



The official Publication of the New York State Bar Association's Committee on Animals and the Law

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## Letter from the Chair, Barbara J. Ahern, Esq.

When I look back at the last three years, the years in which I have been the Chair of the Committee on Animals and the Law, one thing that stands out to me is the numerous changes in the Committee and in the issues that have concerned the Committee. The Committee has grown, and I thank the NYSBA Presidents who have continued to accommodate my requests for more members on this Committee. With those new members has come interest in new issues.

The Committee originally had a strong focus on companion animals – and as someone who owns two or three dogs at any given time, I think our work to protect dogs and cats is very important! But I'm happy that we are looking outside the field of companion animals as well, to see what can be done to help other animals. The Committee was started by NYSBA President, Lorraine Power Tharp, who was deeply concerned with horses and equine issues, but the Committee had not had a strong focus on those issues – until recently. We now have many members who own horses; our Annual Meeting CLE program in 2022 was about laws that relate to horses, horse owners, and horse rescues, and we will have another CLE on an equine topic later this year. Many of the bills recommended for support by the Legislation Subcommittee are now on equine issues, and we were able to report in our 2023 New Laws for Animals CLE program in January that several of them had been passed by the legislature and signed into law in 2022 and 2023.

The new law in that CLE program (and in the Legislative Update report included in this issue of *Laws and Paws*) that was one of the greatest achievements for the Committee – because we had supported this legislation every year since the 2019 Legislative Session, before the bill finally passed last year – was the prohibition on wildlife killing contests, in strong support of wildlife in the state. The legislative memos listed on the Committee webpage shows that many other wildlife-related bills are supported annually by the Committee, and the topic of wildlife was a runner-up for the 2024 Committee Annual Meeting CLE program – I hope it will be next year's program. Last year's Annual Meeting CLE program provided a broad update on laws, regulations and issues related to birds, a new topic for the Committee that will continue to be one of our concerns. Agricultural animals and issues related to their health will be addressed in this year's Annual Meeting CLE program, in which the Education Subcommittee is providing an overview of zoonotic diseases and the role played in the spread of these diseases, to other animals and to humans, by animals in agriculture. The Committee members who bring you a new issue of *Laws and Paws* twice a year are in the process of updating the LEGALease brochure on animal law – and adding in many laws that are among the recent concerns of the Committee.

And we have not left our concerns for companion animals behind – the newest project taken on by the Special Projects Subcommittee deals very specifically with companion animals in the many animal shelters, humane societies and rescue organizations in the state, and ensuring that there is enough room there for all the animals abandoned by their humans or seized by humane law enforcement officers in animal cruelty cases. That special project will also try to help animal

shelters meet the new standards enacted in 2022 that becomes effective in December 2025 – a bill supported by the Committee in 2022.

My retrospective view of the Committee and all the activities with many different kinds of animals is prompted by the knowledge that this is the last time I will be writing to you “from the Chair,” because my term as the Chair of this Committee is coming to an end in the next few months. I look forward to continuing to work with the Committee, on many of the projects I’ve mentioned here and others, but I know that the work of the Committee will go forward, with great success, under new leadership. I am also happy to see that among the law students who will be the lawyers of the future – a group we meet through their very impressive entries in our Student Writing Competition every year -- there is also strong interest in protecting all the animals among us. I leave you in good hands.

A handwritten signature in cursive script, reading "Barbara J. Ahern", followed by a horizontal line extending to the right.

Barbara J. Ahern, *Chair, Committee on Animals and the Law*

## COAL 2023 Legislation Subcommittee Report Update

New York State Bar Association's Committee on Animal Law (COAL) position memoranda and support letters are available at <https://nysba.org/2023-and-2024-legislative-memoranda>

The public portion of the Legislative Retrieval Service (LRS) provides access to bill status, text, summary and sponsor's memos at

<http://public.leginfo.state.ny.us/navigate.cgi> [ [public.leginfo.state.ny.us](http://public.leginfo.state.ny.us) ]

Since publication of the Legislation Report in the 2023 Laws and Paws' Fall/Winter Newsletter issue, the Governor acted on several bills that were supported or monitored by COAL. The Governor's actions, the effective dates of new laws, and 2024 Chapter Amendments are summarized below.

**Deer Management Pilot Programs Laws** – The following deer management laws are identical except for the different municipalities covered by each law.

**1. Chapter 683 of the Laws of 2023, Approval Memo 37, S.2630 (May) / A.783 (Hunter)**

**Effective January 1, 2024 and expires December 31, 2026**

*Establishes an Urban Deer Management Program for the City of Syracuse – Pilot Program.*

Authorizes the Department of Environmental Conservation, after a review of the site-specific deer management plan, and upon a finding that deer have become a nuisance, destructive to public or private property or a threat to public health or welfare, to issue a certified nuisance wildlife specialist a deer cull permit. Chapter amendments were passed in 2024. **The COAL did not take a position.**

**2. Chapter 704 of the Laws of 2023, Approval Memo 49, S.4804-A (Palumbo) / A.5542-A (Thiele)**

**Effective January 1, 2024 and expires December 31, 2026**

*Establishes a Deer Management Program for the Town of Southold, Long Island – Pilot Program.*

Authorizes the Department of Environmental Conservation, after a review of the site-specific deer management plan, and upon a finding that deer have become a nuisance, destructive to public or private property or a threat to public health or welfare, to issue a certified nuisance wildlife specialist a deer cull permit. Chapter amendments were passed in 2024. **The COAL did not take a position.**

**3. Chapter Amendments – Deer Management Pilot Programs**

When the Governor has concerns with certain provisions of a bill that comes before her, but agrees with it in concept, she will work with the sponsors to reach agreement on chapter amendments – a bill that will be introduced in the next legislative session to amend this new chapter of law – to resolve the issues. That was done here, with both new chapter laws. **The COAL did not take a position.**

The amended laws on the two pilot projects for deer management, as updated by 2024 laws, are:

**A. Chapter 65 of the Laws of 2024, S.8015 (May) / A.8526 (Hunter) Signed into Law February 7, 2024 – Effective January 1, 2024, and expires December 31, 2026.**

Amended the three-year pilot program for urban deer management in the City of Syracuse enacted by Chapter 683 of the Laws of 2023.

**B. Chapter 83 of the Laws of 2024, S.8052 (Palumbo) / A.8559 (Thiele) Signed into Law February 13, 2024 – Effective January 1, 2024, and expires December 31, 2026.**

Amended the three-year pilot program for urban deer management in the Town of Southold on Long Island enacted by Chapter 704 of the Laws of 2023.

The chapter amendments:

- Make certain technical changes in the description of the nuisance wildlife specialist (NWS) and their qualifications to clarify that the NWS participating in the urban deer management program will be subject to the provisions of the Environmental Conservation Law and regulations of the Department of Environmental Conservation (state law and regulation) and there will not be any separate provisions for a NWS established by the locality participating in the pilot program for deer management;
- Require the NWS to have a copy of the cull permit and log of cull activities on their person when engaging in any of the deer management activities authorized by this program;
- Require the locality (Syracuse or Southold) to submit to DEC a copy of the adopted deer cull application when making application to DEC for authorization for the taking of deer by a NWS in accordance with the deer management plan adopted by the municipality;
- Require the municipality to list the names and qualifications of NWS that will work, under contract, with the municipality on the deer management plan; and
- Eliminate the requirement that the report submitted to DEC at the conclusion of the pilot program estimate the deer that existed in the municipality prior to the commencement of the deer management program.

**Equidae (Horse Family) related Laws** – The following new laws protect members of the horse family and humans:

**1. Chapter 724 of the Laws of 2023, S.1677-A (Addabbo) / A.3552-A (Pretlow)**

**Effective December 13, 2023**

*Increases fines for selling a disabled member of the Equidae family at auction.*

The Agriculture and Markets Law Section 358 is amended to increase fines for certain auction sales of certain disabled or diseased horses and expands coverage from horses to all equids. The fines are increased to not more than \$1000 per violation from fines of not less than \$5 nor more than \$100. Fines apply to any licensed auctioneers to receive or offer for sale or sell at public auction any Equidae (the taxonomic family that includes, among other, ponies, miniature horses, donkeys, mules, and zebras) who is diseased, debilitated, or lame, or for any other cause such that working that equid would violate the state's law against cruelty to animals. Possible punishment of not more than six months' imprisonment or both fine and imprisonment remains unchanged. **The COAL supported** – Letter to the Governor dated September 18, 2023.

