

5-1-1997

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Ming-Han Liu, *Reconsidering Animal Rights: Should Selling Live Animals for Food Consumption Be Banned*, 6 *Penn St. Envtl. L. Rev.* 279 (1997).

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Reconsidering Animal Rights: Should Selling Live Animals for Food Consumption be Banned?

I. Introduction

In the summer of 1996, an eighteen-month old dispute¹ in San Francisco concerning the sale of live animals turned into a heated debate.² A group of animal rights advocates claimed that merchants and shoppers have subjected live animals, including chickens, fish, and frogs to cruel treatment before the animals are sold and slaughtered for food consumption.³ The sales are conducted principally in the markets of Chinatown, and these allegations of unpopular treatment have outraged local merchants and community leaders.⁴ They maintain that the live animals are not pets and that it is hypocritical to single out the merchants' actions while millions of live animals are slaughtered everyday for food consumption worldwide.⁵

The conflicting interests on both sides of the debate have resulted in fierce confrontations.⁶ Merchants and other purchasers of live animals claim that it has long been a traditional practice to cook and consume meat while it is still fresh, not only because this method gives the meat a superior taste, but also because it provides

1. Christine Biegler, *Live Animals for the Cookpot Cause Controversy in San Francisco*, DEUTSCHE PRESSE-AGENTUR, Sept. 9, 1996, at International News. "The whole controversy started about eighteen months ago when animal protectionist Patricia Briggs complained, after a walk through Chinatown, to the city and district authorities in San Francisco about the 'horrible conditions' in which live animals were kept in some shops." *Id.*

2. Kathleen Sullivan, *Chinatown Merchants Respond To Charges; Hot Debate Over Treatment of Animals Sold For Food*, S.F. EXAMINER, July 18, 1996, at A1. Over one hundred people from each side of the dispute attended the heated, and sometimes emotional, hearing. *Id.*

3. *Id.*

4. April Lynch, *Supervisors Unlikely To Stop Animal Sales; S.F. Board Shows Little Interest in Ban*, S.F. CHRON., Nov. 16, 1996, at A15.

5. Jeff Jacoby, *Eating Animals Raises Quandary*, DENVER POST, Sept. 8, 1996, at F5. The Chinese merchants compare their slaughtering of birds in Chinatown to an assembly line in Arkansas. *Id.* See also Golden, *infra* note 9.

6. Sullivan, *supra* note 2.

health benefits.⁷ However, animal rights advocates claim that livestock have a right not to endure unnecessary pain and suffering before being slaughtered.⁸ The advocates support an outright ban on the sale of live animals for food consumption.⁹

The outcome of this controversy may signal how, in the next century, American society will balance the rights of live animals bred for food consumption, on the one hand, with the human interest in culinary pursuits of the tastes. The implications of this dispute may extend as far as prohibiting the sale of live fish and shellfish, including crabs, lobsters, clams, or oysters, for slaughter moments before cooking, as well as farm animals sold at farmers' markets.¹⁰

This comment will address two issues pertaining to the current controversy. Part I will examine the validity of a proposed San Francisco ordinance that calls for an outright ban on the sale of live animals. Part II will offer an alternative proposal, primarily based on existing state regulations, that calls for a less-drastic solution so as to balance the interests on both sides of the issue. In consideration of the on-going nature of the present dispute, the primary objective of this comment is to focus on providing a general framework for analyzing and balancing the need to feed humankind and the desire to protect live animals bred for food consumption.

II. Background

In the markets of San Francisco's Chinatown, cooking animals while they are still fresh has been a traditional practice with a centuries-old history.¹¹ Shoppers want to ensure that they are eating meat that is as fresh as it can possibly be and the surest way to ensure freshness is to purchase the animals alive and then

7. *Activists Howl Over Live-Animal Food Sales; Chinatown Merchants Defend Practices*, DALLAS MORNING NEWS, Aug. 14, 1996, at 4A. "Chinese shoppers have long believed that fresh meat is tastier and more healthful." *Id.*

8. *Id.* The animal rights "activists contend that the creatures often are killed in ways that cause them unnecessary pain" and that the animals "are treated inhumanely in the shops." *Id.*

9. Tim Golden, *Cuisine Raises Debate on Cruelty and Culture*, N.Y. TIMES, Aug. 26, 1996, at A1.

10. *Live Animal Sales by Chinese Restaurants Anger Animal Rights Activists* (DAYBREAK CNN, television broadcast, Oct. 19, 1996). For instance, it has been discussed that "fishermen and street vendors who boil shellfish alive on San Francisco's Fishermans Wharf" are not under scrutiny regarding their practice, although the issues are the same. *Id.*

11. Sullivan, *supra* note 2. Actually, the practice has a 3,000-year-old history originating in China. *Id.*

slaughter them moments before cooking.¹² The shoppers claim that fresher meats not only taste better,¹³ but also provide more health benefits. To the merchants and purchasers of live animals, these animals are not house pets, but are specifically bred for food consumption.¹⁴

However, animal rights advocates (hereinafter "advocates") view this situation differently. They object to the current practices on two grounds. First, they claim that live animals sold for food consumption are often killed in ways that cause them unnecessary pain,¹⁵ and that a humane treatment cannot be regulated once a live animal is taken home.¹⁶ The second ground for the advocates addresses the treatment of the animals before they are sold.¹⁷ Some of the inhumane treatment toward these animals include the following: cutting a live fish in half; blunting the tips of live chickens' beaks by searing (to keep them from pecking each other to death); packing live chickens into small cages, without food or water; fish laying on their sides because there was not enough water in the tank to support the number of fish, as well as providing filthy water for fish, turtles, and other creatures.¹⁸ Advocates also allege severe over-crowding of animals in confined spaces to the point of suffocation.¹⁹

The Chinatown merchants and shoppers have responded with anger to the animal rights advocates' allegations.²⁰ With regard to

12. Karyn Hunt, *Live-Animal Sales Called Mistreatment*, ROCKY MTN. NEWS, Aug. 18, 1996, at 6A. "The Chinatown merchants and shoppers insist on the ultimate assurance of freshness - buying chicken, fish and seafood live for slaughter at home, moments before cooking." *Id.*

13. *Activists Howl*, *supra* note 7.

