

ARTICLE

DIFFERENT ENDINGS: LETHAL
INJECTION, ANIMAL EUTHANASIA,
HUMANE SLAUGHTER, AND
UNREGULATED SLAUGHTER

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I. INTRODUCTION

The United States Supreme Court recently ruled that lethal injection, conducted according to Kentucky's execution protocol, does not violate the Eighth Amendment's prohibition against cruel and unusual punishment.¹ Attorneys for the petitioner, a death row inmate, argued that Kentucky's protocol was less humane than the procedure typically used to euthanize companion animals,² prompting the Court,³ academics,⁴ and others⁵ to compare the procedures by which condemned

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¹ See *Baze v. Rees*, 128 S. Ct. 1520, 1538 (2008).

² See Brief for Petitioners at 6-7, 53 n.15, *Baze v. Rees*, 128 S. Ct. 1520 (2008) (No. 07-5439), 2007 WL 3307732 (comparing overdose by pentobarbital—the method developed by veterinarians to achieve “the most reliably humane method of lethal injection”—with the “three-drug protocol” adopted by Kentucky for human executions, and decrying the use of paralytics “simply to protect the sensibilities of observers”); see also Brief of Veterinary Doctor Kevin Concannon et al. as Amici Curiae Supporting Petitioners at 5, *Baze v. Rees*, 128 S. Ct. 1520 (2008) (No. 07-5439), 2007 WL 3440946.

³ See *Baze*, 128 S. Ct. at 1535-36.

⁴ See Ty Alper, *Anesthetizing the Public Conscience: Lethal Injection and Animal Euthanasia*, 35 *FORDHAM URB. L.J.* 817, 841 (2008).

⁵ The issue received substantial media attention. See, e.g., Mark Sherman, *Animal Vets Can't Use Execution Drug*, ASSOC. PRESS, Apr. 4, 2008; Warren Richey, *Judges Reexamine Lethal*

inmates and companion animals are killed.

The procedures used to kill farmed animals have also been in the news recently. In early 2008, the Humane Society of the United States released video footage of slaughterhouse workers at the Hallmark Meat Company in Southern California prodding and electrically shocking sick, “downed” cattle in an effort to get them to rise and stumble into the slaughter line. The footage prompted public outcry, led to the largest meat recall in the history of the United States, and resulted in criminal convictions for two of the slaughterhouse workers involved in the abuse.⁶

Using these stories, this Article compares the laws and regulations that govern the termination of life in several contexts: lethal injection of condemned inmates; the euthanasia of companion animals; the slaughter of farmed animals covered by the Humane Methods of Slaughter Act; and the slaughter of farmed and other animals not covered by the Act.

Several lessons emerge from the comparison. First, not surprisingly, the process for terminating the lives of certain animals is more careful and more humane than the process for terminating the lives of other animals. In other words, a hierarchy of slaughter exists, in which the degree of care taken in ending an animal’s life diminishes along with the animal’s relationship to humans.

Second, recent efforts to strengthen the laws governing the termination of life—whether human or animal—have succeeded almost exclusively at the state level. This is true with respect to lethal injection of humans, the euthanasia of companion animals, and the slaughter of farmed animals. For example, while Congress has repeatedly failed to take action to protect downed cattle from abuse at slaughterhouses, California responded quickly in the wake of the abuse at the Hallmark Meat Company facility.⁷

Finally, although the courts have not been especially receptive to lawsuits challenging the methods used to terminate life, litigation has nonetheless sparked change by focusing attention on problems with these methods. The controversy over lethal injection illustrates this point especially well and suggests that continued litigation over methods of

Injection for Convicts, CHRISTIAN SCI. MONITOR, Apr. 26, 2006. It also captured the interest of advocacy groups. See, e.g., HUMAN RIGHTS WATCH, SO LONG AS THEY DIE: LETHAL INJECTIONS IN THE UNITED STATES 4 (2006) (noting, in the context of lethal injection, that “[w]hen veterinarians euthanize animals, they . . . use a single massive dose of a barbiturate”).

⁶ See Will Bingham, *Westland/Hallmark Slaughterhouse Worker Sentenced to 270 Days in Jail for Cow Abuse*, INLAND VALLEY DAILY BULL., Sept. 25, 2008; see also David Brown, *USDA Orders Largest Meat Recall in U.S. History*, WASH. POST, Feb. 18, 2008.

⁷ See *infra* notes 71-76 and accompanying text.

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animal slaughter may be worthwhile, even if in-court success continues to be rare.

II. COMPARISON OF LAWS AND REGULATIONS

A. LETHAL INJECTION

Among the thirty-eight United States jurisdictions—thirty-six states, the federal government, and the military—that provide for the death penalty, most allow execution only by lethal injection.⁸ In many of these jurisdictions, the relevant statutes contain only a very general outline of the procedure to be used during an execution, while the appropriate administrative agency (typically a department of correction) has developed a detailed protocol for the procedure.⁹

The first lethal injection protocol was developed by the Chief Medical Examiner of Oklahoma in 1977.¹⁰ Because most jurisdictions borrowed heavily from this first protocol when writing their own, the basic procedure is now fairly standardized.¹¹ It begins with the administration of a fast-acting barbiturate, typically sodium thiopental, which is designed to anesthetize the inmate.¹² Next, the paralytic drug pancuronium bromide is administered to stop the inmate's breath, causing death by asphyxia.¹³ Finally, potassium chloride, a neuromuscular blocking agent, is administered to induce cardiac arrest.¹⁴

Like all criminal punishments, lethal injection is ultimately subject to the Eighth Amendment's ban on cruel and unusual punishments.¹⁵ Lethal injection has been the subject of considerable litigation in recent years, with inmates' lawyers arguing that it is unconstitutional. If the

⁸ See DEATH PENALTY INFO. CTR., DEATH PENALTY FACT SHEET (2009), available at www.deathpenaltyinfo.org/FactSheet.pdf (listing jurisdictions); Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 *FORDHAM L. REV.* 49, 59 (2007) ("Of the thirty-eight death penalty states, lethal injection is the sole method of execution in twenty-eight states and is one of two methods of execution in nine." (citations omitted)). The specific numbers in Professor Denno's article are now slightly outdated, but it remains true that lethal injection is the dominant method of execution.

