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## Religious Ritual Exemptions: Sacrificing Animal Rights for Ideology

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## RELIGIOUS RITUAL EXEMPTIONS: SACRIFICING ANIMAL RIGHTS FOR IDEOLOGY

*Time and time again people cry "sentimentality," and say in the time of world upheaval there are more important things to think about. But what kind of a civilization is it which does not recognize any values besides the materialistic ones? I think the qualities of a civilization are evident in the treatment of the weak and powerless.*<sup>1</sup>

### I. INTRODUCTION

In 1958, Congress passed the Humane Slaughter Act,<sup>2</sup> (the Humane Slaughter Act or the Act), thereby implementing a public policy that the slaughtering of livestock be carried out by humane methods only.<sup>3</sup> Specifically, the Act required that animals be made unconscious prior to slaughter.<sup>4</sup> The new rule conflicted with the requirements of Jewish dietary law that the animal be conscious when slaughtered.<sup>5</sup> Thus, the Act accommodated this requirement by, on the one hand, listing the Jewish method of slaughter as humane, and on the other, by exempting ritual slaughter from the specifications of the Act.<sup>6</sup> The inconsistency resulted from the fact that while the ritual method of *slaughter* was humane, it necessarily required a method of *restraint* by which fully conscious animals are shackled by a rear leg and hoisted off the floor to await slaughter.

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1. *Humane Slaughtering of Livestock and Poultry: Hearings on S. 1636 Before a Subcomm. of the Comm. on Agriculture and Forestry*, 84th Cong., 2d Sess. 138 (1956) [hereinafter *Hearings*] (statement of R. Harvey Dastrup, legislative assistant) (emphasis added). Senate bill 1636 was the precursor to Senate bills 1213 and 1497 and House bill 8308, all of which had the similar purpose of enacting humane slaughter legislation. See H.R. 8308, 85th Cong., 2d Sess. (1958); S. 1497, 85th Cong., 2d Sess. (1958); S. 1213, 85th Cong., 1st Sess. (1957). While Senate bill 1636 was passed in the Senate, no action was taken on it in the House before the end of the session. Thus, similar legislation was reintroduced during the first session of the eighty-fifth Congress. The hearings on the later proposed bills are similar to those on Senate bill 1636. See *Humane Slaughtering of Livestock: Hearings on S. 1213, S. 1497 and H.R. 8308 Before the Senate Comm. on Agriculture and Forestry*, 85th Cong., 2d Sess. (1958).

2. Act of Aug. 27, 1958, Pub. L. No. 85-765, 72 Stat. 862, amended by Humane Methods of Slaughter Act of 1978, Pub. L. No. 95-445, § 5, 92 Stat. 1069, 1069 (codified as amended at 7 U.S.C. §§ 1901-1906 (1988)).

3. 7 U.S.C. § 1901.

4. *Id.*

5. P. SINGER, *ANIMAL LIBERATION* 153 (2d ed. 1990).

6. See 7 U.S.C. §§ 1901(b), 1906.

In the city of Hialeah, Florida, city ordinances prohibit cruelty to animals.<sup>7</sup> No exemption accommodates the Santeria religion whose religious ceremonies involve animal sacrifice. Members of the Santeria Church of Lukumi Babalu Aye are challenging the ordinance on the grounds that it infringes on their free exercise rights under the first amendment of the United States Constitution.<sup>8</sup>

This Comment analyzes the conflict between animal rights and the first amendment right to free exercise of religion by examining two related issues. First, it discusses both the purpose of the Humane Slaughter Act and the inconsistency which the ritual slaughter exemption poses for this purpose. It suggests that contrary to statements in the Act, ritual slaughter is not conducted humanely. The Comment proposes a statute to require ritual slaughterers to implement alternative methods of slaughter which permit compliance with the humane purposes of the Act as well as with the ritual requirements. This section of the Comment is concerned primarily with demonstrating that there is a practical solution to this particular problem and that Congress should amend the Humane Slaughter Act to effect it.

The Comment then recognizes the broader issue in animal rights/free exercise controversies—whether animal rights might be permitted generally to surpass free exercise rights. It discusses the historical progression of the Supreme Court's interpretation of the free exercise right. It then analyzes the Santeria animal sacrifice/free exercise controversy as illustrative of the broader issue and suggests that, in fact, there may be no basis for constitutionally required exemptions from laws intended to protect animals. Finally, the Comment concludes that, in light of the growing recognition of animal rights and our moral inclination that sentient beings have a right to live free from abuse, such exemptions should not be permitted.

## II. BACKGROUND

In 1958, Congress enacted the Humane Slaughter Act,<sup>9</sup> setting forth as a "policy of the United States that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried

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7. Hialeah, Fla., Ordinances 87-40 (June 9, 1987); *id.* 87-52 (Sept. 8, 1987); *id.* 87-71 (Sept. 22, 1987); *id.* 87-72 (Sept. 22, 1987).

8. Church of the Lukumi Babalu Aye v. City of Hialeah, 723 F. Supp. 1467 (S.D. Fla. 1989), *appeal filed*, No. 90-5176 (11th Cir. Feb. 22, 1990); U.S. CONST. amend I.

9. Act of Aug. 27, 1958, Pub. L. No. 85-765, 72 Stat. 862, *amended by* Humane Methods of Slaughter Act of 1978, Pub. L. No. 95-445, § 5, 92 Stat. 1069, 1069 (codified as amended at 7 U.S.C. §§ 1901-1906 (1988)).

out only by humane methods."<sup>10</sup> The Humane Slaughter Act sets out two different methods of slaughter which Congress determined were humane.<sup>11</sup> Section 1902(a) provides that the animal must be rendered unconscious before being shackled, hoisted and bled.<sup>12</sup> Section 1902(b) provides, alternatively, that the animal may be slaughtered in accordance with a religious ritual whereby the carotid arteries are simultaneously and instantaneously severed with a sharp instrument.<sup>13</sup>

The religious ritual provided for in section 1902(b), termed *shechitah* in Hebrew,<sup>14</sup> involves killing the animal with a quick forward and backward movement of a finely sharpened knife,<sup>15</sup> severing the four major blood vessels in the throat and cutting both the trachea and the esophagus.<sup>16</sup> Many commentators have suggested that this method is a humane way to slaughter livestock,<sup>17</sup> because the animal quickly becomes unconscious.<sup>18</sup> In fact, the Jewish religion has placed great value

10. 7 U.S.C. § 1901 (1988).

11. *Id.* § 1902. The section provides, in relevant part,

Either of the following two methods of slaughtering and handling are hereby found to be humane:

(a) in the case of cattle, calves, horses, mules, sheep, swine, and other livestock, all animals are 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

(b) by slaughtering in accordance with the ritual requirements of the Jewish faith or any other religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument and handling in connection with such slaughter.

*Id.*

12. *Id.* § 1902(a).

13. *Id.* § 1902(b).

14. Lovenheim, *Using Restraint*, MOMENT, Jan.-Feb. 1983, at 62, 62.

15. Nicks in the blade are likely to cause the animal pain which is inconsistent with the Jewish tradition concerning humane treatment of animals. Grandin, *Humanitarian Aspects of Shehitah in the United States*, 39 JUDAISM: Q.J. JEWISH LIFE & THOUGHT 436, 436 (1990).

16. *Id.*

17. See, e.g., *Hearings, supra* note 1, at 139, 144-46, 164-65; H.H. DONIN, TO BE A JEW 107 (1972); J. NEUSNER, THE LIFE OF TORAH 97-98 (1974).

18. Grandin, *supra* note 15, at 443. There is a consensus in the scientific community, for example, that sheep and goats lose consciousness within two to fifteen seconds after the cut. *Id.* For calves and cattle, however, the figures range from four to as long as sixty seconds. *Id.* The variation may be due to the skill of the *shochet* (ritual slaughterer). *Id.* at 444. Grandin made the following observation during one ritual slaughter:

At [one plant] it was possible to observe accurately the reactions of hundreds of 375 lb. veal calves to *shehitah*. The most skillful *shochet* was able to cause over 95 percent of the calves to collapse immediately. When a less skilled *shochet* performed *shehitah*, up to 30 percent of the calves righted themselves on the table and some animals even walked on the moving table like on a treadmill.

*Id.*

on the humane treatment of animals,<sup>19</sup> and the original intentions behind the ritual slaughter requirements may have been humanitarian.<sup>20</sup> Nevertheless, hygiene requirements under United States federal law have produced a dichotomy between the original motives of Jewish law and the current ritual slaughter methods which have turned ritual slaughter "into a grotesque travesty of any humane intentions that may once have lain behind it."<sup>21</sup>

In Florida, the Santeria<sup>22</sup> practice of animal sacrifice presents a similar controversy involving humane laws and religious practices. The dilemma with the Santeria practice, however, is even more compelling because there is no humane alternative. There is scientific evidence that the manner of killing during the sacrifices is inhumane.<sup>23</sup> In 1987, the City of Hialeah, Florida passed several animal anti-cruelty statutes in

19. See, e.g., Lovenheim, *supra* note 14, at 62. Lovenheim noted:

The concept of *tsa'ar ba'alei chaim*, prevention of cruelty to animals, is an important doctrine of Jewish law. It is forbidden, for example, to harness to a plough two animals of different species. One should not muzzle an ox during threshing. Animals should be allowed to rest on the Sabbath and on holy days.

