ANIMAL SACRIFICE AND THE FIRST AMENDMENT: THE CASE OF LUKUMI BABALU AYE

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Animal sacrifice and religious ritual have intertwined for thousands of years. The practice remains integral to Santería, an Afro–Cuban religion that has many adherents in the United States, particularly in Florida. In 1987, when the Santería Church of Lukumi Babalu Aye announced plans to open in Hialeah, Florida, the city reacted by passing a set of ordinances banning animal sacrifice. The Church sued and the issue of whether the ritual killing of animals constituted protected religious expression eventually made its way to the United States Supreme Court. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*[1] asked the Court to resolve two linked constitutional questions: Is the ritual slaughter of animals a form of religious expression protected by the First Amendment of the United States Constitution? And, if so, (or even if not) may the practice be banned or regulated by the State?

These are difficult questions and the Court's attempt to answer them raises more questions still. This chapter examines the Court's reasoning in the *Lukumi* case to determine whether it clarified or further clouded the relationship between animal sacrifice and the First Amendment. It argues that the plurality opinion's attempt to cast the Hialeah ordinances as underperforming animal protection statutes was both misguided and counterproductive.

The Hialeah ordinances aimed to suppress Santería practices within the city limits. As such, they were deeply problematic because they intentionally targeted a particular religion. Yet the Court focused primarily on the ordinances' effectiveness at resolving animal cruelty, an issue well beyond their purview. As a result, the Court's analysis mischaracterizes the laws and leaves crucial questions—that is, whether a non-discriminatory prohibition on animal sacrifice is possible or permissible under the First Amendment—unanswered.

Defining the Hialeah ordinances as anticruelty rather than as anti-sacrifice enabled the Court to find them both overbroad and underinclusive. For those reasons, the Court deemed the ordinances to be intolerably burdensome to religious practices. This reasoning does not withstand close analysis and falls prey to the same imprecision the Court imputes to the challenged laws. It demands that the laws be both narrowly drawn to accomplish a specific goal and broadly applicable to behavior that lies beyond their stated scope. These conflicting expectations create an impossible standard. In addition, by classifying animal sacrifice laws as failed anticruelty statutes and then invalidating them on First Amendment grounds, the Court jeopardized future attempts to legislate animal protection laws, even when such laws only incidentally impact religious practices.

Background—Santería and South Florida

Santería has its origins in Africa. In the eighteenth century, Spain brought a great many slaves from Yoruba-speaking areas of Africa (including Nigeria, Togo and Benin) to its colony in Cuba. Over time, these diverse cultures, all of whom shared the Yoruba language and religious traditions, came to be known collectively as "Lukumi." The dominant religion among the Lukumi involved the worship of *Oludumare* ("owner of heaven") and *ashe* ("cosmic blood" of the universe). *Orishas*—the spirits or guardians who personify the *ashe*—were worshipped as "people of heaven."[2]

In colonial Cuba, the Yoruba religion merged with Catholicism, the official religion of Spain and its Cuban colony. The result was a unique Afro–Cuban syncretic faith that combined Orisha worship with Catholic religious iconography. Orishas and saints were venerated both on traditional Catholic days of celebration as well as according to traditional Lukumi practices. Leaders among the faith were known as "santeros." Eventually, the religion itself became known as Santería, the "Way of the Saints."

Santería migrated north to the United States with Cuban exiles and expatriates. By the early 1980s, an estimated fifty to one-hundred thousand Santería practitioners lived in South Florida. Following the Mariel boatlift in 1980, in which Fidel Castro deported 125,000 people, the number of Santería faithful in the United States swelled. Many of the refugees from the boatlift settled in the Miami area.[3] As a result, the early 1990s found Santería well ensconced in the United States, particularly in South Florida.

Santería religious rituals often include the killing of animals. Practitioners sacrifice animals to the Orishas, who require blood to sustain them. They kill goats, guinea pigs, potbellied pigs, rabbits, chickens and turtles and other animals on days of thanksgiving, to cure illness, to initiate one into the faith, to ward off enemies, and at other times as well. The method of slaughter involves placing the animal on a table with its head hanging over the side and then slitting its throat so that the blood drains into a bowl below the table. Because the Santería faith has no formal hierarchy or organizational structure, there is no standardized training or certification process for those who slaughter the animals. Depending on the animal and the skill of the santeros carrying out the ritual, killing the animal swiftly and efficiently can present a formidable challenge. A number of well-publicized examples that emerged in the days surrounding the *Lukumi Babalu* case demonstrated that the animals' deaths are sometimes slow and grisly.[4]

The Founding of the Church of Lukumi Babalu Aye

In 1974, a Cuban immigrant Ernesto Pichardo, along with his brother, mother, stepfather and several others, founded the Church of Lukumi Babalu Aye. Pichardo assumed the dual roles of corporate president (the church was founded as a non-profit organization) and

chief spokesperson. The church operated for many years without a physical home. In 1987, it negotiated a lease with an option to buy an abandoned used-car dealership in downtown Hialeah, Florida.

The announcement of the church's imminent opening caused a vociferous community backlash in Hialeah. Perhaps not coincidentally, the church also encountered difficulties getting utility hookups and a certificate of occupancy for the building. The community outcry soon aggregated into an organized movement opposing the church's presence in Hialeah. That opposition included local religious leaders. The pastor of one local church proclaimed himself in favor of freedom of speech and worship yet still declared, "that there are still people in this era, in our civilized society of the United States, still sacrificing animals ... is indefensible and repugnant."[5]

At a public meeting held by the city council, fervent denunciations came from all quarters. Participants denounced Santería as satanic and medieval. Even the chaplain of the police department labeled it an abomination to the Lord, noting that "We need to be helping people and sharing with them the truth that is found in Jesus Christ."[6] Pichardo was jeered, hectored, and called the "anti-Christ," as well as Satan himself, among other epithets.[7]

Shortly thereafter, the City Council passed a series of resolutions and ordinances outlawing ritual slaughter of the type practiced by the Santería faithful. Resolution 87–66 acknowledged Hialeah residents' "concern" regarding religious practices that conflict with public morals, peace and safety and "reiterated" the city's commitment to the prohibition of animal sacrifice. Ordinance 87–40 incorporated Florida's animal cruelty law which barred anyone from "unnecessarily or cruelly ... kill[ing]" animals. The Florida Attorney General had earlier opined that killing animals for religious purposes was "unnecessary" under the statute and therefore illegal unless the primary purpose was for food consumption. Consequently, by incorporating the state law, the Hialeah City Council effectively outlawed the form of animal sacrifice practiced in Santería.

Since Hialeah is a part of Florida, the Florida anticruelty statute was already in force, so the Council's adoption of it was partially hortatory. However the attorney general's reading of the state statute (that animal sacrifice outside the context of food consumption was "unnecessary" and, therefore, cruel) had not been tested or upheld by the courts. Thus, the state anticruelty statute gained specificity and clarity in the context of the Hialeah ordinances.

Resolution 87–90 declared it city policy to oppose animal sacrifice within the city's limits. Ordinance 87–52 barred the possession or use of animals for ritual slaughter except in properly zoned and licensed establishments. Ordinance 87–71 outlawed animal sacrifice within the city limits except for the primary purpose of food consumption; and Ordinance 87–72 outlawed the slaughter of any animal on any premises not zoned for such activities and which met all city codes and require-

ments. Taken together, these enactments meant that the Church and its adherents were prohibited from carrying out animal sacrifice within the city of Hialeah.

The church and Pichardo jointly filed suit in federal court against the city as well as its mayor and the entire city council. They alleged violations of their First Amendment right to freedom of religion and demanded that the court void the ordinances. The city countered that the laws did not discriminate against Santería or the church. Rather, they sought to safeguard the populace against unsanitary and unseemly practices. Consequently, the city argued, the ordinances passed constitutional muster and should be upheld.

The district court held for the city. The judge found much of Pichardo's testimony unconvincing and consequently held that the plaintiffs had failed to make a convincing case for discrimination. The Eleventh Circuit affirmed without opinion. The Supreme Court granted *certiorari* to decide whether Hialeah's statutes banning ritual animal slaughter violated the Free Exercise Clause of the First Amendment.

The Court's action surprised many because there did not appear to be any issue of unsettled constitutional law. As we will shortly see, previous case law showed that states could pass laws incidentally burdening religion so long as the laws were secular in purpose, neutral, and generally applicable. Nor was there a visible circuit split. Circuit splits occur when the courts of appeals from two different regions of the country (or "circuits") reach differing conclusions on the same point of law. In such cases, the law applies one way in one region of the country and in a different way in another. It often falls to the Supreme Court to resolve such conflicts. Yet, despite the absence of any apparent new issue of constitutional law or disagreement among the circuits, the Court felt that the *Lukumi* case raised important First Amendment issues that required its attention. Understanding the issue before the Court, as well as the Court's decisional process requires some background on the nature of the First Amendment and its treatment of religion.