**2. Chapter 726 of the Laws of 2023, S.2163B (Palumbo) /A.5109-A (Glick)**

**Effective April 11, 2024**

*Prohibits slaughter of horses for human or animal consumption.*

The Agriculture and Markets Law is amended to prohibit the slaughter of horses, including horses, ponies, donkeys, mules, asses and burros, for human or animal consumption. To strengthen its prohibitions, it is now unlawful for a person who owns or is buying a horse to import, export, sell, offer to sell or barter, transfer, purchase, possess, transport, deliver, receive, give away, hold or accept, or direct another to do so, with intent to slaughter the horse for human or animal consumption. Violation of the prohibitions is a misdemeanor punishable by a civil penalty up to \$1,000 for an individual or \$2,500 for a corporation for a first offense, with those monetary penalties doubling for subsequent offenses. This will close gaps in current law that allow for the transport of horses across the border to Canada, where slaughterhouses and abattoirs exist for horses. The prohibition is a humane measure protecting older horses, and a public health measure providing that horsemeat tainted with medications taken by horses for therapeutic or performance reasons will not be included in food intended for human or animal consumption. **The COAL supported** – COAL Memo in Support #18 and Letter to the Governor dated September 1, 2023.

**Protection of wildlife related Law** – The following new law protects wildlife from killing contests:

**Chapter 762 of the Laws of 2023 S.4099 (Kennedy) /A.2917 (Glick)**

**Effective November 1, 2024**

*Prohibits prizes for animal killing contests.*

The Environmental Conservation Law is amended to prohibit the organizing, promoting, conducting, or participation in events in which wildlife are killed for monetary or other prizes given to the individual or team who has killed the largest number of animals. Violations are subject to fines ranging from \$500 to \$2000 per violation and forfeiture of any animals killed to Department of Environmental Conservation (DEC). Exempted from the prohibitions are the hunting, or taking, of white-tailed deer, turkey or bear. Although they are promoted by the organizers as a means of controlling nuisance wildlife species, scientists and wildlife management experts agree that the “wildlife killing contests” prohibited by this law are counterproductive to sound wildlife conservation and management. They are, instead, inhumane activities that ignore the vital role that native wildlife play in a healthy ecosystem. **The COAL supported** – COAL Memo in Support #12 and Letter to the Governor dated September 1, 2023.

**This report was prepared by Barbara Ahern, Esq., Chair of the Committee on Animals and the Law, Fiona Farrell, Esq., and Rebecca Thompson, Esq., Vice Chairs of COAL’s Legislation Subcommittee.**

## Special Report: Special Projects Subcommittee

### Guiding Eyes for the Blind

Every year the members of the Committee on Animals and the Law leave their desks and their computers behind and take a trip to view an organization engaged in some of the work with animals supported by our Committee activities. The Committee has visited a sanctuary for farm animals, a wolf sanctuary, a rescue organization for horses and, during the pandemic, had a virtual visit to the New England Wildlife Center.

This year, on November 11, 2023, and courtesy of our member Peter Tamsen, who also serves as a District Governor with the Lions Club International, we were able to take a tour of the Canine Development Center of Guiding Eyes for the Blind in Patterson, New York.<sup>1</sup>

Guiding Eyes for the Blind, with three locations in the Hudson Valley, raises and trains guide dogs for people with vision loss. They receive substantial financial support, annually, from the Lions Club International, in addition to other donations from businesses, organizations and individuals.

The Lions Club has a long history of working to assist those with visual impairments. The collaboration between the Lions organization and the visually impaired started in 1925 when Helen Keller attended the annual Lions Convention and challenged all in attendance to become “Knights of the Blind.” Her speech launched the organization into their work toward eradicating blindness and visual impairments in others, and in 1938 a local Lions Club in Detroit, Michigan – following Helen Keller’s admonition to become Knights of the Blind -- formed the first school to train guide dogs for the specific purpose of assisting visually impaired persons. The Lions organization today raises money to help raise and train guide dogs to assist those with low vision or total blindness. Guiding Eyes for the Blind is just one of several training schools for guide dogs that exist now.

Guide dogs are service dogs – as defined by federal law, a dog that has been individually trained to do work or perform tasks for a person with a disability<sup>2</sup> -- but the use of guide dogs predated the enactment of laws defining service dogs federally (see the Americans with Disabilities Act<sup>3</sup>) and in numerous state and local statutes. In fact, guide dogs may have been the earliest animals trained for use as service animals before laws were passed relating to service animals, and before our society came to a general recognition that many animals, properly trained, can assist humans with certain physical impairments to perform everyday tasks, and live full and independent lives.

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<sup>1</sup> Our very special thanks to Helen West, Director of Breeding Programs, Guiding Eyes for the Blind, who put in extra time on a Saturday just to conduct our tour of the Patterson facility, and who knowledgeably and patiently responded to our many questions.

<sup>2</sup> See <https://www.ada.gov/resources/service-animals-2010-requirements/>.

<sup>3</sup> Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. sections 12101 et seq., available at <https://www.ada.gov/law-and-regs/ada/>.



In 2022, the Committee on Animals and the Law started a special project to compile updated information on service animals. As part of that special project, Committee members visited Guiding Eyes for the Blind in Patterson, NY to see how guide dogs are chosen and trained today. Guiding Eyes for the Blind has two main locations in New York's Hudson Valley region – a canine development Center, in Patterson, and a Guide Dog Training School in Yorkville Heights – as well as a field training center in White Plains.

The Canine Development Center is the part of Guiding Eyes for the Blind where specially bred puppies are born, and spend the first nine weeks of their lives. Committee members were able to see puppies who were two weeks old, three weeks old and four weeks old, all sleeping in their own rooms.





Litters are kept together, and each one had a human “attendant” who stayed with them all day to provide early socialization and ensure the puppies were accustomed to the constant companionship of humans from the time they were born – nurturing the human-animal bond. When the puppies are six and seven weeks old, they are given “play time” in larger spaces, with obstacles for them to navigate, and with “toys” that will accustom them to working with objects they would encounter in their lives as a companion to a human partner. Their time in these areas is part of their early training, and the obstacles and toys kept there are used in that training.

When a puppy reaches nine weeks, it leaves the Patterson Canine Development Center to live with a volunteer who has volunteered, and qualifies to be a “puppy raiser.” These people are schooled in the training techniques that will promote the appropriate behavior for a guide dog. Puppies in private homes require daily instruction and monitoring to develop the appropriate behavior for a guide dog. The puppies and their puppy raisers also attend weekly or every other week to further train the dog in appropriate behaviors and allow staff at Guiding Eyes for the Blind to evaluate a puppy’s ability to become a good guide dog.

Another section of the Patterson facility houses the adult dogs that have been chosen to be breeders. Once a female dog is pregnant, she is placed in a temporary home with people who will care for her until she is ready to give birth. Adult male dogs also live with people who provide them with secure homes until they are needed again for breeding.

After watching the young puppies at rest and at play, and meeting the adult dogs who will become parents of future guide dogs, Committee members visited those parts of the Patterson facility where breeding information is kept, and where breeding decisions are made. Since 1964, Guiding Eyes for the Blind has maintained a reproduction and cryogenics department, and has been an international leader in guide dog breeding and genetics. By analyzing millions of data points from every step of a dog’s life, they have developed a selective breeding program and Cryogenic freezing facilitates the long-term storage of genetic samples.<sup>4</sup> The genetic material from the same animal can therefore continue producing

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<sup>4</sup> See generally Mazur, P., S.p Leibo, and G. E. Seidel. "Cryopreservation of the Germplasm of Animals Used in Biological and Medical Research: Importance, Impact, Status, and Future Directions." *Biology*

offspring over an extended period of time, utilizing material collected over a far shorter period. Advanced freezer technology allows high quality specimens to be collected and stored ahead of future use.