14. *Id.* According to Rose Pak, a leading activist in the Chinese-American community, "[w]e are not talking about house pets here . . . [t]he trade is only in animals which have been specifically bred for consumption." *Id.*

15. *See Activists Howl*, *supra* note 7.

16. *Id.* *See also* Phillip Matier and Andrew Ross, *S.F. 'Fresh-Kill' Vendors, Activists Set for Unappetizing Debate*, S.F. CHRON., July 17, 1996, at A13. Rich Avanzino, head of San Francisco's Society for the Prevention of Cruelty to Animals (SPCA), stated that "trying to stop home animal slaughters . . . would 'call for creation of a bureaucracy and an involvement in people's lives that is terribly invasive.'" *Id.*

17. Matier and Ross, *supra* note 16. The observation was made by Matthew Kaplan, chairman of San Francisco's Commission of Animal Control and Welfare. *Id.*

18. *Id.*

19. Maria Goodavage, *Activists Try to Stop Sale of Live Animals in Chinatown*, DETROIT NEWS, Aug. 9, 1996, at A7. In addition, animal rights advocates also cited "lack of adequate water and food and tortuous methods of slaughter." *Id.*

20. Lynch, *supra* note 4.

slaughtering live animals, the merchants claim that "there is no more cruelty in their shops than there is to the slaughter of animals on a chicken farm in Texas or a meat-packing plant in Illinois,"²¹ and that "there is no more cruelty in selling a customer a live chicken to strangle at home than in selling her a cut-up, plastic-wrapped bird that was slaughtered on an assembly line in Arkansas."²² The merchants believe the only difference is that "What they do [is] in plain sight,"²³ and they claim that racism was a factor behind this protest.²⁴ Moreover, the merchants insist that they have complied with all legal guidelines in the handling of animals.²⁵ This fact is supported by a statement made by a senior health inspector with the Bureau of Environmental Health Management, who claimed that she had never seen any food safety violations in seven years of occasional health inspections of Chinatown shops.²⁶ In fact, only one store in Chinatown has ever been prosecuted for inhumane conditions, and the charges were subsequently dropped after expert testimony supported a claim that the store had followed proper state and federal standards.²⁷

This matter was brought before the San Francisco Commission of Animal Control and Welfare, and the Commission is considering two proposals.²⁸ The first proposal calls for an outright ban on the sale of all live animals, with the exception of fish and shellfish.²⁹ The second proposal would eliminate some sales of live animals and place severe restrictions on others, as governed by a series of city,

21. Golden, *supra* note 9.

22. Jacoby, *supra* note 5.

23. Golden, *supra* note 9.

24. Biegler, *supra* note 1.

25. Ray Delgado, *S.F. Food Fight; Tradition, Animal Rights Clash in Chinatown*, S.F. EXAMINER, July 16, 1996, at A1. "[S]tores . . . insist their handling of animals meets all legal guidelines." *Id.* See also Sullivan, *supra* note 2. In this article, Arnold Chin, a lawyer and co-chairman of the small business-oriented Chinatown Economic Development Group, said that "[n]othing has been presented to me that shows businesses in Chinatown are not in compliance" with standards already regulated by state and federal agencies. *Id.*

26. Delgado, *supra* note 25. Mary Murphy was a senior health inspector with the Bureau of Environmental Health Management. It is worth noting that, after she was told what some had witnessed in Chinatown, Murphy said she would look into the matter. *Id.* She said she was going to obtain more information, and that "[i]t sounds like there might be a need for more policies." *Id.*

27. *Id.* Ming Kee Game Birds was the only store that has been prosecuted for inhumane conditions. The District Attorney dropped the charges in 1993. *Id.*

28. Ray Delgado, *S.F. Panel Takes on Live Animal Food Sales; Commission Must Choose Ban or Limits*, S.F. EXAMINER, Aug. 8, 1996, at A1.

29. *Id.*

state, and federal guidelines.³⁰ On the other hand, there have been suggestions that existing laws concerning animal treatment and selling live animals are sufficient to resolve the current dispute.³¹

By mid-November of 1996, the Commission of Animal Control and Welfare finally voted on the present dispute. Citing animal cruelty issues, the Commission recommended banning the sale of live animals for food, including live mammals, birds, fowl, reptiles and amphibians.³² The Board of Supervisors is considering what actions to take, if any, regarding the Commission's recommendation.³³ If the Board ultimately decides to support the ban, the City Council and the mayor must then consider the proposal before it would become an ordinance. Although there have been indications that support for the ban is insufficient, both on the Board and the City Council, animal rights advocates have expressed an intent to put the ban on a ballot initiative before the general voters if the recommendation does not legislatively prevail.³⁴

30. *Id.* Under this proposal, "the only way live animals could be sold for food would be through specialty stores that kept live animals away from other food products, so that bacteria wouldn't spread." *Id.*

31. Sullivan, *supra* note 2. Local lawyer Arnold Chin stated that "[t]he City had no business interfering in a matter already regulated by state and federal agencies." *Id.* See also Delgado, *supra* note 25. In fact, the head of San Francisco's SPCA, Mr. Avanzino, also expressed that "the focus should stay on enforcing existing laws that prohibit anybody from abusing or mistreating animals." Matier and Ross, *supra* note 16. However, Mr. Avanzino was of the opinion that it would not be appropriate to apply the requirements to home animal slaughters. *Id.* It should also be noted that some people have suggested that existing law would prohibit sales of live animals at stores. For instance, the Coordinator of Action for Animals indicated in a letter to the editor that it is illegal to sell live animals for human consumption pursuant to the Retail Food Facilities law. *Live Food and Cruelty*, S.F. CHRON., Sept. 3, 1996, at A16.