*Id.* (citations omitted); see also Jones v. Butz, 374 F. Supp. 1284, 1288 (S.D.N.Y.) (Jewish "religious beliefs have a long historical association with the humane treatment of animals."), *aff'd mem.*, 419 U.S. 806 (1974); *Hearings, supra* note 1, at 139 (statement of Rabbi Isaac Lewin, Executive Committee, Union of Orthodox Rabbis of the United States and Canada, New York, N.Y.) ("Humane treatment of animals is an ideal which appeals to all decent men and women. In Judaism this is much more than an ideal as yet to be achieved in the future.").

20. See *Hearings, supra* note 1, at 141 (statement of Leo Pfeffer, Counsel, American Jewish Congress) ("[T]he causing of pain to any living thing . . . is a violation of religious law, and that is why the Jewish religion for thousands of years had engaged in this expensive, difficult method of slaughtering in order to avoid unnecessary pain to a live being."); J. NEUSNER, *supra* note 17, at 98.

21. P. SINGER, *supra* note 5, at 154.

22. The Santeria, generically referred to as "Yoruba" or "Yoba," is a religion represented by the Church of the Lukumi Babalu Aye. Church of the Lukumi Babalu Aye v. City of Hialeah, 723 F. Supp. 1467, 1469 (S.D. Fla. 1989), *appeal filed*, No. 90-5176 (11th Cir. Feb. 22, 1990). The religion originated almost 4,000 years ago in West Africa. *Id.* It is one of the three indigenous religions of the Yoruba people and is practiced openly in Nigeria today. *Id.* In the sixteenth, seventeenth and eighteenth centuries, many Yoruba practitioners were enslaved and taken to Cuba where their religion was forbidden. *Id.* For 400 years thereafter, the religion was practiced underground mostly by slaves and their descendants. *Id.* at 1470.

Santeria first came to the United States with the Cuban exiles who fled Fidel Castro's regime between 1950 and 1960. *Id.* There are approximately 50,000 to 60,000 Santeria practitioners in South Florida today. *Id.* The number who practice animal sacrifice is unknown. *Id.*

The Santeria religion is not socially accepted in the Cuban population and, consequently, has been practiced privately in individual homes. *Id.* Santeria has an interrelationship with the conduct of life such as holidays, Sabbath, and days of worship. *Id.* There are ceremonies for life cycle events like child birth, marriage and death. *Id.* The ceremonies which involve animal sacrifice include the initiation rite and the faith healing rite. *Id.* at 1473-74.

23. *Id.* at 1472.

response to an epidemic of ritual killing of animals in the city.<sup>24</sup> The ordinances were intended to prohibit all ritual killings and were not targeted specifically at the Santeria religion.<sup>25</sup> In fact, the ordinances did not mention religion at all and applied equally to cults, fraternities, or any individual or organization practicing animal sacrifice.<sup>26</sup> The Santeria Church of Lukumi Babalu Aye has challenged the ordinance, claiming that it violates its rights to free exercise of religion.<sup>27</sup>

### III. ANALYSIS

#### A. *The Problem with Ritual Slaughter*

##### 1. The shackle-hoist method of restraint

The problem with ritual slaughter stems from a dichotomy between United States hygiene law and requirements of Jewish dietary law.<sup>28</sup> United States Department of Agriculture regulations<sup>29</sup> provide that an animal becomes "adulterated" if "[i]t has been prepared . . . under unsanitary conditions whereby it may have become contaminated with filth."<sup>30</sup> Thus, "casting," or laying an animal on the floor to restrain it for slaughter, is prohibited due to sanitary concerns that it will become contaminated with dirt or manure.<sup>31</sup> This means that the animal must be

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24. Hialeah, Fla., Ordinance 87-40 (June 9, 1987); *id.* 87-52 (Sept. 8, 1987); *id.* 87-71 (Sept. 22, 1987); *id.* 87-72 (Sept. 22, 1987).

25. Brief of the Humane Society of the United States, as Amicus Curiae in Support of Appellee, City of Hialeah at 1, *Church of the Lukumi Babalu Aye v. City of Hialeah*, No. 90-5176 (11th Cir. filed Feb. 22, 1990).

26. *Id.* at 6; see Hialeah, Fla., Ordinance 87-52 (Sept. 8, 1987) ("This section is applicable to any group or individual that kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed."); *id.* 87-71 (Sept. 22, 1987) ("It shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Hialeah, Florida.").

27. *Church of Lukumi Babalu Aye*, 723 F. Supp. at 1469.

28. P. SINGER, *supra* note 5, at 154. It should be emphasized at the outset that hoisting and shackling is not part of the religious ritual, but a method of animal restraint which, when used with the ritual, becomes objectionable. Much scientific evidence exists for the proposition that the ritual method of slaughter is humane. See *supra* notes 17-18 and accompanying text. There is an argument, however, that even if more humane restraint alternatives were implemented for kosher slaughter, an animal that is conscious prior to having its throat cut (kosher), would arguably experience more fear and stress than an animal rendered unconscious prior to this procedure (non-kosher). To the extent that this is true, the discussion at *infra* notes 119-229 and accompanying text, concerning whether there is ever a need to sacrifice animal rights to accommodate religious practice, would apply.

29. The regulations were enacted pursuant to the authority vested in the Department of Agriculture by the Meat Inspection Act, 21 U.S.C. §§ 601-695 (1988).

30. 9 C.F.R. § 301.2(c)(4) (1990).

31. Grandin, *supra* note 15, at 437; see *Jones v. Butz*, 374 F. Supp. 1284, 1290 n.8 (S.D.N.Y.), *aff'd mem.*, 419 U.S. 806 (1974); Lovenheim, *supra* note 14, at 63.

suspended from a conveyor belt or held up off the floor by some other means before it is killed.<sup>32</sup> This hygiene requirement poses no difficulty in the slaughter of animals for non-kosher use because these animals are rendered unconscious with the use of a stunning device prior to being shackled, hoisted and bled.<sup>33</sup> Jewish law, on the other hand, requires that the animal be "healthy and moving" when slaughtered.<sup>34</sup> Thus, when the requirements of ritual slaughter act in conjunction with those of the hygiene laws, the result is that animals are shackled and hoisted while still fully conscious.<sup>35</sup>

Temple Grandin, an assistant professor of animal science at Colorado State University, has stated,

Shackling and hoisting of conscious animals for ritual slaughter is an area of our profession in need of major housecleaning.

I have been in hundreds of slaughter plants, but I had nightmares after visiting one plant in which five big steers were hung up in a row to await slaughter. They were hitting the walls, and their bellowing could be heard out in the parking lot. To get the shackles on the live cattle, the operation was equipped with a pen with a false bottom that tripped the animal to make it fall down.<sup>36</sup>

Today, the percentage of steers which are kosher-slaughtered in the United States by being shackled and hoisted while conscious has been reduced due to advances in alternative technologies.<sup>37</sup> As of 1989, approximately ten to twenty percent of kosher cattle are slaughtered using the shackle and hoist method.<sup>38</sup> This still means a gruesome atrocity committed against a significant number of animals.<sup>39</sup> Furthermore, the development of similar technologies for smaller animals has become

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32. P. SINGER, *supra* note 5, at 154.

33. Lovenheim, *supra* note 14, at 62.

34. P. SINGER, *supra* note 5, at 153. The purpose of this requirement may have been to prohibit consumption of an animal which had been found sick or dead. *Id.*

35. *Id.* at 154.

36. Grandin, *Shackling, Hoisting Live Animals Is Cruel*, MEAT & POULTRY, Sept. 1987, at 142, 142-43. Temple Grandin, Ph.D. (American Registry of Professional Animal Scientists), is also a livestock handling consultant. Grandin, *Where Reform Is Needed: Bob Calf Handling and Veal Calf Slaughter*, LARGE ANIMAL VETERINARIAN, Jan.-Feb. 1989, at 39, 39. Her company, Grandin Livestock Handling Systems, Inc., specializes in design of livestock handling facilities for feed lots, ranches, auctions, and packing plants. *Id.*

37. See *infra* notes 79-103 and accompanying text for a discussion of the American Society for the Prevention of Cruelty to Animals (ASPCA) pen, the V conveyor restrainer, and the double rail restrainer as new alternatives for humane ritual slaughter.

38. Grandin, *supra* note 15, at 438.

39. See *infra* notes 91-94 and accompanying text.

fruitful only recently.<sup>40</sup> Consequently, over ninety percent of kosher veal and almost one hundred percent of kosher lambs and sheep are still slaughtered using shackling and hoisting.<sup>41</sup>

Once the animals are shackled and hoisted, the length of time they spend on the conveyor belt before they are killed varies.<sup>42</sup> One witness noted that the animal hung for thirty-five seconds before its throat was cut.<sup>43</sup> Singer, an animal rights advocate, has suggested that animals ritually slaughtered in the United States may be shackled and hoisted, and "then [hung], fully conscious, upside down on the conveyor belt for between two and five minutes—and occasionally much longer if something goes wrong on the 'killing line'—before the slaughterer makes his cut."<sup>44</sup> This may be due to the fact that in some plants, five or six animals at a time may be hanging conscious on the chains awaiting slaughter.<sup>45</sup> Additionally, the ritual slaughterers are sometimes not well trained in making the cut correctly, causing the animal to suffer a prolonged death.<sup>46</sup>

The practice of shackling and hoisting conscious animals continues because ritual slaughter is exempt from the requirements of the Humane Slaughter Act.<sup>47</sup> Additionally, meat packing and slaughtering companies are reluctant to voluntarily incur the expense of acquiring handling equipment which is more humane.<sup>48</sup>

## 2. The inconsistency in the Humane Slaughter Act

During the senate hearings on the Humane Slaughter Act,<sup>49</sup> the Union of Orthodox Rabbis of the United States and Canada and the American Jewish Congress expressed alarm at the Act as originally drafted.<sup>50</sup> As originally drafted, the Act listed kosher slaughter as an

40. See *infra* notes 95-99 and accompanying text.

41. Grandin, *supra* note 15, at 438.

42. The conveyor belt is the device that transports the animal to the slaughterer.

43. Lovenheim, *supra* note 14, at 62.

44. P. SINGER, *supra* note 5, at 154.

45. Grandin, *supra* note 15, at 438.

46. See Grandin, *State of the Art, Humane Slaughter System Installed at Utica Veal, VEALER MAG.*, May 1987, at 6, 9. See *supra* note 18 for a discussion of the effect of variation in skill of the *shochet*.