Richard Glickel, a member of the Special Projects Subcommittee of the Committee on Animals and the Law, attended our November 11, 2023 sojourn to the Canine Development Center and shares his insights:

*My fondness and respect for guide dogs began during the Summer of 1958, when I received the first book in that summer's Weekly Reader Book Club collection, Follow My Leader, the inspirational story of a boy named Jimmy who is robbed of his sight from the blast of an errant firecracker and who fears he can't continue Scouting, or be able to do any of the things that he could do before his accident . . . until Jimmy is introduced to a German Shepherd guide dog named "Leader." Some parts of the story I read aloud to my own dog – "Rex" – a 5-month old German Shepherd puppy, that was more interested in romping after tennis balls, fighting with my sneakers and chewing everything. Since then, memories of Rex, and of all my dogs really, remain; and I still remember that summer's reading about a blinded boy's tribulations and life with a smart, strong guide dog.*

*Organizations like Guiding Eyes for the Blind and the Guide Dog Foundation are tops on my list for annual charitable gifting; so I looked forward to joining with other COAL members for our November field trip to the Guiding Eyes Canine Development Center in Patterson, New York.*

*The facility is amazing; and, although puppy kisses were the highlight of the afternoon, it was fascinating to learn about the selective breeding of guide dogs which occurs in two ways, (1) creating puppies and waiting to see how they develop, and (2) through calculations based on the gathering of data on dogs and all their relatives resulting in estimated breeding values or EBV's, which are genetic merit scores on a number of traits, e.g., hip and elbow quality, allergies, etc. The EBV scores help Guiding Eyes determine which dogs have the greatest likelihood of passing on the most desirable genes before breeding, instead of breeding the dogs and then awaiting the result.*

*The goal, of course, is to breed genetically superior dogs, so that each generation of guide dogs represents an improvement on the previous generation's dog in terms of health and temperament. Over the past 20 years, Guiding Eyes' genetics program and extensive data driven computer algorithms have yielded significant reductions in canine hip dysplasia (90%), elbow dysplasia (92%) and a 75% reduction in skin allergies and ear infections, all of which would reduce the number of years that a guide dog could provide the assistance that a human partner needs.*

*One evening many years ago, I shared a train ride with a blind lawyer and his Golden Retriever guide dog. Unfortunately, due to a tragic and increasingly high incidence of disease and shortened life-spans, Guiding Eyes – and presumably other guide dog organizations – have ceased using the intelligent, good-natured "Golden" for their guide dog programs. A more stark example, perhaps, of the organizations' devotion to developing working dogs that can live long, healthy lives with their human pairing.*

*Our tour included visiting the facility's reproduction and cryogenics laboratory where staff*

*can examine and analyze the semen quality of breeding males. The lab can freeze and store semen to help sustain the genetic diversity of guide dogs by sharing semen with other service dog organizations, globally, and importing semen from other “colonies.” The stored semen is used for camera guided trans-cervical insemination; a state-of-the-art procedure that was pioneered and is taught to other schools by Guiding Eyes.*

*Now, whenever I see a guide dog, I know that that dog is the result of decades of information gathering and calculating to achieve the very best dog in terms of health, intelligence and temperament, before the dog was conceived or nurtured, and trained for its assignment in helping to guide its human companion through life and living.*

A second tour of Guiding Eyes for the Blind, to their training center in Yorkville Heights, will take place in the Spring of 2024.

BIO:

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This report was prepared by Nancy J. Volin, Esq., Chair of the COAL Special Projects Subcommittee and Helen C. Lebrecht, Esq. Vice Chair the COAL Special Projects Subcommittee, with Special Project Subcommittee members Barbara Ahern, Esq., Chair of the Committee on Animals and the Law and Richard A. Glickel, Vice Chair of the COAL Student Writing Subcommittee.

Photos by Nancy J. Volin and Helen C. Lebrecht.

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More information on Guiding Eyes for the Blind can be found on their website at <https://www.guidingeyes.org/>.

## The Question of Fundamental Rights for Chimpanzees and Other Primates, by Jim D. Sarlis, Esq.

Just about everyone is familiar with the iconic movie *Planet of the Apes*.<sup>5</sup> After all, it spawned a whole multimedia franchise of sequels, prequels, books, comics and TV shows since it hit theaters in 1968. More consequential, however, is that it managed to address important and controversial subjects under the thinly veiled guise of entertainment. Metaphors, analogies, role-switching, indirect references, all were used. This allowed its sharp commentary to be more palatable, while still becoming part of the growing consciousness of the vast viewing public. Among these subjects were allusions to racism, slavery, politics, religion, relationships, and, of course, nuclear anxiety. One such subject, the one we will focus on here, was the concept of human speciesism — i.e., the human bias of viewing themselves as not merely the dominant species, but also as the superior species, the only species worthy of and possessing fundamental rights. Under this view, only humans are categorized and treated as beings, and all other animals, including nonhuman primates, are categorized and treated as things, as personal property, and our laws have historically reflected this view. As satirized in *Planet of the Apes*, when Honorius the orangutan prosecutor began his ape tribunal presentation against the human astronaut George Taylor, he declared:

*“Learned judges, my case is simple.  
It is based on our first Article of Faith.  
That **the Almighty created the ape in his own image;**  
That He gave [apes] a soul and a mind;  
That He set [apes] apart from the beasts of the  
jungle and **made [them] the lord of the planet.**  
These sacred truths are self-evident.”<sup>6</sup>*

Audiences found the allegory of a planet where talking apes were the dominant species to be intriguing and thought provoking story-telling. On that planet, it was believed that apes descended and evolved from the more primitive, supposedly non-verbal humans. And humans were treated like property rather than beings and relegated to the status of captive slaves, hunted prey, forced laborers, and research subjects. Obviously, this narrative served as a condemnation of the horrid abuse and exploitation that humans have inflicted on each other throughout history. But it also cast a spotlight on the abuse and exploitation humans have inflicted on animals.

### THE SHIFT IN PERCEPTION FROM PERSONAL PROPERTY TO SENTIENT BEINGS

As we discussed in the previous issue of *Laws and Paws*, the laws affecting primates evolved from their treatment as mere objects (household pets mail-ordered from comic book ads, or

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<sup>5</sup> Franklin J. Schaffner, Jerry Goldsmith, and Arthur Morton, *Planet of the Apes*, USA, 1967, Twentieth Century Fox Film Corp., based on the novel *Planet of the Apes*, by Boulle, Pierre, Vanguard Press, NY, 1963.

<sup>6</sup> *Planet of the Apes* shooting script of screenplay, May 5, 1967. Hunter’s *Planet of the Apes* Archive <https://pota.goatley.com/scripts.html>, at section 277. Honorius was an orangutan elder and the Deputy Minister of Justice, who was appointed to present the case for the prosecution of the human, American astronaut George Taylor, in the ape tribunal. See <https://planetoftheapes.fandom.com>.

captive live-in helpers of disabled humans, or cogs used in scientific experiments) to their respectful conservation as living creatures. Indeed, we saw how the enactment of primate protection laws not only shielded them from harm, but also retired them — from labs, zoos, circuses, carnivals, households, and other harmful and unnatural settings — to primate sanctuaries where they can live out the remainder of their lives free from harm, restraint, and exploitation, in a natural and protective environment.<sup>7</sup>

In this article, we go even further. Here, we explore not only the growing view that primates, and in particular chimpanzees, are more than mere things to be used for entertainment or scientific research, but also the evolving recognition that they are sentient creatures capable of language, emotions, and complex social structures, and, as such, are entitled to treatment in a humane manner as beings with certain basic rights.

### THE CHIMP ACT: AN IMPORTANT PRECEDENT-SETTING STEP

The official name of the bill signed into law by President Bill Clinton on December 20, 2000 is the Chimpanzee Health Improvement, Maintenance, and Protection Act (commonly known by its acronym: the CHIMP Act).<sup>8</sup> It came about as a result of a report published in 1997 by the Institute for Laboratory Animal Research (“ILAR”)<sup>9</sup> confirming the formal admission by the NIH that there was a chimpanzee “surplus” and recommending the creation of a sanctuary system for the care of chimpanzees “retired” from scientific research.<sup>10</sup> The law created a federally supported system to “provide for the lifetime care of chimpanzees that have been used, or were bred or purchased for use, in research conducted or supported by the National Institutes of Health, the Food and Drug Administration, or other agencies of the Federal Government.”<sup>11</sup>

Among the positive aspects of the CHIMP Act were the following:

- It prohibited euthanasia of chimpanzees (except when it is in the best interests of the chimpanzee as confirmed by a veterinarian). Significantly, it prohibited killing of any chimpanzees simply because they are no longer “of use,” the facility is overpopulated, or they are too costly to maintain. It is the first law to prohibit the killing of a nonhuman species, when it is solely for the convenience of the lab.
- It established a federally funded sanctuary “retirement” system for chimpanzees no longer needed for research.
- It required that the government contribute the majority of the cost of lifetime care for a former research subject outside of the laboratory setting: The law provided that

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<sup>7</sup> “Monkey Business: From Comic Book Ads to Primate Protection Laws,” and its companion article, “Helping Hands: The Transition from Service Monkeys to Emerging Technologies,” both written by Jim D. Sarlis Esq., *Laws and Paws*, Vol. 11, No. 1, Fall 2023.