⁹ See Denno, *supra* note 8, at app. (listing sources for protocols for many states; almost all are policies of departments of correction).

¹⁰ See *id.* at 65-70.

¹¹ See *id.* at 74-75.

¹² See Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 *OHIO ST. L.J.* 63, 97-98 (2002).

¹³ See *id.* at 98.

¹⁴ *Id.*

¹⁵ U.S. CONST. amend. VIII.

dose of the barbiturate is inadequate, they argue, the condemned inmate may experience asphyxiation and cardiac arrest while still conscious, yet may be unable to express his or her suffering because of the paralytic.¹⁶ The Supreme Court rejected these arguments in *Baze v. Rees*,¹⁷ ruling that lethal injection conducted under Kentucky's protocol carries such a small risk of pain that it is neither cruel nor unusual.¹⁸ The Court concluded that the so-called "three-drug cocktail" used by Kentucky is humane and painless if administered properly, that the petitioner had failed to establish a substantial risk of improper administration, and that there was no alternative method that was clearly superior.¹⁹

B. EUTHANASIA OF COMPANION ANIMALS

Like the execution of condemned prisoners, the euthanasia of companion animals is heavily regulated. Every state has addressed the issue by statute or administrative rule;²⁰ however, the content of the regulations varies considerably. Some states mandate a particular method or methods, and others forbid a particular method or methods. For example, California law specifically authorizes animal-shelter employees to euthanize animals by an overdose of a fast-acting barbiturate,²¹ while Florida prohibits the use of paralytics in euthanasia.²² The regulations also vary in scope, with some applying only to cats and dogs,²³ and others applying to a broader range of animals.²⁴ Many apply only to animals in animal shelters.²⁵

The euthanasia of companion animals is also informally "regulated" by the American Veterinary Medical Association, which promulgates its

¹⁶ See, e.g., *Baze v. Rees*, 128 S. Ct. 1520, 1530-31 (2008); *Cooley v. Strickland*, 479 F.3d 412, 414 (6th Cir. 2007) (describing inmates' contention that "if the sodium thiopental is not administered properly and in sufficient dosage, the prisoner could experience intense pain after being injected with the potassium chloride, but would be unable to convey the sensation due to the paralyzing agent in pancuronium bromide").

¹⁷ *Baze v. Rees*, 128 S. Ct. 1520 (2008).

¹⁸ See *id.* at 1533-38.

¹⁹ See *id.*

²⁰ Alper, *supra* note 4, at 841; Am. Veterinary Med. Ass'n, State Laws Governing Euthanasia, www.avma.org/advocacy/state/issues/euthanasia_laws.asp (last visited Jan. 10, 2009).

²¹ See CAL. BUS. & PROF. CODE § 4827 (Westlaw 2009) (exempting euthanasia by a trained shelter employee's administration of sodium pentobarbital from the general prohibition against the practice of veterinary medicine without a license).

²² FLA. STAT. § 828.058(3) (2009); FLA. STAT. § 828.065(3) (2009).

²³ See, e.g., GA. CODE ANN. § 4-11-5.1 (Westlaw 2008).

²⁴ See, e.g., OKLA. STAT. ANN. tit. 4, § 501(A) (Westlaw 2009) (applies to any animal "kept for pleasure rather than utility").

²⁵ See, e.g., OHIO REV. CODE ANN. § 4729.532 (Westlaw 2009).

own euthanasia guidelines for its members to follow.²⁶ However, most companion animals are euthanized by animal shelter technicians, not by veterinarians;²⁷ the guidelines are not binding even on veterinarians;²⁸ and in any case, they permit a very wide range of euthanasia techniques. For example, acceptable methods for euthanizing dogs under the guidelines include the use of injectable barbiturates; inhalant anesthetics; gassing with carbon dioxide or carbon monoxide, and, conditionally, several other gases; electrocution; and physical euthanasia via a captive-bolt gun.²⁹ The laws in most states allow a narrower range of techniques than those approved under the guidelines. As a result, the guidelines have little practical effect, at least for the types of companion animals typically covered under state euthanasia statutes.

C. SLAUGHTER OF FARMED ANIMALS PROTECTED BY THE HUMANE METHODS OF SLAUGHTER ACT

The federal Humane Methods of Slaughter Act³⁰ provides that the slaughter of “livestock” (a term that probably excludes poultry) must be done humanely.³¹ A method of slaughter is deemed humane if either (1) it is in accordance with certain religious practices, such as Jewish ritual slaughter, or (2) the animal is rendered “insensible to pain” before it is shackled, hoisted, and slaughtered.³²

The Act, at least as currently interpreted, permits methods of slaughter that are not used—and almost certainly could not constitutionally be used—in executions. Indeed, it permits methods that would violate most state laws regarding the euthanasia of companion animals. These methods, which include firing captive bolt guns into the

²⁶ See generally AM. VETERINARY MED. ASS'N, AVMA GUIDELINES ON EUTHANASIA (2007), available at www.avma.org/issues/animal_welfare/euthanasia.pdf.

²⁷ Although some states permit only veterinarians to perform euthanasia, the prevailing practice is otherwise. See Alper, *supra* note 4, at 836-37 (“The vast majority of animal euthanasia takes place not in the offices of veterinarians but in animal shelters, where millions of dogs and cats are euthanized each year. Euthanasia in shelters is performed by shelter workers who are not formally trained in veterinary medicine.” (citations omitted)); cf. Mary-Ellen Themens, *Euthanasia Training in New Brunswick Animal Shelters*, 49 CAN. VET. J. 909, 909 (2008) (noting that, in the studied shelters, euthanasia was typically conducted by unsupervised technicians, not veterinarians).

²⁸ See AM. VETERINARY MED. ASS'N, *supra* note 26, at 1 (stating that the guidelines are recommendations “intended to serve as guidance for veterinarians who must then use professional judgment in applying them”).

²⁹ *Id.* at 28-29 (listing approved methods by species).

