
Defining Meat and Contesting Tradition

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I posit in this Article how lawmakers should consider the relevance and value of secular ritual in U.S. jurisprudence, and argue that the cultural question of “what is meat?” is an illustrative way to think through the relationship of culture to tradition. Animals are legal property in the United States. I expand on the work of property theorist Margaret Radin to explain why the meats of certain threatened or common companion species should be decommmodified. My analysis is limited to animals that are native to the United States and adjacent waters or are already ubiquitous in American households.

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INTRODUCTION

In July 2017 a gray whale was killed and butchered in the Kuskokwim River region of Southwest Alaska. This is an uncommon event, as suggested by the improvised character of the hunt. One participant’s graphic description: “It felt like I was covered in slime and blood.”¹ Indeed, the gray whale is not properly considered a meat

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¹ Teresa Cotsirilos, *Gray Whale Harvest on the Kuskokwim Stirs Up Controversy*, ALASKA PUB. MEDIA (July 31, 2017), <https://www.alaskapublic.org/2017/07/31/gray->

animal per U.S. law. Alaskan native communities enjoy a carve-out to consume a limited number of bowhead whales each year. However, the National Oceanic and Atmospheric Administration (“NOAA”) has not yet permitted the taking of gray whales for *any* American Indian tribe. This de facto moratorium on gray whale hunting is in effect despite the 1,500-year history of Makah whaling.² For the Makah, whaling remains an integral part of the tribe’s traditions and identity, despite having given up its whaling practice voluntarily over a century ago. As the California gray whale has returned to carrying capacity the Makah have made a litigation push to whale lawfully. It is unclear whether the Makah meet the “subsistence” test prescribed by the International Whaling Commission (IWC). However, the embeddedness of whaling in the Makah worldview and the rigorous procedures of the whale hunt evidence this as a profound secular ritual for the community. I posit in this Article how lawmakers should consider the relevance of value of secular ritual in U.S. jurisprudence, and argue that the cultural question of “what is meat?” is an illustrative way to think through the relationship of culture to tradition.

The Kuskokwim kill coincides with the latest iteration of ongoing Makah litigation. In October 2017 the Ninth Circuit held in *Makah Indian Tribe v. Quileute Indian Tribe* that a whale is indeed a “fish” per the 1855 Treaty of Olympia, and therefore the Makah may lawfully take gray whales for meat consumption. However, the Ninth Circuit has continued to struggle with the factual question of the scope of these Makah fishing waters, and how many gray whales the Makah may take annually. This litigation has created a strange dynamic of competing interest groups, where the hunting rite of the Makah is pitted against the individual whale’s existence value for conservation groups and “whale watchers.”³ In this October 2017 *Makah Indian Tribe* decision, Judge McKeown instructed the lower court to re-draw “boundaries that are fair and consistent” with the Ninth Circuit’s understanding of the Treaties of Olympia (1855). This boundary question is a rich, substantive one, as the characterization of the

whale-harvest-on-the-kuskokwim-stirs-up-controversy.

² Carol B. Koppelman, *Anderson v. Evans: The Ninth Circuit Harmonizes Treaty Rights and the Marine Mammal Protection Act*, 16 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 353, 354 (2010).

³ Robert J. Miller, *Exercising Cultural Self-Determination: The Makah Indian Tribes Goes Whaling*, 25 AM. INDIAN L. REV. 165, 242-46 (2001) (describing these tensions in Section III.2: “Hunting Cultures or Animal Preservation Groups - Who Gets to Decide?”).

relevant whale population can turn this from a carrying capacity problem to an aesthetic problem. If the relevant focus is the entire population of California gray whales, then surely a limited Makah kill will not affect the whale's survival as a species. But if the relevant focus is the number of California grays that visit the Strait of Juan de Fuca, then even a limited kill might affect the likelihood a paying consumer on a whale watching vessel spots a cetacean.

The modern history of Makah whaling began in 1995 when the tribe turned to the U.S. government to petition the IWC to obtain an aboriginal subsistence quota.⁴ In *Metcalf v. Daley*, the court agreed with conservation groups that the NOAA failed to take a "hard look" at the environmental impact of whaling in the area.⁵ In 2004, the court in *Anderson v. Evans* further required that the NOAA must submit an environmental impact statement in compliance with the Marine Mammal Protection Act ("MMPA").⁶ Worse for the Makah, the *Anderson* court appended the "Fryberg Test," which subjects Indian treaties to conservation statutes. Included in the court's analysis was the difficult question of how the IWC's subsistence test could be applied to a community that had deliberately *not* whaled since 1915.⁷ There is an obvious paradox in arguing that a certain hunt is necessary when you have foregone it for decades.

However, one way to square this tension is by re-framing the whale hunt as necessary to the *symbolic structures* of the Makah community, if not its literal economic/caloric survival. In *Law as Culture*, the Princeton academic Lawrence Rosen criticizes the "functionalist theory" testimony of anthropologist John Hostetler in *Wisconsin v. Yoder* (1972) as per whether the Amish could "survive" if Amish adolescents were required to attend public high school. In that case, the Supreme Court's majority opinion tracked the "un-contradicted" and "unchallenged" testimony of Hostetler, and his theorizing that the Amish community would simply cease to exist if Amish youth were exposed to the value systems of the American high school. In dissent, Justice Douglas cited to Hostetler's own statistics of communities who did lose more than half their members, yet obviously survived. Lawrence Rosen expands on this point by noting that if the

⁴ See *Metcalf v. Daley*, 214 F.3d 1135, 1139 (9th Cir. 2000).

⁵ *Id.*

⁶ *Anderson v. Evans*, 371 F.3d 475, 494-95 (9th Cir. 2004).

⁷ Emily Brand, *The Struggle to Exercise a Treaty Right: An Analysis of the Makah Tribe's Path to Whale*, 32-SPG ENVIRONS ENVTL. L. & POL'Y J. 287, 297-303 (2009); see also Russell C. D'Costa, *Reparations as a Basis for the Makah's Right to Whale*, 12 ANIMAL L. 71, 79 (2005).

anthropological frame was not a “highly questionable functionalist theory” but instead “a theory based on culture as a set of contested symbols” that the expert testimony would have looked quite different.⁸ Rosen’s “thick” view of law as culture echoes the work of Clifford Geertz, who wrote perhaps the most important narrative paper on animals and ritual of the twentieth century, on the metaphysical violence of the Balinese cockfight in “Deep Play” (1973).⁹

The symbolic importance of whaling to the Makah is manifested in its community members’ attempts to whale *despite* its illegality. In 2007, “out of frustration over the lengthy [litigation] process and virtual abrogation of the Tribe’s treaty right, five members of the Makah nation whaled in protest.”¹⁰ The modest coterie headed to sea with whaling equipment, firearms and two small boats. They did succeed in shooting a whale at least sixteen times,¹¹ but the Coast Guard interrupted their hunt before they were able to complete the kill. The whale died shortly after and sank to the bottom of the Strait of Juan de Fuca.

These five men in *U.S. v. Gonzales* were charged with conspiracy to take a whale in violation of the MMPA.¹² This trial put the tribal council in the awkward position of having to empathize with the legitimate grievances of their community members while not jeopardizing the ongoing administrative process.¹³ The council issued a formal statement denouncing this illegal action and distinguishing it from law-abiding whaling. Also present here were elder concerns that the five hunters did not go through the ritual discipline and preparation of the traditional hunt.¹⁴

Still, this cultural element seems to cut both ways in this example. The group was expected to take a plea bargain to have the charge reduced to misdemeanor violation of the MMPA and two years probation, but turned down the offer “because the government had the option of preventing them from whaling while they were on probation.”¹⁵ Defendant Wayne Johnson described this qualification as

⁸ LAWRENCE ROSEN, *LAW AS CULTURE: AN INVITATION* 120-21 (2006).

⁹ See generally CLIFFORD GEERTZ, *Deep Play: Notes on the Balinese Cockfight*, in *THE INTERPRETATION OF CULTURES* 412, 412-53 (1973).

¹⁰ Brand, *supra* note 7, at 306.

¹¹ Koppelman, *supra* note 2, at 382.

¹² *United States v. Frankie Gonzales*, No.3:07-CR-05656 (W.D. Wash. 2008).

¹³ Brand, *supra* note 7, at 306.

¹⁴ *Id.*

¹⁵ Mike Carter & Lynda V. Mapes, *Federal Plea Deal with Makah Whalers Falls Apart*, SEATTLE TIMES (Mar. 25, 2008, 11:02 PM), <https://www.seattletimes.com/>

“a deal-killer.”¹⁶ This same stubborn persistence is an index of whaling’s elemental value to the Makah community, even if not all members have fully internalized the ritual aspects of the hunt.

My descriptive claim here that whales are not a “meat animal” thus requires some implication. The Ninth Circuit and the NOAA have each agreed that the Makah have a right to eat whale meat. But it has also been decades since this litigation began, and the Makah can still *not* lawfully take a whale for the community’s private consumption. Gray whales are simply illegal to possess. The deliberate pace of courts on this issue reflects its situatedness within layered legal milieu. The United States is a member of the IWC and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“the CITES”), which restricts all cetaceans (whales, dolphins, porpoises) from international trade).¹⁷ The MMPA of course also applies here.¹⁸ There is thus a maze of litigation moves to make and withstand for the Makah.

However, we can also fairly posit that the minority position of the Makah and the conventional intuition of whale as “not meat” play a casual role in this two-decade delay.¹⁹ In part this “non-meat” intuition comes from the relative recent status of California gray whales as endangered. Per the preamble to the MMPA, its October 1972 enactment was in response to concerns “that certain species and populations of marine mammals were in danger of extinction or depletion as a result of human activities.”²⁰ I understand why there is hesitance or fear that re-opening the whale hunt for the Makah could be a slippery slope to commercial whaling.²¹ But consider the counterfactual of a hypothetical pandemic disease that nearly wipes out our

nation-world/plea-deal-with-5-makah-whalers-falls-apart/.