<sup>8</sup> 42 U.S.C. § 287a-3a (2000).

<sup>9</sup> The report, titled “Chimpanzees in Research: Strategies for their Ethical Care, Management and Use,” concluded that there is a “moral responsibility” for the long-term care of chimpanzees used in scientific research and acknowledged the widespread public and government support for the creation of a sanctuary system.

<sup>10</sup> 42 U.S.C. § 287a-3a (2000). The terms “surplus,” “retired”/“retirement” and “sanctuary system” are those used in the CHIMP Act.

<sup>11</sup> 42 U.S.C. § 287a-3a(a). See Establishment of National Sanctuary System for Federally Owned or Supported Chimpanzees No Longer Needed for Research, 42 USC 287, and Sanctuary System for Surplus Chimpanzees, 42 USC 287a; see also 42 USC 216, 287-3a; 73 FR 60423. See also Code of Federal Regulations [eCFR :: 42 CFR Part 9 -- Standards of Care for Chimpanzees Held in the Federally Supported Sanctuary System](#)

Federal funds cover 90% of the cost to establish, and 75% of the cost to operate the sanctuary system.

Unfortunately, there were some negative aspects of the CHIMP Act too, such as:

- It did not establish objective criteria to determine which chimpanzees should be considered for retirement.
- It allowed total lab discretion as to when a chimpanzee would be considered for retirement.
- Under certain circumstances, a retired chimpanzee could be returned to research.

So, the good news was that the CHIMP Act was poised to retire a huge number of chimpanzees from research immediately by authorizing sending the chimpanzees considered “not needed” to sanctuaries. But the bad news was that “not needed” was not defined. Plus ... the retirement could be revoked.

Then, in December 2007, the "Chimp Haven is Home Act" amendment<sup>12</sup> was signed into law. It prohibited returning chimpanzees to research once they were retired into a federal sanctuary. The passage of this amendment, guaranteeing permanent sanctuary, reinforced a moral commitment to chimpanzees by the U.S. government.

In November 2013, the Chimp Act Amendments of 2013<sup>13</sup> removed a \$30 million spending cap that was set in the 2000 CHIMP Act. (Although this amendment appeared to only apply to chimpanzees in sanctuaries, the language of the amendment allows for the additional funds to apply to any and all chimpanzees, even those housed in labs or other environments.)

Passage of the CHIMP Act and its amendments, a crucial step toward ending research on all chimpanzees, constituted a precedent-setting acknowledgement that chimpanzees have an ethical status not previously granted to any species other than humans.

Indeed, this begs the question: What level of consideration are chimpanzees, and possibly other primates, entitled to? Are they entitled to some degree of *Fundamental Rights* analogous to those applicable to humans? And is violation or disregard of these rights not only illegal but also considered immoral?

## THE ARGUMENT IN FAVOR OF FUNDAMENTAL RIGHTS FOR PRIMATES

We are not merely descended from apes — we *are* apes. Humans are part of the Great Apes family, along with our evolutionary cousins: chimpanzees, gorillas, orangutans, and the lesser known bonobos.

Yet, historically, we have been treating and categorizing all nonhuman primates as things, not beings.

But, in recent years, there has been a shift in thinking. There has been a gradual recognition by scientists, lawmakers, judges, and the general public, that chimpanzees are more than just objects, more than just property. That they are sentient beings. And as such are entitled to

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<sup>12</sup> Pub. L. 110-170, Dec. 26, 2007, 121 Stat. 2465. See 42 U.S.C. 201 note.

<sup>13</sup> Pub. L. 113-55, title III, Nov. 27, 2013, 127 Stat. 646. See 42 U.S.C. 201 note.

certain fundamental rights. Many of these arguments are summarized in a policy paper by an academic entity known as Sentience Politics<sup>14</sup>

## THE TRAITS THAT SUPPORT FUNDAMENTAL RIGHTS FOR CHIMPANZEES

Among the traits that support the idea that chimpanzees are sentient beings, worthy of fundamental rights:

1. Chimpanzees are genetically closely related to humans, sharing approximately 99% of our DNA. Indeed, reorganizing the zoological categories has even been proposed to better reflect this level of relationship between the species taxonomically.<sup>15</sup>
2. Chimpanzees have a mastery of language. In the wild, they communicate through sounds, gestures, and body language. A recent study found that they have a vocabulary composed of over 390 unique vocal sequences (singles of one sound, bigrams of two sounds, and trigrams of three sounds) that they combine into an amazing vocal language repertoire.<sup>16</sup> Another found that they possess a far more complex vocabulary than earlier believed.<sup>17</sup> From humans, they have learned and used sign language, keyboards and computers. At the very least, their language skills and the development of those skills are comparable to those of human children,<sup>18</sup> and they can learn by observation and practice. Indeed, they teach each other. For example, chimpanzees who had learned a sign language from humans were subsequently able to teach it to younger chimpanzees, the latter successfully learning the language without additional human assistance<sup>19</sup>
3. They experience emotions, including complex ones.<sup>20</sup> They feel sorrow. They show concern and empathy. They are aware of another's impending death, holding vigils, comforting, mourning. They grieve their dearly departed and watch over their bodies. They laugh; they play; they wrestle, tickle and prank.
4. They are highly intelligent, learn quickly, retain new things, apply what they learned to new situations; they are curious. They have math skills and good memories.

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<sup>14</sup> Fundamental Rights for Primates: Policy Paper by Sentience Politics, Charlotte Blattner, Dr. jur. LL.M. Harvard, May 2016 [https://www.academia.edu/85520438/Fundamental\\_Rights\\_For\\_Primates\\_Policy\\_Paper\\_by\\_Sentience\\_Politics](https://www.academia.edu/85520438/Fundamental_Rights_For_Primates_Policy_Paper_by_Sentience_Politics)

<sup>15</sup> Derek E. Wildman/Monica Uddin/Guozhen Liu/Lawrence I. Grossman/Morris Goodman, Implications of natural selection in shaping 99.4% nonsynonymous DNA identity between humans and chimpanzees: Enlarging genus Homo, in: Proceedings of the National Academy of Sciences of the United States of America, vol. 100, 2003, p. 7181; Giordano Bruno Stiung, Brother Chimp Sister Bonobo: Rights for Great Apes!, 2011, p. 5: <http://www.giordano-bruno-stiung.de/sites/gbs/files/download/greatapes2.pdf>

<sup>16</sup> Girard-Buttoz C, Zaccarella E, Bortolato T, Friederici AD, Wittig RM, Crockford C. Chimpanzees produce diverse vocal sequences with ordered and recombinatorial properties. *Commun Biol.* 2022 May 16;5(1):410. <https://doi.org/10.1038/s42003-022-03350-8>. PMID: 35577891; PMCID: PMC9110424.

<sup>17</sup> Leroux, M., Schel, A.M., Wilke, C. *et al.* Call combinations and compositional processing in wild chimpanzees. *Nat Commun* 14, 2225 (2023). <https://doi.org/10.1038/s41467-023-37816-y>.

<sup>18</sup> See Taylor, D, Gustafsson E, et al. [Vocal functional flexibility in the grunts of young chimpanzees \(cell.com\)](https://www.cell.com/iscience/pdf/S2589-0042(23)01868-0.pdf) *iScience* 26, 107791, Oct. 20, 2023. [https://www.cell.com/iscience/pdf/S2589-0042\(23\)01868-0.pdf](https://www.cell.com/iscience/pdf/S2589-0042(23)01868-0.pdf). Not only did this study find parallels to human infant/child language development, it even concluded that the finding implies “the developmental foundations for [human] language are rooted in our primate evolutionary heritage.”