³⁰ Humane Methods of Slaughter Act of 1958, as amended, 7 U.S.C.A. §§ 1901-1907 (Westlaw 2009).

³¹ *Id.* at § 1901.

³² *Id.* at § 1902.

animals' brains, asphyxiation by carbon dioxide, and, in the case of ritual slaughter, throat-slitting, have been examined in detail elsewhere; suffice it to say that there are serious welfare concerns about some of the slaughter practices that are routinely allowed under the Act.³³

D. SLAUGHTER OF ANIMALS NOT COVERED BY THE HUMANE METHODS OF SLAUGHTER ACT

Although many farmed animals are covered by the Humane Methods of Slaughter Act, a far greater number are not covered. The vast majority of farmed animals are poultry,³⁴ and poultry, as noted above, are excluded from the Act.³⁵ Likewise, farmed fish are not livestock and so are not covered by the Act.³⁶ Nontraditional livestock such as bison and reindeer also, as a practical matter, fall outside the Act's protection.³⁷ Also unprotected, of course, are wild animals that are killed by hunters, animals that are killed during or after laboratory experiments, and many other categories of animals.³⁸ For the sake of brevity, though, this Article will mostly focus on farmed animals.

Although state animal cruelty laws may offer farmed animals limited protection from sadistic and intentional abuse, such laws generally have not been used to constrain the methods by which animals may be slaughtered. Indeed, many animals are slaughtered in ways that are unquestionably painful. For example, farmed and wild-caught fish are often slaughtered by gill-cutting, asphyxiation, or immersion in an ice slurry, which causes hypothermia.³⁹ The scientific consensus is that these methods are painful and cruel and should not be used,⁴⁰ but

³³ See Jeff Welty, *Humane Slaughter Laws*, 70 L. & CONTEMP. PROBS. 175, 176-82 (2007) (summarizing commercial methods of slaughter for several species, and identifying welfare concerns regarding some methods).

³⁴ Food and Agric. Org. of the United Nations, Statistics, www.fao.org/corp/statistics/en (last visited Sept. 20, 2009) (Click on "live animals" on the top banner. On query screen, under "country" scroll down and choose "world." Under "item," scroll down and choose "live animals." Choose "stocks" and "2007" in the remaining two columns.).

³⁵ See *Levine v. Conner*, 540 F. Supp. 2d 1113 (N.D. Cal. 2008); Welty, *supra* note 33, at 198-201.

³⁶ See 7 U.S.C.A. § 1902 (Westlaw 2009) (applies only to "livestock").

³⁷ The U.S. Department of Agriculture, which is charged with enforcing the Act, has declined to promulgate regulations for slaughter of these species. See *Levine v. Johanns*, 2006 U.S. Dist. LEXIS 63667, at *46-51 (N.D. Cal. Sept. 6, 2006).

³⁸ See 7 U.S.C.A. § 1902 (Westlaw 2009) (applies only to "livestock").

³⁹ See Hans van de Vis et al., *Is Humane Slaughter of Fish Possible for Industry?*, 34 AQUACULTURE RESEARCH 211, 211-12 (2003) (describing methods of slaughter for several species and concluding that current methods are not humane).

⁴⁰ See *id.* (noting that "[c]urrent slaughter methods for farmed fish . . . are in most cases not

presumably because they are inexpensive, they are among the dominant methods of commercial fish slaughter. Serious welfare concerns have also been raised about the method by which most poultry are slaughtered, which involves hanging live birds upside down and running them through an assembly line of procedures—including being dipped in electrified water, having their throats cut by machine, and remaining inverted while exsanguinating—that culminate in death.⁴¹ Equally substantial concerns have been raised about the methods used to kill non-farmed animals.⁴²

III. THE HIERARCHY OF SLAUGHTER

Prisoner executions are heavily regulated, as indicated by the length of most lethal injection protocols. Georgia's runs to thirty-one pages,⁴³ the federal government's is more than fifty,⁴⁴ and Tennessee's protocol is over one hundred pages.⁴⁵ The protocols must comply with the statutes under which they are promulgated—statutes that are themselves the product of legislative deliberation—and, ultimately, with the Eighth Amendment. The legality of these protocols is regularly tested through litigation. Furthermore, adherence to these protocols tends to be scrupulous, because executions are infrequent, high-profile events that are typically scrutinized by both the news media and by the attorneys for the condemned inmate.⁴⁶

The killing of nonhuman animals is much less carefully regulated. Furthermore, compliance with and enforcement of the regulations that do

in accordance with [basic humane principles]" and identifying humane and economically feasible alternatives for slaughtering some major commercial species).

⁴¹ See Welty, *supra* note 33, at 180-82 (describing methods of poultry slaughter); United Poultry Concerns, *Poultry Slaughter: The Need for Legislation*, www.upc-online.org/slaughter/slaughter3web.pdf (last visited Jan. 10, 2009) (arguing that current commercial methods of poultry slaughter are inhumane).

⁴² One example that has received considerable scrutiny is the killing of deer by bowhunters. One study suggests that deer shot by bowhunters will die only about half the time, and that these deaths may take hours to occur. Stephen S. Ditchkoff et al., *Wounding Rates of White-tailed Deer with Traditional Archery Equipment*, 52 PROC. ANNUAL CONF. SE. ASS'N FISH & WILDLIFE AGENCIES 244, 246 (1998), available at <https://fp.auburn.edu/sfws/ditchkoff/PDF%20publications/1998%20-%20SEAFWA.pdf>.

⁴³ GA. DEP'T OF CORRECTIONS, *LETHAL INJECTION PROCEDURE* (2007), <http://deathpenaltyinfo.org/GeorgiaLethInj.pdf>.

⁴⁴ U.S. BUR. OF PRISONS, *BOP EXECUTION PROTOCOL* (2001), available at www.thesmokinggun.com/archive/bopprotocol1.html.

⁴⁵ TENN. DEP'T OF CORRECTION, *EXECUTION PROCEDURES FOR LETHAL INJECTION* (2007), available at <http://deathpenaltyinfo.org/TENNIlethinjec.pdf>.

