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## No Farms No Food? A Response to Baylen Linnekin

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# NO FARMS NO FOOD? A RESPONSE TO BAYLEN LINNEKIN

*Joshua Ulan Galperin*\*

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## INTRODUCTION

You have likely seen the bumper sticker, bold white text on a green background, reading “No Farms No Food.” The sticker is a product of, and in fact a tagline for, the American Farmland Trust.<sup>1</sup> On the one hand, the point is obvious: As American Farmland Trust puts it, “[e]very meal on our plates [c]ontains ingredients grown on a farm. We all need farms to survive.”<sup>2</sup> On the other hand, what seems like a plain statement on its face, “no farms no food,” is not so simple. Farms produce affordable food, they produce vast quantities of food, they produce healthy and not so healthy food, but they are not the only source of food. Hunting is another obvious source of food. Foraging is a less obvious example.

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1. *No Farms No Food*, AM. FARMLAND TR., <https://www.farmland.org/no-farms-no-food> [<http://perma.cc/77RJ-VP2M>].

2. *Id.*

In his writing on foraging, Baylen Linnekin reiterates this point about the diversity of food sourcing and offers the possibility of a food system more robust and welcoming than the system that dominates today.<sup>3</sup> Foraging is a source of food with an even longer historical shadow than traditional agriculture. Like the plain and simple promise that without farms we would have no food, the plain and simple appeal of foraging also masks important nuances, many of which Linnekin uncovers in his work, including the complexity of defining foraging at all, the potential ecological impacts of foraging, and the types of properties on which foraging takes place. Despite Linnekin's effort, some nuance remains.

This Response will evaluate the same issues that Linnekin's work addresses, in an attempt to add some additional insight. This Response will also highlight several complexities within foraging law and policy that deserve further attention. Part I will focus on the importance of a precise definition for foraging. Part II will consider society's essentialist approach to food and agriculture. Part III will then consider the way foraging, despite its populist overtones, may succumb to elitism. Part IV will dissect the apparent political and ideological consensus around the benefits of foraging. Part V will examine the property rights issues that are part and parcel of foraging. Finally, Part VI will look more closely at potential ecological issues that can arise from increased foraging. This Response will conclude by offering an alternative regulatory regime that borrows from Linnekin's proposal but combines it with other successful environmental regulatory strategies.

### I. WHAT IS FORAGING, REALLY?

The first nuance is the very definition of foraging. As is the case with almost any environmental issue, a definition becomes even more challenging when it references dynamic environmental baselines. "Foraging," writes Linnekin, "refers to the harvest of foods which are not cultivated by man but that grow spontaneously in the wild, regardless of whether the 'wild' is an urban, suburban, rural, or wilderness area."<sup>4</sup> Linnekin is careful to point out that foraging is not hunting, trapping, or fishing, insofar as foraging does not involve chase or capture.<sup>5</sup> Foraging is not collecting food from cultivated

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3. See generally Baylen Linnekin, *Food Law Gone Wild: The Law of Foraging*, 45 FORDHAM URB. L.J. 995 (2018).

4. *Id.* at 999.

5. See *id.* at 1000.

fields such as a pick-your-own-apple trip to the orchard, nor is foraging the gathering of discarded food products known as dumpster diving.<sup>6</sup> Foraging is essentially collecting food that grows without human intervention.

However, it may be improper to assume there is no human intervention in the wild foods that people forage. We now live in the Anthropocene, an epoch in which nothing is without human intervention. The concept of the Anthropocene is that global and geological aspects of the natural world, once thought beyond the reach of human influence, are now subject to human behavior.<sup>7</sup> While climate change is perhaps the most obvious human-caused global aberration, planetary biodiversity loss and relocation,<sup>8</sup> ocean acidification,<sup>9</sup> and the appearance of microplastics in the world's water<sup>10</sup> are also among the significant human-caused global shifts.

The concept of the Anthropocene, while helpful in spotlighting the cumulative impact of what might seem like otherwise benign human endeavors, is, on first blush, more puffery than precision. The term does not really improve understanding of environmental problems. The too clever commentator is fond of reminding that there is no such thing as natural anymore and no such concept as wilderness.<sup>11</sup> But the impacts of humans on the Earth can still be easily categorized into intentional and unintentional, as well as primary and secondary. Thus, while the once wild area that is now a farm is no longer wild, the undeveloped stretches of mountain or forest that dominate our national parks, for instance, are still usefully called "wild." This designation is practical despite the existence of unintentional and

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6. See *id.* at 999–1000.