47. See 7 U.S.C. § 1906 (1988).

48. P. SINGER, *supra* note 5, at 152-56.

49. Act of Aug. 27, 1958, Pub. L. No. 85-765, 72 Stat. 862, amended by Humane Methods of Slaughter Act of 1978, Pub. L. No. 95-445, § 5, 92 Stat. 1069, 1069 (codified as amended at 7 U.S.C. §§ 1901-1906 (1988)).

50. *Hearings*, *supra* note 1, at 139 (statement of Rabbi Isaac Lewin, Executive Committee, Union of Orthodox Rabbis of the United States and Canada, New York, N.Y.) ("We are . . . firmly opposed to the present measure because by implication it brands the Jewish ritualistic method of slaughter . . . as not humane. Such implication is indeed offensive, and has no basis



exception to humane slaughter, and not, as it currently provides in section 2(b), as a humane alternative.<sup>51</sup> The change in form may have been due to the concern with anti-Semitic propaganda which accompanied similar exemptions in other countries.<sup>52</sup>

While the actual throat cut prescribed by the ritual method may be humane,<sup>53</sup> the pre-slaughter handling of the animal clearly is not. Consequently, section 2(b) is inconsistent with the purpose underlying the Act which advocates the humane slaughter of animals. The *effect* of section 2(b) is that of an exemption and section 6, the catch-all provision, although deceptively severed from it, attests to that.<sup>54</sup> Section 6 indicates that ritual slaughter and the handling of animals in connection with ritual slaughter are "exempt" in order to protect freedom of religion.<sup>55</sup> This section also provides, "[f]or the purposes of this section the term 'ritual slaughter' means slaughter in accordance with section 2(b)."<sup>56</sup> Why did Congress exempt a method of slaughter which it had determined was humane? Clearly, there is an inconsistency.<sup>57</sup> This is because

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in fact."); *id.* at 141 (statement of Leo Pfeffer, Counsel, American Jewish Congress) ("We are concerned that you have put into your bill an exemption for kosher slaughter. Our objection to your bill as it was originally drafted was that it gives a completely false impression of the Jewish method of slaughtering.").

51. The relevant portions of the Act as originally drafted provided:

Sec. 2 (a) No slaughterer shall bleed or slaughter any livestock unless such livestock has first been rendered insensible by mechanical, electrical, chemical, or other means determined by the Secretary to be rapid, effective, and humane.

....  
(c) The requirements of this section shall not apply to any individual who is duly authorized by an ordained rabbi of the Jewish religious faith to serve as a sceptor, while such individual is engaged in the slaughtering of livestock . . . in accordance with the practice of such religious faith.

*Hearings, supra* note 1, at 3-4.

The Act as passed, on the other hand, provides in relevant part:

Sec. 2. . . . Either of the following two methods of slaughtering and handling are hereby found to be humane:

(a) . . . all animals are 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

(b) by slaughtering in accordance with the ritual requirements of the Jewish faith or any other religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument.

Act of Aug. 27, 1958, Pub. L. No. 85-765, § 2, 72 Stat. 862, 862 (current version at 7 U.S.C. § 1902 (1988)).

52. *Jones*, 374 F. Supp. at 1289 n.7.

53. See *supra* notes 17-18 and accompanying text.

54. See 7 U.S.C. § 1906 (1988).

55. *Id.*

56. *Id.*

57. The legislative history of the humane slaughter bill indicates that the inconsistency was apparent in 1958.

while circumstances exist under which kosher slaughter can be conducted in a humane manner,<sup>58</sup> at the time the Act was passed, restraint for kosher slaughter in the United States was generally not humane.<sup>59</sup> The restraint method of shackling and hoisting conscious animals cannot be humane, regardless of how humane the killing might be.<sup>60</sup>

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Under paragraph (b) of section 2 of the bill, slaughtering in conformity with the ritual requirements of the Jewish faith is found to be humane. It appears from the language of this paragraph that the description of this method applies to slaughtering only and not to handling animals in connection with slaughter, in which case the handling of the animals would have to be in compliance with a method designated and approved by the Secretary . . . . During the discussion in the House, it was stated that the provisions of paragraph (b) of section 2 "are not intended to deny the Department of Agriculture the right and power to prohibit any form of shackling and hoisting of conscious animals" . . . .

It is not clear what effect, if any, section 6 of the bill would have upon this situation . . . . In view of the language of sections 2 and 6 of the bill, the remarks made during the discussion of the bill in the House, and the lack of knowledge with respect to the Weinberg pen, it is difficult for this Department to determine what administrative action would be appropriate if this bill becomes law.

S. REP. NO. 1724, 85th Cong., 2d Sess. 8, *reprinted in* 1958 U.S. CODE CONG. & ADMIN. NEWS 3932, 3938 (quoting 104 CONG. REC. 1430 (daily ed. Feb. 4, 1958)). See *infra* note 59 for a discussion of the Weinberg pen.

The language of section 2(b) indicates that the religious method described therein as being humane applies to slaughter only and does not encompass the handling in connection with slaughter. The discussion on the floor of the House of Representatives concerning the provisions of this section also indicated that the described method is not intended to apply to such handling.

*Id.* at 12, *reprinted in* 1958 U.S. CODE CONG. & ADMIN. NEWS at 3942.

Apparently, however, the House attempt to prohibit shackling and hoisting was defeated in the Senate. See *Humane Methods of Slaughter Act of 1977: Hearing on H.R. 1464 Before the Subcomm. on Livestock and Grains of the House Comm. on Agriculture*, 95th Cong., 2d Sess. 9 (1978) (statement of Christine Stevens, Secretary, Society for Animal Protective Legislation).

58. For example, in *Jones v. Butz*, the intervenors for the defendants noted, "In Israel, and indeed, in the old traditional Jewish method, the animal would be laying down on its side, and the throat would be cut on the floor." 374 F. Supp. 1284, 1290 n.8 (S.D.N.Y.), *aff'd mem.*, 419 U.S. 806 (1974). Thus, the cruel restraining method of shackling and hoisting was not necessary. "That is not permitted under Department of Agriculture regulations for sanitary reasons. You can't put an animal down in a Department of Agriculture inspected plant on the ground." *Id.*

59. The development of humane technologies that allow for kosher slaughter without shackling and hoisting the animal occurred after the Act was passed. See *infra* notes 80-103 and accompanying text. Over forty years ago, the Weinberg cattle casting pen was developed in Europe. Grandin, *supra* note 15, at 439. This, however, was also not an upright restraining device. *Id.* The pen consists of a narrow stall which inverts the animal slowly until it is lying on its side. *Id.* While this is less stressful than shackling and hoisting, research indicates that the animals restrained in this manner had higher stress hormone levels and more vocalizations than animals restrained upright. *Id.* The Weinberg device, however, was not used commercially in the United States at the time the Act was passed—probably because there was little knowledge of its practicability for high-speed commercial plants. S. REP. NO. 1724, *supra* note 57, at 8, *reprinted in* 1958 U.S. CODE CONG. & ADMIN. NEWS at 3938.

60. See *supra* notes 28-48 and accompanying text.

The apparent inconsistency is supported as well by section 4(c) of the original Act. This section provided: "Handling in connection with such slaughter which necessarily accompanies the method of slaughter described in subsection (b) . . . shall be deemed to comply with the public policy specified by this section."<sup>61</sup> Congress's choice of words may indicate that by "deeming" the handling humane, the drafters avoided the practical inconsistency which the ritual slaughter provision posed for the statute's purpose. Furthermore, because the provision applies to section 2(b), it appears to be "misplaced," an apparent attempt by the draftsmen "to avoid the appearance of inconsistency."<sup>62</sup> It might also be noted that the 1978 revised version of the Act struck out section 4(c) and added to section 2(b) the words "and handling in connection with such slaughtering."<sup>63</sup> Thus, the revised Act, with the stroke of a pen, resolved the literal "misplacement" of the provision, completely ignoring that there is a clear tension in finding "humane" a method of slaughter which required a grossly inhumane method of restraint.

### 3. *Jones v. Butz*

In accordance with Jewish law, for meat to be kosher, not only must it be slaughtered by the throat cutting method described earlier,<sup>64</sup> but the sciatic nerve of the hindquarter must also be removed.<sup>65</sup> This requirement stems from the tale in *Genesis* of Jacob wrestling with a mysterious stranger during which he injured the nerve of his thigh.<sup>66</sup> Thus, the Torah requires that Jewish people do not eat the sciatic nerve.<sup>67</sup>

Complete removal of the sciatic nerve involves much labor.<sup>68</sup> Therefore, it is more economical to sell the hindquarter of an animal slaughtered by the ritual method to the general market than it is to re-

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61. Act of Aug. 27, 1958, § 4(c), 7 U.S.C. 1904(c) (1958), *repealed by* Humane Methods of Slaughter Act of 1978, Pub. L. No. 95-445, § 5(b), 92 Stat. 1069, 1069 (emphasis added).