32. Henry K. Lee, *Panel OKs Ban on Live Animal Sales; Chinatown Markets May Have to Reduce Stock*, S.F. CHRON., Nov. 15, 1996, at A21. "The Commission of Animal Control and Welfare voted 7-to-3, with one abstention, to recommend to the Board of Supervisors a ban on the sale of live mammals, birds, fowl, reptiles, and amphibians in San Francisco. The proposed ban would not apply to fish." *Id.*

33. Lynch, *supra* note 4. "Although city animal welfare officials voted . . . to prohibit market owners from selling live creatures . . . , the Board of Supervisors still has the last word." *Id.*

34. *Id.* "San Francisco's SPCA regularly gets national attention for its innovative programs, and has thousands of sponsors and volunteers. The group may help lead a drive to put the ban before the voters if the Board of Supervisors will not consider it." *Id.* According to the president of San Francisco's SPCA, "[i]f we won't get a fair hearing, then our only recourse is the people, . . . [t]he community will have to be given a fair chance to make its own decision." *Id.* It is worth noting that in April of 1997, a group of animal rights activists decided to file a lawsuit against twelve Chinese-American merchants in an attempt to stop them from selling live frogs, chickens, and rabbits for culinary purposes, citing to

PART I

The validity of the proposal calling for an outright ban of the sale of live animals can be analyzed by examining the sources of rights for animals, as well as the constitutionality of similar local legislation regulating the interests of animals vis-à-vis the interests of humankind.

A. *General Sources of Animal Rights*

Legislation enacted to protect animals from harassment and ill-treatment is generally recognized as a valid exercise of the police power,³⁵ and various federal and state laws have been drafted to achieve that endeavor.³⁶ In fact, virtually every state currently provides criminal statutes prohibiting animal cruelty.³⁷

However, such animal rights "have achieved something less than full recognition in the eyes of mainstream society."³⁸ In spite of the nationwide legislation prohibiting animal cruelty, the rights for animals are not in a sense as "fundamental" so as to rise to a stricter level of constitutional protection.³⁹ Nevertheless, the close interactions between human beings and animals for millennia have inevitably subjected animals to human laws and punishment.⁴⁰ In fact, it has been argued that animals are indeed entitled to some fundamental rights because there have been instances when society had deemed animals "worthy of a degree of Due Process, as well as what amounts to a specific constitutional" protection.⁴¹ Yet, when such animal rights are in direct confrontation with human interests, a controversy arises as to whether and to what extent the interests

the violation of local and state laws forbidding cruelty to animals. Harriet Chiang, *Suit Over Sales of Live Animals for Food; Supervisors, D.A. Ignoring the Problem, Animal Advocates Say*, S.F. CHRON., Apr. 16, 1997, at A15.

35. See Caroline E. Johnson, Comment, *Protecting the Animals: The Free Exercise Clause and the Prevention of Ritual Sacrifice*, 21 FLA. ST. U. L. REV. 1295, 1316-17 (1994).

36. See Brendan White, Note, *Sacrificial Rights: The Conflict Between Free Exercise of Religion and Animal Rights*, 9 ST. JOHN'S J. LEGAL COMMENT. 835, 848 (1994).

37. *Id.* The author lists statutes from forty-seven states that prohibit animal cruelty.

38. *Id.* at 846 (citing R. G. Frey, INTERESTS AND RIGHTS 16-17 (1980) and Emily S. Leavitt, *Introduction to the Original Edition in ANIMAL WELFARE INSTITUTE, ANIMALS AND THEIR LEGAL RIGHTS* xi (4th ed. 1990)).

39. White, *supra* note 36, at 846-47.

40. See *Id.* at 847.

41. *Id.*

between human beings and animals should be balanced.

B. The Constitutionality of the "Fresh Kill" Ban

The Supreme Court has decided a number of cases concerning the legislation of rights for animals vis-à-vis the interests of humankind. Two opposing trends have emerged from these decisions, which are particularly helpful in analyzing the constitutionality of the proposed ordinance to ban the sale of live animals for food consumption. First, the Court, in considering the significance of the First Amendment constitutional guarantee of free exercise of religion, has held that legislation is unconstitutional if it prohibits animal sacrifice of a sole religious group.⁴² Second, if the interests of human beings are founded merely on the basis of pleasure, state and local laws banning the killing of animals, such as in animal fighting sports, are valid and constitutional.⁴³ In the present dispute, the interests of the shoppers and merchants, with regard to live animals, appear to fall between the two extremes noted in these trends. While the interests of the shoppers and merchants do not fall under a protected religious practice, it is equally apparent that the slaughtered animals are not subjected to cruel treatments comparable to the type of death found in animal fighting sports.