7. See, e.g., THE ANTHROPOCENE AND THE GLOBAL ENVIRONMENTAL CRISIS: RETHINKING MODERNITY IN A NEW EPOCH 4 (Clive Hamilton et al. eds., 2015); Louis J. Kotzé, *Rethinking Global Environmental Law and Governance in the Anthropocene*, 32 J. ENERGY & NAT. RESOURCES L. 121, 121 (2014); Will Steffen et al., *The Anthropocene: Are Humans Now Overwhelming the Great Forces of Nature?*, 36 AMBIO 614, 614 (2007); Joseph Stromberg, *What Is the Anthropocene and Are We in It?*, SMITHSONIAN MAG. (Jan. 2013), <https://www.smithsonianmag.com/science-nature/what-is-the-anthropocene-and-are-we-in-it-164801414/> [<http://perma.cc/T4T8-CR6D>].

8. See Bradley J. Cardinale et al., *Biodiversity Loss and Its Impact on Humanity*, 486 NATURE 59, 64 (2012).

9. See Sam DuPont & Hans Portner, *Get Ready for Ocean Acidification*, 498 NATURE 429, 429 (2013).

10. See Kara Lavender Law & Richard C. Thompson, *Microplastics in the Seas*, 345 SCIENCE 144, 144 (2014).

11. See Rachel Nuwer, *There's No Such Thing as Truly 'Pristine' Nature Anymore*, BBC (Feb. 8, 2016), <http://www.bbc.com/future/story/20160208-theres-no-such-thing-as-truly-pristine-nature-anymore> [<http://perma.cc/GTP2-ZK6V>].

secondary climate impacts from burning coal, for example, which leads to climate change even in these wild parks.<sup>12</sup>

One could argue that the very ideas of “wild” and “spontaneous” in Linnekin’s definition of foraging offer little guidance in the Anthropocene. But foragers themselves are probably little troubled by a critique of this nature, or even the practical legal definitions that will become increasingly necessary as foraging becomes more popular. A forager knows when she is foraging, regardless of the origins of the plant from which she picks blackberries (Eurasia, not the Pacific Northwest where foragers usually find them)<sup>13</sup> or the impact of trace elements on the growth of that plant.

Rather than affecting the reality of foraging in any way, what we can learn from the Anthropocene is that our unintentional impacts on the world are at least as important and interesting as our intentional impacts. Foraging demands a precise definition because it is a growing pursuit that could have cultural, nutritional, and environmental impacts, and as Linnekin suggests, it is ready for a new regulatory regime.<sup>14</sup> When pursuing deregulation, there must be precise definition to prevent admission of unwanted conduct under a poorly or loosely defined practice of foraging.<sup>15</sup>

Failing to precisely define a term can have substantive legal effects. Vermont’s state-wide land use permitting scheme, for example, exempts agriculture from its regulatory strictures.<sup>16</sup> Without a sufficiently tight and accurate definition of agriculture, bed and breakfasts, wedding venues, bakeries, and certain housing developments could conceivably escape coverage if they are growing or raising food along with their other commercial pursuits. In the realm of foraging, Linnekin explains that hunting, trapping, and fishing, among other outdoor activities, are not foraging.<sup>17</sup> But these activities are not a far cry from foraging. One could easily foresee a world of permissive foraging regulations in which hunters, trappers, and anglers claim the mantle of foragers to escape their own more

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12. See *Global Warming’s Evil Twin: Ocean Acidification*, CLIMATE REALITY PROJECT (June 21, 2016, 6:01 AM), <https://www.climaterealityproject.org/blog/global-warming-ocean-acidification> [<http://perma.cc/529P-ZARG>].

13. See *Plant Profile for Rubus Armeniacus (Himalayan Blackberry)*, U.S. DEP’T OF AGRIC. NAT. RES. CONSERVATION SERV., <https://plants.usda.gov/core/profile?symbol=RUAR9> [<http://perma.cc/NW2C-QPYP>].

14. See generally Linnekin, *supra* note 3.

15. See Linnekin, *supra* note 3, at 999–1000.

16. VT. STAT. ANN. tit. 10, § 6001(3)(D)(i) (2017) (exempting “construction of improvements for farming” from the statute’s definition of “development”).

17. See Linnekin, *supra* note 3, at 1000.

restrictive governance regimes. Foragers are a growing, but still very small part of American society, while hunters, trappers, and anglers make up a much larger and more politically persuasive bloc.<sup>18</sup> One can imagine the political pressure that would persuade regulators to expand the definition of foraging to make it more welcoming to these powerful groups.

