UNHAPPY COWS AND UNFAIR COMPETITION: USING UNFAIR COMPETITION LAWS TO FIGHT FARM ANIMAL ABUSE

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Most farm animals suffer for the entirety of their lives, both on the farm and at the slaughterhouse. While there are state and federal laws designed to protect these animals from abuse, such laws are rarely enforced by the public officials who have the authority to do so. Animal advocacy groups have taken matters into their own hands by utilizing state unfair competition laws, including California Business and Professions Code section 17200. Section 17200 is a state version of the Federal Trade Commission Act, which prohibits unfair and deceptive business practices. Such "Little FTC Acts" exist in every state and are, for the most part, very similar. Thus, while this Comment focuses on section 17200, its reasoning is applicable to other states as well. This Comment explores the many ways in which unfair competition laws, namely section 17200, may be employed to protect farm animals. The passage of Proposition 64 by California voters in November 2004, which added a standing requirement for section 17200 plaintiffs, has curtailed the scope of the statute significantly. This Comment argues, however, that section 17200 can still be used to protect farm animals, through the use of humane competitors and individual consumers as plaintiffs.

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INTRODUCTION

On December 2, 2003, a 1800-pound cow attempted a daring escape from death, ramming through a door as workers tried to herd it into a slaughterhouse in Detroit, Michigan.[1] The cow ran across Gratiot Avenue, one of Detroit's busiest streets, and roamed for more than a mile before being tranquilized.[2] What exactly was this steer running from? A fate worse than

1. *See* Emilia Askari & Ben Schmitt, *Wayward Steer Leads Detroit Cops on a Chase*, DETROIT FREE PRESS, Dec. 3, 2003, http://www.freep.com/news/locway/cow3_20031203.htm.
2. *See id.*

death—an *inhumane* death.[3] Abuse of farm animals, however, begins far before the animals are slaughtered. Most farm animals suffer inhumane conditions and cruel treatment throughout their lives.[4]

While state and federal laws exist to protect farm animals from abuse both on the farm and in the slaughterhouse,[5] they do not protect farm animals perfectly. For instance, California Penal Code section 597(b) requires that certain animal suffering be "needless" in order for it to be illegal. Moreover, these laws provide only for public enforcement by government officials and agencies, such as prosecutors, state departments of food and agriculture,[6] and the United States Department of Agriculture (USDA).[7] Public enforcement of these laws is weak because prosecutors are subject to political pressure and are often too overworked to prosecute animal cruelty cases.[8] Moreover, state and federal agricultural departments are "closely allied to the meat industry"[9] and are therefore poor candidates for policing the industry.

Animal rights activists have taken matters into their own hands by utilizing state unfair competition laws, including California Business and Professions Code section 17200.[10] Section 17200 is a state version of the

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3. *See generally* Joby Warrick, *"They Die Piece by Piece,"* WASH. POST, Apr. 10, 2001, at A1 (detailing the common industry practice of slaughtering conscious cattle).

4. *See* MATTHEW SCULLY, DOMINION: THE POWER OF MAN, THE SUFFERING OF ANIMALS, AND THE CALL TO MERCY 247–86 (2002) (reporting observations of animals in farms).

5. *See, e.g.*, CAL. PENAL CODE §§ 596–600 (West 1999 & Supp. 2005); California Humane Methods of Slaughter Law, CAL. FOOD & AGRIC. CODE §§ 19501–19503 (West 2001); CAL. CODE REGS. tit. 3, §§ 1245.1–.16 (1990); Humane Methods of Slaughter Act of 1958, 7 U.S.C. §§ 1901–1906 (2000); Twenty-eight Hour Law of 1877, 49 U.S.C. § 80502 (2000).

6. The California Department of Food and Agriculture is an example of a state department of food and agriculture that is charged with enforcing the state's humane slaughter law.

7. CAL. PENAL CODE §§ 596–600; California Humane Methods of Slaughter Law, CAL. FOOD & AGRIC. CODE § 19503; Humane Slaughter Resolution, Pub. L. No. 107-171, § 10305, 116 Stat. 134, 493–94 (2002) (codified at 7 U.S.C.A. § 1901 (West 1999)).

8. Los Angeles Deputy City Attorney Robert Ferber discussed "The Decriminalization of Animal Abuse" on October 18, 2001, as a guest speaker of the Bohnett Animal Law Lecture Series at the UCLA School of Law. See http://groups.yahoo.com/group/AnimalAdvocacy/message/2443 for information on the lecture.

9. GAIL A. EISNITZ, SLAUGHTERHOUSE 24 (1997) ("The USDA, closely allied to the meat industry and opposed to the Humane Slaughter Act, was nevertheless made responsible for its enforcement.").

10. The entire statute is covered in CAL. BUS. & PROF. CODE §§ 17200–17209 (West 1997 & Supp. 2005). The California unfair competition statute can be more accurately characterized as an "unfair business practices" statute, because competitive harm is not actually required; nor does the suit have to be brought by a competitor. However, it is conventionally named the "Unfair Competition Law," not to be confused with the "Unfair Practices Act," which is CAL. BUS. & PROF. CODE §§ 17000–17101 (West 1997). Sections 17000 to 17101 address "competitive practices such as antitrust violations, consumer protection issues and unfair competition as defined by common law." Gail E. Lees, *The Defense of Private and Governmental Unfair Competition Law Claims*, *in* UNFAIR COMPETITON CLAIMS 2004, at 113, 190 (PLI Litig. & Admin. Practice Course, Handbook Series No. 711, 2004).

Federal Trade Commission Act, which prohibits unfair and deceptive business practices.[11] Such "Little FTC Acts" exist in every state and are, for the most part, very similar.[12] Thus, while this Comment will focus on California Business and Professions Code section 17200, its reasoning is applicable to other states as well.[13]

Formerly, section 17200's scope was broad.[14] It prohibited "unlawful, unfair or fraudulent business act[s] or practice[s]"[15] and allowed nonprofit organizations and members of the public, as well as competitors, to sue for alleged violations of the law.[16] Competitive harm was not a requirement,[17] and the plaintiff need not have been injured by the business act or practice to have standing.[18] Given section 17200's broad application, the statute was a potentially valuable weapon against animal abuse.[19]

On November 2, 2004, a majority of California voters approved Proposition 64.[20] Proposition 64 significantly curtailed the scope of section 17200 by imposing a standing requirement on plaintiffs. As a result of the

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11. 15 U.S.C. § 45(a)(1) (2000) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.").

12. *See* Lees, *supra* note 10, at 189. Lees' article explains:

> Across the country, every one of the states has adopted a local version of section 5 of the Federal Trade Commission Act ("FTC Act") (15 U.S.C. § 45(a)), which proscribes unfair methods of competition and deceptive or misleading practices. Referred to in the vernacular as "Little FTC Acts," these statutes take many forms, but they have in common a core set of standards forbidding "unfair" or "deceptive" practices, as well as provisions for governmental and private enforcement of the acts.

Id.

13. *See id.*

14. The statute was so broad, in fact, that it was criticized. *See generally* Joshua D. Taylor, Note, *Why the Increasing Role of Public Policy in California's Unfair Competition Law Is a Slippery Step in the Wrong Direction*, 52 HASTINGS L.J. 1131 (2001).

15. CAL. BUS. & PROF. CODE § 17200.

16. *Id.* § 17204 (stating that an action may be brought by "any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public") (amended by Initiative Measure, Proposition 64, § 3, on Nov. 2, 2004).

17. *See* Herr v. Nestle U.S.A., Inc., 135 Cal. Rptr. 2d 477, 485 (Ct. App. 2003) ("Actual injury to competition is *not* a required element of proof of a violation of Business and Professions Code section 17200." (citing People *ex rel.* Van de Kamp v. Cappuccio, Inc., 251 Cal. Rptr. 657, 663 (1988), and WILLIAM L. STERN, BUSINESS AND PROFESSIONS CODE SECTION 17200 PRACTICE § 3:17, at 3-3 (Rutter Group 2004)).

18. *See* Saunders v. Superior Court, 33 Cal. Rptr. 2d 438, 441 (1994) ("A plaintiff suing under section 17200 does not have to prove he or she was directly harmed by the defendant's business practices. An action may be brought by any 'person, corporation or association or by any person acting for the interests of itself, its members or the general public.'" (quoting CAL. BUS. & PROF. CODE § 17204)).

19. *Cf.* James Wheaton, *California Business and Professional Code Section 17200: The Biggest Hammer in the Toolbox?*, 16 J. ENVTL. L. & LITIG. 421 (2001) (discussing how to use section 17200 to protect the environment).

20. *See* Jordan Rau, *Election 2004 California*, L.A. TIMES, Nov. 3, 2004, at A1.

Proposition 64 changes, a section 17200 plaintiff now must "[have] suffered injury in fact and [have] lost money or property as a result of . . . unfair competition."[21] Consequently, for the most part, animal advocacy groups can no longer bring section 17200 lawsuits because they do not suffer financial or property damage as a result of the cruel treatment of farm animals.[22] Section 17200 lawsuits alleging harm to the public now can be brought only by public prosecutors such as the Attorney General, a district attorney, or a city attorney.[23] However, section 17200 lawsuits are still potentially powerful weapons against farm animal abuse because humane competitors and individual consumers have standing to sue. Under section 17200, humane competitors—which include farms or slaughterhouses that treat their animals humanely and companies that produce meat substitutes[24]—would argue that they lose market share to inhumane competitors because the inhumane competitors can charge lower prices by being cruel to their animals.[25] Individual consumers would argue that they have suffered financial injury as a result of buying animal products that were produced in violation of anticruelty and humane slaughter laws. This argument is especially strong if the inhumane farm in some way affirmatively represented that its animals were treated humanely.

This Comment explores the many ways in which unfair competition laws, namely California Business and Professions Code section 17200, may be employed to protect farm animals. Part I discusses the need for private enforcement of animal protection laws. Part II presents an overview of section 17200. Part II also describes how animal advocates have tried to utilize section 17200,[26] as well as what constitutes the ideal section 17200 case. Part III details the three prongs of section 17200 and describes how they can be used to protect farm animals. The Comment ends by concluding

21. KEVIN SHELLEY, STATE OF CALIFORNIA, OFFICIAL VOTER INFORMATION GUIDE FOR NOVEMBER 2, 2004, at 109 (2004) (displaying text of Proposition 64).

22. This Comment argues *infra* Part III.C, that animal advocacy groups *can* be plaintiffs if they sue under the "fraudulent" prong of section 17200, because in such instances they *do* compete against cruel farms and slaughterhouses and therefore suffer financial damage.

23. *See infra* Part III.C. Obviously, this is not much help: the need for section 17200 arose from the lack of public enforcement of anticruelty and humane slaughter statutes.

24. Examples of the many companies that produce meat substitutes are Morningstar Farms, Boca Burgers, and Yves Veggie Cuisine. Information on these companies can be found on their web sites: http://www.morningstarfarms.com, http://www.bocaburger.com, and http://www.yvesveggie.com.

25. An example of a farm that treats animals humanely is Niman Ranch, discussed *infra* Part II.B.

26. The lawsuits discussed in Part II were filed prior to the passage of Proposition 64. With the exception of PETA's lawsuits against the California Milk Advisory Board and Kentucky Fried Chicken for fraudulent business practices, in which PETA can be considered a competitor, these lawsuits would not be viable if brought today, because of the standing requirement imposed by Proposition 64.

that, despite Proposition 64, section 17200 can still be a powerful tool in fighting farm animal abuse because a humane competitor can sue a cruel farm or slaughterhouse for competitive harm, and an individual consumer can sue for financial injuries that result from paying for animal products produced in violation of animal protection laws.

I. THE NEED FOR PRIVATE ENFORCEMENT

A. The Lack of Public Enforcement

1. Cruelty in the Slaughterhouse

The cruelty inflicted on farm animals has increased over the last several years. As Americans increase their consumption of meat and kill rates rise, the "performance [of slaughterhouse workers] doesn't simply decline—it crashes."[27] Because of the rise in standard kill rates, workers are pressured to kill more quickly and therefore become sloppy. Such sloppiness results in "incidents in which live animals [are] cut, skinned or scalded."[28]

Slaughtering animals while they are conscious is illegal. California and federal laws require that animals be "rendered insensible to pain" before being slaughtered.[29] These laws, however, are far too often ignored. For example, one slaughterhouse worker admitted to slaughtering animals that were "clearly alive and conscious. Some . . . surviv[ing] as far as the tail cutter, the belly ripper, the hide puller. 'They die,' said [the worker], 'piece by piece.'"[30] Frighteningly, such incidents are commonplace in the meat industry.[31]

State departments of food and agriculture are responsible for enforcing the states' humane slaughter statutes—for instance, the California Department of Food and Agriculture is charged with enforcing the California Humane Methods of Slaughter Law.[32] Similarly, the USDA is supposed to

27. Warrick, *supra* note 3 (quoting Temple Grandin, an assistant professor with Colorado State University's animal science department and one of the nation's leading experts on slaughter practices).

28. *Id.*

29. California Humane Methods of Slaughter Law, CAL. FOOD & AGRIC. CODE § 19501(b)(1) (West 2001); Humane Methods of Slaughter Act of 1958, 7 U.S.C. § 1902(a) (2000). The California statute covers most farm animals, like "cattle, calves, horses, mules, sheep, swine, goats, or fallow deer . . . or poultry." The federal statute does not cover poultry. *See infra* notes 195–198 and accompanying text.

30. Warrick, *supra* note 3 (quoting Ramon Moreno, a worker at a modern slaughterhouse).

31. *Id.* (describing a Texas plant that "had 22 violations in six months" but told the USDA "its practices were no different than others in the industry").

