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ASSOCIATION'S COMMITTEE ON ANIMALS AND THE LAW**

L a w s a n d P a w s

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From the Chair

The New York Times recently ran an article on the illegal trade of apes.¹ Consumers with enough money, can use social media apps like Whatsapp and Instagram to buy baby primates like bonobos and orangutans from a trafficker who goes by the name Tom. The author focused on a sting where an “ape trafficking detective” purchased two endangered baby orangutans in an attempt to infiltrate a global market that deals in the sale of apes. At the end of the article, the orangutan babies are in fact delivered to the detective, in the back seat of a car “clutching each other” and terrified. While authorities arrested the driver, the capo, Tom, was not.

The article mentions plying apes with drugs and alcohol to the point of addiction, to make them more compliant, easier to work with and transport. The author writes about other atrocities including using a female orangutan for prostitution; infant chimps, one only a month old, smuggled in plastic sacks and carry-on luggage; not to mention the number of apes that are killed in the process of smuggling. Often mothers are killed in front of their babies. The apes that are rescued from these smugglers suffer from withdrawal from the drugs and alcohol they were given and Post Traumatic Stress Disorder.

The familiar quote about the relationship between a nation’s moral progress and its treatment of animals, attributed to Gandhi, comes to mind. What does this tell us about ourselves at a time when science is expanding our understanding of animals’ social behavior and emotional

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capacities?

Humans share between 95% and 98.8% (depending on which calculation you look at)² of their DNA with chimpanzees and bonobos; humans share a common ancestor with all great apes- add gorillas and orangutans to the list above. Humans are, in fact, great apes.

Images of juvenile gorillas playing, mother chimpanzees carrying their babies in their arms, and the thoughtful gaze of a bonobo are all graphic evidence of our similarities. But we don't have to rely on our emotional observations that "they're just like us" when studies show what many already feel.

Notions of empathy and love, once only attributed to humans, are shown to exist among primates like chimpanzees and bonobos³ but also among animals not as genetically related to us, but who spent time co-evolving with us like dogs.⁴ Observations on yawn-contagion show that chimpanzees, bonobos, and gelada baboons can empathize among their own kind (and, quite amazingly, dogs can empathize with humans!).⁵ Chimpanzees have been observed reconciling with one another after disputes⁶ and both chimps and bonobos have been observed comforting others who are distressed by hugging, kissing, embracing, and inspecting a victim's wounds.⁷

Chimpanzees are also known to use conflict resolution to bring disputing parties together.⁸ Female chimps have been observed physically bringing males together by the arms attempting to broker resolution. Lead males in chimp groups have been observed literally breaking-up fights by separating disputants.

Chimps will adopt the offspring of other chimps who have died or are unable to care for their young and they'll also assist much older chimps who need help eating or getting water.⁹

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How to enter the 2018 Committee on Animals and the Law Student Writing Competition

The Committee on Animals and the Law of the New York State Bar Association is very pleased to announce the Tenth Annual Student Writing Competition. The deadline for submission is **July 12, 2018**.

The Committee on Animals and the Law was established to provide information resources for the New York State Bar Association's members and the public about non-human, animal-related humane issues, which arise from and have an effect upon our legal system. This competition seeks to foster legal scholarship among law students in the area of animals and the law. This competition provides law students with an incentive and opportunity to learn more about this area of law.

Law students (which include J.D., L.L.M., Ph.D., and S.J.D. candidates) are invited to submit to the Committee on Animals and the Law an article concerning any area of Animal Law. All submissions will be reviewed by a panel of attorneys and other professionals practicing or otherwise involved in animal law. The winner will be chosen in accordance with the competition rules. The first place winner will receive \$1,000 and a certificate of achievement. The second place winner will receive \$500 and a certificate of achievement.

Format: One hard copy of the written submission and one electronic copy in Microsoft Word format on a disk or CD must be submitted by mail, **postmarked no later than July 12, 2018**, and addressed to:

Kimberly Francis,
NYSBA Staff Liaison
Committee on Animals and the Law
New York State Bar Association
One Elk Street
Albany, NY 12207

Committee on Animals and the Law 2018 Annual Meeting

On January 24, 2018 the Committee on Animals and the Law will hold its annual CLE program. This years program is "Animal Cruelty 101: Why All Animals Are Not Treated Equally Under The Law—Farm Animals to Companion Animals." The program will be presented by experts in their fields and will offer a practical discussion of laws relating to animals. Topics discussed will include the current status of New York State and federal animal cruelty laws, ethics in animal crimes and advocating for more effective animal cruelty laws. To register, please visit www.NYSBA.org.



The Student Writing Competition

This issue of *Laws and Paws* includes the 2017 Student Writing articles, First Place: *Stepping Up For Horses: In The Absence of Strong Federal Regulations, Can California End Institutionalized Abuse?*, by Allison K. Athens and Third Place: *Mutt Mutation: Practical and Legal Remedies for Man's Harmful Interference into Canine Genetics*, by Micaylee A. Noreen.

Amy Pontillo, Esq., Committee Chairperson
Ashlee Cartwright, Esq., Committee Co-Chairperson
Kirk Passamonti, Esq., Publications Subcommittee Chairperson
Charis Nick-Torok, Esq., Secretary

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There is much more evidence supporting the advanced mental and emotional capabilities of these beings. And it's not to say that all similarities between humans and animals are about love, empathy, and reconciliation either. There are definite comparisons that reflect our darker more violent sides that are obvious¹⁰.

I was particularly moved when I read the *New York Times* article. In fact, I was heartbroken. Each year the Committee on Animals and the Law presents a CLE program on animal law issues. This coming year, for 2018, the program is entitled, "Animal Cruelty 101: Why All Animals Are Not Treated Equally Under the Law - Farm Animals to Companion Animals, Litigation to Advocacy, and Everything In Between". Cruelty to animals must necessarily be understood to mean how humans treat animals cruelly. When we, as lawyers, look at animal welfare it should be viewed from a very human perspective. Who are we as a society when we are treating animals as if they don't have an emotional understanding of themselves or as if their fear isn't as paralyzing as a human's? Further, if we can treat non-human animals in ways evidenced by the ape smuggling, how are we regarding our fellow humans?

Some discredit anthropomorphism, the attribution of human characteristics or behavior to an animal. But how can we not anthropomorphize when we do share such similar characteristics, behaviors, and emotions? And not only are humans one of the great apes, we are in our basic classification, animals.

Amy Pontillo, Esq., Committee Chairperson

¹Jeffrey Gettleman, *Smuggled, Beaten and Drugged: The Illicit Global Ape Trade*, THE NEW YORK TIMES, November 5, 2017, <https://www.nytimes.com/2017/11/04/world/africa/ape-trafficking-bonobos-orangutans.html> (last visited Nov 11, 2017).

²Frans de Waal, *The Bonobo and the Atheist: in search of humanism among the primates* 81 (1st ed. 2013).

³Frans de Waal, *The Age of Empathy: Nature's Lessons for a Kinder society* 48-49 (1st ed. 2009).

⁴Berns, Gregory. *How Dogs Love Us: A Neuroscientist and His Adopted Dog Decode the Canine Brain* (2013).

⁵Romero, Theresa, Akitsugu Konno, and Toshikazu Hasegawa. "Familiarity Bias and Physiological Responses in Contagious Yawning by Dogs Support Link to Empathy." PLOS One, August 2013, Vol. 8 Iss. 8 e71365; plosone.org. The study observed dogs caught the yawn of humans they were most familiar with. This was the first instance of interspecies yawn contagion where the yawn recipient was not human. Yawn contagion has been linked with empathy, the ability to understand how another is feeling and sharing those feelings.

⁶Frans de Waal, *The Bonobo and the Atheist: in search of humanism among the primates* 97-98 (1st ed. 2013).

⁷*Id.* at 144-45.

⁸Frans de Waal, *The Age of Empathy: Nature's Lessons for a Kinder society* 34 (1st ed. 2009).

⁹Frans de Waal, *The Bonobo and the Atheist: in search of humanism among the primates* 117 (1st ed. 2013).

¹⁰ de Wall mentions in his observations of bonobo behavior that there would be no need for reconciliation if it wasn't preceded by aggression.

*Constructive Approaches to Consensus Building and Conflict Resolution
Under the Animal Welfare Act
James F. Gesualdi*

You can't solve problems until you understand the other side.

Jeffrey Manber

Leveraging and Respecting the Human Element Within Animal Law

The relatively young and still rapidly evolving field of Animal Law is fertile ground for the use of alternative dispute resolution and other innovative means of resolving conflict and advancing the interests of the parties, including those of animals themselves. The tremendous passion within the field may make such methods seem too challenging, but more collaborative, restorative or simply constructive approaches actually elevate legal practice within Animal Law consistent with some of the underlying values at the heart of the field. Simply put, the vast majority of the public, and many within Animal Law, regardless of perspectives (including most seeking greater protections for animals and their welfare) agree that many animals should be accorded greater compassion, dignity and respect. Experience within Animal Law (and land use/municipal law) demonstrates that consensus building and conflict resolution techniques generally lead to more civil, respectful and constructive engagement. Within the practice of Animal Law, such approaches can help drive down the hard and soft costs of conflict in terms of litigation and associated expenditures, and re-focus resources towards improvements beneficial to the animals.

The following discusses successful examples of consensus building and conflict resolution under the federal Animal Welfare Act.

The Animal Welfare Act

The Animal Welfare Act (“AWA”)¹ was enacted by Congress in 1966 to provide for the humane care and treatment of certain covered animal species (for the most part mammals) used in regulated activities, i.e., research, exhibition, commercial breeding and interstate transport.² The United States Department of Agriculture (“USDA”) Animal and Plant Health Inspection Service (“APHIS”) Animal Care unit is responsible for implementing, administering and enforcing the AWA. In the AWA’s fifty plus years the agency has effectively employed a means of multi-party consensus building (to eliminate and reduce conflict), i.e., the Marine Mammal Negotiated Rulemaking (the “Neg Reg”)³, and at least one form of conflict resolution, i.e., the inspection report appeals process. These processes provide models for fostering better outcomes for animals and people, preventing and reducing litigation, and redirecting resources to areas of greatest potential impact. The Neg Reg was a multi-stakeholder consensus building rulemaking. Inspection report appeals address conflicts between a licensed or regulated entity and the agency’s inspectors.

¹ 7 U.S.C. § 2131.

² 9 C.F.R. § 1.1, et seq.

³ Animal Welfare; Marine Mammals, 66 Fed. Reg. 239 (January 3, 2001)(final rule arising from the Neg Reg).

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In its administration and implementation of the AWA, USDA APHIS Animal Care develops, and periodically revises and updates standards of humane care and treatment. These standards are contained within regulations which are issued by the agency following notice and comment rulemaking wherein the agency develops a proposal, publishes notice of the proposed rule in the Federal Register, receives public comments while the docket is open, and eventually publishes a reworked final rule which is published in the Federal Register in advance of its effective date. Fairly regularly issues arise as to implementation and interpretation. At times the regulations are delayed or impacted through agency initiated reconsideration, Congressional intervention, and litigation whether from a regulated community or critics of the AWA. Essentially, conflicts or competing interests present before a rule is proposed, often grow throughout the process and ultimately take other forms which can often frustrate progress. The Marine Mammal Neg Reg discussed below provides a better way forward for the development of meaningful regulations.

* * *

Once regulations are in place, they are applied to regulated entities through regular, unannounced inspections conducted by agency Veterinary Medical Officers and Animal Care Inspectors. If an inspector finds compliance with the AWA regulations, an inspection report will be issued which notes, “No noncompliant items identified during this inspection.” If there are any issues or instances of noncompliance, an inspection report will be issued noting each such noncompliant item by regulatory section and accompanied by a brief narrative of the condition(s) encountered. Inspection reports constitute the official record of compliance and are available to the public through the Freedom of Information Act⁴, and in some cases in electronic form online.⁵ The noncompliance contained within an inspection report can trigger an enforcement action and may be adjudicated or found to be formal violations of the AWA. As expected, there can be differences between an inspector and a regulated entity. The agency’s inspection report appeals process discussed below was created to provide an outlet for resolving such disputes.

Negotiated Rulemaking

Following an initial feasibility study, in 1995 and 1996, the agency convened a group of stakeholders to help review and update the then existing marine mammal regulations⁶ originally enacted in 1979⁷ and 1984⁸. During the course of these multi day sessions facilitated by a

⁴ 5 U.S.C. § 552

⁵ In February 2017, the agency took down its comprehensive database which contained three years of inspection reports for each regulated entity. While a number of inspection reports have been restored to the agency website, others have not.

⁶ Marine Mammal Negotiated Rulemaking Advisory Committee; Establishment, 60 Fed. Reg. 27049, 27050 (May 22, 1995).

⁷ Marine Mammals; Regulations for Humane Handling, Care, Treatment, and Transportation, 44 Fed. Reg. 36874 (June 22, 1979) (codified at 9 C.F.R. pt. 1, 3).

⁸ Marine Mammals; Regulations for Animal Welfare, 49 Fed. Reg. 26681 (June 28, 1984) (codified at 9 C.F.R. pt. 3).

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neutral third party, the agency, its expert and the stakeholder representatives reviewed the regulations and ultimately came to consensus (operationalized as unanimous agreement) on 13 of the 18 regulatory sections and one paragraph in a fourteenth section. The “consensus language” sections included: Facilities, general; a portion of Space requirements; Feeding; Sanitation; Employees or attendants; Separation; Veterinary care; and all the transport-related sections.⁹ Those subjects not included within the consensus language were: variances and implementation dates, indoor facilities, outdoor facilities, water quality, space requirements, and swim-with-the-dolphin (SWTD) programs. Significantly, participants in the Neg Reg agreed not to challenge any consensus decisions and to forego any litigation.

After the conclusion of the Neg Reg, the agency compiled the consensus language and a minor clarifying provision or two in a proposed rule published in the Federal Register in 1999.¹⁰ The comments submitted into the rulemaking docket were much less numerous and substantial than conventional rulemakings. The final rule was published on January 3, 2001¹¹ and no litigation ensued.

Notably, the regulatory sections lacking consensus during the Neg Reg were eventually included in a 2015 proposed rule and same is still pending more than two decades after the Neg Reg and sixteen (16) years since the Neg Reg final rule.

It has been noted that the Neg Reg advanced meaningful innovations in the marine mammal regulations¹², such as:

- Incorporated language throughout to better address the unique conditions found in open ocean facilities.¹³
- Created additional recordkeeping, including written protocols, plans, justifications, and animal-specific feeding and health records.¹⁴
- Acknowledged importance of enrichment via safe and effective use of enhancements and incorporating enrichment in certain situations.¹⁵

⁹Supra 3.

¹⁰Animal Welfare; Marine Mammals, 64 Fed. Reg. 8735, 8736 (proposed Feb. 23, 1999) (codified at 9 C.F.R. pt. 3).

¹¹Supra 3.

¹²With the exception of the last item, this list originally appeared in James F. Gesualdi’s article, *Coming Together To Make A Difference For Animals And People*, American Bar Association, Tort Trial and Insurance Practice Section Committee News, ANIMAL LAW COMMITTEE NEWSLETTER, (Fall 2015), available at <http://www.americanbar.org/content/dam/aba/uncategorized/tips/alc/AnimalLawFall2015.authcheckdam.pdf> (p. 16).

¹³*E.g.*, the necessity of recall and retrieval training for marine mammals in open ocean facilities where they might be released into the ocean in accordance with a contingency plan during a natural disaster. 9 C.F.R. § 3.101(b); and veterinary separation rather than isolation of animals in natural water environments, 3.110(b).

¹⁴*See, e.g.*, 9 C.F.R. § 3.101(a)(3) (requiring all facilities to maintain written protocol on cleaning); *id.* § 3.104(a) (requiring written veterinary justification for some temporary holding situations); *id.* § 3.105(c) (requiring keeping of feeding records); *id.* § 3.108 (requiring adequate number and training of employees or attendants); *id.* § 3.109 (requiring a collaborative written plan for the care of an animal housed separately).

¹⁵*See, e.g., id.* § 3.101(g) (standards for enclosure or pool environmental enhancements); *id.* § 3.109 (provision of enrichment for animals housed separately).

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- Considered pools/pool complexes and required written veterinary justification for certain temporary housing situations.¹⁶
- Provided for allowance of living organisms “such as algae, coelenterates, or molluscs” that do not diminish water quality or pose health risks.¹⁷
- Provided for more detailed and extensive animal and staff training requirements, including “participation in and successful completion of” a training course on “species appropriate husbandry techniques, animal handling techniques, and information on proper reporting protocols, such as recordkeeping and notification of veterinary staff for medical concerns.”¹⁸
- Incorporated additional standards for veterinary care—greater veterinary involvement and oversight generally and in different ways than for other species covered by the AWA.¹⁹
- Required transport plans and “letters of veterinary accompaniment.” Transports of certain animals and durations require written transport plans and written documentation of whether a veterinarian must accompany the animals.²⁰
- Expanded concept of emergency contingency planning in certain circumstances to include potential animal evacuations, relocations, and marine mammal release in the event of a disaster.²¹

Significantly, the Neg Reg also brought stakeholders together in the same room at the same time and facilitated constructive conversation toward a common goal of revising the marine mammal regulations. Today, though more challenging, such an effort might redirect the energy of conflict towards constructive action.

¹⁶See, e.g., *id.* § 3.104(a) (space requirements and veterinary justifications and oversight for different situations).

¹⁷See, e.g., *id.* § 3.107(a)(3).

