, with upscale restaurants comprising a major part of the customer base.<sup>25</sup> The legislation does, however, theoretically impact all foie gras consumers in California by making it illegal to sell any product in California that is the result of force-feeding a bird for purposes of abnormally enlarging its liver.<sup>26</sup> The remaining ninety percent of domestic production takes place in New York, but France remains the world leader, producing some 16,000 tons of foie gras annually.<sup>27</sup>

### B. Who's Looking Out for the Animals?

It may be difficult for the typical urban American to fathom the idea that an enlightened society with access to advanced technologies has incorporated (in fact, institutionalized) mistreatment of animals into its modern farming practices. A further misconception widely shared is that the law would not tolerate such an overt abuse of animals. To be sure, the law is evolving in this

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21. *Senate Hearing, supra* note 18.

22. A 1991 investigation of a New York foie gras producer by People for the Ethical Treatment of Animals found, *inter alia*, that "[e]ach worker was expected to force-feed five-hundred birds three times a day. So many ducks died when their stomachs burst from overfeeding that workers who killed fewer than 50 of "their" 500 received bonuses." Animal Frontline, *Factory Farming*, <http://www.animalfrontline.nl/bioindustrie/bio-eng.php> (last visited Dec. 18, 2006).

23. *Senate Hearing, supra* note 18.

24. *Id.*

25. Retail prices for fresh and canned foie gras range from around \$40 to more than \$100 per pound. Tanith Tyrr, *Foie Gras FAQ: The Liver Everyone Loves*, <http://member.tripod.com/~BayGourmet/foiegr.html> (1998) (last visited Dec. 18, 2006); Mire Poix USA, <http://enjoyfoiegras.com/products/foie-gras.html> (last visited Dec. 18, 2006); Eurogrocer, <http://eurogrocer.com/page/E/CTGY/fgp> (last visited Dec. 18, 2006). Of course, the entire bird carcasses are sold, not just the livers.

26. CAL. HEALTH & SAFETY CODE § 25982 (West 1999 & Supp. 2005).

27. World Society for the Prevention of Cruelty to Animals, *Forced Feeding—The Facts Behind Foie Gras Production*, <http://ww2.wsipa-international.org/action/foiegras/foiegras.html> (last visited Dec. 18, 2006).

area. However, a brief review of the history and trends in animal protection law will assist the reader to appreciate the subject statute in its proper perspective.<sup>28</sup>

### 1. Federal Legislation

The Animal Welfare Act ("AWA") was enacted by Congress in 1966 and amended several times through 1990.<sup>29</sup> Animal welfare groups largely view the AWA as a feeble and disappointing effort to protect animals because it fails to provide protection for many vulnerable species of animals, despite its grandiose name.<sup>30</sup> The AWA gives some cruelty protection to laboratory animals (but excludes rats and mice), exhibition and performing animals, and certain animals bred for commercial sale or used for fighting. *Excluded* from the list of covered warm-blooded animals *are all farm animals, horses and birds:*

(g) The term "animal" means any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet; but such term excludes horses not used for research purposes and other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. With respect to a dog, the term means all dogs including those used for hunting, security, or breeding purposes. . . .<sup>31</sup>

Factory farming is virtually untouched by this federal legislation.<sup>32</sup>

The most significant federal statute affecting farm animals is the Humane Slaughter Act of 1958, which was so poorly enforced that Congress passed a resolution in 2002 entitled "Enforcement of the Humane Slaughter Act."<sup>33</sup> Its purpose was to put the Secretary of Agriculture on notice that full enforcement

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28. A full treatise on the status of animal protection laws is beyond the scope of this Note.

29. 7 U.S.C.A. § 2131 *et seq.* (West 1999 & Supp. 2005).

30. MATTHEW SCULLY, DOMINION: THE POWER OF MAN, THE SUFFERING OF ANIMALS, AND THE CALL TO MERCY 382–88 (2002).

31. 7 U.S.C. § 2132(g) (West 1999 & Supp. 2005) (definitions).

32. David J. Wolfson, *Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production*, 2 ANIMAL L. 123, 125–26 (1996).

33. Farm Security and Rural Investment Act of 2002 §10305, 7 U.S.C. § 1901 (West 1999 & Supp. 2005).

was expected. Even if fully enforced, however, regulations promulgated pursuant to the act exempt the slaughter of poultry, which accounts for more than 95 percent (approximately 8.5 billion annually) of the animals slaughtered.<sup>34</sup> A federal statute enacted in 1877 governs interstate transportation of livestock, comparable to California's "twenty-eight hour law," but it too suffers from weak enforcement and trivial penalties. Furthermore, the Secretary of Agriculture has interpreted its outdated language to exempt transportation by truck, which is the dominant means of moving livestock.<sup>35</sup>

## 2. State Legislation

Animal cruelty legislation has traditionally been the province of the states. California has extensive legislation covering the treatment of animals, but like most states the greatest protection is afforded to companion animals.<sup>36</sup> The Penal Code contains a general proscription against torturing animals,<sup>37</sup> but also contains an implied (or, in some sections, expressed) deference to the Food and Agriculture Code for customary standards and specific legislation for farm animal welfare. At least one section of the cruelty statute contains a general exemption for farm animals, typical of many state anti-cruelty statutes: "This section shall not be construed to interfere with the production, marketing, or disposal of any livestock, poultry, fish, shellfish or any other agricultural commodity produced in this state."<sup>38</sup>

In surveying state animal cruelty statutes, explicit protections for farm animals are the exception, rather than the rule. In fact, twenty-two state codes grant a blanket exemption from their animal cruelty statutes for all "customary" farming practices, effectively empowering agribusiness interests to define the laws under which they operate.<sup>39</sup> The California Food and Agriculture Code,

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34. Wolfson & Sullivan, *supra* note 10, at 205, 207-08.

35. *Id.*

36. California did recently enact legislation protecting laboratory animals from the cruelty of unnecessary and duplicative testing of cosmetic products. CAL. CIV. CODE § 1834.8. *See also* Stacy E. Gillespie, *A Cover-Girl Face Does Not Have to Begin with Animal Cruelty: Chapter 476 Gives Legal Force to Alternative Testing Methods*, 32 MCGEORGE L. REV. 461 (2001).

37. CAL. PENAL CODE § 597(a) (stating in part: "[E]very person who *maliciously and intentionally* maims, mutilates, tortures, or wounds a living animal, or *maliciously and intentionally* kills an animal, is guilty of an offense punishable by imprisonment . . . or by a fine of not more than twenty thousand dollars . . .") (emphasis added).