32. California Humane Methods of Slaughter Law, CAL. FOOD & AGRIC. CODE § 19503.

enforce the federal Humane Methods of Slaughter Act.[33] Enforcement, however, is practically nonexistent, because agricultural departments and the meat industry are "closely allied."[34] For instance, USDA veterinarians and their supervisors "want to . . . go easy on the [slaughterhouses] because they know that after they leave the USDA they can get . . . high-paying job[s] as . . . industry consultant[s]."[35] The USDA demonstrated its loyalty to the meat industry when it opposed the Humane Slaughter Act.[36] Enforcement of humane slaughter statutes is so weak that workers are often unaware that such laws even exist or that agricultural departments have authority to enforce humane treatment of farm animals.[37] Clearly, public "enforcement" of existing humane slaughter statutes is not enough.

2. Cruelty on the Farm

"'What is more important, is seeing how these creatures lived their lives before they were killed . . . . People have this false sense of security that before death, these animals had some sort of life.'"[38] Unfortunately, life on the farm is no better than death at the slaughterhouse. Farm animals live in their own excrement.[39] Many are confined to small spaces, such as gestation crates for pigs[40]

33. *See* 21 U.S.C. § 603 (2000); *see also* Humane Slaughter Resolution, Pub. L. No. 107-171, § 10305, 116 Stat. 134, 493–94 (2002) (codified at 7 U.S.C.A. § 1901 (West 2004)) (asserting Congress's intent that the Secretary of Agriculture, who heads the USDA, enforce the Humane Slaughter Act).

34. EISNITZ, *supra* note 9, at 24.

35. *Id.* at 205, 209–10 (quoting Dr. Lester Friedlander, a USDA veterinarian). Dr. Friedlander proceeded to name sixteen USDA executives he knew, including veterinarians, "[t]raining officers, area supervisors, regional directors, agency administrators, [and] Washington staff officers" who moved into industry jobs upon leaving the USDA. *Id.* at 210–11.

36. *Id.* at 24.

37. *Id.* at 62, 63, 105 ("I asked Mike [a United Food and Commercial Workers International Union official] why the union hadn't brought the humane violations to the USDA's attention. Neither he nor the other local union officials were aware that the USDA had any enforcement authority regarding the humane treatment of livestock, or that there even was a Humane Slaughter Act.").

38. Shennie Patel, *Making the Change, One Conservative at a Time: A Review of* Dominion: The Power of Man, the Suffering of Animals, and the Call to Mercy *by Michael [sic] Scully*, 9 ANIMAL L. 299, 308 (2003) (quoting Interview with Matthew Scully, Special Assistant to the President of the United States and White House Senior Speech Writer (Jan. 28, 2003)).

39. *See, e.g.*, SCULLY, *supra* note 4, at 266 ("What must it be like for them, lying here covered in their own dung? . . . [A pig] is lying there covered in feces and dried blood . . . ."); *see also infra* note 61.

40. *See* SCULLY, *supra* note 4, at 265 ("'Confinement' doesn't describe their situation. They are encased, pinned down, unable to do anything but sit and suffer and scream . . . ."); *see also* Wayne Pacelle, Editorial, *Cruel and Unusual Punishment on the Farm*, L.A. TIMES, Jan. 15, 2003, at B13 ("90% of breeding sows are confined in gestation crates."). Florida is the only state to have banned gestation crates—"no other state restricts the means of confining pigs, chickens, turkeys, cattle, sheep or goats." *Id.*

and battery cages for chickens.[41] Overstocked pens are no better.[42] Painful maladies, ranging from massive tumors to open sores, are not treated unless they are detrimental to profit.[43] The animals are systematically mutilated without anesthetics: chickens are debeaked;[44] pigs are castrated and have their tails docked;[45] and cows are dehorned, branded, and castrated.[46] Some workers maliciously torture and abuse animals by, for example, making dry-ice bombs out of chickens[47] or throwing them against trucks.[48]

Inflicting such abuse and horrific living conditions upon animals is unnecessary in preparing them for consumption, and California Penal Code sections 596 to 600 prohibit such "needless suffering" and "unnecessary cruelty."[49] However, prosecutors rarely charge farms with animal cruelty. There are two main reasons for this inaction on the part of prosecutors. First, as previously mentioned, prosecutors are subject to political pressure from the agricultural industry.[50] For example, the Los Angeles City Attorney and Los Angeles County District Attorney are elected officials.[51] If a deputy city attorney or assistant district attorney wants to prosecute a farm for animal cruelty, he or she will certainly be outmaneuvered by his or her elected superior, the City Attorney or District Attorney, who depends on financial contributions from the agricultural industry. Second, prosecutors are largely overworked[52] with prosecuting "human cases,"

41. *See* David J. Wolfson, *Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production*, 2 ANIMAL L. 123, 149 (1996); *see also* Pacelle, *supra* note 40 ("More than 95% of egg-laying hens are kept in battery cages . . . .").

42. *See* SCULLY, *supra* note 4, at 259 ("[The pigs] draw back, as if I am a wolf. At least they try to draw back. There isn't room to draw back."); PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, VEGETARIAN STARTER KIT 7 (2004), *at* http://www.vegetarianstarterkit.com/pdfs/VSKceleb-dl.pdf ("'Beef cattle' spend most of their lives on overcrowded feedlots.").

43. *See* SCULLY, *supra* note 4, at 267–68 ("If the ailment threatens a particular production unit's meat-yielding capacity . . . that'll get treated.").

44. *See* PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, *supra* note 42, at 8.

45. *See* SCULLY, *supra* note 4, at 276.

46. *See* PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, *supra* note 42, at 7; Video: Meet Your Meat (People for the Ethical Treatment of Animals 2002) [hereinafter Meet Your Meat], *at* http://www.petatv.com/tvpopup/video.asp?video=mym2002.

47. *See* Stephanie Simon, *A Killing Floor Chronicle*, L.A. TIMES, Dec. 8, 2003, at A1. A dry-ice bomb involves "shoving a piece of dry ice up a live chicken's rectum, then plugging it with a wooden cork." Farm Sanctuary, Chickens Subjected to Horrific Cruelty, *at* http://www.poultry.org/tyson.htm (reprinting signed statement of former Tyson employee Virgil Butler).

48. *See* Meet Your Meat, *supra* note 46.

49. CAL. PENAL CODE § 597(b) (West 1999).

50. *See supra* note 8 and accompanying text.

51. *See* L.A. City Attorney, The Office of the City Attorney, *at* http://www.ci.la.ca.us/atty/atyoa1.htm; L.A. County District Attorney's Office, Welcome, *at* http://da.co.la.ca.us/.

52. *See* Anna Gorman, *Witness Mistakes Costly for Accused*, L.A. TIMES, Sept. 2, 2002, at B1 (quoting Los Angeles Head Deputy District Attorney Lauren Weis).

leaving little time to pursue "animal cases."[53] For these reasons, cruelty to farm animals is rarely, if ever, prosecuted.[54]

II. AN OVERVIEW OF UNFAIR COMPETITION LAW USAGE: CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 17200

A. Current Usage of Section 17200 in Animal Law

The need for private enforcement of anticruelty and humane slaughter laws is clear. Thus, animal activists recently started using section 17200 as a valuable weapon against animal abuse. For example, People for the Ethical Treatment of Animals (PETA) and John Robbins, former heir to the Baskin-Robbins fortune,[55] filed a section 17200 lawsuit against the California Milk Advisory Board (CMAB) on December 11, 2002.[56] The complaint alleged that the CMAB's "Happy Cows" campaign was deceptive advertising,[57] which thus constituted a fraudulent business practice under section 17200. PETA sought to enjoin the ad campaign,[58] which consisted of television ads with the slogan, "Great Cheese comes from Happy Cows. Happy Cows come from California."[59] These ads portrayed dairy cows and calves in "spacious, grassy pastures on beautiful, rolling hills with a few cows grazing and wandering about and 'enjoying' the ease, luxury and contentment of life as a dairy cow in

53. *See supra* note 8; *see also* TEX. HUMANE LEGISLATION NETWORK, A PRIMER FOR ANIMAL CRUELTY INVESTIGATION 3 (n.d.), *available at* http://ark4pets.com/thln/Primer.pdf ("Prosecutors are generally overworked, and animal cruelty cases become low priority compared to cases of violent crimes against people."). Since people generally view humans as more important than animals, animals are low priority victims.

54. It is noteworthy that the Los Angeles City Attorney's Office has made a historic effort in combating animal abuse by creating a special Animal Protection Unit. *See* L.A. City Attorney, Animal Protection Unit, *at* http://www.ci.la.ca.us/atty/atycb1c2b.htm. Deputy City Attorney Robert Ferber, the supervising attorney of the Unit, prosecutes solely animal abuse cases. Interview with Robert Ferber, Deputy City Attorney of Los Angeles and Supervisor of the City Attorney's Office's Animal Protection Unit (Jan. 13, 2004).

55. John Robbins turned down his chance to head Baskin-Robbins, "the world's largest ice-cream company," because of "*the unspeakable quality of the lives [the animals] are forced to live.*" JOHN ROBBINS, DIET FOR A NEW AMERICA, at xiii–xv (1987).

56. Plaintiff's Complaint, People for the Ethical Treatment of Animals, Inc. v. Cal. Milk Advisory Bd. (Cal. Super. Ct. filed Dec. 11, 2002) (No. 415579) [hereinafter Unhappy Cow Complaint], *available at* http://www.unhappycows.com/newsuit.html.

57. *Id.*

58. *Id.*

59. Videos of the commercials are viewable on the California Milk Advisory Board's web site, http://www.realcaliforniacheese.com.

California."[60] However, the harsh reality is that the life of a dairy cow or a calf is anything but happy—it is not even decent.[61] PETA therefore sought to enjoin the CMAB's fraudulent advertising under section 17200.[62] Unfortunately, the Superior Court of San Francisco dismissed the lawsuit, stating that governmental entities are exempt from false advertising laws.[63] At the hearing, however, "[t]he judge did acknowledge that California cows probably aren't happy and that if the ads implying that they were happy had been made by a private individual, false-advertising laws might apply."[64] PETA appealed the ruling, and the California Court of Appeal affirmed the dismissal.[65]

PETA also sued Kentucky Fried Chicken (KFC) for false advertising under section 17200 on July 7, 2003.[66] The complaint alleged that KFC disseminated false information through its telephone information hotline, web site, and news releases, and it sought to enjoin the false advertising.[67] For example, the complaint alleged that KFC falsely stated on its web site that it had a strict animal welfare policy and that all of its birds were treated humanely and suffered no pain.[68] According to PETA, representatives from KFC's telephone information hotline falsely told consumers that KFC and PETA had gone through mediation, PETA had lost the case, and KFC had adopted gas killing, which is PETA's recommended humane slaughter method.[69] The case was ultimately settled when KFC removed the statements from its web site and showed PETA a new telephone script for its hotline representatives.[70]

60. Unhappy Cow Complaint, *supra* note 56, ¶ 1; *see supra* note 59.

61. *See* People for the Ethical Treatment of Animals, Photos Submitted with PETA's Complaint, *at* http://www.unhappycows.com/photos-new.html, http://www.unhappycows.com/photonew2.html, http://www.unhappycows.com/photonew3.html, http://www.unhappycows.com/photonew4.html, http://www.unhappycows.com/photonew5.html. The photos on the web site show dairy cows living in muddy fields soaked with feces and urine, with horrifically (and unnaturally) large and distended udders. Calves are shown crammed in veal crates.

62. Unhappy Cow Complaint, *supra* note 56, ¶ 1; *see supra* note 59.

63. People for the Ethical Treatment of Animals, Inc. v. Cal. Milk Producers Advisory Bd., No. 415579 (Cal. Super. Ct. Apr. 16, 2003) (order sustaining demurrer); *see* People for the Ethical Treatment of Animals, PETA Takes "Happy Cows" Lawsuit to Higher Court, *at* http://www.unhappycows.com/index.html [hereinafter PETA, Appeal].

64. PETA, Appeal, *supra* note 63.

65. People for the Ethical Treatment of Animals, Inc. v. Cal. Milk Producers Advisory Bd., 22 Cal. Rptr. 3d 900, 908 (Ct. App. 2005).

66. *See* People for the Ethical Treatment of Animals, PETA and KFC, *at* http://www.kentuckyfriedcruelty.com/complaint.asp.

67. *See id.*; Plaintiff's Complaint, People for the Ethical Treatment of Animals, Inc. v. KFC Corp. (Cal. Super. Ct. filed July 7, 2003) (No. BC 298572) [hereinafter KFC Complaint].

68. *Id.* ¶¶ 10–11.

69. *Id.* ¶ 16.

70. *See* People for the Ethical Treatment of Animals, KFC's Lies Stopped: Campaign Full Speed Ahead!, *at* http://www.kentuckyfriedcruelty.com/victory1.asp.