¹⁸See, e.g., 9 C.F.R. § 3.108(b), (d). APHIS has noted that, “for purposes of enforcing the requirement, APHIS would use available professional organization standards as a point of reference. We may also use the experts within the marine mammal community as resources, as well as our own expertise and any professionally recognized standards.” 66 Fed. Reg. at 244. Similarly, in the preamble to the proposed rule on marine mammals, the agency noted that “[t]he Marine Mammal Negotiated Rulemaking Advisory Committee agreed that, for purposes of enforcing this requirement, APHIS should use professional organization standards, such as those used by the International Marine Animal Trainers Association, as a point of reference.” 64 Fed. Reg. at 8740.

¹⁹See, e.g., 9 C.F.R. § 3.110 (standards for provision of veterinary care). Marine mammals are the only animals covered under the AWA with species-specific veterinary care provisions. This is in addition to the generally applicable provisions concerning the attending veterinarian and program of veterinary care, found at 9 C.F.R. §§ 2.33 (research facilities) and 2.40 (dealers and exhibitors). Additionally, several other revisions to the regulations for care of marine mammals expressly require veterinary input or justification in certain situations.

²⁰See, e.g., *id.* § 3.116 (care in transit).

²¹9 C.F.R. § 3.101(b).

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Inspection Report Appeals

Sometime in the 1990s Animal Care launched an inspection report appeals process to regulated entities (i.e., licensees and registrants under the AWA). At that time, the then Deputy Administrator for Animal Care, Dr. W. Ron DeHaven stated:

Animal Care (AC) understands that at times there may be concerns about findings noted on inspection reports. It is in the best interest of you (the facility), AC, and, above all, the welfare of the animals to resolve disputes quickly and cooperatively.²²

While the actual process has changed somewhat and been streamlined over the years, the emphasis on conflict resolution remains the same. A 2014 Animal Care Announcement (and Factsheet)²³ noted:

Our goal is threefold: to bring about quicker appeals resolutions; to ensure consistency in the appeals process; and to ensure that subject matter experts are involved in reviewing each appeal.

* * *

The revised appeals process, effective immediately, is as follows:

If, during an inspection, a facility operator has questions or concerns about any of the noncompliant items cited by the inspector, the facility operator should bring the issue up during the inspection and/or exit briefing. If the matter is resolved at that time, the inspector will modify the citation, remove it altogether or leave it as originally written.

If the facility operator and the inspector are unable to resolve the matter, or if the facility later decides to question the report, the facility operator should send a detailed, written appeal to the regional director in the appropriate Animal Care regional office. We must receive this appeal within 21 days of the facility receiving the finalized inspection report. If the appeal is received after the 21-day period, it will be rejected.

* * *

²²Letter from Dr. W. Ron DeHaven, Deputy Administrator, APHIS, Animal Care (undated) to Licensees and Registrants.

²³The USDA announcement dated July 9, 2014 is available at <https://content.govdelivery.com/accounts/USDAAPHIS/bulletins/c317a1>; however, the referenced link to the factsheet and the factsheet itself are no longer available.

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We realize that disagreements are a natural part of regulatory oversight, and our inspectors understand that regulated facilities have the right to appeal inspection findings. We are committed to ensuring that the appeals process is objective and thorough, while not resulting in reprisal against any facility. The new appeals process is a way to streamline and improve decision making so that we can better serve the regulated community, general public and the animals.

The agency's Animal Welfare Inspection Guide²⁴ notes "[i]f the licensee/registrant has a concern about any findings on the Inspection Report, use the inspection appeals process to resolve the dispute."

The agency issued an Inspection Report Appeals Process Tech Note in June 2017 which explained appeals as:

. . . a request made by an AWA licensee or registrant to Animal Care to reconsider all or part of the content of an inspection report. The appeals process provides an objective and thorough method for Animal Care to review any disagreements involving the content of an inspection report, without fear of retaliation on the part of the licensee or registrant. A licensee or registrant may appeal content in the inspection report that he/she believes is incorrect, does not consider relevant facts, or is inconsistent with the applicable AWA regulations or standards. The appeals process is beneficial to licensees/registrants and Animal Care because it can lead to improved understanding of the AWA and regulations and standards, and the opportunity to discover additional resources to promote compliance.²⁵

As noted in the Inspection Report Appeals Process Tech Note, the process begins by attempting to resolve any concerns or issues with the inspector during the inspection exit briefing or during a prompt follow up conversation. If anything (or everything) remains unresolved the licensee or registrant must notify the agency and submit a written appeal to the appropriate regional office within twenty-one (21) days of the receipt of the inspection report. The appeal is then reviewed (and may be heard) by an appeals team consisting of "a Director and/or Assistant Director of Animal Welfare Operations, a Supervisory Animal Care Specialist, and an additional member who may be a staff veterinarian or other subject matter expert, based on the specific details of the appeal".²⁶ If anything is changed in the inspection report an amended inspection report is issued and that becomes the final record of compliance relating to the inspection. If no changes are made the inspection report is unchanged and becomes final.

²⁴ Animal Welfare Inspection Guide (2013, portions revised 2015), Inspection Appeals Process (at 3-27), available at https://www.aphis.usda.gov/animal_welfare/downloads/Animal-Care-Inspection-Guide.pdf.

²⁵ United States Department of Agriculture, Animal and Plant Health Inspection Service, Animal Care Tech Note, *Inspection Report Appeals Process* (June 2017), available at https://www.aphis.usda.gov/publications/animal_welfare/2017/AC-Tech-Note-Inspection-Report-Appeals-Process.pdf.

²⁶ *Id.*

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The inspection report appeals process can also be used to present and drive corrective measures and improvement plans geared towards exceeding compliance and/or enhancing animal welfare.²⁷

Although it is not used very often given the thousands of AWA inspections annually, the appeals process is an effective means for dispute resolution. Parties can obtain corrections, agency clarification and guidance through an appeal determination. Approached constructively, with an emphasis on conflict resolution, the process is invaluable in fostering AWA compliance, advancing animals' interests and building better working relationships.

Conclusion

These two processes, negotiated rulemaking for improving regulatory standards and inspection report appeals for resolving micro level differences, provide solid examples of the advantages of alternative means of dispute resolution. In short, both can alleviate conflict and associated costs, advance positive change for animals, and spur constructive action and relationships.

James F. Gesualdi, an animal welfare attorney in Islip, Long Island, New York, and author of the book *Excellence Beyond Compliance: Enhancing Animal Welfare Through the Constructive Use of the Animal Welfare Act*, has served as a special professor of law at Hofstra University School of Law where he has taught Animal Law; a founding member and Chair of the New York State Bar Association Committee on Animals and the Law; founding Co-Chair of the Suffolk County Bar Association Animal Law Committee; a vice-chair of the American Bar Association Tort Trial and Insurance Practice Section Animal Law Committee; and Deputy Managing Editor for the American Bar Association, Section of Administrative Law and Regulatory Practice, *Administrative & Regulatory Law News*.

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²⁷ See, James F. Gesualdi, *EXCELLENCE BEYOND COMPLIANCE: Enhancing Animal Welfare Through the Constructive Use of the Animal Welfare Act*, (2014), specifically, V: THE INSPECTION EXIT BRIEFING, Inspection Report Appeals, 9. Act fast; 10. Stay constructive during the appeal; 11. Make the appeal credible and substantial; 12. Potential bases for appeal; 13. Outside consultation or review; 14. Inspection reports, inspection report appeals, and the Freedom of Information Act.

Pet Trusts: An Important Planning Tool

By Jim D. Sarlis

We Americans love our pets and consider them members of the family. We treat them like our children, and even refer to ourselves as their Mommies and Daddies.¹ While it is true that we take care of them, the relationship is far from one-sided. In addition to unconditional love, there are many other benefits our animal friends bestow upon us. Elders and people with health issues, in particular, are known to derive therapeutic benefits from interaction with animals. These benefits include lower blood pressure and decreased anxiety, increased circulation and mental sharpness, and reduced loneliness due to the enhanced opportunities for social interaction and the distraction of focusing on the pets' needs.² It is also well documented that the presence of pets in nursing homes increases the longevity of residents.³

As with any loved ones for whom we are responsible, the concern arises: How can we make sure that our pets continue to receive care if the time comes when we ourselves can no longer provide it? One possible answer is a pet trust.

What is a pet trust?

A pet trust is a legal arrangement whereby a person can provide for the care and maintenance of dogs, cats, and other animals in the event of the person's disability or death. Although they may take different forms and have to comply with varying laws in different jurisdictions, pet trusts are set up much like any other trust. The "grantor" is the person who creates the trust. The "beneficiary" is the pet or other animal that is to be cared for. The "trustee" is the person who holds legal title to the assets for the benefit of the animal. In addition, a "guardian" or "caretaker" is appointed to actually care for the pet, and even an "enforcer" can be named to make sure the trust terms are followed. Like other trusts, a pet trust can be *inter vivos*, taking effect during the grantor's lifetime, or testamentary, taking effect upon the grantor's death.

Providing for pet care, past and present: Defining the issue

The public is mesmerized by the multi-million-dollar pet care cases emphasized in the media.⁴ However, most people have more modest concerns. They just want to make sure that someone will take care of their pets, and see to it that their pets will have food, shelter, and veterinary care. The problem was that, prior to the enactment of pet trust legislation, if a pet owner wanted to earmark money for the care of a pet, there was no functional mechanism to do so. For example, a regular bequest made to an individual with the expectation that he or she would act as the caretaker of the pet lacked any oversight or enforcement mechanism to make sure the person did, in fact, use the money to take care of the pet. Similarly, money left in a

regular trust attempting to name the pet itself as the beneficiary would fail⁵ since pets and other animals cannot be beneficiaries of Wills and traditional trusts because of their legal classification as personal property in every U.S. jurisdiction.⁶

This left people who wanted to protect their pets and arrange for their care with little choice but to try some creative things in an attempt to do so. Thus, in the past, people tried to ensure a pet's well being after the owner's death by making a conditional testamentary gift to a friend or family member for the pet's care and maintenance – the condition being the care of the pet.⁷ However, conditional gifts are difficult to enforce, since there is no trustee or overseer to ensure that the funds given to the caretaker are actually used for the benefit of the pet.

Pet trusts to the rescue: their nuts-and-bolts and advantages

Unlike these prior imperfect methods, a pet trust is designed specifically for pet care planning and alleviates all of these shortcomings. First and foremost, the pets or other animals are expressly recognized as the beneficiaries. As with other trusts, the maker of the trust may specify a trustee and a successor trustee. The trustee should be someone other than the individual who will be the pets' caretaker. The caretaker can be an individual or an organization, but most owners select a friend or relative who knows the pets and is ready, willing, and able to care for them. If no friend or relative can be found to take the pet, another good choice would be a charitable organization whose function is to care for or place companion animals; for example, a humane society or shelter might agree to accept the animal along with a cash bequest to cover expenses.⁸ Alternate caretakers may be named as well. The trust must also name a "remainder beneficiary" – i.e., the individual or organization that will receive any funds left in the trust after the death of the last pet beneficiary. An *inter vivos* trust, which takes effect during the life of the pet owner, can provide for the care of the animal in the event that the pet owner becomes incapacitated, as well.

A pet trust also takes the various advantages that a trust has as compared to a Will, when it comes to caring for a vulnerable beneficiary, and expressly applies them to the care of pets and other animals:⁹

- Bequests in a Will are geared towards disbursing property in one shot after probate of the Will – not in ongoing steps over a period of time. By contrast, that is precisely the function of a pet trust.
- Wills have an inherent time gap between the testator's death and probate during which there is nothing in place to govern what happens. In the meantime, who cares for the pet and where will the pet stay? By contrast, an *inter vivos* pet trust remains in effect seamlessly during the pet owner's life, at the moment of death, and after death, with no interruption.

- Because the probate process necessarily puts the Will before a judge for confirmation, it increases the possibility that a Court will tinker with the Will’s pet care provisions. By contrast, a free-standing *inter vivos* pet trust is a private document that needs no judicial confirmation or intervention.¹⁰

- Wills do not put care in place for pets during the owner’s lifetime if the owner suffers illness or incapacity. By contrast, this is precisely what an *inter vivos* pet trust can do.

- Pet provisions in a Will may be considered “honorary” or “precatory” and, therefore, unenforceable.¹¹ By contrast, a pet trust allows owners to expressly establish trust accounts for the ongoing care and maintenance of their domestic or companion animals, with safeguards in place to ensure compliance.

Like other trusts, a pet trust can – and, perhaps, should – be very specific.¹² The trust may name one or more veterinarians to care for the pets, state how the trustee will finance the caretaker’s pet expenses, and indicate how often the trustee should visit the caretaker and pets to ensure that the trust’s terms are being followed. It should detail how the pets should be maintained, and can specify the particular brand of food the pet prefers, or specify that the pet likes to play frisbee in the park. Since pet owners know the particular habits and preferences of their companion animals better than anyone else, they can describe the exact kind of care their pets should have and identify the individuals who should be involved in that care.

Overcoming the Rule Against Perpetuities

One of the reasons that special pet trust laws are required is to overcome a significant obstacle to effective estate planning for pet owners: the Rule Against Perpetuities, which requires that a trust be measured in human lives. Over the years, many state courts ruled that the life of a domestic or companion animal could not be used to sustain a legal trust agreement. As a result of this prohibition, many early decisions involving pet care trusts held that the trusts were only honorary, and therefore technically unenforceable.¹³

Pet trusts are exempt from the rule against perpetuities. This makes sense if you consider that some pets have a very long lifespan. While some states limit the maximum duration of the trust to 21 years, New York allows the trust to continue for the life of the pet without regard to such a 21 year limit.¹⁴ This is important for animals that have an extended life expectancy, such as horses (40 years), parrots (as much as 100+ years), and turtles (over 120 years).¹⁵

Pet trust statutes have been enacted by most states

All fifty states and the District of Columbia have enacted some form of pet trust law.¹⁶ New York’s is codified in Estates, Powers and Trusts Law (“EPTL”) Section 7-8.1.¹⁷ The statute has six main parts, providing:

1. That such a trust is valid for the care of a “domestic or pet animal.” This is generally considered to include dogs, cats, birds, guinea pigs, hamsters, fish, rabbits, lizards, horses, turtles and tortoises, even other domestic animals.¹⁸
2. That a person can be appointed with the ability to enforce the terms of the trust.¹⁹
3. That the trust terminates upon the death of the animal or animals for which it was created.²⁰
4. That, upon the trust’s termination, the trustee shall transfer the remaining trust property as directed in the trust instrument or, if there are no such directions in the trust instrument, the property shall pass to the estate of the grantor.
5. That a court may lower the amount of money to be transferred into the trust for the pet’s care if the amount is unreasonably large.
6. That the court may appoint a trustee if no trustee is designated or no designated trustee is willing or able to serve.

Alternative options

Other options exist for those who do not want to create a pet trust, or whose state does not have a pet trust law. Here are a few examples:

- Believe it or not, there are pet retirement homes. Some are sponsored by schools for veterinary medicine, for example Purdue University, University of Minnesota, Oklahoma State University's Center for Veterinary Health Sciences, and Texas A&M University’s Stevenson Companion Animal Life Care Center; others are privately operated.²¹ The requirements of the particular organization should be researched.

- It may also be possible to create a pet trust by establishing a connection with a state that has a suitable pet trust law, such as the state in which the trustee or caretaker lives, the state in which the chosen pet retirement home or charitable organization is located, or some other basis. A lawyer in that other jurisdiction should be consulted if a client wishes to explore this option.

- Arrangements could be made with a humane society, animal rescue group or animal rest home to take possession and care of the pet.

Pet Powers of Attorney

Given the degree of planning we do for our clients so that all kinds of contingencies are addressed, we might consider adding a paragraph like the one below in our Durable Powers of Attorney, or even doing a separate Pet Power of Attorney, appointing an agent to handle pet situations:

I, (name of owner), do hereby appoint my (relationship, name, address and all telephone numbers of agent) my attorney-in-fact to act in my place and stead in any way which I myself could do if I were personally present with respect to the following matters, to the extent that I am permitted by New York law to act through an agent: to care for any animals I have and to follow the instructions in a pet trust, if I have one; to prepare a pet trust if I do not have one or if the one I have has expired or is otherwise not valid; to expend funds for the care, safety and maintenance of my animals; and to place my pets with temporary or permanent caretakers if appropriate.²²

In all cases, carry emergency instructions with you

It is important for pet owners to have instructions for the care of their pets readily available in the event of an emergency. This is particularly true for people who live alone (that is, without human roommates or family). The New York City Bar Association's Committee on Legal Issues Pertaining to Animals even recommends that pet owners carry a copy of instructions in their purse or wallet indicating what happens to their pets in the event of an emergency, disability or death, with information on who should be called in the case of emergency, how they can be contacted, and what arrangements should be made.²³

Conclusion

Pet trusts enable us to set aside assets, knowing that they will be applied for the care and maintenance of our animal friends when we can no longer provide the care ourselves due to disability or death. Such trusts are the best choice to ensure ongoing care for our pets, while giving us peace of mind.