The First Amendment and Religion

The text of the First Amendment reads straightforwardly. It states in relevant part that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .[8]

Embedded in this phrase are two important clauses that exist in delicate counterbalance: the Establishment Clause and the Free Exercise Clause. The Establishment Clause forbids the federal government from favoring religion or favoring one religion over another, while the Free Exercise Clause requires that there be no governmental prohibition of religious practice. The Supreme Court has held that, under the Due Process Clause of the Fourteenth Amendment, these precepts apply to the states as well.[9] Taken in tandem, the two clauses propound state neutrality toward religion. Courts have interpreted this to mean that

governmental goals and actions should be secular and accomplished in a religiously neutral manner. Articulating such goals and carrying them out in an acceptable manner presents a significant challenge.

Navigating a path between not favoring religion and not inhibiting its practice is not always easy. It is virtually impossible for the government to completely avoid aiding religion unless it actively undermines religion—something it is likewise forbidden to do. For example, if the fire department (a state entity) responds to a fire alarm at a church, it is aiding religion, theoretically in violation of the Establishment Clause. Yet, if the fire department refuses to put out the fire, it is withholding assistance on the grounds of religious affiliation. Under the Free Exercise Clause, that too is prohibited. It would seem that in many circumstances if the state acts, it violates the Establishment Clause and if it declines to act, it violates the Free Exercise Clause. Thus, if applied inflexibly, the First Amendment's noble rhetoric could effectively paralyze the government.

The nature of this dilemma has led the Court to issue a thicket of opinions that attempt (not entirely successfully) to clarify the state's obligations. As a general matter, the two clauses taken together prevent the government from singling out specific religious groups for either benefits or burdens. If the state provides a benefit solely on the basis of religious affiliation, it runs afoul of the Establishment Clause. If, on the other hand, the government imposes a burden or penalty solely because of religious affiliation, then it violates the Free Exercise Clause.

Over the nation's history, a number of laws have been challenged under the Establishment Clause and the Court has fashioned a strategy (which it modifies from time to time) for adjudicating them. Essentially, the Court looks to whether the challenged law has a secular purpose, whether its effect promotes or inhibits religion, and whether it creates an "excessive entanglement" between the government and religion.[10]

Comparatively little jurisprudence arises from the Free Exercise Clause. This may be because there have been fewer instances where federal, state or local governments attempted to suppress or punish religious beliefs or practices so directly that they inspired Free Exercise clause challenges. However, existing case law makes plain that the Free Exercise Clause prohibits the state from prohibiting an activity because of its religious nature or because the government wishes to suppress or burden a particular faith or practice.

For example, in *Fowler v. Rhode Island*,[11] the Court barred enforcement of a municipal ordinance in a manner that prohibited Jehovah's Witnesses from preaching in a public park while allowing Catholic or Protestant services to take place in public parks. Similarly, in *McDaniel v. Paty*,[12] the Court struck down a Tennessee state law excluding ministers from serving in the state legislature. The state may also not impose special burdens of faith on people. Thus, in *Torcasso v. Watkins*,[13] the Court invalidated a Maryland requirement that state elected officials declare their belief in God prior to taking office.

The Court's recent jurisprudence suggests that if the state acts in a religiously neutral manner, it does not violate the Free Exercise Clause even if its actions incidentally burden practitioners of a particular faith. *Employment Division v. Smith*,[14] held that two drug counselors at an Oregon rehabilitation facility fired for ingesting peyote for sacramental purposes during a Native American ritual were not entitled to unemployment compensation. No one contested that the two men used the peyote for religious purposes or that the law interfered with their ability to do so. Nevertheless, the Court upheld the law and denied compensation because the state did not intentionally target religious practices by enacting or enforcing the law. The state's intent was to prevent drug abuse, not to interfere with religious activity. Any burdens placed on religion were incidental. Consequently, the Court held, the law did not violate the Free Exercise Clause.

The *Smith* case presented a new turn in Free Exercise jurisprudence. While *Smith* did not purport to overrule prior case law, the rule in previous cases had been that if a law burdened religious beliefs it had to pass a strict scrutiny test (that is, be narrowly tailored to meet a compelling state interest) to survive. Strict scrutiny poses a formidable barrier to a law's survival. A finding by the Court that a state action must undergo strict scrutiny usually means that it will be struck down. However, that is not always the case. For instance, in *United States v. Lee*,[15] the Court rejected the contention that members of the Amish faith were exempt from paying Social Security taxes. The Court acknowledged that paying or receiving Social Security benefits interfered with the free exercise of the Amish faith but nevertheless found the law "essential to accomplish an overriding governmental interest."[16] As will be argued later in this chapter, a law banning animal sacrifice could also conceivably withstand strict scrutiny.

Although the *Smith* case did not explicitly overrule previous Free Exercise cases, the rule it propounded represented a clear departure from precedent. In *Sherbert v. Verner*,[17] a case that predates *Smith* by almost two decades, the Court determined that a facially neutral law faces strict scrutiny if a plaintiff could show that the law significantly burdened the exercise of her religion. In *Verner*, the plaintiff, a Seventh Day Adventist, had been denied unemployment benefits because she refused to work on Saturdays despite a statutory requirement that applicants be available to work Monday through Saturday. The Court found for the plaintiff, reasoning that if a plaintiff could show a significant burden on the free exercise of her religion, the state would have to demonstrate that that burden was necessary to a compelling state interest. In this instance, the societal interest was not sufficiently compelling to counterbalance the burden. Consequently, the plaintiff could not be deprived of unemployment benefits because she refused to work on the Sabbath.

The key difference between the *Verner* and *Smith* decisions is that in *Verner*, the Court applied strict scrutiny to a neutral law whereas in *Smith*, it held that for neutral, generally applicable laws, strict scrutiny

is unnecessary. However, since *Smith* did not explicitly overrule or modify *Verner*, the *Smith* decision created, in Justice Souter's words, "a free exercise jurisprudence in tension with itself. . . ."[18] As a result, it is difficult to extrapolate a general rule from the Court's Free Exercise cases. Nevertheless, based on the Court's explicit reliance in *Lukumi* on the reasoning of *Smith* (as well as Justice Souter's impassioned critique of that case in his concurrence), it is clear that the *Smith* rule holds sway in *Lukumi*.[19]

The *Lukumi* Decision

When the Court granted *certiorari* in *Lukumi* it galvanized interest groups on both sides of the issue. A flurry of *amici* ensued, with religious organizations generally supporting the church's position and animal advocacy organizations weighing in on the side of Hialeah.

In a plurality opinion authored by Justice Kennedy, the Court held for the church, reversing the holdings of the district and circuit courts.[20] The combination of the plurality and concurrences clearly hold the Hialeah ordinances unconstitutional. In a later settlement, Hialeah agreed to pay the legal fees incurred by Pichardo and the church totaling nearly half a million dollars and to pay one dollar to the church as a symbol of reconciliation. Neither Pichardo nor the church pursued further legal action against the elected officials named in the lawsuit.[21]

In keeping with *Smith*, the Court noted that a law that burdens religious practices need not undergo strict scrutiny if it is neutral and of general applicability. However, if the law is not neutral or generally applicable, it must pass strict scrutiny—that is, it must be justified by a compelling governmental interest and narrowly tailored to advance that interest. Should it fail strict scrutiny, the law will be struck down as violative of the Free Exercise Clause.

In the Court's view, the Hialeah ordinances were neither neutral nor generally applicable and also roundly failed strict scrutiny. The second paragraph of Justice Kennedy's opinion encapsulates the plurality's position:

> [T]he laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their actions violated the Nation's essential commitment to religious freedom. The challenged laws had an impermissible object; and in all events the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs.[22]

The Court held that the Hialeah ordinances were not neutral because the city had "gerrymandered" the ordinances to exclude virtually all types of animal killings except those carried out by Santería adherents.

Animals could still be killed and/or mistreated in many ways; the ordinances carved out only a very narrow prohibition against specific

types of ritual killing. Therefore, they were underinclusive as a means of preventing animal cruelty or safeguarding the public (aims which were among the ordinances' stated objectives).[23] The Court found that this result, when coupled with the discriminatory rhetoric that preceded the ordinances' enactment, impermissibly targeted the Santería faith and, consequently, were neither neutral nor generally applicable.

If a law that burdens religion is neither neutral nor generally applicable, then it is unconstitutional unless narrowly tailored to meet a compelling state interest. The Court concluded that the Hialeah ordinances were not narrowly tailored because they regulated behavior that had little to do with their purported purpose. The city could accomplish its goals of protecting animals and the public through other means than a blanket prohibition of ritual sacrifice.