38. CAL. PENAL CODE § 598b (West 1999).

39. The included states are Arizona, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Michigan, Missouri, Montana, Nebraska, Nevada, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Washington, West Virginia, and Wyoming. Wolfson, *supra* note 32, at 135-36, 152-54.

like other state codes, does, for example, address the minimum care of livestock in transport by limiting confinement of cattle in a semi trailer to twenty-eight hours from the time the animals were last fed and watered.<sup>40</sup> However, most of the statutes pertaining to animals in California's Food and Agriculture Code are concerned with the economic considerations of the *industry* of animal agriculture. In reading these statutes one is promptly reminded of the legal status of farm animals as "property." Thus proscriptions against cruelty sometimes exist only in the context of preventing harm to another's property.<sup>41</sup> State codes also provide rules concerning fish and wildlife, but again these are largely directed to the enterprise of "harvesting" game, as the euphemism goes. A number of states have recently enacted constitutional amendments protecting "the right to hunt and harvest game."<sup>42</sup> The property status of wildlife has not progressed appreciably since the time of *Pierson v. Post*.<sup>43</sup>

### 3. *The Role of the Courts*

The adjudication of civil actions in animal cruelty cases is severely limited by questions of standing. Federal actions are constitutionally limited to actual "cases" or "controversies."<sup>44</sup> Plaintiffs must plead a redressable, causally-related, injury-in-fact, with respect to the *plaintiff*, not the animal victim, who is the real party in interest.<sup>45</sup> Thus a potential plaintiff is reduced to pleading less tangible injuries, such as aesthetic or opportunity losses.<sup>46</sup> Congress and state legislatures may of course grant private causes of action on behalf of mistreated animals, but such grants could potentially subject corporate farmers to far greater liability than the publicly enforced statutes, such as the ban on force-feeding.<sup>47</sup> According to Richard Posner, courts are reluctant to expand the law

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40. CAL. FOOD & AGRIC. § 16908 (West 2001).

41. See, e.g., CAL FOOD & AGRIC. § 17553 (West 2001) (prohibiting the cutting of ears of bovine animals not in order to protect animal welfare, but rather to prevent fraudulent misidentification of animal "property").

42. See, e.g., VA. CONST. art. XI, § 4.

43. *Pierson v. Post*, 3 Cai. R. 175 (N.Y. 1805); *Bilida v. McCleod*, 211 F.3d 166 (1st Cir. 2000) (holding that the state had not deprived plaintiff of her property rights, where an orphaned raccoon was rescued and raised as a pet for seven years by plaintiff, before being seized and destroyed by animal control authorities because plaintiff lacked the permit needed to assert property rights over the wild animal).

44. U.S. CONST. art. III, § 2, cl. 1.

45. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 566–67 (1992).

46. *Id.*

47. Sonoma Foie Gras was sued in 2003 by the Animal Protection & Rescue League ("APRL") and In Defense of Animals ("IDA") for violating state cruelty laws. The plaintiffs sought an injunction to force Sonoma Foie Gras to cease production. The suit was initiated by



in a manner that grants rights to animals.<sup>48</sup> On the other hand, he suggests that courts would not be unreceptive to more vigorous enforcement of laws designed to prevent gratuitous cruelty to animals and to protect property rights in animals.<sup>49</sup> He further suggests that a relatively conservative animal welfare approach within the political arena may prove more efficacious for advancing protections for animals than, for example, attempting to secure constitutional rights (by analogy) for higher animals through the courts.<sup>50</sup>

#### 4. Religious Protection of Animals

While the primary beneficiary of modern American anti-cruelty legislation has been the companion animal, the laws of the Old Testament Bible gave both generous and explicit protection to farm animals, both to beasts of burden and to animals raised for food and fiber.<sup>51</sup> Later on in the Jewish tradition, laws were introduced by the Rabbis to insure the proper treatment of animals,<sup>52</sup> and Talmudic scholars portray a God who looks with favor upon the kind treatment of animals.<sup>53</sup> It is clear that there is a strong moral imperative in the Judeo-Christian tradition and scriptures favoring compassion and proper treatment for the animals "given" to mankind (in stewardship) for sustenance. The sponsors

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Sonoma against four individual APRL members for trespassing while trying to document conditions on the farm. See Joshua Coman, *Battle Over Duck Liver Continues*, Sonomanews.com, Apr. 30, 2004, available at [http://www.sonomanews.com/articles/2004/04/30/news/top\\_stories/news03.prt](http://www.sonomanews.com/articles/2004/04/30/news/top_stories/news03.prt) (last visited Dec. 18, 2006); *IDA Applauds Court Decision Forcing Foie Gras Farmer to Pay Attorneys \$21,000*, June 6, 2005, available at [www.stopforcefeeding.com/page.php?module=press\\_release&article\\_id=191](http://www.stopforcefeeding.com/page.php?module=press_release&article_id=191) (last visited Dec. 18, 2006).

48. Richard A. Posner, *Animal Rights*, 110 YALE L.J. 527, 533 (2000) (book review).

49. *Id.* at 539.

50. *Id.* See also WISE, *supra* note 17, at 180–214.

51. A commandment pertaining to the Sabbath observance explicitly states that one's ox, ass, and cattle should not do any work on that day. *Deuteronomy* 5:14. One is forbidden to muzzle an ox while it is threshing. *Deuteronomy* 25:4. One is prohibited from boiling a kid in its mother's milk. *Exodus* 23:19, 34:26; *Deuteronomy* 14:21. One must not take both a mother bird and her eggs or fledglings, but must let the mother go free. *Deuteronomy* 22:6–7.

52. A person is required to feed his animals before he may himself partake of food. *Berachot* 40a. Acts normally forbidden on the Sabbath are permitted in order to relieve an animal's pain. *Shabbat* 128b. See also BRADLEY SHAVIT ARTSON, *IT'S A MITZVAH!: STEP BY STEP TO JEWISH LIVING* 194 (1995).

53. Moses was chosen by God to lead the Israelites after he rescued a stray lamb: "You who have compassion for a lamb shall now be the shepherd of my people Israel." *Exodus Rabbah* 2:2. Rebecca was found to be a suitable wife for Isaac because of the compassion she showed to his camels. *Genesis* 24:11–20. See also RICHARD H. SCHWARTZ, *JUDAISM AND VEGETARIANISM* 22–23 (2d ed. 1988).

and supporters of SB 1520, the bill ultimately passed in California, reflected concerns rooted in the moral law.