Endnotes

1. “81% of those surveyed consider their dogs to be true family members, equal in status to children” . . . Coren, Stanley, Ph.D., F.R.S.C., *Do We Treat Dogs The Same Way As Children In Our Modern Families?* Psychology Today, May 2, 2011, available at <http://www.psychologytoday.com/blog/canine-corner/201105/do-we-treat-dogs-the-same-way-children-in-our-modern-families>; the 1999 American Animal Hospital Association (AAHA) Pet Owner Survey shows that 84% refer to themselves as their pets’ “Mommy” and “Daddy”, available at www.peteducation.com/article.cfm?c=22+1275&aid=1265; “Pet owners are extremely devoted to their animal companions with 80% bragging about their pets to others, 79% allowing their pets to sleep in bed with them, 37% carrying pictures of their pets in their wallets, and 31% taking time off from work to be with their sick pets The number of [households with pets] is staggering [with almost 100 million U.S. households having pets that include dogs, cats, fish, birds, small animals (such as hamsters and rabbits), and reptiles]. An owner's love for his pet transcends death, as documented by studies revealing that between 12% and 27% of pet owners include pets in their wills.”Beyer, Gerry W., *Pet Animals: What Happens When Their Humans Die?* 40 Santa Clara Law Rev. 617 (2000)(footnotes omitted), available at <http://www.animallaw.info/articles/arus40sanclr617.htm>.
2. *Pets for Senior Citizens*, HealthyPet.com, available at http://www.healthypet.com/petcare/PetCareArticle.aspx?title=Pets_for_Senior_Citizens , last viewed March 3, 2013. See, generally, articles on the benefits of pet interactions reported at PetPartners.org, including Rider, Tiffany, *Man’s Best Friend: Dog Ownership Proven to Reduce Blood Pressure, Other Health Risks*, Long Beach Business Journal, available at <http://lbbusinessjournal.com/long-beach-business-journal-newswatch/119-lof-scroller-articles-12-05-22/590-mans-best-friend-dog-ownership-proven-to-reduce-blood-pressure-other-health-risks.html>.
3. *Pets for Senior Citizens*, HealthyPet.com, available at http://www.healthypet.com/petcare/PetCareArticle.aspx?title=Pets_for_Senior_Citizens; Hirschfeld, Rachel, *Ensure Your Pet’s Future: Estate Planning for Owners and their Animal Companions*, Elder's Advisor, Marquette University Law School, Vol. 9, No. 1 at 155, 155-56 (2007) available at http://www.animallaw.info/articles/art_pdf/arus9marqeldersadvisor155.pdf, citing studies on the benefits of pet ownership from the Delta Society, available at: deltasociety.org.
4. Recent examples include the \$12 million trust fund (later reduced to \$2 million by the Surrogate’s Court) left by real estate mogul Leona Helmsley to care for her Maltese poodle named Trouble, and the \$8.3 million Miami mansion and more than \$3 million for care left by Florida heiress Gail Posner for her Chihuahua, Conchita, and two other dogs. Yet those two examples do not even come close to the case of Gunther IV, a German Shepard, that inherited \$124 million from his father Gunther III, who inherited his wealth from German countess Karlotta Liebenstain when she died in 1992.
5. See note 11, below.
6. See, e.g., *Lewis v. DiDonna*, 294 A.D.2d 799, 743 N.Y.S.2d 186 (3d Dept. 2002)(Declaring the well-settled view: “Pets are recognized as personal property”).

7. See, e.g., *In re Erl's Estate*, 491 P. 2d 108 (Colo. Ct. of App., 2d Div. 1971)(detailed explanation of relationship between bequest to person and condition to care for pet).

8. Sample Will provisions suggested by the New York City Bar Association, Committee on Legal Issues Pertaining to Animals, are available at

<http://www.nycbar.org/media-aamp-publications/brochuresbooks/providing-for-your-petsnin-the-event-of-your-death-or-hospitalization>.

9. I.e., for purposes of this discussion, and to isolate the outcome of a Will alone, this assumes a Will without trust provisions.

10. The Surrogate's Court always has jurisdiction over any trust, of course, but the likelihood of interference is the point here.

11. See, e.g., *The Fidelity Title and Trust Co. v. Clyde*, 143 Conn. 247, 121 A.2d 625 (1956)(honorary or precatory language unenforceable, therefore not a true trust); *Phillips v. Estate of Holzmann*, 740 So.2d 1 (Fla. Dist. Ct. of App., 3d Dist. 1998)(The true beneficiary is the pet, making this an honorary trust, "not a true trust", and therefore not enforceable). As a recent article put it: "In the . . . states without statutory pet trusts . . . [t]he person who receives the funds decides whether or not to use them for the pet's care. There is nothing to prohibit the [person] from dumping the pet at the pound and using the money to go to Paris." See also Hirschfeld, Rachel, *Estate Planning Issues Involving Pets*, available at https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/petestateplanning.html.

12. A sample trust for the care of dogs and cats based on the form suggested by the New York City Bar Association, Committee on Legal Issues Pertaining to Animals, is annexed at the end of this article.

13. See, e.g., *The Fidelity Title and Trust Co. v. Clyde*, *supra*; *Phillips v. Estate of Holzmann*, *supra*. See Beyer, *Pet Animals: What Happens When Their Humans Die?* *supra*, at 635-39.

14. See note 20, below.

15. Source: petdoc.ws, *Dr. Bob's All Creatures Site*, available at sonic.net/~petdoc/lifespan.html.

16. Ala. Code 1975 §§ 19-3B-110 and 19-3B-408; Alaska Stat. Ann. § 13.12.907; Ariz. Rev. Stat. Ann. §§ 14-2907 and 14-10408; Ark. Code Ann. § 28-73-408; West's Ann. Cal. Prob. Code § 15212; Colo. Rev. Stat. Ann. § 15-11-901 (Colorado's pet trust law appears to be unique in extending trust coverage to the offspring of a domestic or companion animal "in gestation" at the time of the owner's death); Conn. Gen. Stat. Ann. § 45a-489a; 12 Del. C. § 3555; D.C. Code § 19-1304.08; Fla. Stat. Ann. § 736.0408; Ga. Code Ann., § 53-12-28; Hawaii Stat. § 560:7-501; 760 I.L.C.S. 5/15.2; Ind. Code Ann. 30-4-2-18; Iowa I.C.A. § 633a.2101-2105; Kans. Stat. Ann. § 58a-408; Louisiana LSA-R.S.9:2263; Mass. Stat. 203 § 3C; Md. Est. & Trust Code § 14-112; Maine Stat. Title 18-B § 408; Mich. Stat. 700.2722; Minn Stat. M.S.A. § 501C.0408; Mississippi Miss. Code Ann. § 91-8-408; Mont. Stat. 72-2-1017; Mo. Stat. 456.4-408; Neb. Rev. Stat. § 30-3834; Nev. Stat. 163.0075; N.H. Rev. Stat. § 564-B:4-408; N.J. Stat. Ann. 3B:11-38; N.M. Stat. Ann. §§ 45-2-907 and 46A-4-408; N.C. Gen. Stat. Ann. § 36C-4-408; N.D. Stat. 59-12-08;

O.R.C. Ann. 5804.08; 60 Okl. Stat. Ann. § 199; Oreg. Stat. § 130.185; 20 Pa. C.S.A. § 7738; R.I. Stat. § 4-23-1; Tenn. Stat. § 35-15-408; Tex. Prop. Code Ann. § 112.037; Utah Code Ann. § 75-2-1001; 14A Vt. Stat. Ann. § 408; Va. Code Ann. § 55-544.08 Wash. Stat. 11.118.005 - 11.118.110; W.Va. Stat. § 44D-4-408; West's Wisc. Stat. Ann. 701.11; Wyo. Stat. § 4-10-409. Idaho's statute, Idaho Code § 15-7-601, does not refer to a pet trust, per se, but provides that a so-called "purpose trust" may be created "for any purpose, charitable or noncharitable" with no named beneficiary, including for animal care.

17. The statute provides:

§ 7-8.1 Trusts for pets

(a) A trust for the care of a designated domestic or pet animal is valid. The intended use of the principal or income may be enforced by an individual designated for that purpose in the trust instrument or, if none, by an individual appointed by a court upon application to it by an individual, or by a trustee. Such trust shall terminate when the living animal beneficiary or beneficiaries of such trust are no longer alive.

(b) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the benefit of all covered animals.

(c) Upon termination, the trustee shall transfer the unexpended trust property as directed in the trust instrument or, if there are no such directions in the trust instrument, the property shall pass to the estate of the grantor.

(d) A court may reduce the amount of the property transferred if it determines that amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property pursuant to paragraph (c) of this section.

(e) If no trustee is designated or no designated trustee is willing or able to serve, a court shall appoint a trustee and may make such other orders and determinations as are advisable to carry out the intent of the transferor and the purpose of this section.

(Formerly § 7-6.1, added L.1996, c. 159, § 1. Renumbered § 7-8.1 L.2003, c. 630, § 3, eff. March 28, 2004. Amended L.2010, c. 70, § 1, eff. May 5, 2010.)

18. "Domestic animal" is defined at New York Agriculture and Markets Law § 108 as "any domesticated sheep, horse, cattle, fallow deer, red deer, sika deer, whitetail deer which is raised under license from the Department of Environmental Conservation, llama, goat, swine, fowl, duck, goose, swan, turkey, confined domestic hare or rabbit, pheasant or other bird which is raised in confinement under license from the State Department of Environmental Conservation before release from captivity, except . . . fowl commonly used for cock fights . . ." "Pet" and "companion animal" are defined at New York Agriculture and Markets Law § 350 (5) as "any dog or cat, and . . . any other domesticated animal normally maintained in or near the household" but does not include a "farm animal" which is defined in §350(4) as "any ungulate, poultry, species of cattle, sheep, swine, goats, llamas, horses or furbearing animals [i.e., beaver, bobcat, coyote, raccoon, sable or marten, skunk, otter, fisher, nutria and muskrat], which are raised for commercial or subsistence purposes. Furbearing animals shall not include dogs or cats."

19. *See, e.g., Matter of Fouts* [Trustees under the 1997 Chimpanzee Care Trust], 176 Misc.2d 521, 677 N.Y.S.2d 699 (Sur. Ct., Nassau Co. 1998).

20. The legislative history reveals that the limitation of 21 years was removed in favor of whatever the lifetime of the animal is. Subd. (a). L.2010, c. 70, § 1, in the last sentence, substituted “the living animal beneficiary or beneficiaries of such trust are no longer alive” for “no living animal is covered by the trust, or at the end of twenty-one years, whichever occurs earlier”.

21. *See* U.S. News and World Report, Health News, available at <http://health.usnews.com/health-news/family-health/brain-and-behavior/articles/2011/04/01/when-pets-outlive-owners-retirement-homes-offer-refuge>.

22. Derived from form suggested at Hirschfeld, Rachel, *Ensure Your Pet’s Future: Estate Planning for Owners and their Animal Companions*, Elder's Advisor, Marquette University Law School, Vol. 9, No. 1 at 155, 166 (2007), *supra*, available at http://www.animallaw.info/articles/art_pdf/arus9marqeldersadvisor155.pdf.

23. The following is a sample note recommended by the New York City Bar Association, Committee on Legal Issues Pertaining to Animals, intended to be carried in a purse or wallet, regarding emergency care of pets:

In any situation in which I am unable to return home to feed my pets, such as my hospitalization or death, please immediately call [Mary Smith] at [address and phone] or [John Doe] at [address and phone], to arrange for the feeding of my [cats] located in my home at [address]. The superintendent of my apartment building [name, address and phone], my Executor [name, address and phone], and my neighbor [name, address and phone] have a copy of this document.

New York City Bar Association, Committee on Legal Issues Pertaining to Animals, available at <http://www.nycbar.org/media-aamp-publications/brochuresbooks/providing-for-your-petsnin-the-event-of-your-death-or-hospitalization>.

SAMPLE TRUST FORM

The following is a sample trust for the care of dogs and cats based on the form suggested by the New York City Bar Association, Committee on Legal Issues Pertaining to Animals:

I give the sum of Fifty Thousand Dollars (\$50,000) and all of my dogs, cats, and any other animals of mine living at the time of my death to the trustee hereunder, IN TRUST, for the following purposes and subject to the following terms and conditions:

This trust is created pursuant to New York Estates, Powers and Trusts Law Section 7-8.1 for the benefit of all of my dogs, cats, and any other animals of mine living at the time of my death (the "Beneficiaries" herein).

The trust shall terminate upon [the earlier to occur of the following events:] the last to die of the Beneficiaries [, or if required by New York law, twenty-one (21) years from the date of my death].

During the term of the trust, the trustee shall apply for the benefit of the Beneficiaries, any or all of the net income of the trust and so much or all of the principal of the trust from time to time, as the trustee shall in the trustee's discretion determine to be advisable for the care, including veterinary care, of the Beneficiaries. Any income accrued but not distributed for the benefit of the Beneficiaries shall be added to the principal of the trust.

[Describe details of care, specific instructions, and veterinarians and other individuals to be involved with the Beneficiaries' care]

I appoint (name and address) to be the trustee of such trust. If such person has predeceased me or for any other reason is unable to act as such trustee, I appoint (name and address) to be the trustee of such trust.

I designate (name and address) to be the caretaker of the Beneficiaries. If such person has predeceased me or for any other reason is unable to act as such caretaker, I designate (name and address) to be the caretaker of the Beneficiaries. If such person has predeceased me or for any other reason is unable to act as such caretaker, the trustee shall select another person to act as caretaker of the Beneficiaries. The Trustee, in the trustee's discretion, may pay a stipend from the trust to the person acting as such caretaker.

I designate (name and address), as the person to enforce the trust, if necessary. If such person has predeceased me or for any other reason is unable to act in this capacity, I designate (name and address) as the person to enforce the trust, if necessary.

I am creating this trust to provide for the care of my animals and the trustee does not need to consider the interests of the remainderman when making distributions. The trustee, in the trustee's discretion, may use all of the trust property for the benefit of my animals; even if the result is that nothing will pass to the remainderman.

Upon the termination of the trust, if any property remains in the trust at the time of termination, the trustee shall distribute any such income and/or principal to (name of trust remainderman–charity that rescues animals recommended), located at (address). If such charitable organization is not in existence at the time of termination, I give the trust remainder, if any, to a charitable organization that benefits animals [described in Section 170(c) and 2055(a) of the Internal Revenue Code], to be selected by the trustee.

Id.

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Saving Homes for House Pets

By Bari Wolf

The “Three Month Law,” as it is commonly known, gives New York State tenants the right to keep pets in the home if the landlord does not commence a lawsuit within three months of knowledge of the pet.¹ This right is not found statewide. The Three Month Law was passed in New York City² in 1983 in response to widespread abuses by landlords who sought to evict tenants harboring pets for an extended period, despite no-pet lease clauses, but with no prior complaints by their landlords. Other jurisdictions including Westchester County³ and Rockland County⁴ have enacted their own versions of the Three Month Law.

The Three Month Law serves a twofold purpose: (1) to protect pet owners from retaliatory eviction; and (2) to safeguard the health, safety and welfare of tenants who harbor pets.⁵ While there are differences between the laws,⁶ the following language from the NYC Three Month Law is closely tracked in all three jurisdictions:

“Where a tenant in a multiple dwelling openly and notoriously for a period of three months or more following taking possession of a unit, harbors or has harbored a household pet or pets, the harboring of which is not prohibited by the multiple dwelling law, the housing maintenance or the health codes of the city of New York or any other applicable law, and the owner or his or her agent has knowledge of this fact, and such owner fails within this three month period to commence a summary proceeding or action to enforce a lease provision prohibiting the keeping of such household pets, such lease provision shall be deemed waived.”

A question that was recently at issue before Judge Adrian Armstrong of Mount Vernon City Court, 9th Judicial District, Second Department, in *Hope Horizon Realty v Johnson*, 2017 NY Slip Op 51052(U), NYLJ 1202798889617, at *1 (City Ct, Westchester County, Aug 21, 2017) was what it means to keep a pet openly and notoriously.

¹The terms “landlord” and “tenant” as used herein include building owners and unit owners.

²Housing Maintenance Code (City of NY Administrative Code, tit 27, subch 2)§27–2009.1.

³No Pet Clauses, ch 695 (Charter and Administrative Code of Westchester County) §695.01 et. seq.

⁴Multiple Dwellings (Code of Rockland County, ch 304) §304-1 et. seq.

⁵ See legislative declarations set forth in NYC Administrative Code §27-2009.1(a); Westchester Administrative Code §695.01; Rockland Code §304-1.

⁶ All three versions of the Three Month Law discussed in this article expressly apply to multiple dwelling units (both free market and rent regulated units). However, the Three Month Law does not apply in NYC to New York City Housing Authority (NYCHA) units and in Rockland/Westchester to any multiple dwelling owned or operated by any government entity. Subsequent federal legislation now allows tenants in federally-assisted housing to have pets. See 14 USC §1437 Sec. 31. The Rockland and Westchester Three Month Laws expressly apply to cooperative or condominium units. The NYC Three Month Law has a departmental split under the applicable case law: in the Second Department (encompassing Brooklyn, Queens, and Staten Island) it applies to cooperative or condominium units, but in the First Department (covering Manhattan and the Bronx) it applies only to cooperative units and not to condominium units. See *Board of Mgrs. v Lamontanero*, 206 AD2d 340 (2d Dept 1994); but cf *Board of Mgrs. of Parkchester N. Condominium v Quiles*, 234 AD2d 130 (1st Dept 1996).

This article will discuss the “open and notorious” element of the Three Month Law, focusing on how it is applied to house pets like cats that do not leave the home on a regular basis. It will also explain an additional contractual defense to keep pets in the home.

While beyond the scope of this article, other issues under the Three Month Law must be kept in mind as part of the legal analysis. These issues include whether the tenant lives in a qualified multiple dwelling, what it means to commence a proceeding within the three month period, the effect of settlement talks on the three month period, whether a new pet is permitted, analysis of the relevant agreement for other potential defenses, and what happens if the pet is a nuisance. Notably, there are also separate rights under the Federal, New York State, and local laws to have a companion animal in the home as a reasonable accommodation.

‘Hope Horizon Realty’

In *Hope Horizon Realty*, the landlord commenced a holdover summary proceeding seeking to evict the tenants due to a failure to cure a violation of a no-pet clause in the parties’ lease. The landlord alleged that the tenants had violated their lease by harboring two cats without the landlord’s permission. The tenants’ answer asserted, among other defenses, that they were entitled to retain their cats and possession of the premises because the landlord had waived enforcement of the no-pet clause by commencing litigation more than three months after it had become aware of the cats.