¹⁶ *Id.*

¹⁷ See generally *CITES Species*, CONVENTION ON INT’L TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA, <https://cites.org/eng/disc/species.php> (last visited Apr. 26, 2018).

¹⁸ See generally *Marine Mammal Protection Act*, MARINE MAMMAL COMMISSION, <https://www.mmc.gov/about-the-commission/our-mission/marine-mammal-protection-act/> (last visited Apr. 26, 2018).

¹⁹ Cf. *The Effects of the President’s Regulatory Reform and Rollback Efforts on Small Businesses*: Hearing on H.R. 2360 Before H. Comm. on Small Business, 115th Cong. (2018) (testimony of Lisa Heinzerling), http://progressivereform.org/articles/Heinzerling_Testimony_House_SmBiz_030718.pdf (implying problematic delay techniques of Trump administrative).

²⁰ MARINE MAMMAL COMMISSION, *supra* note 18.

²¹ Miller, *supra* note 3, at 168.

domestic pig species.²² It seems highly unlikely that if a conventional meat animal like the pig was temporarily endangered, and then returned to carrying stock levels, that we would bother to wait another twenty-plus years to make them lawful to possess and eat. Another relevant data point here is the plight of the Bluefin Tuna, which is thought to be at only three percent of its carrying stock²³ and is already determined by non-governmental organizations like the World Wildlife Fund to be endangered. But yet the Trump administration — like each previous U.S. presidency — refuses to list Bluefin as an endangered species under the Endangered Species Act (“ESA”).²⁴ This reflects the Veblen good status of Bluefin Tuna (or “o-toro” on sushi menus) as a prized food, associated with the most chic, gourmet and exclusive restaurants of Tokyo, San Francisco and New York City. Simply referring to “culture” as the independent variable here that distinguishes a hypothetical pig pandemic or current Bluefin Tuna threat from whale meat doesn’t do much explanatory work. Still, I think that it is our own (hegemonic/group) biases and preferences that help maintain this standard of whale versus tuna.

The saga of the Makah and the gray whale is illustrative of the tensions and paradoxes embedded in our food law. American courts employ a functional approach to defining food.²⁵ But implicit to “common sense” notions of food are assumptions of what kinds of animals may be eaten. To the extent that American courts represent hegemonic views of “what white people eat,” traditional meats of marginalized (or perhaps simply forgotten) communities are made subaltern within the law. For example, in *People v. Voelker* (1997), defendant was convicted under the New York state animal cruelty statute for cutting off the heads of three live iguanas while preparing them as food. Obviously this is a very raw and inhumane way to slaughter an animal, but we might also ask if there would be a criminal trial at all if someone disposed of a fish or poultry in similar fashion. In that case the court was informed by “the moral standards

²² Cf. Emily Porter, *Swine Flu Doesn't Just Pass from Pigs to People – It Goes Both Ways*, CONVERSATION (Sept. 7, 2016, 8:31 AM), <http://theconversation.com/swine-flu-doesnt-just-pass-from-pigs-to-people-it-goes-both-ways-63958>.

²³ Alastair Bland, *Should Pacific Bluefin Tuna Be Listed as an Endangered Species?*, NPR (June 29, 2016, 11:42 AM), <https://www.npr.org/sections/thesalt/2016/06/29/483835875/should-pacific-bluefin-tuna-be-listed-as-an-endangered-species>.

²⁴ Paul Rogers, *Tuna Won't Be Listed as Endangered, Trump Administration Says*, MERCURY NEWS (Aug. 7, 2017, 4:56 AM), <https://www.mercurynews.com/2017/08/07/trump-administration-refuses-to-list-pacific-bluefin-tuna-as-endangered-disappointing-environmentalists>.

²⁵ See, e.g., *Nutrilab, Inc. v. Schweiker*, 713 F.2d 335 (7th Cir. 1983).

of the community.”²⁶ This reference begs the question of *which* community. An intuition that iguana (a not uncommon meat in Central America) is not an American food animal likely influenced the posture of this case.²⁷

Whales are of course a more challenging ethical problem than iguanas or tuna. Whales are a particularly evolved form of marine mammal life. Whales have large limbic systems, which are thought to be the part of the brain that informs our capacity for forming emotions and managing memories. Whales also possess “spindle neurons” associated with the ability to “recognize, remember, reason, communicate, perceive, adapt to change, problem solve and understand,” or capacities typified as “uniquely” human.²⁸ Indeed, cetaceans (whales, dolphins, porpoises) are now understood to use advanced form of communication. But — in part because of their enormous size and expansive, marine habitat — whales are not very amenable to human study. Their size and range make the practice of cognitive ethology difficult. Still, there is evidence that the songs of humpback whales are transmitted *culturally*.²⁹ Whales have a way of life, just like us.

Marine mammals are also very alien to us: they swim, live mostly underwater and have bodies and likely forms of intelligence much different from our own. That they happen to be mammals perhaps makes them *more* foreign — how can a similar animal seems so profoundly different? This same intellectual posture informed philosopher Thomas Nagel’s important 1974 essay, “What is it like to be a bat?”³⁰ The experience of being such a qualitatively different, yet advanced, form of animal life seems beyond the ken of the human mind. Does this same alien quality make it okay for us to eat them?

Eminent jurist Richard Posner holds that we treat animals nicely if we find them adorable.³¹ Kant and Bentham don’t inform our food

²⁶ *People v. Voelker*, 658 N.Y.S.2d 180, 183 (N.Y. Crim. Ct. 1997).

²⁷ Andrew J. Kerr, *Pedagogy in Translation: Teaching Animal Law in China*, 1 *ASIAN J. LEGAL EDUC.* 33, 38 (2014).

²⁸ Madison Montgomery, *Still Think Humans Are the Most Intelligent Animals? Here’s Why Whales and Dolphins Have Us Beat*, ONE GREEN PLANET (July 8, 2017), <http://www.onegreenplanet.org/animalsandnature/human-intelligence-versus-whales-and-dolphins/>.

²⁹ Ellen C. Garland et al., *Dynamic Horizontal Cultural Transmission of Humpback Whale Song at the Ocean Basin Scale*, 21 *CURRENT BIOLOGY*, 687 (2011), available at [https://www.cell.com/current-biology/fulltext/S0960-9822\(11\)00291-0](https://www.cell.com/current-biology/fulltext/S0960-9822(11)00291-0).

³⁰ Thomas Nagel, *What Is It Like to Be a Bat?*, 83 *PHIL. REV.* 435, 438 (1974).

³¹ Richard Posner, *Animal Rights: Legal, Philosophical, and Pragmatic Perspectives*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 51, 62-63 (Cass R. Sunstein

choices — our hard-wired human biases do. This does help explain why Americans do not eat the gregarious, intelligent dog, but do eat the similarly evolved pig. Still, this test of cuteness is decidedly subjective. I agree with the literature on “food as culture” from the kin field of anthropology.³² Shared traditions and mores inform how we think about animals, and notions of meat animals become naturalized over time, despite hierarchies in sentience or intelligence among the animals we choose to eat or not. It is difficult to draw an ethically coherent line to separate whales from other evolved food (“meat”) mammals, or other intelligent food animals like octopi or bees.

However, I point out here the limits of Posner’s adorability thesis. The Yulin Dog Meat Festival in Guangxi Province, China is one very public example of dog eating (though it is also a marginal and very contested event within China). It might be surprising to learn that dog meat consumption is also potentially lawful in forty-three U.S. states.³³ The same is true of other common companion animals like the horse (a food animal in neighboring Quebec).³⁴ However, although neither dog nor horse meat is illegal under federal law, it is effectively removed from the market because American slaughterhouses may not butcher either animal. Indeed, the ban on horse slaughterhouses received a last-minute extension in March 2018.³⁵ This means that dog or horsemeat cannot be commodified or sold as a meat within the United States; however, it could theoretically be “gifted” locally. It exists outside of the market. Or in the lexicon of property theorist Margaret Radin, it is *not alienable*.³⁶

Professor Radin’s scholarship on the association of personhood to property, and how we think of bodily goods (sex work, surrogacy) as

& Martha C. Nussbaum eds., 2004).

³² See, e.g., Marie C. Boyd, *Cricket Soup: A Critical Examination of the Regulation of Insects as Food*, 36 *YALE L. & POL’Y REV.* 17, 75-80 (2017) (exploring the notion of “food law as culture”).

³³ Mike Clark, *It’s Still Legal to Eat Dogs in the United States — And Yes, It Happens*, DOGTIME, <http://dogtime.com/advocacy/49933-still-legal-eat-dogs-united-states-yes-happens> (last visited Apr. 26, 2018).

³⁴ David George-Cash, *Who Knew? Canada is No. 3 in Global Horse-Meat Export Trade*, WALL ST. J.: CANADA REAL TIME BLOG (Feb. 27, 2013, 6:01 PM), <https://blogs.wsj.com/canadarealtime/2013/02/27/who-knew-canada-is-no-3-in-global-horse-meat-export-trade/>.

³⁵ Erin Kelly, *Ban on Slaughtering Horses for Meat Gets Last-Minute Renewal in Spending Law Trump Signed*, USA TODAY (Mar. 26, 2018, 4:12 PM), <https://www.usatoday.com/story/news/politics/2018/03/26/ban-slaughtering-horses-meat-gets-last-minute-renewal-spending-law-trump-signed/459076002/>.