### *C. Legislative History of California's Force-Feeding Ban*

SB 1520 was introduced by Senate President pro Tempore John L. Burton to the California Senate on February 19, 2004. Sponsors of the bill included The Association of Veterinarians for Animal Rights, Farm Sanctuary, Los Angeles Lawyers for Animals, and Viva!USA – International Voice for Animals. A long list of animal welfare organizations and individuals lent their support for the bill. The bill's opposition came from Sonoma Foie Gras, The California Farm Bureau Federation, The California Grain and Feed Association, The California Restaurant Association, The Pacific Egg and Poultry Association, a few other trade groups, and a sizeable group of individuals.<sup>54</sup>

Arguments were presented at a hearing on April 26, 2004. The bill's author and sponsors presented scientific studies backing up their assertions of the unnatural character and the cruelty of force-feeding, along with documentation of public opinion and the recent trend towards abandoning the practice. The following countries have ceased force-feeding of birds: Italy, Austria, the Czech Republic, Denmark, Sweden, Germany, Poland, Norway, Finland, Luxembourg, Holland, Switzerland, the United Kingdom, and Israel.<sup>55</sup> In August 2003, the Israeli Supreme Court issued a thirty-nine page decision declaring foie gras production to be contrary to the country's animal protection laws. In issuing its opinion, the Chief Justice concluded:

[N]o one denies that these creatures also feel the pain inflicted upon them through physical harm or a violent intrusion into their bodies. Indeed, whoever wishes to may find, in the circumstances of this appeal, *prima facie* justification for the acts of artificial force feeding, justification whose essence is the need to retain the farmer's source of livelihood and enhance the gastronomic delight of others . . . But this has a price - and the price is reducing the dignity of Man himself.<sup>56</sup>

The European Union Scientific Committee on Animal Health and Animal Welfare was commissioned in 1998 to perform a study on the animal welfare aspects of foie gras production on geese and ducks. The committee, which included a dozen professors of veterinary medicine and agricultural scientists

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54. *Senate Hearing*, *supra* note 18, at 8.

55. *Id.* at 6.

56. *Id.* at 7.

from across Europe, reached the obvious conclusions: that force-feeding, combined with the incident confinement conditions, creates very high levels of emotional and physical stress and disability for the birds, and leads to elevated death rates.<sup>57</sup>

A 2004 Zogby International poll of one thousand “likely voters” nationwide indicated that 77% of voters agreed that the process of force-feeding ducks and geese to produce foie gras should be banned by law in the United States, while 16% disagreed and 7% were not sure.<sup>58</sup> California legislators thus found themselves in the classical bind: follow the money (and the relationships forged with business supporters), or go “populist.” The bill’s opponents gave them little to work with in the way of arguments that would play well with the public. Opponents contended that force-feeding to produce foie gras is neither unethical nor harmful to the ducks. They claimed it “mimics a natural process” during which ducks gorge themselves prior to migration.<sup>59</sup> They argued further that banning a specific product based on emotions rather than facts sets a dangerous precedent.<sup>60</sup>

Faced with this political quandary, legislators struck a deal with the parties. On May 5, 2004, the bill was amended to delay implementation for seven and one-half years, enabling supporters to procure the one additional vote needed to get the bill passed out of the Senate committee.<sup>61</sup> On August 26, 2004, after reconciling minor amendments between the Assembly and the Senate, the bill passed both chambers by substantial margins and was presented to the governor. Governor Schwarzenegger issued the following signing message on September 29, 2004:

To the members of the California State Senate:

I am signing Senate Bill 1520 which prohibits a person from force feeding a bird for purposes of enlarging its liver.

This bill’s intent is to ban the current foie gras production practice of forcing a tube down a bird’s throat to greatly increase the

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57. *Id.* at 6.

58. *Id.* at 4–5.

59. These are, in fact, *not* migratory species of ducks. The hybrid duck commonly used in foie gras production is a cross between a non-migratory tropical species (Muscovy) and a domestic species not capable of flight (Pekin). JOHN K. TERRES, THE AUDUBON SOCIETY ENCYCLOPEDIA OF NORTH AMERICAN BIRDS 178 (1991).

60. *Senate Hearing*, *supra* note 18, at 10.

61. COMPLETE BILL HISTORY FOR S. B. NO. 1520 at 1 (2004).

consumption of grain by the bird. It does not ban the food product, foie gras. This bill provides 7 and one half years for agricultural husbandry practices to evolve and perfect a humane way for a duck to consume grain to increase the size of its liver through natural processes. If agricultural producers are successful in this endeavor, the ban on foie gras sales and production in California will not occur.

Sincerely, [sic]

Arnold Schwarzenegger<sup>62</sup>

It does not require a political science degree to observe how the winks and nods nearly jump off the page. The governor's message lacks fundamental consistency with the legislative intent, as expressed in § 25984:

(c) It is the express intention of the Legislature, by delaying the operative date of provisions of this chapter pursuant to subdivision (a) until July 1, 2012, to allow a seven and one-half year period for persons or entities engaged in agricultural practices that include raising and selling force fed birds to modify their *business practices*.<sup>63</sup>

### III. STATUTORY ANALYSIS

#### *A. Practical Considerations for Enforcement*

The two major components of the statute present different levels of challenge for law enforcement personnel. The proscription against force-feeding should presumably be easy to monitor, since only one producer is involved. With various officers empowered to issue citations, routine inspections and responses to complaints are likely to be effective.<sup>64</sup>

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62. CAL. HEALTH & SAFETY CODE § 25980 (West 1999 & Supp. 2005) (historical and statutory notes).

63. CAL. HEALTH & SAFETY CODE § 25984 (West 1999 & Supp. 2005) (emphasis added).

64. As is written in the statute:

(a) A peace officer, officer of a humane society as qualified under Section 14502 or 14503 of the Corporations Code, or officer of an animal control or animal regulation department of a public agency, as qualified under Section 830.9 of the Penal Code, may issue a citation to a person or entity that violates this chapter.

The civil penalties (and the potential for adverse publicity) appear adequate to deter noncompliance. The prospect of additional charges under the cruelty statutes further buttresses the deterrent effect.<sup>65</sup> The revenue generated from successful prosecutions is payable to the enforcement agency initiating the proceedings, reducing the burden of enforcement.<sup>66</sup> Furthermore, Sonoma Foie Gras and its allies were clearly participants (however reluctant) in the negotiating process that led to the passage of the amended bill, which supports a reasonable expectation of voluntary compliance.

The second prong of the statute may not fare as well: "A product may not be sold *in California* if it is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size."<sup>67</sup> The language may well be characterized as "a loophole waiting to happen." An obvious weakness is that the *point of sale*, for all but the final consumer (typically the California restaurant patron), can easily be arranged to occur outside of California. With respect to restaurant sales, the obstacles presented by the statute seem unlikely to severely test the ingenuity of entrepreneurs, given the operative term "sale," when accorded its ordinary meaning.<sup>68</sup> Internet sales from out-of-state sources offer similar opportunities to circumvent the letter of the law, based on where the customer takes possession.