C. Religious Practice v. Animal Rights

A state or local law banning animal sacrifice for religious purposes has been held unconstitutional by the Supreme Court. The U.S. Supreme Court case *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,⁴⁴ involved practices of the Santeria religion, a "syncretion, or fusion" of traditional African religion with significant elements of Roman Catholicism, where animal sacrifice is a central element.⁴⁵ Animals, including chickens, pigeons, doves, ducks, guinea pigs, goats, sheep and turtles are sacrificed by cutting carotid arteries in the neck prior to cooking and eating, except in healing and death rituals.⁴⁶

The *Lukumi* case was instigated by the announcement that a Santeria house of worship would be opened in Hialeah, Florida,

42. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

43. See generally the discussion under the section of this comment entitled "Animal Fighting Sports v. Animal Rights."

44. 508 U.S. 520.

45. *Id.* at 524-25.

46. *Id.* at 525.

which prompted the city of Hialeah to enact ordinances addressing the issue of religious animal sacrifice.⁴⁷ The ordinances declared that animal sacrificing was contrary to the public health, safety, welfare, and morals of the community.⁴⁸ Hence, the ordinances prohibited everyone from killing, slaughtering or sacrificing animals for any type of ritual, regardless of whether humans would consume the flesh or blood of the animals. However, exceptions existed for "slaughtering by 'licensed establishment[s]' of animals 'specifically raised for food purposes.'"⁴⁹ The ordinances further defined "slaughter" as "'the killing of animals for food'" and prohibited this act outside areas zoned for slaughterhouse use. The ordinance provided an exemption for the "slaughter or processing for sale of 'small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law.'"⁵⁰

The Court held that the city ordinances were unconstitutional because they were not narrowly tailored to advance the stated governmental interests.⁵¹ The Court determined that the numerous exemptions made within the ordinances resulted in a targeted prohibition of practicing the Santeria faith.⁵² For instance, if an animal is killed specifically to be consumed as food, and that killing does not occur during the course of a ritual, it would fall outside the ordinances' prohibitions.⁵³ The Court concluded that the ordinances were "overbroad or underinclusive in substantial respects,"⁵⁴ and that "[t]he proffered objectives were not pursued with respect to analogous non-religious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree."⁵⁵

The Court's decision in *Lukumi* indicates that a local ordinance that is both neutral on its face and of general applicability must be narrowly tailored to advance a stated governmental interest, when the ordinance is directed at religious practice.⁵⁶ To survive a claim of a violation of the free exercise of religion, a compelling state

47. *Id.* at 526-27.

48. *Id.* at 528.

49. *Lukumi*, 508 U.S. at 528.

50. *Id.*

51. *Id.* at 546. See also White, *supra* note 36, at 844-45.

52. *Lukumi*, 508 U.S. at 535-36.

53. *Id.* at 536-37.

54. *Id.* at 546.

55. *Id.*

56. Johnson, *supra* note 35, at 1312-13.

interest must be found.⁵⁷ However, where “government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling.”⁵⁸

Nevertheless, the facts surrounding the current animal rights debate are distinguishable from *Lukumi* in several respects. First, the interests of the shoppers and merchants of Chinatown do not appear to have risen to the level of requiring constitutional protection. The shoppers purchase live animals primarily for the animals’ superior taste, and the merchants sell the animals for a profit.⁵⁹ While the merchants have raised a claim of targeted racial discrimination,⁶⁰ it is not likely that this argument will succeed. A proposed ordinance prohibiting the sale of live animals, on its face, is unlikely to specifically target the activities taking place in Chinatown, but rather, will regulate those within the entire city. Moreover, some merchants have stated in interviews that a significant proportion of their customers are of Indian and European background;⁶¹ therefore, making the merchants’ claim regarding racial or ethnic discrimination less plausible.

The human interests involved in the present dispute, however, are more analogous to the type of pleasure a spectator enjoys in animal fighting sports, such as cockfighting, than the religious interests at stake in *Lukumi*.

D. *Animal Fighting Sports v. Animal Rights*

An overwhelming majority of the states have enacted laws prohibiting cockfighting.⁶² Such legislation has not been found unconstitutional; rather, a United States Supreme Court Justice has treated cockfighting as a prohibited activity “not because [animal

57. See *Lukumi*, 508 U.S. at 546.

58. *Id.* at 546-47.

59. See *Activists Howl*, *supra* note 7.

60. Biegler, *supra* note 1.

61. Golden, *supra* note 9. Astella Kung, the proprietor of Ming Kee Game Birds, stated that “about a fifth of her customers are of Indian, Latin American or European extraction.” *Id.* She stated that she also does business with practitioners of Santeria, who can sacrifice animals so long as they eat them afterward under a special city ordinance passed in 1992. *Id.* Her position is that “[o]nly the Chinese . . . are under attack.” *Id.*

62. James L. Huffman, Postscript, *Chicken Law in an Eggshell: Part III - A Dissenting Note*, 16 ENVTL. L. 761, 766 (1986). “[C]ockfighting continues to be legal in Arizona, Oregon, Arkansas, and Florida.” *Id.* at 766 n.24 (citing P. SMITH AND C. DANIEL, *THE CHICKEN BOOK* 9 (1982)).

fighting sports] harm others but because they are considered, in the traditional phrase, 'contra bonos mores,' i.e., immoral."⁶³ In *Barnes v. Glen Theatre, Inc.*, Justice Scalia in a concurring opinion compared cockfighting to numerous prohibited activities in American society such as sadomasochism, bestiality, suicide, drug use, prostitution, and sodomy.⁶⁴ The rationales behind the laws banning cockfighting, in part, were "out of compassion for the suffering animals," and because such sports "debased and brutalized the citizenry who flocked to witness such spectacles."⁶⁵

California Penal Code, section 597b,⁶⁶ prohibits, among other things, cockfighting for the purpose of amusement or gain.⁶⁷ The human interest involved in such animal fighting sports is more analogous to the present dispute. The pleasure of eating fresher meat, considering its alleged superior taste, is comparable to the pleasure that spectators gain while watching birds fighting ruthlessly against each other. Likewise, the merchants who sell livestock for profit are similar to the owners who arrange the cockfighting for economic gain. However, the animals' pain and suffering in a cockfight is likely to be much greater than that of animals waiting in a shop or home to be slaughtered. While the animals in a fight are injured for an extended period of time, the animals slaughtered in a kitchen are likely to die in a much shorter time span, if not instantly.⁶⁸ Moreover, the objectives between cockfighting and

63. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 575, 111 S. Ct. 2456 (1991).