Linnekin has made headway in crafting an appropriate definition, but, as his work demonstrates, this is a challenging task with many variables.<sup>19</sup> As more regulators, from local to federal, adopt his recommendations, it will be increasingly important to maintain a dogged adherence to a strict and meaningful definition.

## II. IDOLIZING AND IDEALIZING EVERYTHING WE EAT

The second nuance that Linnekin uncovers is the history of cultural and economic essentialism in American eating. Essentialism here is the idea that one specific form of growing or eating truly represents what is most important about food and agriculture.<sup>20</sup> From hunting and gathering to small-scale, and now industrialized, agriculture, it seems that we idolize and idealize the currently dominant practice. We do so at the expense of the prior, imagining that the winds of progress can only push us forward, away from our inefficient and technologically immature histories.<sup>21</sup>

Unlike other cultural and technological innovations, so much of the conversation surrounding the history of food focuses on moralizing rather than mere economizing. First, history put the yeoman farmer on a pedestal due to his ability to wrestle the earth into submission, thereby supporting the Jeffersonian vision of the viable Republic.<sup>22</sup> Then, history revered the industrialized conglomerate because it provided cheap and plentiful bounty while demonstrating American

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18. See Scott Bestul, *The Dirty Politics of Deer Management*, FIELD & STREAM (Jan. 8, 2014), <https://www.fieldandstream.com/articles/hunting/2013/10/dirty-politics-deer-management> [<http://perma.cc/53NR-D4XH>].

19. Linnekin, *supra* note 3, at 999–1000 (defining foraging as “the practice of gathering vegetables, fruits, fungi, herbs, nuts, seaweed, and other edibles where they appear naturally in the wild” and distinguishing it from agriculture).

20. See generally *Natural Kinds*, STAN. ENCYCLOPEDIA PHIL., <https://plato.stanford.edu/entries/natural-kinds/#Ess> [<http://perma.cc/329A-7RC3>].

21. See generally Eliza MacLean, *American Agricultural Policy: How Food Shaped the United States*, U.S. HIST. SCENE, <http://ushistoryscene.com/article/ag-policy/> [<http://perma.cc/M22P-VQU8>].

22. See MICHAEL J. SANDEL, DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 144 (1998).

ingenuity and promise to feed the world.<sup>23</sup> But if we feed the world we have little time for individual farmers toiling on their forty acres. And if we have no time for those solitary toiling farmers, we have no time for the naïve foragers gathering berries at the mercy of nature, barely feeding their families.

While many writers embrace one of these essentialist agricultural romances, Linnekin avoids most of this moralizing in his writing. His article perhaps looks askance at the government employees who enforce current restrictions against foraging, but this doubt seems to be directed at bureaucrats rather than in favor of foragers. The foragers in Linnekin's work are individuals, going about their business, confronting hurdles along the way. They are championed because of their individuality, not because of the specific ways they choose to find their food. But Linnekin is one of the few writers who does not treat the foragers as messianic liberators. In the sources he cites in his article, foragers are described as: authentic;<sup>24</sup> the only ones who can capture "the freshest ingredients Mother Nature has to offer";<sup>25</sup> bringing you food as it is "supposed to taste";<sup>26</sup> "doing the ecosystem . . . a favor";<sup>27</sup> while foraging itself is "perfect" for the "cash poor and time rich";<sup>28</sup> and wild plants themselves are "nutritious, free, and unconditionally fresh."<sup>29</sup> Self-named "Wildman" Steve Brill is one of the grandest proponents of foraging, writing that foraging will help us "increase our enjoyment of nature,

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23. See Tom Philpott, *A Reflection on the Lasting Legacy of 1970s USDA Secretary Earl Butz*, GRIST (Feb. 8, 2008), <https://grist.org/article/the-butz-stops-here/> [<http://perma.cc/2AWE-DVK6>].

24. See Melia Robinson, *Top Restaurants Are Going Crazy for These Secret Ingredients Found in the Wild*, BUS. INSIDER (July 14, 2014), [www.businessinsider.com/field-to-table-food-movement-and-foraging-2014-6](http://www.businessinsider.com/field-to-table-food-movement-and-foraging-2014-6) [<http://perma.cc/PY7N-2WEB>] (referring to the "authenticity" of menus comprised of ingredients supplied by "professional foragers").

25. *Id.*

26. *Id.*

27. Lisa Foderaro, *Enjoy Park Greenery, City Says, but Not as Salad*, N.Y. TIMES (July 29, 2011), <http://www.nytimes.com/2011/07/30/nyregion/new-york-moves-to-stop-foraging-in-citys-parks.html> [<https://nyti.ms/2vK1yoP>].