According to the plurality, "[t]he legitimate governmental interests in protecting the public health ... could be addressed by restrictions stopping far short of a flat prohibition of all Santería sacrificial practice."[24] Similarly, "[w]ith regard to the city's interest in ensuring the adequate care of animals, regulation of conditions and treatment, regardless of why an animal is kept, is the logical response to the city's concern, not a prohibition on possession for the purpose of sacrifice."[25] For example, Florida's anticruelty statute, which Hialeah adopted, outlaws the unnecessary killing of animals or any actions which result in "the cruel death, or excessive or repeated infliction of unnecessary pain or suffering." This statute, taken on its own, does not seem vulnerable to First Amendment challenge (recall that the Court struck down the ordinances because they discriminated against Santería in the aggregate). However, the wording of the Florida statute, which closely resembles New York's, has its own set of (non-constitutional) difficulties, as David Favre makes clear in his chapter in this book.

By prohibiting ritual sacrifice altogether even though the public's concerns could be addressed with narrower rules, the Court reasoned that the impact of the laws far exceeded their intended scope and purpose and were therefore overinclusive as well. "The proffered objectives are not pursued with respect to analogous non-religious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree"[26] Consequently, the laws were neither neutral nor generally applicable nor narrowly tailored to meet a compelling state interest. Therefore, they violated the Free Exercise Clause and could not stand.

This reasoning raises a number of questions. For example, it is not clear what the Court means by "neutral," "narrowly tailored," or "compelling state interest." Such questions are not confined to the *Lukumi* controversy; they pervade much of the Court's strict scrutiny jurisprudence.

Strict scrutiny evolved as a method of protecting "preferred" or fundamental rights from governmental intrusion. While the state must occasionally impinge on individual rights to protect the common good,

certain rights, such as those enumerated in the Bill of Rights, those guaranteeing access to the political process, and those that protect "discrete and insular minorities" against discrimination receive greater protection. State intrusions into these areas and against such groups therefore meet with a higher degree of judicial skepticism. Strict scrutiny evolved in the 1960s as a way of codifying that judicial skepticism.[27]

Nevertheless, the Court's approach to strict scrutiny remains highly variable. As constitutional scholar Richard Fallon explains, it falls into three main categories: (1) the nearly categorical prohibition version; (2) the weighted balancing test; and (3) the illicit motive test.

The first category works much as one might expect. If a state action threatens fundamental rights, the Court will permit the action only to avoid an impending catastrophe. For example, if there is an imminent danger of death, serious injury, or violent social upheaval, the state can pass a law constraining fundamental rights. Barring an imminent catastrophe, however, any attempt to pass such a law will fail.

The weighted balancing test balances the state's interest in carrying out a particular action against the public interest in protecting fundamental rights. The scales are so heavily weighted in favor of the fundamental rights, the state interest must be quite strong to override them. However, there need not be a showing of imminent calamity. Professor Fallon cites the Court's upholding of a statute giving the government custody of President Richard Nixon's presidential papers despite the apparent violation of Nixon's First Amendment rights. In that case, though the need was compelling and urgent, no impending cataclysm loomed.[28]

The illicit motive test focuses on sussing out whether the government purposely (and improperly) targeted a fundamental right or protected group. If so, the government's behavior will not stand. This test concerns itself more with motive than with outcome. Consequently, a law enacted with illicit motives but whose impact does not burden any protected rights or groups may nonetheless be struck down.[29]

The Court's approach in *Lukumi* seems to combine elements of all three tests. The combination of approaches generates a lack of internal consistency. As a result, the Court's reasoning is often hard to comprehend.

The Neutrality and General Applicability Analysis

The Court's neutrality and general applicability discussion lays out the legislative history behind the ordinances and shows how it demonstrates the City Council's intent to target the Santería faith. It describes the actions at the City Council's public hearing and the community resistance to the church's presence in Hialeah. The rhetoric of elected officials during the lawmaking process reflected a demonstrable bias against the Lukumi Babalu Church and against Santería practices generally. That bias manifested itself in the enactment of laws that plaintiffs claimed disproportionately impacted Santería practices. The Court's

analysis underscores how each of the ordinances seemed more directed at deterring Santería rituals than in protecting animals or safeguarding the public.

For example, Ordinance 87–71 bans animal sacrifice that is "not for the primary purpose of food consumption." This excludes ritual slaughter for purposes of creating kosher meat[30] while effectively isolating and outlawing Santería practices. Similarly, the Court finds that Ordinance 87–52, which enjoins the possession, slaughter or sacrifice of animals with intent to use them for food purposes but exempts "licensed food establishments" with regard to animals "specifically raised for food purposes" intended to exempt kosher (and halal) slaughter while specifically targeting Santería practices. Santerians typically do not conduct their rituals in licensed food establishments nor are the animals they kill necessarily raised for food purposes. As a result, the law's onus fell on Santerians as opposed to followers of other faiths. In this sense, the law was not neutral in its applicability.

The Court's analysis goes awry in its examination of Ordinance 87–40, which incorporates the Florida anticruelty statute and holds liable anyone who "unnecessarily ... kills any animal." It makes no attempt to prohibit most forms of animal killing, including fishing, hunting, and extermination yet it outlaws animal sacrifice. In the Court's view, this selective prohibition of only certain types of killing demonstrates an impermissible targeting of religious expression. Though facially persuasive, this position raises as many questions as it answers.

Must a Neutral Anti-Sacrifice Statute Regulate All Animal-Related Behavior?

The Court's determination that the Hialeah ordinances were both over and under inclusive is logically suspect. The laws purportedly aimed to accomplish a narrow goal—prohibiting ritual animal sacrifice—a type of killing the city (and state) deemed "unnecessary."[31] The city did not take a position on or attempt to ban many other types of animal killing. The Court concluded that this omission demonstrated a clear bias against Santería practices. However, there are other possible explanations. One could argue, for example, that killing animals for food and/or for sport has little in common with ritual sacrifice other than the fact that each involves animals dying.

It is possible to maintain that killing animals for food is ethically defensible while killing them for ritual is not. The argument might be that food is necessary to continued existence and animal protein has been a primary food source for humans for millennia. Therefore, the consumption of animal flesh transcends ethics and resides squarely in the realm of biological necessity.

One could likewise argue the converse—that ample alternative sources of protein and calories exist and that there is no need to consume animal flesh. By contrast, there are no substitutes for the

commands of faith. In order to live an ethical life and find peace in the hereafter, one must obey the will of the gods. Both positions, while diametrically opposed, share the view that the two forms of animal slaughter are distinct and unrelated.

For present purposes, the persuasiveness of the various rationales is irrelevant. What matters is that each of the methods of animal killing cited by the Court can lay claim to different normative justifications. Therefore, grouping them together and claiming that regulating one necessarily means regulating them all does not comport with either logic or history.

The ability to differentiate between and among these activities indicates that they are normatively distinct and therefore potentially subject to different restrictions. Indeed, hunting and fishing are each regulated differently, and pest control is regulated differently than either. The slaughter of animals for food is likewise controlled by specific regulations and guidelines.

While broad statutory guidelines could apply to animal treatment (that is, a general anticruelty statute might apply but for the standard exemption for animals used in agriculture), each form of animal killing is governed by a narrow set of guidelines that apply to that activity alone. Lumping them together under the broad rubric of animal cruelty fails to acknowledge the diversity of actions involved. It also ignores the large body of pre-existing codes and regulations governing their practice. To say that hunting and cattle ranching must be covered by the same set of laws because both involve animals is akin to arguing that baseball and tennis ought to have the same rules because both involve hitting balls.

The Hialeah Statutes Were Narrowly Drawn

The Hialeah anti-sacrifice statutes were quite specific; they reached only animal sacrifice, which was the behavior they sought to regulate (as opposed to animal cruelty in general). This narrowness of scope suggests not that the ordinances sought to impose "a prohibition that society is prepared to impose upon [Santería worshippers] but not upon itself,"[32] (as the Court presumes) but rather that the statutes aimed to accomplish a defined goal—the prevention of ritual animal killing for non-food purposes.[33] Indeed, the Court acknowledges the laws' narrowness of purpose when it observes, "The net result [of the ordinances] is that few if any killings of animals are prohibited other than Santería sacrifice, which is proscribed because it occurs during a ritual or ceremony and its primary purpose is ... not food consumption."[34] Yet the Court treats this narrow scope as a flaw even as it criticizes the laws for a perceived lack of precision. It demands a breadth of coverage from the ordinances that extends well beyond what the drafters intended or what a City Council could hope to regulate.

The same dichotomy arises when the Court takes up the question of general applicability. Statutes must be generally applicable and not single out one particular entity for regulation or special treatment. While

it is appropriate for the Court to strike down legislation that specifically disallows Santerians but not other religious groups from engaging in religious sacrifice, the Court does not rest its argument about general applicability on that basis. Instead, it concludes that the ordinances are not generally applicable because they are underinclusive with respect to their goals of, *inter alia*, preventing cruelty to animals. This leads back to a discussion of the statutes' narrow ambit—that they do not regulate non-sacrificial modes of animal killing, including hunting, fishing, medical research, and euthanasia. The plurality maintains that because the ordinances do not reach these other forms of animal killing and mistreatment, they are not generally applicable and therefore fail the second prong of the test for constitutionality.