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(b) A citation issued under this section shall require the person cited to pay a civil penalty in an amount up to one thousand dollars (\$1,000) for each violation, and up to one thousand dollars (\$1,000) for each day the violation continues. The civil penalty shall be payable to the local agency initiating the proceedings to enforce this chapter to offset the costs to the agency related to court proceedings.

(c) A person or entity that violates this chapter may be prosecuted by the district attorney of the county in which the violation occurred, or by the city attorney of the city in which the violation occurred.

CAL. HEALTH & SAFETY CODE § 25983 (West 1999 & Supp. 2005).

65. See discussion *infra* Part III.D.2.

66. See CAL. HEALTH & SAFETY CODE § 25983(b) (West 1999 & Supp. 2005).

67. CAL. HEALTH & SAFETY CODE § 25982 (West 1999 & Supp. 2005) (emphasis added).

68. For example, "Your appetizer (pâté de foie gras) comes free with your entrée purchase." One can readily concoct any number of variations on this type of theme to bypass a "sale" to the final consumer, since the law "does not ban the food product, foie gras." See *supra* note 62 (Schwarzenegger signing statement).

## *B. Survivability Under Legal Challenge*

### *1. The Dormant Commerce Clause*

Legal challenges may also loom, as the statute may be vulnerable with respect to the Commerce Clause of the United States Constitution. Under “dormant Commerce Clause” analysis, the California statute’s sale provision would not likely be found to facially discriminate against interstate commerce, since it does not favor California producers over out-of-state sellers. Thus it would need only to survive a “balancing test” of the state’s interests against the burden on interstate commerce.<sup>69</sup>

Health and safety defenses of the legislation would be difficult to prove. (Recall that the statute was enacted under the Health and Safety Code.) The enlarged bird livers, although medically viewed as pathological with respect to the bird, are not considered unsafe for human consumption. The birds, of course, do not have legal standing to act on behalf of their *own* health and safety, although internationally the law is evolving in this regard.<sup>70</sup>

Anti-cruelty legislation, usually within the criminal codes, is traditionally part and parcel of the state’s police powers.<sup>71</sup> Where the intent is to act within that sphere, and the effect on interstate commerce is only incidental, the balance ought to tip in favor of the state’s interests. Justice Thomas, in his concurring opinion in *United States v. Lopez*, reflected the current trend in dormant Commerce Clause jurisprudence:

But it seems to me that the power to regulate “commerce” can by no means encompass authority over mere gun possession, any more than it empowers the Federal Government to regulate marriage, littering, or cruelty to animals, throughout the 50 States. Our Constitution quite properly leaves such matters to the individual

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69. See *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 675–79 (1981). An alternative test, proposed by Justice Rehnquist in his dissent, would defer to state legislatures when the benefit to a legitimate state police power could be shown to be more than trivial. See *id.* at 690, 700, 705–06.

70. The European Union (EU) elevated the legal status of farm animals from mere property to “sentient beings” in 1997, requiring all EU legislation and member states to pay full regard to the welfare requirements of animals in the formulation and implementation of EU policies on agriculture, research, and transport. See Wolfson & Sullivan, *supra* note 10, at 223.

71. As a practical matter, criminal code anti-cruelty statutes are difficult to prosecute, because of the need to prove a *mens rea*. CAL. PENAL CODE § 597 (West 1999). The problem is compounded by the trend to allow agribusiness interests to virtually define what is cruelty in state laws by exempting customary and/or “necessary” farming and husbandry practices. Judges’ hands are thus tied, and prosecutors are reluctant to bring cases. See Wolfson, *supra* note 6, at 132–39.

States, notwithstanding these activities' effects on interstate commerce. Any interpretation of the Commerce Clause that even suggests that Congress could regulate such matters is in need of reexamination.<sup>72</sup>

The burden on interstate commerce from the foie gras sales ban will fall on the two New York producers of foie gras and on importers who will be unable to sell their products inside California. The question is bound to arise as to whether California has a legitimate state interest in preventing animal cruelty *outside* its own borders, sufficient to justify any burden on interstate commerce. Intuitively, it is simply a matter of foreclosing surrogate out-of-state animal torturers from undoing the intended benefit of §25981 *within* California. It is not yet clear how the courts would respond to a challenge on these grounds.

## 2. Federal Preemption

Another potential hazard the new law might encounter is federal preemption. The federal government's current *laissez-faire* policy toward farm animal husbandry practices will not likely devolve to outright sanction of cruel farm practices, at least so long as agribusiness interests have sufficient safe havens (courtesy of the states which court their presence). If that were to happen, however, then a federal law or policy in conflict with the California statute would invalidate it under the Supremacy Clause.<sup>73</sup> Conversely, the best hope for force-fed birds, and indeed all factory-farmed animals, would be positive Congressional action under the authority of the Commerce Clause to alleviate the suffering of the food animal population.<sup>74</sup>

## C. Moral Relativism Meets Political Absolutism

### 1. The Philosophies of Animal Cruelty

The proper role and status of animals is a topic that pervades the theological and philosophical traditions that nurture human thought. The Old Testament and its commentaries instruct the Jewish tradition of being mindful of the welfare of farm animals. The Jew is forbidden from eating the flesh of an animal that has suffered.<sup>75</sup> Cogent biblical arguments have been made for the

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72. *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring).

73. U.S. CONST. art. VI, cl. 2.

74. *See Wickhard v. Filburn*, 317 U.S. 111, 124 (1942) (holding that Congress' commerce power extends even to intrastate activities which contribute to any measurable effect on interstate commerce).

75. 1 SOLOMON GANZFRIED, CODE OF JEWISH LAW—KITZUR SCHULHAN ARUKH 148–49

case that God intended man to be vegetarian,<sup>76</sup> having first addressed the question of meat consumption after the Great Flood. The Christian tradition emphasizes a greater division between man, made in God's image, and the animals, which lack even souls.<sup>77</sup> St. Thomas Aquinas expressed the traditional view:

Hereby is refuted the error of those who said it is sinful for a man to kill dumb animals: for by divine providence they are intended for man's use in the natural order. Hence it is no wrong for man to make use of them, either by killing them or in any other way whatever. If any passages of Holy Writ seem to forbid us to be cruel to dumb animals, for instance to kill a bird with its young: this is either to remove man's thoughts from being cruel to other men, and lest through being cruel to animals one becomes cruel to human beings: or because injury to an animal leads to the temporal hurt of man, either the doer of the deed, or of another."<sup>78</sup>

Seventeenth century "social contract theory" philosophers held animals to be outside the protection of any social contract. René Descartes and Nicolas de Malebranche popularized the idea that, besides lacking souls, animals are also incapable of feeling pain.<sup>79</sup> Descartes likened animals to "automatons, or moving machines," engaging in "experiments" in which animals were nailed to boards and cut open to reveal their beating hearts. The animals' predictable reactions to this brutality were dismissed as being equivalent to the noises of a malfunctioning machine.<sup>80</sup>

The "animal rights" movement advocates for legal status and rights for animals, and against the "use" of animals for human purposes, particularly for purposes of meat production. It draws support from the moral philosophical positions of utilitarianism, which recognize and attach great significance to the status of animals as "sentient beings," capable of experiencing both pleasure and pain. Utilitarian philosophers, such as Jeremy Bentham and John Stuart Mill, argue that because humans and animals can experience suffering and pain, we have the same reason for not mistreating both.