³⁶ See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089 (1972).

alienable, is a useful heuristic for mapping out meat and non-meat animals in American law. Radin argues that certain items should remain outside of the market (e.g., babies, adoption) because of deontological notions of “the good” or self-actualization.³⁷ Similar, dogs and horses are formative to many Americans’ notions of self, and helped forge our (contested) identity as a settler nation. Dogs and horses are our *friends*, and inherent to notions of friendship is special treatment. I contend here that their placement in this diverse space of “non-commodity” is justified by the unique value of horses and dogs to American life, but that the same ambiguous terrain of this space allows the law to defer from forming a wholly coherent mapping of meat versus non-meat animals.

I make several novel points in this Article. First, I draw on the Makah whaling example to limn how the underlying logic of the First Amendment can inform discretionary choices made by lawmakers regarding secular ritual. For an arguably non-theistic group like the Makah, whaling has similar spiritual import to kosher or halal slaughter, or pursuing animal sacrifice à la the Santeria rituals of *Church of the Lukumi Babalu Aye*. I build on the recent theorizing of legal philosopher Brian Leiter, and make soft comparisons to possible secular rituals for other diasporas, such as eating foie gras for the French-American or shark fin for the Chinese-American.

I make the alternative argument that secular ritual is an index of property essential to personhood in the Radin schema, and that evidence of secular ritual can instruct if we privilege certain goods because they inform our sense of identity.³⁸ Radin points to more overt ways that the law already protects these items (such as the home), e.g., tenant rights against an impatient or predatory landlord. I suggest here that this notion of secular ritual already functions in our law in less obvious ways, e.g., the insulation of violence in sport, and special exceptions for “national pastimes” like baseball. Indeed, this Article is likely only concretizing shared intuitions that already guide legislatures when deciding which kinds of secular traditions should be insulated from legal regulation. The contribution of this Article is that it moors this rough political calculus to an articulable jurisprudence, and at the same time thinks about how species intelligence and sentience can be thoughtfully balanced with culture and ethical

³⁷ See generally Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) [hereinafter *Market-Inalienability*].

³⁸ See generally Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 982 n.87 (1982) (explaining value and utility consumers place on certain goods) [hereinafter *Property and Personhood*].

husbandry or hunting. My Article could be critiqued as a compromise position, but it is one that provides a reasoned basis for weighing the interests of animal rights-based activists, conservationists, animal welfarists, omnivores and ritual eaters.

Interestingly, this cultural mapping of meat versus non-meat animal has been reified by the potentially problematic California penal statute section 598b, which crystalizes certain animals as either companion or meat. I hope that my analysis in this Article exposes the “legitimation costs”³⁹ of distinguishing a select group of animals as non-meat and how this validates the brutality of industrial agriculture. The paired corollary of my argument is that we should be treating our food pigs and other evolved meat animals more kindly.

I write from an animal welfarist position, and so here I am a bit uncomfortable with my contention that the Makah whale hunt ritual deserves reconsideration. I offer a corrective hedge based on my theorizing on secular ritual and identity: if a community argues that eating a contested agricultural animal is formative to its collective identity, this same metaphysical approach to food and ritual should take the meat from outside the purely transactional domain of the market, and place it into a revised property model based in stewardship and care. Individual states also enjoy broad authority to use their police powers to draw valid, neutral laws to limit ritual killing of animals.⁴⁰ I expect that the material consequence of my decommodification thesis is that we will have fewer sorts of meat animals sold in the market and that far fewer individual animals will be consumed. It is also a pragmatic move that avoids the contentious debate over court creation of “rights” or legal personhood for non-human animals.

Conventional deontological and utilitarian arguments for animal rights break down when applied to these sorts of ethereal cases involving human tradition.⁴¹ I instead argue that a conception of

³⁹ Cf. Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1405-12 (2009) (discussing the “legitimation costs” of the creation of a constitutional right to abortion).

⁴⁰ Cf. *Oregon v. Smith*, 494 U.S. 872, 880-81 (1990) (saying a state may ban the use of peyote, even in religious contexts, as part of a neutral, generally applicable law); *Jones v. City of Opelika*, 316 U.S. 584, 609 (1942) (stating that municipalities may levee flat, neutral licensing fees for pamphlet distribution).

⁴¹ See, e.g., Luis E. Chiesa, *Animal Rights Unraveled: Why Abolitionism Collapses into Welfarism and What it Means for Animal Ethics*, 28 GEO. ENVTL. L. REV. 557 (2016) (making the argument that those who oppose animal welfare reforms that substantially reduce animal suffering *solely* because they continue to treat animals as commodities are ultimately doing more harm than good to the welfare of animals such

welfarism informed by notions of ritual eating can reduce aggregate meat consumption while maintaining important — if ineffable — aspects of the human experience. Soylent creator Robert Rhinehart seems right when he argues that most of our meals are forgettable,⁴² and for those an open-sourced genetically engineered amino-complete protein drink (or clean meat, or plant-based meat) should work just as well as foods found in nature. But perhaps for the special meal there should still be protections to lawfully eat certain traditional — even if contested — American meats.

I. FOOD AS RITUAL

Food is a particularly useful vehicle to think through notions of ritual in society. Casual viewers of *Downton Abbey* might guess that Anglo-American rules of etiquette developed in pair with the rigorous procedures of the manorial dining hall. Readers of mythology remember the story of Prometheus and fire, and how the very fact of cooking the flesh we eat is what first separated humans from other animal life. Michael Pollan's Netflix series *Cooked* emphasizes the evolutionary aspects of our current food practices. There is a primordial aspect of food that we carry with us today, and perhaps all human cultures possess traditions of both feasting and abstinence, and eating certain prized foods to celebrate important rites. Tasting food and consuming its nutrients is a paradigmatically individual process, but the social fact of preparation, dining, sharing food, conversing about food etc. makes food a uniquely shared experience. The communal performance of food preparation and eating makes it a ritual exercise.

The notion of “secular ritual” has a contested provenance. In the edited anthology *Secular Ritual* (1977), lawyer-anthropologist Sally Falk Moore brings together academic commentators to debate the usefulness and applicability of this heuristic to describe non-religious experience.⁴³ In the chapter, “Against ‘Ritual’: Loosely Structured

individuals purport to advocate).

⁴² Dan Stone, *The End of Food?*, NAT'L GEOGRAPHIC: ONWARD (May 20, 2014), <https://www.nationalgeographic.com/people-and-culture/onward/2014/05/20/the-end-of-food/> (“For all the initial discomfort about drinking your dinner, there’s veracity to founder Rob Rhinehart’s claim that as much as we all enjoy food, not every meal is unique or even memorable. A product like Soylent isn’t coming after fun dinners and potlucks with friends, it’s trying to replace forgettable meals like frozen, unhealthy food eaten for convenience, often alone.”).

⁴³ SALLY F. MOORE, *SECULAR RITUAL* (Sally F. Moore & Barbara G. Myerhoff eds., 1977).

Thoughts on a Loosely Defined Topic,” Jack Goody derides the concept of “secular ritual” as both an example of hyper-categorization and lack of categorization, and being over-inclusive as to what is ritual. I agree that the modifier “religious” in “religious ritual” does important work in delimiting this category.⁴⁴ To refer back to Robert Rhinehart and his Soylent, there might be just as much repetitive procedure in opening and downing a bottle of *Soylent Cacao* as there is in roasting a Thanksgiving turkey, though even Rhinehart would agree that removing the bottle cap from the *Cacao* hardly makes for an actualizing experience.

II. RE-CONCEPTUALIZING SECULAR RITUAL

Still, I posit that there might still be some forms of secular ritual that merit special tolerance, especially for individuals or communities that do not have other opportunities to practice theistic or institutional forms of spiritual practice. In his pithy *Why Tolerate Religion?*, legal philosopher Brian Leiter asks if there are principled reasons to tolerate (or put up with something that we don’t like) religious practices but not analogous secular practices. For example, at page 96, Leiter asks “why not give the vegan prisoner, with bona fide involvements in the animal liberation ‘movement,’ legal standing to claim exemption from dietary and/or prison work regimens that would violate her conscientious objection to the exploitation of nonhuman animals?”⁴⁵ The core of our anti-discrimination norm is that we treat like cases in like ways. The strength of obligation of the secular vegan seems comparable to a prisoner who wants to keep kosher (though in fifteen states the prison systems don’t provide a full kosher diet⁴⁶) or has other religious dietary obligations. Leiter seems right to question what makes the distinguishing traits of religion (categoricity of its commands, insulation from evidence, existential consolation) so important or useful that the law should uniquely insulate religious practices from scrutiny.⁴⁷

The question for the Supreme Court in *Church of the Lukumi Babalu Aye* was whether the local Hialeah, Florida statute criminalizing

⁴⁴ Jack Goody, *Against “Ritual”: Loosely Structured Thoughts on a Loosely Defined Topic*, in *SECULAR RITUAL* 25-35 (Sally F. Moore & Barbara G. Myerhoff eds., 1977).

⁴⁵ BRIAN LEITER, *WHY TOLERATE RELIGION?* 96-97 (2012).

⁴⁶ Lizette Alvarez, *You Don’t Have to Be Jewish to Love a Kosher Prison Meal*, N.Y. TIMES (Jan. 20, 2014), <https://www.nytimes.com/2014/01/21/us/you-dont-have-to-be-jewish-to-love-a-kosher-prison-meal.html>.

⁴⁷ LEITER, *supra* note 45, at 52.

animal sacrifice unfairly targeted Santeria religious practice.⁴⁸ Santeria is a syncretic religion of Roman Catholicism and West African Yoruba. Orishas, a sort of life force or spiritual manifestation of the supreme Yoruba divinity, are thought to subsist off the blood of the relevant animal sacrifice.⁴⁹ The relative obscurity of this practice certainly motivated the Hialeah city council's choice to target it.⁵⁰ But Santeria still seems to possess a binomial worldview of the secular and sacred, where we can separate religious rituals from the quotidian events of daily life. The thought experiment that first inspired this Article is this wrinkle to the *Church of the Lukumi Babalu Aye* fact pattern: what if the relevant group was not Santeria practitioners, but a group of Cuban émigrés who killed these animals in similar ways for non-religious reasons?