In addition to false advertising claims, attempts are also being made to enjoin the actual cruelty committed against farm animals. For example, the Animal Protection and Rescue League and In Defense of Animals filed a complaint against Sonoma Foie Gras (Sonoma), seeking to enjoin Sonoma from force-feeding ducks to produce foie gras, which is fatty duck liver.[71] To produce foie gras, the ducks are deliberately induced to develop hepatic lipidosis, "a painful swelling of the liver."[72] The ducks are force-fed with eight to twelve inch metal tubes shoved down their esophagi, so that their livers swell to "twelve times their normal size,"[73] and the ducks would die of organ rupture if not slaughtered first.[74] Moreover, as a result of being "too weak and overweight to defend themselves, rats . . . eat[ ] pieces of damaged anal tissue of the ducks."[75] The plaintiffs argued that such cruelty violated various sections of the California Penal Code, which prohibits malicious and intentional torture, needless suffering and unnecessary cruelty, and improper care and attention to an animal.[76] They further argued that this unlawful business activity constituted a violation of section 17200.[77] Sonoma responded to the lawsuit with a lawsuit of its own, claiming that "[d]ucks do not suffer pain when they gorge" and that ducks' esophagi are designed for overfeeding.[78] Later, Sonoma amended its complaint to eliminate this language.[79]

Section 17200 has also been used to enjoin the use of kangaroo leather in shoes. On May 7, 2003, Viva! International Voice for Animals filed a lawsuit against Adidas for violating California Penal Code section 653o, which makes it "unlawful to import into this state for commercial purposes, to possess with intent to sell, or to sell within the state . . . any part or product

71. Plaintiff's Complaint, Animal Protection & Rescue League v. Sonoma Foie Gras [hereinafter Foie Gras Complaint] (on file with UCLA Law Review). This lawsuit is no longer viable because a bill banning foie gras was signed into law by California Governor Arnold Schwarzenegger in October 2004. The ban goes into effect in 2012, which in turn legalizes foie gras until that date. *See infra* note 166.

72. *Id.* ¶ 15.

73. *Id.* ¶¶ 16, 17.

74. *Id.* ¶ 16.

75. *Id.* ¶ 19.

76. *Id.* ¶¶ 24–31 (quoting CAL. PENAL CODE §§ 597(a), 597(b), 597f(a), 597.1(a), 599b).

77. *Id.* ¶¶ 32–35.

78. Plaintiff's Complaint ¶¶ 13, 14, Sonoma Foie Gras v. Pease (Cal. Super. Ct. filed Oct. 2003) (No. CV022172) [hereinafter Sonoma Complaint] (on file with UCLA Law Review). The complaint also accused the defendants of trespass, burglary, and theft in furtherance of conspiracy. *Id.* ¶¶ 34–37.

79. Plaintiff's First Amended Complaint, Sonoma Foie Gras v. Pease (No. CV022172) [hereinafter Sonoma Amended Complaint] (on file with UCLA Law Review).

thereof, of any . . . kangaroo . . . ."[80] Viva! alleged that Adidas was liable under section 17200 because it imported and sold shoes made of kangaroo leather, an unlawful business practice.[81] Adidas's response was that California Penal Code section 653o was unconstitutional, and that the California legislature did not intend for it to be applied to species that were not endangered, despite the express inclusion of kangaroos in the statute.[82]

B. The Ideal Section 17200 Lawsuit

All of the above lawsuits were filed by animal rights organizations. Under section 17200's formerly broad reach, this was perfectly acceptable. With the passage of Proposition 64,[83] however, animal advocacy groups can be plaintiffs only if they have suffered financial or property damage as a result of the cruelty against the farm animals. This can occur only in the context of fraudulent business acts or practices, which violate the third prong of section 17200.[84] In such instances, the animal advocacy group *is* competing against the inhumane farm or slaughterhouse. This is because, for every false advertisement by a cruel farm or slaughterhouse, claiming that its animals are treated humanely, the animal advocacy group has to spend more money on its own advertising to disseminate the truth.

In cases filed under the "unlawful" or "unfair" prongs of section 17200, animal advocacy groups are unlikely to have suffered financial injury or property damage as a result of cruelty against the animals. In such cases, potential plaintiffs could be humane competitors or individual consumers. Humane competitors could include: (1) farms or slaughterhouses that treat their animals humanely or (2) companies that produce meat substitutes. Individual consumers would have to be people who purchased animal products produced in violation of anticruelty statutes or humane slaughter laws.

Sadly, humane competitors—perhaps the best potential section 17200 plaintiffs after Proposition 64—are few are far between. A truly free-range egg

80. Plaintiff's Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment at 3, Viva! Int'l Voice for Animals v. Adidas Promotional Retail Operations, Inc. (Cal. Super. Ct. filed Nov. 10, 2003) (No. 420214) [hereinafter Kangaroo Leather Motion for Summary Judgment] (quoting CAL. PENAL CODE § 653o) (alterations in original) (on file with UCLA Law Review).

81. *Id.* at 3–4.

82. Defendant's Answer to Unverified First Amended Complaint ¶¶ 3, 4, Viva! Int'l Voice for Animals v. Adidas Promotional Retail Operations, Inc. (Cal. Super. Ct. filed Aug. 4, 2003) (No. 20214) [hereinafter Kangaroo Leather Answer].

83. SHELLEY, *supra* note 21, at 109.

84. CAL. BUS. & PROF. CODE § 17200 (West 1997).

producer, for example, could be a humane competitor.[85] For example, Flying F Farm, a small family farm with a "backyard flock" of 500 chickens, is a truly free-range egg producer. Flying F keeps two flocks of chickens on its farm.[86] The chickens have access to the outdoors twenty-four hours a day, seven days a week—the doors of the buildings in which they live are never closed.[87] There is almost twenty square feet of living space per chicken.[88] Because there are no cages, the hens can roam and fly into whichever nests they choose.[89] "Spent hens," which are no longer capable of producing eggs, are allowed to continue to live on the farm with the rest of the hens.[90] Of course, giving the hens all this space is costly.[91] Flying F Farm thus has to charge higher prices, which means that it loses consumers and suffers from competitive harm by obeying the anticruelty statutes that many competitors violate. It is therefore an ideal plaintiff for bringing a section 17200 suit.

Niman Ranch provides another example of a humane competitor that is an ideal section 17200 plaintiff. Niman Ranch is the only meat producer in the nation that meets the Animal Welfare Institute's humane husbandry standards.[92] It raises hogs, cattle, and lamb for consumption.[93] All of its animals are free-range.[94] Pig pens are deeply rooted with hay so that pigs can

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85. The use of the term "free-range" on egg packages, however, is not really regulated by the USDA and is not regulated by the California Department of Food and Agriculture at all. Just because eggs are labeled "free range" does not mean that they were produced humanely. *See* U.S. DEP'T AGRICULTURE, MEAT AND POULTRY LABELING TERMS (2003), *at* http://www.fsis.usda.gov/OA/pubs/lablterm.htm ("Producers must demonstrate to the Agency that the poultry has been allowed access to the outside [to be considered free range or free roaming]."). However, there is no requirement as to the amount of time a bird must be allowed outside. Theoretically, a bird allowed outside even for two seconds could be considered free-range. *See also* Elaine Lipson & Dan Luzadder, *Making Sense of Meat Labels*, NATURAL FOODS MERCHANDISER, *at* http://www.naturalfoodsmerchandiser.com/ASP/articleDisplay.asp?strArticleId=153&strSite=NFMSite; *CNN Live Sunday* 16:00 (CNN cable television broadcast, July 26, 2004).

86. Telephone Interview with Dave Friend, Owner, Flying F Farm (Dec. 17, 2003).

87. *Id.*

88. *Id.* Flying F provides two enclosures, each with an outdoor yard and a building. Each building is approximately sixty by thirty feet, and each yard is approximately sixty by fifty feet. This yields 4800 square feet of living space for each lot. Each lot has approximately 250 hens. Each hen thus has approximately 19.2 square feet of living space. *Id.*

89. *Id.*

90. *Id.*

91. *Cf.* SCULLY, *supra* note 4, at 248. Scully explains the financial benefits of confining pigs; this reasoning can be extended to all farm animals. For a reproduction of Scully's explanation, see *infra* note 157 and accompanying text.

92. *See* Animal Welfare Inst., Alternatives to Intensive Confinement Systems, *at* http://www.awionline.org/farm/alternatives.htm; Diane Halverson, *Niman Ranch: AWI Approved*, ANIMAL WELFARE INST. Q., Summer 1999, *at* http://www.awionline.org/farm/farmsu99.html#niman.

93. Niman Ranch, FAQ: Questions about Niman Ranch, *at* http://store.nimanranch.com/store/nimanranch/help3.jsp#slaughter.

94. *Id.*

"carry out their natural behaviors such as rooting, tunneling and nesting."[95] After the animals are transported to the slaughterhouse site, "they are held in a resting area overnight to recover from the excitement of the ride. The next morning the [animals] walk individually up a ramp, calmed by . . . ranchers who have been handling them for at least 4 months."[96] Gates are shut behind the animals, and when they raise their heads, they either are stunned with a pneumatic hose or an electric shock.[97] The animals are therefore insensible to pain upon slaughter.

Giving the animals so much space is very costly. Paying ranchers to calm the animals prior to slaughter is yet another expense.[98] Thus, the humane slaughtering of animals slows down production rates and is costly,[99] and higher costs to producers mean higher prices for consumers. For example, three pounds of beef brisket costs $17.97 at Vons Supermarket ($5.99 per pound).[100] The same amount of beef brisket at Niman Ranch is priced at $27.00.[101] Humanely produced beef brisket thus costs $3.01 more per pound than inhumanely produced beef brisket. Simple economics dictate that Niman Ranch will have fewer consumers than Vons because it must pass on the higher costs of being humane in the form of higher prices to consumers. Because Niman Ranch is obeying anticruelty and humane slaughter laws, it is suffering competitive injury. This makes it an ideal section 17200 plaintiff.

Companies such as Morningstar Farms, Boca Burger, and Yves Veggie Cuisine are examples of companies that produce meat substitutes. These companies are also humane competitors. They produce meat substitutes based on soy or wheat gluten,[102] and they could argue that inhumane farms charge relatively low prices for meat because the inhumane treatment of animals results in lower costs. Because the inhumane farms enjoy lower costs, they can pass the savings on to consumers in the form of lower prices. For this reason, meat substitutes tend to be more expensive than inhumanely produced meat,

95. *Id.*

96. *Id.*

97. *Id.* Cows are stunned with a pneumatic hose, while pigs and lambs are electrically stunned.

98. *Cf.* SCULLY, *supra* note 4, at 266 ("After that brief human involvement, the machines take over. Computers monitor temperature and ventilation. Automated misters and drip coolers water them. Automated heat lamps are their sun. An automated feeding system delivers scientifically formulated food . . . ."); *id.* at 247 ("Standing outside a factory farm, the first question that comes to mind is . . . [W]here is everybody? Where are the owners, the farmers, the livestock managers, the extra hands, anybody?").

99. *See supra* note 27 and accompanying text.

100. Vons Supermarket, Brisket Whole, *at* http://shop.safeway.com/ (last visited Dec. 18, 2003).

101. Niman Ranch, 1/2 Beef Brisket, *at* http://store.nimanranch.com/ (last visited Dec. 18, 2003).

102. *See, e.g.*, Morningstar Farms, Chik—Morningstar Farms Chik'n Nuggets, *at* http://www.kelloggs.com/cgi-bin/brandpages/product.pl?product=320&company=23.

which reduces consumer demand for meat substitutes. The inhumane farms thus capture a larger share of the market than they would if they treated their animals humanely. For example, Vons's web site sells 10.5 ounces of Morningstar Farms Chik Nuggets[103] for $4.99 ($0.48 per ounce).[104] Vons's web site also sells 13.5 ounces of Banquet Chicken Breast Nuggets for $4.49 ($0.33 per ounce).[105] Presumably, Banquet is able to keep its prices low by treating its animals inhumanely. Morningstar Farms and other meat substitute producers thus suffer from financial injury when farms inhumanely treat the animals they sell for consumption.

A cruel farm or slaughterhouse might argue that humane competitors such as Niman Ranch and Flying F Farm lose market share because they go above and beyond what anticruelty laws and humane slaughter statutes require—that is, they lose market share and profit by voluntarily incurring higher costs. However, the issue is whether the defendant farm or slaughterhouse is violating anticruelty laws or humane slaughter statutes. If the defendant is in fact violating such laws, Niman Ranch and Flying F Farm have standing to sue because they are competitors that obey the laws. That Niman Ranch and Flying F Farm arguably go above and beyond the bare minimum of what these laws require does not mean that they cannot sue a cruel competitor. Even if the loss of profits suffered by them could only partially be allocated to the cruel competitor's behavior, that fact does not foreclose their ability to sue cruel competitors, but only would affect the amount of lost profits that humane producers could recover.

For the reasons stated above, the ideal section 17200 plaintiff is a humane competitor suing for competitive harm. Humane competitors generally are: (1) farms or slaughterhouses that treat their animals humanely, (2) companies that produce meat substitutes, or (3) animal advocacy groups in the "fraudulent advertising" context.

However, a section 17200 lawsuit can also be brought by an individual consumer who has bought a cruelly produced animal product. Such a consumer could argue that he or she was harmed because the animal product was produced inhumanely, contrary to anticruelty laws, humane slaughter statutes, and the public policy of those laws. The consumer's financial harm would stem from the fact that he or she paid for the animal product.

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103. These nuggets are in fact vegetarian. *See supra* note 102 and accompanying text.

104. Vons Supermarket, Veg/Organic, Frozen, *at* http://shop.safeway.com/ (last visited Nov. 23, 2004).

105. Vons Supermarket, Family, Multiserve-Frozen, *at* http://shop.safeway.com/ (last visited Nov. 23, 2004).

A crucial inquiry, in a section 17200 lawsuit by an individual consumer, would be whether the consumer *reasonably* expected that the animal product was produced humanely. As discussed in Part III.C. below, it is quite likely that the typical consumer accepts the "family farm myth" that animals happily live on small family farms, unmutilated, well-treated, and with plenty of room to move. Whether the average consumer believes this is a factual inquiry that would probably entail some survey or poll evidence.