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(Hyman E. Goldin trans., 1963).

76. RICHARD H. SCHWARTZ, *JUDAISM AND VEGETARIANISM* 1–12 (2d ed. 1988).

77. JAMES RACHELS, *THE ELEMENTS OF MORAL PHILOSOPHY* 96 (2d ed. McGraw-Hill 1993).

78. *Id.*

79. *Id.* at 157.

80. Gary L. Francione, *Animals—Property or Persons?*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 108, 110–11 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).



But is there any reason why we should be suffered to torment them? Not any that I can see. Are there any why we should *not* be suffered to torment them? Yes, several....

The day *may* come, when the rest of the animal creation may acquire those rights which never could have been withhelden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. It may come one day to be recognized, that the number of the legs, the villosity of the skin, or the termination of the *os sacrum*, are reasons equally insufficient for abandoning a sensitive being to the same fate? What else is it that should trace the insuperable line? Is it the faculty of reason, or, perhaps, the faculty of discourse? But a full-grown horse, or dog, is beyond comparison a more rational, as well as a more conversible animal, than an infant of a day, or a week, or even a month, old. But suppose the case were otherwise, what would it avail? the question is not, Can they *reason*? nor, Can they *talk*? but, Can they *suffer*?<sup>81</sup>

The presence or absence of a soul has no bearing on whether animals experience many of the sensory, emotional, and mental processes ordinarily ascribed to humans.<sup>82</sup> The empirical and other scientific evidence affirming that they do is compelling.<sup>83</sup> Utilitarian theory advocates for the greatest good and the greatest happiness for the greatest numbers. When factory farming is analyzed under this theory (in which animals are counted among the “numbers”), the result is that the prevalent amount of animal suffering being inflicted is not justified by human necessity. It is well established that humans are able to satisfy their nutritional needs with a vegetable-based diet,<sup>84</sup> complemented, if desired, with foods derived from humanely treated animals. The latter option is consistent with the “animal welfare” point of view, which

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81. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 308–09 (Legal Classics Library spec. ed. 1986) (1789).

82. “The possibility that animals have mental experiences is often dismissed as anthropomorphic. . . . *This belief that mental experiences are a unique attribute of a single species is not only unparsimonious; it is conceited.* It seems more likely than not that mental experiences, like many other characteristics, are widespread.” TOM REGAN, THE CASE FOR ANIMAL RIGHTS 31 (1983) (quoting DONALD R. GRIFFIN, THE QUESTION OF ANIMAL AWARENESS: EVOLUTIONARY CONTINUITY OF MENTAL EXPERIENCE 104 (1976)).

83. For an expansive review of the supporting research, see *id.* at 34–81.

84. FRANCES MOORE LAPPÉ, DIET FOR A SMALL PLANET 77–85 (rev. ed. 1975).

embraces the same tacit acknowledgement of the legitimacy of animal agriculture found in the Bible, and is consistent with Old Testament admonitions to alleviate suffering and generally improve living conditions for animals. That approach is the author's principle reference point for analysis of the force-feeding statute.

## 2. Philosophical Jousting over the Ducks

The arguments advanced by Sonoma Foie Gras and its allies against SB 1520 hearken back to the philosophy of Rene Descartes, and his characterization of animals as being devoid of sensations and thoughts.<sup>85</sup> It is instructive to reflect upon how this method of assigning an oppressed or exploited group to a lower echelon of created order has been successfully repeated throughout history as a means of desensitizing certain susceptible elements of society to that which ought to evoke shock and outrage. Thus agribusiness interests believed they could safely rely upon public acceptance of their *de facto* demotion of ducks to animate, but spiritually and neurologically empty, instrumentalities. In our nation's history we have seen the American Indian and the African American relegated to "subhuman" (specifically, animal-like) status. The same was done to the Jews of Nazi Europe. Terms such as "vermin," "savages," and "apes" were commonly employed.<sup>86</sup> Post-Civil War white supremacist groups have continued to justify their bigotry and acts of racial hatred with similar tactics, utilizing a twisted Bible interpretation of Genesis that accomplishes the same goal.<sup>87</sup>

No level of rhetoric or legislative complicity can render the torturous practice of force-feeding birds (and many other customary factory farming practices) into something that is morally acceptable. Modern agribusiness boasts of how its state-of-the-art technologies increase the efficiency of the pipeline from feeding and housing to transporting to slaughtering.<sup>88</sup> Today's "farmers" are number crunchers and engineers. They frequently have no contact with the animals whose fate rests in their hands.<sup>89</sup> Visitors who wish to observe this technology are generally viewed with suspicion and are not warmly welcomed.<sup>90</sup> Factory farm visits do not resemble the Hershey's chocolate

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85. REGAN, *supra* note 82, at 3–5.

86. See Posner, *supra* note 48, at 535. See generally LUCY S. DAWIDOWICZ, *THE WAR AGAINST THE JEWS 1933–1945*, 8–47 (1986).

87. See, e.g., B. A. Robinson, *Christian Identity Movement*, Religious Tolerance.org, [http://www.religioustolerance.org/cr\\_ident.htm](http://www.religioustolerance.org/cr_ident.htm) (last visited Dec. 18, 2006).

88. SCULLY, *supra* note 30, at 247–86.

89. *Id.* at 249–55.