62. *Jones*, 374 F. Supp. at 1291. The court noted,

[S]ection 4(c), the misplaced provision of the statute, expressly refer[s] to section 2(b), setting forth the ritual method of slaughter, and state[s] that handling necessarily connected with such method "shall be deemed to comply with the public policy specified" by the statute. The draftsmen apparently attempted, perhaps inartistically, to avoid the appearance of inconsistency.

*Id.*

63. See Humane Methods of Slaughter Act of 1978, Pub. L. No. 95-445, § 5(a), 92 Stat. 1069, 1069 (codified as amended at 7 U.S.C. § 1902(b) (1988)); *supra* note 61.

64. See *supra* notes 14-16 and accompanying text.

65. *Hearings, supra* note 1, at 147 (statement of David H. Greenwald, Counsel, American Federation of Retail Kosher Butchers, New York, N.Y.); J. NEUSNER, *supra* note 17, at 97.

66. J. NEUSNER, *supra* note 17, at 97; see *Genesis* 32:25-26.

67. J. NEUSNER, *supra* note 17, at 97.

68. *Id.*

move the sciatic nerve and sell the meat to the kosher market.<sup>69</sup> Consequently, the meat of animals slaughtered by the shackle and hoist method still employed by the religious ritual may unwittingly be purchased by unknowing, non-Jewish consumers who would be unwilling to purchase such meat were they informed about the method of handling.<sup>70</sup>

In 1974, for the first time, a federal court was confronted with a challenge to the religious ritual exemption of the Humane Slaughter Act based on this deception. In *Jones v. Butz*,<sup>71</sup> the plaintiffs challenged the ritual slaughter exemption from the Act on constitutional grounds.<sup>72</sup> The plaintiffs claimed that the practice of selling the hindquarter of a kosher-slaughtered animal to the general market made it impossible to know with certainty whether the meat they were buying was slaughtered by humane methods,<sup>73</sup> and that this caused injury to their "moral principles" and "aesthetic sensibilities."<sup>74</sup> The plaintiffs requested that the trial court declare the ritual slaughter provisions unconstitutional under the establishment and the free exercise clauses of the first amendment to the United States Constitution.<sup>75</sup> The court, however, rejected the

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69. *Hearings*, *supra* note 1, at 147 (statement of David H. Greenwald, Counsel, American Federation of Retail Kosher Butchers, New York, N.Y.); J. NEUSNER, *supra* note 17, at 97.

70. P. SINGER, *supra* note 5, at 155. In Britain, the Farm Animal Welfare Council has estimated that a large proportion of kosher slaughtered meat is sold to the general market. *Id.* In the United States, fifty percent of kosher slaughtered animals, that is, the hindquarter, is sold to the general market. Telephone interview with Temple Grandin (Mar. 24, 1991). *Id.* Additionally, kosher slaughtered meat which is rejected by the *shochet* also ends up in the general market. *Id.* Consequently, the majority of kosher slaughtered meat is purchased by consumers in the general market.

71. 374 F. Supp. 1284 (S.D.N.Y.), *aff'd mem.*, 419 U.S. 806 (1974).

72. *Id.* at 1286. The plaintiffs were six individuals and three organizations committed to the humane treatment of animals. *Id.* at 1287.

73. *Id.*

74. *Id.* at 1289.

75. *Id.* at 1290-91; U.S. CONST. amend I. The plaintiffs claimed that the provision violated the establishment clause of the first amendment in that the exemption clearly had a religious purpose. *Jones*, 374 F. Supp. at 1291. The court rejected this argument. It held that the Act simply listed ritual slaughter as an alternative method of slaughter which was humane, and that the establishment clause does not prohibit enactment of laws which happen to coincide with the tenets of a religion. *Id.* at 1292. It seems, however, that the court avoided resolution of the real issue. While it may be true that the ritual method of slaughter is a humane method, it is not true that the method of restraint used with it is. Section 4(c) of the Humane Slaughter Act unquestionably had the effect of exempting ritual slaughterers from using a humane method of restraint. See *supra* notes 61-63 and accompanying text. Thus, the establishment clause argument is a plausible one which the court might have analyzed more realistically. The establishment clause issue, however, is beyond the scope of this Comment. The focus of the Comment's analysis of the kosher slaughter issue is that the availability of alternatives to the present method of restraint makes the ritual slaughter exemption unneces-

argument.<sup>76</sup>

Nevertheless, *Jones* is important in that it was the first challenge to the ritual slaughter provisions of the Humane Slaughter Act. While the court held that the provisions of the Humane Slaughter Act do not violate the first amendment, it apparently recognized that the plaintiffs were airing a legitimate concern.<sup>77</sup> Ultimately, however, the court noted that "the proper forum for plaintiffs is the Congress and not the courts."<sup>78</sup>

#### 4. Humane alternatives

The case for amending the Humane Slaughter Act to require that ritual slaughter be conducted in a humane manner is strong. The availability of humane alternatives to the shackle and hoist method of restraint has made it possible to satisfy the requirements of Jewish dietary law as well as those of social decency.<sup>79</sup> Thus, any balancing of religious interests and governmental interests must incorporate the fact that the former can be accommodated without a burden on the latter.

At the time Congress passed the Humane Slaughter Act, most kosher slaughter was conducted using the shackle and hoist method of restraint.<sup>80</sup> Today technology is available to conduct ritual slaughter more humanely and without the use of the shackle and hoist method.<sup>81</sup> For example, the American Association for the Prevention of Cruelty to Animals (ASPCA) pen has been an available alternative for restraining cattle

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sary. See *infra* notes 79-103 and accompanying text. If such alternatives are implemented, then the reasoning of the *Jones* court becomes more accurate.

The *Jones* court also rejected the plaintiffs' free exercise claim holding that the assertion of ethical principles against eating ritually slaughtered meat was not sufficient to provide a free exercise claim. *Jones*, 374 F. Supp. at 1294. It should be noted that the free exercise claim asserted in *Jones* bears no relevance to the free exercise claims which this Comment analyzes. *Jones* is cited simply because it is the only case challenging the ritual slaughter provision of the Humane Slaughter Act.

76. *Jones*, 374 F. Supp. at 1293.

77. For example, in analyzing whether the plaintiffs had suffered an injury for the purpose of standing, the court stated, "[W]e are willing to accept . . . that governmental refusal to purchase the meat of animals slaughtered by the ritual method would so influence production in the great packing houses as to save plaintiffs from the uncertainty of which they complain." *Id.* at 1289. At the time, the Humane Slaughter Act applied only to animals slaughtered for the purpose of government procurement. 7 U.S.C. § 1903 (1970) (repealed 1978). The Act was amended in 1978 to apply to the slaughter of animals in the United States meat industry in general. See Humane Methods of Slaughter Act of 1978, Pub. L. No. 95-445, § 5(b), 92 Stat. 1069, 1069 (repealed at 7 U.S.C. § 1903 (1988)); see also H.R. REP. NO. 1336, 95th Cong., 2d Sess. 3-4, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 2650, 2651-52.

78. *Jones*, 374 F. Supp. at 1291.

79. See *infra* notes 80-103 and accompanying text.

80. See Grandin, *supra* note 15, at 437.

81. *Id.*

since the 1960s.<sup>82</sup> The pen is a narrow stall with an opening in front for the animal's head.<sup>83</sup> A lift supports the animal's belly and the animal's head is raised by a chin lift.<sup>84</sup> The chin lift holds the animal's head until the throat is cut.<sup>85</sup> Thus, the animal is shackled and hoisted only after the slaughter.<sup>86</sup>

The V conveyor with a head holder is another alternative for restraining cattle.<sup>87</sup> Under this method, the cattle ride between two conveyors which form a V.<sup>88</sup> The animal remains in an upright position, its body is supported by the angled conveyors along each side, and its feet protrude through an opening between the bottom of the conveyors.<sup>89</sup> The conveyor is stopped for the slaughterer, and a hydraulically operated head holder lifts the animal's head for the cut.<sup>90</sup>

Presently, about 2,000,000 heavy beef steers, 1,000,000 sheep, and 500,000 calves are slaughtered annually for kosher trade in the United States.<sup>91</sup> Yet in spite of the availability of alternatives, approximately ten to twenty percent of kosher slaughtered steers are restrained using the shackle and hoist method.<sup>92</sup> Professor Grandin has indicated that for one southern plant, approximately 1,200 large cattle are killed per day by shackling and hoisting a conscious animal.<sup>93</sup> Thus, this still means an intolerable amount of suffering for many farm animals. As one commentator has noted, "When a heavy iron chain is clamped around the leg of a heavy beef animal weighing between 1,000 and 2,000 pounds, and the steer is jerked off its feet, the skin will open and slip away from the bone. The canon bone will often be snapped or fractured."<sup>94</sup>

The number of small animals which are slaughtered using the shackle and hoist method of restraint is even more significant. Over ninety percent of the calves and virtually one hundred percent of the sheep and lamb slaughtered for sale as kosher meat are still being shack-

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82. *See id.* at 439-40.

83. *Id.* at 440.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 440-41.