<sup>19</sup> Roger S. Fouts/Deborah H. Fouts/Thomas E. van Cantfort, The Infant Loulis Learns Signs from Cross-Fostered Chimpanzees, in: R. Allen Gardner/Beatrice T. Gardner/Thomas E. van Cantfort (eds.), Teaching sign language to chimpanzees, Albany: State University of New York Press, 1989.

<sup>20</sup> Watch dying grandma chimp remember and show love and delight at seeing her human friend after many years <https://fb.watch/px7Pus7wci/?mibextid=Nif5oz>.



5. They have strong bonds and group cultures. In the wild, the young ones are close to their mothers, who protect and nurture them, guiding and teaching them. Orphans are raised by the other family members. The whole group stays, travels, and plays together, with the older members teaching and guiding the younger ones.
6. They make and use tools. Jane Goodall first proved in the 1960s that chimpanzees make and use their own tools in the wild, find and hunt food.
7. They work together, share, and help each other. Researchers have discovered that apes will consistently make thoughtful decisions and multi-step plans to acquire rewards. Chimpanzees seem naturally inclined to aid others in distress and will help other chimps acquire food. In these experiments, researchers placed one primate in a room with the food, where they could elect to eat all the food themselves or open a door to let a fellow ape inside and share the bounty. They unlocked the door, even though that meant less food for themselves.
8. They exhibit self-awareness. Besides recognizing their own mirror image,<sup>21</sup> they can recognize their own image even over time and even if changed by adding dots or decals.<sup>22</sup>
9. They have a sense of the past and the future. They remember things they are taught or events they experienced, and can anticipate and plan for future events. They learn. They store food, they accumulate stones to throw as weapons.<sup>23</sup>

These traits, especially when they all exist in one organism, describe a creature that thinks, plans, communicates, possesses advanced social structures, and is self-aware. It experiences emotions, and can feel pain, fear, sadness, suffering, deprivation, and grief. It is not a thing. It is a sentient being. It is entitled to certain basic rights. Among them, the right to life, freedom from suffering and pain, and right to bodily and mental integrity.

## STEVEN WISE AND THE NONHUMAN RIGHTS PROJECT: USING LITIGATION AS A TOOL

The late animal rights attorney Steven Wise founded the Nonhuman Rights Project (“NhRP”), an entity that, in its own words, is “challenging the rightlessness of nonhuman animals.”<sup>24</sup> The concept of having absolutely no rights, due solely to the arbitrary decision of the group that is in power, was bluntly exposed in a classic *Planet of the Apes* role-reversal scene:

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<sup>21</sup> Abigail Z. Rajala/Katharine R. Reininger/Kimberly M. Lancaster/Luis C. Populi, Rhesus monkeys (*Macaca mulatta*) do recognize themselves in the mirror: Implications for the evolution of self-recognition, in: *PLoS ONE*, vol. 5, 2010, p. 1; Monique W. de Veer/Gordon G. Gallup Jr./Laura A. Theall/Ruud van den Bos/Daniel J. Povinelli, An 8-year longitudinal study of mirror self-recognition in chimpanzees (*pan troglodytes*), in: *Neuropsychologia*, vol. 41, 2003, p. 229; Frans de Waal/Marietta Dindo/Cassiopeia A. Freeman/Marisa J. Hall, The monkey in the mirror: hardly a stranger, in: *National Academy of Sciences USA*, vol. 102, 2005, p. 11140-11147; Justin J. Couchman, Self-agency in rhesus monkeys, in: *Biology Letters*, vol. 8, 2012, p. 39.

<sup>22</sup> See, e.g., Chimpanzees recognize their own delayed self-image. Satoshi Hirata, Kohki Fuwa, and Masako Myowa, *Royal Society Open Science*, Aug. 2017, published by National Center for Biotechnology Information, National Institutes of Health, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5579101/>

<sup>23</sup> Michael Balter, Stone-Throwing Chimp is Back – And This Time It’s Personal, in: *Science*, 9 May 2012: <http://www.sciencemag.org/news/2012/05/stone-throwing-chimp-back-and-time-its-personal>

<sup>24</sup> See Nonhuman Rights Project, <https://www.nonhumanrights.org/about-us/>

*Zira (the chimpanzee doctor trying to defend the human in the ape tribunal):*  
“At the very least, this man has the right to know whether there's a charge against him.”  
*Honorius (the orangutan prosecutor):*  
“Objection! This exhibit is indeed a man. Therefore he has **no rights under ape law.**”<sup>25</sup>

The scene brought to the forefront not only the injustice, the unfairness, and the cruelty of rightlessness imposed by others, but also the terrifying and debilitating feeling of utter vulnerability and powerlessness it instills.

The Nonhuman Rights Project seeks to change this. It summarizes its mission and values as follows:

“The NhRP is the only civil rights organization in the United States dedicated solely to securing rights for nonhuman animals. Our groundbreaking work challenges an archaic, unjust legal status quo that views and treats all nonhuman animals as legal ‘things’ with no rights. As with human rights, nonhuman rights are based on fundamental values and principles of justice such as liberty, autonomy, equality, and fairness.”<sup>26</sup>

The NhRP’s strategy is to concentrate on securing rights in the courts by seeking “recognition of the legal personhood and fundamental right[s] of [nonhuman animals]” arguing that “courts must free these self-aware, autonomous beings to appropriate sanctuaries not out of concern for their welfare, but respect for their rights.”<sup>27</sup>

This concept of legal personhood is the crux of the whole matter. After all, the animal welfare laws that are already in place do not prevent the injustices against animals that exist. “Animal welfare statutes don’t provide recourse against the mental and physical suffering that results from depriving self-aware, autonomous beings of their freedom, the company of others of their kind, and their natural habitats.”<sup>28</sup> An example is the case of the very first client of the NhRP: Tommy the Chimpanzee. Tommy had worked in the entertainment industry, including a film set where the chimpanzees were beaten into submission with blackjacks, clubs, and cattle prods. Now he was held all alone in a used trailer lot in the small town of Gloversville, New York. Tommy was locked in a bare cage, made of steel and cement, inside a small building, alone, with no company or interactions – not with humans, not with chimps or other animals – with only a TV set playing outside the bars of his cage as his sole source of light and his sole activity. His “owner” maintained that Tommy liked being alone. Once Tommy became the object of media attention, he disappeared from the trailer and apparently was shipped to a roadside zoo in Michigan. While the NhRP’s extensive legal efforts were still pending, Tommy died. Tommy’s death demonstrates the shortcomings of animal welfare laws: after all, everything that happened to Tommy was legal. This is why fundamental rights, some version of personhood that recognizes them as beings and not just things, is necessary.

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<sup>25</sup> *Planet of the Apes* shooting script of screenplay, May 5, 1967. Hunter’s Planet of the Apes Archive <https://pota.goatley.com/scripts.html>, at section 273. Dr. Zira was a chimpanzee psychologist and “veterinarian,” who specialized in the study of humans, and who advocated that the human, Taylor, was a sentient being who had the ability to use and understand language and to speak, which was considered heresy in the ape world. See <https://planetoftheapes.fandom.com>.

<sup>26</sup> See Nonhuman Rights Project, <https://www.nonhumanrights.org/about-us/>

<sup>27</sup> *Id.* It specifically mentions great apes, elephants, dolphins, and whales.

<sup>28</sup> *Id.*

Tommy, the NhRP explained, was a sentient being held captive, imprisoned in a bare cage, all alone:

“No trees to climb.

No grass to walk on.

No sunshine, breeze, or fresh air.

No members of his own species with whom to interact.

[Yet] all perfectly legal under animal welfare laws.”<sup>29</sup>

## HABEAS CORPUS IS AN IMPORTANT TOOL TOWARDS THE GOAL OF ESTABLISHING PERSONHOOD

The right of habeas corpus is an important tool with a storied history. It literally means “bring me the body” in Latin, whereby the Court mandates that the detained or confined person be brought before the Court to make the confiner explain and justify the confinement. It is a paramount mechanism to prevent the arbitrary or unjustified confinement of a person by a government entity or private entity. Significantly, it was used to establish personhood for slaves.