⁴⁶ There were 37 executions in 2008, about one per death-penalty state. DEATH PENALTY INFO. CTR., *supra* note 8.

exist is inconsistent. Interestingly, however, the degree of regulation varies considerably even among animal species.

Companion animals, which receive the most protection, must be euthanized in compliance with state law, often by injection of a barbiturate. Livestock covered by the Humane Methods of Slaughter Act receive less protection, as the law permits such animals to be killed in a wider array of methods, some of which are inhumane. Finally, fish, poultry, and other animals that are excluded from the Act receive no protection, and therefore may be slaughtered in almost any way.⁴⁷ Thus, the law creates a hierarchy of slaughter,⁴⁸ with humans at the top, followed by companion animals, then livestock, and then poultry, fish, and other animals that may lawfully be killed by virtually any method.

This hierarchy has been implicitly recognized, and explicitly put to use, in the recent litigation surrounding the constitutionality of lethal injection. Many states ban the use of paralytics for euthanizing companion animals, yet administer these drugs as part of their execution protocols; therefore, opponents of lethal injection have argued that the process is less humane than animal euthanasia. The implication is that the hierarchy of slaughter has been partially inverted—that animal slaughter is more carefully regulated than executions—and that lethal injection procedures should therefore be reexamined.⁴⁹ At times, courts have expressed interest in this argument,⁵⁰ despite the fact that it is questionable as a matter of law, and plainly wrong as a matter of practice.

While every state regulates animal euthanasia to some extent, these laws form an inconsistent patchwork, with some limited to certain

⁴⁷ See *supra* notes 34-42 and accompanying text.

⁴⁸ Technically, the term “slaughter” means “[t]he killing of animals especially for food,” AM. HERITAGE DICTIONARY (4th ed. 2000), and so does not apply to the execution of human beings in the context considered in this Article. The phrase “hierarchy of slaughter” is used here for convenience because “hierarchy of termination of life” is too cumbersome. Neither the use of that term, nor anything else in this Article, is intended to be a statement either for or against the death penalty.

⁴⁹ See *Baze v. Rees*, 128 S. Ct. 1520, 1535 (2008) (“If pancuronium is too cruel for animals, the argument goes, then it must be too cruel for the condemned inmate.”); Denno, *supra* note 8, at 76 (arguing, for example, that “[t]he methods for euthanizing animals require substantially more medical consultation and concern for humaneness than the techniques used to execute human beings” (citation omitted)).

⁵⁰ See, e.g., *Zimmerman v. Johnson*, 124 S. Ct. 982, 982 (2003) (Stevens, J., dissenting from denial of stay of execution) (arguing that the Court should stay the execution of a petitioner who “contend[ed] that the Texas Legislature has recently outlawed the use of the method for animal euthanasia because it is so excruciatingly painful”); *Beardslee v. Woodford*, 395 F.3d 1064, 1073 (9th Cir. 2005) (finding it “somewhat significant” that many states forbid the use of neuromuscular blocking agents during animal euthanasia).

species, others limited to certain contexts—such as animal shelters—and many providing only very general guidance.⁵¹ Thus, these laws are like a blanket full of holes: they provide the appearance of warmth, but little real comfort.

Furthermore, the laws applicable to animal euthanasia, unlike the protocols governing lethal injection, are rarely tested through litigation. There are no human plaintiffs for whom animal euthanasia is a life-or-death issue,⁵² and there is no Eighth Amendment equivalent to provide legal footing for a challenge in any event.⁵³

As a matter of practice, it is even clearer where animals fall in the hierarchy. Executions are infrequent and are usually conducted with painstaking care, while euthanasia of animals is common and is often performed hastily by gassing and other methods that are plainly less humane than even an imperfect system of lethal injection. The majority in *Baze* echoed this last point, noting that animals may be killed by stunning or by “severing [their] spinal cord[s].”⁵⁴

Beyond noting its existence, two points are worth making about this legal hierarchy. First, it does not mirror any biological reality. There is no correlation between a species’ place in the hierarchy and its ability to feel pain, its intelligence, or other factors that might be relevant to how life should be terminated. Deer are no different from sheep in any relevant capacity, yet sheep fall within the protections of the Humane Methods of Slaughter Act, while deer do not.⁵⁵ Likewise, pigs, which fall within the Act but are not protected by companion animal euthanasia

⁵¹ See generally *supra* notes 20-25 and accompanying text.

⁵² Because euthanasia laws principally affect animals, not humans, standing is a serious problem for animal advocates who want to challenge euthanasia practices. Perhaps inhumane euthanasia procedures could be challenged under a law like North Carolina’s Civil Remedy for Protection of Animals statute, N.C. GEN. STAT. ANN. § 19A-1 et seq. (Westlaw 2008), which allows “any person” to seek an injunction to stop animal cruelty, but most states have no comparable statute. See William A. Reppy, Jr., *Citizen Standing To Enforce Anti-Cruelty Laws by Obtaining Injunctions: The North Carolina Experience*, 11 ANIMAL L. 39 (2005).

⁵³ But see *infra* notes 95-96 and accompanying text (describing lawsuits that have been filed over euthanasia methods).

⁵⁴ *Baze*, 128 S. Ct. at 1535-36. While the majority’s conclusion is correct, the examples it uses are misleading, as they are methods for terminating life that are not typically used with companion animals. Even under the AVMA’s very permissive guidelines, stunning is “not recommended as a sole means of euthanasia, but should be considered [an] adjunct[] to other agents or methods.” AM. VETERINARY MED. ASS’N, *supra* note 26, at 13. And the severing of spinal cords, i.e., decapitation, is typically used only “to euthanize rodents and small rabbits in research settings.” See *id.* at 14. Nonetheless, it is true that the AVMA guidelines allow typical companion animals, such as dogs, to be euthanized by methods including gassing with carbon monoxide or carbon dioxide, and, conditionally, electrocution or use of a captive bolt gun. See *id.* at 28.