If a consumer actually knew that an animal product was produced inhumanely and proceeded to buy the product anyway, it would be very difficult to argue that he or she was *harmed* by the farm's cruelty because he or she "assumed the risk" that the product resulted from cruelty. In such a case, cruel farms could argue that the consumer had the choice of buying humanely produced meat from humane competitors. The consumer could rebut this argument by pointing out that, although humane competitors are an alternative, they are not a meaningful alternative, because (1) their prices are artificially high because they cannot capture the market share they would otherwise have, due to the cruel farms' unfair competition, and (2) humane competitors are few and far between.

Additionally, the consumer could argue that every consumer has the *right* to expect that animal products are produced humanely. After all, the law and public policy dictate that farm animals be treated humanely. Everyone has the right to expect legally produced food, and when the individual consumer buys an animal product, he or she has the right to expect that it was produced humanely. Whatever price the consumer paid, financial harm arguably results from the purchase of any illegal product. How a court would decide this issue is unclear, since one could argue that consumers financially benefit from the cruelty because it results in lower prices. As of the writing of this Comment, Proposition 64 is very new, so there is no case law regarding whether an individual consumer can suffer financial harm in such circumstances.

In considering these potential section 17200 plaintiffs, it seems that the ideal plaintiff would be a farm or slaughterhouse that treats its animals humanely. Such a plaintiff would be in direct competition with cruel farms or slaughterhouses, whereas meat substitute companies and animal advocacy groups are more *indirect* competitors. Humane competitors that produce animal products also might seem more sympathetic than individual consumers, because they would not be viewed as animal advocates merely trying to advance their ideals. Because they usually are small family farms, humane competitors would be viewed as "little guys" merely trying to effect fair competition.

III. THE THREE PRONGS OF SECTION 17200

Section 17200 consists of three prongs that establish the types of business acts or practices that plaintiffs can sue defendants for committing: (1) unlawful, (2) unfair, and (3) fraudulent.[106] Each of these prongs can be utilized by plaintiffs in fighting cruelty to farm animals.

Generally, unlawful acts mean those acts that are unlawful under other statutes or case law—for example, criminal, regulatory, and civil statutes, as well as common law actions.[107] Unfair acts, for competitors, essentially are anticompetitive acts that violate the spirit of antitrust laws.[108] Unfair acts, for individual consumers, are acts that violate the public policy of anticruelty statutes.[109] Fraudulent business acts are those that are likely to deceive reasonable consumers—notably, actual deception is *not* required.[110]

A. Unlawful Practices

The "unlawful" practices prohibited by section 17200 are any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made. It is not necessary that the predicate law provide for private civil enforcement. "As [the California] Supreme Court put it, section 17200 'borrows' violations of other laws and treats them as unlawful practices independently actionable under section 17200 et seq."[111] If a company's business practice violates the law, the practice is enjoinable under section 17200. Thus, California criminal and regulatory laws allow recovery in cases involving cruelty to, and inhumane slaughter of, farm animals.

It should be noted from the outset that use of the unlawful prong is unavailable in some states. This is because "[t]hirty states provide an exemption in their animal cruelty laws for commonly accepted animal husbandry practices, including activities such as dehorning, castrating, and branding."[112] Fortunately, Texas and California, respectively the nation's first

106. CAL. BUS. & PROF. CODE § 17200 (West 1997).

107. *See* Saunders v. Superior Court, 33 Cal. Rptr. 2d 438, 440–41 (Ct. App. 1994).

108. *See* Cel-Tech Communications v. L.A. Cellular Tel., 973 P.2d 527, 544–45 (Cal. 1999).

109. *See* Gregory v. Albertson's, Inc., 128 Cal. Rptr. 2d 389, 395 (Ct. App. 2002); Smith v. State Farm Mut. Auto. Ins., 113 Cal. Rptr. 2d 399, 415 (Ct. App. 2001).

110. *See* Comm. on Children's Television, Inc. v. Gen. Foods Corp., 673 P.2d 660, 668–69 (Cal. 1983).

111. *Saunders*, 33 Cal. Rptr. 2d at 441 (citing Farmers Ins. Exch. v. Superior Court, 826 P.2d 730, 734 (Cal. 1992)).

112. Pamela D. Frasch et al., *State Animal Anti-Cruelty Statutes: An Overview*, 5 ANIMAL L. 69, 77 & n.34 (1999).

and second largest livestock producers, are not among them.[113] As a matter of fact, six of the nation's ten largest livestock producing states do not have exemptions for common farming practices.[114] For those states that do exempt customary farming practices, the unlawful prong is unavailable as a cause of action because farm animal abuse has essentially been legalized. The logic (or lack thereof) of such an exemption has been criticized in both American courts[115] and British courts.[116] Indeed, this exemption "hand[s] the decision as to what is cruel to the food industry completely."[117]

In 1998, the California Supreme Court clarified, once and for all, that companies that violate the California Penal Code—which contains the state's anticruelty statutes—can be held liable under section 17200. In *Stop*

113. *Id.*

114. The top ten producers in 1996, based on cash receipts, were, in descending order: Texas, California, Iowa, Nebraska, Kansas, North Carolina, Wisconsin, Minnesota, Arkansas, and Georgia. U.S. DEP'T OF AGRICULTURE, AGRICULTURE FACTBOOK 1998, at 41–42, *available at* http://www.usda.gov/news/pubs/fbook98/afb98.pdf. Iowa, Nebraska, Kansas, and Wisconsin have exemptions for customary farming practices in their anticruelty statutes. *Id.*

115. American courts have not criticized "customary industry practice" exemptions in the context of animal abuse statutes, but they have criticized such exemptions in the context of other industries:

> For example, Justice Learned Hand, in determining whether a tugboat company had violated the law in failing to equip its tugboats with radios, responded to the argument that other companies had similarly failed:
>
> > There are yet, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence. . . . Indeed, in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It may never set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.

David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House: Animals, Agribusiness, and the Law: A Modern American Fable*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 205, 216 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (quoting Hooper v. Same, 60 F.2d 737, 740 (2d Cir. 1932)). "Supreme Court Justice Oliver Wendell Holmes [has stated] . . . that 'what usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.'" Wolfson & Sullivan, *supra*, at 216 (quoting Tex. & Pac. Ry. v. Behmer, 189 U.S. 468, 470 (1902)).

116. When McDonald's sued some activists in the United Kingdom for defamation, claiming that the activists had falsely stated that McDonald's was culpably responsible for cruelty to farm animals, McDonald's suggested that the court should find a practice humane if it was customary in the farming industry. The court stat[ed] that it "cannot accept this approach" because "[t]o do so would be to hand the decision as to what is cruel to the food industry completely, moved as it must be by economic as well as animal welfare considerations." This simple logical statement is an unequivocal rejection of the statutory reality in the majority of states in the United States. Wolfson & Sullivan, *supra* note 115, at 219–20 (quoting Chief Justice Bell, Verdict Section 8, The Rearing and Slaughter of Animals (Oct. 18, 2003), *at* http://www.mcspotlight.org/case/trial/verdict/verdict_jud2c.html). For a detailed analysis of "McLibel," and the customary farming practice exemption, see David J. Wolfson, *McLibel*, 5 ANIMAL L. 21 (1999), and Wolfson & Sullivan, *supra* note 115, respectively.

117. *Id.* at 219–20 (quoting Chief Justice Bell, *supra* note 116).

Youth Addiction, Inc. v. Lucky Stores, Inc.,[118] the plaintiff sued a market under section 17200, claiming the market committed an unlawful business practice by selling cigarettes to minors, a violation of California Penal Code section 308.[119] Lucky argued that the plaintiff could not state a section 17200 claim by alleging a violation of Penal Code section 308, because the underlying statute itself did not provide for private enforcement.[120] The court disagreed, finding that "it is in enacting the [unfair competition law] itself, and not by virtue of particular predicate statutes, that the Legislature has conferred upon private plaintiffs 'specific power' to prosecute unfair competition claims."[121] It pointed out that "[the plaintiff] seeks relief from alleged unfair competition, not to enforce the Penal Code."[122] The court agreed with the plaintiff that "[e]nforcing the [unfair competition law] in this manner . . . would advance the policy of discouraging unfair competition by leveling the playing field on which Lucky competes with other, law-abiding, retailers."[123] The California Supreme Court therefore held that the plaintiffs had stated a valid cause of action.[124]

Stop Youth Addiction made it clear that private plaintiffs could sue under section 17200, even if businesses violated statutes that did not provide for private enforcement. It furthermore confirmed that violations of the California Penal Code could be considered unlawful business acts or practices, enjoinable under section 17200.

1. Anticruelty Laws: California Penal Code Sections 596–600 and the Twenty-eight Hour Law

"California has one of the nation's toughest anticruelty laws, and enforcement of the law appears to be more rigorous than in many other states."[125] California Penal Code sections 596 to 600 comprise a series of anticruelty statutes. Those applicable to farm animals are described below. Section 599b expressly allows companies to be vicariously liable for the cruel acts of their employees: "the knowledge and acts of any agent of, or person

118. 950 P.2d 1086 (Cal. 1998).
119. *Id.* at 1089.
120. *Id.* at 1090.
121. *Id.* at 1091 (citing People v. McKale, 602 P.2d 731, 733 (Cal. 1979)).
122. *Id.* at 1094. Of course, providing for recovery under section 17200 offers an indirect way of enforcing the Penal Code, which is why section 17200 can be of much help in fighting animal cruelty.
123. *Id.* at 1101.
124. *Id.* at 1102. The California Supreme Court affirmed the court of appeal's reversal of the superior court's decision to sustain Lucky's demurrer.
125. GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 119 (1995).

employed by, a corporation . . . must be held to be the act and knowledge of such corporation as well as such agent or employee."[126] Thus, farms and slaughterhouses can be held liable for violating these statutes.

a. California Penal Code Section 599c—Exemptions

Section 599c states that "this title [must not] . . . interfere with the right to kill all animals used for food . . . ."[127] It therefore exempts, among other things, the killing of farm animals from Penal Code sections 596 to 600. However, while section 599c preserves a farm's legal right to *humanely* kill farm animals, it does not exempt farms from *torturing* farm animals or *inhumanely* killing them.

In *People v. Thomason*,[128] the defendant was convicted of "three felony counts of cruelty to . . . mice, rats, [and] newborn mice . . . in violation of Penal Code section 597, subdivision (a)," which prohibits the malicious torture of animals.[129] The defendant had produced "crush videos," which are "fetish videos in which small animals are taunted, tortured, then crushed to death under the feet of provocatively dressed women."[130] The defendant argued that because section 599c exempted "the right to destroy . . . any animal known as dangerous to life, limb, or property," section 597(a) did not apply to rodents.[131] The court squarely rejected this argument, finding that the animals were domestic and did not pose the health risks of wild rodents.[132] More importantly, the court held that

> [a]ssuming [section 599c] could be construed to permit the *destruction* of all mice and rats, wild or bred and domesticated, as deadly or dangerous or destructive, *it does not permit defendant to intentionally and maliciously torture or maim or taunt or mutilate or wound or disembowel and kill any living animal in the process.*[133]

The court held that the exemption did not mean that the defendant could kill rodents by "any means available."[134]

This holding is vital because it distinguishes the legal right to *humanely kill* animals, which falls within the section 599c exemption, from the right to

126. CAL. PENAL CODE § 599b (West 1999 & Supp. 2005).
127. CAL. PENAL CODE § 599c (West 1999 & Supp. 2005).
128. 101 Cal. Rptr. 2d 247 (Ct. App. 2000).
129. *Id.* at 249.
130. *Id.* at 249 n.2.
131. *Id.* at 250 (quoting CAL. PENAL CODE § 599c).
132. *Id.*
133. *Id.* at 251 (emphasis added).
134. *Id.*

inhumanely torture, kill, or neglect them, as prohibited by sections 596 to 600. Even though it is legal to kill dangerous animals, *Thomason* makes it clear that a defendant can still be guilty of violating sections 596 to 600 when killing an animal inhumanely. The section 599c exemption for killing dangerous animals is analogous to the section 599c exemption for slaughtering animals for consumption. Thus, even though it is legal to slaughter animals for food, slaughterhouses can still be guilty of violating sections 596 to 600 if their killing is not done humanely. As for farms, the section 599c exemption should not apply to them at all, since they do not slaughter animals—they raise them and then send them to slaughterhouses. Section 599c, in the context of farm animals, exempts only the right to humanely kill them.

A cruel slaughterhouse might try to distinguish *Thomason* on two grounds. First, it might argue that *Thomason* only held that malicious torture does not fall within the 599c exemption, and that section 599c exempts the intentional or the negligent mistreatment of animals. However, this is not supported by the text of section 599c, which exempts only the "right to *kill* all animals used for food."[135] This was basically the rationale underlying *Thomason*—section 599c exempts only the humane killing of certain animals, so a defendant can still be liable for mistreating the animals as prohibited by sections 596 to 600. Moreover, there is nothing in the *Thomason* opinion indicating that there should be a distinction between malicious cruelty and other types of cruelty for purposes of determining the scope of the section 599c exemptions. Given the text of section 599c and the fact that there is no reason to believe that *Thomason*'s reasoning was limited only to malicious cruelty, section 599c should be interpreted to exempt only the right to humanely slaughter farm animals.

A cruel slaughterhouse might also try to distinguish *Thomason* on the basis that it does not involve farm animals. However, there is nothing in the *Thomason* opinion indicating that there should be a distinction between the right to kill dangerous animals and the right to slaughter animals for food. The two exemptions are perfectly analogous. Moreover, there is no reason to believe that California's anticruelty statutes distinguish between farm animals and nonfarm animals. As discussed in Part III.A. above, several other states have exempted customary farming practices from their anticruelty laws. California is not one of them, which strongly implies that the California Legislature intended that farm animals be accorded the same protection as other animals. Thus, *Thomason* is not distinguishable simply because it did not involve farm animals.