64. *Id.*

65. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68 n. 15 (1973) (citing Professor Irving Kristol, *ON THE DEMOCRATIC IDEA IN AMERICA* 33 (1972)):

66. California Penal Code § 597b provides as follows:

Any person who, for amusement or gain, causes any bull, bear, cock, or other animal, not including any dog, to fight with like kind of animal or creature, or causes any such animal, including any dog, to fight with a different kind of animal or creature, or with any human being; or who, for amusement or gain, worries or injures any such bull, bear, cock, dog or other animal, or causes any such bull, bear, cock, or other animal, not including any dog, to worry or injure each other; and any person who permits the same to be done on any premise under his charge or control; and any person who aids, abets, or is present at such fighting or worrying of such animal or creature, as a spectator, is guilty of a misdemeanor.

67. The prohibition is a proper power left to the states to exercise. See Huffman, *supra* note 62, at 766.

68. Ray Delgado, *Sale of Live Animals Continues for Now; Commission Needs City Attorney Input, More From Residents*, S.F. EXAMINER, Aug. 9, 1996, at A3. According to Lisa Gouw with the organization, In Defense of Animals, the animals "are living creatures. If we have to kill them, chop, chop, quick! I want to change

buying and selling live animals are different in a fundamental respect. While the primary motive for viewing a cockfight is to see the spectacle of the bodily confrontation between the birds, the primary objective for buying and selling a live chicken is not the enjoyment rendered by the act of killing the animal, but rather the alleged pleasure associated with the superior food taste as well as its nutritional value.⁶⁹

Examining cases which deal with legislation banning animal sacrificing and cockfighting, it is apparent that the current dispute falls somewhere between these two lines of cases. On one hand, the human interests of the merchants and shoppers of live animals are similar to the owners and spectators of a cockfight. On the other hand, the pain and suffering inflicted on the live animals sold for food consumption appears to be less than that endured during animal sacrifice⁷⁰ or animal fighting sports.

my culture's habits, but please make some guidelines." *Id.* The pain, if any, that live animals suffer while in the kitchen is likely to be substantially less compared to an animal in a fighting sport because the animals that are slaughtered almost always die instantly.

69. *Id.* M.J. Lee, a 70-year-old woman who has cooked with live animals since the age of 9 stated "I really feel sorry for you who haven't tasted fresh-killed chicken, because there's nothing else like it." *Id.*

70. It is apparent that live animals in an animal sacrificing ritual endure relatively longer pain and suffering as compared to live animals slaughtered for food consumption. An animal sacrifice ritual has been described as follows:

[A] man brings the first live chicken into the apartment. He brushes it across the priest's chest and back. Still another man places the bird upon the altar and holds down its feet. The chicken, overcome by fear, begins to struggle vainly. Raising the bird's head, the priest begins to pluck its feathers, sprinkling them haphazardly over the pots and the altar. He bows silently before the altar, praying to Babalu Aye. Taking the knife from one of the cauldrons, the priest slits the chicken's throat, severing the carotid arteries. A short stream of blood shoots from the laceration, and the bird dies. The priest and his assistant drip blood over the objects adorning the altar. They then decapitate the chicken and place its head on a pot. One of the men bites into the breast bone of the bird's now headless body and rips the animal open with his teeth. He stuffs the open chest of the chicken with various herbs, tobacco, and bits of dried fish. After bathing the carcass in liquid from one of the cauldrons, he wraps it in a brown paper bag and places it outside the apartment. Later, the carcass will be buried near a cemetery. The ceremony is repeated with two more chickens, two roosters, a pigeon and a small goat. Finally, the priest informs the participants that the ceremonies have ended - Babalu Aye is pleased.

Johnson, *supra* note 35, at 1295 (citing Roberto A. Torricella, Jr., *Babalu Aye Is Not Pleased: Majoritarianism and the Erosion of Free Exercise*, 45 U. MIAMI L. REV. 1061, 1062-63 (citing Chavez, *Santeria: A Cult of Sacrifice*, UPI, Oct. 11, 1981)).