91. Karas, *Ritual Slaughter Under Fire*, J.N. Shore Jewish Community, Nov. 23, 1989, at 26, col. 3.

92. Grandin, *supra* note 15, at 438.

93. Karas, *supra* note 91, at 26, col. 3.

94. J. MACFARLANE, *ANIMALS INTO MEAT: A REPORT ON THE PRE-SLAUGHTER HANDLING OF LIVESTOCK* 16-17 (1971).

led and hoisted while conscious.<sup>95</sup> The availability of alternative technologies for small animals is only a recent development.<sup>96</sup> Grandin Livestock Systems, Inc. has designed a new double rail restrainer system. Under this system, the animal rides along a moving conveyor.<sup>97</sup> It straddles the double rail and is supported under its belly and brisket.<sup>98</sup> The conveyor is stopped for the slaughterer when the animal reaches the end.<sup>99</sup>

The availability of alternatives makes the religious ritual exemption unnecessary and its purpose heavily outweighed by the governmental interest in protecting animals from unnecessary abuse. The new humane slaughter technology unfortunately has not been adopted widely because ritual slaughter is exempt from the Humane Slaughter Act.<sup>100</sup> Thus, slaughterers who perform ritual slaughter have neither legal nor economic incentive to implement these technologies.<sup>101</sup> Only one kosher veal plant has to date installed modern restraint equipment.<sup>102</sup> While the plant is to be commended for installing the new system, it must be noted that the expense was shared by national humane organizations which have only limited resources.<sup>103</sup>

##### 5. Proposed amendment to the Humane Slaughter Act

The current exemption for ritual slaughter under section 1902 is not warranted in light of the availability of humane handling equipment which satisfies the requirements of the religious ritual. No valid reason exists for exempting ritual slaughterers from installing the new alternatives. Although costs are a concern, such costs were also a concern for the conventional slaughterer when the Act was passed.<sup>104</sup>

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95. Grandin, *supra* note 15, at 438.

96. The first upright restraining system for small animals was installed in a commercial plant in 1986. *Id.* at 441. A wooden laboratory prototype had been developed by the University of Connecticut in the early 1970s, but was not a practical alternative for a commercial plant. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. P. SINGER, *supra* note 5, at 155.

101. *Id.*

102. Grandin, *supra* note 15, at 438. The plant, Utica Veal in New Jersey, kosher slaughterers calves once a week at a rate of 120 to 150 per hour. Grandin, *supra* note 46, at 7.

103. Grandin, *supra* note 15, at 441.

104. *See, e.g., Hearings, supra* note 1, at 72. Senator Humphrey, who originally proposed the Act, stated:

[I]n anything where there is a change there is some cost involved. . . .

This is true of a hundred and one different kinds of businesses. There isn't a packinghouse in the country that hasn't had to revise its methods of moving the carcasses at great cost. There have been tremendous costs. It expedites, it improves,

Ritual slaughter should not be exempted from the ordinary costs of doing business. "It is disturbing that two large shackle-hoist operators spent large amounts of money and time fighting the government about safety and animal rights groups. At one plant, the money already spent on politics would have paid for a restraining pen."<sup>105</sup> Additionally, while modern restraint equipment can be costly,<sup>106</sup> so may the safety hazards posed by heavy animals frantically struggling on a conveyor.<sup>107</sup> Employees have been kicked in the head and have had their teeth knocked out by the flailing front feet of the restrained animals.<sup>108</sup> At one plant, one man almost died from loss of blood as a result of the *shochet* cutting him while he was attempting to restrain the head of a struggling steer.<sup>109</sup> Accordingly, a reduction in workmen's compensation claims will often pay for the cost of installing more humane and safer restraining systems.<sup>110</sup>

The United States is somewhat primitive in holding on to the ritual slaughter exemption and allowing shackling and hoisting to continue.<sup>111</sup> Canada, Australia, New Zealand, England and other European countries have prohibited the practice.<sup>112</sup> Clearly, there is a legitimate concern with anti-Semitism.<sup>113</sup> Yet, it must be emphasized that a ban on shackling and hoisting is not a ban on ritual slaughter. In Israel, shackling and hoisting is not an acceptable restraining method in performing the ritual.<sup>114</sup> Furthermore, many authorities within the Jewish community it-

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it is more efficient and more economical, and on that basis, I think, you have to relate the cost item, not to the initial cost, but what does it do in terms of the quality of product, the methods in which the product is handled, the salability of the product, the general economics involved in it and also certain social standards. It costs money to have a health and welfare union for your workers, and it costs money to have time and a half for overtime, but we have laws that say you have to have it.

*Id.*

105. Grandin, *supra* note 15, at 442.

106. *Id.* For plants which handle over 100 animals per hour, the conversion may cost about \$250,000. *Id.* However, the ASPCA pen is fairly inexpensive ranging from \$5,000 to \$35,000. *Id.* For small animals, the ASPCA pen may cost even less, approximately \$3,000 in materials. *Id.*

107. *Id.* For example, at Utica Veal, after installation of the new restrainer, there was only one accident. *Id.* Prior to the installation, there were five accidents in an 18-month period resulting in 126 lost work days. *Id.*; see also 7 U.S.C. § 1901 (1988) (finding that use of humane slaughter methods results in safer and better working conditions).

108. Grandin, *supra* note 15, at 442.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. See *Jones*, 374 F. Supp. at 1289 n.7.

114. See *id.*



self oppose shackling and hoisting.<sup>115</sup> In fact, “[t]he elimination of shackling and hoisting as a method of restraint would help strengthen the position of *shehitah* in the United States,” as there are many who believe, unfortunately, that the cruel practice is part of the ritual.<sup>116</sup>

Congress should amend the Humane Slaughter Act to require that animals subject to ritual slaughter must be restrained by a humane method. Thus, as amended section 1902 might read:

Either of the following two methods of slaughtering and handling are hereby found to be humane:

- (a) (unrevised)
- (b) by slaughtering in accordance with the ritual requirements of the Jewish faith or any other religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument *provided that* the animal is restrained in a comfortable upright position.<sup>117</sup>

Section 6 would be repealed as, clearly, it is a catch-all provision exempting ritual slaughter from using humane restraint methods.<sup>118</sup>

### *B. The Broader Issue—Animal Rights vs. Religious Freedom*

The ritual slaughter controversy, because of the availability of alternatives, is fortunately one with a solution which seems capable of accommodating both religious and animal interests. A more difficult inquiry arises, however, when both interests cannot be simultaneously accommodated and one has to yield. Thus, for example, in 1958 the compelling

115. For example, the Union of Orthodox Jewish Congregations of America (OU) and the Joint Advisory Committee of the Synagogue Council both support the use of restraining pens for cattle, a humane alternative to shackling and hoisting. Grandin, *supra* note 15, at 437. In fact, all OU-supervised kosher slaughter plants are required to use a restraining pen for cattle. *Id.* at 437. The OU is an entity which supervises the labeling of foods as complying with Jewish dietary laws.

116. *Id.* at 444-45.

117. The question arises whether only ritual slaughterers might use the section 1902(b) alternative. One might argue that if the two methods were equally humane, a slaughterer might be permitted to choose his preference. It remains arguable whether making the restraint methods associated with ritual slaughter humane renders the two methods of slaughter equally humane. See *supra* note 28, *infra* note 167. The author's position is that if ritual slaughter is, in fact, any less humane, it should not be accommodated. In such a case, the discussion concerning the need to accommodate the Santeria's religious practice of animal sacrifice is relevant. See *infra* notes 119-229 and accompanying text.

118. See 7 U.S.C. § 1906.

question might have been whether the first amendment *required* that the Humane Slaughter Act provide an exemption for ritual slaughter. Today, a clear case which illustrates the conflict involved in this broader issue is the Santeria religion's challenge to animal anti-cruelty ordinances. The broader issue, then, is whether the free exercise clause requires that an exemption be granted to such groups and, if not, whether such an exemption should even be permitted.

1. The free exercise right

a. *supreme court precedent*

The free exercise clause of the first amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof . . .*"<sup>119</sup> Whether the clause prohibits Congress from making laws which are not specifically intended to prohibit the free exercise of religion, but which, nevertheless, incidentally burden it, has been a recurring theme in religious freedom cases.<sup>120</sup>

The earliest Supreme Court interpretation of the free exercise clause appeared in *Reynolds v. United States*.<sup>121</sup> In *Reynolds*, a Mormon claimed that the free exercise clause allowed him to practice polygamy as prescribed by his religion.<sup>122</sup> In analyzing what religious freedoms the Constitution guarantees, the Court stated that, while the first amendment protected religious *opinion*, it did not protect religious *actions* which were a violation of social duties.<sup>123</sup> Polygamy was an "offense against society."<sup>124</sup> The Constitution, therefore, did not require a religious exemption from a generally applicable law prohibiting the practice of polygamy.<sup>125</sup>

*Reynolds* provided that the free exercise clause does not grant an absolute right.<sup>126</sup> The Court compared religious opinion with religious action, emphasizing that, while the government cannot make a law bur-

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119. U.S. CONST. amend. I (emphasis added).

120. See, e.g., *Department of Human Resources v. Smith*, 110 S. Ct. 1595 (1990) (generally applicable law prohibiting use of peyote); *Bowen v. Roy*, 476 U.S. 693 (1986) (generally applicable law conditioning welfare benefits on furnishing of social security number); *Sherbert v. Verner*, 374 U.S. 398 (1963) (generally applicable law conditioning unemployment compensation benefits on claimant's acceptance of available suitable employment).

121. 98 U.S. 145 (1878).