The *Hope Horizon Realty* court held a non-jury trial spread over six court dates. The landlord put on five fact-witnesses who all testified that they never knew or saw any evidence of the cats until about one month before the notice to cure was served on the tenants.

However, the tenants and at least one fact witness testified that the landlord knew or should have known about the cats from maintenance personnel visiting the premises for repairs between the years 2009 to 2016. Their testimony was that the cats were always present in the premises and “traditional accouterments of household pets, including a litter box and jungle gym, were in plain view.” The court’s findings included the fact that one cat became a permanent resident of the premises in 2001, the other cat was purchased in 2008, the tenant never hid her cats, and on occasion the cats escaped out to the exterior hallway.

The *Hope Horizon Realty* court ultimately found that the landlord had not waived its right to enforce the no-pet clause and awarded the landlord a judgment of possession to evict the tenants. Citing *Seward Park Hous. Corp. v Cohen*, 287 AD2d 157 (1st Dept 2001), the court held that the trial evidence failed to establish that the cats’ presence was “open and notorious.”

Divergent Precedent

Hope Horizon Realty, a Second Department case interpreting the Westchester Three Month Law, relied on *Seward*, a First Department Case interpreting the NYC Three Month Law, for the meaning of the “open and notorious” element of the Three Month Law. However, *Seward* and the relevant case law do not support the *Hope Horizon Realty* decision.

The courts have held that the “open and notorious element” can be satisfied for pets who rarely leave an apartment, such as cats or “paper trained” dogs, by leaving evidence of the pets out in plain sight. Such proof typically includes food or water containers, toys, leashes, litter box, and other similar items.

In *Seward*, the appellate court ruled:

“The landlord may not avoid having imputed knowledge of the tenant harboring the pet by turning a ‘blind eye’ to this open and notorious fact...A review of the facts in this case reveals that petitioner would have had to close its eyes, cover its ears, and hold its breath to have remained ignorant of the presence of respondent’s puppy.”

Seward makes it clear that there are actually two separate factors at play. The first is who needs to know for the three months to start running and the second is the meaning of “open and notorious.” The answer to the first question is that actual or implied knowledge of a pet can come from building employees, even those employed as independent contractors. It is not necessary to prove actual knowledge by the landlord.

The court found that the *Seward* dog was harbored in an “open and visible or notorious” manner based on evidence, among other things, that the tenant walked the dog in and out of the building in sight of the building employees. However, other cases have squarely addressed the question of what it means to harbor a house pet “openly and notoriously” when the pet does not leave the home on a regular basis.

In *Matter of Robinson v City of New York*, 152 Misc 2d 1007 (Sup Ct, NY County 1991), the pet in question was a five pound Maltese dog who was “paper trained” and only taken outside the apartment in a bag. The *Robinson* court found that the landlord had knowledge of the dog from several employees of the landlord who had come into the apartment for various problems. As the court pointed out:

“The [Three Month] law does not state that an animal is harbored openly and notoriously only when it is displayed by taking the animal outside or allowing it to roam through the building...[a finding that a house animal must be taken outside to be displayed openly and notoriously] would seem to work most harshly against tenants who are housebound for one reason or another, such as age or disability, and who choose to have small dogs (or cats) as a companion without the need to walk them.”

The *Robinson* court correctly anticipated that this line of reasoning would also be used for cases involving cats. *Robinson* was upheld by the appellate courts in *184 W. 10th St. Corp. v Marvits*, 59 AD3d 287 (1st Dept 2009), which was in turn followed by *West Side Family Realty, LLC v Goldman*, 2016 NY Slip Op 32067(U) (Civ Ct, NY County 2016).

In both cases, the courts found that the house cats had been kept openly and notoriously when there was a litter box present in the apartment and the landlords’ agent had been inside the apartment for repairs. The *184 W. 10th St.* court also gave credence to cats’ special character:

“Respondent met her burden of demonstrating that she harbored her two cats “openly and notoriously” by showing that she kept the cats and their effects in an open manner, as any cat owner ordinarily would do, without hiding them from the landlord or his agents. In particular, the *presence of the cats’ litter box* in the bathroom was an unmistakable indicium of cat ownership. The *cats’ shy nature and tendency to hide from strangers notwithstanding, respondent was not required to display the cats in public.*”

(Emphasis added).

The fact pattern in *Hope Horizon Realty* is on point with *184 W. 10th St. and West Side Family Realty*, yet the court reached a different conclusion. Even giving deference to the *Hope Horizon Realty* trial court’s assessment of the witnesses’ credibility, it strains the imagination to find that the landlord’s agents saw no evidence of the cats over the seven (7) year period that the tenants harbored the cats in the apartment. There may have been other issues at play in the decision such as the accumulation of arrears. In any event, the *Hope Horizon Realty* parties also missed a crucial defense based on this considerable time period.

Additional Contractual Defense to Keep Pets in the Home

Rental units have a lease, cooperative units have a proprietary lease and bylaws, and condominium units have a condominium declaration and by-laws. There are also often other documents that come into play like the house rules. All of these documents are contracts. Stating the obvious, a landlord cannot prohibit pets if the relevant documents do not contain a no-pet clause.

As these documents are contracts, the six (6) year statute of limitations for contract claims under CPLR 213 applies. Thus, the six (6) year statute of limitation will bar any breach of lease claim older than six years, including having a pet in violation of a no-pet clause. Crucially, CPLR 213 does not require a showing of actual or constructive knowledge for it to be used as a successful defense.

In *Elliana 76 LLC v Spier*, 27 Misc 3d 139(A) (App Term, 1st Dept 2010), the landlord brought a holdover proceeding claiming the tenant violated her lease by harboring a dog. On a motion for summary judgment, it was undisputed that the dog had lived in the apartment for over seven (6) years, but the landlord claimed that it had no actual or implied knowledge of the dog. The lower court granted summary judgment in favor of the tenant, and the Appellate Term affirmed.

Similarly in *Hope Horizon Realty*, it was undisputed that one cat had resided in the apartment from 2001 and the other cat from 2008, well beyond the six (6) years statute of limitations. Unfortunately, neither party raised CPLR 213, which likely would have saved the tenancy.

Conclusion

Under the prevailing state of the case law, keeping evidence of a pet in plain view when the landlord’s agents are in the premises, even if the pet itself is not seen, satisfies the “open and

notorious” element of the Three Month Law. At trial, witness credibility will play a crucial role in proving imputed knowledge of the landlord. Of course, actual knowledge by the landlord will be a sure winner. In sum, as long as the pet was not actively hidden by the tenant, and the other provisions of the Three Month Law are fulfilled, the landlord should be found to have waived any no-pet clause.

Finally, it is not necessary to show actual or implied knowledge if the pet has been in the premises over six (6) years under CPLR 213.

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Stepping Up For Horses:
In the Absence of Strong Federal Regulations,
Can California End Institutionalized Abuse?

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**STEPPING UP FOR HORSES:
IN THE ABSENCE OF STRONG FEDERAL REGULATIONS,
CAN CALIFORNIA END INSTITUTIONALIZED ABUSE?**

INTRODUCTION

Horses are as American as apple pie, an integral feature of the American imagination. Whether one's mind conjures up mustangs roaming freely across the American West, American Indians hunting buffalo on their pinto ponies descended from Spanish war horses, or the stately riding horse of the antebellum Southern plantations, horses have been a part of almost every historical era of American history. Modern life, however, needs horses less than in centuries past. Horses are no longer needed for transportation, war, mail delivery, hunting, or agriculture. Now, horses bred for various purposes are kept as club breeds for enthusiasts who admire the animals' qualities and history. The Tennessee Walking Horse and the American Quarter Horse are two examples of horse breeds that are prized for their specially bred work qualities. Now, however, these horses are valued as popular show horses for breed specific hobbyists.¹

For equine enthusiasts, breed specific shows can be quite profitable for a winning horse. The Tennessee Walking Horse National Celebration showcases up to 2,000 horses every year and awards \$650,000 in prizes during its eleven-day festival.² Enthusiasts of the American Quarter Horse have their own grand event of the show season: the All-American Quarter Horse Congress.³ These shows and celebrations purport to showcase the best of the breed, but in reality these events serve as glossy exteriors for the performance horse industry.⁴ Like other industries, the people involved have livelihoods staked on the performance of their horse, whether it is the

¹ KJIRSTEN SNEED, *When Cheaters Prosper: A Look at Abusive Horse Industry Practices on the Horse Show Circuit*, 6 KY. J. EQUINE AGRIC. & NAT. RESOURCES L., at 253 (2013-2014).

²*Id.*

³*Id.*

⁴*Id.*

rider, owner, trainer, or stable hand. A horse that wins is a horse that guarantees an income. Moreover, people in the horse show industry are treating horses like machines are treated in other industries: genetically and physically optimizing them to perform efficiently. Rather than take the slow and uncertain route of breeding and the use of positive training techniques, many horse owners and trainers have gone for the quick and violent mechanical option of abusing the animals in order to achieve winning performances.⁵

Part I of this paper introduces the abusive horse training technique called “soring.” Part II will give an overview of the Horse Protection Act of 1970, its subsequent successful amendments, and the last two failed amendments. I will discuss the reasons (1) why the Act was needed and what it was intended to cover; (2) why this coverage failed and further amendments were subsequently proposed; and (3) why some of these amendments have failed to pass and agency-authorized regulations proposed in their stead failed to be adopted. Part III will discuss a proposed solution for the protection of horses in California that should be but are not being protected under the HPA.

I. THE ISSUE

This paper focuses on the cruel act of “soring” and the laws that seek to prevent it. Soring is the purposeful “sensitizing” of the front feet of a horse with the intention of causing the horse to put more of its weight to its back legs in order to relieve the pain in front, creating an exaggerated and “showy” gait.⁶ Soring can be done in a variety of ways, including applying caustic chemicals that penetrate to the skin and then putting boots or other devices on the feet to further irritate the sensitive area, cutting the horse’s hooves too short and applying painful shoes

⁵Horse Protection Act; Requiring Horse Industry Organizations to Assess and Enforce Minimum Penalties for Violations, 77 Fed. Reg. 33608 (June 7, 2012) (to be codified at 9 C.F.R. pt. 11).

⁶THERESA LAVOIE, *The Horse Protection Act: The Dark Side of the Tennessee Walking Horse Show World*, ELLIS LAW GROUP LLP, <http://www.ellislawgrp.com/article11horseprotection.html> (last visited Apr. 21, 2017).

or other objects such as a tight wire around the hairline of the hoof, and using devices that place pressure on the sensitive underside of a horse's hoof.⁷ The Horse Protection Act, codified as 15 U.S.C. §§ 1821-1831 (hereinafter "HPA"), states that the term "sore," when used to describe a horse means

- (A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,
- (B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,
- (C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or
- (D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse, and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.⁸

Soring is primarily used in the training of Tennessee Walking Horses, "racking" horses, and other related "gaited" breeds.⁹ Tennessee Walking Horses are known for their unique fourbeat ambling gaits: the running walk, the flat walk, and their "rocking horse" canter, and they were originally bred in the Southern United States to carry the owners of plantations around their lands.¹⁰ Because of their smooth gaits, stamina, and calm dispositions, Tennessee Walking Horses became a popular riding horse and by the 1920's, the Tennessee Walking Horse had

⁷See *id.*

⁸See 15 U.S.C.A. § 1821 (defining the term "sore" as describes a horse under the HPA). See also *Horse Protection Act and Regulations*, U.S. DEP'T OF AGRIC., https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_hpa/ct_hpa_reg_sections (last updated Jul. 18, 2016).

⁹Horse Protection Act, 77 Fed. Reg. at 33607-08. See also FRAN JURGA, *Research Revelation: A Simple Gene Mutation Sets Gaited Horses Apart*, EQUUS, <http://equusmagazine.com/blog-equus/research-sweden-gene-gaited-horse> (last visited Apr. 22, 2017) (explaining that "gaited" horses have an alternative or additional gait to the two-beat trot where diagonal pairs of legs move in unison. This other gait is often called a "pace" and has legs on the same side of the horse moving in unison and this makes for a smoother and faster gait. This gait may arise from a mutation of a gene that controls movement and is a trait that is found disproportionately in Icelandic ponies, Tennessee Walking and other Saddlebred horses, and horses bred for harness racing).

¹⁰See LAVOIE, *supra* note 5.

become a registered American breed with its own thriving show circuit.¹¹ Throughout the 1930's and 40's, breed enthusiasts continued to "improve" the breed and during this time the "big lick" performance horse emerged.¹²

The abusive training practices of soring are meant to exaggerate the Tennessee Walking Horse's natural "running walk" to produce the prized competition stride termed the "big lick." The big lick is an exaggerated high lift and reach of the horse's front legs with an equally extended over reach by the back legs to compensate for the shift of its body weight, and the weight of the rider, to the horse's back legs.¹³ Typically the forelegs are sored, which causes the horse to place its hind legs further forward than normal under the horse's body, "resulting in its hind limbs carrying more of its body weight [and when] the sored forelimbs come into contact with the ground, causing pain, the horse quickly extends its forelimbs and snaps them forward."¹⁴ The horse's exaggerated stride is an attempt by the horse to reduce the pain caused by the soring; this is the desired show-winning gait.¹⁵ A similar, but less exaggerated gait, can be achieved through selective breeding and humane training methods; soring, however, produces the accentuated gait with less effort over a shorter period of time.¹⁶

Jennie Jackson, now a vocal anti-soring advocate in Tennessee, sored horses when she was first starting out on the show horse circuit in California in the 1970s—she knows "how [soring is] done, how it's hidden and why people hurt horses to win ribbons."¹⁷ Furthermore, she

¹¹*Id.*

¹²*Id.*

¹³KEITH DANE, *Institutionalized Horse Abuse: The Soring of Tennessee Walking Horses*, 3 KY. J. EQUINE AGRIC. & NAT. RESOURCES L., at 202 (2010-2011).

¹⁴Horse Protection Act, 77 Fed. Reg. at 33607-08.

¹⁵*Id.*

¹⁶*Id.*

¹⁷TODD SOUTH, *Indictment Shines Light on Abuse Allegations in Tennessee Walking Horse Industry*, TIMES FREE PRESS (Mar. 18, 2012), <http://www.timesfreepress.com/news/news/story/2012/mar/18/indictment-shines-light-abuse-allegations-tennesse/73344/> (last visited Apr. 22, 2017).

states: “It’s very addictive...It’s a quick fix, and it works.”¹⁸ In effect, Jackson knows that sored horses win shows and there is little to no repercussion for the owners and trainers for the abuse. The HPA was meant to eliminate this “cruel and inhumane” practice, because states like Kentucky, Tennessee, and Virginia (and to a lesser extent California) were not eliminating the soring of horses and the abuse was gaining public attention.¹⁹ An early case, originating in California and decided by the Ninth Circuit (*Stamper v. Secretary of Agriculture*), interpreted the HPA as being a strict liability statute, with no *mens rea* of intent or knowledge required in order to violate the Act.²⁰ In the case involving the Stampers, the USDA’s administrative law judge found the Stampers liable because under the HPA, the “statutory presumption of soreness was irrebuttable.”²¹ However, lax enforcement of the Act resulted in the Tennessee Walking Horse industry largely ignoring the HPA and continuing the practice of soring.²²

While this paper will solely focus on the HPA and the Tennessee Walking Horse it was enacted to protect, it must be noted that horses of all breeds and abilities are being abused to achieve winning results and prize money in all sectors of the performance horse industry.²³ The American public conveniently ignores or overlooks the abuses of the animals within the show setting because this violence is anathema to how people believe horses are treated, or how they wish horses to always be treated: with love, kindness, and respect.²⁴ However, when the underlying suffering is brought to light, the public may be galvanized to protect the innocent

¹⁸*Id.*

¹⁹See LEWIS BOLLARD, “The Legal Tipping Point on Horse Soring, Racing, and Slaughter,” 7 KY. J. EQUINE AGRIC. & NAT. RESOURCES L., at 427 (2014-2015).

²⁰See LAVOIE, *supra* note 5 for a full discussion of the case and its impact. See also *Stamper v. Sec’y of Agric.*, 722 F.2d 1483 (9th Cir. 1984) (holding that (1) evidence supported finding that horse was sore; (2) person need not intend to sore a horse in order to violate statute prohibiting showing of sore horses; (3) owners could be held liable for showing sore horse even though they did not know that horse was sore; and (4) imposition of fines and suspensions was not an abuse of discretion).

²¹See LAVOIE, *supra* note 5.

²²See BOLLARD, *supra* note 19, at 427.

²³See SNEED, *supra* note 1, at 257.

²⁴See BOLLARD, *supra* note 19, at 423-24.

animals and punish the perpetrators.²⁵ Unfortunately, the heat of public sentiment, while powerful, cannot always overcome a lucrative industry that has powerful political allies.²⁶ Moreover, while there are general animal welfare laws in every state that usually apply to these cruel activities, federal protections like the HPA only cover a small segment of the performance horse industry, leaving many animals unprotected, with little or no legal tools to fight against abuse in these industries.²⁷

II. BACKGROUND OF THE FEDERAL REGULATION OF SORING

A. The Horse Protection Act of 1970

The Horse Protection Act (HPA) was passed by Congress in 1970 to eliminate the practice of soring horses by prohibiting the showing, selling, or transporting of sored horses.²⁸ The Act excludes therapeutic treatment by or under the supervision of a licensed veterinarian from the definition of “sore” when used to describe a horse.²⁹

In order to regulate animal cruelty, which is normally the purview of the states, Congress invoked the Commerce Clause, declaring “the movement, showing, exhibition, or sale of sore horses in intrastate commerce adversely affects and burdens interstate and foreign commerce,”³⁰ because this form of competition is a national industry. Congress found that soring unfairly improves the performance of horses shown in these breed and gait specific arenas to the detriment of those who do not sore their horses.³¹

²⁵See DANE, *supra* note 13, at 209; See BOLLARD, *supra* note 19, at 424.