28. Nathanael Johnson, *Can Urban Foraging Actually Feed Poor People?*, GRIST (Jan. 30, 2015), <http://grist.org/food/can-urban-foraging-actually-feed-poor-people/> [<http://perma.cc/J4UD-A8QH>].

29. Cari Taylor-Carlson, *Backyard Weeds Can Be a Meal for Foragers*, MILWAUKEE J. SENTINEL (Apr. 29, 2014), <http://archive.jsonline.com/features/food/backyard-weeds-can-be-a-meal-for-foragers-b99244355z1-257179551.html> [<http://perma.cc/GVM2-D76H>].

grow healthier, and reaffirm our commitment to preserving and rebuilding our ecological riches.”<sup>30</sup>

Linnekin’s argument, conversely, is not necessarily for more foraging, but for fewer restrictions on foraging. Policymakers who take up Linnekin’s arguments, however, are likely to be more sympathetic to the lofty, essentialist, rhetoric of other foraging writers who describe foraging as the perfect panacea to all food concerns. When politicians address a public problem in response to grand rhetoric, they may do so in a grand way, rather than through the modest approach Linnekin advocates.<sup>31</sup> How, in the all-or-nothing, 280-character world in which we live, can we propose a modest regulatory change for a practice that promises to save the world? Perhaps this is Linnekin’s next paper.

### III. EL-EAT-ISM

The third nuance that bolsters Linnekin’s argument is around the elitist motivation for early restrictions on foraging. He writes, “[t]he history of early American anti-foraging laws reveals that supporters of restricting foraging rights typically grounded their efforts in racism, classism, colonialism, imperialism, or some combination of these odious practices and beliefs.”<sup>32</sup> While today’s foraging skeptics more frequently ground their critique in conservation concerns, even that position has a history of elitism in which “outsiders,” who are typically wealthy nature lovers, “sought to protect the land from its residents” who actively relied on that land for sustenance.<sup>33</sup>

Explaining this history makes the case for reducing foraging regulations much more appealing. But the contemporary case for foraging—relying on claims of variety, freshness, self-reliance, and environmental protection, among other benefits—is less motivated by overturning discrimination than by helping celebrity chefs inject new adjectives into their menus.<sup>34</sup> Put differently, foraging today seems to thrive more on its neoliberal promise to reinvent society through the

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30. See “WILDMAN” STEVE BRILL, [https://www.wildmanstevebrill.com/\[http://perma.cc/MA6Q-6SDV\]](https://www.wildmanstevebrill.com/[http://perma.cc/MA6Q-6SDV]).

31. See, e.g., *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act*, Pub. L. No. 107-56, 2001 U.S.C.A.N. (115 Stat.) 272 (2001) (making fundamental and far reaching changes to the American security system after the attacks of September 11, 2001).

32. Linnekin, *supra* note 3, at 1010–11.

33. *Id.* at 1013.

34. See generally Robinson, *supra* note 24.



eating habits of the wealthy than on its potential for breaking down America's discriminatory status quo.

#### IV. THE POLITICAL CONSENSUS AROUND FORAGING IS TOO GOOD TO BE TRUE

Although Linnekin probably did not intend it, his article points to an ideological schism that makes foraging more partisan than it first appears. This is the fourth nuance. There is a near consensus among participants in the putative “food movement” that one of the key problems in the current food system is industrialization and the many symptoms that arise therefrom.<sup>35</sup> But different political philosophies, while they may agree on naming the problem, can define it as a problem for very different reasons. A progressive—seeking to advance a more equal society—may look at over-industrialization as an unjust distribution of wealth and therefore proof of income inequality; an offense to the common good through its many negative environmental impacts; and an assault on public health because of industrial agriculture's reliance on dense calories with limited nutritional value.<sup>36</sup> A classic liberal—seeking to advance a society of more individual sovereignty—however, might see industrialization as a form of oppression because it grants too little autonomy, too little freedom of choice in eating, too little respect for the diversity of individual thought, and too dramatic an obstacle to self-sufficiency.<sup>37</sup> The liberal's attack is reinforced by the claim that the system is facilitated by a history of government intervention.<sup>38</sup>

Under either critical view of the contemporary food system, foraging is a counterpoint—it is a symbol of what we have lost and a herald of what the future can hold. Foraging, as Linnekin describes, is an “ancient and valued practice,”<sup>39</sup> a tool for environmental

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35. See Joshua Ulan Galperin, *Value Hypocrisy and Policy Sincerity: A Food Law Case Study*, 42 VT. L. REV. 345, 356–57 (2017).