90. *Id.*

factory or Budweiser brewery tours. The documentation of factory farm practices often requires "infiltration" or trespassing on farm property. In 1991, People for the Ethical Treatment of Animals ("PETA") investigated foie gras production at Commonwealth Enterprises, a New York operation, which had repeatedly made claims that it made foie gras without force-feeding ducks.<sup>91</sup> Based on evidence from PETA's investigation, eyewitness accounts and veterinarians' statements, New York State Police raided the facility and charged the company with cruelty to animals.<sup>92</sup> According to PETA, the district attorney, under pressure from agricultural groups, withdrew the criminal charges, and persuaded the judge to seal the case file, so that the proceedings leading up to the dismissal would remain secret.<sup>93</sup>

### 3. *The Real Process of Deciding*

"No absolute right and no absolute wrong obtain in our treatment of animals . . . . The creatures under our dominion thus inhabit a moral void of subjective human desires and situational ethics."<sup>94</sup> Politicians arguably occupy a prominent place in this moral void, and their policy decisions set the enforceable standards of animal care. They are caught in a tug-of-war between the demands of their revenue suppliers (lobbyists and other contributors) and the ethical expectations of their constituents, while remaining focused on preserving their own power. It can be reasonably proposed that a politically proclaimed moral judgment ought to acquire considerable public gravitas when given the force of law, unless, and until, trumped by a superseding moral judgment.

Notwithstanding the mental gymnastic efforts to the contrary of Descartes and his progeny, the state criminal codes provide abundant evidence that animal cruelty, as a general proposition, is *malum in se*.<sup>95</sup> The same conclusion was proclaimed one hundred fifty years ago with respect to Negro slavery in the United States via the Emancipation Proclamation. However, in the years preceding that proclamation, politicians faced comparable dilemmas of reconciling what they knew to be morally wrong (or unsettling, at the very

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91. See *The Grief Behind Foie Gras*, <http://animal-lib.org.au/lists/foiegras/foiegras.shtml> (last visited Dec. 18, 2006).

92. *Id.*

93. *Id.*

94. SCULLY, *supra* note 30, at 192.

95. The common law historically has been in accord: "Cruelty to animals is an offense 'against public morals, which the commission of cruel and barbarous acts tends to corrupt,' . . ." *Animal Legal Defense Fund Boston, Inc. v. Provimi Veal Corp.*, 626 F.Supp. 278 (D. Mass. 1986) (quoting *Commonwealth v. Turner*, 145 Mass. 296, 300 (1887)).

least) with economic interests linked to property rights in slaves. In 1804 the New Jersey legislature passed an act abolishing slavery, but retained an exemption for those persons already born and enslaved.<sup>96</sup> Dismissing the disingenuous explanation offered for the exemption, it is readily apparent that a political compromise had been forged which would not inconvenience the property rights of existing slave owners.

The legislative history of § 25980 et seq. at least tacitly acknowledges that force-feeding is a form of animal cruelty. Not unlike the New Jersey slavery exemption, the negotiated delay of the statute's implementation until 2012 represents an economic (and possibly tactical) concession to the producer-perpetrators. Such compromises allow the central question, "Is it right or is it wrong?" to become obscured by art of political deal-making.<sup>97</sup> Was the governor's ridiculously conciliatory tone an acknowledgment of moral confusion, or was it a case of yielding to quasi-extortion?"<sup>98</sup>

#### *D. Assessment: Compromise or Giving Away the Store?*

Political reality necessarily includes the acceptance of a certain amount of compromise in the process of advancing legislation. Certain circumstances dictate that moral imperatives may justifiably be asked to yield a bit to economic and other considerations. For example, a formerly condoned or legally sanctioned practice, now outlawed, may have created a significant chain of reliance interests. The responsible arm of government may then be at risk of creating additional harm if it fails to mitigate on behalf of the relying parties. Thus, if total confinement swine operations were required to convert to a less restrictive arrangement, allowing for outdoor exercise and social interaction (as they ought to be), it would be reasonable to allow sufficient "phase-in" time to restructure facilities to meet the new requirements. Such accommodations are comparable to phased-in implementation periods for environmental regulations, e.g. for a factory or power plant to decrease emissions, or for auto manufacturers to improve fuel economy or safety features.<sup>99</sup> Under more pressing circumstances, accommodation might even be extended to assist businesses coming into compliance by allowing a reasonable time delay to

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96. See *State v. Post*, 20 N.J.L. 368 (N.J. 1845).

97. See SCULLY, *supra* note 30, at 350–53, 382.

98. See discussion *supra* Part II.C.

99. See, e.g., Marcia J. Tarbet, *Cost and Weight Added by the Federal Motor Vehicle Safety Standards for Model Years 1968–2001 in Passenger Cars and Light Trucks* (Dec. 2004), available at <http://www.nhtsa.dot.gov/cars/rules/regrev/evaluate/809834.html> (providing examples of safety standard effective dates logically related to the burden of compliance) (last visited Dec. 18, 2006).

recover significant investment expenses or by providing government financial assistance (e.g. in the form of loan guarantees or interest subsidies), depending upon the extent of the reliance interests being compromised by the new legislation.

Sonoma Foie Gras is not well situated to justifiably extract such concessions. The plain meaning intent of the delayed implementation provision is consonant with the intent as stated by Senator Burton in his letter of August 27, 2004, to Greg Schmidt, Secretary of the Senate:

Dear Greg,

This letter is to clarify the intent of my SB 1520.

SB 1520 will ban, beginning July 1, 2012, the force feeding of birds for the purpose of enlarging their livers.

In addition, SB 1520 will provide limited term immunity to any business that currently employs force feeding in the production of its agricultural products. The *immunity provision of SB 1520* only applies to acts of force feeding and is intended to prohibit any pending or future criminal or civil cause of action, including an action under Chapter 5....from being brought. The immunity does not cover acts prohibited by SB 1520 that occur after July 1, 2012.

Peace and friendship,

JOHN L. BURTON

Senate President pro Tempore<sup>100</sup>

The very characterization of § 25984 as an immunity provision exposes the absence of a morally justifiable underpinning for the concession to the producer.<sup>101</sup> It contains neither a requirement nor a justification to include a phase-in period, since the force-feeding ban could be effortlessly implemented within the timeframe of a single three-week cycle of force feeding. The nature of the operation does not suggest any reliance basis for allowing an extended

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100. CAL. HEALTH & SAFETY CODE § 25980 (West 1999 & Supp. 2005) (historical and statutory notes) (emphasis added).