Black-letter constitutional law provides no support for the secular group that feels obligated to do something not permitted by the law. Indeed, the fact Christmas has become secularized with popular images of Santa Claus and Black Friday shopping sprees is the very reason that public observance of Christmas does *not* violate the Establishment Clause. Even more curious here is that some states justify closing public schools on Good Friday because of its secularity.⁵¹ Brian Leiter writes without hesitation that the rural youth who comes from a family tradition of wearing a knife “is out of luck” if he wants to bring it to school, whereas judges might allow the Sikh youth to wear a *kirpan* (dagger) on campus.⁵²

In part the reason for this secular/religion distinction is pragmatic. First, as noted by scholars like Jack Goody, it is difficult to place limits on the boundaries of secular ritual.⁵³ Second, there is the evidentiary problem of discerning the sincerity of belief of the secular conscience

⁴⁸ *Church of the Lukumi Babalu Aye Inc. v. Hialeah*, 508 U.S. 520, 524 (1993).

⁴⁹ *Id.* at 524.

⁵⁰ *Id.* at 534.

⁵¹ See *Supreme Court Rejects Challenge to Good Friday Holiday*, ASSOCIATED PRESS (Mar. 7, 2000), http://www.nwitimes.com/uncategorized/supreme-court-rejects-challenge-to-good-friday-holiday/article_43c181a7-d5b8-5b3d-8524-1bced6a9ee5d.html (discussing Indiana's designation of Good Friday as a state holiday justified by its secularity). But see *Metzl v. Leininger*, 57 F.3d 618, 618 (7th Cir. 1995) (finding public school closure on Good Friday violates the establishment clause).

⁵² LEITER, *supra* note 45, at 4; see also *Ban on Sikh Kirpan Overturned by Supreme Court*, CBC (Mar. 2, 2006), <http://www.cbc.ca/news/canada/ban-on-sikh-kirpan-overturned-by-supreme-court-1.618238> (discussing Supreme Court of Canada decision finding that a Quebec school board erred in prohibiting Sikh boy from wearing ceremonial dagger in the classroom).

⁵³ Goody, *supra* note 44.

(Leiter). For the Sikh student we need to only ask the conditional question of whether an individual is or is not Sikh. If yes, then we can end our judicial inquiry, as we can make the working assumption that a religious person agrees with most all tenants of their faith. However, for the secular student, we have to make the additional inquiry of whether the knife-wearing obligation is sincere or instead pretextual or contrived. This gets to the epistemological problem of mind-reading, something beyond judicial ken. Perhaps a similar logic motivates why courts protect religious belief, but not necessarily religious action.⁵⁴ Despite our increasingly Big Brother society, we could not police thoughts even if we wanted to.

This detour exposes some of the important practical considerations about opening up secular ritual to legal protection. But I am not wholly convinced that the black-letter secular/religious distinction is consistent with the underlying principles of constitutional law. The First Amendment is now understood to put theism and atheism on an equal plane, and protect the rights of non-believers. For example, in footnote 11 of *Torcaso v. Watkins*, Justice Black suggests that “ethical culture” and “secular humanism” are cognizable as religions.⁵⁵ In *U.S. v. Seeger*, Justice Clark protected “a given belief that is sincere and meaningful [if it] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the [conscientious objector] exemption.”⁵⁶ These data points point to a reframed and expanded notion of how we might think about belief, obligation and praxis in a modern society. A 2014 Pew Research Survey confirmed that twenty-three percent of Americans self-identify as being atheist, agnostic or having no particular religion.⁵⁷

There is of course an important distinction between the freedom of belief and the freedom to *act* on that belief.⁵⁸ This secular humanism thread in Supreme Court precedent goes to the negative freedom from being compelled to do something. In this Article I am considering the

⁵⁴ See Ignatius Michael Ingles, Note, *Regulating Religious Robots: Free Exercise and RFRA in the Time of Superintelligent Artificial Intelligence*, 105 GEO. L.J. 507, 513 (2017) (“The freedom of belief is absolute, but the freedom to act on such belief can be limited within the bounds of jurisprudential and statutory tests.”).

⁵⁵ *Torcaso v. Watkins*, 367 U.S. 488, 496 n.11 (1961) (“Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.”).

⁵⁶ *U.S. v. Seeger*, 380 U.S. 163, 166 (1965).

⁵⁷ *Religious Landscape Study*, PEW RES. CTR.: RELIGION & PUB. LIFE, <http://www.pewforum.org/religious-landscape-study> (last visited Apr. 27, 2018).

⁵⁸ Ingles, *supra* note 54, at 513.

converse problem — of whether secular ritual justifies the Makah whale hunt. I make two arguments for why we should consider expanding this positive freedom of secular ritual: (1) some individuals have less opportunity to “opt out” of religion, and (2) some secular rituals are sufficiently communitarian, traditional and regimented that we don’t need to worry about the Jack Goody vagueness problem or the Brian Leiter evidentiary problem.

The Cuba émigrés thought experiment is an insightful one because of the common secular nature of Communist society. I qualify again this exercise as a construct for theorizing, and acknowledge the variety and nuance of communist cultures, and also retreat from making any normative or descriptive claims about animal sacrifice. But perhaps one working assumption we can make is that individuals from certain countries do not have the same ability to “opt out” of an Abrahamic or comparable religious tradition with a religious/secular binary worldview. Cuba is an atheist state. France is the archetypal secularized European state (*Laïcité*). China formally recognizes five religions, but most of its people are irreligious. This might place the Makah in a different ethical posture from the White American who made the deliberate decision to quit attending Mass or Synagogue. Many American teenagers choose to not attend church even if they would get to lawfully drink wine underage. Do the Makah youth have the same decision-making calculus? Should this matter?

The Makah whaling tradition also possesses the kind of lineage and rigor that compares it to an organized religion. In *Oregon v. Smith*, Justice Scalia’s opinion seemed motivated by the concern of creating a legal regime “in which each conscience is a law unto itself,” or where each individual can express an independent morality that allows her to avoid state punishment or regulation.⁵⁹ But the community tradition of the Makah whale hunt and the necessarily group effort involved in taking a behemoth animal like a whale make this a social ritual.

III. MAKAH WHALING AS SYMBOLIC STRUCTURE

The real debate here is where the Makah whaling tradition fits on a spectrum of secularity to religion. James G. Swan (1818–1900) worked on behalf of the Smithsonian as an Indian artifact collector and wrote the first ethnography of the Makah people.⁶⁰ Today his

⁵⁹ *Oregon v. Smith*, 494 U.S. 872, 890 (1990).

⁶⁰ James G. Swan, *The Indians of Cape Flattery*, 16 SMITHSONIAN CONTRIBUTIONS TO KNOWLEDGE 220 (1870), available at <https://www.biodiversitylibrary.org/bibliography/19016#/summary>.

apparent finding that there was not “an official tribal religion or an outward form of religion” has been challenged as ethnocentric.⁶¹ But it still seems accurate that Makah express spirituality and find existential solace (Leiter) in ways fundamentally different than binary secular/religious communities. Instead whaling is embedded into Makah culture and functions as a kind of totem that connects most all aspects of traditional Makah life.

Perhaps this interconnectedness reflects the language in relevant international covenants like the UN Declaration of the Rights of Indigenous Peoples. Its preambulatory language recognizes the need to protect the inherent rights of indigenous peoples that derive “from their cultures, spiritual traditions, histories and philosophies.”⁶² The conjunctive use of “and” to combine these seemingly disparate concepts into a unified constellation admits the integrated worldviews of indigenous communities. It is of course impossible to generalize across communities, and I myself am not an expert on or personally familiar with Makah life, but this general integration of culture, economy and spirituality seems to capture the practice of whaling to the Makah. I synthesize below previous literature on whales and whaling in the Makah community:

The whale is integral to the symbolic structures of the Makah (Rosen). Constellations are named after whales.⁶³ Many months and moons are named after whale events, “including the arrival of the gray whale in their waters.”⁶⁴ Songs and legends are devoted to whales and whaling.⁶⁵ Traditionally the whale hunt was a way that children learned important hunting and teamwork skills.⁶⁶ Being a successful whaler “was the highest social status and prestige a Makah could attain.”⁶⁷ Whaling was “primarily a chiefly prerogative and prestige was gained by distributing great quantities of whale meat and oil.”⁶⁸ The Makah feasted on whale meat at important ceremonies, holidays and celebrations.⁶⁹ They “used whale oil like butter or gravy and

⁶¹ Miller, *supra* note 3, at 174.

⁶² UNITED NATIONS DECLARATION OF THE RIGHTS OF INDIGENOUS PEOPLES – ANNEX 2 http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (last visited Apr. 27, 2018).

⁶³ D’Costa, *supra* note 7, at 78.

⁶⁴ Miller, *supra* note 3, at 181.

⁶⁵ D’Costa, *supra* note 7, at 78.

⁶⁶ *Id.* at 78-79.

⁶⁷ Miller, *supra* note 3, at 175.

⁶⁸ *Id.* at 180-81.

⁶⁹ *Id.* at 181.

poured copious amounts of it on all their food.”⁷⁰ Makah art and architecture made use of decorative whalebones.⁷¹

Before setting off a whaling trip, “members of the tribe would undergo intense ritual preparation, including abstaining from contact with family members and sexual abstinence.”⁷² Upon harpooning the whale, the Makah “would pray to the whale and sing to it, begging its spirit to turn toward the shore.”⁷³ Upon return to the village the felled whale was treated as a distinguished guest.⁷⁴

This description of whales and whaling seems to subvert common Western perceptions of the human-animal relationship. There is an obvious respect for the whale, but this respect is also manifested in how the Makah *kill* the whale. In addition, this hunt is not a vehicle or conduit for some other metaphysical purpose (i.e., to nourish an Orisha), but is parcel to the sensual experience of eating the whale’s flesh. It is not a representational act, but it is still one that connects the integrated worldview of the Makah. So should we argue this a religious or a secular ritual?

