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BAN ON FOIE GRAS: A LEGISLATIVE FOWL

Vanessa Ma

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Introduction

Foie gras is a French term foreign to many of us. However, for many food enthusiasts and the French culture, it is a culinary delicacy. Foie gras is the fattened liver of a duck or goose. This delicacy is made by intentionally force-feeding a duck or goose to fatten and enlarge its liver. Foie gras has recently made its way into media headlines, sparking a controversial debate.

Some view foie gras as an enjoyable delicacy that everyone has the right to produce and consume while others feel that the force-feeding of ducks and geese is cruel, and both inhumane treatment to the birds and foie gras should be outright banned.[?] It is a challenging task to balance the rights of animals and an individual's personal choice. Many people are conscious of the slippery slope in regulating controversial food, where no one knows where exactly to draw the line. Animal cruelty is still an evolving movement and animal rights are an amorphous ideology. Creating legislation that can accommodate all of the factors and contrasting views of these two concerns is a difficult task, which is the basis of the foie gras controversy.

Foie gras has recently come to the center of attention of the American public and the forefront of legislative consciousness for many states and localities. For instance, Chicago was one of the first cities to issue an ordinance banning the sale and production of foie gras.¹ However, it was an unsuccessful attempt by local efforts, and just two years later the ordinance was repealed. More recently, California has enacted legislation that also bans the production and sale of foie gras. California is the first state to enact

¹ See CHICAGO, ILL, Ordinance 7-29-001 (Apr. 26, 2006).

such a stringent law on foie gras² and the effect and viability of this legislation is still yet to be determined.

The goal of this paper is to provide a resolution that tries to balance the two opposing views on foie gras. Part I of this paper presents the background information necessary to grasp a general understanding of the foie gras debate. It includes a brief history and description of foie gras and its impact on the U.S. economy, and a general overall of the debate arguments on both sides. Part II of the paper describes various legislative bills that have been proposed or enacted, including California's newly enacted statute and the City of Chicago's prior ordinance. Part III examines the constitutionality of legislation on regulating foie gras, using the *Illinois Restaurant Ass'n* case as a basis. Also, this section analyzes the constitutionality of the recent California's statute and its ability to survive legal challenges. Part IV discusses the future of foie gras legislations and its political viability, while investigating whether an outright ban on foie gras is necessary. Part V proposes different solutions to deal with the current issue and suggests regulations on the treatment of birds used for foie gras production by enactment of state laws. Finally, this paper asserts that although state and local efforts to ban foie gras are constitutional, such a ban may not be politically viable. Therefore the paper asserts that more state law regulation of the treatment of ducks and geese is needed rather than an outright ban.

I. Background

A. What is Foie Gras?

² See CAL. HEALTH&SAFETY CODE §25980 (2004).

Foie gras is a French term meaning “fatty liver”.³ Foie gras is a popular dish and ingredient in the culinary world. It has become a symbolic cousin to cashmere and caviar, an emblem of wealth and refinement.⁴ Foie gras has a buttery consistency and is usually used as an accompaniment for seafood or steak. It is made from an engorged liver of a duck or goose that is force-fed usually with corn boiled in fat, which creates the buttery, rich and silky texture of foie gras.

Foie gras is a modern delicacy that dates back centuries old.⁵ Egyptians were the first to domesticate and force feed geese.⁶ In the ancient tombs of Egypt, there are depictions of servants grasping geese around the neck in order to push pellets down their throats.⁷ By the servants’ side were tables piled high with pellets most likely made from roast grain and flask for moistening the feed before feeding it to the birds.⁸ The depiction on the tombs provide the earliest accounts of a force-feeding method now known as the gavage.⁹

The gavage method and foie gras were later introduced worldwide. In the eighteenth century there was a wide dissemination of France’s cookbooks and cooking methods throughout Europe, which led to the spread and increase of the popularity of foie gras.¹⁰ During the 1830s and 1840s foie gras made its way into the United States by individual retailers who brought limited quantities of livers with them from Europe.¹¹ In

³ Force Fed Birds: Hearing on S.B. 1520 Before the S. Comm. On Business & Professions, 2004 Leg. (Cal. 2004) [hereinafter Senate Hearing].

⁴ Marshall Sella, *Does a Duck Have a Soul? How Foie Gras Became the New Fur*, N.Y. Mag., June 18, 2005, available at <http://nymag.com/nymetro/food/features/12071/>

⁵ MICHEAL GINOR ET AL., FOIE GRAS: A PASSION 320 (1999).

⁶ *Id.* at 2-3.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 57.

the modern era, the production of foie gras has evolved from servants forcing feed grain pellets down a bird's throat to metal tubes attached to a motor known as the gavage. The increase in popularity of foie gras has spurred the opening of foie gras production facilities within the United States.