²⁶See BOLLARD, *supra* note 19, at 424-25.

²⁷See SNEED, *supra* note 1, at 257.

²⁸See 15 U.S.C.A. § 1824 (outlining unlawful acts under the HPA).

²⁹See 15 U.S.C.A. § 1821(3)(D).

³⁰15 U.S.C.A. § 1822(3).

³¹See 15 U.S.C.A. § 1822(2).

Congress also gave authority to the Department of Agriculture to draft regulations for the enforcement of the Act.³² Currently, within the USDA, the Animal Plant Health Inspection Service (APHIS) has the responsibility of enforcement.³³ To facilitate greater enforcement, the Act's 1976 amendments expanded its inspection program by directing the U.S. Secretary of Agriculture to establish a regulatory regime appointing qualified individuals to conduct inspections enforcing the HPA.³⁴ USDA established the Designated Qualified Persons (DQP) program where accredited veterinarians, horse trainers, farriers, or other knowledgeable horsemen whose past experiences in the industry would qualify them as organization or association judges are eligible to undergo formal training to become a DQP.³⁵ DQPs are trained to examine horses for soreness or for evidence of the "use of devices or chemicals which caused the horse to experience pain in the lower part of its front or hind legs, but only if the horse is involved in a show, exhibition, or sale."³⁶ Starting in 1999, APHIS delegated responsibility of the DQPs and enforcement of the HPA to certified Horse Industry Organizations (HIOs).³⁷ This industry self-regulation was largely necessitated because of inadequate funding of the Agency's Horse Protection Program under the HPA.³⁸ Some HIOs are known to have zero tolerance towards soring and are free from conflicting industry interests; others, especially the HIOs for the performance sector that favors the big lick, are much less effective at identifying sored horses and punishing the perpetrators.³⁹

³²*Horse Protection Act and its Administration*, U.S. DEP'T OF AGRIC., https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_hpa/ct_hpa_history_and_administration (last updated Aug 09, 2016).

³³*Id.*

³⁴*See SNEED, supra* note 1, at 259.

³⁵*Id.*

³⁶*Id.*

³⁷*See Horse Protection Act and its Administration, supra* note 32. *See also SNEED, supra* note 1, at 259-261 (discussing extensively and thoroughly the organization and implementation of HPA enforcement).

³⁸*See DANE, supra* note 13, at 207.

³⁹*Id.*

Typically, “an inspector will manually examine or ‘palpate’ the front legs of a horse to see if the horse reacts in pain, and [] look for other abnormalities, such as the presence of foreign substances or violations of the Scar Rule.”⁴⁰ During the early days of HPA enforcement, soring techniques left visible scarring and even open and bleeding lesions on horses’ legs.⁴¹ In response to these highly visible signs of abuse, the USDA implemented the Scar Rule in 1979 (later amended in 1988).⁴² A violation of the Scar Rule was an automatic disqualification of the horse from competition and other penalties could be assessed against violators.⁴³ The stricter punishments available under the Scar Rule were taken seriously; however they did not stop unscrupulous trainers—instead it made them develop new and even more painful techniques for masking the caustic substances applied to the animals’ limbs.⁴⁴

Violations of the HPA can lead to both civil and criminal penalties.⁴⁵ Civil penalties include fines, horse and trainer disqualifications, and temporary bans processed through an administrative law system.⁴⁶ Criminal cases are rare.⁴⁷ Enforcement has not been effective at eliminating the practice of soring and in a “scathing” opinion in 1987, the United States Court of Appeals for the District of Columbia “accused the USDA of having ‘misapprehended’ the HPA as ‘a sort of compromise between industry proponents of soring and persons who regarded the practice as barbarous’—an interpretation that the court soundly rejected.”⁴⁸ Although this ruling

⁴⁰*Id.* at 206.

⁴¹*Id.* at 203.

⁴²*Id.*

⁴³See DANE, *supra* note 13, at 203.

⁴⁴*Id.*

⁴⁵*Id.* at 209.

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸See BOLLARD, *supra* note 19, at 428. See also *Am. Horse Prot. Ass’n, Inc. v. Lyng*, 812 F.2d 1, *6 (D.C. Cir. 1987) (stating “We see nothing ambiguous in the Act’s treatment of soring methods. The Act was clearly designed to end soring”).

forced the USDA to strengthen its definition of “sore” horses through the Scar Rule, the USDA continued to fall far short of a zero tolerance approach to soring.⁴⁹

B. The 2012 Amendment

The 2012 proposed amendments to the HPA required “horse industry organizations or associations that license [DQPs] to assess and enforce minimum penalties for violations” of the HPA.⁵⁰ At the time of the amendment, the regulations provided that penalties would be set by the horse industry organization or association or by the USDA.⁵¹ The 2012 amendment was meant to strengthen enforcement of the HPA by ensuring that minimum penalties are “assessed and enforced consistently by all horse industry organizations and associations that are certified under the regulations” by the USDA.⁵²

The 2012 amendment was in response to the Harden Audit Report that closely examined the efficacy of the then-current regulations in preventing soring.⁵³ The report found that due to close industry ties of conflicted inspectors and administrators, industry self-regulation had been largely ineffective in detecting violations and eliminating soring.⁵⁴ The audit found overall that

DQPs working independently issued few tickets; they were much more likely to issue violations when they were being observed by an APHIS employee. From 2005 to 2008, APHIS veterinarians were present at only 6 percent of all shows, yet DQPs issued 49 percent of all violations at these shows. In other words, DQPs noticed about half of the violations they found at the small number of shows where they were being observed by an APHIS employee.⁵⁵

⁴⁹*Id.*

⁵⁰Horse Protection Act, 77 Fed. Reg. at 33607.

⁵¹*Id.*

⁵²*Id.*

⁵³*See* DANE, *supra* note 13, at 206; Gil H. Harden, U.S. Dep’t of Agric., Animal and Plant Health Inspection Service Administration of the Horse Protection Program and the Slaughter Horse Transport Program, Audit Rep. 33601-2-KC 2 (Sept. 30, 2010), available at www.usda.gov/oig/webdocs/33601-02-KC.pdf.

⁵⁴*See* DANE, *supra* note 13, at 207.

⁵⁵*Id.* at 208.

As of 2011, not a single HIO had ever been decertified for failure of its DQPs to properly detect soring.⁵⁶

In 2012, the USDA's "final rule" clarified that it has the authority to decertify an HIO for failure to comply with regulations.⁵⁷ At the 2012 Tennessee Walking Horse Celebration, the USDA increased its inspection efforts and found that an "incredible 145 of the 190 horses it tested were positive for the masking agents that are used to hide soring."⁵⁸ The USDA moved to decertify several HIOs, including the one in charge of the Celebration which had claimed that "98% of the horses at the Celebration were in compliance with federal law."⁵⁹ However, the teeth of the 2012 amendment were pulled when the part of the rule that required uniform mandatory minimum penalties for violations of the HPA was struck down by the Fifth Circuit Court of Appeals in *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 274 (5th Cir. 2015).⁶⁰

C. The PAST Amendment and the Stalled New Regulations

After the minimum penalties and eradication of self-regulation amendments failed to pass in 2012, a spate of high profile "horse torture" cases graphically brought the issue to the public's attention along with a demand for more and harsher action.⁶¹ In 2013, Representative Ed Whitfield of Kentucky and Representative Steve Cohen of Tennessee introduced the Prevent All Soring Tactics (PAST) Act.⁶² The PAST Act was written to stop the cruel practice of soring by

⁵⁶*Id.*

⁵⁷*See Horse Protection; Requiring Horse Industry Organizations to Assess and Enforce Minimum Penalties for Violations, Final Rule*, USDA, (July 07, 2012), <https://www.regulations.gov/document?D=APHIS-2011-0030-0903> (stating that "HIOs that do not wish to cooperate in the effort to eliminate soring by imposing the minimum penalties required in this final rule may withdraw from certification; if an HIO refuses to implement the minimum penalties, we will initiate proceedings to decertify the HIO").

⁵⁸*See* BOLLARD, *supra* note 19, at 434.

⁵⁹*Id.*

⁶⁰ In *Contender*, the court held that "[i]n sum, the plain language of the HPA suggests that Congress intended a private horse *inspection* system. This statutory regime does not support the USDA's position that Congress authorized it to promulgate the Regulation, which requires private parties to impose government-mandated suspensions as an arm of HPA *enforcement*." 779 F.3d at 274.

⁶¹*See* BOLLARD, *supra* note 19, at 423-24.

⁶²*Id.* at 424.

strengthening penalties, banning the use of “action devices” (chains or other devices that are placed over the hoof to irritate a sensitive area) and “performance packages” (stacks or pads that add weight and height to a horse’s front limbs and makes the limbs strike at an unnatural angle) and ending the walking horse industry’s failed system of self- regulation.⁶³

The proposed amendment reintroduced the goals of the 2012 amendments, including requirements that APHIS personnel train and license DQPs to inspect horses at horse shows, exhibitions, sales, and auctions for compliance with the HPA, rather than have persons chosen from within the industry as the overseers of their peers.⁶⁴ In other words, the proposed changes would “relieve HIOs of all regulatory burdens and requirements.”⁶⁵ Furthermore, the proposed amendment established “a process by which APHIS can revoke the license of a DQP for professional misconduct or failure to conduct inspections in accordance with the regulations” and “requirements to minimize conflicts of interest between DQPs and others within the horse industry that enable the practice of soring.”⁶⁶ Moreover, the amendment proposed changes to the “responsibilities of management of horse shows, exhibitions, sales, and auctions,” and “to the list of devices, equipment, substances, and practices that can cause soring or are otherwise prohibited” under the HPA regulations, as well as to the “inspection procedures that DQPs are required to perform.”⁶⁷ These actions and changes were meant to strengthen existing

⁶³*Id.* See also *The American Veterinary Medical Association and the American Association of Equine Practitioners Position on the Use of Action Devices and Performance Packages for Tennessee Walking Horses*, AVMA, <https://www.avma.org/KB/Resources/Reference/AnimalWelfare/Documents/AVMA-and-AAEP-Position-on-the-Use-of-Action-Devices-and-Performance-Packages-for-Tennessee-Walking-Horses.pdf> (last visited Apr. 29, 2017) (supporting a ban of action devices and performance packages in the training and showing of Tennessee Walking Horses because “the inhumane practice of soring... has continued 40 years after passage of the [HPA], and because the industry has been unable to make substantial progress in eliminating this abusive practice, [this ban] is necessary to protect the health and welfare of the horse”).

⁶⁴*Horse Protection; Licensing of Designated Qualified Persons and Other Amendments*, 81 Fed. Reg. 49112 (July 26, 2016) (to be codified at 9 C.F.R. pt. 11).

⁶⁵*Id.*

⁶⁶*Id.*

⁶⁷*Id.*

requirements intended to protect horses from the unnecessary and cruel practice of soring and eliminate unfair competition.⁶⁸

At the same time that Representatives Whitfield and Cohen proposed the PAST Act to strengthen the HPA and provide better protection to industry horses, strong lobbyists from within the industry sought to maintain the status quo by having politicians who opposed animal welfare reforms and had strong ties to the industry propose a competing bill that would “enshrine the industry’s failed system of self-regulation, with minor adjustments.”⁶⁹ This obfuscating tactic had worked for the industry for over forty years, but following the outrages brought to light during the investigation of famed Tennessee Walking Horse trainer Jackie McConnell—who was videotaped beating horses with clubs and dousing their legs in chemicals to produce the prized big lick gait—a majority seemed to be in favor of passing the PAST Act and urged for the “abominable” practice to be stopped.⁷⁰ Additionally, two “political powerhouses in Washington, D.C.—the American Veterinary Medical Association and the American Horse Council—testified in favor of the PAST Act.”⁷¹ Although quickly overruled by the board of directors, leaders of the Tennessee Walking Horse Breeders’ & Exhibitors’ Association (TWHBEA) initially supported PAST, as did “[v]eterinary associations, humane groups, and horse industry professionals from around the country [and at] the close of the 113th Congress, the PAST Act had the support of over 300 of the nation’s 435 Representatives and fifty-nine of the 100 U.S. Senators.”⁷² Although PAST had the second highest number of House sponsors of any bill in the last two Congresses (307 in the 113th Congress [2013-14] and 272 in the 114th [2015-16]), it never received a floor vote because House leaders “sided with opponents of the measure in the Tennessee delegation,

⁶⁸*Id.*

⁶⁹See BOLLARD, *supra* note 19, at 424-25, 435.

⁷⁰*Id.* at 423, 425.

⁷¹*Id.* at 425.

⁷²*Id.*

like Republican Scott DesJarlais, who represents the walking horse industry’s epicenter in Shelbyville.”⁷³ Instead of relying on passing the amendments, in the last week of Barack Obama’s presidency, the Department of Agriculture chose to finalize new regulations that largely followed the amendments proposed in the PAST Act.⁷⁴

As late as January 13th, 2017, the Humane Society of the United States was praising the Obama administration for finalizing protections for the Tennessee Walking Horse after the USDA had announced the release of its final rule to upgrade the HPA.⁷⁵ It was a short-lived victory for anti-soring advocates as the new regulations were put on hold indefinitely.⁷⁶ While the USDA had announced the rule was finalized, to become effective it must be published in the Federal Register, which did not happen before President Obama left office.⁷⁷ Three days before the notice of the new rules was due to be published in the Federal Register, President Trump took office and “issued a memorandum for all unpublished rules to be withdrawn and sent back to the relevant agency for review,” which could mean that there will be no further action and no further protections.⁷⁸ Keith Dane, senior adviser for equine protection for the Humane Society of the United States, is not sure what happened in the last days of Obama’s presidency that led to the failure to publish the new regulations, and opined that it could have been lost in the shuffle of every other new regulation being pushed through or there could have been “some other behind-the-scenes action.”⁷⁹

⁷³*Tennesseans Look to Rescind Obama Walking Horse Rule*, CQ MAGAZINE (January 30, 2017), <http://library.cqpress.com/cqweekly/weeklyreport115-000005028536> (last visited Apr. 06, 2017).

⁷⁴*Id.*

⁷⁵*Obama Administration Finalizes Rule to Protect Tennessee Walking Horses*, HUMANE SOCIETY OF THE UNITED STATES, http://www.humanesociety.org/news/press_releases/2017/01/USDA-finalizes-horse-soring-rule-011317.html (last visited Apr. 21, 2017).

⁷⁶Michael Collins, *Horse Soring Restrictions Among Those Halted by Trump Ban on New Rules*, USA TODAY, (Jan. 25, 2017), <http://usat.ly/2kpzoHa> (last visited Apr. 21, 2017).

⁷⁷*Id.*

⁷⁸*Id.*

⁷⁹*Id.*

The Memorandum (“Memorandum for the Heads of Executive Departments and Agencies”) issued shortly before President Trump attended his Inaugural Ball reads in pertinent part: “With respect to regulations that have been sent to the OFR [Office of Federal Regulation] but not published in the Federal Register, immediately withdraw them from the OFR for review and approval.”⁸⁰ Additionally, U.S. Senate Majority Leader Mitch McConnell from Kentucky has been an outspoken opponent of more protective measure for horses in his home state and across the country.⁸¹ It has been suggested that Senator McConnell “made sure that the OFR was included in the Memorandum.”⁸²

III. CALIFORNIA’S ANTI-CRUELTY LAWS AND HORSE SORING

Commentators suggest that adequately funding the Horse Protection Program is one way to provide effective enforcement and oversight, because it will extinguish industry reliance on self-regulation.⁸³ Another way to increase protection and enforcement would be to have states take responsibility for protecting horses.⁸⁴ All states have animal protection laws that apply to horses, and some states, like Tennessee and Virginia, have statutes that explicitly prohibit soring.⁸⁵ In the absence of strong federal regulations and adequate funding for oversight and prosecution—as is the current state of the HPA—states should fill the gap by investigating reports of abuse and prosecuting violators under existing animal cruelty or anti-soring laws. Moreover, this would have a “major impact on soring, by forcing violators to face criminal charges for the acts they commit on their own property, not just at horse shows where they have

⁸⁰*Trump and McConnell Team Up to Prevent Rule That Would Virtually End Horse Soring*, TUESDAY’S HORSE, <https://tuesdayshorse.wordpress.com/2017/01/21/trump-and-mcconnell-team-up-to-prevent-rule-that-would-virtually-end-horse-soring/> (last visited Apr. 21, 2017).

⁸¹*Id.*

⁸²*Id.*

⁸³See DANE, *supra* note 13, at 216.