IV. LITIGATING TRADITION

For the purposes of this Article I assume that this hunt is conceptualized as a secular act, and now compare it to other arguable secular rituals. In his 2017 article, “Food, Animals, and the Constitution: California Bans on Pork, Foie Gras, Shark Fins, and Eggs,” Professor Ernesto Hernández-López explores the relationship of culture to foods and food production processes that have been proscribed in California.⁷⁵ I analyze the foie gras sales ban and shark fin possession ban specifically.

In 2012, the California ban on the sale of foie gras, or liver from force-fed ducks, went into effect.⁷⁶ Professor Hernández-López elegantly explains the relevant dormant commerce clause and federal preemption challenges, and makes the intriguing point that in *Association des Éleveurs de Canards et D’Oies du Québec v. Harris* (2013)

⁷⁰ *Id.*

⁷¹ *Id.* at 188.

⁷² D’Costa, *supra* note 7, at 78.

⁷³ Miller, *supra* note 3, at 186.

⁷⁴ *Id.* at 183.

⁷⁵ Ernesto Hernández-López, *Food, Animals, and the Constitution: California Bans on Pork, Foie Gras, Shark Fins, and Eggs*, 7 UC IRVINE L. REV. 347, 347, 372 (2017).

⁷⁶ Lawrence Hurley, *Supreme Court Leaves California Foie Gras Ban Intact*, REUTERS (Oct. 14, 2014, 7:12 AM), <https://www.reuters.com/article/us-usa-court-food/supreme-court-leaves-california-foie-gras-ban-intact-idUSKCN0131NH20141014>.

the Ninth Circuit's characterization of foie gras as a "niche" product helped California avoid a commerce clause conflict.⁷⁷ Other national courts have equated the gastronomic use of foie gras as a mere delicacy and unlike other foods we eat for nutrition or sustenance. In the Israeli Supreme Court *Foie Gras* case the court described foie as a "luxury" item as it concomitantly phased out the local production of foie gras.⁷⁸ However, I have asked previously whether there is "a corollary argument that only via these more sublime culinary experiences that we as humans can tap into the apotheosis of e.g. Maslow's peak experience?"⁷⁹ Food sociologist Michaela DeSoucey describes how eating foie actualizes the individual French person's sense of national identity.⁸⁰ Is sustenance the only purpose of eating food? Is it the highest purpose?

Still, an important rejoinder is that foie gras is capable of being produced without cruelty. Eduardo Sousa and Diego Labourdette have gained deserved attention for the "ethical foie gras" they produce at their Spanish farm, in which the geese "fatten themselves up naturally — doubling their body weight in just a few weeks to prepare for their annual migration."⁸¹ Sousa and Labourdette allow the geese to wander and forage so they sense their natural migration instincts. The geese are then slaughtered while their livers are enlarged. If the hypothetical French-American claims that foie consumption is a secular ritual, then this same metaphysical approach should take the meat from outside the purely transactional domain of the market, and place it into a revised property model based in stewardship and care. If the duck is truly valued as something beyond nutritive, then there should be a corollary ethic of reciprocity and respect for the duck. This echoes the "cosmic holism" of moral philosopher Gary Steiner.⁸²

⁷⁷ Hernández-López, *supra* note 75, at 370.

⁷⁸ See *Noah v. Att'y Gen.*, (2003) 9232/01 HCJ 270 (Isr.), translated in Israel Law Reports http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Noah%20v.%20Attorney%20General_0.pdf.

⁷⁹ Andrew Jensen Kerr & Yu Dan, *Tradition as Precedent: Articulating Animal Law Reform in China*, 11 J. ANIMAL & NAT. RESOURCE L. 71, 84 (2015).

⁸⁰ Michaela DeSoucey, *Gastronationalism: Food Traditions and Authenticity Politics in the European Union*, 75 AM. SOC. REV. 432, 433 (2010).

⁸¹ Lauren Frayer, *This Spanish Farm Makes Foie Gras Without Force-Feeding*, NPR (Aug. 1, 2016, 4:27 PM), <https://www.npr.org/sections/thesalt/2016/08/01/487088946/this-spanish-farm-makes-foie-gras-without-force-feeding>.

⁸² See, e.g., Gary Steiner, *Cosmic Holism and Obligations Toward Animals: A Challenge to Classical Liberalism*, 2 J. ANIMAL L. & ETHICS 1, 1 (2007).

In California, as in ten other U.S. states,⁸³ it is illegal to possess shark fin.⁸⁴ Most shark species are considered “vulnerable,” in large part because of how sharks are hunted for their fins. Because the fin is the most valuable part of the shark for fishermen, and fishing boats have space and weight limitations, fishermen often keep the fin and throw the rest of the shark carcass overboard.⁸⁵ This is a cruel death for the shark, a species that does “not reproduce frequently, mature[s] slowly, and ha[s] few pups when they do give birth.”⁸⁶

China’s long history of shark fin soup consumption “dates back to the Ming Dynasty (AD 1368–1644), when it was served in royal ceremonies as something expensive and exotic, since sharks were difficult to catch.”⁸⁷ It continues as a popular banquet food throughout China and Asia, and also among some Chinese-American concentrations in the United States. The celebratory nature of shark fin soup provides it an arguably secular ritual value akin to Makah whale consumption. However, an important distinction with foie gras and whale meat is that shark fin itself is often described as “tasteless”⁸⁸ (though I have heard it described as having a delightful texture). The traditional and historically rare nature of the soup provides the dish its Veblen status as a vehicle to toast to future success.

Again, we adumbrate the difficult question of: what is *food*? How can we distinguish between taste, nutrition and the other sorts of utility we gain from consuming animals? American courts have struggled with this question, particularly in the context of unpacking food from food additive in processed foods. In *United States v. Forty Barrels and Twenty Kegs of Coca-Cola* (1916), the Supreme Court was presented with the question of whether a Coke is adulterated by the addition of caffeine per 21 U.S.C. § 321 of the Food, Drug, and Cosmetics Act.⁸⁹ We certainly drink Coke for its taste, and hopefully not for its nutrition, but also surely in part *because* of its caffeine

⁸³ Max Bonem, *Everything You Need to Know About Eating Shark in the U.S.*, FOOD & WINE (July 27, 2017), <http://www.foodandwine.com/seafood/fish/everything-to-know-about-eating-shark-us>.

⁸⁴ Hernández-López, *supra* note 75, at 352 (citing CAL. FISH & GAME CODE § 2021(b) (2013)).

⁸⁵ *Id.* at 374.

⁸⁶ *Id.* at 374-75.

⁸⁷ *Id.* at 371-72.

⁸⁸ Matthew Kassel, *Here’s What Happens When You Order a \$65 Bowl of Shark Fin Soup*, BUS. INSIDER (Mar. 19, 2012), <http://www.businessinsider.com/new-york-could-ban-shark-fin-trade-2012-3>.

⁸⁹ *U.S. v. Forty Barrels & Twenty Kegs of Coca-Cola*, 241 U.S. 265, 270-72 (1916).

content. Since this 1916 case the Supreme Court has largely avoided this complex question of why we consume food or drink. But it manifests here in these contested — though cultural — food items like whale meat, foie gras and shark fin. How can we articulate a legal test that acknowledges the actualizing sense of tradition or ritual we get from eating certain animal products?

Another important distinction here is that for both foie gras and shark fin the California legislature seems to be targeting a *practice* (the cruelty of *gavage* force-feeding, or finning a shark) rather than a certain animal. Perhaps one could make the same argument that because of the enormous size of a whale it is simply impossible to kill one painlessly. Still, shark fin is distinguished from foie gras in that not only is shark fin not alienable but it is for many Californians *illegal to possess*.

V. ANIMALS AS PROPERTY

A background point that informs meat consumption in the United States is that, with the exception of wildlife still in nature, animals are property. There is a rich academic literature on the merits and problems of this property system for animals generally, but here I focus on the particular aspects of animals' status as property that implicate the legalities of their food status. First, animals — unlike all other forms of property — enjoy some level of sentience. Because of this, we have institutionalized a criminal law regime that forbids unnecessary cruelty to companion or wild animals.⁹⁰ The Animal Welfare Act promoted by the USDA regulates the transport and slaughter of many farm animals.⁹¹ The fundamental sentience of animal life distinguishes Professor David Favre's construct of "living property" to explain and argue for "a new status for animals within the legal system."⁹²

Because animals are a unique and especially actualizing form of human property, we can frame this discussion of meat, animals and tradition within the intellectual framework of property theorist Margaret Radin. In her masterful "Property and Personhood" (1982), Professor Radin argues for an intuitive view of property informed by a shared sense of how property is inherent to our construction of

⁹⁰ See, e.g., *People v. Voelker*, 658 N.Y.S.2d 180, 183 (N.Y. Crim. Ct. 1997).

⁹¹ See *Animal Welfare Act*, U.S. DEP'T OF AGRIC. — NAT'L AGRIC. LIBR., <https://www.nal.usda.gov/awic/animal-welfare-act> (last visited Apr. 30, 2018).