135. CAL. PENAL CODE § 599c (emphasis added).

b. California Penal Code Section 597(b)—Intentional and Negligent Acts of Cruelty

California Penal Code section 597(b)[136] is probably the section most applicable to the meat, egg, and dairy industries. It states that:

> [1] every person who overdrives, overloads, drives when overloaded, overworks, 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 overdriven, overloaded, driven when overloaded, overworked, tortured, tormented, deprived of necessary sustenance, drink, shelter, or to be cruelly beaten, mutilated, or cruelly killed; and [2] 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 any manner abuses any animal, or fails to provide the animal with proper food, drink, or shelter or protection from the weather, or who drives, rides, or otherwise uses the animal when unfit for labor, is, for every such offense, guilty of a crime . . . .[137]

Section 597(b) sets forth many potential violations, including, among other things, inflicting "needless suffering" or "unnecessary cruelty" on an animal, or depriving an animal of food, water, or shelter.[138] Unfortunately, farms satisfy the actus reus requirement all too easily. For example, egg ranches periodically deprive hens of food for five to fourteen days, in a process known as "forced molting," so that the hens will produce more eggs.[139] Such cruelty is unnecessary to produce eggs, although it certainly speeds up the production rate. More generally, however, farms inflict "needless suffering" and "unnecessary cruelty" on their animals by forcing the animals to live in their own excrement, confining them to small spaces so they are barely able or completely unable to turn around, failing to treat painful injuries unless doing so is cost-effective, and systemically mutilating animals by debeaking, dehorning, branding, tail docking, and castrating without anesthesia.[140] Ultimately, none of this treatment is necessary to produce meat, eggs, or dairy products. Farms engage in such cruelty simply because it is cost-effective.

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136. CAL. PENAL CODE § 597(b) (West 1999).

137. *Id.* (emphasis added). That there are two ways of violating this section, as illustrated by my use of "[1]" and "[2]," is supported by *People v. Youngblood*, 109 Cal. Rptr. 2d 776, 780 (Ct. App. 2001), which stated that "[b]y using the word 'whoever' as a second subject in the sentence, the Legislature, effectively, listed two separate ways (each with a list of acts) to find a defendant guilty of animal cruelty."

138. CAL. PENAL CODE § 597(b).

139. For more information on forced molting, see United Poultry Concerns, Inc., Forced Molting, *at* http://www.upc-online.org/molting/.

140. *See supra* Part I.A.2.

Many courts have convicted people for acts of cruelty toward nonfarm animals that are similar to those done by farms. Defendants have been convicted for failure to provide veterinary treatment for animals, a practice in which farms frequently engage. For instance, a defendant was convicted for failing to treat a puppy for an infected bite wound to the head, causing live maggots to "mov[e] and eat[ ] inside the wound."[141] Another defendant was convicted for failure to treat her dogs' "fleas, eye and ear problems, ear mites, intestinal parasites, rotted teeth, and mouth disease" and "anemi[a]."[142] Yet another defendant was convicted for neglecting her horses such that they had "open and infected sores on their bodies."[143] Defendants have also been convicted for subjecting their animals to living in their own excrement, which farms commonly do. For example, a defendant was convicted when her dogs were found living on a "feces-encrusted floor;"[144] another defendant was convicted for neglecting her cats such that they "were covered in urine and feces[,] . . . [and suffering from] urine scald."[145] Defendants have also been found guilty for not providing enough space for their animals, including one convicted for "providing less than one square foot for each cat" in a trailer.[146]

Section 597(b) requires that the cruelty be committed at least negligently. This is a lower mens rea[147] standard than that required by subsection (a), which prohibits malicious cruelty. There are two types of negligence: ordinary negligence, which is generally the standard in civil lawsuits; and gross negligence, which is generally the standard in criminal proceedings. Ordinary negligence is a lower threshold than gross negligence.[148] Negligence is "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation."[149] While ordinary negligence is a departure from the reasonable person standard, gross negligence is a *gross* departure from the reasonable person

141. People v. Sanchez, 114 Cal. Rptr. 2d 437, 441 (Ct. App. 2001).
142. People v. Speegle, 62 Cal. Rptr. 2d 384, 387 (Ct. App. 1997).
143. People v. Reed, 176 Cal. Rptr. 98, 101 (Super. Ct. 1981).
144. *Speegle*, 62 Cal. Rptr. 2d at 387; *see also Reed*, 176 Cal. Rptr. at 100.
145. People v. Youngblood, 109 Cal. Rptr. 2d 776, 778 (Ct. App. 2001).
146. *Id.* at 777.
147. Mens rea is "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime . . . ." BLACK'S LAW DICTIONARY 999 (7th ed. 1999).
148. CALIFORNIA JURY INSTRUCTIONS—CRIMINAL § 3.36 (6th ed. 1996) [hereinafter CALJIC] ("['Gross negligence'] means conduct which is more than ordinary negligence.").
149. BLACK'S LAW DICTIONARY, *supra* note 147, at 1056. The California Jury Instructions define ordinary negligence as "the failure to exercise ordinary or reasonable care." CALJIC, *supra* note 148, § 3.36.

standard. Criminal negligence, for example, is "negligence so extreme that it is punishable as a crime."[150] The California Jury Instructions define gross negligence generally as

> [a] negligent act[s] which [is] [are] aggravated, reckless or flagrant and which [is] [are] such a departure from what would be the conduct of an ordinarily prudent, careful person under the same circumstances as to be contrary to a proper regard for [human[151] life] [danger to human life] or to constitute indifference to the consequences of those act[s]. The facts must be such that the consequences of the negligent act[s] could reasonably have been foreseen and it must appear that the [death] [danger to human life] was not the result of inattention, mistaken judgment or misadventure but the natural and probable result of an aggravated, reckless or flagrantly negligent act.[152]

While there is old case law supporting an ordinary (civil) negligence mens rea requirement for section 597(b), recent case law suggests that criminal negligence is the appropriate standard.[153]

Section 597(b) is likely the most applicable statute in farm animal cruelty cases because the cruelty inflicted on farm animals is largely the result of reckless disregard for the animals.[154] The California Jury Instructions, as stated above, consider recklessness as a form of gross negligence.[155] Recklessness is, in the legal world, often defined as "[c]onduct where the actor does not desire harmful consequence but nonetheless foresees the possibility and consciously takes the risk . . . [t]he state of mind in which a person does not care about the

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150. BLACK'S LAW DICTIONARY, *supra* note 147, at 1056.

151. Obviously, for animal cruelty statutes, the instructions should be altered to state "animal life" and "danger to animal life," because the victims would be animals, not people, as in other crimes.

152. CALJIC, *supra* note 148, § 3.36 (bracketing in original).

153. In determining the mens rea required by section 597(b), courts have analogized to child endangerment statutes. In *People v. Farley*, 109 Cal. Rptr. 59 (Super. Ct. 1973), an animal neglect case, the court held that the appropriate mens rea standard was ordinary negligence because cases interpreting analogous child endangerment statutes required only ordinary negligence. *Id.* at 62–64 (relying on child endangerment cases such as *People v. Harris*, 48 Cal. Rptr. 677 (Ct. App. 1966), and *People v. Beaugez*, 43 Cal. Rptr. 28 (Ct. App. 1965)). However, in *People v. Peabody*, 119 Cal. Rptr. 780 (Ct. App. 1975), a child endangerment case, subsequently held that the correct mens rea standard for child endangerment cases was criminal negligence. *Id.* at 782. Following *Peabody*, the court in *People v. Brian*, 168 Cal. Rptr. 105 (Super. Ct. 1980), an animal neglect case, held that the mens rea standard for animal cruelty under section 597(b) was also criminal negligence. *Id.* at 107. In 2002, in *People v. Valdez*, 42 P.3d 511 (Cal. 2002), the California Supreme Court clarified that criminal negligence was indeed the correct mens rea standard for child endangerment cases. *Id.* at 512–20. Criminal negligence therefore probably is the applicable mens rea standard for section 597(b), though *Farley* has not been overruled.

154. Since these actions do not rise to the level of maliciousness, they cannot be prosecuted under section 597(a).

155. CALJIC, *supra* note 148, § 3.36.

consequences of his or her actions."[156] Cruel farms engage in recklessness when they institute cost-cutting practices that ultimately hurt animals. Indeed, most of the harm done to farm animals is not malicious but is due to a desire to cut costs and thereby maximize profits. The below passage explains the cost benefits of subjecting animals to strict confinement:

> Wendell Murphy . . . [is] the man generally credited with the concept of mass-confinement hog farming. Inspired by the poultry industry, which today can pack as many as a quarter million birds into a single building, he realized that with just a bit more ingenuity hog farmers could also eliminate the space, labor, and cost of raising pigs in open lots. He saw the possibility of barring their movements entirely—saving money on feed since confined pigs burn off less energy and require fewer calories than free-range pigs, deploying vaccines and antibiotics to control the diseases borne of mass confinement, and, five millennia after the first pig was domesticated, solving the problem that the animals are, well, animate. The crucial breakthrough came in the early 1960s when he conceived of how, by the simple device of slatted floors, their refuse could be collected underneath a climate-controlled confinement facility, flushed through a drainage channel, mixed with chemicals, and then sprayed onto the soil or carried off—somewhere—by the winds.
>
> For Mr. Murphy and others who soon followed his example, in America and across the world, this innovation meant riches. For the pigs, it meant that not only must they be confined forever, now they could no longer have okay straw to lie on. Straw would only clog the slats and pipes and mar the system. The creatures now live their whole lives on metal and concrete.[157]

Such treatment of animals is reckless because the farms' executives and employees are aware that cost-cutting procedures, like the ones described above and in Part I.A, inflict pain and suffering on the animals; yet, they consciously disregard these inevitable effects. By consciously disregarding the pain and suffering they inflict on the animals,[158] farm executives and employees possess the state of mind required to violate Penal Code section 597(b).

As discussed in Part III.A. above, several other states have exempted customary farming practices from their anticruelty laws. Because California is not one of them, one can infer that the California Legislature intended that farm animals be accorded the same protection as other animals. If that was

156. BLACK'S LAW DICTIONARY, *supra* note 147, at 1277.

157. SCULLY, *supra* note 4, at 248–49.

158. Numerous photos and videos of farm animals can be found at http://www.peta.org. *See, e.g.*, Meet Your Meat, *supra* note 46.

not its intent, it would have worded or amended California's anticruelty laws to reflect this. Thus, it can be argued that cases involving nonfarm animals are not distinguishable from those involving farm animals.

2. What Constitutes "Unnecessary Suffering"?

There is no clear line as to what exactly constitutes "unnecessary suffering" under section 597(b); yet, the phrase itself provides some guidance for answering this question. The first question should be, "Is the animal suffering?" For example, Niman Ranch's animals clearly are not suffering, whereas typical factory farm animals obviously do. Any "gray area" case that encounters the issue will likely involve scientific testimony as to the sentience and needs of the animals,[159] as well as a factual judgment based on general human interaction with animals.[160] If the answer to the first question is yes, the animal is suffering, the next question should then be: "Is the pain necessary?" The answer to this question can vary greatly, depending on who you ask. To an animal rights supporter, the slaughtering of animals for consumption is wholly unnecessary because people do not need meat to survive; therefore, any pain that is a byproduct of slaughter is unnecessary. However, California Penal Code section 599c explicitly forecloses such an argument,[161] and even if it did not, it is highly unlikely that a judge or jury would ever agree with such a notion. Rather, given that the consumption of animals is legal, and section 599c in fact provides a "safe harbor" for killing animals for consumption, the question should be whether the pain is necessary in order to produce the animal product.

Section 597(b)'s largest loophole is that it prohibits causing certain suffering to an animal only if such suffering is "unnecessary" or "needless."[162] Thus, the "necessity" of cruelty might be raised as a defense to section 597(b). This defense is largely inapplicable to the farming industry, since it is not necessary to neglect or torture animals to produce meat, eggs, or milk. This is exemplified by the fact that many years ago, before factory farms became prevalent, small family farms were the industry standard and cruelty was not a

159. Various articles discussing the sentience and needs of farm animals exist. For a list of such articles, see Animal Welfare Inst., Alternatives to Intensive Confinement Systems for Farm Animals: An Annotated Bibliography, *at* http://www.awionline.org/farm/alt-farming.html.

160. Obviously, most people have not interacted with farm animals. However, most people have interacted with other types of animals and have viewed animals in documentaries, such that they can form some basis for evaluating the ability of animals in general to feel pain and experience suffering.

161. CAL. PENAL CODE § 599c (West 1999 & Supp. 2005) (stating that "this title [must not] . . . interfere with the right to kill all animals used for food . . . .").

162. CAL. PENAL CODE § 597(b) (West 1999).

common industry practice.[163] However, foie gras provides an example of a farm animal product that may entail necessary cruelty. Foie gras necessarily entails force-feeding ducks because the ducks' livers cannot otherwise be so severely fattened—the only way they are desirable for human consumption.[164] As a result of the force-feeding, the ducks develop hepatic lipidosis and their livers swell to twelve times their natural size.[165]

The pain and suffering that results from producing foie gras might very well be considered necessary, because eating foie gras is legal.[166] Moreover, section 599c of the Penal Code specifically forbids sections 596 to 600 from interfering with the right to kill animals for food.[167] If the only way to produce foie gras is to force-feed ducks, it could be argued that using Penal Code section 597(b) would interfere with the right to kill ducks for food.

A possible response to the above argument is that, while section 597(b) cannot be used to enjoin farms from producing duck liver, it can be used to enjoin farms from *inhumanely* producing duck liver, even if the result is duck liver that no one would want to eat because it is not fatty and tasty. There is no case law on this issue, so whether this argument would succeed is unknown.