⁸⁴*Id.*

⁸⁵*Id.*

learned to ‘beat the system’ of HPA inspections.”⁸⁶ However, using state anti-cruelty laws relies on strong prosecutorial interest in ending the intentional infliction of severe pain and distress that is inherent in soring. Furthermore, the anti-cruelty laws can only be enforced by local and state governments, so animal welfare advocates will need to rely on state prosecutors taking veterinarians, show officials, concerned citizens, and the well-being of horses seriously. Just as necessary is community support within the performance horse industry to have zero tolerance for abusive practices. Only by combining zero tolerance within the industry and a strong inclination to prosecute violators of the state’s animal-cruelty law, will abusive practices finally end.⁸⁷

California Penal Code § 597 covers animal cruelty. The statute reads, in part:

(a) every person who maliciously and intentionally maims, mutilates...or wounds a living animal...is guilty of a crime...punishable as a felony with imprisonment and/or a fine of not more than \$20,000 or as a misdemeanor with imprisonment in county jail and/or a fine of not more than \$20,000.⁸⁸

Additionally, the statute provides that

(b) every person who...mutilates...or causes or procures any animal to be so...tormented...or to be cruelly beaten [or] mutilated...and whoever, having the charge or custody of any animal, either as owner or otherwise, subjects any animal to needless suffering, or inflicts unnecessary cruelty upon the animal, or in any manner abuses any animal...or who drives, rides, or otherwise uses the animal when unfit for labor, is, for each offense, guilty of a crime.⁸⁹

In California, there is no specific law against soring, although § 597g specifically prohibits “poling” a horse (forcing a horse to jump higher by raising an obstruction that hits their legs

⁸⁶ *Id.*

⁸⁷ See *Animal Legal Def. Fund v. Cal. Exposition & State Fairs*, 239 Cal. App. 4th 1286, 1297 (2015) (holding that there “exists a comprehensive statutory scheme that provides multiple avenues for the enforcement of California’s animal cruelty laws [such as humane] societies [which] are vested with ‘quasi-governmental powers’ to aid local authorities in the enforcement of anticruelty laws, and any individual can make a complaint under oath to a magistrate authorized to issue warrants in criminal cases if the complainant believes animal cruelty is taking place or will take place. These methods of enforcement are in addition to the authority of law enforcement agencies to enforce the penal laws of California.” However, these avenues do not include either a private right of action or a taxpayer action).

⁸⁸ Cal. Penal Code § 597 (West).

⁸⁹ *Id.*

while jumping); § 597k prohibits the use of a bristle-bur, tack-bur, or other like device on horses for any “purpose whatsoever;” and § 597n prohibits docking (cutting the solid part of the tail off) of horses and cows.⁹⁰ In Kentucky, which has a large walking horse industry and proudly proclaims itself the “Horse Capitol of the World,” there is a specific anti-soring law, but it only carries a maximum fine of \$100 and there is no evidence that it has ever been enforced.⁹¹ According to the USDA, Kentucky has the second highest incidence of documented soring of any state.⁹² Soring also occurs in California, which does not have as high a rate as Kentucky or other southern states, but there is a cluster of soring activity noted around the Bay Area, a larger cluster in Los Angeles, and reported incidents in the Central Valley.⁹³

The Northern California Walking Horse Association is a group “dedicated to building a Pleasure Walking Horse Community” through the promotion of the Tennessee Walking Horse, advocating “against all abusive and inhumane treatment,” and providing “competitive venues...judged in full compliance with all aspects of the [HPA].”⁹⁴ Although the group provides information about horse shoeing rules and regulations for regional shows and within their group, their informational site never mentions the word “soring.” Rather, action devices and training methods that might indicate soring are prohibited: any “appliance attached to a horse’s hoof other than a regulation shoe...are prohibited” in the show ring, as are “appliances attached to a horse’s hoof...action devices on the pastern areas...and plastic wrap used for the purpose of

⁹⁰ Grant Miller, DVM, Carolyn Stull, PhD, Gregory Ferraro, DVM, A GUIDE: MINIMUM STANDARDS OF HORSE CARE IN THE STATE OF CALIFORNIA, at 49-50 (2014). Also available at http://www.vetmed.ucdavis.edu/ceh/local_resources/pdfs/CAStandards-Feb2014.pdf (last visited Apr. 21, 2017).

⁹¹ See DANE, *supra* note 13, at 216.

⁹² *Id.*

⁹³ *Soring Violation by State*, STOP SORING, <http://www.stopsoring.com/> (last visited Apr. 18, 2017).

⁹⁴ *Membership*, NORTHERN CALIFORNIA WALKING HORSE ASSOCIATION, <https://www.ncwha.com/membership> (last visited Apr. 18, 2017).

creating occlusive leg wraps” in the show area.⁹⁵ The reason given is that “while we understand the need for therapeutic shoes, given the [Tennessee Walking Horse’s] unique situation they can be used adversely (weight added, pressure added).”⁹⁶

Given the reluctance of a group dedicated to advocating for the humane treatment of Tennessee Walking Horses in California to confront—or even name—the abusive practice, does California need a specific law for soring even though the harmful action is covered by the general anti-cruelty laws? California has made it a criminal act to abuse horses by specific acts that cause the animals pain and distress: poling, placing bristle-burs under the saddle, and docking their tails. From the evidence of these laws’ existence, if a general anti-cruelty law is not going to be completely effective at eliminating soring, then it would seem that a specifically targeted anti-soring criminal law could be a successful solution.

However, in the absence of such a law, the animal cruelty law may be effective in alleviating the suffering of horses and punishing those who intentionally wound the animals in order to produce the desired show gait. In *People v. Alvarado*, a California court ruled that § 597(a) “does not state that an offender...must have an intent to do some further act or achieve some further consequence other than the proscribed acts [because it] does not contain a phrase such as ‘with the intent to’ or ‘for the purpose of’ that would be used in a specific intent crime.”⁹⁷ If California is going to close the gap in enforcement left by the failure to publish the stricter anti-soring federal regulations and in the absence of a specific anti-soring law, § 597(a) is a reasonable place to start. Because the crime is not a specific intent crime, this will give prosecutors more leeway in determining that intentionally inflicted injuries to a horse’s leg or

⁹⁵*History and Gaits*, NORTHERN CALIFORNIA WALKING HORSE ASSOCIATION, <https://www.ncwha.com/membership> (last visited Apr. 18, 2017).

⁹⁶*Id.*

⁹⁷*People v. Alvarado*, 125 Cal. App. 4th 1179, 1186–87 (2005).

legs constitute an illegal act, without having to prove that the injuries were for any purpose or intended to achieve any specific result. Furthermore, the court in *Alvarado* explained, quoting *People v. Ramsey*, that “[a]s a rule, the term ‘intentionally’ requires only that the agent acted intentionally in engaging in the proscribed conduct, and not that the agent knew that the conduct was proscribed.”⁹⁸

As noted above, the HPA allows for civil and criminal penalties, with criminal indictments being rare and civil fines and limited-time bans being the most frequent penalties. In the context of a state anti-soring law that also has little deterring force, the one in Kentucky only provides for light civil penalties. In California, if advocates can obtain the strict enforcement of § 597(a) of the Penal Code for soring, with attendant criminal penalties, it may lead to a swifter end to the violent practice of intentionally “maiming, mutilating, or wounding” gaited horses so that they perform in a particular manner in the show ring.

Moreover, § 597(b) could allow for the prosecution of individuals who may not have been the one to actually cut or apply caustic chemicals to a horse’s legs, but somehow participate in or benefit from the conduct. Subsection (b) provides that

whoever, having the charge or custody of any animal, either as owner or otherwise, subjects any animal to needless suffering, or inflicts unnecessary cruelty upon the animal, or in any manner abuses any animal, or...who drives, rides, or otherwise uses the animal when unfit for labor, is, for each offense, guilty of a crime.⁹⁹

Additionally, it could be used to prosecute people who use “action devices,” such as the pads and chains that cause horses discomfort or even extreme pain, but are not in and of themselves an intentionally inflicted wound.

Given that there are horse specific criminal laws in California and the state has a robust animal cruelty statute that courts seem willing to enforce, even in the absence of federal anti-

⁹⁸*Id.* at 1188.

⁹⁹Cal. Penal Code § 597 (West).

soring enforcement if prosecutions are brought, soring could be addressed within the state. In the absence of strong HPA regulatory oversight to eliminate soring through the prosecution of violators, horse advocates will have to work to encourage law enforcement and prosecutors to take up the battle against the intentional torment and mutilation of horse forelimbs that is the practice of soring. For those in the walking horse industry, winning has been big business and historically there have been few repercussions to winning at all costs.

CONCLUSION

In each push for tougher enforcement of the HPA, it was public awareness and anger at the continued suffering of horses in the walking horse industry that led to change. Negative public scrutiny arising out of several high profile horse abuse cases spurred the United States' Equestrian Federation (USEF) to hold "town hall meetings" in several states, including California, in 2013 that focused on performance horse welfare.¹⁰⁰ During these meetings, John Long, USEF Chief Executive Officer, pressed for harsher penalties for HPA violators, calling for penalties that would effectively deter the practice of soring.¹⁰¹ The HPA, however, is only an imperfect protection for gaited horses on the show circuit and does not address other abusive practices in other show circuits and industries for other breeds and disciplines of horses.¹⁰² Private equestrian governing organizations like the USEF are supplementing the enforcement of the HPA by passing their own bans and animal welfare standards. While oversight and zero tolerance within the performance horse community are important, state action through criminal prosecution of animal abuse will demonstrate an even greater commitment to stopping

¹⁰⁰See SNEED, *supra* note 1, at 270.

¹⁰¹*Id.*

¹⁰²*Id.* The author also mentions abuse of American Quarter Horses and Arabians in breed specific competitions and horses generally in show jumping and dressage competitions, at 257.

widespread mistreatment across the performance horse industry, helping to alleviate the pain of all mistreated horses, sores gaited horses among them.¹⁰³

¹⁰³*Id.* at 270.

Mutt Mutation:
Practical and Legal Remedies for Man's Harmful Interference into Canine
Genetics

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Approximately 10,000 years ago humans made a fundamental lifestyle shift away from hunting and gathering to permanent civilized society.¹ This revolutionary change in human activity was spurred by a newfound ability to grow food rather than forage for nourishment.² A natural consequence of this sedentary way of life was the domestication of animals for consumption, which first occurred in 9,000 BC in northern Iraq.³ However, the domestication of dogs began pre-civilization, around 15,000 years ago, and dogs have remained a constant human ally into the modern age.⁴

Humans integrated wild animals into the societal fold by slowly molding their nature to best suit human needs for food, companionship, and labor.⁵ Relatively few animals have qualities that are inherently adaptable for successful domestication, which is why cats, dogs, horses, cows, pigs, and chickens—a relatively exclusive group—have become staples of domestication across the globe.⁶ These animals possess the six qualities that acquiesce to domestication best: (1) indiscriminate dietary requirements; (2) fast maturation; (3) receptiveness to close-quarters captive breeding; (4) instinctive docility; (5) minimal flightiness; and (6) receptivity to social hierarchy and dominance.⁷

This paper explores the companionship aspect of canine animals and questions whether humans have overstepped the legal and moral bounds of selective modification of man's best

¹Bamber Gascoigne, *Hunter-Gatherers to Farmers*, HISTORYWORLD, <http://www.historyworld.net/wrldhis/PlainTextHistories.asp?ParagraphID=ayj>.

²*Id.*

³*Id.*

⁴ Tabitha M. Powlidge, *The First GMO (Hint: Human's Best Friend)*, GENETIC LITERACY PROJECT (Nov. 19, 2013), <https://www.geneticliteracyproject.org/2013/11/19/the-first-gmo-hint-humans-best-friend/>.

⁵ Natalie Wolchover, *Why Can't All Animals be Domesticated?*, LIVESCIENCE (Apr. 30, 2012, 2:15 PM), <http://www.livescience.com/33870-domesticated-animals-criteria.html>.

⁶*Id.*

⁷*Id.*

friend. Part I considers the history of canine domestication and intentional human interference into the modern day. Part II describes the various contemporary methods for continued canine customization and identifies practical remedies for harmful human interference. Part III discusses the current civil and criminal remedies for inappropriate genetic modification and calls for additional legal safeguards. Part IV concludes that humans have not only a legal duty, but also an ethical obligation, to shield canine companions from injurious genetic meddling.

I. Introduction: Origins of the Modern Domestic Canine

Dogs are the result of the longest running genetic engineering experiment in the history of the world and have been artificially selected to become human-compatible companions.⁸ *Canis lupus familiaris*, the domestic dog, is the result of thousands and thousands of years of selective breeding.⁹ The modern dog is the most diverse mammal in the world and comes in all shapes, sizes, colors, and hair textures, tailored to the needs and desires of those who choose to associate with a particular type or breed.¹⁰ However, all domestic canines have a singular point of origin, the gray wolf, with domestication occurring between 10,000 and 17,000 years ago.¹¹ In fact, domestic dogs and gray wolves technically remain within the same species, *canus lupus*, and therefore, are able to interbreed without complication or incident to the resulting

⁸ Williams Saletan, *FrankenFido: Our Creepiest Genetic Invention, the Dog*, SLATE (Dec. 14, 2005, 12:35 AM),

http://www.slate.com/articles/health_and_science/human_nature/2005/12/frankenfido.html.

⁹HISTORY AND EVOLUTION OF DOGS, <http://www.mans-best-friend.org.uk/history-evolution-dogs.htm> (last visited Nov. 9, 2017).

¹⁰ Andrea Thompson, *Genes for Dog Breeds Discovered*, LIVESCIENCE (Jan. 11, 2010, 10:57 AM), <http://www.livescience.com/6023-genes-dogs-breeds-discovered.html>.

¹¹ Remy Melina, *The Incredible Explosion of Dog Breeds*, LIVESCIENCE (Aug. 5, 2010, 4:02 AM), <http://www.livescience.com/8420-incredible-explosion-dog-breeds.html>.

offspring.¹² Because all dogs share a common historical lineage, it is a likelihood, if not a certainty, that all domestic dogs are the result of a single event of human-wolf companionship.¹³

Human association forced a small sect of wolves to become isolated from the wolf population at large, thereby limiting the pool of viable mates and resulting in closely held breeding and inbreeding.¹⁴ Mutations arose from such closely held breeding over time and created unique and previously unseen characteristics, such as a curly tail, short legs, or a distinctive coat.¹⁵ Those animals possessing undesirable mutations were killed or otherwise prevented from breeding, and those animals that mutually possessed a desired mutation were encouraged to breed in order to fortify the viability of that characteristic into the future.¹⁶ Because what is considered “desirable” is wholly subjective, different individuals had different traits they believed to be valuable. For example, Alaskan huskies were bred with dog sledding in mind, with desirable characteristics of a thick fur coat, stamina, and tough feet;¹⁷ in contrast the bloodhound was historically bred for tracking, characterized by their keen sense of smell.¹⁸ Different mutations were encouraged to meet the needs of human companions, resulting in hundreds of well-defined breeds, each with a very specific utilitarian purpose. This process of

¹² Tabitha M. Powlidge, *supra* note 4.

¹³ Remy Melina, *supra* note 11.

¹⁴ Brian Thomas, *How Did Wolves Become Dogs?*, INST. FOR CREATION RES., <http://www.icr.org/article/how-did-wolves-become-dogs/>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Jane Lee, *What Makes a Great Sled Dog? Breed, Ambition, Tough Feet*, NAT’L GEOGRAPHIC (Jan. 31, 2015), <http://news.nationalgeographic.com/news/2015/01/150131-sled-dog-alaskan-husky-racing-itarod-winter-video-culture/>.

¹⁸ *Meet the Bloodhound*, AM. KENNEL CLUB, <http://www.akc.org/dog-breeds/bloodhound/detail/> (last visited Nov. 19, 2016).

artificial selection through interbreeding has resulted in 340 officially recognized breeds of dog today.¹⁹

There are some characteristics that humans may not consciously recognize as purposefully bred-in traits. Rather, it is unclear that man can take any credit for the initial domestication of the gray wolf, as scientists have hypothesized that the wolf may have self-domesticated for survival purposes.²⁰ Over time, dogs have adapted to life with humans by acquiring the ability to interpret and react appropriately to our facial expressions, body language, and vocalizations.²¹ They have also contrived exaggerated mannerisms that are more easily recognized and understood by humans, such as tail wagging, whimpering, and licking.²² As a means of understanding this phenomenon, scientists have purposefully replicated this evolutionary socialization using foxes.²³ Researchers chose the least aggressive foxes in a large group and bred them with docility and tameability in mind.²⁴ The most submissive offspring were then interbred and this process continued over several generations. Within only three generations, fear avoidance was eliminated and after only six generations the foxes purposefully sought out human contact, licked, and wagged their tails, just as all modern dogs do.²⁵ This recent research indicates it is possible historically that wild gray wolves could have solidified their role

¹⁹FÉDÉRATION CYNOLOGIQUE INTERNATIONALE, <http://www.fci.be/en/Nomenclature/Default.aspx> (last visited Nov. 19, 2016) (The FCI is the largest canine organization in the world).

²⁰ Tabitha M. Powlidge, *supra* note 4.

²¹ Hilary Hansen, *Dogs Can Understand Human Speech a lot Better than We Thought*, HUFFINGTON POST (Aug. 30, 2016, 2:34 PM), http://www.huffingtonpost.com/entry/dogs-understand-human-language-words-study_us_57c5aa82e4b0cdfc5ac95fa0; Brian Thomas, *supra* note 14.

²² DOGS DECODED: UNDERSTANDING THE HUMAN-DOG RELATIONSHIP (Public Broadcasting Service 2010).

²³ Osinka Trut & A. Kharlmaova, *Animal Evolution during Domestication: The Domesticated Fox as a Model*, 31(3) BIOESSAYS 349-360 (2009).

²⁴ *Id.* at 349.

²⁵ *Id.*

as a human companion within just three generations, with more human-intentioned transformations coming much later.²⁶

Between socialization factors, utility, and the malleability of canine characteristics, it is no surprise that dogs began to live with humans inside the home approximately 2,000 years ago, during the height of the Roman Empire.²⁷ Today, within the United States alone, there are approximately 78 million pet dogs living in 44% of households.²⁸

II. Modern Canine Modification

Beyond the initial canine transformation from wolf to dog, there are two methods by which humans continue to mold canines to their preference into the modern era. Taking a page from history, humans can breed and interbreed for the traits or assets that are particularly valuable or useful. This is called selective breeding.²⁹ A more cutting-edge method of genetic manipulation is by way of bioengineering technology that can be harnessed to create the perfect “designer dog.”³⁰

A. Technological Means of Modifying Canine Genetics

A revolutionary gene-splicing technology known as CRISPR-Cas9 is a genome-editing tool that can remove, add, or alter sections of a DNA sequence.³¹ This new technology is currently taking the world by storm because it is simple to use, inexpensive, and has incredible

²⁶ Brian Thomas, *supra* note 14.