One of the most famous and influential cases is *Somerset v. Stewart* (also known as *Sommersett v. Steuart*), Lofft 1, 98 Eng. Rep. 499 (K.B. 1772) in which the Lord Chief Justice of England and Wales granted the writ of habeas corpus to a human slave named James Somerset. Somerset was kidnapped from Africa at the age of seven and was sold to Charles Stewart in Virginia. Under Virginia Law, Somerset was considered the property of Stewart. Later on, when Stewart, who was a customs officer, brought Somerset with him to England, Somerset ran away and managed to evade Stewart and others looking for him for about two months before being caught by Stewart. Stewart, to punish Somerset's rebellion, sold him to hard labor in the sugar cane fields. He then forced Somerset to stow on a ship called “Ann and Mary” that was scheduled to leave for Jamaica. Aboard “Ann and Mary, Somerset was in the custody of the ship's skipper, Captain Knowles. While Somerset was shackled on the ship, three Londoners – James Marlowe, Thomas Walkin, and Elizabeth Code, who were Somerset's godparents from his baptism as a Christian in England – applied for a writ of habeas corpus. Lord Mansfield then issued the writ and ordered that Somerset be brought before the Court of King's Bench, and required Captain Knowles to show cause for his detainment of Somerset.

Significantly, at the time, human slavery was not only legal in England, it was a major economic activity; therefore, the granting of habeas corpus was a landmark event, both legally and politically. Lord Mansfield found the practice of slavery, despite its legality, “so odious that nothing can be suffered to support it.” Lord Mansfield granted James Somerset his freedom, and with that, Mr. Somerset, who started out as legal property, walked out of the King's Bench discharged, free, and a person under the law.

Similarly, *Lemmon v. New York* (also cited as *Lemmon v. The People*) (1860)<sup>30</sup>, popularly known as The Lemmon Slave Case, started in 1852 with a writ of habeas corpus which was granted by Judge Paine of the Superior Court of New York, and made its way through the courts, ultimately having the writ upheld and the case decided by the New York Court of Appeals in 1860. Significantly, this was on the eve of the Civil War.

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<sup>29</sup> *Id.*

<sup>30</sup> 20 N.Y. 562 (1860).

In his analysis, Judge Paine relied on *Somerset v. Stewart*, and the idea that, since the Lemmons chose to bring slaves to New York when they were going from Virginia to Texas, knowing that New York was a free state, and notwithstanding laws in effect that slaves remained property that should be returned to their owners, the slaves were free according to New York's 1817 law which forbid bringing slaves in transit into the state: *No person held as a slave shall be imported, introduced, or brought into this State on any pretence whatever ... . Every such person shall be free. ....*<sup>31</sup>

## THE NhRP's ARGUMENTS

The NhRP filed very detailed Memoranda of Law in support of its case, ultimately joined by *amicus curiae* briefs by many scholars, including such luminaries as famous English primatologist Jane Goodall, considered the world's foremost expert on chimpanzees, and Harvard's Laurence Tribe.<sup>32</sup> The gist of their argument is that the chimpanzees are cognitively complex autonomous legal persons with the fundamental right not to be imprisoned, and that these captive chimpanzees are enslaved beings – not merely held or stored property – and the same principles that applied to enslaved humans should apply to them as well.

It is important to note – especially by any naysayers – that the NhRP is not asking the Courts to declare chimpanzees the same or equivalent to human beings, any more than a corporation, which is also considered a legal person, is a human being. Nor is the goal for the chimpanzees to be set completely free, but rather that they be moved to one of the sanctuaries in the North American Primate Sanctuary Alliance.

In deciding against Tommy, the Court stated that “animals have never been considered persons for the purposes of habeas corpus relief, nor have they been explicitly considered as persons or entities capable of asserting rights for the purpose of state or federal law. Petitioner does not cite any precedent – and there appears to be none ... that an animal could be considered a ‘person’ for purposes of the common law habeas corpus relief. In fact, habeas corpus relief has never been provided to any nonhuman entity.”<sup>33</sup>

Among the NhRP's arguments were the following:

- **Historically, the writ's use has been expanded:** As noted by the court in the NhRP's *Stanley* decision, “[t]he lack of precedent for treating animals as persons for habeas corpus purposes does not, however, end the inquiry, as the writ has over time gained increasing use given its ‘great flexibility and vague scope.’”<sup>34</sup> Moreover, “[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.”<sup>35</sup>
- **It's not that writs for nonhuman animals were ever denied in the past – rather, they had never before been requested:** Further, the reason there was no precedent for treating nonhuman animals as “persons” for the purpose of securing habeas

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<sup>31</sup> Laws of 1817, 136, §9; 20 N.Y., 601; 5 S.S.C., 681; 26 B., 272. *See Statutes at Large* (as of July 1, 1862) edited by John W. Edmonds (Albany, N.Y.: Weare C. Little, 1863), volume 1, Revised Statutes, Part II (Rights of Person and Property), chapter XX (Of the Internal Police of this State), Title 7VII (Of the Importation into this State of Persons Held in Slavery), §1.

<sup>32</sup> *See, e.g., TOMmyNYCTYSUPCT12-2-15 (MM FINAL).docx (nonhumanrights.org)*

<sup>33</sup> *People of the State of NY, et al. on Behalf of Tommy v. Lavery et al.*, Sup Ct, App Div., 3d Judicial Dept., # 518336, Dec. 4, 2014, Opinion and Order of Peters P.J. (citations omitted).

<sup>34</sup> *Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, 16 N.Y.S.3d 898, 912 (N.Y. Sup. Ct. 2015).

<sup>35</sup> *Id. (citing Obergefell v. Hodges*, 135 S. Ct. 2602 (2015)).

corpus relief was not because the claim had been rejected by the courts. It was because no nonhuman entity capable of being imprisoned (unlike a corporation), certainly not a nonhuman animal, and most certainly not an autonomous being such as a chimpanzee, had ever demanded a writ of habeas corpus.

- **The novelty of the assertion does not bar the relief sought:** This is the first such demand ever made by a nonhuman animal in a common law jurisdiction. But the novelty of this claim is no reason to deny Tommy or any other chimpanzee habeas corpus relief. E.g., that no Native American had previously sought relief pursuant to the Federal Habeas Corpus Act did not foreclose a Native American from being characterized as a “person” and being awarded the requested habeas corpus relief.<sup>36</sup> Similarly, that no slave had ever been granted a writ of habeas corpus was no obstacle to the court granting one to the slave petitioner.<sup>37</sup>
- **Personhood is not necessarily based on any particular purely biological or zoological concept, nor does it depend on whether the entity in question is currently considered a person:** Once the demand for personhood is made, the court must open-mindedly consider the issue, engage in a mature weighing of public policy and moral principle.<sup>38</sup>
- **Non-U.S. jurisdictions have granted habeas corpus relief to nonhuman animals:** Contrary to the Court’s assertion that “habeas relief has never been found applicable to any animal,” habeas corpus relief has been ordered for nonhuman animals elsewhere, for example: an orangutan named Sandra in Buenos Aires, Argentina, *Asociacion de Funcionarios y Abogados por los Derechos de los Animales y Otros contra GCBA, Sobre Amparo (Association of Officials and Attorneys for the Rights of Animals and Others v. GCBA, on Amparo)*, EXPTE. A2174-2015 (October 21, 2015), and in Mendoza, Argentina, based in large part on the work of the NhRP, an Argentine civil law court in 2016 recognized a chimpanzee named Cecilia as a “non-human person,” ordered her released from a Mendoza Zoo pursuant to a writ of habeas corpus, and sent to a sanctuary in Brazil. *In re Cecelia, Third Court of Guarantees, Mendoza, Argentina, File No. P-72.254/15 at 22-23. In re Cecelia, File No. P-72.254/15 at 22-23.* It also appears that the writ was issued to a captive bear in Colombia, though that ruling was subsequently overruled by a higher court pending appeal, *Luis Domingo Gomez Maldonado contra Corporacion Autonoma Regional de Caldas Corpocaldas, AHC4806-2017 (July 26, 2017).*

Tommy’s case was litigated extensively, including multiple attempts at appeal, but ultimately denied. The – arguably questionable and controversial – reasoning given by the court for denying Tommy habeas corpus was based on the court’s theory that a “person” supposedly must have the ability to engage in reciprocity between rights and legal duties and responsibilities stemming from principles of “social contract”. Under this view, society extends rights in exchange for an express or implied agreement from its members to submit to social responsibilities. In other words, “rights [are] connected to moral agency and the ability to accept societal responsibility in exchange for [those] rights.”<sup>39</sup> The obvious flaw in this *quid pro quo* argument, in fact the counter-argument, is that literally millions of

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<sup>36</sup> See, e.g., *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697 (D. Neb. 1879).