Despite the "necessity" qualification, California still has some of the toughest anticruelty laws in the country. Animal advocates and humane competitors should take advantage of them through section 17200.

a. Additional California Penal Code Sections Applicable to Farm Animals and the Twenty-eight Hour Law of 1877

The California Penal Code contains four other sections that are applicable to farm animals. Section 597a requires the humane transportation of animals if the method of transportation is a vehicle.[168] Section 597s prohibits the willful abandonment of an animal.[169] Section 599f was deliberately created for farm animals and requires the immediate euthanization of a

163. That is why the modern factory farm likes to be perceived as a small family farm and continues to perpetuate the small family farm myth. *See* SCULLY, *supra* note 4, at 256 ("[Factory farms] do not mind at all if consumers still think of their own corporate operations as small farms like the ones [they have] been systematically killing off."); *see also supra* note 157 and accompanying text.

164. *See supra* notes 71–73 and accompanying text.

165. *See supra* notes 71–73 and accompanying text.

166. California Governor Arnold Schwarzenegger signed a bill banning the force-feeding of ducks and geese to produce foie gras in October 2004. The ban does not take effect until July 2012. *Governor Vetoes 273 Bills but Signs 571*, L.A. TIMES, Oct. 3, 2004, at A28.

167. CAL. PENAL CODE § 599c (West 1999 & Supp. 2005).

168. CAL. PENAL CODE § 597a (West 1999). This should not be confused with § 597(a), which prohibits malicious cruelty to animals. *See infra* Part III.A.1.

169. CAL. PENAL CODE § 597s.

"downed animal."[170] Section 599f also prohibits dragging or pushing downed animals, requiring that they be moved with a sling or sled-like conveyance.[171]

Section 597t requires that a confined animal be provided with "adequate exercise area."[172] The statute does not define what constitutes "adequate" exercise area, but it would seem that, at a minimum, this entails allowing the animals enough room to turn around. Currently, gestation crates, veal crates, battery cages, and crowded pens do not meet this minimum standard. Beyond this minimum, however, it is difficult to determine what "adequate" means. To an animal rights advocate, this could mean giving the animals enough space to roam freely, like they once did on small farms. To a judge or jury, this might seem unrealistic. A judge or jury might think that giving the animals enough space to roam for several yards is enough. This determination is also clearly dependent on whether the animal is small (like a chicken) or large (like a cow).

The Twenty-eight Hour Law[173] is also specific to farm animals. It is a federal statute that prohibits land carriers from "confin[ing] animals in a vehicle or vessel for more than twenty-eight consecutive hours without unloading the animals for feeding, water, and rest."[174] Sheep can be confined for thirty-six consecutive hours if the twenty-eight-hour period ends at night.[175] The statute, however, has a large loophole: it allows animals to be confined for thirty-six consecutive hours when the owner of the animals requests the extension in writing.[176]

All of these sections are commonly violated by the meat, egg, and dairy industry, because it increases costs to be humane. It costs money to euthanize animals, give them adequate space, and transport them humanely. Humane competitors (farms or slaughterhouses) that obey these laws suffer competitive harm because they have to incur higher costs; thus, they can sue inhumane farms for violating these sections under section 17200. Companies that sell meat substitutes similarly suffer competitive, financial harm when inhumane farms or slaughterhouses mistreat their animals. They lose market share because they charge relatively higher prices. Their prices are relatively higher because the inhumane farms or slaughterhouses can charge lower

170. *Id.* § 599f. A downed animal is one that is "nonambulatory." Downed animals, unable to move, are frequently dragged by trucks or pushed by bulldozers, and are left to die slowly. *See* PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, *supra* note 42, at 6–7.

171. CAL. PENAL CODE § 599f.

172. *Id.* § 597t.

173. Twenty-eight Hour Law of 1877, 49 U.S.C. § 80502 (2000).

174. *Id.* § 80502(a)(1).

175. *Id.* § 80502(a)(2).

176. *Id.* § 80502(a)(2)(B).

prices by cutting costs by mistreating their animals. This results in less demand for meat substitutes. Thus, they are also qualified to sue under section 17200. Lastly, an individual consumer can also bring a section 17200 lawsuit for violation of these Penal Code sections. He or she was harmed because the animal product that he or she purchased was illegally produced, in violation of anticruelty statutes.

b. California Penal Code Section 597(a)—Malicious Cruelty

California Penal Code section 597(a) prohibits malicious cruelty, providing that "every person who maliciously and intentionally maims, mutilates, tortures, or wounds a living animal, or maliciously and intentionally kills an animal, is guilty . . . ."[177] Unfortunately, farm and slaughterhouse workers often engage in malicious acts against animals.[178] For example, Virgil Butler, a former Tyson slaughterhouse worker, "claims he saw his co-workers . . . rip the heads off live chickens, stomp them to death and blow them up with dry-ice bombs."[179] He recalls one coworker in particular, who would throw live chickens into giant fans.[180]

(1) Malicious Cruelty as a Business Act or Practice (Vicarious Liability)

Whether malicious cruelty can be considered a "business act" or "business practice" and therefore falls within the scope of section 17200 is debatable. The statute fails to define a "business act" or "business practice." Case law on the issue is only slightly helpful; a business act or practice has been defined by the Fourth District of the California Court of Appeals as "an act or practice, committed pursuant to business activity."[181]

177. CAL. PENAL CODE § 597(a).

178. *See* Meet Your Meat, *supra* note 46 (depicting malicious cruelty, such as pig beating and throwing chickens against a truck).

179. Simon, *supra* note 47. Simon notes that Butler is now vegan because of his firsthand experience in the meat industry. *Id.*

180. Virgil Butler, *Tyson Torture Tactics—Culling the Runts*, CYBERACTIVIST, Sept. 27, 2003, *at* http://www.cyberactivist.blogspot.com/2003_09_01_cyberactivist_archive.html.

181. Bernardo v. Planned Parenthood Fed'n of Am., 9 Cal. Rptr. 3d 197, 222 (Ct. App. 2004) (citing Klein v. Earth Elements, Inc., 59 Cal. App. 4th 965, 969 (Ct. App. 1997)).

(2) Negligent Retention or Supervision of Employees Engaging in Malicious Cruelty as a Business Act or Practice (Direct Liability)

Even if malicious cruelty cannot be viewed as a business act or practice, a farm or slaughterhouse can be found directly liable for negligently retaining or supervising an employee who engages in the illegal act of maliciously harming animals. The retention and supervision of employees are clearly business acts or practices, since they are necessary to the operation of a business.

An employer can be found liable for negligently retaining an employee when a plaintiff proves the basic four elements of all negligence actions: duty, breach, causation, and damages.[182] As with all employers, farms and slaughterhouses have the duty of "retain[ing] only safe and competent employees."[183] They breach this duty when they "retain[ ] employees that [they] know[ ] or should know are"[184] maliciously cruel to the animals. Failure to terminate these employees causes malicious cruelty to the animals with which they work. Damage is then suffered in two ways: (1) by the public, because, as established above, cruelty to animals is contrary to public policy, and (2) by a humane competitor, because the employer of the cruel employee does not have to bear the costs of dealing with the cruel employee and therefore obtains a competitive advantage.

The analysis is fairly similar for the tort of negligent supervision. However, in such cases, the employer's duty arises only when the employer has actual or constructive knowledge of the employee's inclination to engage in the illegal activity.[185] The remaining elements—breach, causation, and damages—are the same elements as those for negligent retention.

If malicious cruelty cannot be viewed as a business act or practice, a farm or slaughterhouse may be held indirectly liable for the cruelty because it causes it by negligently retaining or supervising the employee who committed the cruelty. Because retaining and supervising employees are business acts or practices, they fall within the scope of section 17200.

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182. *See* Louis Buddy Yosha & Lance D. Cline, *Negligent Hiring and Retention of an Employee*, 29 AM. JUR. *Trials* 267, § 2 (1982).

183. *Id.*

184. *Id.*

185. *See, e.g.*, Federico v. Superior Court, 69 Cal. Rptr. 2d 370, 375 (Ct. App. 1997) (stating that the defendant needed to have "actual knowledge, or reason to suspect" that the employee had engaged in illegal acts in order to be held liable for negligent supervision); *see also* Juarez v. Boy Scouts of Am. Inc., 97 Cal. Rptr. 2d 12, 25 (Ct. App. 2000) ("[T]here can be no liability for negligent supervision 'in the absence of knowledge by the principal that the agent or servant was a person who could not be trusted to act properly without being supervised.'" (quoting Noble v. Sears, Roebuck & Co., 109 Cal. Rptr. 269, 275 (Ct. App. 1973))).

3. Humane Slaughter Laws

a. California Humane Methods of Slaughter Law, California Food and Agriculture Code Sections 19501–19503; California Code of Regulations Sections 1245.1–1245.16

The California Humane Methods of Slaughter Law covers "cattle, calves, horses, mules, sheep, swine, goats, . . . fallow deer, [and] poultry."[186] It requires that animals be slaughtered: by being (1) "rendered insensible to pain by a captive bolt, gunshot, electrical or chemical 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," or (2) "slaughtered in accordance with ritual requirements of the Jewish or any other religious faith . . . 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."[187]

Title 3 of the California Code of Regulations, sections 1245.1 to 1245.16,[188] details the Humane Methods of Slaughter Law as it applies to poultry, specifying the following methods as acceptable and humane: "(1) [Gas]. (2) Electrical stunning. (3) Electrocution to cardiac arrest. (4) Captive bolt (ostrich and rabbit[189] only). (5) Cervical dislocation. (6) Carotid artery severance. (7) Decapitation. (8) Other methods as approved by the Department [of Food and Agriculture]."[190] This allowance for "other methods" is a large loophole, although the Department has not yet approved any other methods.[191]

As detailed in Part I.A.1, violations of the California Methods of Humane Slaughter Law are industry custom. Animals frequently are cut, skinned, or scalded alive, dying "piece by piece."[192] Humane slaughter means decreased kill rates, which means fewer profits.[193] Thus, humane slaughterhouses that actually ensure their animals are rendered insensible to pain before slaughtering them suffer from a competitive disadvantage. Invoking section 17200 would level the playing field and improve the lives of farm

186. California Humane Methods of Slaughter Law, CAL. FOOD & AGRIC. CODE §§ 19501–19503 (West 2001).

187. *Id.* § 19501(b)(1)–(2).

188. CAL. CODE REGS. tit. 3, § 1245.1–.16 (1990).

189. One wonders why "rabbit" would be considered poultry.

190. CAL. CODE REGS. tit. 3, § 1245.4.

191. Telephone Interview with Dr. Namara Garbaba, Veterinary Medical Officer IV—Meat Inspection, California Department of Food and Agriculture (Dec. 18, 2003).

192. *See supra* notes 28 and 30 and accompanying text.

193. *See* EISNITZ, *supra* note 9, at 24 ("Since 'down time' can result in fewer profits for the day, the threat of USDA line stoppages is supposed to assure industry compliance with the law.").

animals. Even though companies that produce meat substitutes do not engage in the slaughter of animals, they still suffer a competitive disadvantage due to inhumane slaughter, because inhumane slaughter translates to lower prices for consumers, which translates to a larger market share for the inhumane competitor. Lastly, an individual consumer could invoke section 17200 by arguing that the meat that he or she bought was the result of inhumane slaughter. He or she was harmed because the meat that he or she purchased was illegally produced, in violation of humane slaughter laws.

b. Humane Slaughter Act, 7 U.S.C. Sections 1901–1906

The federal Humane Methods of Slaughter Act[194] is very similar to the California Humane Methods of Slaughter Law. Like the California Humane Methods of Slaughter Law, the federal statute requires that farm animals be slaughtered by either: (1) being "rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut," or (2) following "the ritual requirements of the Jewish faith or any other religious faith . . . whereby the animals suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument."[195]

The scope of the federal Humane Methods of Slaughter Act, however, renders it much less animal-friendly than the California Humane Methods of Slaughter Law. The statutory language of the Act indicates that it covers "cattle, calves, horses, mules, sheep, swine, *and other livestock*."[196] The common sense definition of livestock is "animals of *any kind* kept or raised for use or pleasure."[197] Thus, one would imagine that poultry is covered under the federal act. However, the statute that provides for the federal act's enforcement by the Secretary of Agriculture and the USDA does not include poultry; it covers only "cattle, sheep, swine, goats, horses, mules, and other equines."[198] Thus, the federal Humane Methods of Slaughter Act fails to protect a substantial portion of farm animals.

194. Humane Methods of Slaughter Act of 1958, 7 U.S.C. §§ 1901–1906 (2000).
195. *Id.* § 1902(a)–(b).
196. *Id.* § 1902(a) (emphasis added).
197. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1324 (3d ed. 1993) (emphasis added).
198. 7 U.S.C. §§ 1901–1906.

c. Problems with State and Federal Humane Slaughter Laws

Like California's anticruelty statutes, the humane slaughter laws do not provide ideal protection for farm animals. For instance, California's Humane Methods of Slaughter Law applies only to farm animals that are subsequently sold as food.[199] As a result, it exempts "spent hens" that are too old to produce eggs efficiently, as well as any other animals that farms exploit and later decide are not fit for consumption.[200] While the federal Humane Methods of Slaughter Act does not expressly state that it applies only to animals subsequently sold for consumption, it is also flawed because it does not provide for enforcement of the Act for poultry, which comprise an extremely large majority of the animals slaughtered for food.[201] Despite the need to reform these laws, however, they can be invoked via section 17200 to protect a substantial percentage of farm animals.