B. Production of Foie Gras

There is passionate debate as to whether the production of foie gras is cruel or unethical.¹² Foie gras has traditionally been produced from geese, but more recently mulard duck has become a popular alternative.¹³ Prior to the gavage methodology, the birds are fed hay for fiber to help expand their esophagi.¹⁴ The goal of the gavage method is to alter the metabolism of ducks and geese in a manner that causes their livers to swell up and fill up with fat.¹⁵ The process involves a twelve-week stage in which ducks or geese are allowed to roam free in a yard.¹⁶ Afterwards, the birds are subjected to a four-week period of force feeding, where two to three times a day the birds have tubes inserted down their esophagi and are injected with a few pounds of cornmeal --by means of the gavage.¹⁷ The tube is attached to a funnel where an electric motor can be switched on for the feed to proceed down the tube into the bird's esophagi.¹⁸

¹² Joshua I. Grant, *Hell to the Sound of Trumpets: Why Chicago's Ban on Foie Gras Was Constitutional and What It Means for the Future of Animal Welfare Laws*, 2 *Stan. J. Animal L. & Pol'y* 52 (2009).

¹³ A mulard duck could be produced from artificial insemination which made the process easier [Why would the process be easier??]

¹⁴ GINOR, *supra* note 5, at 77.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ GINOR, *supra* note 5, at 58.

Each feeding takes approximately thirty seconds and each employee is in charge of a batch of birds consist of about 350 ducks.¹⁹ The amount of feed increases incrementally each day. Eventually, the birds' livers expand and consist of no less than eighty percent fat.²⁰ This alteration of metabolism of ducks and geese causes their livers to swell to approximately ten times their normal size.²¹ The fattiness in the liver creates a buttery and rich texture that many food enthusiasts adore. This process usually takes place in special foie gras production facilities, and the United States has now become a home to a several of them.

C. The US Economy and Foie Gras

Currently there are only four foie gras production facilities in the United States. They are located in three states: California, New York, and Minnesota.²² The two largest facilities, which account for majority of US foie gras production, are Hudson Valley Foie Gras in New York and Sonoma Foie Gras in California.²³ In total, the four foie gras production facilities slaughter approximately 400,000-500,000 ducks annually.²⁴ These facilities produce about 800,000 pounds of liver per year, which is worth about \$27 million wholesale.²⁵

As of now, any legislation regarding the production and the sale of foie gras would have the most economic impact upon California and New York, where the majority of the US foie gras production occurs. Hudson Valley Foie Gras and La Belle

¹⁹ *Id.*

²⁰ SELLA, *supra* note 4, at 3.

²¹ Sidney H. Storozum, *Why A Duck? California Pokes A Hole in the "Iron Curtain" of Factory Farming*, 1 Liberty U.L. Rev. 193 (2006)

²² GRANT, *supra* note 12.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

Poultry, also in New York, together produce about 90% of the domestic supply of foie gras while Sonoma Foie Gras in California makes up the remaining 10%.²⁶ Sonoma Foie Gras sells its product to approximately 300 restaurants in California and 200 restaurants outside of the state.²⁷ Producers of foie gras undoubtedly have an economical self-interest in preventing legislation from banning any sale or production foie gras from being enacted. Americans buy about 420 tons of foie gras and it is approximately a \$17.5 million business.²⁸ On the other hand, many people view the gavage method and foie gras itself as inhumane, therefore generating a great divide.

D. Debate

The production of foie gras has been a highly contested issue with people generally taking positions on the far sides of the spectrum. “Foie gras, depending on your point of view, is either a particularly brutal form of animal cruelty or a gastronomic feast that many adore”.²⁹ The controversy has arisen not over the mere slaughter of the poultry but over the way foie gras is created. Protesters denounce the process of gavage and believe it is a grueling process in which birds are crippled, terrified and medically prone to gastric diseases or rupturing of livers.³⁰ The force-feeding process can cause many internal injuries such as cuts and lesions in the birds’ throats from the regular insertion of a metal tube.³¹ Not only are there physical injuries to the birds, there are also psychological problems associated with force-feeding.

²⁶ *Id.*

²⁷ Senate Hearing, *supra* note 3.

²⁸ STOROZUM, *supra* note 21, at 3.

²⁹ SELLA, *supra* note 4.

³⁰ *Id.*

³¹ Senate Hearing, *supra* note 3, at 11.

Forced confinement during force-feeding causes stress and other behavioral problems for the birds.³² Some foie gras facilities keep the birds in near darkness for two to three weeks during the force-feeding period.³³ The darkness is an attempt by producers to keep the birds calm. Confinement and a low light environment can be detrimental to birds' health and welfare. First, this type of confinement prevents normal exploratory behavior and hinders birds from seeking adequate exercise.³⁴ Second, ducks are sometimes housed in individual cages during the force-feeding period, thus causing their social instincts to be completely thwarted.³⁵ These are a few of the major arguments of those in opposition to foie gras production, which includes many animal welfare groups such as the Animal Legal Defense Fund, Animal Action Network, and Avian Welfare Coalition.³⁶

On the other side, there are several organizational proponents of foie gras production, including the California Farm Bureau, California Grain and Feed Associations, California Poultry Federation, California Restaurant Associations.³⁷ Proponents of the foie gras industry argue that force-feeding is just mimicking the natural tendency of birds to overeat in preparation for migration.³⁸ Most importantly, they contend, the USDA inspects and approves each fatty liver destined for consumption.³⁹ Some supporters of foie gras also argue that banning a specific product based on emotion rather than fact is a dangerous precedent.⁴⁰ As a result of this debate,

³² Senate Hearing, *supra* note 3, at 10.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 9.