<sup>37</sup> *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772); see also *Lemmon v. People*, 20 N.Y. 562 (1860).

<sup>38</sup> See, e.g. *Byrn v. NYC Health & Hosp. Corp.*, 31 N.Y.2d 194 (1972).

<sup>39</sup> *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 998 N.Y.S.2d 248 (N.Y. App. Div. 2014). (*People ex rel. Nonhuman Rights Project, Inc. v Lavery*, 124 AD3d 148 [3d Dept 2014], *lv denied* 26 NY3d 902 [2015]). 2017 NY Slip Op 04574 [152 AD3d 73 (Appellate Div., First Dept., June 8, 2017), 31 N.Y.3d 1054 (2018).

humans are held to be “persons” despite being too sick, too disabled, too young, or too old to take on such societal responsibilities. And besides: administering justice is not about what the victim can do for you in return.

Sadly, while the NhRP was in the process of continuing its legal efforts, they received the bad news that Tommy had died.

### A TRILOGY OF CHIMPANZEE CASES

Tommy’s case was one of a trilogy of cases brought by the NhRP involving chimpanzees. The second was *Nonhuman Rights Project, Inc., ex rel. Kiko v. Presti*<sup>40</sup> and concerned a chimpanzee known as Kiko who was living in a cage at the home of Carmen Presti in Niagara Falls, New York. Kiko had been partially deafened by blows to the head when forced to work on a movie set. In Kiko’s case, the Fourth Department affirmed the Supreme Court's ruling to dismiss the NhRP's petition for habeas corpus. The reasoning, however, did not focus on whether Kiko was a "person" capable of asserting habeas corpus rights, but rather that NhRP was not seeking Kiko's immediate release. Instead, the NhRP sought to have Kiko transferred from Kiko’s current location of captivity, that was alleged to be unsuitable, to a facility selected by The North American Primate Sanctuary Alliance, and the court reasoned that a habeas corpus claim can only lie where the petitioner is entitled to immediate release from confinement, not a transfer from one confinement to another. The court further reasoned that even assuming, *arguendo*, that Kiko was a person, habeas corpus would not be available for the purpose of changing the conditions of Kiko’s confinement.

The third case, *Nonhuman Rights Project, Inc. ex rei. Hercules & Leo v. Stanley*,<sup>41</sup> concerned two chimpanzees known as Hercules and Leo who were being held at Stony Brook University and used as research subjects. The NhRP sought habeas corpus relief for their release and transfer to a sanctuary in Florida. The NhRP did not challenge the conditions of their confinement, nor did they allege that Stanley violated any state or federal law. In denying NhRP's petition for a writ of habeas corpus, the court focused its analysis on the issue of whether chimpanzees can be considered a "person" and ultimately felt bound by the Third Department's decision in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*.

On February 21, 2018, the NhRP once again asked the New York Court of Appeals for permission to appeal the denials. On May 8, 2018, the Court of Appeals again denied the request, effectively ending Tommy’s and Kiko’s litigation.<sup>42</sup>

Although, as explained below, much progress has been made towards eroding the barriers against legal recognition of nonhuman personhood, in large part thanks to the tireless and passionate efforts of advocates such as Steven Wise and his Nonhuman Rights Project, as

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<sup>40</sup> *Nonhuman Rights Project, Inc., ex rel. Kiko v. Presti*, 999 N.Y.S.2d 652 (N.Y. App. Div. 2015) *leave to appeal denied*, 126 A.D.3d 1430 (N.Y. App. Div. 2015) *leave to appeal denied*, 38 N.E.3d 827 (N.Y. 2015). (*Matter of Nonhuman Rights Project, Inc. v Presti*, 124 AD3d 1334 [4th Dept 2015], *lv denied* 26 NY3d 901 [2015]).

<sup>41</sup> *Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, 49 Misc.3d 746, 16 N.Y.S.3d 898 (N.Y. Sup. Ct. 2015). In that proceeding, Supreme Court, Suffolk County, declined to sign an order to show cause and in 2014, the Second Department dismissed petitioner's appeal (*Matter of Nonhuman Rights Project, Inc. v Stanley*, 2014 NY Slip Op 68434[U] [2d Dept 2014]).

<sup>42</sup> NY Slip Op 03309 (May 8, 2018). Judge Eugene M. Fahey’s concurring opinion offered an emotional and legally cogent critique of the failure by the court to directly address the issue of nonhuman animals’ personhood, concluding that the issue of whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is complex, profound, and far-reaching, and that, moreover, it speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a “person,” there is no doubt that it is not merely a thing. *Id.*

well as the Animal League Defense Fund, so far no U.S. Court has recognized legal personhood status of chimpanzees or other primates.

## CASES INVOLVING NON-PRIMATES

Cases have been brought to advocate for the rights of non-primates, as well. Somewhat unexpectedly, the hippopotamus was the nonhuman creature that took center stage in an interesting case. It arose from the private zoo set up by Pablo Escobar when he was a kingpin in Colombia, which went largely unsupervised after his death in 1993, leading to the uncontrolled expansion of the hippo population there. As part of the debates that took place as the hippos multiplied and threatened to upset the ecological status of the area, there were suggestions of culling the herd. Upon allegations that Colombian authorities were ignoring the call to take testimony, which argued that it was depriving the hippos of a solution that would preserve their lives, and since two of the witnesses to be deposed were in the US, a filing was made in U. S. District Court for the Southern District of Ohio under 28 U.S.C. § 1782(a) to take the depositions. Federal magistrate Judge Karen Litkovitz granted the request on October 15, 2021.<sup>43</sup> The case has been heralded as a groundbreaking first where hippos were deemed to be “interested persons” under the law of the U.S. “U.S. District Court for the Southern District of Ohio recognizing Pablo Escobar’s ‘Cocaine Hippos’ as ‘interested persons’ that can seek discovery in support of a foreign proceeding under Section 1782(a)” and the like were the summaries, headlines, and internet click bait. That, in fairness, was a reasonable summary of the situation. Somewhat less reasonable were announcements like “Pablo Escobar’s ‘cocaine hippos’ are legally people, US judge rules”<sup>44</sup> as part of the worldwide media attention. The case was an application for an order to take the testimony of two U.S. witnesses who were wildlife experts in sterilization, the goal being for the Colombian administrative case to support the application made on behalf of the hippos. The discovery is to explore the viability of solutions other than euthanasia in an attempt to persuade the Colombian authorities to consider alternatives, such as chemical sterilization to control the population, that both resolve the issue and respect the interest of the hippos. Arguably, therefore, the decision could be viewed as narrow, esoteric, and utilitarian for an order to conduct discovery for use in a foreign proceeding. But still, it is certainly a first. And it is an important precedent in the piece by piece erosion of the barriers to nonhuman legal personhood.

And there was the case of Happy the elephant. The NhRP sought to free Happy from her captivity at the Bronx Zoo, where she had been held for over 40 years. The lower Courts ruled against theNhRP’s petition seeking habeas corpus relief on Happy’s behalf, stating that New York Courts have ruled that nonhuman animals are not legally “persons.” The New York Court of Appeals affirmed the denial, and concluded by saying:

“[T]hese statutory distinctions reflect the abiding view that nonhuman animals are not persons with a common law right to liberty that may be secured through a writ of habeas corpus [cite omitted]. We close with the observation that, despite the relative simplicity of the legal issue presented, this case has garnered extraordinary interest from amici curiae and the public—a testament to the complicated and ever-evolving relationship between human beings and other animals. Though beyond the purview of courts, we appreciate that the desire and ability of our community to engage in a continuing dialogue regarding the

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<sup>43</sup> *Community of Hippopotamuses Living in the Magdalena River, Applicant, To Issue Subpoenas For The Taking of Depositions Pursuant to 28 U.S.C. § 1782*. No. 1:21-mc-00023-TSB-KLL.