⁹² David Favre, *Living Property: A New Status for Animals Within the Legal System*, 93 MARQ. L. REV. 1021, 1021 (2010).

human identity.⁹³ Radin builds on the non-commodity examples of our blood (when inside of us) or organs, to then argue that we feel similarly possessive about the property of our skin or “shirt off [our] back.”⁹⁴ She offers a nuanced, welcome view of how we can avoid the problem of object fetishizing, while still being able to celebrate *things* that exist outside of our bodily person yet inform our identity. Radin explores the notion of the home, in particular, as an illustrative example of how the law might already implicitly recognize this relationship of property to personhood. We do not allow the predatory landlord to immediately seize someone’s apartment if they are a day late with the rent. Similarly, we have the federal Animal Welfare Act and state animal cruelty statutes that regulate how we interact with our animals. Living things surely inform our identities, *see, e.g.*, the millions of Americans who present themselves as “dog people” or “cat people” to the world.

In her 1987 article, “Market-Inalienability,” Professor Radin outlines some of the inconsistencies in the category of market-inalienable goods, and argues for a human flourishing lens to better explain why certain things should or should not be saleable.⁹⁵ Her central descriptive claim is “that market-inalienability is grounded in noncommodification of things important to personhood.”⁹⁶ Still, there is an important slippage here between her examples of babies or sex and my core examples of horses, dogs and whales. We always like babies; we usually like sex. But here I am not just writing about whales in living form, but as *meat*. The Radin articulation is not simply: because I like whales (and babies and sex), that (living) whales should be giftable, but not saleable. Instead the articulation is: because whale *meat* is core to my identity, I should be able to possess it or gift it, but not debase the purity of whale meat by selling it as a commodity in the marketplace.

I agree this important distinction makes animal meat not purely analogous to baby/child adoption or sex work. But I still think that the general heuristic of saleability/ giftability/illegality to possess is a useful one for mapping out how the law distinguishes meat from non-meat animals. Below is a schema of the lawfulness of meats of certain animals native to the United States and adjacent waters or already ubiquitous in American households:

⁹³ See *Property and Personhood*, *supra* note 38, at 957-59.

⁹⁴ *Id.* at 966.

⁹⁵ See *Market-Inalienability*, *supra* note 37.

⁹⁶ *Id.* at 1903.

	Alienable	Not alienable	Illegal to Possess
Threatened/ Recently Endangered	Shark		Shark fin (if not a licensed angler, or part of a scientific or charitable organization)* Gray Whale
Human Companion	Rabbit Guinea Pig	Horse	Guinea Pig* (?)

* = in California

I first comment on the idiosyncratic position of shark and shark fin. An interesting tension is that I can eat shark meat in California, but yet I cannot share its removed fin.⁹⁷ Shark meat can in theory be served by licensed restaurants, and it is certainly legal to fish for many shark species, filet the meat and grill it for friends or family.⁹⁸ This strange posture (you can possess a shark as meat, and you can do what you want with it, so long as you don't chop off the fin and make a soup to share with another person) colored the litigation context of *Chinatown Neighborhood Ass'n v. Harris*⁹⁹ and the negative reaction that the shark fin legislation was “racist, targeting Chinese cuisine and culture.”¹⁰⁰ Why can some people go deep-sea fishing and eat a shark steak for the thrill and conquest, but others cannot eat a food with a millennium-long tradition of celebration and goodwill? The distinction is striking. But the distinction is justified in part because secular ritual lacks legal traction in American constitutional culture.

⁹⁷ CAL. FISH & GAME CODE § 2021(d) (permitting exception that “(a)ny person who holds a license or permit issued by the department to take or land sharks for recreational or commercial purposes may possess a shark fin or fins consistent with that license or permit”). *But see* CAL. FISH & GAME CODE § 2021.5(a)(1) (allowing this person to only “donate to a person licensed or permitted pursuant to Section 1002,” which is specific to scientific, educational or propagation purposes). Read together, this does not allow a shark angler to share and serve shark fin soup to guest eaters.

⁹⁸ *Current California Ocean Recreational Fishing Regulations*, CAL. DEP'T OF FISH AND WILDLIFE, <https://www.wildlife.ca.gov/fishing/ocean/regulations/fishing-map/southern#leopard> (last visited Feb. 8, 2018).

⁹⁹ *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136 (9th Cir. 2015).

¹⁰⁰ Hernández-López, *supra* note 75, at 372.

VI. RIGHTS TO RITES

Or does it? I argue in this Article that the law already does make carve-outs for core rituals and traditions to American identity. In *Federal Baseball Club of Baltimore* (1922), Justice Holmes contrived a not very convincing argument as to why the travel of baseball teams is only “incidental” to the business of a national baseball league, thus exempting the National League of Professional Baseball Clubs from the Sherman Antitrust Act.¹⁰¹ The Supreme Court affirmed the special status of baseball in *Toolson v. New York Yankees* in 1953.¹⁰² In Justice Burton’s dissenting opinion he speculated that the reason Congress chose to not regulate baseball was “the high place [it] enjoys in the hearts of our people.”¹⁰³ Baseball is special for many Americans; its ritual nature is underlined by our use of the word “pastime.” We also insulate the institutionalized violence of sports like American Football, boxing, mixed martial arts or ice hockey. Sports crimes are rarely investigated by police. For example, despite violent stickwork in ice hockey that has caused serious and permanent injury, “to this day, no player in the NHL or its minor league affiliates has been sent to jail for conduct in an athletic event that occurred on U.S. soil.”¹⁰⁴ Sporting events are formative secular rituals in modern America, and because of this we immunize and ignore malicious injuries and concussions, etc.

My secular ritual thesis echoes the theorizing of constitutional law scholar Philip Bobbitt. In *Constitutional Fate*, Bobbitt outlines his typology of constitutional reasoning in the Supreme Court.¹⁰⁵ Of particular note for this Article is the Bobbitt modality of “ethical reasoning,” in which the Court bases its holding not on text, precedent or constitutional structure, but instead on our American *ethos* of democratic government and national identity. For example, Bobbitt cites to the famous Dr. Kenneth and Mamie Clark “doll experiment” cited at footnote 11 of *Brown v. Board of Education* as “an appeal to the American ethos: not necessarily what we are, but perhaps what we think we are, and thus how we think about ourselves and our society; that is, what we would like to be, or in some cases what we know we are and what we are no longer willing to abide.”¹⁰⁶ There is

¹⁰¹ See *Fed. Baseball Club, Inc. v. Nat’l League of Profl Baseball Clubs*, 259 U.S. 200, 207-09 (1922).

¹⁰² *Toolson v. N.Y. Yankees*, 346 U.S. 356, 356 (1953).

¹⁰³ *Id.* at 364 (Burton, J., dissenting).

¹⁰⁴ *Sports Violence*, USLEGAL, <https://sportslaw.uslegal.com/sports-violence/> (last visited May 1, 2018).

¹⁰⁵ See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 3 (1982).

¹⁰⁶ Philip Bobbitt, *Methods of Constitutional Argument*, 23 U. BRIT. COLUM. L. REV.

an aspirational value to the law that reflects our self-perception as Americans, and the law *as written text* — in its ambition for generality and intelligibility — can also be too rigid and unaware of manifest truths that underlie the American experience. Others might argue that the 14th Amendment does not provide clear and consistent textual support for *Brown v. Board of Education*,¹⁰⁷ but the American soul requires us to banish the kind of odious segregation that existed in the time of *Plessy*, Jim Crow and the early Civil Rights Era.

VII. ETHOS AND ANIMAL FRIENDS

The history of dogs and cats as companion animals in the United States makes them unique from other evolved food animals. Dogs are working animals; domestic cats have been bred to provide us individual attention, care and comfort. They are “our best friend[s], and inherent to friendship are notions of special treatment.”¹⁰⁸ And so we should not eat them.¹⁰⁹ Indeed, U.S. Representative Alcee Hastings is currently sponsoring H.R. 1406, or the “Dog and Cat Meat Trade Prohibition Act of 2017,” which makes it a misdemeanor crime to slaughter any dog or cat, or to “sell” (alienate) or “donate” (gift) the carcasses of these animals.¹¹⁰ The bill’s added value is that personal slaughter and gifting dog and cat meat would be criminalized in the many states where it currently occupies a Radin liminal space as not alienable, yet legal to possess.¹¹¹

I agree criminalizing dog and cat meat possession is within the authority of the federal congress. As an animal welfarist and friend of dogs and cats, this certainly seems like a wonderful, well-intentioned idea. However, an abolitionist response to the animal property regime might point out a core tension here — how do we promote dog and cat ownership, yet at the same time surveil what individual owners do with their personal property (i.e., their pets)? Property regimes create private zones of autonomy that are difficult to police. A separate issue is the problem of consistency — at what point can we delimit animals

449, 455 (1989).

¹⁰⁷ *But see* Charles Black, *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 421 (1960) (arguing the neutral principle underlying *Brown* is awkwardly simple).

¹⁰⁸ Kerr & Dan, *supra* note 79, at 82.

¹⁰⁹ *Id.*

¹¹⁰ *See H.R.1406 — Dog and Cat Meat Trade Prohibition Act of 2017*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/1406> (last visited Apr. 30, 2018).

¹¹¹ *See Market-Inalienability*, *supra* note 37, at 1849-53.

as purely companions, and not as meat as well? Do different sorts of Americans have different sorts of animal friends? Or different sorts of animal friendships?