³⁷ *Id.* at 11.

³⁸ *Id.* at 9.

³⁹ *Id.*

⁴⁰ *Id.*

many legislative bills have been proposed, and several have been enacted, and at least one repealed, as will be explained in Part II.

II. Legislation

A. Proposed Legislation

As US citizens have become more concerned with the practice of force-feeding in the production foie gras, it may be appropriate for their state governments to address the issue. Several states have thus proposed legislation regarding the production and/or sale of foie gras. One of the broadest legislative bills that was proposed occurred in Connecticut in 2007.⁴¹ The proposed legislation declared that “ the general statute be amended to prohibit the production or sale of any food item produced by force-feeding a bird for the purpose of enlarging the bird’s liver beyond the normal size.”⁴² The legislative intent as stated was, “[t]o prohibit the inhumane treatment of birds in the production of certain food items”.⁴³

Likewise, the Hawaii Legislature saw the introduction of foie gras bills in both its House and Senate.⁴⁴ The House bill proposed to criminalize “[t]he force feeding of a bird for the purpose of enlarging the bird’s liver beyond the normal size, or hiring of another person to do so.”⁴⁵ Force-feeding was defined as the process that causes the bird to consume more food than the typical bird of the same species would consume

⁴¹ See Conn. H.B. 6866. What was the general statute that was to be amended?

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See Haw. H.B. 3012; Haw. S.B. 2686.

⁴⁵ See Haw. H.B. 3012 § 1(21).

voluntarily.⁴⁶ Is this a quote? If so, it should have quotation marks]The Senate bill went further and added the element of banning the sale of “any product that is the result of force feeding a bird...”⁴⁷ The definition of force-feeding in this bill was the same as the California bill that had been previously enacted.⁴⁸ Ultimately, these bills were never voted upon and at the end of the 2006 session they died in committee. Since then they have not been reintroduced.⁴⁹

Another state that considered the idea of banning foie gras is Massachusetts. The Massachusetts Senate proposed to do so during both its 2005 and 2006 sessions.⁵⁰ These bills had similar definitions of force feedings as the previous states mentioned and would have criminalized production of foie gras in Massachusetts.⁵¹ Currently, none of these bills have been enacted. So, as demonstrated, although numerous states have proposed legislation for banning the sale or production of foie gras, only in a handful of instances has legislation been enacted.

B. California

California was the first (and only??) state to enact legislation that would ban the production and sale of foie gras.⁵² The statute was enacted in 2004 as an amendment to California’s Health and Safety Code. This statute provides the definition of force feeding which was discussed above. The statute also explains that, “force feeding methods include, but are not limited to, delivering feed through a tube or other device inserted into

⁴⁶ *Id.*

⁴⁷ *Id.* at § 1(2), § 3 ch. 711(1)(b).

⁴⁸ *See id.* at § 3, ch. 711(1)(b), *see also* Cal. S.B. 1520 §1(b).

⁴⁹ *See id.*

⁵⁰ *See generally* Mass. S.B. 2397; Mass. S.B. 498.

⁵¹ *Id.*

⁵² *See* CAL. HEALTH&SAFETY CODE §25980(2004).

a bird's esophagus.”⁵³ This statute outlaws force-feeding a bird “for the purpose of enlarging the bird’s liver beyond normal size, or hiring another person to do so.”⁵⁴ It furthers specifies that “[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 the normal size.”⁵⁵

Although enacted in 2007, this California statute was not to become effective until July 1, 2012. The purpose for the time delay was “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.”⁵⁶ The statute also contains civil and criminal penalties in the event that these prohibitions are violated.⁵⁷ Currently, the statute remains in effect, but its survival is yet to be determined.

C. City of Chicago

California was not the first jurisdiction in the US to implement a ban on foie gras. The City of Chicago holds that honor, having enacted an ordinance in 2006 to ban the sale of foie gras within city limits.⁵⁸ One of the stated justifications for this ordinance was that “[t]he people of the City of Chicago and those who visit here have come to expect, and rightfully deserve the highest quality in resources, service and fare;”⁵⁹ and “[b]y ensuring

⁵³ *Id.*

⁵⁴ *Id.* at §25981.

⁵⁵ *Id.* at §25982.

⁵⁶ *Id.* at §25984(c).

⁵⁷ *Id.* at §25983(b); Each violator is issued a citation and can pay a fine up to \$1,000 for each day the violation continues. Also, 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.