4. Defenses

There are two defenses to section 17200's "unlawful" prong that California courts have rejected. The first defense is the "industry custom" defense. Sadly, it has indeed become industry custom to subject farm animals to inhumane and filthy living conditions.[202] It is even industry custom to kill them maliciously. However, industry custom is not a defense to any of the underlying anticruelty statutes,[203] nor is it a defense to a section 17200 claim.

In *People ex rel. Van de Kamp v. Cappuccio, Inc.*,[204] the defendants allegedly understated the weight of squid they had purchased from fishermen, which was a violation of California Fish and Game Code section 8011.[205] The defendants, providing "considerable testimony regarding practices in the industry, based upon their thirty-five years of experience," argued that understating the weight of squid

199. California Humane Methods of Slaughter Law, CAL. FOOD & AGRIC. CODE § 19501(a) (West 2001) ("This chapter applies to any person engaged in the business of slaughtering animals enumerated in this section, or any person slaughtering any of those animals when all, or any part of, that animal is subsequently sold or used for commercial purposes.").

200. Examples of other such animals include dairy cows or male calves that farms do not raise for veal; these dairy cows and male calves are often, but not always, slaughtered for human consumption.

201. For some perspective on just how large a portion of farm animals chickens comprise, consider that: about 41.8 million beef cows are killed each year for human consumption; about 115 million pigs are killed each year; and about 8.785 billion chickens are killed every year. *See* Animal Protection Inst., Compassionate Living: Human Choices, Humane Results, *at* http://www.api4animals.org/159.htm.

202. *See generally* SCULLY, *supra* note 4, at 247–86; Pacelle, *supra* note 40.

203. There is no statutory language or case law suggesting industry custom as a defense to the state or federal anticruelty and humane slaughter laws.

204. 251 Cal. Rptr. 657 (Ct. App. 1988).

205. CAL. FISH & GAME CODE § 8011 (current version at CAL. FISH & GAME CODE § 8043 (West 1998)).

was not an unlawful business practice because it was an industry custom.[206] The court agreed with the Attorney General that "fairness, as based upon an industry-wide custom and practice, is not a defense in this case. Irrespective of the asserted fairness of the practice, it is in fact unlawful and therefore enjoinable. If a defense is available, it must be found on the face of the underlying statute . . . ."[207] The court emphasized that "[t]he fact the industry itself may have been in violation of the Fish and Game Code and Business and Professions Code is not a defense."[208] Similarly, although cruelty to animals is pervasive in the meat, egg, and dairy industries, it is still enjoinable under section 17200 because such cruelty is illegal, and industry custom is not a defense.

The court has also rejected the "business justification" argument. In *Hobby Industry Ass'n of America v. Younger*,[209] the California Attorney General interpreted the California Fair Packaging and Labeling Act[210] such that "'nonfunctional slack fill'" packages were unlawful, "even when there [was] no other showing that the packaging [was] fraudulent or deceptive."[211] It also sought to enforce section 17200 as a result of this allegedly unlawful act.[212] The defendant, a national hobby products trade association, argued that its costs would substantially increase if it was required to comply with the law.[213] The court stated that increased costs were not a defense because "[it saw] no way to accommodate the industries' concerns in this regard and at the same time render a faithful interpretation of the law."[214] Thus, the increased cost of being humane to farm animals is not a defense to a section 17200 lawsuit alleging an unlawful business practice.

B. Unfair Practices

"[A] practice may be deemed unfair even if not specifically proscribed by some other law."[215] Different standards have emerged for evaluating whether a business act or practice is "unfair," depending on whether the plaintiff is a competitor or a consumer.

206. *Cappuccio*, 251 Cal. Rptr. at 664.
207. *Id.* at 665 (citing Barquis v. Merch. Collection Ass'n, 496 P.2d 817, 828–29 (Cal. 1972)).
208. *Id.* (citing People v. Casa Blanca Convalescent Homes, Inc., 206 Cal. Rptr. 164, 175 (Ct. App. 1984)).
209. 161 Cal. Rptr. 601 (Ct. App. 1980).
210. CAL. BUS. & PROF. CODE §§ 12601–12615.5 (West 1987 & Supp. 2005).
211. *Hobby Indus. Ass'n of Am.*, 161 Cal. Rptr. at 604.
212. *Id.* at 601.
213. *Id.* at 607.
214. *Id.*
215. Cel-Tech Communications, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 540 (Cal. 1999).

1. Competitor Actions

In *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*,[216] the Supreme Court of California clarified that, in unfair competition cases involving direct competitors, "unfair" basically means "anticompetitive."[217] Specifically, the court held that the conduct had to be close to violating antitrust laws, violate the "policy or spirit" of such laws, or "threaten[ ] . . . competition."[218]

The emphasis of *Cel-Tech* was on incipient antitrust violations.[219] Indeed, the facts of *Cel-Tech* were such that antitrust behavior allegedly resulted from a government-licensed duopoly.[220] However, after stating that "unfair" prong violations had to be of the antitrust variety, the court added behavior that "otherwise significantly threaten[ed] or harm[ed] competition" could also qualify.[221] The court's emphasis on antitrust probably limits "unfair" prong violations to antitrust behavior, although it could be argued that other types of anticompetitive behavior fall under the court's language. Exactly what other types of anticompetitive behavior could qualify is unknown. If recovery under the "unfair" prong for competitors is limited to incipient antitrust behavior, a humane competitor probably has no basis for bringing a section 17200 suit under this prong, as there is currently no evidence that inhumane competitors engage in antitrust conduct.

2. Consumer Actions

To date, the Supreme Court of California has not articulated a standard of what "unfair" means in consumer actions. There have, however, been two

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216. *Id.*

217. *Id.* at 544 ("[T]he word 'unfair' . . . means conduct that [1] threatens an incipient violation of an antitrust law, or [2] violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or [3] otherwise significantly threatens or harms competition.").

218. *Id.*

219. Specifically, the court held:

> When a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes section 17200, the word "unfair" in that section means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

Id. at 544.

220. *Id.* at 546–57. The plaintiff was a cell phone equipment retailer. The defendant was one of the two duopolists who had control over the cell phone service industry. The plaintiff alleged that the defendant was able to sell cell phones below cost by bundling service contracts with cell phones, such that the losses from selling the cell phones were offset by the service contracts they gained. *Id.* at 532.

221. *Id.* at 544.

separate standards articulated by various districts of the Court of Appeal. The main issue between the two approaches is whether looking to *Cel-Tech* for guidance in defining the word "unfair" in consumer actions is appropriate, because the *Cel-Tech* court explicitly limited its holding to lawsuits by competitors.

Another concern with consumer actions is that, under the "unfair" prong, the plaintiffs would typically allege that the defendant farms or slaughterhouses violated public policy in treating their animals cruelly. However, as mentioned earlier, Proposition 64 amended section 17200, such that suits alleging harm to the public can only be brought by public prosecutors such as the Attorney General, a district attorney, or a city attorney. An individual has standing to sue only if he or she has suffered financial injury or property damage.

An individual consumer could argue that, when a farm or slaughterhouse mistreats its animals in violation of public policy, he or she was harmed as an *individual*; that is, he or she was harmed as a *member* of the public. This argument is supported by the fact that the suit would be brought on behalf of the individual consumer, not on behalf of the general public. Thus, the individual arguably is seeking to redress harm to himself or herself, not to the public (which Proposition 64 precludes). Moreover, the individual consumer would have suffered requisite financial injury, because he or she would have paid for the animal product at issue. Because Proposition 64 was passed so recently, we can only speculate as to how a court would interpret this issue. Yet, because Proposition 64 conceivably still allows for the assertion of an individual interest in public policy, the following discussion will be premised on the idea that an individual consumer can bring a lawsuit under the "unfair" prong of section 17200.

a. Expanding *Cel-Tech*: Requiring That the Predicate Public Policy Be "Tethered" to a Specific Law

In *Gregory v. Albertson's, Inc.*,[222] the California Court of Appeal looked to *Cel-Tech* in articulating a standard for what "unfair" meant in consumer actions.[223] The First District decided that, even though *Cel-Tech* applied only to lawsuits by competitors, in lawsuits based on violations of public policy (that is, consumer actions), "the public policy which is a predicate to the action must be 'tethered' to specific constitutional, statutory or regulatory provisions."[224]

222. 128 Cal. Rptr. 2d 389 (Ct. App. 2002).
223. *Id.* at 394.
224. *Id.* at 395.

The public policy supporting humane treatment of farm animals is clearly "tethered" to specific statutory and regulatory provisions—namely, the anticruelty and humane slaughter laws at the state and federal level. This public policy is why the California Legislature enacted California Penal Code sections 596–600.[225] For a more detailed analysis of public policy in support of protecting animals, see the immediately following section below (Section III(B)(2)(c)). Moreover, the federal Humane Slaughter Act expressly states, in two separate sections, that it is the public policy of the United States that the slaughter of farm animals only be done humanely.[226] The legislative intent behind the California Humane Slaughter Law is probably the same, as the statutes are worded nearly identically. By treating animals cruelly, farms and slaughterhouses violate public policy.

In addition, if the cruel act was malicious, another public policy that is violated is society's interest in "protect[ing] the public from violent and dangerous felons."[227] In *People v. Dyer*,[228] the defendant slit a dog's throat, intending to cook and eat the dog.[229] The court found that

> [i]t does not take a leap in logic to conclude that an individual who violently or forcefully injures an animal might be dangerous to people. The legislature recognized [that] "[t]he link between animal abuse and future human abuse has been, and continues to be, documented. Demonstrating the seriousness of acts of aggression toward animals, the Federal Bureau of Investigation includes it in their serial killer triad which is used to profile suspects . . . . The tragic examples are evident: [¶] 1. Mass murderer and cannibal Jeffrey Dahmer killed neighborhood pets and impaled a dog's head before he moved on to gruesome acts against people . . . . [¶] . . . [¶] 3. Carroll Edward Cole, convicted of 35 murders, admitted his first act of violence was as a young child when he strangled a puppy."[230]

Therefore, in considering whether malicious acts of cruelty violate public policy, courts should consider the societal harm in failing to punish animal cruelty offenders. Because the state and federal legislatures have enacted

225. *See supra* note 174 and accompanying text.
226. *See supra* notes 194–195 and accompanying text.
227. People v. Dyer, 115 Cal. Rptr. 2d 527, 533 (Ct. App. 2002).
228. *Dyer*, 115 Cal. Rptr. 2d 527.
229. *Id.* at 528, 530. Interestingly enough, doing the same thing to a farm animal, provided that the animal loses "consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries," is perfectly legal if it is "in accordance with the ritual requirements of the Jewish faith or any other religious faith." Humane Methods of Slaughter Act of 1958, 7 U.S.C. § 1902 (2000); California Humane Methods of Slaughter Law, CAL. FOOD & AGRIC. CODE § 19501 (West 2001).
230. *Dyer*, 115 Cal. Rptr. 2d at 532.

laws that clearly support the humane treatment of animals, a farm or slaughterhouse clearly violates the public policy "tethered" to these laws when it mistreats its animals. Such conduct is then enjoinable by section 17200 as "unfair."

b. Declining to Expand *Cel-Tech*: The Balancing Test

In *Smith v. State Farm Mutual Automobile Insurance*,[231] the Second District of Division 3 of the Court of Appeal declined to follow *Cel-Tech* in the "non-competitor" context and take such a narrow view of what "unfair" meant.[232] The court defined an unfair business practice as one that "offends an established public policy or [one that] is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."[233] "The test of whether a business practice is unfair 'involves an examination of [that practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim.'"[234]

It is unclear if animals would qualify as victims whose interests should be weighed against those of inhumane farms. Certainly, the Legislature valued animal life in enacting the anticruelty sections of the California Penal Code and the humane slaughter laws. California courts have repeatedly stated that the legislative intent of the Penal Code's anticruelty sections was to protect animals—not just as property, but as sentient beings with rights. The Court of Appeal, in a cockfighting case, held that it was "the Legislature's intent to prevent cruelty to animals."[235] It also stated, in a different case:

> We recognize that dogs are considered personal property or chattels for some purposes.... But dogs are different than inanimate objects. They are living, breathing creatures, and the slashing of a dog's throat is an act of violence against a living being.[236]

231. 113 Cal. Rptr. 2d 399 (Ct. App. 2001).

232. *Id.* at 416 & n.23 ("It would thus appear that the *Cel-Tech* court's comments did not signal a retreat (at least in non-competitor cases), from its earlier statements in *Barquis v. Merchants Collection Ass'n*...." (citation omitted)). The *Barquis* court had stated that section 17200 was intended to be very broad and sweeping.

233. *Id.* at 415 (quoting State Farm Fire & Cas. Co. v. Superior Court, 53 Cal. Rptr. 2d 229, 235 (Ct. App. 1996)).

234. *Id.* (quoting *State Farm Fire & Cas. Co.*, 53 Cal. Rptr. 2d at 235).

235. People v. Elder, 247 Cal. Rptr. 647, 654 (Ct. App. 1988).

236. People v. Dyer, 115 Cal. Rptr. 2d 527, 533 (Ct. App. 2002) (emphasis added).

In addition, several courts have analogized animal abuse to child abuse by turning to child abuse cases in interpreting animal abuse law.[237] For example, in *People v. Brian*, the defendant was charged with neglecting her animals by depriving them of food, water, and shelter.[238] The court, in deciding the appropriate mens rea standard for animal neglect, "[thought] the analogy to child endangering decisions [was] apt" and analyzed child abuse cases.[239] The court in *People v. Speegle* engaged in a similar analysis, after which it stated, "*even were we* to consider the animals mere chattel,"[240] thereby implying that it did not consider animals as such. It then went on to state that "[i]n our society, those who mistreat animals are the deserved object of obloquy, and their conduct is wrongful of itself and not just as a matter of legislative declaration."[241] Lastly, the court recognized that "animals [were] living sentient creatures . . . ."[242] The court's comparison of animals to children reaffirmed the Legislature's intent to protect animals as helpless, vulnerable beings capable of experiencing pain and suffering.