122. *Id.* at 161-62. Polygamy is the practice of having two or more husbands or wives at the same time. BLACK'S LAW DICTIONARY 1044 (5th ed. 1979).

123. *Reynolds*, 98 U.S. at 164.

124. *Id.* at 165.

125. *Id.* at 166-67.

126. *Id.* at 164.

dening religious opinion, it can make a law burdening religious action which is a violation of a social duty.<sup>127</sup>

*Sherbert v. Verner*<sup>128</sup> was the first and, until recently, the leading case in the Supreme Court's modern interpretation of the free exercise clause,<sup>129</sup> setting forth a balancing test for religious exemption controversies.<sup>130</sup> In *Sherbert*, the issue was whether a Seventh-Day Adventist was required to take employment requiring her to work on Saturday, a practice her religion prohibited, in order to be eligible for unemployment compensation.<sup>131</sup> The Court held that the disqualification for unemployment compensation benefits clearly imposed a burden on the plaintiff's free exercise right.<sup>132</sup> The Court next considered whether there was a compelling state interest which justified the infringement of the plaintiff's first amendment rights.<sup>133</sup> Finding no compelling state interest, the Court held for the first time that a neutral law—one not directed at religion—unconstitutionally violated the free exercise clause of the Constitution.<sup>134</sup>

The *Sherbert* balancing test implied that, once the plaintiff showed that a law or governmental practice interfered with the free exercise of his or her religious beliefs, the burden shifted to the government to show that the law or practice was necessary to the accomplishment of a compelling secular objective.<sup>135</sup> Since *Sherbert*, however, the Court has appeared reluctant to apply the test in favor of granting religious exemptions from general laws.<sup>136</sup> Furthermore, since 1972, the Court

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127. *Id.* The *Reynolds* conclusion is consistent with more recent Supreme Court decisions as well. See, e.g., *Smith*, 110 S. Ct. at 1599; *Sherbert*, 374 U.S. at 402.

128. 374 U.S. 398 (1963).

129. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1412 (1990). The most recent Supreme Court decision on the free exercise clause appears to reject the *Sherbert* analysis in cases outside the unemployment compensation field and those involving generally applicable criminal laws. See *Smith*, 110 S. Ct. at 1602-03.

130. *Sherbert*, 374 U.S. at 403.

131. *Id.* at 399-402.

132. *Id.* at 403.

133. *Id.* at 406.

134. *Id.* at 410.

135. *Id.* at 406-07.

136. The Court has applied the *Sherbert* test and held that the free exercise clause requires states to provide a religion-based exemption from general laws on only four occasions since 1962. See *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989) (denial of unemployment compensation benefits to individual on ground that his refusal to work was not based on tenets of established religion violated his first amendment right to free exercise of religion); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) (denial of unemployment compensation benefits to individual who refused to work on Sabbath for religious reasons violated her first amendment right to free exercise of religion); *Thomas v. Review Bd.*, 450 U.S.

has not granted any claim for a religion-based exemption outside the very narrow scope of unemployment compensation.<sup>137</sup> Justice Rehnquist has criticized the *Sherbert* test, stating, "Where . . . a State has enacted a general statute, the purpose and effect of which is to advance the State's secular goals, the Free Exercise Clause does not . . . require the State to conform that statute to the dictates of religious conscience of any group."<sup>138</sup>

The Court's most recent free exercise decision appears to solve the problem of inconsistency in applying the *Sherbert* test to religious exemption controversies. In *Department of Human Resources v. Smith*,<sup>139</sup> the plaintiffs were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church of which they were members.<sup>140</sup> Subsequently, the plaintiffs applied for, and were denied, unemployment compensation because they had been discharged for work-related misconduct—using peyote.<sup>141</sup> The consumption of peyote was prohibited by Oregon's controlled substance law, which did not include an exception for consumption for sacramental purposes.<sup>142</sup> The plaintiffs in *Smith* claimed they were entitled to a religious exemption from the

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707 (1981) (denial of unemployment compensation benefits to employee who terminated his employment for religious reasons violated his first amendment right to free exercise of religion); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (requirement that member of Old Order Amish send his children to school until age sixteen violated his first amendment right to free exercise of religion).

137. See, e.g., *Smith*, 110 S. Ct. 1595 (rejecting claim that free exercise clause prohibits application of state drug law to ceremonial ingestion of peyote); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (rejecting claim that free exercise clause grants orthodox Jewish air force officer right to wear yarmulke while on duty and in uniform); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (rejecting religious school's free exercise claim to tax exempt status because of school's religious rule against interracial dating and marriage); *United States v. Lee*, 455 U.S. 252 (1982) (rejecting self-supporting religious group's free exercise claim to not contribute to Social Security because it violated their religion).

In 1972, in *Wisconsin v. Yoder*, the United States Supreme Court granted to a member of the Old Order Amish an exemption from a law which required that children attend school until age sixteen. 406 U.S. at 234. The Court found it significant, however, that the Amish "alternative mode of continuing informal vocational education" resulted in a "minimal difference between what the State would require and what the Amish already accept." *Id.* at 235-36. Thus, unlike the general cases where an exemption may adversely affect the state's interest, in granting the Amish an exemption the state's interest in educating children would not be adversely affected. *Id.* at 236.

138. *Thomas*, 450 U.S. at 723 (Rehnquist, J., dissenting).

139. 110 S. Ct. 1595 (1990).

140. *Id.* at 1597-98.

141. *Id.* at 1598.

142. *Id.*

criminal statute.<sup>143</sup>

In a five-to-four opinion, the Court held *Sherbert* applicable only to the narrow field of unemployment compensation.<sup>144</sup> The Court recalled that, although at times it had applied the *Sherbert* test to analyze free exercise challenges to generally applicable criminal prohibitions, it had never used the test to invalidate one.<sup>145</sup> The Court then concluded that the *Sherbert* test was inapplicable to such challenges,<sup>146</sup> and that permitting its application would "open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service . . . to . . . animal cruelty laws."<sup>147</sup>

The *Smith* decision is likely attributable to the fact that many neutral and otherwise valid laws cannot pass the *Sherbert* "compelling interest" test. Requiring the government to adhere to that standard would inevitably result in the government tailoring its health and safety laws to conform to the diversity of religious beliefs.<sup>148</sup>

After *Smith*, the applicability of *Sherbert* remains unclear. The narrowest implication of *Smith* is that the *Sherbert* test does not apply to neutral criminal laws which are generally applicable, and which are unrelated to unemployment compensation. A broader reading, however, implies that the test is inapplicable to *any* neutral, generally applicable law, even outside the unemployment compensation area.

#### b. *church of the lukumi babalu aye v. city of hialeah*

The Santeria religion, represented by the Church of the Lukumi

143. *Id.*

144. *Id.* at 1602-03. Justice O'Connor wrote an opinion concurring in the judgment but disagreeing with the Court's opinion. *Id.* at 1607 (O'Connor, J., concurring). Justices Blackmun, Brennan and Marshall joined parts I and II of Justice O'Connor's opinion. *Id.* (O'Connor, J., concurring). Justice Blackmun, with whom Justices Brennan and Marshall joined, dissented. *Id.* at 1615 (Blackmun, J., dissenting).

145. *Id.* at 1603 (citing *United States v. Lee*, 455 U.S. 252, 257-60 (1982); *Gillette v. United States*, 401 U.S. 437, 462 (1971)).

146. *Id.*

147. *Id.* at 1605. Predictably, Justice Brennan was one of the four justices upholding the broader applicability of the *Sherbert* test. *Id.* at 1607 (joining parts I and II of Justice O'Connor's concurring opinion); *id.* at 1615 (joining Justice Blackmun's dissenting opinion). Thus, his retirement will not change the ultimate position of the Court on the issue of constitutionally mandated religious exemptions.

148. Brief of the Humane Society, *supra* note 25, at 4. The government, for example, might be compelled to permit snake handling in religious ceremonies, *see State ex rel. Swann v. Pack*, 527 S.W.2d 99 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976), or the use of marijuana for religious reasons, *see United States v. Middleton*, 690 F.2d 820 (11th Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983).

Babalu Aye, practices animal sacrifice during many of its religious ceremonies.<sup>149</sup> Practitioners argue that animal sacrifices are necessary to cure illnesses and sanctify births, deaths and marriages.<sup>150</sup> The animals sacrificed in the Santeria ceremonies include chickens, pigeons, doves, ducks, guinea fowl, goats, sheep, and turtles.<sup>151</sup> Only priests conduct animal sacrifice, and they are taught as apprentices through observation.<sup>152</sup>

Typically, the initiation rite lasts eight days and the sacrifices all occur consecutively on the second day.<sup>153</sup> Approximately six four-legged animals and twenty-four chickens are sacrificed.<sup>154</sup> The animals are brought into the initiate's room for the initiate to touch, and are then sacrificed.<sup>155</sup> In the faith healing rites usually one animal is sacrificed, and the illness is then believed to pass to the animal.<sup>156</sup>

Generally, for the sacrifice, the animal is placed on a table on its left side.<sup>157</sup> The apprentice holds the animal's legs and the priest holds the animal's head, which extends beyond the edge of the table.<sup>158</sup> The knife is always held in the priest's right hand, whether or not he is right-handed.<sup>159</sup> The priest punctures the neck of the animal with a knife inserted into the right side and all the way through the animal's neck.<sup>160</sup> Some of the smaller animals undergo a different experience. Their heads are twisted or torn off by the priest, sometimes by gnashing the head off.<sup>161</sup>

There is scientific evidence that the method of killing involved in the Santeria sacrifices is not humane.<sup>162</sup> Puncturing the animal's neck does not guarantee that both carotid arteries can be simultaneously severed.<sup>163</sup>

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149. Resnick, *To One City, It's Cruelty. To Cultists, It's Religion*, Nat'l L.J., Sept. 11, 1989, at 8, col. 1.