⁵⁸ See CHICAGO, ILL, Ordinance 7-29-001 (Apr. 26, 2006).

⁵⁹ *Id.*

the ethical treatment of animals, who are the source of the food offered in our restaurants, the City of Chicago is able to continue to offer the best dining experience...⁶⁰

The ordinance further stated that “[a]ll food dispensing establishments... shall prohibit the sale of foie gras.”⁶¹ Any violations of this ban will be subject to monetary penalties.⁶² Any business that violated the ordinance was subject to a fine “not less than \$250 and no more than \$500 for each offense.”⁶³ In retrospect, the City of Chicago’s ordinance was very similar to the California statute enacted a year later, since both contain similar definitions and penalties.

After enactment of its foie gras ordinance in 2006, however, Chicago governing body decided to repeal it less than two years later.⁶⁴ Chicago’s aldermen voted 37 to 6 to repeal the ban on sales of the controversial delicacy.⁶⁵ Their decision seems to be based on the fact that they consider Chicago to be one of the most renowned culinary cities in the United States. Many chefs and restaurant owners had lobbied the alderman to repeal this ordinance. Proponents of the repeal believed the ordinance drew undue national attention to Chicago and infringed on an individual’s freedom of choice.⁶⁶ So within a two-year time span, Chicago both enacted and then repealed its ordinance on banning foie gras.

It should be observed that several substantial policy and legal issues were associated with the foie gras ordinance. These issues sparked many concerns as to whether it is

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ See CHICAGO, ILL., MUN. CODE §7-39-005 (2006)(adopted Apr. 26,2006), *repealed by* Chicago, Ill., Ordinance 2008-2041 (May 14,2008).

⁶⁴ See Chicago, Ill., Ordinance 2008-2041 (May 14, 2008)(repealing CHICAGO, ILL., MUN. CODE §§ 7-39-001-005(2006)).

⁶⁵ Monica Davey, *Ban Lifted, Foie Gras Is back on the Menu in Chicago*, N.Y. TIMES, May 15,2008, at A19.

⁶⁶ GRANT, *supra* note 12, at 7.

appropriate for the government to regulate this type of activity, the procedure of force-feeding ducks or geese. In fact, some of the proponents for repeal questioned whether Chicago's ordinance was constitutional.

III. State and Federal Constitutionality

A. Illinois Restaurant Associations v. City of Chicago

The Illinois Restaurant Association and a local Chicago restaurant sued the City of Chicago in state court, claiming that the City's ordinance violated the Illinois Constitution.⁶⁷ As previously noted, the ordinance amended the City's Municipal code to add a section prohibiting the sale of foie gras at "food dispensing establishments" within the City and provided that any business that violated the Ordinance was subject to a fine of between \$250 and \$500 per offense.⁶⁸ One of the plaintiffs' main arguments was that the ordinance exceeded the City's police powers under the Illinois constitution.⁶⁹ The plaintiffs also decided to amend their complaint to include a dormant Commerce Clause claim under the federal Constitution.⁷⁰ The City filed a motion to dismiss the complaint in its entirety.⁷¹ The district court concluded that the ordinance was a valid exercise of the City's police powers under the Illinois constitution {why?}and the only remaining issue was the dormant Commerce Clause issue.⁷²

⁶⁷ Ill. Rest. Ass'n v. City of Chicago, 492 F. Supp. 2d 891, 892 (N.D. Ill. 2007).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

Under traditional Commerce Clause analysis, an ordinance is invalid if the ordinance on its face or in practical effect discriminates against interstate commerce.⁷³ If the purpose of the law is simple economic protectionism, it is presumed to be invalid.⁷⁴ The district court, however, held that the ordinance did not discriminate against interstate commerce on its face or in effects.⁷⁵ The court explained that even though the ordinance had an economic effect on out-of-state foie gras production⁷⁶ that was not the same as regulating or discriminating against interstate commerce.⁷⁷ The court reasoned that since the ordinance did not regulate foie gras production or pricing and did “not force out-of-state foie gras producers or distributors to do anything,” it did not regulate or discriminate against interstate commerce.⁷⁸ Also, the ordinance could not have any effect on in-state interests since foie gras is not produced in Illinois.⁷⁹

In its analysis the court also usually takes into account a “balancing test” of the state’s interest against the ordinance’s burden on interstate commerce.⁸⁰ However, in the case the court decided that this balancing test was not applicable.⁸¹ The test was inapplicable because the plaintiffs failed to allege that, after the ban, Chicago consumers would turn to alternate products produced primarily in Chicago or Illinois.⁸² Therefore, given the fact that the ordinance did not discriminate against interstate commerce and that the balancing test was not applicable, the court deemed the ordinance was constitutional.

⁷³ *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1792-93, 1797 (2007).

⁷⁴ *United Haulers*, 127 S. Ct. at 1796-96.