⁵⁵ See *supra* notes 34-42 and accompanying text (explaining that nontraditional livestock are not protected by the Humane Methods of Slaughter Act).

laws, are in some ways more intelligent than dogs,⁵⁶ which are higher in the hierarchy and so more protected.⁵⁷ Rather than biology, it is a species' usual relationship to humans that appears to determine where it falls in the hierarchy. Thus, companion animals, which are often viewed as family members, receive the most protection. Large livestock, which have relatively long lifespans, and which, at least before the rise of factory farms, were viewed by farmers as individuals, are next. Poultry, fish, and wild animals rarely have individual relationships with humans and receive the least protection.⁵⁸

Second, the same hierarchy is reflected in legal scholarship. The vast majority of legal scholarship deals with humans, of course, but the majority of articles dealing with animals concern companion animals. A smaller volume of scholarship deals with the treatment of large livestock, often arguing for greater regulation of on-farm conditions. Other animals, including poultry and fish, receive virtually no attention.⁵⁹ Ironically, this may in part be a "chicken-and-egg" problem. Because there is so little law about the animals at the bottom of the hierarchy, there is little grist for legal scholars' mills; but the fact that these animals are so infrequently discussed in legal scholarship means that they remain invisible—at least in a legal sense—and so there is little momentum to enact more-protective laws.

IV. FEDERALISM

Historically, state legislatures have been viewed as conservative institutions. This image dates back at least to southern states' efforts to preserve slavery under the banner of states' rights, and it was reinforced by the fact that many key changes in the civil-rights era were imposed by Congress over the objections of the states.⁶⁰ Because both the protection

⁵⁶ The relative intelligence of pigs and dogs is discussed in Lisa Duchene, *Probing Questions: Are Pigs Smarter than Dogs?*, www.rps.psu.edu/probing/pigs.html (last visited Feb. 26, 2009) (discussing university research into porcine intelligence).

⁵⁷ See *supra* notes 34-42 and accompanying text (explaining that nontraditional livestock are not protected by the Humane Methods of Slaughter Act).

⁵⁸ The fact that the animals at the top of the hierarchy are large, easy-to-anthropomorphize animals that are culturally connected to humans is reminiscent of the privileged position of so-called charismatic megafauna in environmental law and policy. See, e.g., Shannon Petersen, Comment, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 ENVTL. L. 463, 467 (1999) ("[M]ost in Congress believed the [Endangered Species] Act to be a largely symbolic effort to protect charismatic megafauna representative of our national heritage, like bald eagles, bison, and grizzly bears.").

⁵⁹ *Id.*

⁶⁰ See, e.g., Erwin Chemerinsky, *Progressive and Conservative Constitutionalism as the United States Enters the 21st Century*, 67 L. CONTEMP. PROBS. 53, 56 (2004) ("Throughout U.S.

of inmates during execution and the protection of animals during slaughter are usually seen as liberal causes,⁶¹ one might expect the federal government to be more fertile ground than the states for strengthening end-of-life protections. At least in recent years, however, the converse has been the case: the states have enacted reforms while the federal government has mostly been idle.

In the context of lethal injections, several states have recently revised their execution protocols in order to provide stronger assurances of humane death. For example, California revised its protocol in response to a court order, while Florida revised its own after a botched execution.⁶² In addition, Nebraska recently switched to lethal injection after its supreme court struck down the use of the electric chair.⁶³ Prior to New Jersey's 2007 abolition of the death penalty, its protocol was distinctive because it did not call for the use of a paralytic drug at all, presumably in order to minimize the risk of inflicting a painful death.⁶⁴

The states have also acted to reform the procedures by which companion animals may be euthanized, while the federal government has done virtually nothing in this area. In 2004, Kentucky banned the use of gunshot as a routine method of euthanasia.⁶⁵ In 2005, Rhode Island banned the use of carbon monoxide gas chambers for euthanasia.⁶⁶ By 2007, all Virginia municipalities were voluntarily eliminating the use of

history, conservatives have invoked federalism to limit federal power, such as in the use of 'states' rights' to oppose abolition of slavery, New Deal programs, desegregation, and federal civil rights laws.'").

⁶¹ *But see, e.g.,* Carol Marbin Miller, *An Unlikely Champion in Execution Fight*, MIAMI HERALD, Jan. 26, 2006 (describing the role of Dr. David Lubarsky, chair of the University of Miami medical school's anesthesiology department and "a conservative Republican with an MBA from Duke University's [b]usiness [s]chool" in supporting the litigation challenging lethal injection); MATTHEW SCULLY, DOMINION (2003) (presenting a conservative Republican author's argument for much stronger animal-welfare protection).

⁶² Seema Shah, *How Lethal Injection Reform Constitutes Impermissible Research on Prisoners*, 45 AM. CRIM. L. REV. 1101, 1114-29 (2008) (describing the impetus for these reforms and the reforms themselves); DEATH PENALTY INFO. CTR., NEW EXECUTION PROTOCOLS, <http://deathpenaltyinfo.org/lethal-injection-moratorium-executions-ends-after-supreme-court-decision#drugs> (scroll to "Additional Resources" and "New Execution Protocols") (last visited Jan. 10, 2009) (linking to several states' revised protocols).

⁶³ *See State v. Mata*, 745 N.W. 2d 229, 278 (Neb. 2008) (ruling that the use of electrocution violates the state constitution's prohibition against cruel and unusual punishments); LEGISLATIVE BILL 36 (May 28, 2009), available at www.legislature.ne.gov/FloorDocs/Current/PDF/Slip/LB36.pdf.

⁶⁴ *See Baze v. Rees*, 128 S. Ct. 1520, 1545-46 (2008). (Stevens, J., concurring in the judgment) (explaining that the New Jersey protocol omitted a paralytic despite an express statutory requirement that a paralytic be used); N.J.P.L.2007, c. 204 (repealing New Jersey's death-penalty statutes).

⁶⁵ KY. REV. STAT. ANN. § 258.505 (Westlaw 2009).

⁶⁶ R.I. GEN. LAWS § 4-19-12(a) (2009).

gas chambers in animal shelters,⁶⁷ a policy the legislature then codified into state law.⁶⁸ Legislation has recently been introduced to strengthen the euthanasia laws in Georgia,⁶⁹ Illinois,⁷⁰ and perhaps elsewhere.