36. See generally *Liberalism*, STAN. ENCYCLOPEDIA PHIL., <https://plato.stanford.edu/entries/liberalism/> [http://perma.cc/GB9J-APC5] (describing the way that unjust distribution of power can restrict liberty).

37. See *id.* (describing multiple views of liberty, including the views that address liberty as coercion or limitations imposed by others).

38. See *id.* (explaining liberalism's preference for only limited government intervention). See generally BAYLEN J. LINNEKIN, BITING THE HANDS THAT FEED US: HOW FEWER, SMARTER LAWS WOULD MAKE OUR FOOD SYSTEM MORE SUSTAINABLE (2016) (arguing that government over-intervention has made the food system less just and sustainable).

39. Linnekin, *supra* note 3, at 998, 1039.

conservation,<sup>40</sup> and a mechanism of individual and community empowerment.<sup>41</sup>

As with agreement on the larger problems within the food system, the place where two distinct political philosophies come together on practice—in this case foraging—must not be mistaken for agreement on ideologies. For the liberal, foraging is about liberty, freedom of choice, and increased agency over food decisions. For the progressive, foraging is a path that treads lightly on the environment, that empowers communities to push back against corporate greed, or that maximizes public welfare with little cost.<sup>42</sup> These otherwise competing ideologies agree that foraging is a valuable pursuit, but that does not mean that they converge on exactly how to leverage foraging into a solution to the larger ailments of the food system.

Despite the apparent agreement between the competing ideologies, it is important to examine how different motivating values influence the policy instruments that ideologically-motivated advocates prefer. The progressive food movement will, in all likelihood, be comfortable removing regulatory burdens on foraging, but will also welcome new regulatory structures to promote foraging and the public health, conservation, and community empowerment that it might bring.<sup>43</sup> The same is true for the progressive approach to the larger food system: there is a willingness to deconstruct a broken system through public intervention. Alternatively, the liberal food movement will focus on stimulating foraging by removing barriers such as the web of regulations at the municipal, state, and federal levels that Linnekin identifies.<sup>44</sup> Likewise, the liberal food movement will deconstruct the larger food system by removing the incentives for conglomeration and industrialization, as well as barriers to autonomy that currently exist in the law.<sup>45</sup>

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40. See Linnekin, *supra* note 3, at 1035.

41. See *id.* at 1033–35.

42. See Galperin, *supra* note 35, at 356–57.

43. See *id.* at 375.

44. See Linnekin, *supra* note 3, at 1014–15, 1034–35.

45. These incentives and barriers include “agricultural subsidies, utilizing taxes or regulations to force industrial food producers to internalize the costs of their negative impacts on health and the environment, or decreasing consumer access to or demand for these products by implementing marketing restrictions, labeling requirements, or bans . . .” Emily Broad Lieb, *The Forgotten Half of Food System Reform: Using Food and Agriculture Law to Foster Healthy Food Production*, 9 J. FOOD L. & POL’Y 17, 19 (2013).

The different values that drive people to similar critiques of the food system and similar commendations of foraging may not be enough to fashion a consensus beyond foraging.

### V. LESS GOVERNMENT, MORE GOVERNMENT LAND

Moreover, the limited scope of the agreement around foraging becomes increasingly obvious when examining the role of private property in foraging. The role of property, both public and private, is the fifth nuance that foraging exposes.

Linnekin points to the distinction between agriculture and foraging as a driver of property privatization.<sup>46</sup> Understandably, when an owner works her land to grow agricultural crops, it would be anathema to then allow others to enter that land, harvest the crops, and profit from them, leaving little or nothing for the owner. However, sometimes private land is unworked and its owner does not intend to profit from its fruits. In this case, it is easier to imagine a property regime that permits foragers to enter, gather, and then profit from the food, or at least sustain themselves with what they have collected. But unworked and unprofitable land is not necessarily wasted land. It may be reserved for conservation, wildlife, recreation, or any other use that the landowner prefers. For this reason, the American property system places a high value on the owner's right to exclude other persons, regardless of how the owner uses property.<sup>47</sup> Surely some property owners permit foragers to enter their land, but this is likely the exception, not the rule, shunting the bulk of foraging to public lands of various types.

With foraging taking place primarily on public lands, Linnekin understandably focuses his recommendation for reduced regulatory burden on public land.<sup>48</sup> While the federal government alone owns 640 million acres of land, which represent twenty-eight percent of the country's total land mass,<sup>49</sup> there are philosophical contradictions in relying on this land (and similar state and municipal lands) to support foraging.