⁷⁵ *Ill. Rest.*, 492 F. Supp. 2d at 901-05.

⁷⁶ Note that Illinois does not have any foie gras production facilities, since the only foie gras production facilities are found in the states of New York, California, and Minnesota.

⁷⁷ *Id.* at 889.

⁷⁸ *Id.*

⁷⁹ *Id.* at 904.

⁸⁰ *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 675-79 (1981).

⁸¹ *Ill. Rest.*, 492 F. Supp. 2d at 901-05.

⁸² *Id.*

B. California's Statutory Ban of Foie Gras

Currently, California's ban on foie gras has not yet been challenged. If the legislation were challenged, the case would pose similar issues as those raised *Illinois Restaurant Ass'n*. Therefore, it appears that the statutory ban would most likely survive a legal challenge.

Under the dormant Commerce Clause analysis, the California statute's sale provision would likely not be found to be facially discriminatory against interstate commerce, since it does not favor California producers over out-of-state sellers.⁸³ But the "balancing test" factor that would also need to be considered: the state's beneficial interest against the burden the statute would place on interstate commerce. One of the strongest arguments for the state in this regard derives from the health and safety concerns of its citizens. Yet there does not appear to be much of a demonstration of a health and safety risk to residents. Even though the statute was enacted under Health and Safety Code, any health and safety defense of the legislation might be difficult to prove.⁸⁴ Although there are numerous research and studies about the adverse health effects to birds using the gavage method, that method is not considered unsafe for human consumption.⁸⁵ As for the birds, the current state of law does not give them legal standing to act on behalf of their own health and safety.⁸⁶

Besides the state's questionable health and safety rationale, a court would still need to analyze the ordinance's burden on interstate commerce. There are currently three major

⁸³ STOROZUM, *supra* note 21, at 205.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* all on same ;page??

foie gras production facilities that become the big players in this analysis. Two of the facilities are in New York and one in the state of California. The burden on interstate commerce of the foie gras sale ban would likely be imposed upon the two New York producers and on importers who would be unable to sell their products inside California.⁸⁷ The main issue would be whether California has a legitimate state interest sufficient to justify any burden on interstate commerce. The court would have to determine whether preventing animal cruelty is a strong enough argument to burden interstate commerce. This issue has not yet come before the courts in California and it is not certain how its courts would rule on these grounds.

Given these circumstances, it seems difficult to determine whether California's state interest would outweigh the burden on interstate commerce. California is home to one of the major foie gras production facilities, thus the burden on interstate commerce is heightened compared to Illinois. Additionally, precedent has been set in Illinois and so it is likely that a court might decide that California does not have a legitimate state interest sufficient enough to justify the burden on interstate commerce. More analysis is needed here? Are you saying that you think CAk's ban is unconstitutional??

IV. The Future

A. Political Viability

From past precedents and legal history it seems likely that foie gras legislation would likely pass constitutional muster. [What about what you said just above??] However, the survivability of the legislation also remains vulnerable due to on-going political

⁸⁷ *Id.*

opposition to such bans. Shortly after the court ruled in the *Illinois Restaurant Ass'n* case, that the challenged ordinance was constitutional, the ordinance was repealed within two years. . The whole process Chicago went through from the banning to unbanning foie gras demonstrates the political vulnerability of such legislation. Although the federal court upheld the constitutionality of the ordinance, sufficient opposition mobilized against it which therefore ultimately led to its repeal.

The City of Chicago's repeal of its ordinance—although upheld by a federal court-- demonstrates that any similar laws in the future may need to overcome not only legal but political barriers after enactment.⁸⁸ This requirement will continue to hold true for the California's newly enacted statute. California, like Chicago, is well known for its diversity of cuisines and numerous well-renowned restaurants offering the finest cuisine and dining. It is not surprising that newly effective ban on foie gras will produce on-going controversy in the state. Many chefs and restaurant owners in California, just like in Chicago, will likely voice their opposition to the foie gras ban now that it has become enforceable this year. . In the near future it is very likely that lawsuits will be brought in California similar to the *Illinois Restaurant Ass'n* case. As opposed to Chicago, California's ban on foie gras will have greater impact, since California is home to one of the three major foie gras production facilities. This legislation will greatly affect Sonoma Foie Gras, since the majority of its income comes from the production of foie gras. It is still too early to tell whether this California's statute will survive on-going political opposition. But it must be emphasized that, California is a state with a foie gras production facility and has more on the line compare to Chicago.

⁸⁸ GRANT, *supra* note 12, at 104.

To sum up, the California statute will likely be able to overcome legal barriers; however, as with Chicago's ordinance, the statute might not remain politically viable.. This ban could lead to a closure of an entire market, one which the Chicago's Ordinance did not have to worry about. It is predicted that California's statute will most likely experience the same fate as Chicago's. Opponents of the California's statute will probably have an easier hurdle in attempting to repeal the ban, now that Chicago has already repealed a similar law, and so they can try to follow a similar approach.