As to the slaughter of farmed animals, several states have enacted humane-slaughter provisions that are stronger than the federal Humane Methods of Slaughter Act.⁷¹ California's, for example, covers poultry as well as livestock.⁷² Similarly, some states have enacted downed animal laws that are more protective than USDA regulations concerning such animals.⁷³ California responded promptly to the Hallmark Meat Company crisis by passing legislation that strengthened its downed animal law.⁷⁴ By contrast, although legislation addressing downed animals had already been introduced in Congress before the Hallmark story broke, Congress took no action on the legislation even after the well-publicized incident.⁷⁵ Similar legislation remains stalled today.⁷⁶

The fact that federalism has facilitated, rather than obstructed,

⁶⁷ See Press Release, Humane Soc'y of the U.S., 2007 Marks End of Gas Chamber for Cats and Dogs in Virginia (Aug. 10, 2007), available at www.hsus.org/press_and_publications/press_releases/2007_marks_end_of_gas_chamber_081007.html.

⁶⁸ VA. CODE ANN. § 3.2-6505(B) (2009).

⁶⁹ S.A. Reid, *Legislature 2008: Gas Chambers Would Die*, ATLANTA J.-CONST., Mar. 6, 2008 (describing introduction of H.R. 1060, 2007-2008 Leg. (Ga. 2008)).

⁷⁰ H.R. 4844, 95th Gen. Assemb. (Ill. 2008).

⁷¹ Welty, *supra* note 33, at 189-91 (discussing state humane slaughter laws).

⁷² CAL. FOOD AND AGRIC. CODE § 19501(a) (Westlaw 2009).

⁷³ Compare, e.g., KAN. STAT. ANN. 47-1008(b) (2008) (requiring immediate humane euthanasia of downed livestock at market) with 9 C.F.R. 309.3(e) (2009) (allowing slaughter of downed cattle on a case-by-case basis).

⁷⁴ See Assemb. B. 2098, 2008 Leg. (Cal. 2008) (strengthening CAL. PENAL CODE 599(f) by, inter alia, adding a prohibition against "process[ing] . . . nonambulatory animals for human consumption").

⁷⁵ The Downed Animal and Food Safety Protection Act was introduced in both chambers of Congress in January 2007. H.R. 661, 110th Cong. (2007); S. 394, 110th Cong. It would have required stockyards and slaughterhouses to euthanize downed animals immediately and humanely. In the House, it was referred to the House Committee on Agriculture in January 2007 and to the Subcommittee on Livestock, Dairy, and Poultry in February 2007. The subcommittee neither held hearings nor took any other action on the bill. In the Senate, the bill was referred to Committee on Agriculture, Nutrition, and Forestry in January 2007. That committee likewise took no action on the bill. This is consistent with Congress's repeated inaction on similar bills. See, e.g., Downed Animal Protection Act, H.R. 1421, 107th Cong. (2001); Downed Animal Protection Act, S. 1779, 109th Cong. (2005); Downed Animal Enforcement Act of 2008, S. 2770, 110th Cong. (2008).

⁷⁶ But see Humane Soc'y of the U.S., Key Progress for Animals in 110th Congress, www.hsus.org/legislation_laws/federal_legislation/great_strides_for_animal.html (last visited Jan. 10, 2009) (asserting that "legislation to ban slaughter of downed cattle is poised for action when the 111th Congress revisits an economic stimulus package in 2009"). It should also be noted that the USDA has promulgated proposed regulations that would ban the slaughter of downed animals. See Requirements for the Disposition of Cattle that Become Non-Ambulatory Disabled Following Ante-Mortem Inspection, 73 Fed. Reg. 50889 (Aug. 29, 2008) (to be codified at 9 C.F.R. pt. 309).

stronger regulation of animal slaughter is consistent with recent developments in other animal-welfare contexts. Ballot measures designed to improve on-farm conditions for farmed animals have passed in Florida,⁷⁷ Arizona,⁷⁸ and most recently, California,⁷⁹ while the federal government has done nothing to improve on-farm welfare. In addition, cockfighting was virtually eliminated through a state-by-state campaign before the federal government took meaningful action.⁸⁰ State animal-cruelty laws have also been used to prosecute slaughterhouse workers involved in animal abuse.⁸¹

This is not to suggest that Congress has done nothing to protect animals. Indeed, the Humane Methods of Slaughter Act itself is proof that the federal government can take dramatic steps. But in recent years, progress at the federal level has been slow,⁸² and the federal courts have invalidated at least one of the few animal-protection laws that Congress has passed.⁸³ The lesson for animal advocates is not to ignore, but rather to focus on, the states rather than the federal government. This is somewhat contrary to the European model that many animal advocates

⁷⁷ See Fla. Amend. 10 (2002) (codified at FLA. CONST. art. X, § 21) (amending the state constitution by prohibiting close confinement of pregnant sows).

⁷⁸ See Ariz. Proposition 204 (2006) (codified at Ariz. Rev. Stat. Ann. § 13-2910.07 (2009)) (prohibiting close confinement of pregnant sows and veal calves, effective Dec. 31, 2012).

⁷⁹ See Cal. Proposition 2 (2008) (codified at CAL. HEALTH & SAFETY §§ 25990-94 (Westlaw 2009)) (prohibiting close confinement of many farmed animals, effective Jan. 15, 2015).

⁸⁰ Louisiana was the last state to ban cockfighting; it was banned in July 2007. LA. REV. STAT. ANN. § 14:102.23 (2008)); Int'l Herald Tribune, *Louisiana Governor Signs Cockfighting Ban, Effective Next Summer*, July 12, 2007. Most states banned it years earlier, usually by legislation but sometimes by ballot initiative. See Animal L., *2007 Legislative Review*, 14 ANIMAL L. 265, 297 (2008) (noting that ballot "initiatives have successfully banned cockfighting in Arizona, Missouri, and Oklahoma"). The federal government did little to combat cockfighting until it belatedly passed the Animal Fighting Prohibition Enforcement Act in 2007, which makes interstate commerce related to cockfighting a federal felony. See Pub. L. No. 110-22, 121 Stat. 88 (2007) (codified at 18 U.S.C. § 49 and 7 U.S.C. § 2156).