101. Immunity is defined as "a right of exemption from a duty or penalty; a favor or benefit granted to one and contrary to the general rule." STEVEN H. GIFIS, LAW DICTIONARY 240 (2003). Immunity thus implies that *but for* the protection granted in the statute there would be no justification to automatically exempt a party from answering for a violation of the statute.

period to recover investment expenses in equipment related to the newly proscribed practice. Based on Sonoma Foie Gras' production turnover rate and the number of ducks force fed daily per employee, it can be inferred that the company would need approximately nine tubes and food injectors to maintain stated production levels.<sup>102</sup> Indeed, the company argued no claim in the legislative history for hardship due to unamortized equipment expenses.<sup>103</sup>

The "immunity" granted by the statute's delay in operative effect is, in effect, a reprieve for the foie gras industry. It is not a reprieve for the ducks, who will continue to suffer mistreatment, only now with the blessing of the state,<sup>104</sup> while the producers are allowed seven and one-half years to either find new ways to make money (implied intent as per the statute) or to "evolve and perfect a humane way for a duck to consume grain to increase the size of its liver through natural processes" (the Governor's hopeful position).<sup>105</sup> The net flow of political capital from the bargain struck by legislators will ultimately reflect the importance of the values compromised by the interested parties, as modified by the passage of time and by their evolving goals.

### *E. Implications, Strategies, Goals, and Prospects*

#### *1. Short-Term Outlook: The Transition Period*

It is significant that the statutory language either neglects or intentionally omits any mention of cruelty or inhumane treatment of animals, the presumed reason for the statute's enactment. One must look to the Historical and Statutory Notes of the Annotated Code (West) for support of any such inference, along with its corollary that such practices are *malum in se*. It is ironic that Governor Schwarzenegger's tongue-in-cheek signing message provides the only supporting evidence that the practice of force-feeding is not humane.<sup>106</sup> Even Senator Burton's letter omits any mention of cruelty.

The immunity provisions in effect during the delayed implementation period support the conclusion that, with respect to the practice of force-feeding of birds, the animal cruelty statutes of the California Penal Code<sup>107</sup> are overruled by implication for the same time period.<sup>108</sup> Ironically, then, the perpetrators of

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102. See discussion *supra* Part II.A.

103. *Senate Hearing*, *supra* note 18.

104. See discussion *infra* Part III.E.1.

105. CAL. HEALTH & SAFETY CODE § 25980 (West 1999 & Supp. 2005) (historical and statutory notes).

106. See discussion *supra* Part II.C.

107. CAL. PENAL CODE § 597 *et seq.* (West 1999).

108. "No civil or criminal cause of action shall arise on or after January 1, 2005, nor shall a pending action commenced prior to January 1, 2005, be pursued under any provision of law

the practice will benefit from *enhanced* legal protection until the provisions of §§ 25980-25983 become operative. Other inhumane practices associated with the production of foie gras, such as crowded, darkened, and unsanitary housing conditions, will technically remain within the reach of the anti-cruelty statutes, but are more difficult to successfully enforce.<sup>109</sup> Perhaps the publicity attendant to the statute's enactment has been sufficient to persuade prosecutors that stepped-up enforcement is worth the effort. Enforcement, however, may be further hindered by the operative effect provision in paragraph (c) of § 25984, which injects a measure of ambiguity into the overall immunity by adding, for the first (and only) time, language protecting "agricultural practices that include *raising* and selling force fed birds."<sup>110</sup> To the extent that other inhumane husbandry practices can be proven to be *specifically* attendant to the raising of *force-fed* birds, courts might be reluctant to convict on any cruelty charge during the immunity period.

## 2. Implementation: Smooth Sailing?

Conversely, once the force feeding statutes are given operative effect, law enforcement officers and prosecutors will be able to bring additional charges under existing animal cruelty statutes to buttress their cases and improve the chances for obtaining convictions or pleas. It seems unlikely, however, that with the public eye trained upon the lone producer in California, there will be any flagrant violations. Enforcement is more likely to be needed to stop attempts at circumventing the sales ban. Animal welfare/rights organizations can be expected to play a key role in monitoring compliance by restaurants and other resellers. They have already been engaging in demonstrations and other activities aimed at shaming restaurant owners into removing foie gras products from their menus, apparently with some success.<sup>111</sup>

It remains to be seen whether California authorities will invest the resolve and the resources necessary to enforce the sales ban against internet and other private selling forums. Californians are, of course, not prohibited from possessing or eating foie gras, either in or out of the state.<sup>112</sup> The sales ban will

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against a person or entity for engaging, prior to July 1, 2012, in any act prohibited by this chapter." CAL. HEALTH & SAFETY CODE § 25984(b)(1) (West 1999 & Supp. 2005).

109. See *supra* note 71. CAL. PENAL CODE § 597(f) also creates misdemeanor penalties for failure to provide proper care and attention for animals, but includes only minimal standards of care, relating primarily to failure to seek medical attention for sick and neglected animals.

110. CAL. HEALTH & SAFETY CODE § 25984 (West 1999 & Supp. 2005) (emphasis added).

111. See *supra* note 91.

112. Perhaps we will witness the rise of "foie gras parlours" as the next growth industry in neighboring Nevada, alongside prostitution, gambling, and tax-free corporations.

thus function more as a discouragement to consumption rather than as a prohibition of contraband, by reducing access and imposing a form of social stigma (comparable, perhaps, to the wearing of animal fur products).<sup>113</sup>

### 3. *Protecting the Gains*

A nagging question that remains is whether the delayed implementation period will be usurped by the bill's opponents to quietly lobby political support for its effective repeal or emasculation, including, perhaps, the governor's suggestion of perfecting a "humane" way to swell duck livers (medically an oxymoron). The answer lies with the public, which is presently unwilling to countenance the type of suffering imposed on birds to yield this food delicacy for the relatively few. Firm political resolve will be needed to resist any attempts to undermine the progress made thus far in California. To further solidify the protections tentatively secured will require the pushing forward of similar measures in New York and other states,<sup>114</sup> and ultimately a federal measure with the full constitutional underpinnings of the Commerce Clause.

### 4. *Revolution or Baby Steps?*

It has been proposed that a piecemeal approach of attacking the most egregious practices on a state-by-state basis offers the best hope, in the present climate, of building the necessary momentum towards acquiring the critical mass needed to place factory-farming issues on the national political agenda.<sup>115</sup> The force-feeding ban and the Florida gestation crate ban both enjoyed popular support among their respective voter constituencies. Their value as "test cases" is limited, however, by the fact that both are currently under implementation delays and neither measure impacts a major home state agri-industry. If, by comparison, a gestation crate ban were proposed for the swine industry in Virginia or North Carolina, one could expect the considerable influence and economic muscle of large producers to be brought to bear on defeating the measure. The sentiments of even a sympathetic public might wilt under the

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113. See *Famous Fur Foes*, <http://www.furisdead.com/FurFoes.asp> (last visited Dec. 18, 2006).

114. Force feeding bills have been introduced in several state legislatures. The New York measures, A 6212 and S. 3330, were withdrawn when their primary sponsor changed position on the measure. The amended bills are viewed by animal welfare advocates as industry-sponsored state endorsements of animal cruelty. See The Humane Farming Association, *Stop Legalized Force-Feeding in New York*, [http://www.hfa.org/force\\_feeding/ny3330a.html](http://www.hfa.org/force_feeding/ny3330a.html) (last visited Dec. 18, 2006).