B. To ban or not to ban?

Since foie gras legislation may not be politically viable, there needs to be a solution to the foie gras controversy that is responsive to the interests of both proponents and opponents of the ban.. An outright ban on foie gras seems to be an extreme and undoable solution to the problem. There are backlashes attached to an outright ban on foie gras. One of the major consequences of a ban on the sale and production of foie gras in states like California is that it would probably put foie gras production facilities out of business.

As it stands, Sonoma Foie Gras can no longer operate under the newly enacted law unless it redoes its entire business practice. It should be observed tht California implemented a seven-year grace period in hopes that production facilities such as Sonoma Foie Gras could find alternative and more humane production methods for foie gras or else switch its business to something else. However, after this grace period expired no new innovative production has been created. Moreover, California has not provided budgetary or any other support to Sonoma Foie Gras to assist in the endeavor of

developing a more humane method of creating the fat concentration necessary to produce foie gras.⁸⁹

In contrast, New York appropriated \$420,000.00 in 2006 to Hudson Valley Foie Gras in order for it to *expand* and develop its production capabilities, thereby encouraging the development of such facilities.⁹⁰ A feasible but not popular solution to California's problem would be to follow the actions of New York and appropriate funds to foie gras production facilities to research and develop a more humane production method. However, this solution is unrealistic due to the fact that many states, including California?, detest the idea of appropriating funds under such circumstances, especially in the rough economic situation states like California find themselves in.

It must be emphasized that domestic foie gras facilities are viable businesses that provide jobs to many people in the communities in which they are located, and they also supply restaurants and retailers throughout the country.⁹¹ With economic incentives attached to foie gras, an outright ban may not be a viable option.

In order to enact a viable and sustainable legislative solution, that solution must create a reasonable compromise between the two opposing groups. One of the keys to finding a fair resolution is knowledge about the needs and concerns of both sides. The dissemination of accurate information to both sides is essential in reaching a compromise. For instance, after the enactment of the Chicago's ordinance and shortly thereafter, its repeal suggested that many Chicago City officials were not properly informed about foie

⁸⁹ See generally CAL. HEALTH & SAFETY CODE § 25980 (2007).

⁹⁰ *Chicago Foie Gras Ruling Sets Dangerous Precedent*, GRASSROOTS:THE VOICE O THE NEW YORK FARM BUREAU (July 2006), available at <http://www.nyfb.org/Grassroots/grass0706/FoieGras.htm>.

⁹¹ *Id.*

gras or the ban.⁹² They may have relied on alarmist media, which often depicted many horrific images of metal pipes shoved down a bird's throat. But it is important to keep in mind that ducks and geese lack gag reflexes.⁹³ Additionally, the lining of a duck or goose esophagus is keratinized which means that it contains fibrous protein cells that resemble bristles allowing large pieces of food to pass safely.⁹⁴ Therefore, the gavage method, although strongly criticized, may not be as horrifying as the media has displayed it to be.

It is also important to note that while modern agricultural practices are not cloathed with absolute secrecy, the majority of Americans will never have the opportunity or occasion to personally observe them.⁹⁵ Many proponents of foie gras may lack the knowledge of what foie gras actually is and how it is produced. A balanced and neutral discussion that educates citizens and legislators about the merits and downfalls of foie gras is necessary in order to reach a rationale compromise.⁹⁶ You keep repeating the same point.

In the end, it is submitted that an outright ban should not be the proper resolution for the controversial foie gras debate. In Chicago, the ban on foie gras was not carefully thought out and received much backlash from restaurant owners and chefs. As for California, it is still too early to tell if the ban will be upheld in the future. It is submitted that outright banning of a product such as foie gras is a prime example of the realities of the slippery slope argument. After foie gras, there could be opposition to other controversial food products such as veal, and from then on the idea of banning could

⁹² See MARK CARO, THE FOIE GRAS WARS: HOW A 5,000-YEAR-OLD DELICACY INSPIRED THE WORLD'S FIERCEST FOOD FIGHT 86 (2009).

⁹³ *Id.* at 81.

⁹⁴ *Id.*

⁹⁵ STOROZUM, *supra* note 21 at 216.

⁹⁶ GRANT, *supra* note 12 at 104.

snowball into standard products such as beef or chicken. { why is that necessarily a bad thing??] Another important element is that the major foie gras production facilities are located in areas that are geographically close to major culinary centers of the United States. New York and California, like Chicago, contain many famous upscale restaurants and have a diversity of cuisine. It would be a difficult hurdle for a ban to overcome the opposition voiced by many chefs, restaurant owners, and food enthusiasts in these culinary markets.. The states of California and New York are on a much bigger scale compared to the City of Chicago. It is very likely that the ban on foie gras which was upheld legally in Chicago but overturned politically, would not survive political opposition in these two states as well. And, with respect to a legal challenge based on constitutionality, the burden on interstate commerce found in New York and California would prove greater in scale as compared to Chicago, and thus prove difficult for the state to identify an interest strong enough to overcome this burden.