E. The Need for Facially Neutral Legislation

These two lines of arguments suggest that an outright ban on the sale of live animals is likely to be a valid exercise of state or local governmental police power,⁷¹ if it is aimed at protecting animals while remaining facially neutral.⁷² The Supreme Court has held that a facially neutral law that bans certain human activities is constitutional, even if an individual's constitutional right has been violated.⁷³ In *Employment Division, Department of Human Resources of Oregon v. Smith*,⁷⁴ two individuals were fired from their jobs with a private drug rehabilitation organization because they ingested peyote, a prohibited controlled substance with hallucinogenic effects.⁷⁵ The two individuals were members of a Native American church that used peyote for sacramental purposes at religious ceremonies.⁷⁶ However, when they applied for unemployment compensation, the Employment Division determined that they were ineligible for benefits because they had been discharged for work-related misconduct.⁷⁷ Upon the United States Supreme Court's remand, the Oregon Supreme Court found that the Oregon statute prohibited the use of peyote inspired by religious practice, and did not exempt the sacramental use of the drug.⁷⁸ However, the court concluded that the State's prohibition was not valid under the Free Exercise Clause of the First Amendment of the United States Constitution and ruled that the State could not deny unemployment benefits to the former employees.⁷⁹

The Supreme Court reversed the state supreme court's ruling, stating that it had never held that an individual's religious beliefs would relieve such a person's obligation to comply with an otherwise valid law prohibiting conduct freely regulated by a state.⁸⁰ The Court reinforced its prior holdings that a valid and neutral law of general applicability would apply to an individual, even if the law

71. See Johnson, *supra* note 35.

72. See *Lukumi*, 508 U.S. 520, and Part I section C, *supra* "Religious Practice v. Animal Rights."

73. See generally, *Employment Div., Or. Dept. of Human Res. v. Smith*, *infra* note 74.

74. 494 U.S. 872 (1990).

75. *Id.* at 874.

76. *Id.*

77. *Id.*

78. *Id.* at 876 (citing *Smith v. Employment Division*, 763 P.2d 146, 148 (Or. 1988)).

79. *Employment v. Smith* 494 U.S. at 876.

80. *Id.* at 878-79.

“proscribes (prescribes) conduct that his religion prescribes (proscribes).”⁸¹ Because the Oregon statute prohibited the use of peyote by all of its citizens, the law was facially neutral and thus constitutional, and the State did not violate the former employees’ First Amendment rights when it denied them unemployment compensation due to the work-related misconduct discharge.⁸²

In the present dispute, if San Francisco ultimately decides to ban only certain types of live animals, excluding fish, as recommended by the City Commission on Animal Control and Welfare, such legislation is likely to be held a valid exercise of governmental power. Adhering to the Supreme Court’s holding in *Employment v. Smith*,⁸³ a ban on the sale of all live animals excluding fish is nevertheless neutral in its applicability. Since the proposed ban does not limit its application only to practices taking place in Chinatown or by Chinese merchants and shoppers, a court is likely to determine that the ordinance is facially neutral and therefore a valid exercise of governmental power.

However, this comment proposes that the City Commission’s recommendation should include banning sales of *all* live animals if San Francisco does decide to enact legislation to protect animals bred for food consumption. It is generally undisputed that the Chinatown merchants and shoppers are not claiming possible violations of their constitutional rights in the free exercise of religion under an outright ban of live animal sales.⁸⁴ Nevertheless,

81. *Id.* at 879 (citing *United States v. Lee*, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring in judgment) (rejecting a claim by an Amish employer to be exempted from collection and payment of Social Security taxes on the ground that the Amish faith prohibited participation in governmental support programs). *Id.* at 879-80; *See Minersville School Dist. Bd. of Ed. v. Gobitis*, 310 U.S. 586, 595 (1940) (collecting cases). *See also Prince v. Massachusetts*, 321 U.S. 158 (1944) (holding that a mother could be prosecuted under the child labor laws notwithstanding her religious motivation); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (plurality opinion) (holding Sunday-closing laws as to persons whose religious practices compelled them to refrain from work on other days); *Gillette v. United States*, 401 U.S. 437, 461 (1971) (sustaining the military Selective Service System regarding persons who opposed a particular war on religious grounds).

82. 494 U.S. at 890.

83. *Id.* at 872.

84. Delgado, *supra* note 25. According to Chinatown activist Rose Pak, “[m]any customers also use chickens as religious offerings, asking for good luck before they cook and eat the bird.” *Id.* However, she has not presented objective support that demonstrates a particular Chinese religious practice does require the killing of live animals. Rather, almost all shoppers have expressed that their primary motive for purchasing live animals is because the freshly-slaughtered meat is healthful and tastier. Therefore, it is unlikely that the merchants or shoppers will establish a claim on the basis of a violation of their free exercise of religion.

if such an ordinance is tailored so as to effectively ban only certain animals, with disparate impacts falling most heavily on the Chinatown merchants and shoppers, their claim that the ordinance contains certain racial overtones is not entirely without merit. For instance, the Commission's recommendation that exempts fish from the ban is likely to generate a somewhat unfair result. While the Chinatown merchants and shoppers are not permitted to sell and slaughter live chickens, other San Franciscans will be free to kill fish if they desire. Moreover, the rationale behind the animal rights advocates' movement is that all living creatures deserve to be treated humanely before they are slaughtered for food consumption.⁸⁵ Therefore, it is only a logical conclusion that all types of live animals within the city deserve similar protections.

Such a facially neutral law with general applicability, however, "would conceivably require making all animal slaughter illegal, a prospect that even most animal rights activists would presently consider extreme."⁸⁶ For such legislation to be fair, not only should the selling and killing of live animals in Chinatown markets be banned, but all other similar activities should be banned as well, such as killing fish on a fishing trip or boiling live lobsters in San Francisco's Fishermen's Wharf.⁸⁷ Legislation of such magnitude, however, appears to be insensitive to human interests,⁸⁸ and is likely to encounter substantial opposition.⁸⁹ Therefore, it is

85. Golden, *supra* note 9.

86. See White, *supra* note 36, at 645 n.91.

87. Golden, *supra* note 9. For instance, Patricia Briggs, an animal rights activist, said she "believes Chinatown is just a beginning, and that the struggle must be carried even to the defense of the lobsters and crabs boiled alive down on Fisherman's Wharf, where she witnessed similarly appalling conditions . . ." *Id.* Furthermore, she stated that "[t]he time of the crustaceans is coming also, You'd think people wouldn't care about lobsters, because they aren't cuddly and fuzzy and they have these vacant looks and they don't vocalize. But you'd be surprised how many people care." *Id.*

88. For instance, it would be insensitive to deprive a person the right to continue what one has practiced for over sixty years. See Delgado, *supra* note 68. See also Goodavage, *supra* note 19.