This reasoning raises the same questions of practicability and scope that we saw in the neutrality discussion. Furthermore, it complicates the strict scrutiny analysis. When the Court determined that the Hialeah statutes burdened religion and were neither neutral nor generally applicable, that conclusion triggered a strict scrutiny review. Yet, it seems impossible to have a statute that is both narrowly tailored, as the strict scrutiny test requires, while still encompassing the many disparate behaviors that the plurality's interpretation of neutrality and general applicability demands. It is to the tension between these competing requirements that we now turn.

An Unworkable Strict Scrutiny Analysis

In finding that the ordinances fail to pass strict scrutiny, the Court references its earlier conclusion that the ordinances are not narrowly tailored because they do not cover a raft of behaviors other than ritual sacrifice that also kill or mistreat animals. It would seem that the Court objects to statutes that prohibit a particular type of animal killing unless they also prohibit virtually all manners of animal killing. As noted earlier, this approach mandates that the statutes be simultaneously narrow in scope and breathtakingly broad in application. Few if any laws could meet such a requirement.

Consider the following fictional example:

> The Polaricer faith requires that its adherents snowmobile at midnight through the streets of Oshkosh, Wisconsin every year during the month of January. Thousands of the faithful make the annual pilgrimage. They gather each January evening and trundle through the streets of Oshkosh, the rumbling of their snow machines echoing through the city. The noise problem is exacerbated by the fact that the roaring of the snowmobiles' engines melds with the traffic sounds (particularly the noise from trucks traveling on nearby highways).
>
> The ritual dismays and disrupts many of the town's inhabitants and has generated considerable friction between the locals and the Polaricers. The Oshkosh City Council, declaring its concern about detrimental impacts on public health, noise and safety from snow-

mobile use, passes an ordinance banning snowmobiles from city streets after dark.

A group of Polaricers sue, claiming violations of their rights under the Free Exercise Clause. They argue that the city government unfairly singled out their particular practice for regulation. Since the ordinances did not attempt to regulate all forms of transportation that impact the public welfare, noise and safety, Polaricer practices have been wrongfully suppressed.

The plaintiffs note the lack of any similar ban on trucks, despite their considerable noise quotient. They note as well that other modes of transportation (toboggans, for example) are potentially hazardous to health and safety yet remain unregulated. Clearly, they argue, the town's concern with public health and safety is pretextual and the real reason for the ordinances is the town's growing dislike for the annual influx of religious pilgrims. Therefore, the Polaricers claim, the statute is unconstitutionally underinclusive and void.

The Polaricers further maintain that the statute is overinclusive because there are more circumscribed ways of accomplishing the town's stated goals. The City Council could, for example, limit the size of the snowmobile engines permitted after ten p.m. and/or require extra soundproofing as well as lights and safety flags. Instead, the Council passed a law effectively rendering it impossible for members of a particular religious group to obey the tenets of their faith. This constitutes unlawful discrimination under the Free Exercise Clause. The plaintiffs seek damages and injunctive relief.

Based on the *Lukumi* court's reasoning, shouldn't the Polaricers prevail? The City Council singled out a specific form of winter transportation for regulation in a manner that directly burdened the religious practices of a particular group. Even though it could have opted for any number of other ways of safeguarding the public safety and welfare and decreasing noise, the Council chose a method that directly and detrimentally impacted the Polaricer faith. In addition, public welfare and safety as well as the peace of the evening remain at risk because the ordinance did not regulate all possible sources of noise or disruption. Shouldn't the statute be invalidated because it enjoins religiously motivated behavior while failing to address other activities that pose a similar threat to the Council's stated goals?

The problem with this reasoning is that it simultaneously demands too much and too little. On the one hand, it requires that the statute be narrowly tailored to accomplish its goal. On the other hand, it broadens the statute's goal to the point where narrow tailoring becomes impossible.

The issue in Oshkosh is not *all* noise and *all* dangers to public health and safety. The City Council's concern lay with the noise from snowmobile use at night on town streets and its accompanying disturbances. It defies logic and the principles of statutory construction to

require that the Oshkosh legislature regulate all noise just because it has concerns with one particular kind of noise. Such a requirement would effectively render any legislative undertaking quixotic and unworkable. Yet, this is apparently the condition that the Supreme Court imposed on the city of Hialeah.

Since the Hialeah anti-sacrifice ordinances target religiously motivated behavior, the Court properly demands that they be narrowly tailored. However, the opinion also requires that the ordinances concurrently address all behavior that negatively impacts animals. No statute could successfully negotiate such a gauntlet and it follows that the Hialeah ordinances were doomed from the outset.

As noted earlier, a law faces strict scrutiny when it burdens a protected group or fundamental right (in a non-neutral manner). Strict scrutiny requires that the law be narrowly tailored to further a compelling state interest. If the law does not further that state interest, it creates a burden on religion for no reason. It follows that a law that burdens religion must have a compelling purpose. An ineffective law that burdens religion would necessarily fall short of this standard. Therefore, though efficacy is not explicitly enumerated in the test, an ineffective law could not pass strict scrutiny.

The chief problem with the Court's approach lies less in its methodology than in its characterization of the city's goals. No statute could eliminate all animal cruelty, not least because of the multifarious definitions of "cruelty." And the Hialeah ordinances—as the Court points out—made no such attempt. Instead, the ordinances prohibited a *certain type* of animal cruelty—the cruelty that stems from ritually killing animals for purposes not explicitly linked to food consumption. Thus, the Court held the ordinances to a standard they could not (and did not attempt to) reach. It then invalidated the laws because they fell short of this artificial standard. Returning to Professor Fallon's terminology, the Court's approach resembles a "weighted balancing test" with the scale so weighted in favor of invalidating the ordinances that it becomes more of a "nearly categorical prohibition." In effect, the Court erected a set of straw men, substituted them for the Hialeah ordinances, and then struck them down.

A Different Approach to Strict Scrutiny

A. *Narrow Tailoring*

The Court determined that the city structured its ordinances to accomplish a religious gerrymander—an "impermissible attempt" to target Santería religious practices. This assessment seems entirely accurate in light of the xenophobic testimony by council members and community leaders at the public hearing prior to the laws' passage. However, determining if these particular ordinances illegitimately targeted a religious group presents an entirely different issue than determining whether a law enjoining ritual animal slaughter for non-food purposes is illegitimately underinclusive. The Court's conflation of these

two issues unnecessarily complicates an already complicated body of Free Exercise jurisprudence.

The latter question—whether it would be constitutionally legitimate to prohibit ritual animal slaughter for non-food purposes—raises a host of interesting issues that the *Lukumi* court sidestepped. For instance, the Court's rhetorical linkage of animal sacrifice with all other forms of animal killing/cruelty demands further inquiry. While killing and cruelty are often linked, they are not always—a fact that the law routinely recognizes in both the human and animal realms.

In the human arena, killing and cruelty are distinct and severable phenomena. The law recognizes certain types of killing as acceptable while condemning others. One cannot imagine, for example, the Court striking down a statute prohibiting human sacrifice. It would not matter that other circumstances exist in which people are routinely killed (execution, military combat, etc). Nor would it matter that the anti-human sacrifice statute proscribes killing in certain situations and places and not in others and that the statute targets specifically religious behavior. The law would survive because, despite its apparent underinclusiveness and focus on a specifically religious practice, it still satisfies a compelling state interest (avoiding "unnecessary" human deaths) and is narrowly tailored to accomplish that goal.

"Cruelty" to humans is a similarly fluid concept. The Constitution forbids "cruel and inhuman" punishment yet so-called "Supermax" prisons routinely confine inmates to a tiny cell in solitary confinement for twenty-three hours per day (the other hour is spent in an exercise pen known as a "kennel"). This type of confinement can and often does lead to deep psychological trauma and is considered highly punitive. Yet, it remains both legal and widely tolerated. Clearly, there exist certain situations where treatment that might otherwise be labeled cruel has been found to be expedient and socially acceptable.

The debate between the Bush administration and Congress, as well as the Courts, as to what exactly constitutes "torture" provides another example of the state sanctioning cruelty in some circumstances but not in others. That cruelty is tolerated in some contexts and not in others does not mean that all laws seeking to limit cruel behavior under certain prescribed conditions are useless or underinclusive. It rather indicates that the laws aim to prohibit certain behaviors that society finds particularly objectionable. Since other forms of cruelty do not give rise to the same level of societal concern, it follows that killing and cruelty are not objectionable *per se*. Instead, society allows certain kinds of killing and cruelty while prohibiting others.

A similar tolerance for certain forms of killing and cruelty extends to animals. While numerous laws—both state and federal—ban the mistreatment or killing of animals, those laws are narrowly circumscribed to permit activities which might otherwise fall within their purview. Hunting, for example, involves the killing of animals, but it is regulated rather than prohibited. The same holds true for fishing.