V. How to deal with the current issue

A. Regulation on Treatment of Birds

Instead of proposing an outright ban, a better proposal would be to enact state laws that regulate the treatment of birds used in the production of foie gras.. Opponents of foie gras have mostly criticized the gavage method and the treatment of birds during that process. Instead of imposing draconian legislation that would ban the production and sale of all foie gras, a more balanced solution might be to regulate the treatment of the birds.

However, creating a new and less harmful foie gras technique to replace the gavage does not seem to be a feasible at the present time.. California's seven-year toll on the enactment of the foie gras statute seems to prove that there is no new innovation towards developing a new method. Without funding from the state, any organizations or agencies it is demanding on producers of foie gras to invest a significant amount of money into research and development?? unclear. Innovation requires capital and if neither party appropriates the necessary fund, innovation would be held at a stand still. During the seven-year toll, it appears that there was minimal effort invested into research and development for production of foie gras due to economic barriers.

Instead, it is submitted that a more favorable idea would be to set regulations for the treatment of the birds during the gavage process. A regulation on treatment of ducks and geese would seemingly have higher probability to withstand legal challenges and would be politically more viable.

Such regulationr should first be geared towards the confinement, feeding, and lighting at the production facilities. One major issue with confinement during force-feeding is that birds can be sometimes housed in individual cages.⁹⁷ The birds are confined tightly in these cages and as a results often become agitated and possibly injured. Many proponents of a foie gras ban argue that confinement prevents the birds from getting adequate exercise and their ability to engage in natural exploratory behavior.⁹⁸ Another problem with confinement is that the birds are not provided with sufficient access to water and end up becoming dehydrated.⁹⁹ Thus any legislation should require a specific number of hours for the birds to freely roam in an expansive area where

⁹⁷ Senate Hearing, *supra* note 3, at 10.

⁹⁸ *Id.*

⁹⁹ *Id.*

they can engage in their natural behaviors, such as socializing or engaging in exploratory instincts. In addition, the birds should be permitted to access water after feeding.

A second part of the proposed legislation should specifically address the gavage method. It seems unlikely that in the near future a new method will be created to replace that method. So, for the time being, there should be some regulations to mitigate the harshness of this process. Since ducks and geese have a different anatomy as compared to a human, the gavage method may not be as horrible as it seems to be. Each feeding lasts approximately thirty seconds, and proposed legislation should require that feeding should not last longer than this. Also, the majority of foie gras facilities use metal tubes in the process, and it is recommended that a viable substitute for metal tubing could be found by using rubber tubing. Rubber would be less harsh and damaging for the birds. It would also alleviate the potential adverse health effects of injuring a bird by use of a metal tube.

Additionally, the regulation should cap the number of birds an employee should handle a day. According to Sonoma Foie Gras Farm, each employee handles approximately 350 birds each which may be too much for one person to safely administer. Also, it is submitted that the production facilities should establish a rewards program to its employees for every uninjured bird they handle. This would encourage each employee to handle his or her batch of birds with the highest level of care.

Lastly, the proposed legislation should address the biggest issue many opponents of foie gras criticize. Presently, most ducks and geese are kept in a low-lighting environment in order to keep them calm for the feeding process. The reduced light levels

affect the birds' abilities to interact socially in a normal behavior.¹⁰¹ During the free roaming period proposed above there should be an additional requirement that the lighting of the area cannot be lower than a certain established level. This would enhance the birds' abilities to socialize in a well-lit environment where they would be able to roam freely and engage in their natural behavior.

Overall, the proposed legislation should closely regulate the treatment of birds within the foie gras production facilities. The birds should have a minimum number of hours per day to roam freely in a fairly expansive area provided with adequate water and lighting. The feeding process should not last longer than a certain period of time and each employee should handle only a specified amount of birds. The production facilities should start implementing rubber tubes rather than metal for the gavage. In addition, the production facilities should start implementing rubber tubes rather than metal for the gavage method. Finally, each production facility should impose some sort of reward program for every uninjured bird an employee handles.

B. Federal vs. State Law

Proposing new legislation poses the question as to whether it should be on the federal or state level. On the federal level the United States Congress enacts laws that every state must obey. On the contrary, state laws apply to everyone who resides within that state. Because the concern over animal cruelty has traditionally been the province of the states, it is submitted that they should be the more favorable choice in dealing with the issue of foie gras.¹⁰² It is also more sensible for states to impose foie gras legislation due to the fact that there are currently only four foie gras production facilities found in only three

¹⁰¹ *Id.*

¹⁰² STOROZUM, *supra* note 21, at 198.

states. Because foie gras production facilities are limited and not found nationwide, attempting to impose federal legislation does not seem rational or warranted. Unlike, situations such as protection of migratory birds which involve more of an interstate or interstate component to it, federal law should not be sought, since it could prove unnecessary or difficult to achieve..