The contradictions in using public land for foraging relates back to the complexity of underlying political philosophies. First, the classical

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46. See Linnekin, *supra* note 3, at 999.

47. See Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 736 (1998).

48. See Linnekin, *supra* note 3, at 997–98 (describing foraging incidents at city parks).

49. CAROL HARDY VINCENT ET AL., CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW & DATA 6 (2017).

liberal framework would not permit weakening a private landowner's right to exclude foragers from her land.<sup>50</sup> The liberal benefits that come with foraging are real but they hardly supersede more foundational commitments to strong property rights. Second, the very existence of extensive public property ownership is critiqued in some liberal circles.<sup>51</sup> With only equivocal support for the public lands on which foragers rely, there is a shaky foundation on which to champion more foraging. And should foraging grow to the point where even more public lands are needed (admittedly, an unlikely scenario), when the government seeks to acquire additional property, which necessarily must come from private ownership, the liberal foundation becomes even shakier.

Linnekin, of course, does not recommend that the government acquire more land for the purpose of foraging or that the common law of property adjust to limit the right of property owners to exclude foragers. Instead he offers simple proposals to shift our regulatory bias from one that prohibits foraging to one that welcomes it. This will help a modest number of foragers enjoy their endeavors more easily. One might say that Linnekin is, ahem, gathering the low hanging fruit.

## VI. FORAGING ISN'T PERFECT

The sixth and final nuance that foraging exposes is that foraging is not without negative consequences. Linnekin's article does not ignore these consequences but it does not spend sufficient time grappling with them. Although there are surely other negative impacts from foraging, this part focuses on some of the conservation concerns. For example, in certain ecosystems, the possibility of depletion is very real, the risk of non-native invasive species is heightened when foraging becomes commonplace, and relatedly, significant foraging can facilitate biotic homogenization.

Foraging doesn't seem to be happening in such massive numbers that the threats to our environment are significant today,<sup>52</sup> but that

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50. See, e.g., *Liberalism*, *supra* note 36 (“[T]he aim of government in a community is to assure the basic liberty and property rights of its citizens . . .”).

51. See generally Terry Anderson, Opinion, *Op-ed: Time to Consider Privatization of Federal Lands*, MONT. STANDARD (Apr. 30, 2014), [http://mtstandard.com/news/opinion/mailbag/op-ed-time-to-consider-privatization-of-federal-lands/article\\_6c5a84c6-d01f-11e3-a09a-001a4bcf887a.html](http://mtstandard.com/news/opinion/mailbag/op-ed-time-to-consider-privatization-of-federal-lands/article_6c5a84c6-d01f-11e3-a09a-001a4bcf887a.html) [http://perma.cc/M8J9-KWZA].

52. See Peter Rowley-Conwy & Robert Layton, *Foraging and Farming as Niche Construction: Stable and Unstable Adaptations*, 366 PHIL. TRANSACTIONS ROYAL SOC'Y B 849, 854 (2011).

does not excuse ignorance of potential future harms. For example, foraging can interfere with plant population growth, regeneration, and spread.<sup>53</sup> Although Linnekin looks dubiously at the conservation measures that prohibit gathering berries from the ground, writing that “[neither a] wild blackberry or blueberry, a pawpaw or a coconut fallen to the ground, or a wild crab apple or a walnut . . . inherently requires any such protection,”<sup>54</sup> these fruits and nuts are all essential parts of their species’ reproduction and thus survival.<sup>55</sup> In general, a plant flowers, the flower is pollinated, after which it produces berries, which are central to the spread of seeds, which in turn are essential for producing offspring. If foraging clears forest floors of berries, crab apples, or other components of plant reproduction, the plant population does not survive.

Foraging may also facilitate the spread of invasive species. Invasive species are non-native species that have naturalized in wild habitats and spread to the point where they cause economic, environmental, or health problems.<sup>56</sup> Some invasive species are popular foraging species, such as Burdock, garlic mustard, and Japanese knotweed.<sup>57</sup> Each of these species also easily spread throughout ecosystems on their own and spread even faster with human transport.<sup>58</sup> A single segment of Japanese knotweed stalk, for example, can re-root wherever it is dropped.<sup>59</sup> As foragers gather these plants and carry them far and wide, they are likely to spread invasive species.

This spread may also lead to unintentional biotic homogenization, which is the phenomenon where overall, undifferentiated plant

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53. Charles M. Shackelton et al., *Urban Foraging: A Ubiquitous Human Practice Overlooked by Urban Planners, Policy, and Research*, 9 SUSTAINABILITY 1884, 1889, 1892–93 (2017).