Similarly, one cannot simply butcher one's house pets and the federal Humane Slaughter Act lays out federal guidelines regarding the slaughter of animals for food.

This selective prohibition of animal mistreatment results from a normative (and legislative) choice. While much gratuitous killing of animals still occurs, it does not mean that the laws governing hunting and house pets are failures because they do not regulate or prohibit the various other methods in which animals are killed. Rather, the laws are underinclusive by design. They are narrowly tailored to accomplish the state's particularized interest in preventing the killing and mistreatment of animals in those particular ways that do not meet with state approval.

With this clarification in mind, the Court's position in the *Lukumi* case that the Hialeah statutes are underinclusive because they focus on ritual sacrifice and do not address other methods of animal cruelty or slaughter begins to look strained. Putting aside the fact that hunting, fishing, and medical research are regulated by other statutes, invalidating a law because it fails to regulate behavior that it does not seek to regulate is fundamentally illogical. The Hialeah statutes were narrowly tailored to accomplish the goal of enjoining animal sacrifice within the city limits. If they had a broader scope, they would lose their narrow tailoring. Furthermore, the Court's reasoning demands a breadth of coverage from the ordinances that is well beyond what the drafters intended or what a City Council could hope to accomplish. The Court's complaint seems not to be that the statutes are insufficiently narrow, but rather that they are *too* narrow.

B. If the Statutes are Narrowly Tailored, Is their Purpose Compelling?

If, as now seems clear, the statutes were narrowly tailored, that does not complete the strict scrutiny test. The second prong of the test requires determining if the challenged law furthers a compelling state interest. The *Lukumi* Court found the interests at issue in the Hialeah ordinances insufficiently compelling. Yet, it is not at all clear to which interests the Court referred when it made that determination.

The opinion is highly critical of the manner in which the ordinances were gerrymandered to burden the Lukumi Babalu church and Santería practices. But that gerrymander does not seem to form the basis—or at least not the sole basis—for the Court's decision to invalidate the laws. Instead, the Court focuses at length on the scope of the laws and their efficacy with respect to preventing animal mistreatment.

Few would disagree that a law enacted for the purpose of excluding a religious organization from a community fails to satisfy any compelling state interest. The record in the *Lukumi* case indicates that such a gerrymander did occur in Hialeah. However, the Court's attention is primarily directed elsewhere. It cites with approval the 1989 case of *Florida Star v. B.J.F.*,[35] which notes that "a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited."[36] The Court

then declaims that the Hialeah ordinances are underinclusive with respect to preventing animal cruelty and/or deaths and that only religiously motivated conduct is impacted by the laws' restrictions.

As we have seen, this critique is only partially accurate. While the ordinances do disproportionately impact religious conduct, they are not underinclusive. They are rather narrowly tailored to accomplish their stated goal of preventing animal sacrifice. When the Court assumes that the statutes seek to remedy all animal cruelty within the city limits, it misapprehends their intent. It then offhandedly notes that "there can be no serious claim that *those interests* justify the ordinances."[37]

The phrase "those interests" in the sentence quoted above does not have a clear referent. It could refer to the prevention of animal cruelty *or* the burdening of religiously motivated conduct. If the former, then the statement is exaggerated and derogates the cause of animal protection. If the latter, then the Court's dismissiveness arguably deprives it of an opportunity to evaluate the ordinances on the terms under which they were enacted. Had the Court focused more explicitly on the religious gerrymander, it would have avoided imposing a significant burden on future animal protection legislation. The Court's insistence that anticruelty legislation be all-encompassing could hinder the enactment of specific statutes in the future that address particular types of cruelty to animals. This intolerance for targeted legislation is particularly problematic because the notion of what constitutes cruelty continues to evolve.

C. Statutes That Aim to Discriminate Against Religion Will Fail

The behavior and statements of the Hialeah City Council members (and the members of the community) at the public hearing prior to the ordinances' enactment demonstrate an unmistakable bias against the Santería faith and the Lukumi Babalu Church. The plurality acknowledges this, observing that "the record in this case compels the conclusion that suppression of the central element of the Santería worship service was the object of the ordinances" and that this represented "an improper attempt to target Santería."[38] That obvious bias means that the Court could have taken a much different approach in its analysis.

The examination of the statute's neutrality and general applicability would have been short, swift and irrefutable. Though arguably of general applicability, the ordinances were not neutral; they aimed directly at Santería. That fact alone would have triggered strict scrutiny, requiring that the ordinances be narrowly tailored to accomplish a compelling state interest in order to survive. This analytical approach fits Professor Fallon's "illicit motive test."

Assuming the aim of the statute was to exclude Santería practices from Hialeah, the Court's analysis makes clear that the ordinances were indeed narrowly tailored to accomplish this goal. However, the last prong of the test—determining whether the ordinances satisfy a compelling state interest—is where the ordinances run into difficulty. The state has

no compelling interest in discriminating against a particular religious faith or practice. Indeed, under the Free Exercise Clause, such interests are constitutionally impermissible. If the state's interest in passing the anti-sacrifice ordinances centered on suppressing the Santería faith, then the ordinances cannot survive.

Rather than avail itself of this framework, the Court instead dwells on the laws' inclusiveness and efficacy (or lack thereof) with respect to animal cruelty. In light of the Court's lengthy disquisition on the inclusiveness of the ordinances as well as the omission of a straightforward analysis of their discriminatory nature, it is at least plausible that the statement, "there can be no serious claim that those interests justify the ordinances," referred to the state's interest in protecting animals from cruelty and unnecessary death. Both Justice Blackmun and Justice Souter's respective concurrences make plain that they did not believe the plurality opinion addressed the issue of whether animal protection can rise to the level of a compelling state interest. Nevertheless, the language of the plurality opinion with respect to this issue is far from clear.

Assuming the Court intended to refer to animal protection, the decision needlessly undermines that goal while erecting gratuitous hurdles to future laws aimed at safeguarding animals from ritual sacrifice. It conflates the general goal of alleviating animal *suffering* with the narrower goal of eliminating animal *sacrifice* and in so doing needlessly complicates the free exercise analysis. We have already established that, under the Court's jurisprudence, laws can burden and/or constrain religious practices if those constraints are incidental to the enforcement of a neutral law. Unfortunately, when the Court classified animal sacrifice as a protected form of religious expression while finding that laws seeking to regulate it must also address all other types of animal cruelty, it all but eliminated the possibility that a law seeking to regulate and/or ban animal sacrifice could be neutral.

Can an Anti-Sacrifice Statute be Neutral?

At first reading, the idea of a religiously neutral law prohibiting animal sacrifice may appear self-contradictory. After all, the notion of animal sacrifice has powerful religious connotations. Any law aiming to regulate it would have to negotiate the attendant burden such a law would place on religion. Nevertheless, according to the Court, though "[t]he words 'sacrifice' and 'ritual' have a religious origin, ... current use admits also of secular meanings.... *The ordinances, furthermore, define 'sacrifice' in secular terms*, without referring to 'religious practices.' "[39] Thus, even as the Court struck down the Hialeah ordinances because they unconstitutionally burdened Santería religious practices, it acknowledged that the term sacrifice can be defined secularly and that the Hialeah ordinances did just that.

Ordinance 87–52 defines "sacrifice" as to "unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption." The

dictionary defines a ritual as "the performance of actions in a set, ordered, and ceremonial way." Numerous types of secular animal killing meet this definition. For example, "crush" videos, in which, leggy, spike-heeled women are filmed grinding small animals underfoot meet the definition of sacrifice. So too do many forms of laboratory experiments in which animals are killed according to precise guidelines. Indeed, the common term used to refer to the slaughter of laboratory animals is "sacrifice."

The key term in the ordinance is "unnecessarily." The Attorney General of Florida opined that ritual sacrifice not for the purpose of food consumption was unnecessary and therefore illegal under the state anticruelty statute. The Hialeah ordinances simply adopted the state law. The Court found that the Hialeah ordinances were discriminatory against Santería when viewed in the aggregate because they effectively excluded all forms of animal killing except Santería sacrifice.

One need not quarrel with this conclusion to take issue with the notion that a law banning animal sacrifice must necessarily be discriminatory. If the term can have a secular definition that encompasses the gratuitous killing and torment of animals, then it seems an appropriate area for state regulation. It should likewise be possible to regulate the practice in a neutral, generally applicable way. And, if that regulation is neutral, generally applicable and narrowly tailored, albeit incidentally burdensome to religion, then, under *Smith*, it should pass constitutional muster.[40]

A thornier issue arises when an anti-sacrifice ordinance is not neutral and instead aims to suppress a particular religious practice. The question then becomes whether the regulation is narrowly tailored to further a compelling state interest. Such a law could be narrowly tailored (as evidenced by the Hialeah statutes). And, while the suppression of religion is not (and cannot be) a compelling state interest, suppressing religion need not be the point of the law. It may rather be that the practice is offensive to the majority of society and the legislature wishes to put an end to it (the practice, not the religion). In that case, the legislature would be focusing on the eradication of a certain offensive practice (animal sacrifice). The burden on religion would be incidental, with no intent to suppress religious expression.