⁸¹ See, e.g., Bingham, *supra* note 6 (describing California convictions in Hallmark Meat Co. case); Catherine Donaldson-Evans, *North Carolina Slaughterhouse Worker Charged with 6 Counts of Animal Cruelty*, FOX NEWS, July 1, 2008 (describing North Carolina charges in pig farm cruelty case).

⁸² A list of animal protection legislation passed recently by Congress is available online at Press Release, Humane Soc'y of the United States, *Prospects Even Brighter for New Congress and Administration* (Dec. 15, 2008), www.hsus.org/press_and_publications/press_releases/progress_on_animal_protection_in110th_congress_121508.html.

⁸³ See, e.g., *United States v. Stevens*, 533 F.3d 218 (3d Cir. 2008) (en banc) (invalidating, on First Amendment grounds, statute criminalizing the sale of depictions of animal cruelty in interstate commerce, e.g., "crush" videos); *cf.* *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (striking down municipal ordinances that forbade ritual animal sacrifice).

admire, but the European Union has shown a willingness to lead on animal welfare issues, while our federal government has not.⁸⁴

V. COURTS

The reforms discussed in the previous section have been enacted largely through ballot initiatives or legislative action. Very few reforms have taken place, in the states or at the federal level, by court order, i.e., as a direct result of litigation victories.

Legal challenges to methods of execution, while sometimes prevailing in the short run, have generally failed in the long run. *Baze* is, of course, the best example: after years of expensive and time-consuming litigation, the petitioner's challenge to Kentucky's lethal injection protocol was rejected. In fact, the Supreme Court has *never* held a method of execution unconstitutional.⁸⁵ Its rulings have held that the Eighth Amendment permits execution by firing squad,⁸⁶ electrocution,⁸⁷ gassing,⁸⁸ and, of course, lethal injection.⁸⁹ The Court has also approved a second try at execution after one botched attempt,⁹⁰ and in *Baze*, it established a relatively exacting standard for reviewing claims that particular methods of execution are cruel and unusual.⁹¹

The Court itself recognizes that progress toward more humane

⁸⁴ See, e.g., Gaverick Matheny & Cheryl Leahy, *Farm Animal Welfare, Legislation, and Trade*, 70 L. & CONTEMP. PROBS. 325, 339-43 (2007) (comparing animal welfare regulations in the United States and Europe).

⁸⁵ See *Baze v. Rees*, 128 S. Ct. 1520, 1530 (2008).

⁸⁶ *Wilkerson v. Utah*, 99 U.S. 130, 134-35 (1878).

⁸⁷ See *In re Kemmler*, 136 U.S. 436, 443 (1890).

⁸⁸ The Court has never ruled directly on the constitutionality of the gas chamber, but its decision denying certiorari in *Gray v. Lucas* functions as a shadow decision on the merits. *Gray v. Lucas*, 463 U.S. 1237, 1239-40 (1983) (Burger, C.J., "[T]he showing made by petitioner does not justify a court holding 'that, as a matter of law or fact, the pain and terror resulting from death by cyanide is so different in degree or nature from that resulting from other traditional modes of execution as to implicate the eighth amendment right.'" (citing *Gray v. Lucas*, 710 F.2d 1048, 1061 (5th Cir. 1983))).

⁸⁹ See *Baze*, 128 S. Ct. 1520.

⁹⁰ See *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).

⁹¹ The Court held that, to prevail, a plaintiff contesting a method of execution must establish that the method entails a "substantial risk of serious harm" that is "objectively intolerable." *Baze*, 128 S. Ct. at 1530-31 (citing *Farmer v. Brennan*, 511 U.S. 825, 842, 846 & n.9 (1970)). To the extent that the plaintiff's analysis involves contrasting the challenged method with an alternative, he must show that the alternative method is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *Id.* at 1532. In part because of concerns about courts' competence to adjudicate close scientific disputes, the Court rejected the argument that a plaintiff could prevail simply by showing that a better or safer method was available, even if the improvement was slight. *Id.* at 1531.

executions has taken place despite, rather than because of, its decisions.⁹² Admittedly, a few lower courts have been more receptive to arguments about the constitutionality of various methods of execution,⁹³ but many of these cases have been decided on technical grounds, such as a state's failure to provide for a public-comment period on its execution protocols.⁹⁴ Most cases—certainly most of those considering the fundamental issue—have rejected challenges to methods of execution.

The courts' response to litigation about methods of euthanasia for companion animals has also been lukewarm. Only a few cases have been filed, most involving challenges to the use of carbon monoxide gas chambers by animal shelters on the grounds that the use of carbon monoxide is inconsistent with the state's euthanasia statutes. With one notable exception,⁹⁵ courts have typically refused to prohibit the use of gas chambers.⁹⁶

The courts have been even less receptive to challenges to the methods used to slaughter farmed animals. Animal advocates have targeted ritual-slaughter exemptions to humane slaughter laws, asserting that the exceptions violated the Establishment Clause or were otherwise invalid, but the courts have uniformly upheld the exemptions.⁹⁷ More recently, the courts have rejected efforts to compel the United States Department of Agriculture to interpret the Humane Methods of Slaughter

⁹² See *id.* 128 S. Ct. at 1538 (“Throughout our history, whenever a method of execution has been challenged in this Court as cruel and unusual, the Court has rejected the challenge. Our society has nonetheless steadily moved to more humane methods of carrying out capital punishment . . . , culminating in today’s consensus on lethal injection.”).

⁹³ See, e.g., *State v. Mata*, 745 N.W.2d 229, 278 (Neb. 2008) (holding that execution by electrocution violates the state constitution’s prohibition against cruel and unusual punishment); *Fierro v. Gomez*, 77 F.3d 301, 309 (9th Cir.1996) (holding that use of the gas chamber violates the Eighth Amendment), *vacated on other grounds sub nom.* *Fierro v. Terhune*, 147 F.3d 1158 (9th Cir. 1998).