89. Goodavage, *supra* note 19. Chinatown activist Rose Pak stated that if the city makes it impossible for merchants to sell live animals, the essence of Chinatown will disintegrate. *Id.* "Then we'll all be forced to eat Chicken McNuggets, headless shrimps frozen from god-knows-where and unrecognizable stuff you call fish . . ." *Id.* She also added "[w]e will become a homogeneous society, and this is not what America is all about." *Id.* See also Delgado, *supra* note 28. In the Goodavage article, Rose Pak stated that whatever "crap" the city Commission passes, "we'll deal with it." *Id.* She wished that "those people would show more compassion for humans who need it than poultry and other animals raised for food." *Id.*

apparent that a less drastic solution is needed to balance the human interest of finding pleasure in food consumption with the need to avoid unnecessary pain and suffering of animals bred for consumption as food.

PART II

Even though San Francisco is likely to be able to enact valid legislation banning the sale of all live animals, it can adopt a less-drastring means of controlling animal slaughtering that addresses to animal welfare while balancing other interests in the current controversy. This approach is more akin to the second proposal considered by the Commission of Animal Control and Welfare in that it calls for a solution on the basis of existing laws. The alternative approach offered by this comment, however, asserts that the Commission should view the present controversy in a different perspective. In essence, the animal rights advocates' two major claims of animal rights violations should be examined under two independent considerations.

A. *Before Live Animals are Sold*

It should be noted that the advocates' initial claim deals with the alleged animal mistreatment that takes place in the shops of Chinatown before the animals are sold.⁹⁰ These alleged violations are easily observable⁹¹ and existing state animal cruelty statutes can adequately correct them.⁹² For example, under California Penal Code Section 597(b),

[E]very person who . . . tortures, torments, deprives of necessary sustenance, drink, or shelter, cruelly beats, mutilates, or cruelly kills any animal, or causes or procures any animal to be so . . . tortured, tormented, deprived of necessary sustenance, drink, shelter, or to be cruelly beaten, mutilated, or cruelly killed; and whoever, having the charge or custody of any animal, either as owner or otherwise, subjects any animal to needless suffering, or inflicts unnecessary cruelty upon the animal, or in

90. Matier and Ross, *supra* note 16. See generally Goodavage, *supra* note 19.

91. Sullivan, *supra* note 2. According to supporters of tighter regulations who testified before the subcommittee of the Commission of Animal Control and Welfare, "all one had to do was take a walk through Chinatown to see evidence of unsanitary and inhumane conditions." *Id.*

92. Although the City of San Francisco itself may enact its own animal cruelty law, the California law has already made a provision for nearly identical protection. See also California Penal Code § 597b, *supra* note 66.

any manner abuses any animal, or fails to provide the animal with proper food, drink, or shelter or protection from the weather. . . [is guilty of a misdemeanor].

Each of the allegations of animal mistreatment, if proven, is likely to be prohibited under Section 597(b). Blunting the tips of the live chickens' beaks by searing⁹³ is likely to be found as a cruel mutilation. Cutting a live fish in half⁹⁴ is likely to be found as cruel killing. Packing live chickens into small cages without food or water,⁹⁵ and allowing fish tank water levels to be so shallow that fish have to float on their sides to stay alive⁹⁶ are both actions that are likely to be found as deprivations of necessary sustenance, drink, or shelter, as well as failure to provide the animals with proper food and drink. Failing to maintain clean, fresh water for fish and turtles,⁹⁷ as well as crowding the animals to the point of suffocation,⁹⁸ are also likely to be prohibited under the same provision. In addition, all of the alleged violations are likely to be determined as needless suffering and infliction of unnecessary cruelty upon the animals, which are prohibited conditions under the statute. Therefore, if any of these allegations are proven, the proper authorities are likely to find the merchants in violation of the existing state law.

Furthermore, if the Commission determines that the current inspection effort is inadequate, it should demand more stringent enforcement of and compliance with the existing state regulation. Recommending new, but probably redundant, guidelines or ordinances to regulate the activities that are already prohibited by the state law would be a wasteful duplication of efforts.

B. After Live Animals are Sold

The advocates' other major claim of violation is the core of the current dispute. The animal rights advocates are calling for an outright ban of the sale of live animals because they fear that such animals often endure unnecessary pain and suffering moments before they are slaughtered at consumers' homes. The advocates, however, have failed to adequately substantiate their claims with respect to alleged unnecessary pain and suffering to which the

93. Matier and Ross, *supra* note 16.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. Goodavage, *supra* note 19.

animals are subjected.⁹⁹ It should be noted that the bulk of the advocates' initial claim is focused on the mistreatment of live animals before, and not after, they are sold for food consumption. Therefore, evidence of after-sale treatment is lacking when compared to the on-site observations of animal mistreatment while the animals are still at the shops. Incidentally, this is precisely one of the major concerns that the advocates assert - that it is not really possible to protect live animals after they are sold because it would be difficult to monitor and regulate activities taking place in private homes.