Nor must such a law address animal mistreatment in all its forms. The law could simply seek to ban a particular form of animal mistreatment that American society finds intolerable. The pivotal question then becomes: can such a narrow form of animal protection form a compelling state interest? If so, then a properly drafted law banning animal sacrifice should withstand constitutional challenge.

Unsurprisingly, determining if a ban on animal sacrifice can rise to the level of compelling state interest is no simple task. As we have seen, the term "compelling state interest" defies easy categorization. As the Court makes clear, certain types of animal mistreatment and killing are socially acceptable. Others are not. The reasons for society's acceptance

of some forms of mistreatment and its flat prohibition of others are far from obvious. Even the laws designed to protect animals are filled with exemptions that often gut their capacity for enforcement.

Federal Laws are Riven with Exceptions

At the federal level, the Animal Welfare Act[41] is the principal federal statute mandating protections for animals and setting standards for their care. Yet the Act specifically excludes farm animals from its ambit.[42] Without an umbrella statute that gives it authority to prevent industrial practices that cause farmed animals to suffer, the U.S. Department of Agriculture ("USDA") cannot promulgate regulations to safeguard the health and wellbeing of food animals. Since over nine billion farm animals are killed each year, this regulatory gap looms highly significant.

Similarly, the Humane Slaughter Act,[43] enacted to protect livestock from the often agonizing deaths awaiting them at industrial slaughterhouses, mandates that livestock be slaughtered using "humane methods."[44] However, the USDA has determined that the term "livestock" excludes poultry.[45] Thus, the billions of chickens, turkeys and ducks slaughtered every year need not be—and usually are not—rendered insensible to pain before being hoisted, shackled and cut. In addition, the Humane Slaughter Act exempts ritual slaughter as well as state-inspected slaughterhouses from its ambit. Numerous instances of egregious cruelty have been documented in such facilities.[46]

State Laws are Likewise Unproductive

Twenty-eight states have anticruelty statutes that specifically exempt farming practices that are generally accepted in the industry.[47] This exemption effectively strips the laws of any force or normative component. Standard industry practices are typically those that best serve the industry. Removing those practices from legal oversight enables regulated entities to tailor their practices to their maximum benefit, regardless of societal standards or impact on the affected animals.

State criminal anticruelty statutes have also proven ineffective. First, the state must prove intent, a task complicated by the enormous number of animals processed by industrial food producers.[48] Given the hundreds of thousands of animals in their custody, producers can easily claim that they did not know the condition of any given animal. Thus, indifference to the animals' well being actually becomes a defense to prosecution.[49]

Furthermore, criminal statutes do not spawn regulations. Without guidelines for the industry or an administrative agency tasked with the laws' enforcement, no regular inspections take place. This means the job falls to local law enforcement officials who, absent a search warrant, cannot enter private property to ensure compliance.[50] Even if they could

enforce the statutes, these officers would have little incentive to do so; penalties for violations are generally quite low.

The low penalty for violations of animal cruelty statutes indicates a low societal interest in deterring such behavior. This lack of interest in protecting animals from harm stems from the fact that the animals' value is often enhanced through their mistreatment (in the sense that the less money invested in their welfare, the greater the profit realized from their sale). Stated differently, the efficacy of animal protection statutes is inversely proportional to the potential profit to be gained from animals' mistreatment. In light of these statutory deficiencies, it becomes fair to ask whether animal protection could realistically be characterized as a compelling state interest. Given the porous nature of existing state and federal statutes, it seems unrealistic to classify protection of all animals as a state interest at all, much less a compelling one.

All fifty states have animal cruelty statutes and the trend in recent years has been to widen rather than narrow the reach of those statutes. For example, several states recently passed laws banning some of the most inhumane factory-farming practices. Florida passed a constitutional amendment prohibiting the use of gestation crates for sows[51] (and another limiting marine net fishing).[52] Similarly Arizona passed a statute effective December 31, 2012 that bans gestation crates for pigs and veal crates for calves.[53]

It also bears mention that federal laws (including those discussed above), while truncated in scope, nevertheless demonstrate a state interest in safeguarding the welfare of at least some animals. Recent trends also indicate a slight shift toward increased protections for animals at the federal level. For example, the Twenty–Eight Hour Law[54], originally enacted in 1873, requires that animals not be confined for more than twenty-eight continuous hours when being transported across state lines in a "rail carrier, express carrier, or common carrier (except by air or water)" without at least five hours of rest, watering and feeding.[55] Yet, the USDA steadfastly maintained that the statute applied only to rail transport and not to trucks.[56] Since trucks form the primary means of transporting animals, this interpretation excluded most animals from the little protection that the statute purported to offer. In 2006, following the filing of a legal petition against the USDA by several advocacy organizations, the agency finally conceded that the statute did indeed apply to trucks.

Can Animal Welfare Rise to the Level of Compelling State Interest?

The haphazard approach to animal protection under the current legal regime suggests that animal welfare lies far from the forefront of the nation's consciousness. However, that does not mean the state (and the public) evinces no interest in the issue. Some animals (for example, endangered species, companion animals, service animals) benefit from a clear state interest in their protection, even if that interest lies less with the animals themselves than in the benefits humans gain from their

protection. A second possibility is that the nation's laws do not accurately reflect society's strong interest in animal protection and welfare. Still another possibility is that the current animal legal regime overstates society's bent toward animal protection and that, but for the government's proactive legislating, animals would have even fewer legal protections.

The latter possibility (that extant laws are overly strict and out of step with lax contemporary notions of animal welfare) seems least likely. Animal welfare issues have enjoyed increasing visibility and support both in the press and by statute.[57] In addition, as the American public has become more familiar with industrial agriculture, the resulting outcry at its methods has spurred a shift away from some of the most inhumane practices. For example, Smithfield Foods, the world's largest producer of pork, has pledged to move away from gestation crates for sows;[58] Burger King has agreed to transition away from battery cage raised eggs;[59] and celebrity chef Wolfgang Puck will not serve battery cage-raised eggs, pig products from companies that use gestation crates, or foie gras, a duck liver product created through force feeding.[60] These recent developments, as well as the favorable press these and other initiatives have received, and the aforementioned national trend toward tightening animal welfare statutes, militate against the notion of a small and dwindling base of public support for animal welfare.

The second possibility—that current laws do not accurately reflect the public's increased interest in animal welfare—again in light of recent developments in the statutory and corporate realms—seems possible and even likely. Many of the companies that changed their business practices did so in response to public pressure. Similarly, much of the recent legislation has been propelled by public interest groups.[61] Surveys and other data demonstrate that, when informed of the way animals are treated in industrial agriculture and elsewhere (for example, in medical research or puppy mills), the public response tends toward calls for stronger protection for the animals.[62] It therefore seems reasonable to conclude that public interest in animal welfare is both real and growing and that current laws do not satisfactorily reflect the public's concern.

It remains true, however, that the public's concern for animals is not boundless. Even companion animals remain property in the eyes of the law. This means that the animals' interests are always subordinate to the interests of the people who "own" them.[63] Consequently, their legal rights and ability to enforce those rights remain minimal.

Even more dire is the situation of non-companion animals. Though many if not most Americans believe farm animals ought to be better treated during their lives, only a small minority believes that animals should not be killed for food. An even smaller percentage condemns the use of animals for producing dairy products. Nor do most Americans oppose hunting or fishing. In addition, despite questions of efficacy and ethics, experimentation on animals remains an integral part of scientific methodology.

It would seem that American laws lack consistency of purpose when it comes to animal welfare. Most animal protection statutes exempt most animals from their coverage. Many types of animal mistreatment are legal and, in some cases, actively encouraged. In addition, as the *Lukumi* decision demonstrates, religiously based animal cruelty can potentially claim constitutional protection. Nevertheless, there remains a powerful undercurrent of concern for animals and their welfare. In the wake of *Lukumi*, the question lingers whether animal sacrifice can be regulated or whether it must always be protected religious behavior. In order to answer that question we must first determine whether preventing animal sacrifice can rise to the level of a compelling state interest. If so, then despite an inevitable burden on religious behavior, a law banning animal sacrifice should survive challenge under the Free Exercise Clause.

Can an Anti-Sacrifice Statute Survive a Free Exercise Challenge?

The range of protections and public attention afforded animals suggests that the nation's interest in animal protection varies. It further indicates that existing laws do not necessarily reflect the depth of public concern (or lack thereof). The degree of interest depends on the affected animals and the circumstances. Under the current set of laws, one can kill (and eat) some animals but not others. Even among those animals raised for slaughter, some must be killed "humanely" while others need not. Still other animals may not be killed under any except the most exigent of circumstances.