54. Linnekin, *supra* note 3, at 1032.

55. *See generally Plant Reproductive System*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/science/plant-reproductive-system> [<http://perma.cc/NF7K-7PXC>].

56. *See* Joshua Ulan Galperin & Sara E. Kuebbing, *Eating Invaders: Managing Biological Invasions with Fork and Knife?*, 28 NAT. RESOURCES & ENV’T 41, 41 (2013).

57. *See* Leda Meredith, *Foraging in the Northeast: 3 Invasive Plants That Make for Good Eating (and a Healthier Planet)*, TIMBER PRESS (Aug. 27, 2014), <https://www.timberpress.com/blog/2014/08/foraging-in-the-northeast-3-invasive-plants-that-make-for-good-eating-and-a-healthier-planet/> [<http://perma.cc/S48S-RLUK>].

58. *See id.*

59. *See generally* Brandon Wanke & Mark Renz, *Japanese Knotweed*, in MANAGEMENT OF INVASIVE PLANTS IN WISCONSIN 2012 (Univ. of Wis.-Extension, Coop. Extension, Fact Sheet No. A3924-11, 2012), <https://learningstore.uwex.edu/Assets/pdfs/A3924-11.pdf> [<http://perma.cc/M8A4-MNZZ>].

coverage may not change, but the diversity of plants still decreases.<sup>60</sup> As a result of biotic homogenization, the same mix of plant life would exist in each park, thereby limiting plant diversity on a larger scale. Homogenization is an environmental concern, as well as a cultural concern. In fact, the cultural concern is one that motivates many foraging advocates in the first place.<sup>61</sup> Different human communities prefer to forage different traditional plants, but unchecked foraging, if it leads to biotic homogenization, can erase the plant diversity that motivates foragers from certain cultures.

There is also a risk of intentional homogenization. As Linnekin explains, foraging is a hobby, a form of sustenance, and a commercial endeavor.<sup>62</sup> If there is profit in foraging, over time the most profitable species will separate themselves from those less interesting to consumers. Chefs, guides, and medicinal foragers, for instance, will gather the plants that are most attractive to their customers and may also attempt to increase the abundance of those plants.<sup>63</sup> It is possible that the tragedy of common usage of foraging resources will prevent any effort to maintain or grow these profitable species. But it is also possible that tenacious business owners will find ways to promote their preferred species—“picking” winners, you might say—ushering in a world of parks that are dominated by a few profitable plants at the expense of the rest.

Population decline, invasive species, and biotic homogenization are all real ecological concerns that deserve more attention within foraging literature and within foraging regulatory regimes.

#### CONCLUSION: ON DOG PEE AND HOG POOP

I am lucky to be married to an ecologist who studies terrestrial plant communities.<sup>64</sup> Early in our relationship she taught me a lot about local plants. One such plant is wood sorrel. Wood sorrel is a wide-ranging plant that happens to be edible.<sup>65</sup> It tastes a bit like a lemon without the strong acidity. The taste is nice, but it is mostly

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60. See Michael L. McKinney & Julie L. Lockwood, *Biotic Homogenization: A Few Winners Replacing Many Losers in the Next Mass Extinction*, 14 TRENDS IN ECOLOGY & EVOLUTION 450, 450 (1999).

61. See Linnekin, *supra* note 3, at 1004, 1008–09.

62. See *id.*

63. See Galperin & Kuebbing, *supra* note 56, at 42.

64. See Sara Kuebbing, U. OF PITT. DEPT OF BIOLOGICAL SCI., <http://www.biology.pitt.edu/person/sara-kuebbing> [<http://perma.cc/CSV8-WN6K>].

65. See *Wood Sorrel: Oxalis Stricta*, EDIBLE WILD FOOD, <http://www.ediblewildfood.com/wood-sorrel.aspx> [<http://perma.cc/GH2N-F24V>].

just fun to pick a plant growing in a sidewalk crack and eat it. Once, walking through an urban park with my dad, I did exactly this. He was mortified.

“You can’t eat a *plant!*” he said with genuine disgust and shock.

“Dad, we basically only eat plants,” I reminded him.

“But dogs don’t pee on farm fields!”