²⁷ Hilary Hansen, *supra* note 21.

²⁸ Melissa Chan, *The Mysterious History Behind Humanity’s Love of Dogs*, TIME (Aug. 25, 2016), <http://time.com/4459684/national-dog-day-history-domestic-dogs-wolves/>.

²⁹ University of Waikato, *Selective Breeding*, BIOTECH LEARNING HUB, http://biotechlearn.org.nz/about_this_site/glossary/selective_breeding.

³⁰ Kevin Loria, *The Age of Genetically Modified Animals Has Arrived*, BUSINESS INSIDER (July 27, 2015, 11:18 AM), <http://www.businessinsider.com/the-age-of-genetically-engineered-animals-has-arrived-2015-6>.

³¹ *Facts: What is CRISPR-Cas9?*, YOUR GENOME, <http://www.yourgenome.org/facts/what-is-crispr-cas9>.

medical potential. Scientists are optimistic about its applicable success in editing genes within human embryos to rule out defects or carve out diseases such as Down’s syndrome and Huntington’s disease.³² However, in October 2015, China boasted creation of the first genetically modified dog via CRISPR-Cas9 technology.³³ Chinese scientists used gene-splicing technology to remove a muscle-inhibitor gene, myostatin, from the embryo of two beagles.³⁴ Removing this gene allowed these genetically modified dogs to attain double the muscle mass of their peers.³⁵

1. Technological Modification for Research

While creating “Hercules dogs” is just CRISPR-Cas9’s first canine application, scientists anticipate further collaboration between dogs and CRISPR to study genetic removal of disease and establish its potential viability in human subjects.³⁶ Eager scientists cite common “metabolic, physiological, and anatomical characteristics” shared by dogs and humans as justification for future canine testing.³⁷ Because most research animals are exempted from protections provided by the Animal Welfare Act (the “AWA”), it is unlikely there will be any significant legal safeguards for canines being genetically altered to both procure and repair a crippling disease.³⁸ The only real means of protection for laboratory animals is through grant programs. Many research grants have care standards as a requirement for continued funding. For example, any U.S. research facility receiving federal funding is required to comply with the “PHS Policy on Humane Care and Use of

³² Heidi Ledford, *CRISPR: Gene Editing is Just the Beginning*, NATURE (Mar. 7, 2016), <http://www.nature.com/news/crispr-gene-editing-is-just-the-beginning-1.19510>.

³³ Antonia Regalado, *First Gene-Edited Dogs Reported in China*, MIT TECH. REV. (Oct. 19, 2015), <https://www.technologyreview.com/s/542616/first-gene-edited-dogs-reported-in-china/>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ SONIA S. WAISMAN, ET AL., ANIMAL LAW 475 (Carolina Academic Press, 5th ed. 2014).

Laboratory Animals.”³⁹ This policy fills many of the gaping holes left by the AWA, but the remedy is non-severe—a loss of federal funding for researchers.⁴⁰

Turning away from protection problems related to animal research as a whole, dogs subject to CRISPR-Cas9 may be spared from testing altogether. In this respect, China’s lack of regulations may be a blessing in disguise for animals, as CRISPR-Cas9 human trials have already begun there.⁴¹ With human testing underway, there is a decreased need to use dogs as intermediary test subjects. In this race to the top, lovingly coined “Sputnik 2.0,” U.S. researchers have joined China in initiating testing on human subjects, including a substantial breakthrough announced in August 2017 that successfully fixed a disease gene in viable human embryos.⁴² Because animal tests are not accurate predictors of human application⁴³ and because canine genomes share only 84% commonality with humans, in contrast with primates who share approximately 96-98%, it is likely that canine CRISPR-Cas9 testing and research will be sidestepped entirely.⁴⁴

³⁹Office of Laboratory Animal Welfare, *PHS Policy on Humane Care and Use of Laboratory Animals*, National Institutes of Health (2015), <http://grants.nih.gov/grants/olaw/olaw.htm>

⁴⁰*Id.*

⁴¹David Cyranoski, *CRISPR Gene-Editing Tested in a Person for the First Time*, NATURE (Nov. 15, 2016), <http://www.nature.com/news/crispr-gene-editing-tested-in-a-person-for-the-first-time-1.20988> (Which anticipated the beginning of human testing in the United States in 2017).

⁴²*Id.*; Heidi Ledford, *CRISPR Fixes Disease Gene in Viable Human Embryos*, NATURE (Aug. 2, 2017), <http://www.nature.com/news/crispr-fixes-disease-gene-in-viable-human-embryos-1.22382>.

⁴³*Frequently Asked Questions about Animal Testing*, PHYSICIAN’S COMMITTEE FOR RESPONSIBLE MED., <http://www.pcrm.org/research/animaltestalt/tailtox/frequently-asked-questions-about-animal-testing>.

⁴⁴Lori Garrett-Hatfield, *Animals that Share Human DNA Sequences*, SEATTLE PI, <http://education.seattlepi.com/animals-share-human-dna-sequences-6693.html>.

2. Technological Modification for Commercial Use

Despite the likelihood that canines may, in general, be spared from gene-splicing *research* for later use in humans, canines will not escape this new technology for *commercial* purposes. Removal of the myostatin gene to allow increased muscle growth unleashes “stronger running ability, which is good for hunting, police, and military applications.”⁴⁵ This is just one way CRISPR-Cas9 technology can genetically alter dogs. With the ability to add and remove genetic traits at will, labs could easily become a one-stop shop for high-end customizable pets, using CRISPR-Cas9 to change an animal’s size, increase intelligence, or correct illness.⁴⁶

Scientists have already used CRISPR-Cas9 to create “spotty sheep,” which could “pave the way for dye free wool and allow pet owners to order animals with customized fur coloring.”⁴⁷ The Beijing Genomic Institute has successfully marketed pet pigs, which are genetically modified to reach a maximum weight of only thirty-three pounds.⁴⁸ This commercialization could be easily applicable to canine companions in the U.S. marketplace, as technological development and the demand for new and unique “designer dogs” increases in tandem.⁴⁹ What is unclear is how U.S. lawmakers will respond to such rapidly developing irregular methods of achieving the perfect pet.⁵⁰

⁴⁵ Antonia Regalado, *supra* note 33.

⁴⁶ *Id.*

⁴⁷ Rachel Bishop, *CRISPR-Engineered Sheep Given Custom Fur Colors Paves Way for Custom Colored Pets*, GENETIC LITERACY PROJECT (June 9, 2016), <https://www.geneticliteracyproject.org/2016/06/09/crispr-engineered-sheep-given-custom-fur-colors-paves-way-custom-colored-pets/>.

⁴⁸ Antonia Regalado, *supra* note 33.

⁴⁹ Victoria Heuer, *Deconstructing the ‘Designer Dog,’* PETMD, http://www.petmd.com/dog/care/evr_dg_deconstructing_the_designer_dog.

⁵⁰ To be discussed in *infra* Part III.

B. Selective Breeding

Selective breeding has been a tried and true staple of the human-canine relationship. As described in *Part I*, every identifiable breed of the modern world is the result of thousands of years of selective breeding. This method of altering pets is slower than the biogenetic engineering of CRISPR-Cas9, as it may take several generations of careful selection to achieve a desired characteristic or combination of characteristics. Particularly over the last one hundred years, canine utility has fallen by the wayside, as human's access to food no longer depends on a Cocker Spaniel's hunting ability.⁵¹ And while dogs are still widely used for narcotics detection, bomb detection, and search and rescue, most people no longer have a specific need for dogs beyond companionship.⁵² Because of this, the modern focus of selective breeding has become aesthetic-centric when compared to an historic focus on utility-based breeding.⁵³ This concentration on, and selective reinforcement of visually desirable traits has resulted in significant unintended negative consequences for both human consumers⁵⁴ and animals⁵⁵ as a direct result of selective breeding.

1. Aesthetic-Centric Selection

Intentionally designed “cute and cuddly” characteristics come at a significant price. For example, the 1850s bulldog had an elongated muzzle, sturdy frame, and energetic

⁵¹ Carlotta Cooper, *Why We Need Purebred Dogs*, HUFFINGTON POST (Mar. 10, 2016, 9:22 AM), http://www.huffingtonpost.com/carlotta-cooper/why-we-need-purebred-dog-_b_9256556.html.

⁵² *Id.*

⁵³ Ali Wonderman, *Aesthetics vs Ethics: Our Love Affair with Purebred Dogs has Created Genetically Inferior Animals*, QUARTZ (Jan. 11, 2016), <http://qz.com/590678/our-love-affair-with-purebred-dogs-has-created-genetically-inferior-animals/>.

⁵⁴ See *infra* Part III(A) for an in-depth legal discussion of this issue.

⁵⁵ See *infra* Part III(B) for an in-depth legal discussion of this issue.

affect.⁵⁶ Originally, they were utilized to guard, control, and bait bulls.⁵⁷ Today's bulldogs are squat, bow-legged, and sluggish, with a flat muzzle and severe under-bite.⁵⁸ This purposeful anatomic design, in and of itself, causes suffering via "locomotion difficulties, breathing problems, [and] an inability to mate or give birth without assistance."⁵⁹ "We have to some extent, accentuated physical characteristics of the breed to make it... like a caricature human.... We've bred bulldogs for their flat faces, big eyes, huge mouth in relation to head size, and huge smiling face."⁶⁰ The bulldog is just the most extreme example of genetic manipulation resulting in severe hereditary and congenital defects.⁶¹

The shift toward exaggerated features is, in part, due to human's instinctive visual preferences.⁶² A secondary culprit is the American Kennel Club (the "AKC"), which sets increasingly difficult-to-obtain breed-specific criterion.⁶³ The AKC standards encourage individuals to continue aesthetic-centric selective breeding that has functional consequences for the animal; but the AKC also provides a platform for dog show winners to spread genetic material broadly, thereby effectuating a wholesale watering down of genetic diversity within the

⁵⁶ Claire Maldarelli, *Although Purebred Dogs Can be Best in Show, Are They Worst in Health?*, SCI. AM. (Feb. 14, 2014), <https://www.scientificamerican.com/article/although-purebred-dogs-can-be-best-in-show-are-they-worst-in-health/>.

⁵⁷ Catherine Marien-de Luca, *History of the English Bulldog*, THE BULLDOG INFO. LIBR. (2011), <http://www.bulldoginformation.com/english-bulldog-history.html>.

⁵⁸ *Id.*

⁵⁹ Benoit Denizet-Lewis, *Can the Bulldog be Saved?*, N.Y. TIMES (Nov. 22, 2011), <http://www.nytimes.com/2011/11/27/magazine/can-the-bulldog-be-saved.html>.

⁶⁰ *Id.* (quoting Sandra Sawchuk, chief of primary care services at University of Wisconsin School of Veterinary Medicine).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *See, e.g., Official Standards of the Bulldog*, AM. KENNEL CLUB (July 12, 2016), <http://images.akc.org/pdf/breeds/standards/Bulldog.pdf?ga=1.31139967.1347224460.147958318>.

breed.⁶⁴ Bulldogs in particular have been selectively bred to such an extreme extent that continued breeding is considered implicitly unethical.⁶⁵ Including the aforementioned defects, bulldogs have skeletal defects that manifest in high rates of hip dysplasia, wrinkly skin results in acne and eye problems, dental complications arise from an unnaturally exaggerated under-bite, and a brachycephalic face shape that obstructs breathing.⁶⁶ Even the most responsible and reputable breeders are ill-equipped to correct such extensive defects and are liable for the suffering of their canine companions when they reinforce life-threatening characteristics through aesthetic-centric selective breeding and inbreeding.⁶⁷

Dogs have many mutations, which become more and more prominent as a result of the breeding and inbreeding that is meant to keep bloodlines pure.⁶⁸ However, selective breeding is an imprecise science that presents sometimes unpredictable results.⁶⁹ Breeding animals that are related to one another increases predictability but offspring are often smaller, have decreased fertility, decreased vitality, and live shorter lives.⁷⁰ The closer the relation between inbred animals, the higher the likelihood that offspring will suffer from increasingly detrimental

⁶⁴*Dog Breeders*, AM. KENNEL CLUB (2016), <http://www.akc.org/dog-breeders/>.

⁶⁵ Karin Brulliard, *Why Breeding Bulldogs is Borderline Inhumane*, WASHINGTON POST (Aug. 2, 2016), <https://www.washingtonpost.com/news/animalia/wp/2016/08/02/why-breeding-bulldogs-is-borderline-inhumane/>.

⁶⁶*Id.*

⁶⁷*Id.*; *see infra* Part III.

⁶⁸ Carol Beuchat, *COI FAQs: Understanding the Coefficient of Inbreeding*, INST. OF CANINE BIOLOGY (June 4, 2016), <http://www.instituteofcaninebiology.org/blog/coi-faqs-understanding-the-coefficient-of-inbreeding>.

⁶⁹*Id.*

⁷⁰*Id.*

mutative side effects.⁷¹ Because dogs have so many genetic mutations, it is nearly impossible to choose only desired traits, while avoiding all undesirable traits.⁷²

2. Practical Remedies to Aesthetic-Centric Selection

There are ultimately two practical solutions that can correct the unsavory consequence of modern selective breeding: (1) increased genetic education for breeders;⁷³ and (2) corrective technological modification.⁷⁴

CRISPR-Cas9 technology has been the recipient of equal amounts of fear and praise. While it has the potential to create “FrankenDogs,” it also has the potential to correct significant and debilitating diseases in all biological life forms, including dogs.⁷⁵ Gene-splicing technology, applied at the embryonic stage, is simply a much more efficient and targeted means of doing what selective breeding has attempted, and failed, to perfect.⁷⁶ CRISPR-Cas9 technology is still too new a technology to demonstrate perfectly predictable results, but it is likely that in the next several years it could be easily harnessed to correct harmful mutations that arose from selective breeding without significant tradeoffs.⁷⁷

An alternative to technological intervention is a call to all breeders to increase their biogenetic education and obtain a high level of genetic literacy.⁷⁸ In order to begin reversing the effects of the kind of ignorant selective breeding that resulted in the modern bulldog, “canine

⁷¹ *Id.*

⁷² Carol Beuchat, *Solving the Problem of Genetic Disorders in Dogs*, INST. OF CANINE BIOLOGY (June 2, 2015), <http://www.instituteofcaninebiology.org/blog/solving-the-problem-of-genetic-disorders-in-dogs> [hereinafter *Solving the Problem*].

⁷³ *Id.*

⁷⁴ Kevin Loria, *The Age of Genetically Engineered Animals has Arrived*, BUS. INSIDER (July 27, 2015, 11:18 AM), <http://www.businessinsider.com/the-age-of-genetically-engineered-animals-has-arrived-2015-6>.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Carol Beuchat, *Solving the Problem*, *supra* note 72.

breeders and their registering organizations will be required to understand genetics in a much more sophisticated way.”⁷⁹ Increased access to genetic education is necessary to change the collective direction of dog breeding. In this way, breeders will be armed with the knowledge necessary to select external candidates for infiltration of a pure bloodline to best counteract harmful mutations and reintroduce genetic diversity.⁸⁰

III. Legal Remedies for Harmful Genetic Modification

Today, nearly all purebred dogs have mutations that manifest in a harmful genetic defects.⁸¹ From an historical standpoint, it is easy to comprehend how humans have unintentionally overstepped nature’s boundaries in a quest to fashion the “perfect pet,” creating vast numbers of strikingly unique, but fatally flawed companions.⁸² From a practical standpoint, consumers oft become financial and emotional victims of selective breeding gone awry. Similarly, the animals that are born with painful and debilitating hereditary diseases or disfigurements become casualties of human selfishness. Thankfully, there are potential legal remedies—albeit imperfect legal remedies—available to these unwitting victims.

A. Puppy Lemon Laws: Civil Penalties for Illness and Genetic Defect

Every year hundreds of thousands of people resolve to add a canine companion to their family. Unfortunately, people are often drawn to increasingly unique, trendy, or specialized pets—exactly the type of canine that falls victim to significant genetic defects.⁸³ As of June 2014,

⁷⁹ *Id.*

⁸⁰ Lindsay L. Farrell, et al., *The Challenges of Pedigree Dog Health: Approaches to Combating Inherited Disease*, 2 *CANINE GENETICS AND EPIDEMIOLOGY* 3, 82 (2015).

⁸¹ Carol Beuchat, *Solving the Problem*, *supra* note 72; *see also supra* Part II.

⁸² Claire Maldarelli, *supra* note 56.

⁸³ Katie Finlay, *10 Most Popular “Designer” Dog Breeds*, *I HEART DOGS* (Dec. 4, 2013), <http://iheartdogs.com/10-most-popular-designer-dog-breeds/>.

twenty-one states have recognized this problem and statutorily enacted a “puppy lemon law” to combat it.⁸⁴

1. The General Structure of Puppy Lemon Law

Puppy lemon laws are meant to provide canine consumers a remedy for dogs that are purchased with preexisting illnesses or hereditary abnormalities.⁸⁵ These laws are often in addition to, rather than a replacement for, contractual and commercial remedies provided by the Uniform Commercial Code (“UCC”).⁸⁶ Unfortunately, because less than half of states have adopted this type of law, it offers little deterrence for unethical breeders.⁸⁷ Similarly, because dogs are considered personal property under U.S. law, consumer protection against the purchase of defective pets is not wholly dissimilar from product liability.⁸⁸

Puppy lemon laws are founded in the theory of seller misrepresentation.⁸⁹ None of these laws require that the seller have knowledge of illness, disease, or genetic defect for the law to be exercised against them, as there is an implied representation that the animal being sold is in good health.⁹⁰ The decision to return or exchange a defective pet involves much more complex calculus than would be required to return a pair of shoes. Often, new pet owners do not consider this an

⁸⁴ State Advocacy Department, *Pet Purchase Protection Laws*, AM. VETERINARY MED. ASSOC. (June 2014), <https://www.avma.org/Advocacy/StateAndLocal/Pages/pet-lemon-laws.aspx>.