Assuming, *arguendo*, that more stringent monitoring under California's Animal Cruelty law, as discussed in previous paragraphs, can adequately control the alleged animal mistreatment at the shops, the advocates' claim that live animals are also subjected to similar mistreatment at home, without additional substantiation, appears to be a weak policy argument for an outright ban of the sale of live animals. The primary motive for purchasing a live animal is to ensure the freshness of the meat, and not to enjoy the act of killing the animal itself.¹⁰⁰ Hence, the type of pain or suffering to which the animals are subjected at home should be no different than any other animals that are being slaughtered at animal farms. As such, both types of slaughtering should be regulated under similar standards.

This comment proposes that existing California state laws prescribing humane methods for slaughtering animals for food consumption may be used as a model to regulate the killing of live animals in private homes. For example, section 19501 of California's Food and Agricultural Code provides:

Methods of slaughter

... prescribed methods are defined to be the following:

All cattle, calves, horses, mules, sheep, swine, goats, or poultry shall be slaughtered by either of the following prescribed methods:

(a) The animal shall be rendered insensible to pain by a captive bolt, gunshot, electrical or chemical

99. In fact, of all the newspaper articles cited in this comment, none of them contained any statement by the animal rights advocates that supported the claim that live animals indeed endure unnecessary pain and suffering at consumers' homes, other than a mere general declaration that such animals do often endure pain and suffering.

100. See Hunt, *supra* note 12.

means, or any other means that is rapid and effective before being cut, shackled, hoisted, thrown, or cast, with the exception of poultry which may be shackled.

(b) The animal shall be handled, prepared for slaughter, and slaughtered in accordance with ritual requirements of the Jewish or any other religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument.¹⁰¹

Under the principles of this state law, California or San Francisco may require live animal buyers to use either of the above methods for slaughtering, or any other humane methods that the state or city may deem appropriate. The buyers, or the merchants, in the case where the animals are slaughtered at the shops, are likely to be willing to comply with these requirements because such methods would not conflict with their intended motive for consuming or providing fresher meat. The animal rights advocates are also likely to agree with such a proposal if it provides adequate protection for animals from unnecessary pain and suffering. For example, the president of the San Francisco's SPCA has indicated that once inhumane slaughter is stopped and inhumane conditions are ended, they would not find it necessary to call for a ban.¹⁰²

On the other hand, the concern remains that such regulation would be difficult to monitor. Without additional evidence demonstrating that animals are indeed enduring unnecessary pain or suffering before being slaughtered at home, however, human interests for food consumption deserve greater consideration. As an alternative, if the city worries that inexperienced shoppers or

101. Cal. Food & Agric. Code § 19501. It should be noted that this provision might not be directly applicable to an ordinary buyer of live animals because it applies principally "to any person engaged in the business of slaughtering animals . . . or any person slaughtering any such animal when all, or any part of, that animal is subsequently sold or used for commercial purposes." *Id.* It should further be noted that this section does not apply to the slaughter of "spent" hens and small game birds, as defined by the department by regulation, as well as fish and shellfish. *Id.* However, the principle of avoiding the infliction of unnecessary pain and suffering upon *all* animals should apply to *all* situations where animals are slaughtered, whether for commercial purpose or for private food consumption. *See also* 7 U.S.C. § 1902 (1988).

102. Lynch, *supra* note 4. According to Richard Avanzino, if the inhumane slaughter is stopped and crushing of animals is eliminated, "we would find no necessity to call for a ban. It is not culture or national origin that causes shopkeepers to treat animals this way, it is profit margin." *Id.*

inappropriate killing methods might inflict unnecessary pain or suffering upon live animals, it may choose to issue permits for people who wish to slaughter animals at home. For instance, it may require a shopper to demonstrate his or her knowledge of killing an animal in a humane method as required by the city before the city issues a permit, thus further ensuring the welfare of live animals sold for slaughtering at home. San Francisco also could publish pamphlets explaining the need to avoid inflicting unnecessary pain or suffering upon animals and proper methods to accomplish that goal. At a minimum, San Francisco may choose to allow slaughtering of live animals at licensed shops, but ban the sales of such animals to regular consumers.

III. Conclusion

The dispute in San Francisco concerning the sale of live animals for food consumption warrants a delicate solution. In the past and present, the city has been quite successful in balancing the interests of people with different views, backgrounds and cultures the interests humankind and nature. In the present case, although the city has a valid interest in protecting the welfare of animals, it would be inappropriate to entirely ban the sale of live animals for food consumption if implementing a less-drastic solution could resolve the controversy.

It is likely that the city would be able to enact valid legislation that bans all sales of live animals for food consumption, or even selected sales, excluding fish and shellfish. However, given the primary intent of the animal rights advocates' claims that all animals, including fish and shellfish, should not endure unnecessary pain or suffering, it would be unfair if such an ordinance exempts certain animals from the prohibition. For example, while Chinatown shoppers would not be permitted to purchase chickens to be slaughtered at home, other San Franciscans should not be free to boil live lobsters or crabs, or even to consume live clams, for the same human pleasure in food taste. Such an ordinance, moreover, would be detrimental to shoppers who have cooked meals in traditional ways for generations, and to merchants who have sold live animals as a livelihood for generations.

This comment proposes that the Commission and San Francisco City Council can resolve the current dispute by examining the allegations of animal rights violations under two independent considerations and under existing state laws and regulations. The State's animal cruelty law can be administered more effectively

through additional and more stringent monitoring. The shoppers can be required to slaughter the animals in accordance with appropriate standards which prescribe proper and humane methods of killing. As an alternative, the city may choose to issue permits for people who wish to purchase live animals for slaughter at home, after the buyers demonstrate proper killing methods. This permitting requirement would provide the city with somewhat greater control over the welfare of the animals after they have been sold in the markets.

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