At the very least, as established in the immediately preceding section above, a farm or slaughterhouse violates public policy when it mistreats its animals. Thus, even if the animals' interests cannot be counted in this balancing test, the individual consumer's interest can be. Because mistreatment of animals violates public policy, and the plaintiff consumer's morals would be consistent with this public policy, the consumer is harmed when such cruelty occurs.[243] This harm itself should be enough to outweigh the monetary gain that the farm or slaughterhouse receives from mistreating its animals. Moreover, the existence of Penal Code sections 596–600 is proof that the public valued animal life so much that the Legislature made animal abuse *criminal*. The public felt that animal abuse was so wrong that animal abusers should be put in jail. This denial of freedom is generally thought of as more severe than mere monetary harm, which is the consequence of losing a civil lawsuit if found guilty. That is why the burden of proof in criminal cases is higher than that in civil cases. In that sense, the Legislature has already

237. *See* People v. Speegle, 62 Cal. Rptr. 2d 384, 389 (Ct. App. 1997); People v. Brian, 168 Cal. Rptr. 105, 107 (Ct. App. 1980); People v. Farley, 109 Cal. Rptr. 59, 62–64 (Ct. App. 1973).

238. *Brian*, 168 Cal. Rptr. at 106.

239. *Id.* at 107.

240. *Speegle*, 62 Cal. Rptr. 2d at 389 (emphasis added).

241. *Id.* at 391.

242. *Id.* at 393.

243. An individual's moral values *alone* would not be enough to count in this balancing test. For example, if an individual consumer was in favor of cruel treatment toward animals, he or she would not be able to sue a humane animal producer under the "unfair" prong, because his or her view would be idiosyncratic. In the case of an individual consumer who finds cruelty to animals offensive, however, such morals would be supported by public policy; thus, they should be given credence.

made the determination that monetary benefit can never outweigh the pain and suffering inflicted on an animal. If human freedom can never outweigh the pain and suffering inflicted on an animal, and monetary interest is valued even less than human freedom, then monetary interest can never outweigh the pain and suffering inflicted on an animal.

In deciding whether a farm's cruelty toward its animals is an unfair business act or practice, a court might weigh the pain and suffering of the farm animals, or the detriment to the individual consumer's interest caused by the farm's contravention of public policy, against the monetary benefit the farm receives from engaging in such a practice. Because the Legislature has made a clear decision to protect animals as sentient beings, such practices should very well be considered unfair.

C. Fraudulent Practices (Deceptive Advertising)

> But man to man, I ask, isn't there something, you know, just a little sad about locking millions of animals away like that?
>
> "They love it," Sonny replies.
>
> "They do?"
>
> "Yeah. They don't mind at all. They're in state-of-the-art confinement facilities. The conditions that we keep these animals in are much more humane than when they were out in the field."[244]

The meat, egg, and dairy industries make false statements like this all the time. The notion that it is humane to confine animals in tiny feedlots, gestation crates, or battery cages is ridiculous. The idea that the animals *love* it is even more ridiculous. In the 1980s, two agricultural scientists tried

> to design a cost-efficient group-housing system for pigs that could be used on a large scale by corporate farmers. So they took a control group of hogs raised in confinement and simply let them loose, into a park complete with a stream, a pine copse, and a swampy mud bog.[245]

The scientists observed the pigs over the course of three years and recorded these observations:

> It was found that pigs built a series of communal nests in a cooperative way. These nests displayed certain common features, including walls to protect the animals against prevailing winds and a wide view that allowed the pigs to see what was approaching. The nests were far from the feeding sites. Before retiring to the nest, the animals brought

244. SCULLY, *supra* note 4, at 258. Sonny Faison is an executive of Caroll's Foods, a subsidiary of Smithfield Foods, Inc., the world's largest producer of pork. *Id.* at 250, 253.

245. *Id.* at 273.

> additional nesting material for the walls and rearranged the nest. On arising in the morning, the animals walked at least 7 meters before urinating and defecating . . . . The pigs formed complex social bonds between certain animals, and new animals introduced to the area took a long time to be assimilated. Some formed special relationships—for example, a pair of sows would join together for several days after farrowing, and forage and sleep together . . . . In autumn, 51 percent of the day was devoted to rooting.[246]

This study demonstrates the ludicrousness of the idea that farm animals do not mind being confined. Sonny's statement, however, is not unique. The idea that animals have better lives in farms than if they were free is one that is frequently perpetuated by the industry.[247]

If the American public is not fooled by the idea that farm animals are happier when confined, nevertheless, it likely does not even think of modern farms as factory farms. The myth of the family farm is one of the greatest myths perpetuated by the meat, egg, and dairy industries.[248] For example, Murphy "Family Farms" is a factory farm subsidiary of Smithfield Foods, the largest pork producer in the world.[249]

> [Farms like Smithfield] do not mind at all if consumers still think of their own corporate operations as small farms like the ones Smithfield has been systematically killing off. They understand the deep sentimental value of family farming, with its connotations of land stewardship and decent treatment of animals. That's why so many of our meat labels still bear images of happy little farms with animals grazing afield. That's why the New Agriculture still trades on the reputation of the old with its countrified corporate brand names, all of this "Murphy Family Farms," "Clear Run Farms," "Sunnyland," and "Patrick's Pride" when the more apt designations would be Murphy Factory Farms, Never Run Farms, Sunlessland, and Patrick's Shame.[250]

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246. *Id.* (quoting BERNARD E. ROLLIN, FARM ANIMAL WELFARE 74–75 (1995)).

247. *See, e.g., id.* at 280. Scully states:

> Well, the fact is that to that animal it may not be so bad. That animal seems to live longer, to prosper, to do well. Its comfort is there. If you put it outside, I would suggest to you that the most cruel thing you could do to these animals in the summer, in North Carolina, is to have them outside and, in the winter in Minnesota, is to have them outside. Because if you want to see them die, you try that . . . .

Id. (quoting Jerry H. Godwin, president of Murphy Family Farms, another subsidiary of Smithfield Foods, Inc.).

248. Go to http://www.bancruelfarms.org/meatrix/ to watch "The Meatrix," an amusing cartoon about the family farm myth.

249. *See* SCULLY, *supra* note 4, at 250.

250. *Id.* at 256.

When the American public thinks of farms, it tends to conjure up images of small family farms. This myth shields the public from the true nature of factory farming, where animals are treated as machines.

Section 17200 proscribes fraudulent business acts and practices.[251] However, section 17200's fraudulent business practices prong should not be confused with common law fraud.[252] The bar is much lower for recovery under section 17200.[253] A business practice is fraudulent if members of the public are "*likely* to be deceived."[254] Actual deception, reasonable reliance, and damage need not be proved.[255] "[U]nless the advertisement targets a particular disadvantaged or vulnerable group, it is judged by the effect it would have on a reasonable consumer."[256] The reasonable consumer need not be "exceptionally acute and sophisticated."[257] However,

> "[l]ikely to deceive" implies more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner. Rather, the phrase indicates that the ad is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.[258]

It is certainly arguable that the family farm myth and the industry's statement that animals love being confined are likely to deceive a significant portion of the general consuming public. For instance, PETA tried to enjoin the CMAB's perpetuation of the family farm myth, and the judge suggested that if the CMAB was a private entity, PETA might have won.[259]

Additionally, the perpetuation of the family farm myth begins long before adulthood.[260] Factory farms embed the idea of the family farm myth in children through insidious methods such as coloring books and "educational materials."[261] Such false advertising is actionable under a lower standard than the usual "reasonable consumer" standard in section 17200 "fraudulent" prong cases. In cases where the advertising is targeted at a particularly vulnerable

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251. CAL. BUS. & PROF. CODE § 17200 (West 1997).
252. *See* Prata v. Superior Court, 111 Cal. Rptr. 2d 296, 309 (Ct. App. 2001).
253. *See id.*
254. Comm. on Children's Television, Inc. v. Gen. Foods Corp., 673 P.2d 660, 668 (Cal. 1983) (quoting Chern v. Bank of Am., 544 P.2d 1310, 1316 (Cal. 1976) (emphasis added)).
255. *Id.*
256. Lavie v. Procter & Gamble Co., 129 Cal. Rptr. 2d 486, 494 (Ct. App. 2003) (citing Haskell v. Time, Inc., 857 F. Supp. 1392, 1399 (E.D. Cal. 1994)).
257. *Id.* at 496 (quoting Donaldson v. Read Magazine, 333 U.S. 178, 189 (1948)).
258. *Id.* at 495.
259. *See* PETA, Appeal, *supra* note 63.
260. ROBBINS, *supra* note 55, at 125–31.
261. *Id.* at 126–27.

subgroup, such as children, the effect of the advertising must be determined from the viewpoint of a reasonable member of that subgroup.[262] Thus, the effect of these coloring books and "educational materials" should be determined from the viewpoint of a reasonable child, who is more susceptible to believing the family farm myth than an adult.

Other lies by the industry are more concrete and provable than the family farm myth. For example, many egg producers label their cartons with the words "free range" or "free roaming." They get away with this because use of the term is highly unregulated. Most "free-range" hens are not given much more space than their battery-caged counterparts.[263] They still spend all or most of their time indoors, crammed onto a large, feces-covered floor.[264] The reasonable consumer does not know that the term "free range" is highly unregulated and likely believes erroneously that the chickens are truly free range. Truly free-range egg producers, such as Flying F Farm, can sue these companies for gaining competitive advantage through fraudulent practices under section 17200. These companies get the benefit of consumers paying higher prices for free-range eggs, without having to incur the costs of actually allowing their chickens to roam free.

Interestingly enough, animal advocacy groups, not just humane competitors and individuals, can sue under the "fraudulent" prong of section 17200 because they suffer financial harm as a result of fraudulent business practices by inhumane farms or slaughterhouses. If an inhumane farm or slaughterhouse falsely claims that it is humane, the animal advocacy group has to spend more money to disseminate the truth to the public. Thus, an animal advocacy group has standing as required by section 17200, post-Proposition 64.

1. Defenses

As with unlawful business practices, courts have rejected the "industry custom" defense for fraudulent business practices. It is no defense that it is the industry's custom to make similar deceptive statements or advertisements.[265]

262. *Lavie*, 129 Cal. Rptr. 2d at 494.

263. Free-range hens get one to two square feet per hen, while battery-caged hens get only fifty square inches. *See* COMPASSION OVER KILLING, HOW FREE IS "FREE-RANGE"? (nd.), *at* http://www.cok.net/lit/freerange.php.

264. *See id.*

265. *See* Chern v. Bank of Am., 544 P.2d 1310, 1316 (Cal. 1976).

Lack of intent to deceive is also not a defense. "Irrespective of its truth or falsity, any statement which is deceptive or merely misleading, without intent to deceive, violates the statute."[266]

It is also no defense that a statement is technically true. If a statement is true to some degree, but withholding relevant information made it likely that the public would be misled, the statement is still actionable.[267]

> By their breadth, the statutes encompass not only those advertisements which have deceived or misled *because* they are untrue, but also those which may be accurate on some level, but will nonetheless tend to mislead or deceive. . . . A perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under these sections.[268]

For instance, in *PETA v. KFC*,[269] PETA claimed that KFC told consumers, via its web site, that it prohibited its "suppliers from de-beaking any poultry that will be *sold in its restaurants*."[270] PETA claimed that this statement was "grossly misleading when one considers that the *breeding parents* of broiler chickens raised for defendants' restaurants do, in fact, have their beaks cut by the millions."[271] While KFC's statement was technically true, it misled the reasonable poultry-consuming KFC patron to think that he or she would not be supporting the cruel practice of debeaking poultry.

CONCLUSION

State unfair competition statutes are powerful tools that can be wielded to privately enforce anticruelty and humane slaughter laws. California's unfair competition law, section 17200, is useful because it provides three prongs under which plaintiffs can sue: plaintiffs can sue if defendants violate laws, engage in anticompetitive conduct, or make statements likely to mislead the reasonable consumer. It is less clear after Proposition 64 whether they can sue for violations of public policy. Because of Proposition 64, animal advocacy groups can no longer bring section 17200 lawsuits except to enjoin fraudulent business acts or practices. However, even if animal advocacy groups could still sue under section 17200, humane competitors are

266. Audio Fidelity, Inc. v. High Fidelity Recordings, Inc., 283 F.2d 551, 555 (9th Cir. 1960) (citing People v. Wahl, 100 P.2d 550 (Cal. Ct. App. 1994)).

267. *See* Brockey v. Moore, 131 Cal. Rptr. 2d 746, 755 (Ct. App. 2003).

268. *Id.* (quoting Day v. Am. Tel. & Tel. Corp., 74 Cal. Rptr. 2d 55, 60 (Ct. App. 1998)).

269. *See supra* notes 66–79 and accompanying text.

270. KFC Complaint, *supra* note 67, ¶ 13 (quoting KFC's web site) (emphasis added).

271. *Id.* (emphasis added).

more ideal plaintiffs because they can allege more concrete harm. Moreover, they have more credibility and appear more sympathetic than animal rights organizations because they have personally suffered harm and are typically small family farms. Similarly, they are better plaintiffs than individual consumers.

A concern, of course, for these typically small family farm competitors and meat substitute producers is legal fees. My suggestion is that animal rights groups name humane competitors as plaintiffs to their complaints and fight these legal battles for them, free of charge. Both parties will benefit: Animal rights groups will accomplish better treatment of farm animals, and humane competitors will reduce competitive harm.

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