115. Colin Kreuziger, *Dismembering the Meat Industry Piece by Piece: The Value of Federalism*, 23 LAW & INEQ. 363, 405 (2005).



pressure of arguments alleging dire economic consequences or threats to relocate to another state. Thus, under a federalist approach to curtailing farm animal cruelty, the likelihood of ever reaching the worst offenders seems remote.

Even if the public consciousness can be raised one issue and one state at a time, the prospect looms that federal pre-emption could wipe out years of gains in one fell swoop.<sup>116</sup> The approach being taken with respect to force-feeding legislation, however, represents the beginnings of a workable model. Animal welfare organizations, by targeting important states, are laying the groundwork necessary to warrant serious consideration of federal legislation *on this particular issue*. The precedent of Israel and many European countries in banning this one practice suggests that the method could work.<sup>117</sup>

### 5. Overcoming the Problem of Invisibility

To initiate legal-political changes in American society, it is necessary to first capture the attention of the public. The competition is fierce: Family demands, job demands, school work, web surfing, cell phone talking, sound-byte news, Monday Night Football- a myriad of reasons not to become engaged in the work of repairing our society. To compound the problem, agribusiness interests are adept at insulating the positive public image of their finished product from the unsavory process from which it springs.<sup>118</sup> While modern agricultural practices are not cloaked in absolute secrecy, it is evident that the vast majority of Americans will never have the opportunity or occasion to personally observe them, any more than they will observe the third world factories which produce the manufactured goods lining store shelves in developed countries. The strategic challenge then becomes one of how to motivate a distracted and disengaged public to confront an invisible problem.

Advocates for animal welfare can learn from the successes of their counterparts working to bring other moral issues to the public fore. Access to and skillful use of the various media channels has proven indispensable, for example, to conservative Christian organizations in their efforts to make their moral concerns an integral part of the American conversation. Repeated exposure to graphic (and therefore presumably "true") evidence of disturbing

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116. See discussion *supra* Part III.B.2.

117. See *supra* text accompanying note 55. Among the countries banning the force-feeding of birds, only Sweden, since as early as 1994, shuns the intensive confinement operations used to raise swine in the United States. SCULLY, *supra* note 30, at 263–64. The national appetite (or, perhaps, attention span) for confronting such issues may well be limited to one at a time, in spite of their common thread.

118. See SCULLY, *supra* note 30, at 28–31.

practices intuitively cannot help but break down barriers of ignorance and apathy. Then, depending upon which way the political winds are blowing, lawmakers are apt to discern opportunities in the issues and seize them as their own, or else simply feel pressured into taking a position.<sup>119</sup>

The process of gaining legislative attention can be hastened significantly when lawmakers have a personal interest in animal welfare issues. "Animal friendly" legislators at all levels of government have introduced, often with successful outcomes, bills targeting inhumane treatment of animals.<sup>120</sup> Typically, however, such bills take aim at softer targets, such as cruel or unsportsmanlike hunting practices, and avoid the more risky and sensitive issues surrounding factory farming.<sup>121</sup>

#### IV. CONCLUSION

For the reader still pondering the title question, "Why a Duck?," the comments on strategy and invisibility support the proposition that the duck is well suited to serve both as a poster child and as a prototype for legislative action. Those struggling to harmonize legislative codes and constitutions with the moral law have demonstrated the value of an approach that resonates at an emotional level with commonly held religious beliefs and other cherished values. As childhood icons, the ducks of Disney and Warner Brothers taught generations to be loyal, comforting, passionate, industrious, sympathetic, clever, tender, loving, and very, very silly. In real life, ducks must adopt multiple roles as their lives intersect with human activity. Various species of ducks have been either domesticated for food production, hunted in the wild, utilized to advance scientific progress, enjoyed in nature, kept as pets, and even become incorporated into religious ritual tradition (the gifting of Easter ducklings). At the risk of stretching a metaphor beyond its feathered skin, this child of nature seems to adapt readily in each of these realms (although with trepidation in some). She reminds us that even the humblest of creatures deserve more than the one-dimensional consideration they are accorded by the

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119. This process appears to have been at work in building momentum towards the introduction and passage of the foie gras bill. Legislators were moved to action after the public release of video footage of the force-feeding process. *Senate Hearing*, *supra* note 18. Video clip may be viewed at *Foie Gras: Delicacy of Despair*, <http://www.goveg.com/feat/foie/> (last visited Dec. 18, 2006).

120. The Humane Society of the U.S. maintains a current list of pending state and federal legislation. *See, e.g.*, [http://www.hsus.org/legislation\\_laws/state\\_legislation/](http://www.hsus.org/legislation_laws/state_legislation/) (last visited Dec. 18, 2006); [http://www.hsus.org/legislation\\_laws/federal\\_legislation/](http://www.hsus.org/legislation_laws/federal_legislation/) (last visited Dec. 18, 2006).

121. Recall that the Florida gestation crate ban failed as a legislative initiative, but succeeded as a voter referendum to amend the state constitution. *See supra* note 9.

dominant methodology of our agricultural industry. Matthew Scully's "Call to Mercy" serves as a sobering testament to our dominion and stewardship failures.<sup>122</sup>

Governor Schwarzenegger, while hedging his bets, did make legislative history. The force-feeding ban, though a small and tentative measure in the greater universe of farm animal abuse, is nevertheless a significant step in the right direction for a nation that is largely disengaged from issues of animal welfare. Marginalized and often disparaged, animal welfare/rights advocates stand to benefit in stature by raising issues such as this one, which was recognized as legitimate and then acted upon through mainstream channels. The methodology was sound, but in several respects the issue was easier than what lies ahead in the effort to make farming more humane.<sup>123</sup>

The legislative model used to secure the force-feeding ban in California might next lend itself to obtaining more humane treatment of veal calves.<sup>124</sup> Although widely practiced, veal farming caters to a relatively small niche market and has other general characteristics in common with force-feeding, thus making the abuses ripe for action at the state level. These, and all other animal husbandry practices that are plainly cruel, can and must be legally terminated. Legislators and the general public *are* persuadable. When forced to openly choose between right and wrong, they may well decide in favor of humane treatment for farm animals. The force-feeding ban demonstrates that this is more than just mere possibility.

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122. See SCULLY, *supra* note 30, at title page.

123. See discussion *supra* Part III.E.4.

124. For a concise review of customary farming practices, including veal calf raising, see Wolfson, *supra* note 32, at 133–34.