Clearly, the laws protect some animals more than others. It follows that the state possesses a compelling interest in protecting certain animals from certain types of mistreatment. Other animals facing other (or similar) types of harm do not engender the same level of interest. Determining whether a compelling state interest exists requires a fact-specific inquiry focusing on existing laws, the degree of public concern, and other competing societal priorities.

If the legislature enacted additional laws protecting certain animals from mistreatment while leaving others exposed to peril, those laws would blend readily with the current legal regime. Those additional laws might, for example, protect certain animals from certain types of death viewed as not needful while allowing those same animals to be killed in other ways for other reasons. For example, a dog living in domestic situation cannot be poisoned, mutilated or sensorily deprived, yet if that same dog were to find itself the subject of a sanctioned scientific research project, it could suffer any or all of those fates. Similarly, the state could conceivably prioritize killing animals for food while strictly regulating other types of animal slaughter. Ritual killing for purposes other than food consumption might then fall into a state-defined category of non-needful uses. Consequently, barring animal sacrifice might rise to the level of compelling state interest even as the state permits other forms of animal killing and mistreatment.

Thus contextualized, a law banning animal sacrifice seems no more inconsistent or underinclusive than most other animal protection laws. Furthermore, the Court acknowledges that laws prohibiting sacrifice need not specifically aim to burden religion, even if they incidentally do so. Under *Smith* and its progeny, any anti-sacrifice statute that incidentally burdened religion would have to be neutral and generally applicable. If it singled out religious practices, it would also have to be narrowly tailored and necessary to further a compelling state interest. A well-drafted ordinance that defined animal sacrifice carefully and prohibited it for compelling (secular) reasons might well pass such strict scrutiny.

By contrast, the Hialeah ordinances would likely fail because they were neither neutral nor generally applicable. The record overwhelmingly demonstrates that the ordinances' specifically targeted and sought to suppress Santería religious practices. Suppressing religion is *never* a compelling state interest.

Had the Court focused its analysis in this manner, its conclusion would not have changed but it would have avoided opining on the relative worth of animal protection versus religious freedom. The plurality opinion arguably strays into this uncertain territory and its analysis does little to clarify the issue. Indeed, it is not even clear if the opinion actually takes up the question. The concurrences claim that it does not. According to Justice Blackmun, the plurality opinion did not reach the question of "whether the Free Exercise Clause would require a religious exemption from a law that sincerely pursued the goal of protecting animals from cruel treatment." For him, that is a question for another day and one that the outpouring of *amici* demonstrates should not be taken lightly.[64]

Justice Blackmun apparently read the phrase, "there can be no serious claim that *those interests* justify the ordinances" to refer to the interest in discriminating against religious practices—an uncontroversial assertion with a clear constitutional predicate. If he is correct, then the Court's lengthy analysis regarding the alleged over and underinclusiveness of the Hialeah statutes and their relationship to animal cruelty becomes simply dicta. If he is wrong, however, then the plurality opinion enshrined the ritual killing of animals in the pantheon of constitutionally protected behavior. It did so based on a vision of animal protection that has little correlation with contemporary laws or norms. And it did so needlessly.

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1. 508 U.S. 520 (1993).

2. Much of the description of Santería and the history of the Church of the Lukumi Babalu Aye are drawn from DAVID M. O'BRIEN, ANIMAL SACRIFICE AND RELIGIOUS FREEDOM (2004).

3. Following the exodus, U.S. government agents determined that many of the refugees had been chosen for release due to their status as "undesirable" whether because of religious affiliation, prior criminal record, sexual orientation, political dissidence, or other quality. Having decried Castro's totalitarian regime for decades, the U.S. government was effectively forced to accept the 125,000 refugees or risk appearing to support the concept of the island prison. *See, e.g.*, Stephen Webbe, *Flight from Cuba*, CHRISTIAN SCI. MONITOR, May 8, 1980, at B2 (describing the processing procedures for asylum seekers and the efforts of Cuban–Americans to collect their relatives from Mariel); Paul Montgomery, *1,774 People Without a Country: Cuban Refugees Sit in U.S. Jails*, N.Y. TIMES, Dec. 7, 1980, at 1 (discussing the classification and detention of Cuban refugees based on alleged criminal backgrounds); Steven Weisman, *Havana Government Unilaterally Cuts Off Refugee Boat Exodus*, N.Y. TIMES, Sept. 27, 1980, at 1 (discussing the end of the exodus and the political implications of the relocation efforts).

4. *See* Mirta Ojito, *Santeria Priest Faces Charges in Animal Slaughter*, MIAMI HERALD, June 12, 1995, at 2B (describing the prosecution of a Santería priest who publicly sacrificed 15 animals in celebration of the Lukumi decision, but was arrested for the violent manner in which he attempted to kill the animals); Mike Williams, *Santeria Priest Challenges Fla. City's Ban on Ritual Animal Sacrifice: Freedom of Religion Claim Vies with Cruelty Charges*, ATLANTA J.-CONST., Aug. 31, 1989, at A10 (describing the painful techniques employed during Santería's ritual sacrifices); G. Savage, *Justices Revisit Unsettled Issue in Santeria Case Law*, L.A. TIMES, Nov. 1, 1992, at A22 (discussing the differences between Santería sacrifices and slaughterhouse practices).

5. O'BRIEN, *supra* note 2, at 35.

6. *Id.* at 43.

7. *Id.*; *see also* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 541 (1993).

8. U.S. CONST. amend. I.

9. *See* Everson v. Bd. of Educ., 330 U.S. 1 (1947) (holding that the Establishment Clause applies to the states via the Fourteenth Amendment); Cantwell v. Connecticut, 310 U.S. 296 (1940) (holding that the Free Exercise Clause also applies to the states via the Fourteenth Amendment).

10. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971). The Court revisited and modified the so-called "*Lemon* test" in Agostini v. Felton, 521 U.S. 203 (1997), particularly the "excessive entanglement" prong to focus more on whether the challenged law or government program had the impermissible effect of aiding or inhibiting religion. However, the *Agostini* Court left the *Lemon* test largely intact.

11. 345 U.S. 67 (1953).

12. 435 U.S. 618 (1978).

13. 367 U.S. 488 (1961).

14. 494 U.S. 872 (1990).

15. 455 U.S. 252 (1982).

16. *Id.* at 257–60.

17. 374 U.S. 398 (1963).

18. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 564 (1993) (Souter, J., concurring in part and concurring in the judgment).

19. The plurality opinion cites directly to *Smith* for the proposition that, "our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Id.* at 531 (plurality opinion).

20. *Lukumi*, 508 U.S. at 547.

21. *See* O'BRIEN, *supra* note 2, at 160.

22. *Lukumi*, 508 U.S. at 524.

23. While the Official Code of Hialeah no longer contains the relevant provisions, the ordinances are included in the appendix to the opinion of the Supreme Court. *See id.* at 548. Resolution No. 87–66 and Ordinance No. 87–90 specifically identify the prevention of animal cruelty and the protection of public safety as goals of the ordinances.

24. *Id.* at 538.

25. *Id.* at 539.

26. *Id.* at 546.

27. Robert H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1270–71 (2007) (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).

28. *Id.* at 1306 n.228 (citing Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 467–68 (1977)).

29. *Id.* at 1302–09.

30. The Court does not address halal practices but they would be exempt as well.

31. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537 (1993). The fact that the city had ulterior motives in enacting the law (discriminating against Santería practices) does not mean that the laws *as written* did not claim a different motivation.

32. *Id.* at 545.

33. The Court quotes several Hialeah officials stating their clear opposition not to the killing of animals but rather to the use of animals in religious sacrifice. *See id.* at 541–42.

34. *Id.* at 536.

35. 491 U.S. 524 (1989).

36. *Id. at* 541–42.

37. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993) (emphasis added).

38. *Id.* at 534.

39. *Id.* at 534 (emphasis added).

40. A number of municipalities have anti-sacrifice statutes that are in many respects identical to the challenged Hialeah ordinance 87–52. *See, e.g.*, L.A., CAL., MUN. CODE § 53.67 (1990) (prohibiting animal sacrifice except for food purposes). The Los Angeles Municipal Code defines animal sacrifice to mean "the injuring or killing of any animal in any religious or cult ritual or as an offering to a deity, devil, demon or spirit, wherein the animal has not been injured or killed primarily for food purposes, regardless of whether all or any part of such animal is subsequently consumed." *Id.* The City of Chicago Municipal Code bans the possession or slaughter of animals for food purposes and explicitly states that the ban "is applicable to any cult that kills (sacrifices) animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed; except that Kosher slaughtering is exempted from this ordinance." CHI., ILL., MUN. CODE § 7–12–300 (LexisNexis 2007). The City of Euless, Texas passed an ordinance that prohibits the slaughter of animals except for poultry intended for consumption. EULESS, TEX., CODE § 10–3 (1974). Recent friction between a local Santería church and the Euless city council over a municipal sacrifice ban led to a suit against the city. *See Suit Over Animal Sacrifice Ban Highlights Growing Religious Clashes in a More Diverse U.S.*, INT'L HERALD TRIB., Mar. 27, 2007, http://www.iht.com/articles/ap/2007/03/28/america/NA-FEA-REL-US-Suburban-Sacrifices.php.