In crafting a piece of legislation, enforcement is a major concern. It would appear easier to regulate and enforce rules on a state as opposed to federal level for issues such as foie gras production. Since there are currently only three states with foie gras production facilities, enforcement on a state level should be an issue to enforce. In addition, state laws allow flexibility for impacted states to construct a piece of legislation tailored to their needs rather than imposition of a general federal law that all states would have to follow regardless of their needs.

State statutes apply only to that particular . Once a statute is passed in that state it allows the appropriate state agency to supplement or more fully regulate the statute. Regulations are utilized as guidelines for statutes allowing the state to increase the flexibility and efficiency in the operation of laws. Regulations as issued by state agencies have the effect of law, but can be changed more easily by revising them through changes in the administrative code of the state. Of course state agencies must facilitate the enforcement of a state statute. Given these conditions, it is suggested that the state agency that would oversee a statute on the treatment of foie gras birds be the appropriate agency that deals with the welfare of farm animals within the state. Overall, it is submitted that this would be the most sensible way to create a state statute regulating the treatment of birds used in foie gras production.

Conclusion

States and local efforts attempts to ban foie gras have managed to overcome legal barriers such as litigated constitutionality concerns; however, their efforts to ban the process may not survive political challenges. Striking a balance between the two extreme sides, the proponents and adversaries of the ban, is not an easy task. Because of this difficulty, it is recommended that both sides should seek to construct state laws that regulate the treatment of ducks and geese used to produce foie gras. This would seemingly provide a feasible alternative as compared to an outright ban.

Free market and personal choice remain strong American ideals. Banning foie gras tends to conflict with those ideals. The public welfare of an animal can be difficult to justify when it interferes with the free market and a person's freedom to choose. An outright ban of foie gras would mean putting four production facilities out of business and many persons out of jobs. Also, enacting a ban on foie gras gives potential for legislation to be overreaching and codify what food is deemed to be "good" or "bad" especially when there is little or no person's health or safety involved. Such legislation could be considered unconstitutional when it starts to interfere with personal choice. Another troubling concern is that the banning foie gras sends a message to the public that some cultures and their foods are "cruel" in their eating habits and that society in general must be spared of these culinary depravities.¹⁰³

¹⁰³ See Amanda Paulson, *A ban on foie gras? Could this really be Chicago?*, THE CHRISTIAN SCIENCE MONITOR, Dec. 13, 2005, available at <http://www.csmonitor.com/2005/1213/p01s04-ussc.htm>

It seems also possible that such laws such as the banning foie gras could open up the floodgates for further regulation of one's dietary choices. It seems a small step away from banning other controversial food products such as veal or even a more extreme standard banning other staple animal products such as beef or chicken. It is submitted that there is no need for an outright ban on foie gras, especially since there is a lack of any public safety issue to support it. The USDA, a federal agency, approves foie gras and has not found any adverse health effects for humans consuming it. Foie gras is deemed to be a safe product to consume and one should have the freedom to choose whether to consume it themselves or not.

The proponents of a ban have argued that the treatment of ducks and geese during the process and use of the gavage method is inhumane, thus constituting unnecessary cruelty. The most persuasive of these proponents' arguments are directed at the treatment of ducks and not necessary the gavage method itself. Therefore, it is more sensible to regulate the treatment of the birds rather than the outright banning of foie gras. The gavage method in reality is not as appalling as the media has depicted it to be. However, it would be less harmful to ducks and geese if the metal tubes used in gavage were replaced by rubber ones.

Finally, it is submitted that as long as the proper law is in place, foie gras production can co-exist with animal rights. The proper law should be mandated by each individual state and should address the treatment of ducks and geese during the process of force-feeding. A state law regulating the treatment of ducks would undoubtedly obtain more support from foie production facilities owners and workers, restaurants owners and chefs than an outright ban.. One driving motivation for foie gras production facilities to accept

further regulation of the treatment of ducks and geese is that they could still keep their business rather than absolutely shutting down.

Eliminating a product from the market does not necessary solve the underlying issue. Legislation does not always have to go to the extreme in order to strike a compromise. In practical reality, the gavage method is currently necessary in order to produce foie gras, and the justifications against it are somewhat weak. Instead of proposing a ban that may not be politically viable, why not engage in an alternative solution where it is likely more accepting. Legislation that does not interfere with the free market and personal choice is preferable. Enacting the proposed state statutes that further regulate the treatment of birds during the force-feeding process addresses the most pressing issues concerning animal welfare. At the same time, such legislation would stray away from intruding individual personal choice and the free market. Although Sstate and local efforts promoting a ban on foie gras may likely overcome legal barriers such as constitutionality, they may not be politically viable. Hence a state law regulating the treatment of ducks and geese would be more beneficial rather than an outright ban. After all, an outright ban on foie gras seems to be a legislative fowl.

Could be more sources, over-reliance on Sella (note 4). Still has grammatical problems (many of which I have cleaned up0

Generally well argued.

Final Grade: A-.