⁹⁴ See, e.g., ASSOC. PRESS, *Judge’s Ruling Could Delay Arkansas Inmate’s Execution*, Aug. 29, 2008 (describing state court’s ruling that Arkansas’s execution protocol is “subject to the Arkansas Administrative Procedure Act and therefore subject to public scrutiny and input”); *Morales v. Cal. Dep’t of Corrections and Rehabilitation*, 168 Cal. App. 4th 729 (Cal. Ct. App. Nov. 21, 2008) (invalidating California’s new protocol based on failure to provide opportunity for public comment).

⁹⁵ In 2007, a judge in Fulton County, Georgia, issued an injunction prohibiting the Georgia Department of Agriculture from allowing animal shelters to use the gas chamber. S.A. Reid, *Judge Says Euthanasia with Gas Must Stop*, ATLANTA J.-CONST., Mar. 24, 2007.

⁹⁶ See, e.g., *State ex rel. Phelps*, 708 N.E.2d 784 (Ohio Ct. App. Dec. 16, 1998) (refusing to prohibit the euthanasia of dogs by carbon monoxide); *State v. Lipsett*, 1997 Conn. Super. LEXIS 907 (Conn. Super. Ct. Apr. 9, 1997) (dismissing criminal animal cruelty charges against animal nuisance control operator who trapped, then drowned, two raccoons).

⁹⁷ See *Jones v. Butz*, 374 F. Supp. 1284, 1291-93 (S.D.N.Y. 1974) (religious slaughter prong of HMSA does not violate the Free Exercise or Establishment Clauses of the First Amendment); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (striking down ordinance that forbade ritual animal sacrifice).

Act as applying to poultry⁹⁸ and to nontraditional livestock, such as bison.⁹⁹ Reinforcing the point about federalism made above, the state courts have arguably been more receptive than the federal courts to animal issues generally,¹⁰⁰ but they have been just as unwilling to strengthen the regulation of slaughter.¹⁰¹

This lack of in-court success does not mean that the litigation efforts described above have been failures. With respect to lethal injection, litigation has focused an enormous amount of media attention on execution procedures,¹⁰² leading several states to revise their protocols as a result.¹⁰³ Litigation efforts regarding the euthanasia of companion animals have also drawn some media attention¹⁰⁴ and, in at least one case, resulted in a settlement that changed an animal shelter's euthanasia procedures.¹⁰⁵ Litigation regarding farmed animals has not yet resulted in changes in the law, but the fact that the litigation over lethal injection and companion-animal euthanasia has resulted in concrete changes provides reason for animal advocates to be optimistic.

⁹⁸ Levine v. Conner, 540 F. Supp. 2d 1113 (N.D. Cal. 2008).

⁹⁹ Levine v. Johanns, 2006 U.S. Dist. LEXIS 63667 (N.D. Cal. Sept. 6, 2006).

¹⁰⁰ See, e.g., N.J. Soc'y for the Prevention of Cruelty to Animals v. N.J. Dep't of Agric., 955 A.2d 886 (N.J. 2008) (rejecting as insufficiently protective of animals some regulations developed by New Jersey's Department of Agriculture pursuant to statutory command that it develop humane standards for animal husbandry).

¹⁰¹ See Farm Sanctuary, Inc. v. Dep't of Food & Agric., 63 Cal. App. 4th 495 (Cal. Ct. App. Apr. 22, 1998) (holding that California's administrative regulations permitting ritual slaughter of poultry do not violate the State's humane slaughter statute).

¹⁰² See John M. Broder, *Lethal Injection Draws a New National Spotlight*, N.Y. TIMES, Feb. 23, 2006; Richey, *supra* note 5; Henry Weinstein, *State Will Help Shape Fate of Lethal Injection*, L.A. TIMES, Feb. 23, 2006.

¹⁰³ For a partial list of states that have revised their execution protocols since 2007, see Death Penalty Info. Ctr., *Lethal Injection: Moratorium on Executions Ends After Supreme Court Decision*, www.deathpenaltyinfo.org/lethal-injection-moratorium-executions-ends-after-supreme-court-decision (last visited Jan. 15, 2009).

¹⁰⁴ See, e.g., Reid, *supra* note 95; Beth Warren, *Lawsuit Targets Use of Gas for Pet Euthanasia*, ATLANTA J.-CONST., Mar. 23, 2007; see generally Maryann Mott, *Animal Gas Chambers Draw Fire in U.S.*, NAT'L GEOGRAPHIC, Apr. 11, 2005.

¹⁰⁵ In March 2008, two animal-advocacy organizations sued officials of Union County, North Carolina, alleging that the county was using the gas chamber, in violation of state law, to euthanize young, old, pregnant, sick, and injured animals. The case was settled in October 2008, apparently without admission of wrongdoing by the county, but with the county agreeing to limit its use of the gas chamber. The lawsuit did not seek, and the county did not agree, to end the use of the gas chamber for healthy adult animals. See N.C. Coal. for Humane Euthanasia, <http://ncche.com/> (last visited Jan. 16, 2009) (describing the litigation and posting a copy of the complaint); Jim Bradley, *Animal Rights Activists Suing Union County Sheriff's Office*, WSOCTV.COM, Mar. 7, 2008, available at www.wsoctv.com/news/15529703/detail.html.

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DIFFERENT ENDINGS

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VI. CONCLUSION

A casual reader of news reports concerning the recent litigation over lethal injection or about the events at the Hallmark Meat Company might conclude that companion animals are euthanized more humanely than condemned inmates are executed and that any problems concerning the slaughter of farmed animals have been addressed. As this Article has demonstrated, neither conclusion is true. There is a hierarchy of slaughter, with executions of condemned inmates being much more carefully regulated than the euthanasia of companion animals, and with farmed animals receiving limited protection under the Humane Methods of Slaughter Act, or none at all, depending on species.

Animal advocates interested in flattening this hierarchy—in “leveling up” the regulation of animal slaughter so that non-human animals are treated with a degree of care similar to that currently reserved for condemned human beings—can learn several lessons from recent efforts to improve the protocols governing lethal injection. These lessons include the value of the states as forums for change and the value of litigation, even when the direct results, as in *Baze*, are adverse.