Guinea Pigs — Literally and Figuratively

Professor Hernández-López is more concerned with the litigation strategies and outcomes at the intersection of food production and culture, and so it makes sense that he excludes California Penal Code section 598b from his analysis. Section 598b has not been tested in court, and has a short paper trail. Indeed, I found it only because of my research on guinea pig consumption, or for the Andean-American — *cuy*. Perhaps the guinea pig will be the first test case as to the constitutionality of section 598b. I cite to *Modern Farmer*:

Some restaurants in Los Angeles, California, another pocket of heavy South American immigration, are serving *cuy* as well. Although California Law prevents any person from selling, buying, giving away, or accepting “any carcass of any animal *traditionally or commonly* kept as a pet or companion with the intent of using or having another person use any part of that carcass for food,” the law seems yet to be tested when it comes to guinea pig.¹¹²

So how would a California judge respond to the case of *cuy*? This statute is interesting for several reasons. First, a previous version of it (1989 Cal. Legis. Serv. 490), targeted only dogs and cats, rather than this broader — seemingly more inclusive language — of “pets.” Second, it includes the modifier “traditionally,” which feels intuitively suspect to a contemporary legal reader and intersects with my previous discussion of secular ritual. Third, this proscription quoted in *Modern Farmer* is negated by the broad disclaimer in section (c) of this statute: “This section shall not be construed to interfere with the production, marketing, or disposal of any livestock, poultry, fish, shellfish, or any other agricultural commodity produced in this state. Nor shall this section be construed to interfere with the lawful killing of wildlife, or the lawful killing of any other animal under the laws of this state pertaining to game animals.”¹¹³ This California legislation is problematic in two competing ways. Section (a) makes it a misdemeanor to “sell[],” “give[] away” (gift) or “possess[]” the carcass of a traditional pet, and thus perhaps subjects the Andean-

¹¹² Angela Drake, *Is America Ready for Farm-to-Table Guinea Pig?*, MOD. FARMER (Dec. 8, 2015) (emphasis added), <https://modernfarmer.com/2015/12/cuy/>.

¹¹³ CAL. PENAL CODE § 598b(c) (2018).

American to the criminal law simply for eating *cuy*.¹¹⁴ Section (c) reifies California agricultural animals as meat (including diverse animals such as emu,¹¹⁵ ostriches,¹¹⁶ rabbits,¹¹⁷ bison¹¹⁸) and thus excludes them from the compass of animal cruelty statutes. It is a catch-22. Once meat, you are always meat. If you have never been meat, you cannot become meat.

I am of course mostly happy about this exclusionary function of section 598b (preventing non-meat animals from becoming meat animals). I also argue we should keep as non-meat in the United States all ESA endangered species as well as non-native CITES-listed species *even into the future* if these non-native animals one day return to sustainable population levels, e.g., tropical birds, “bushmeats” including big cats and other megafauna, sundry reptiles and amphibians I’ve never heard of etc. Indeed, possession of these animal carcasses may be criminalized. These animals are not indigenous to the United States or adjacent waters. They are also often associated with the transmission of zoonotic diseases and other sorts of public health or animal welfare problems. The federal government should be more restrictive in limiting the import of these sorts of exotic species. After the traumatic October 2011 incident in which Terry Thompson “committed suicide by gunshot after cutting open the cages of fifty-six exotic animals on his farm in Zanesville, Ohio,” the Ohio legislature passed Ohio Rev. Code Ann. section 935.04 to increase individual responsibility for “dangerous wild animals.”¹¹⁹ Other states should follow this model.

Individual states also enjoy broad authority to use their police powers (*Jones v. City of Opelika*) to draw valid, neutral laws (*Oregon v. Smith*) to limit ritual killing of animals.¹²⁰ For example, in *Lawson v. Commonwealth*, the Kentucky Supreme Court upheld the snake-

¹¹⁴ See *id.* at (a).

¹¹⁵ See, e.g., Mollie Bloudoff-Indelicato, *What Ever Happened to Emu, the Next Red Meat?*, NAT’L GEOGRAPHIC: PLATE (Dec. 30, 2015), <http://theplate.nationalgeographic.com/2015/12/30/what-ever-happened-to-emu-the-next-red-meat> (“Texas has the largest emu population, followed by California and Wisconsin.”).

¹¹⁶ E.g., *Welcome to Ostrichland USA*, OSTRICHLAND USA, <https://www.ostrichlandusa.com/> (last visited Apr. 30, 2018).

¹¹⁷ E.g., JONES RABBIT FARM, <http://jonesrabbitfarm.com/> (last visited Apr. 30, 2018).

¹¹⁸ E.g., STAR B RANCH AND HOP FARM, <http://www.starbranchandhopfarm.com/about-us.html> (last visited Apr. 30, 2018).

¹¹⁹ Matt Ampleman & Douglas A. Kysar, *Living with Owning*, 92 IND. L.J. 327, 327, 331 (2016).

¹²⁰ *Jones v. City of Opelika*, 319 U.S. 103 (1943); *Emp’t Div., Dep’t. of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990).

handling statute that fines worshippers who use snakes in religious gatherings, as the regulation “is necessary for the safeguarding of the health, good order and comfort of the community.”¹²¹ There are likely all sorts of animal rituals performed all over the world that involve animal consumption, sacrifice or fighting. Courts and legislatures can ban such rituals on U.S. soil for varied reasons, including animal welfare, species conservation or human health and safety.

However, the guinea pig is a more challenging example because of its ubiquity in American homes, pet stores and rescue/adoption centers. The guinea pig seems to meet the test of section 598b(a) in that it is “traditionally or commonly kept as a pet or companion” in California. The American Veterinary Medical Association estimated in 2012 that 847,000 U.S. households kept guinea pigs as pets.¹²² A large percentage of these households are likely in California. Guinea pigs also have a long history of human domestication. They were first domesticated around 5000 BCE in the Andean region of South America, and traders introduced guinea pigs as pets to Europeans in the 16th century.¹²³ Guinea pigs arrived in the United States in the early 1900s.¹²⁴ Many Americans first think of guinea pigs as companions.

My claim that legislatures or prosecutors should consider secular ritual is limited to *only* those traditions that have been long practiced in the United States. But my alternative Radin-inspired test of whether a certain animal is formative to collective personhood seems relevant to the Andean peoples of South America. In Peru, in particular, “the guinea pig also has symbolic and social significance above and beyond its nutritional value, especially in rural areas, where it serves to strengthen social and family ties and enhance prestige, and even offers medicinal qualities, in addition to being kept as a pet.”¹²⁵ Indeed, Andean peoples often think of guinea pigs as both family member and food. Traditionally guinea pigs were raised in the same mud homes of

¹²¹ Danny Cevallos, *Snakes and Church vs. State*, CNN (May 28, 2014, 4:56 PM), <https://www.cnn.com/2014/02/26/opinion/cevallos-snake-handling-law/index.html>.

¹²² *U.S. Pet Ownership Statistics*, AVMA, <https://www.avma.org/KB/Resources/Statistics/Pages/Market-research-statistics-US-pet-ownership.aspx> (last visited May 1, 2018).

¹²³ E.g., *Guinea Pig*, WIKIPEDIA, https://en.wikipedia.org/wiki/Guinea_pig (last visited May 1, 2018).

¹²⁴ E.g., Marylou Zarbock, *American Guinea Pig Breed*, LAFEBER (Dec. 9, 2017), https://lafeber.com/mammals/american-guinea-pig-breed/#American_Guinea_Pig_History.

¹²⁵ Milagros Salazar, *PERU: Guinea Pigs Spell Independence for Women*, IPS NEWS AGENCY (Oct. 2, 2009), <http://www.ipsnews.net/2009/10/peru-guinea-pigs-spell-independence-for-women>.

Andean peoples, but as cuy has become a foodie item for Americans or coastal Peruvians, and become more known as a climate change-conscious form of meat, guinea pigs are now raised in cages as well for market consumption.¹²⁶ For Peruvians in coastal cities like Lima, there is less history of guinea pigs as either meat or pet.¹²⁷ And, in California, there seem to be no guinea pig farms (thus not qualifying for the section 598b(c) exception).

So, yes, guinea pigs are adorable, but there are other adorable animals eaten by California consumers. “Demand for rabbit meat is so high right now that farmers”¹²⁸ are having trouble supplying area restaurants. Befuddled European chefs are said to ask, “Where’s the rabbit?” when entering California kitchens.¹²⁹ But what happens when a Peruvian-American chef — or a Peruvian-American home cook — wants to slaughter, eat or gift her own guinea pig? Should she be guilty of a misdemeanor crime per section 598b?

VIII. REIMAGINING RADIN

The dual status of guinea pig as pet and meat is difficult to unpack and seemingly irreconcilable. But, as noted by animal rights theorist Gary Francione, this same “schizophrenia” is omnipresent in the complicated relationship of humans to animals. The orca Keiko, better known as “Willy” from *Free Willy*, received \$20 million from a private donation to be released from captivity.¹³⁰ But, until quite recently, Americans paid far more money to enjoy the same captive orcas at SeaWorld. We cherish dogs, yet we eat pigs. We keep rabbits as pets, but we also eat rabbits as well. Remember the candid interview from Michael Moore’s documentary *Roger and Me* (1989), in which an impoverished Flint resident selling roadside rabbits asks Moore whether he wants one as a pet or for food.¹³¹

¹²⁶ Arni Fernandez, *Raising Cuys (Guinea Pigs) in Cuzco*, CUSCO EATS (Aug. 30, 2014 10:52 AM), <http://cuzcoeats.com/raising-cuys-guinea-pigs-in-cuzco>.

¹²⁷ See Jane Chambers, *Guinea Pigs: A Popular Peruvian Delicacy*, BBC NEWS (Feb. 15, 2017), <http://www.bbc.com/news/business-38857881>.

¹²⁸ Michelle Lanz & Jacob Margolis, *California Farmers Struggle to Keep Up with Demand for Rabbit Meat*, KPCC (June 3, 2013), <https://www.scpr.org/programs/take-two/2013/06/03/32061/as-popularity-grows-california-rabbit-farmers-stru/> (referring to demand in 2013).

¹²⁹ *Id.*

¹³⁰ See Sandi Doughton, *The \$20M Lessons of “Freeing” Keiko the Whale*, SEATTLE TIMES (May 13, 2009), <https://www.seattletimes.com/seattle-news/the-20m-lessons-of-freeing-keiko-the-whale/>.