150. *Id.*

151. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 723 F. Supp. 1467, 1471 (S.D. Fla. 1989), *appeal filed*, No. 90-5176 (11th Cir. Feb. 22, 1990).

152. *Id.*

153. *Id.*

154. *Id.* at 1474. Since about 600 initiations are performed per year, this means that approximately 12,000 and 18,000 animals are sacrificed in the initiation rites alone each year. *Id.* at 1473 n.22.

155. *Id.* at 1474.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. Brief of the Humane Society, *supra* note 25, at 11 (citing McFarland, *The Secrets of Santeria Part Two*, 2 ANIMALS' VOICE 42, 44 (1989)).

162. *Church of Lukumi Babalu Aye*, 723 F. Supp. at 1472.

163. *Id.*

Furthermore, young goats and sheep have arteries which are deeper within the vertebrae and, thus, they are not likely to lose consciousness instantaneously.<sup>164</sup> Chickens pose a special problem because they have four carotid arteries that must be severed and there is a possibility that one of the arteries might be missed.<sup>165</sup> The animals which undergo these sacrificial ceremonies experience intense fear.<sup>166</sup> Additionally, animals which experience fear often secrete chemical metabolites known as pheromones, and the odor of these can trigger an intense fear reaction in other animals that detect those odors.<sup>167</sup> Moreover, animals which are used for sacrifice are often kept under inhumane conditions until they are sacrificed.<sup>168</sup>

Between June 9 and September 22, 1987, the City Council of Hialeah, Florida enacted four ordinances aimed at ending the practice of animal sacrifice in Hialeah.<sup>169</sup> The first ordinance was a general criminal statute adopting as city law the Florida state anti-cruelty to animals statute.<sup>170</sup> The second ordinance explicitly criminalized the possession of animals for sacrifice.<sup>171</sup> The last two ordinances expressly prohibited animal sacrifice and empowered humane societies to assist in the investigation of violations.<sup>172</sup>

The Hialeah ordinances were prompted by a concern with animal abuse which the Church of the Lukumi Babalu Aye was attempting to institutionalize.<sup>173</sup> Nevertheless, the ordinances were not intended to discriminate against the church. Rather, they applied equally to any individual or organization practicing animal sacrifice.<sup>174</sup> The church brought an action against the city of Hialeah claiming that the ordinances regulating ritual animal sacrifice violated their First Amendment free exercise right.<sup>175</sup> In applying the *Sherbert* test, the court found that the ordinances had three secular purposes: (1) preventing cruelty to ani-

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164. *Id.*

165. *Id.* at 1473.

166. *Id.*

167. *Id.*; see Brief of the Humane Society, *supra* note 25, at 10. The author does not ignore the position that animals which undergo ritual slaughter under Jewish dietary law may also experience similar fear. See *supra* note 28.

168. *Church of Lukumi Babalu Aye*, 723 F. Supp. at 1474.

169. Hialeah, Fla., Ordinance 87-40 (June 9, 1987); *id.* 87-52 (Sept. 8, 1987); *id.* 87-71 (Sept. 22, 1987); *id.* 87-72 (Sept. 22, 1987).

170. Hialeah, Fla., Ordinance 87-40 (June 9, 1987); see also FLA. STAT. ANN. § 828.12 (West 1976 & Supp. 1991) (state animal anti-cruelty law).

171. Hialeah, Fla., Ordinance 87-52 (Sept. 8, 1987).

172. *Id.* 87-71 (Sept. 22, 1987); *id.* 87-72.

173. Brief of the Humane Society, *supra* note 25, at 6.

174. *Church of Lukumi Babalu Aye*, 723 F. Supp. at 1479.

175. *Id.* at 1469.

mals, (2) safeguarding the health, welfare and safety of the community, and (3) preventing the adverse psychological effects on children exposed to such sacrifices.<sup>176</sup>

During the trial, expert testimony revealed that the method of killing was not humane because there was no guarantee that the person performing the sacrifice could cut through both carotid arteries simultaneously.<sup>177</sup> Furthermore, the city established that the church generally obtained the animals from botanicas or from local farms which bred the animals specifically for sacrifice.<sup>178</sup> Such animals were often subject to overcrowding and filthy conditions, and sometimes remained without food and water until sold for sacrifice.<sup>179</sup>

Expert testimony also revealed that the animals which undergo the ritual experience both extreme pain and fear.<sup>180</sup> In chickens, stress and fear affect the immune system which leads to the increased growth in their systems of bacteria, especially salmonella.<sup>181</sup> Salmonella is harmful to humans, and visual inspection would not reveal its presence in the chicken.<sup>182</sup> Experts further testified that the remains of animals were sometimes left in public places—most often near rivers or canals, by four-way stop signs, under certain palms and on people's lawns or on doorsteps.<sup>183</sup> The animal carcasses were health hazards in that they attracted flies, rats and other animals.<sup>184</sup> Thus, the risk of spreading disease to humans was increased.<sup>185</sup>

Finally, experts testified regarding the effect on children's welfare. The Santeria initiation rites generally involve adults, but children as young as seven years have been initiated.<sup>186</sup> Nevertheless, children of all ages are permitted to watch the sacrifices, provided that their parents are present.<sup>187</sup> This testimony established that exposure of children to the sacrifices "would detrimentally affect the mental health of the child and the behavior in such a way that it would be detrimental to the community in which the child resides."<sup>188</sup> The court accepted that there was a

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176. *Id.* at 1477.

177. *Id.* at 1472.

178. *Id.* at 1474.

179. *Id.*

180. *Id.* at 1473.

181. *Id.*

182. *Id.*

183. *Id.* at 1474.

184. *Id.*

185. *Id.* at 1474-75.

186. *Id.* at 1474.

187. *Id.* n.25.

188. *Id.* at 1475.



correlation between the observation of violence and aggressive behavior in children,<sup>189</sup> and that animal sacrifice is, contrary to the plaintiffs' expert opinions, a violent act.<sup>190</sup>

Thus, finding that the purpose of the ordinances was secular, and that the ordinances regulated conduct, not religious belief,<sup>191</sup> the court analyzed the governmental interests in enacting the ordinances.<sup>192</sup> The court held that the city's concerns with both community health and the welfare of children were clearly compelling governmental interests.<sup>193</sup> More significantly, the court found that protecting animals from cruelty was "equally compelling."<sup>194</sup> The court noted that "[e]ven absolute proscriptions of religious conduct are constitutional when the law serves a compelling state interest . . . . Compelling governmental interests, including public health and safety and animal welfare, fully justify the absolute prohibition on ritual sacrifice."<sup>195</sup>

*c. application of current free exercise doctrine*

The Church of Lukumi Babalu Aye has appealed the district court's decision to the Eleventh Circuit. Oral arguments have been heard, but as of the writing of this Comment, no decision has been rendered. Yet, in light of the *Smith* decision, published after *Church of Lukumi Babalu Aye*, the church's position may have become much more precarious.<sup>196</sup> *Smith* suggested that *Sherbert*, which provides a stricter test with which the government restrictions on religious freedom must comply, is limited to controversies which involve unemployment compensation.<sup>197</sup> Furthermore, the *Smith* Court noted, "Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law."<sup>198</sup>

*Smith* strongly suggests that the *Sherbert* test applies only to controversies involving unemployment compensation, and clearly holds that it does not apply to generally applicable criminal laws with a secular pur-

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189. *Id.*

190. *Id.* at 1476.

191. *Id.* at 1483.

192. See *supra* notes 128-34 and accompanying text.

193. *Church of Lukumi Babalu Aye*, 723 F. Supp. at 1485-86.

194. *Id.* at 1486.

195. *Id.* at 1487.

196. See *Smith*, 110 S. Ct. at 1603; *supra* notes 136-48 and accompanying text.

197. *Smith*, 110 S. Ct. at 1603.

198. *Id.*

pose.<sup>199</sup> Nevertheless, even if the *Sherbert* test is held to apply in animal rights-free exercise controversies, it would likely be satisfied. The district court's analysis in *Church of Lukumi Babalu Aye* may provide guidelines for applying the *Sherbert* test to such challenges. The court held that prevention of cruelty to animals is an interest "equally compelling" to concern with community health and safety, and with the welfare of children—interests which have generally been held sufficiently compelling.<sup>200</sup> The state, furthermore, has a strong interest in protecting animals "in that they are living sentient beings that have the capacity to suffer and are wholly dependent upon human protection."<sup>201</sup>

Thus, animal anti-cruelty laws which do not include exemptions for religious practices determined to be inhumane appear to be a constitutional exercise of government power. The question, thus, becomes whether, although a legislature may not be constitutionally *compelled* to grant such an exemption, it might nevertheless be *permitted* to do so. The answer lies in determining whether animals have rights and whether, if they do, we can permit an ideology to suppress them.