⁸⁵ Sara Chisnell, *A Look at Dog Sales and Puppy Lemon Laws*, UNITED KENNEL CLUB (Oct. 8, 2011), <http://www.ukcdogs.com/Web.nsf/News/ALookatDogSalesPuppyLe10082011070151AM>.

⁸⁶ Rebecca F. Whish, *Sale of Companion Animals by Breeders and Retailers*, ANIMAL LEGAL AND HIST.CTR. (2005), <https://www.animallaw.info/article/sale-companion-animals-breeders-and-retailers#III>.

⁸⁷ Dr. Patty Khuly VMD, *Pet Lemon Laws, Designed to Help Consumers and Pets*, VETSTREET (Aug. 25, 2015), <http://www.vetstreet.com/our-pet-experts/pet-lemon-laws-designed-to-help-consumers-and-pets>.

⁸⁸ SONIA S. WAISMAN, ET AL., *supra* note 38.

⁸⁹ Sara Chisnell, *supra* note 85.

⁹⁰ *Id.*

option at all;⁹¹ but puppy lemon laws are specifically devised with this in mind. These laws attempt to recognize that animals are more than just merchandise, providing multiple remedial options that account for the human-canine bond.⁹²

The scope of the law can vary widely from state to state, often having different rules for (1) the time limit within which a purchaser can prove defect; (2) the remedies and damages available; and (3) against whom the law can be asserted.⁹³ In almost all states, there is a very short window of time within which a consumer can establish the existence of illness or disease--between seven and twenty-one days from the date of purchase.⁹⁴ For congenital or genetic defects, the time frame is generally more liberal, requiring owners to establish the existence of a defect between ten days and two years from the date of purchase.⁹⁵ If the owner can timely establish that an illness, disease, or genetic defect exists, there are generally three remedial options available: (1) the buyer can return the animal in exchange for the money paid in addition to reasonable veterinary costs necessary to certify the defect; (2) the buyer can return the animal in exchange for an equivalent replacement; or (3) the buyer can keep the animal and recover costs, up to a certain amount, to fix the defect.⁹⁶

⁹¹*Id.*

⁹²*Id.*

⁹³ Staff Advocacy Dep't, *Pet Purchase Protection Laws*, AM. VETERINARY MED. ASSOC. (June 2014), <https://www.avma.org/Advocacy/StateAndLocal/Pages/pet-lemon-laws.aspx>.

⁹⁴*Id.* (indicating Nebraska has the shortest available remedial window, requiring veterinary examination within seven days of purchase and veterinary proof that that illness *existed at the time of purchase*, and Illinois has the most liberal time frame, allowing twenty-one days to establish illness, disease, or presence of a symptom that influences the general health of the animal).

⁹⁵*Id.* (indicating Arkansas has the least forgiving law, requiring proof for hereditary or genetic defect to be established within ten days of purchase, with Delaware and Rhode Island permitting owners to establish the existence of a hereditary defect within two years of the date of purchase).

⁹⁶*Id.* (noting that California has the most liberal reimbursement law, allowing owners to retain their new pet while receiving damages up to 150% of the purchase price to remedy the defect).

The question of whom the law can be enforced against is a little more difficult. Legislators often draft puppy lemon laws with pet stores and puppy mills in mind, and guard against liability for hobbyist or backyard breeders.⁹⁷ Some states fail to define a “breeder,” which can lead to significant confusion as to who is liable.⁹⁸ Secondly, where there are a chain of merchants and suppliers of pets, such as a puppy mill to pet store scheme, it is unclear which entity is legally responsible for a defective pet. However, because the UCC defines “merchant” (in part) as “a person who deals in goods of that kind,” owners are almost always able to recover from a selling pet store and are sometimes able to recover from backyard breeders or other sellers even if they are not included in a state’s puppy lemon law.⁹⁹ Similarly, consumers of states that have not enacted a puppy lemon law can still recover under a contract or commercial liability theory, but with increasingly narrow remedial options.

2. Problems with Puppy Lemon Laws

Puppy lemon laws have a sole purpose of protecting consumers. However, the protections provided by puppy lemon laws are extremely limited. One major pitfall of all enacted puppy lemon laws is a lack of adequate damages for veterinary care of a sick or genetically defective animal. The amount a consumer can recover is based on the amount of the dog’s original purchase price.¹⁰⁰ Even California, which has the most liberal monetary remedy, caps damages for reasonable veterinary fees at 150% of the price of the animal.¹⁰¹ If an owner chooses to keep an animal with long-term hereditary defects, the costs incurred can amass into thousands or tens

⁹⁷ See, e.g., ARK. CODE ANN. §§ 4-97-101 (West 1991) (providing consumer remedies only from retail pet stores).

⁹⁸ Sara Chisnell, *supra* note 85 (describing the significant shortcomings of Michigan’s puppy lemon law and indicating how the state legislature’s failure to use precise language puts an unnecessary hardship on consumers seeking legal remedy under Michigan law).

⁹⁹ Rebecca F. Whish, *supra* note 86.

¹⁰⁰ Staff Advocacy Department, *supra* note 93.

¹⁰¹ See CAL. HEALTH & SAFETY CODE § 122070(a)(3) (West 2006).

of thousands of dollars at the owner's expense¹⁰² and it is unlikely, if not impossible, that statutory damages provided by the state's puppy lemon law will cover those costs. Because owners often quickly bond with their new pet, most will shoulder the cost of disease or defect, rather than opt to return or exchange, without realizing the magnitude and unpredictability of the associated financial obligation over time.¹⁰³ Many people are forced to eventually put down or surrender their pet because of the extensive financial burden.¹⁰⁴ At the same time, commercial pet retailers and puppy mills are often not deterred by puppy lemon laws because the damages cap limits overhead. Compared to potential and actual profits,¹⁰⁵ reimbursement costs for sick or defective dogs are negligible.

The second major issue that cripples the effectiveness of puppy lemon laws is enforceability. First, stringent time restrictions place an extreme burden on a new owner to identify a problem and seek veterinary attention and be eligible to recover under a state's puppy lemon law.¹⁰⁶ In addition, puppy mills are often shielded from liability by selling their puppies to pet stores or by selling pets online.¹⁰⁷ This makes it difficult for consumers to find and file suits against the individual or organization responsible for the animal's health or genetic condition

¹⁰²See, e.g., Dr. Paul F. Gustafson, *Veterinary Bills of Micaylee A. Noreen*, WARWICK ANIMAL HOSPITAL (2016) (on file with the author) (noting that the author has amassed approximately \$6,000.00 in veterinary bills to care for her Rottweiler, Princess, who was diagnosed with the genetic defects of wheat allergy and hip dysplasia at five months old and two years old, respectively).

¹⁰³*Id.*

¹⁰⁴Chris Bern DVM, *Euthanizing Because of Cost*, A VET'S GUIDE TO LIFE (Feb. 5, 2009), <http://avetsguidetolife.blogspot.com/2009/02/euthanizing-because-of-cost.html>.

¹⁰⁵Stephanie K. Savino, *Puppy Lemon Laws: Think Twice Before Buying that Doggy in the Window*, 114 PENN ST. L. REV. 643, 648 (2009) (indicating the puppy mills alone can gross up to \$500,000.00 annually with minimal overhead costs).

¹⁰⁶Sara Chisnell, *supra* note 85.

¹⁰⁷*Puppy Mills: Why You Should Never Buy a Puppy Online*, ASPCA (2016), <http://www.aspc.org/animal-cruelty/puppy-mills/why-you-should-never-buy-puppy-online>.

upon purchase.¹⁰⁸ Because puppy lemon laws are enacted in less than half the states, a consumer who purchases a dog out of state may not have a canine-specific remedy available to them at all.¹⁰⁹ It is the state of the seller, not the buyer, which dictates the applicable law.¹¹⁰

3. Means of Improving Puppy Lemon Laws

The easiest way to cure many of the problems surrounding puppy lemon laws is congressional action to enact uniform federal legislation that encompasses all fifty states. This would prevent interstate sellers from avoiding liability to consumers. Second, enacting a more realistic time frame to establish the existence of a disease or defect would allow increased numbers of consumers to take advantage of this specific statutory remedy. A puppy lemon law allowing thirty days to discover disease or illness and a three year limitation to certify a hereditary or genetic defect would better account for the complex realities of pet ownership and veterinary medicine, while also providing a reasonable time limit on seller liability. Lastly, damage caps should be lifted or increased to account for the harsh reality of expensive veterinary care resulting from illnesses or genetic defects. A law that provides for increased damages would also cut into the profits of retail sellers, thereby incentivizing them to breed dogs with health and longevity in mind. These alterations or additions to the law would better protect consumers and increase the quality of life for affected canine companions.

¹⁰⁸*Id.*

¹⁰⁹ David Colker, *An Outpouring from Readers Over Tales of Puppy Problems*, L.A. TIMES, Apr. 20, 2008 (describing the story of a California dog owner who could not assert her rights under California's puppy lemon law because she purchased the dog from a Texas breeder, a state which does not have a similar law).

¹¹⁰*Id.*

B. Criminal Liability for Canine Bioengineering

Society has an interest in responsible animal practices that extends beyond simply protecting humans from the negative effects of reckless genetic modifications in pets.¹¹¹ Society maintains ever-increasing concerns for animal welfare. The legal status as personal property prevents animals from achieving any “rights,” but because humans recognize that animals are a unique form of property, they are afforded “protections” that extend beyond almost any other type of property.¹¹² There is an independent governmental interest in protecting the lives and welfare of the animals themselves that is expressed within state and federal law and based on a foundation of ethical ideals.¹¹³ The federal government and each of the fifty states have various criminal anti-cruelty statutes aimed at punishing individuals who act ruthlessly toward animals or fail to act to prevent unnecessary harm to them.¹¹⁴ Generally, courts have upheld laws that prevent human infliction of unjustifiable harm on an animal.¹¹⁵ Many of these laws are the result of a balancing test between the interests of human progress and sheltering animals against pain. Where human interest outweighs the ethical interest in protecting animals, the law provides exemptions to circumvent criminality on the basis that the cruelty is justifiable.¹¹⁶ Absent a “legitimate social benefit,” however, animals cannot be “wasted or made to

¹¹¹ See *supra* Part III, Section A.

¹¹² SONIA S. WAISMAN, ET AL., *supra* note 38.

¹¹³ Chad West, *Economics and Ethics in the Genetic Engineering of Animals*, 19 HARV. J.L. & TECH. 413, 431 (2006).

¹¹⁴ Rebecca F. Whish, *supra* note 86.

¹¹⁵ Chad West, *supra* note 113.

¹¹⁶ See, e.g., *Taub v. State*, 463 A.2d 819 (Md. Ct. App. 1983) (holding that the Maryland anti-cruelty statute did not apply to instances of scientific research because the pain and suffering was not unjustifiable or unnecessary, but rather was an incidental and unavoidable consequence of Dr. Taub’s scientific research).

suffer.”¹¹⁷ Unfortunately it does not appear that laws within the United States have recognized harmful breeding as a form of criminal cruelty to animals.

In contrast to the United States, several countries around the world have explicitly adopted laws criminalizing harmful breeding practices. Switzerland has enacted a genetic modification law and has convicted individuals under that law for such unethical breeding practices.¹¹⁸ Switzerland’s recent conviction of a woman for breeding two flat-faced cats, in violation of Switzerland’s “qualzucht” or “torture breeding” statute, drew national attention.¹¹⁹ Australia’s qualzucht law identifies thirty-four breeding-related deformities that are unlawful. Anyone who knowingly causes these deformities in new offspring is criminally liable under the Australian statute.¹²⁰ Similarly, several countries have opted into the European Convention for the Protection of Pet Animals, a European-based treaty, which maintains that “any person who selects a pet animal for breeding shall be responsible for having regard to the anatomical, physiological and behavioral characteristics which are likely to put at risk the health and welfare of either the offspring or the female parent.”¹²¹

As previously stated, the United States has no analogous law, but some state anti-cruelty statutes have been drafted broadly enough to encompass similar theories of criminal liability through intentionally mutative breeding or harmful bioengineering.¹²² Demonstrative of the

¹¹⁷ Michelle K. Albrecht, *Genetic Engineering of Domestic Animals: Human Prerogative or Animal Cruelty?*, 6 ANIMAL L. 233, 234 (2000).

¹¹⁸ Pete Wedderburn, *Qualzucht or “Torture Breeding” Should be a Crime*, TELEGRAPH (Sept. 5, 2016), <http://www.telegraph.co.uk/pets/news-features/qualzucht-or-torture-breeding-should-be-a-crime/>.

¹¹⁹ *Id.*

¹²⁰ Christopher Landauer, *Torture Breeding*, BORDER WARS (July 30, 2011), <http://www.borderwars.com/2011/07/torture-breeding.html>.

¹²¹ European Convention for the Protection of Pet Animals Ch. 1, Art. 5.

¹²² Michelle K. Albrecht, *supra* note 117 (discussing and analyzing California’s anti-cruelty statute, and finding that the breadth of the statutory language could implicate a woman who

scope of general anti-cruelty statutes in the United States, Virginia’s anti-cruelty statute could easily apply to harmful breeding or genetic modification practices. Virginia’s anti-cruelty statute indicates (in probative part) that “[a]ny person who: (i) overrides, overdrives, overloads, tortures, ill-treats, abandons, willfully inflicts inhumane injury or pain not connected with bona fide scientific or medical experimentation, or cruelly or unnecessarily beats, maims, mutilates, or kills any animal, whether belonging to himself or another” is guilty of a misdemeanor.¹²³ In addition to this basic rule, it is a felony to intentionally, “cruelly and unnecessarily beat[], maim[] or mutilate[] any dog or cat that is a companion animal” if that act results in death.¹²⁴ While this statute has been used most heavily to prosecute neglect and affirmative physical abuse of animals, it is possible to convict unethical breeders for breeding they know will result in painful or cruel deformities under “willfully inflicts inhumane injury or pain” or “cruelly and unnecessarily . . . mutilates” statutory language. Similarly, this broad language would be easily applicable to the more recent development of gene-splicing technology. While no cases have been prosecuted utilizing this theory, broad statutory language suggests that this is the result of prosecutorial discretion rather than a linguistic restriction.¹²⁵ Because the language of the statute is broader than its application, it has the potential to play a significant role in increased protections for animals that are harmfully bred or technologically modified.

makes “twisty kats,” purposefully breeding cats to have “twisty” front legs); Sarah Hartwell, *Twisty Cats – The Ethics of Breeding for Deformity*, MESSYBEAST (1999), <http://messybeast.com/twisty.htm> (indicating that Germany maintains a criminal “breeding for deformity” law, but there is no analogous U.S. law).

¹²³VA. CODE ANN. § 3.2-6570(A) (West 2015).

¹²⁴VA. CODE ANN. § 3.2-6570(F)(i) (West 2015).

¹²⁵ Michelle Welch, Lecture at University of Richmond, T.C. Williams School of Law (Sept. 27, 2016) (indicating that it is difficult to get Virginia city and county attorneys to prosecute animal cruelty cases).

The best remedy to the current lack of criminalization of injurious genetic modification in the United States is the establishment of state and federal criminal statutes, similar to those of Switzerland and Australia, which explicitly outlaw intentional breeding or bioengineering of dogs in a way that result in suffering. Short of creating new legal doctrine, emphasizing public concern for this issue and putting social pressure on prosecutors to maximize the potential of currently existing anti-cruelty laws is the best means of criminalizing torture breeding. As the Virginia statute exemplifies, the statutory language of state anti-cruelty law is broad enough to encompass this harmful activity, but social acceptance of these practices prevents any meaningful deterrence. By providing education about the effects harmful inbreeding and genetic engineering can have on our canine companions, public opinion can be shifted to energize meaningful change in the language of the law and the actions of legal advocates.

IV. Conclusion

Since the first wolf-human relationship canines have been faithful human companions and humans have largely taken advantage of their generous partnership. Humans have pushed genetic modification of dogs to the extreme, artificially altering them in a way that overextends the bounds of nature. However, there are some conceivable practical remedies¹²⁶ and potential legal remedies¹²⁷ available to counteract this significant overstepping. With new gene-splicing technology on the cutting edge of scientific discovery, humans could potentially reverse the damage effects of hundreds of years of injurious selective breeding in record speed. The course of action that has been taken with regard to special breeds and designer dogs offends basic conceptions of human ethics. However, the future of the canine-human relationship is bleak should humans not learn from past mistakes of meddling in canine genetics. With the

¹²⁶See *supra* Part II.

¹²⁷See *supra* Part III.

introduction of CRISPR-Cas9 technology, it will become increasingly easy to reach new and extreme forms of canine genetic modification. And legal doctrine evolves so slowly that it is unlikely the law will timely react to abuses of this innovative technology. State statutes may be able to temporarily guard against abuse, but swift federal law protecting against such technological and selective breeding practices should be enacted to prevent further damage. Ethical considerations demand the exercise of self-control, if not for the sake of man, for the sake of man's best friend.



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