¹³¹ Frank H. Wu, *The Best “Chink” Food: Dog Eating and the Dilemma of Diversity*,

I argue that the Radin category of “not alienable, yet legal to possess” is a useful way to distinguish lawful from unlawful meat consumption, especially where these tough questions of tradition and habit manifest. I agree with the State of California that there are important reasons why don’t want our children seeing guinea pigs on menus, and encourage other states to consider decommodifying the meat of guinea pigs and other common companion animals. But it also feels wrong to criminalize habitual behavior like eating cuy, especially if we employ an ethic of husbandry to raise them.¹³² California section 598b would be more sensitive to the self-actualizing tradition of cuy husbandry if its language of criminal possession was deleted, or if individual prosecutors elected to not enforce this language in difficult cases like those of guinea pig consumption. I understand why the State of California might fear that the continued “gifting” of cuy could create an exploitable loophole that mimics a black market for guinea pig meat. My own sense is that the selling price of guinea pig meat on a black market would not be worth the criminal risk, especially when lawful substitute meats are readily available.

This Article provides a legal valence for the sorts of political considerations that go to the discretionary choices of whether to punish someone for eating whale or guinea pig, and to this extent it targets lawmakers and prosecutors rather than judges who must necessarily articulate a more internally consistent position. Alexander Bickel argued in *THE LEAST DANGEROUS BRANCH* that prudential concerns can fairly guide the decision of *whether* to make a legal judgment at all on a sensitive issue. Legislatures and prosecutors already possess a rough moral calculus that guides intuitions of what to keep as secular traditions outside of the law (e.g., your office March Madness betting pool, Spring Break, boxing) from criminalized practices (ivory art, opium dens, bareknuckle fighting¹³³). A wait-and-see approach should work well in the context of Makah whaling and guinea pig consumption, as we can stand back and let these contested meats be shared in a localized decommodified setting without fear of diffuse consumption.

GASTRONOMICA, Spring 2002, at 44.

¹³² Cf. Christopher Brennan, *Police Called After Man from Ecuador is Spotted Roasting a Guinea Pig for Breakfast in New York Park*, DAILY MAIL (June 14, 2015 11:53 PM), <http://www.dailymail.co.uk/news/article-3124101/Man-Ecuador-roasted-guinea-pig-breakfast-New-York-park-police-called-torture.html>.

¹³³ But see *Legal Bare-Knuckle Fighting Makes Bloody Debut in Wyoming*, USA TODAY (June 2, 2018 10:46 PM), <https://www.usatoday.com/story/sports/boxing/2018/06/02/legal-bare-knuckle-fighting-makes-bloody-debut-in-wyoming/35647889/>.

Other scholars have justified Makah whale meat consumption for varied other reasons, including reparative reasons based in historic injustice.¹³⁴ The IWC indigenous whaling exception likely considers the many important reasons why we might want to privilege these whaling traditions, and also assumes that these traditions might not easily map onto a Western religious/secular binary. My broader argument for this Article is that this intermediate Radin category of “not alienable, yet legal to possess” captures sundry kinds of animal meats that we don’t want either 1) commodified or 2) criminalized for different — and often contrasting — reasons. Margaret Radin offered a more precise description of this inalienability category based on human actualization.¹³⁵ We can reimagine this same construct in an animal law context as a liminal space where we may balance the competing ethical and cultural factors that inform how we determine if there is a valorized American tradition of eating a certain meat.

Horses are charismatic and intelligent companion animals, but — in addition to being widely eaten in Central Asia and Europe — the United States has a “marginal, always unsteady” but persistent history of consuming this “poor man’s beef.”¹³⁶ Whales are likely even more intelligent than we now realize, yet for some indigenous communities they are a totem that binds tradition to daily life. Sharks are cruelly fished for their fins, but they are also a sport fish for American anglers. I thus offer an idealized model for how the law should categorize the meats of certain animals either native to the United States or adjacent waters or already ubiquitous in American life:

	Alienable	Not alienable	Illegal to Possess
Threatened/ recently endangered		Shark Whale (AI)*	Whale (for all other Americans)
Human Companion	Rabbit	Horse Guinea Pig	Dogs and Cats (proposed bill H.R. 1406)

* = making whale meat legal to possess *only* for Makah and other American Indian or Native Alaskan tribes with an embedded tradition of a whale hunt

¹³⁴ D’Costa, *supra* note 7, at 71.

¹³⁵ See generally *Market-Inalienability*, *supra* note 37, at 1892.

¹³⁶ Susanna Forrest, *The Troubled History of Horse Meat in America*, ATLANTIC (June 8, 2017), <https://www.theatlantic.com/technology/archive/2017/06/horse-meat/529665/>.

In this revised schema, shark, whale and guinea pig meats are grouped with horsemeat in the “not alienable, yet legal to possess” matrix. There are several benefits to this move (decommodifying shark and guinea pig, while making whale meat legal to possess for certain American Indian or Native Alaskan tribes). First, the ambiguous terrain of this liminal space allows the law to retain its aspirational value (its *ethos*) so that it neither condones this sort of meat consumption, nor enters the consistency problem of treating seemingly “like” products differently, e.g., dogs and cats versus other common companion animals. Second, this category allows tradition-seekers to consume difficult-to-catch foods like whale meat or shark fin, but also requires these eaters to fell the animal themselves, or to know someone who will gift the animal meat outside of the market. The decommodification of the shark and whale should facilitate the animals’ return to carrying capacity, while at the same time functioning as an incentive or test for the tradition-seeker to “prove” the ritual value of this food. For the Makah, the fact that they are willing to go through the difficult labor of a whale hunt is evidence of the legitimacy of their claims for secular ritual. We will see if shark fin eaters maintain this as a celebratory tradition if they are forced to sport fish for shark on their own.

Finally, I note that this analysis implicates the core dilemma in animal law: that animals are human property, and we conceptualize property according to the use status of the animal. For now, it seems quixotic to ban rabbit meat from restaurants. But there are not very good reasons to distinguish rabbits from other adorable companion animals like the guinea pig. A renewed vision of “living property” that provides special husbandry rules for agricultural animals is one way we can reconcile our cultural schizophrenia in how we consume and care for animals, and to bridge differences in tradition in an increasingly multi-cultural America.

I qualify that I encourage readers to pursue a vegetarian or mostly vegetarian diet. My own hope is that we will see the decommodification of more sorts of animal meats, and that barter models based in notions of ethical hunting or husbandry might replace mass markets for conventional meat products. Consumers can instead expect the continued evolution of plant-based meats like the delicious Beyond Burger™.¹³⁷ An intriguing question moving forward is how U.S. regulatory agencies will define “meat” writ large, beyond the

¹³⁷ BEYOND MEAT — THE BEYOND BURGER, <http://beyondmeat.com/products/view/beyond-burger> (last visited May 2, 2018).

traditional understanding of animal flesh. A hotly litigated issue is whether producers of alternative plant-based milks (almond, cashew, rice etc.) can lawfully label their product as being a kind of “milk.”¹³⁸ For many reasons I think that they should be able to. I also think we should expand our social definition of meat to include plant-based meats and “animals” that have previously existed outside our regulatory system, i.e., insects. Professor Marie Boyd just published a fascinating article on insect consumption and the need for regulatory reform in the United States. Insects are protein-rich,¹³⁹ can be raised efficiently and do not produce methane or other climate change agents associated with mammal and poultry husbandry. But insects can also be vectors for disease, and — for many/most Americans — are intuitively *gross* to eat. Both the dual disease/grossness problems combine to inform the FDA’s treatment of insects as “filth” or a “defect” in food production.

In this Article I was forced to acknowledge difficult facts of intelligence and sentience when thinking about the lawfulness of things like whale meat. Lawyer-activist Stephen Wise and his Nonhuman Rights Project argue that since whales possess a high level of intelligence and self-awareness they should be cognized as legal persons with “fundamental rights.”¹⁴⁰ Still, Stephen Wise is surely being pragmatic as well, and electing to not include the intelligent pig within his cohort of super-evolved species, because he is aware of the political blowback such a move would create. In this particular Article I do argue that lawmakers should consider the embedded traditions of whale hunting of certain American Indian and Native Alaskan tribes, but I am not against making highly intelligent animals universally off-limits as meat. I have deliberately limited my matrix of animal species in this Article to a few animals (that other legislatures or commentators have already specified), to hopefully provide it some consistency, and to make my thinking about collective identity and decommodification more explicit. I understand the Makah whaling example is a special case because of its unique history and American setting. I do not expect — or want — any other animals to move from the “illegal to possess” to my “not alienable” category. I am happy if

¹³⁸ E.g., Anahad O’Connor, *Got Almond Milk? Dairy Farms Protest Milk Label on Nondairy Drinks*, N.Y. TIMES (Feb. 13, 2017), <https://www.nytimes.com/2017/02/13/well/eat/got-almond-milk-dairy-farms-protest-milk-label-on-nondairy-drinks.html>.

¹³⁹ See, e.g., CRIK NUTRITION, <https://criknutrition.com/>.

¹⁴⁰ *Confronting the Core Issue of Nonhuman Animals’ Legal Thinghood*, NONHUMAN RIGHTS PROJECT, <https://www.nonhumanrights.org/litigation> (last visited July 16, 2018).

any readers want to argue more animal meats should move in the reverse direction from market commodity to not alienable.

It is a common move for animal law theorists to consider the most evolved animal species when forming a normative argument. But rarely do we think about what separates the lower tranches of animal life from things like plants. It will be interesting to see how American consumers respond to the continued development of CRICK cricket protein powder and other insect-based foodstuffs. Will these be considered meats, or part of a vegetarian diet, or both? This seems like it will be a cultural question, and one whose answer will continue to evolve with our increased sensitivity to climate change and animal sentience and our improved access to plant-based meats.