Putting aside that the amount of dog urine on agricultural products is surely non-zero, it was only a few weeks later that the Food and Drug Administration and the Center for Disease Control confirmed that cow and pig feces were at least partially responsible for a nationwide *E. coli* outbreak in spinach that had killed one person and sickened many more.<sup>66</sup>

There is a lesson about dog pee here, but also a lesson about the impacts of seemingly modest cultural demand for wild species. The pigs that contributed to the outbreak were not domestic pigs, but feral hogs.<sup>67</sup> These non-native invasive species can roam into agricultural fields from adjacent forested areas and can cause significant damage that is often more noticeable than *E. coli* contamination. The population of these hogs is spreading in part because they are a challenge to hunt and they are quite tasty.<sup>68</sup> That is, people who enjoy hunting feral hogs do not always want to travel across the country; they want the pigs in their neighborhood and so they establish new populations.<sup>69</sup> This is another example of intentional biotic homogenization within the “wild” food system.

As with all the nuances of foraging, moving pigs and establishing new populations for cultural or economic reasons is not inherently or necessarily wrong, but it has an unquestionable environmental impact. The pigs can reduce the presence of native plants while increasing the presence of invasive species and otherwise changing the structure of ecosystems.<sup>70</sup> While proponents of foraging often describe the light footprint of their endeavor, the lesson of the feral

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66. See RICK GELTING, CTR. FOR DISEASE CONTROL AND PREVENTION, INVESTIGATION OF AN ESCHERICHIA COLI O157:H7 OUTBREAK ASSOCIATED WITH DOLE PRE-PACKAGED SPINACH, CDC ADDENDUM REPORT, IRRIGATION WATER ISSUES POTENTIALLY RELATED TO 2006 E. COLI O157:H7 IN SPINACH OUTBREAK 6 (2006).

67. See *id.* at 7.

68. See Galperin & Kuebbing, *supra* note 56, at 42.

69. See *id.*

70. See Sérgio L.G. Nogueira-Filho et al., *Ecological Impacts of Feral Pigs in the Hawaiian Islands*, 18 BIODIVERSITY & CONSERVATION 3677, 3677 (2009).

pig is that promises of simplicity and certainty often mask complex challenges—environmental challenges, cultural challenges, and more.

Linnekin's work, both the aforementioned article and his other writing, is so valuable because his critical approach is aimed directly at unmasking the complexities that are buried beneath food-system platitudes along the lines of "No Farms No Food." What Linnekin provides is not, for instance, an indictment of farms but a reminder that there is more to our food system than meets the eye. As in any complex system, there are no simple answers. Other commentators who share Linnekin's leanings might couch their *a priori* deregulatory preferences in simple promises that less regulation is inherently the better political strategy, but Linnekin avoids this trap, critically disassembling the specific arguments for various regulations and offering a leaner regulatory scheme in their place.

Despite the concerns and nuances I have identified in this Response, I agree with the general thrust of Linnekin's proposals. Because of these concerns, however, my support is equivocal. I too would like to see a bias in favor of foraging and a more appropriate regulatory regime. But I also expect a greater recognition of the potential problems that foraging can cause and I am therefore willing to limit foraging more readily than Linnekin might prefer.

My tweak to Linnekin's proposal then, is to establish a system resembling America's key environmental laws. These laws gave regulators authority, but check that authority—through citizen suits, mandatory timelines, and science-based standards.<sup>71</sup> This strategy limits the future political considerations that might cloud more scientific decision-making by establishing explicit evidence-based thresholds, strict timelines, and opportunities for citizen enforcement.<sup>72</sup> Thus, if a persuasive reason to limit foraging is depletion of wild plants, my regulatory structure would first assert that collection of these plants is permitted. Second, I would mandate that the regulator establish an explicit population level, based on scientific evidence in ecology and population biology, below which the population shall not fall. Third, my scheme would, if the population does cross the threshold, include automatically triggered limits on foraging. For each step, there should be opportunities for citizen petitions or even civil suits if the regulator does not act according to the mandates.

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71. See Joshua Ulan Galperin, *Trust Me, I'm A Pragmatist: A Partially Pragmatic Critique of Pragmatic Activism*, 42 COLUM. J. ENVTL. L. 425, 472–73 (2017).

72. *Id.* at 473.



This structure draws from both progressive and liberal ideas. The reliance on numeric standards and automatic triggering reflects progressive beliefs about scientific governance and the meaningful role of regulators. The bias against regulation and explicit opportunity for citizen enforcement, as well as the limited regulatory discretion, reflects liberal demands for individual autonomy and limited government interference.

This system is not as simple as Linnekin's. But if I can add anything to this work, it is a reminder that nuanced problems often elude simple answers. Linnekin's deep dive into foraging clearly exposes some of the nuance, but there is more complexity still, some of which I have tried to illuminate in this Response. This additional complexity may, or may not, be enough to recommend a regulatory structure relatively less simple than the one Linnekin proposes.