*d. the animal rights perspective*

i. Tom Regan and discarding Descartes

The seventeenth-century French philosopher, Rene Descartes, espoused the view that animals were "thoughtless brutes," *automata*, machines.<sup>202</sup> Essentially, animals were seen as different from machines only in that they were alive.<sup>203</sup> Neither was conscious.<sup>204</sup> Tom Regan summarizes Descartes' views: "In place of electrical current passing through wires and circuits, animals have . . . various 'humors' or 'animal spirits' which . . . cause, when stimulated, various behavioral responses in the animal. . . ."<sup>205</sup> Descartes' views were held also by the scientists of his day who administered beatings to dogs without pity, rationalizing that their cries were merely the noise caused by touching a little spring.<sup>206</sup>

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199. *Id.* at 1602.

200. *Church of Lukumi Babalu Aye*, 723 F. Supp. at 1485-86; *see, e.g.*, *New York v. Ferber*, 458 U.S. 747 (1982) (safeguarding physical and psychological well-being of a minor is compelling); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (state's interest in protecting community from exposure to communicable disease or ill health overcomes religious exercise freedoms); *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905) (state has unquestionable power to preserve and protect public health).

201. Brief of the Humane Society, *supra* note 25, at 2.

202. T. REGAN, *THE CASE FOR ANIMAL RIGHTS* 3 (1983).

203. *Id.* at 8.

204. *Id.*

205. *Id.*

206. *Id.* at 5.

Gradually, Descartes' views were discarded as too simplistic.<sup>207</sup> One objection to his approach was that, if the behavior of animals could be explained as mechanistic, so could the behavior of humans.<sup>208</sup> But, of course, that would go too far. It is a "necessary assumption for any work in moral philosophy" that human beings are not "mindless machines," but are creatures with a mental life.<sup>209</sup>

Descartes' theory also became questionable in light of the Darwinian theory of evolution.<sup>210</sup> That is, consciousness has survival value, and the mental life of animals plays a role in their adaptability to a changing environment.<sup>211</sup> Thus, it is reasonable to conclude that *homo sapiens* are not unique in having conscious awareness.<sup>212</sup>

Today, the position that certain animals, at least, have consciousness, is part of the commonsense view of the world.<sup>213</sup> Those who do not recognize the reasonableness of this position are guilty of "human chauvinism"—the belief that humans are unique in having consciousness.<sup>214</sup> "Where one draws the line regarding the presence of consciousness is no easy matter, but our honest uncertainty about this should not paralyze our judgment in all cases. . . . Our ignorance about the shadowy borders of attributions of consciousness is no reason to withhold its attribution to humans *and* those animals most like us in the relevant respects."<sup>215</sup>

## ii. Peter Singer and utilitarianism

In 1975, Peter Singer published his book, *Animal Liberation*, exposing numerous atrocities that our society commits against animals, and establishing an ethical framework for the modern animal rights movement.<sup>216</sup> Singer advocates the position that animals have interests that warrant recognition and protection. In support of this position, Singer quotes Jeremy Bentham:

"The day *may* come, when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why

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207. See *id.* at 21-25.

208. *Id.* at 9-10. See *id.* at 10-17 for Descartes' possible defense and its inadequacy.

209. *Id.* at 17.

210. *Id.* at 18.

211. See *id.* at 18-21.

212. *Id.*

213. *Id.* at 28.

214. *Id.* at 33.

215. *Id.* at 30.

216. See generally P. SINGER, *supra* note 5.

a human being should be abandoned without redress to the caprice of a tormentor. It may one day come to be recognized, that the number of the legs, the villosity of the skin, or the termination of the *os sacrum*, are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? Is it the faculty of reason, or, perhaps the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than any infant of a day, or a week, or even a month, old. But suppose the case were otherwise, what would it avail? the question is not, Can they *reason*? nor, Can they *talk*? but, Can they *suffer*?"<sup>217</sup>

This position underlies Singer's analysis of the rights society is compelled to extend to its animals. According to Singer, the capacity for suffering is the standard for determining whether a being has rights.<sup>218</sup> Thus, at a minimum, animals should have a right to be free from suffering.<sup>219</sup>

In the United States, there has been a trend toward giving animals increasing legal protection.<sup>220</sup> Animal welfare legislation has been enacted into numerous anti-cruelty laws, including the Animal Welfare Act,<sup>221</sup> which restricts the use of animals for laboratory research,<sup>222</sup> and prohibits animal fighting.<sup>223</sup> Additionally, the federal government has enacted wildlife-protection laws,<sup>224</sup> humane-slaughter laws,<sup>225</sup> and animal-transportation laws.<sup>226</sup> In fact, all fifty states currently have some form of criminal statute prohibiting cruelty to animals.<sup>227</sup> Courts

217. *Id.* at 7 (quoting J. BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 311 n.1 (Haffner ed. 1948)).

218. *Id.* at 8-9.

219. *Id.*

220. For a detailed discussion of animal protection legislation, see generally D.S. MORETTI, ANIMAL RIGHTS AND THE LAW (1984).

221. 7 U.S.C. §§ 2131-2157 (1988).

222. *See id.* § 2143.

223. *See id.* § 2156.

224. *See, e.g.*, Marine Mammals Protection Act of 1972, Pub. L. No. 95-522, 86 Stat. 1027 (codified as amended at 16 U.S.C. §§ 1361-1407 (1988)).

225. *See, e.g.*, Humane Methods of Slaughter Act of 1978, Pub. L. No. 95-445, 86 Stat. 1069 (codified as amended at 7 U.S.C. §§ 1901-1906 (1988); 21 U.S.C. §§ 601, 603, 610, 620 (1988)).

226. *See, e.g.*, Cruelty to Animals Act, ch. 3594, 34 Stat. 607 (1906) (codified as amended at 45 U.S.C. §§ 71-74 (1988)).

227. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-2910 to -2910.04 (1989); CAL. PENAL CODE §§ 597(b), 597.5 (West 1990); FLA. STAT. ANN. §§ 828.01-.26 (West 1976 & Supp. 1990); N.Y. AGRIC. & MKTS. LAW §§ 350-377 (McKinney 1972 & Supp. 1991); *see also* D.S. MORETTI, *supra* note 220, at 1 (noting additional state laws).

have also recognized that avoiding animal cruelty is an established public policy of the United States.<sup>228</sup>

The position that animals have rights, at least basic rights to be free from pain, is not one which we should leave to the whim of individuals. It is a position that should be endorsed as the rule in a moral society. This was summarized well during the 1956 hearings on the Humane Slaughter Act:

[I]t is particularly and especially desirable to eliminate from our national life any cruelty which seems to have a social sanction. Individual cruelty, what often the humane societies experience, purely psychopathic cruelties, they are bad because the animals are damaged. They are bad because they offend our sensibilities. But they don't have great social consequences. But it is really important to the well-being of our Nation that a gargantuan crime of the kind that we are talking about should not have public approval.<sup>229</sup>

#### IV. CONCLUSION

The recent trend in the Supreme Court's interpretation of the religious exemption doctrine appears to suggest that the Court is reluctant to hold that such exemptions are required.<sup>230</sup> The most recent Supreme Court decision on the issue of whether a religion-based exemption is constitutionally mandated, suggests strongly that the question may be resolved even without the benefit of weighing the religious interests involved.<sup>231</sup> The Supreme Court has noted,

"Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."<sup>232</sup>

The animal restraint methods involved in ritual slaughter clearly

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228. See, e.g., *Church of Lukumi Babalu Aye*, 723 F. Supp. at 1486; *Humane Soc'y of Rochester & Monroe County v. Lyng*, 633 F. Supp. 480, 486 (W.D.N.Y. 1986); *C.E. Am., Inc. v. Antinori*, 210 So. 2d 443, 444 (Fla. 1968).

229. *Hearings*, *supra* note 1, at 108 (statement of Fred Myers, Executive Director of the National Humane Society).

230. See *supra* notes 136-48 and accompanying text.

231. *Department of Human Resources v. Smith*, 110 S. Ct. 1595, 1603 (1990).

232. *Id.* at 1600 (quoting *Minersville School Dist., Bd. of Educ. v. Gobitis*, 310 U.S. 586, 594-95 (1940)).

contradict social concerns of decency. Indeed, such concerns underlie the enactment of the Humane Slaughter Act.<sup>233</sup> Had the ritual slaughter exemption been left out of the Humane Slaughter Act, *Smith* is fairly clear that an appeal to the United States Supreme Court would probably not have proven fruitful.

Similarly, the animal sacrifices involved during initiation and faith healing ceremonies of the Santeria religion impose intolerable amounts of suffering on animals and circumvent the established moral attitudes of the people of this country. The Hialeah ordinances, like other animal anti-cruelty laws were enacted to further these established morals. Exemptions from laws intended to protect animals from such suffering clearly are neither necessary, nor permissible.

Freedom of religion can no longer support claims for exemptions from animal anti-cruelty laws that clearly have general applicability. Such laws are enacted to satisfy our moral inclination that sentient beings have a right to be free from physical abuse. It strongly undermines our sense of morals to exempt groups of individuals from laws with such purposes in the name of religious freedom. Holding ideas more important than the right of a living, feeling thing to be free from immense suffering is fundamentally dangerous.<sup>234</sup> Nothing in the first amendment requires such a conclusion. Nothing in natural law would permit it. In the natural hierarchy of things we should be, first, a society of decent people. Only once we have fulfilled the natural requirements of social decency can we diverge from others in our beliefs and practices.

*Tali H. Shaddow\**

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233. See 7 U.S.C. § 1901 (1988).

234. Brief of the Humane Society, *supra* note 25, at 17.

\* The author would like to thank Professor Temple Grandin, not only for her assistance in writing this Comment but, more generally, for her innovation in finding practical solutions to the problem of shackling and hoisting conscious animals.