41. Animal Welfare Act of 1970, Pub. L. No. 91–579, 84 Stat. 1560. Six years later, Congress passed the Animal Welfare Act Amendments of 1976, Pub. L. No. 94–279, 90 Stat. 417.

42. 7 U.S.C. § 2132(g) (1970).

43. Humane Methods of Slaughter Act of 1978, Pub. L. 95–445, 92 Stat. 1069 (codified at 7 U.S.C. §§ 1902–1907 (2000)).

44. 7 U.S.C. § 1902 (2000).

45. 9 C.F.R. § 3012 (2006).

46. *See, e.g.*, Matthew Wagner, *Rabbinate OKs Meat Despite Cruelty to Animals*, JERUSALEM POST (Israel), Mar. 14, 2006, at 8 (discussing the rabbinical approval of slaughtered meat in Iowa that violated U.S. cruelty laws because hooks were used to rip out the esophagus and trachea of conscious animals); Donald G. McNeil, Jr., *KFC Supplier Accused of Animal Cruelty*, N.Y. TIMES, July 20, 2004, at C2 (describing a long list of cruel acts observed by an undercover investigator who infiltrated a KFC plant in West Virginia); David J. Wolfson, *Beyond the Law*, 2 ANIMAL L. 123 (1996) (noting that federal anticruelty laws do not apply to state-inspected slaughterhouses and have no effect on the often cruel, common practices in these facilities).

47. Other states, including Maine, North Carolina, Ohio, Vermont, and Wisconsin, exempt specific industry practices from regulatory scrutiny. Still others, including Louisiana and South Carolina, exempt specific animals (in this case, birds) from state protection. *See* Wolfson, *supra* note 46, at 137; William A. Reppy, *Broad Exemptions in Animal-Cruelty Statutes Unconstitutionally Deny Equal Protection of the Law*, 70 LAW & CONTEMP. PROBS. 255, 307–23 (2007).

48. *See* David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 209 (Martha Nussbaum & Cass Sunstein eds., 2004); *see also* Paula J. Frosso, *The Massachusetts Anti-Cruelty Statute: A Real Dog–A Proposal for a Redraft of the Current Law*, 35 NEW ENG. L. REV. 1003 (2001).

49. *See* David N. Cassuto, *Bred Meat: The Cultural Foundation of the Factory Farm*, 70 LAW & CONTEMP. PROBS. 59, 66 n.44 (Winter 2007) citing Wolfson & Sullivan, *supra* note 48, at 209 (citing New Jersey v. ISE Farms, Inc. (Super. Ct., Warren County, Mar. 8, 2001) (unreported decision on the record) (vacating conviction for animal cruelty because the hundreds of thousands of chickens owned by defendant and the few people actually responsible for them meant that the two sick but still living chickens found in a garbage bin full of dead chickens might not have been "knowingly" discarded)).

50. *See* Wolfson & Sullivan, *supra*, note 48, at 209–10.

51. FLA. CONST. art. 10, § 21.

52. *Id.* art. 10, § 16.

53. ARIZ. REV. STAT. ANN. § 13–2910–07 (2007).

54. Livestock Transportation Act, 45 U.S.C. §§ 71–74 (2000).

55. *Id.* § 71; *see also* Wolfson, *supra* note 46, at 125.

56. *See* 49 U.S.C. § 80502(c) (2000); 9 C.F.R. pt. 89 (2006).

57. *See, e.g.*, Carol Ness et al., *What's New*, S.F. CHRON., Jan. 10, 2007, at F2 (comparing humane treatment labels for meat producers such as "certified humane" and "animal welfare approved"); Nancy Luna, *Restaurants Adopt Humanity*, ORANGE COUNTY REG. (Cal.), May 11, 2007 (describing animal welfare as an important social issue for diners at restaurants and chef's belief that animals raised with compassion create healthier and tastier food); Elizabeth Weise, *Food Sellers Push Animal Welfare*, USA TODAY, Aug. 13, 2003, at 01D (describing efforts of Food Marketing Institute and National Council of Chain Restaurants to spearhead reforms of animal food producers); David Barboza, *Animal Welfare's Unexpected Allies*, N.Y. TIMES, June 25, 2003 at C1 (describing efforts of fast food industry to devise standards for humane treatment of animals raised in factory farms); Michael Leidig, *Government to Farmers: Be Kind to Your Swine*, CHI. SUN TIMES, Feb. 19, 2002, at 34 (discussing Germany's Agriculture Ministry's directive to farmers to provide for welfare of pigs by keeping the pigs happy with toys, exposure to daylight, and with "quality time" of twenty seconds per day with a farmer); Commission Directive 2001/93/EC, 2001 O.J. (L 316) 36 (EC) (European Union legislation laying down minimum standards for the protection of pigs raised for farming purposes).

58. Alexi Barrionuevo, *Pork Producer Says It Plans to Give Pigs More Room*, N.Y. TIMES, Jan. 26, 2007, at C8.

59. Andrew Martin, *Burger King Shifts Policy on Animals*, N.Y. TIMES, Mar. 28, 2007, at C1.

60. Kim Severson, *Celebrity Chef Announces Strict Animal-Welfare Policy*, N.Y. TIMES, Mar. 22, 2007, at A17.

61. *See* Brian T. Murray, *A New Crop for the Amish Pennsylvania Farmers Have Found Raising Puppies Is a Lucrative Business, but They're Reaping an Increasingly Bitter Harvest of Cruelty Charges*, STAR LEDGER (Newark, N.J.), Nov. 20, 2005, at 1 (discussing U.S. Senate bill to add retail dog operations to licensing and inspection authority of U.S. Department of Agriculture that was propelled by activists including the Humane Society); April M. Washington, *Circus Acts or Ax Circus? Animals Mistreated, Groups' Report Says*, ROCKY MOUNTAIN NEWS (Denver, Colo.), July 29, 2004, at 7A (discussing report detailing animal abuse at Ringling Bros. and Barnum & Bailey Circus written by national animal protection groups American Society for the Prevention of Cruelty to Animals, the Fund for Animals, and the Animal Welfare Institute which prompted a ballot initiative in Denver aimed at banning circuses from using exotic animals in their acts); John Horton, *More Oversight of Wild Animal Ownership Sought*, PLAIN DEALER (Cleveland, Ohio), May 26, 2006, at B3 (discussing appeals from the Humane Society of the United States and People for the Ethical Treatment of Animals to support a proposed ban on the private ownership of wild animals in Ohio).

62. *See* Marni Goldberg, *Bill Aimed at Research Trade, Activists Target Dealers Who Collect Animals—Including, Some Say, Stolen Pets—For Sale to Science Facilities*, CHI. TRIB., June 30, 2006, at 3 (crediting momentum from HBO documentary *Dealing Dogs* for public pressure on Congress to pass Pet Safety and Protection Act aimed at prohibiting dealers from selling random source dogs and cats to laboratories); Jeff Mosier, *Bills Seek To Overturn Horse Slaughter Ban : Humane Society Condemns Proposals in State House and Senate*, DALLAS MORNING NEWS (Tex.), Mar. 10, 2007, at 10B (discussing Texas state and Federal Congressional bills pursued by the Humane Society, horse racing associations, and celebrities to end the slaughter of horses for human consumption and citing a poll of Texans showing that about three-quarters of them opposed the slaughter would be less likely to support a legislator who voted to ease a ban); David Crary, *U.S. Activists Revive War on Canadian Seal Hunt*, GLOBE & MAIL (Toronto, Can.), Jan. 29, 2004, at A12 (discussing seal hunt's history as early target of animal welfare movement when public outcry was aroused by grisly videos of baby seals being brutally slaughtered); Bryn Nelson, *Science at a Price, Ethics as the Argument, New Questions Are Raised About Whether the Gains of Animal Research Are Worth the Ethical Uncertainties*, NEWSDAY, Sept. 27, 2004, at A06 (discussing the evolving debate over the use of animals in medical research).

63. *See* Gary Francione, *Taking Sentience Seriously*, 1 J. ANIMAL L. & ETHICS 1, 17 (2006) ("Property status stops us from perceiving animal interests as similar to ours in the first instance and subordinates animal interests to human interests. . . ."); Gary Francione, *Animal Rights Theory and Utilitarianism*, 3 ANIMAL L. 75, 96 (1997) ("[W]e will almost always presume that property owners are the best judges of whether a particular use of their property, including their animal property, will be a 'benefit' to them.").

64. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 581 (1993) (Blackmun, J., concurring).