<sup>44</sup> CBS News, October 26, 2021 <https://www.cbsnews.com/amp/news/pablo-escobar-cocaine-hippos-legally-people-us-judge/>

protection and welfare of nonhuman animals is an essential characteristic of our humanity. Such dialogue, however, should be directed to the legislature.”<sup>45</sup>

Court of Appeals Chief Judge DiFiore delivered the 17 page opinion of the majority; extensive and passionate concurring opinions were filed totaling roughly 100 pages, arguing that a sanctuary setting would be best for Happy without negatively affecting her humans captives, and that in refusing this outcome, we humans are diminished.<sup>46</sup>

Similarly, Justice the American Quarter Horse was denied relief by the Oregon Courts when his new owner, Kim Mosiman, the executive director of Sound Equine Oppositions, tried to be appointed his guardian and sue his prior owner, Gwendolyn Vercher, for animal cruelty and failure to provide care. While with Vercher, Justice (who was then called Shadow) had become tremendously underweight and had difficulty walking. After Mosiman took over, with proper care and veterinary intervention, Justice eventually recovered. The Court reaffirmed the view that animals are property and not legally persons and questioned both the guardianship and tort aspects of Justice’s case. The Oregon Court of Appeals therefore affirmed the trial court’s judgment dismissing the complaint with prejudice. In dismissing the case, the court found “only human beings and legislatively created entities are persons with the capacity to sue under Oregon common law.”<sup>47</sup>

## CONCLUSION

Other countries have recognized nonhuman animals as legal persons for purposes of the writ of habeas corpus. U.S. courts have been reluctant to recognize their legal personhood. But we are not looking to make nonhuman animals citizens who freely wander the streets on their own, or to recognize them as people. Maybe if we stopped getting weighed down by the exact wording, the terminology being used, we could get past the concerns, the fears, and the oppositions and get down to the nitty gritty. Nonhuman sentient creatures need not be called people or even categorized as people in order to be entitled to fundamental rights like respect, being treated in a humane manner, freedom from harm and pain and being killed, physical and mental integrity, freedom from forced captivity in cages and the like when alternatives such as sanctuaries exist where they can live among their own kind and in an environment resembling their natural habitat. They are living creatures. They are more than mere things or property. And the legal system can formally recognize this.

Viewing the issue through the prism of a *Planet of the Apes* style of analogy lays bare the inescapable conclusion:

What if, after all these millennia of our dreaming and imagining about what is out there in the cosmos, and after all these centuries of our exploring and putting together the puzzle pieces of the universe with telescopes and other instruments, and after all these decades of our launching space craft and satellites to travel through space to map and learn the nature of our galaxy, that an Earth vessel finally lands on a distant planet. The Earthling astronauts emerge from the ship and explore the planet, their mission being to seek out new life and new civilizations. They encounter a village, a colony, of creatures. At first, these creatures are standoffish, apprehensive, but... they are curious... friendly... and ultimately forthcoming. Because they are the very first extraterrestrials to be discovered in the entire

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<sup>45</sup> *NhrP et al. v. Breheny et al.* 2022NY Slip Op 03859 Decided on June 14, 2022 Court of Appeals Chief Judge DiFiore.

<sup>46</sup> *Id.*

<sup>47</sup> *Justice, an American Quarter Horse, by and through his Guardian, Kim Mosiman v. Vercher*, 518 P.3d 131 (2002), review denied, 370 Or. 789, 524 P.3d 964 (2023) Date of Decision Aug. 31, 2022, Justice Ortega, P.J.



universe, the Earthlings decide to call their new friends Primies. The Earthlings are surprised – pleasantly, mostly – that these new friends resemble Earthlings. They have large heads on a hominid body. They are four limbed, bipedal, mostly upright, with two eyes facing forward. They have very dextrous hands with opposable thumbs. There are many of them, all forming one large group, one society. There are elders, who seem to be the leaders. They lead the group, teach the younger members. There are adults, who do tasks, care for and carry the babies and toddlers, and teach them. And there are babies and youngsters, who play, are close to their mothers, and learn from the older members of the group. They all travel as a group.

The Primies communicate with each other, although their language – their speech, their gestures, their body language – are not understandable to the Earthlings. The linguist among the Earthlings says that, from what he observes, he believes the Primies have an amazing repertoire of words and sounds that they vocalize. He assures his crewmates that, with patience and paying careful attention, given time and effort, the patterns and interpretations could be translated into Earthly languages. The gestures would become as recognizable as those of our Earthly counterparts in various cultures. And we would be able to communicate with the Primies.

Within a short time, the Primies learn sign language and gestures from the Earthlings and even teach them to their youngsters.

The Primies make and use tools. They gather and use weapons, albeit simple ones.

They plan. They help each other. Work together. They laugh, tickle and prank each other. They grieve, they mourn their dead. They share. They are willing to give up food so that other members can eat.

They are self-aware. When the Earthlings pulled out mirrors and held them near the Primies' faces, or showed them pictures of themselves, they looked at their images and smiled broadly. They pointed at the image and then themselves. They even pointed out their own image from other images. Even if their image was made slightly different, like if spots or stickers were added to them.

The Primies shared their food with the Earthlings. The Primies showed the Earthlings all kinds of things – places, foods, how they do things. They proudly introduced their families. They tried their best to communicate with the Earthlings.

This is quite a civilization – one that we have hoped to *ever* find on another planet. One that proves that we Earthlings are not the only sentient beings in the universe.

Yes, our past is replete with bad interactions we Earth humans have had with each other and with other creatures. But are these new creatures, this civilization discovered on a different planet, not worthy of being considered sentient beings who are entitled to be treated with dignity and respect as separate entities with fundamental rights?

Why would we deny these same rights and protections to these same creatures if they were to come to our planet? We can co-exist. We can treat them with dignity and respect. We can try to communicate with them the best we can. We can protect and help them. To do otherwise would be wrong. Immoral. And, it is submitted, should be illegal.

Or, better yet, and far scarier, imagine if a spacecraft carrying an advanced group of beings comes to Earth. It hovers above our planet. The beings somehow transport themselves down to the surface where they meet and interact with the Earthlings. These beings are mentally and physically powerful, superior to us mere Earthlings.

They can project holograms and images with their minds. From these images they show us that they have traveled vast distances to reach us. Their vessels are far beyond our technology.

Their weapons are like lasers and quite formidable. They can disable our weapons. They are able to communicate with each other through mental telepathy. To the extent that they have tried to communicate with us by expressing sounds, we can't understand them. They therefore do mind reads. They are powerful, can defy gravity, and possess uncanny abilities. They can pass through walls and solid objects. By comparison to these beings, we Earthlings are quite primitive.

How would we feel if they treated us as non-beings? Put us in zoos? Or kept us as pets? Or experimented on us?

The issue becomes clear when the shoe is on the other foot, doesn't it? ... An important lesson taught to us more than a half century ago ... in an entertaining movie ... called *Planet of the Apes*.

### **In Memory of Animal Rights Attorney Steven M. Wise**

(Dec. 19, 1950 - Feb. 15, 2024)

Steven Wise, who was the president of the Animal Legal Defense Fund, and the founder and president of the Nonhuman Rights Project, has passed away at the age of 73. A noted legal scholar, speaker, author, and advocate of world renown, who specialized in animal rights, primatology, and animal intelligence, Mr. Wise was a pioneer in using the writ of habeas corpus to pursue Court recognition of legal personhood for animals. He was the force behind the NhRP litigations which argued, with passion and persistence, that animals possess traits which entitle them to be viewed as beings, and not as mere things or property. A graduate of The College of William and Mary and of Boston University Law School, Mr. Wise taught Animal Rights Law at Harvard, Stanford, and several other law schools. His contributions to animal rights law are immeasurable. He was an inspiration to us all and will be greatly missed.

– *The Committee on Animals and the Law*

#### *About the author:*

Jim D. Sarlis, Esq. concentrates on Elder Law and Trusts & Estates, and recently presented a NYSBA CLE webinar on Pet Trusts. While his office is now in Rosedale, Queens, he was born and raised in Hell's Kitchen in Manhattan, where he attended Columbia University, Fordham University School of Law, and NYU School of Law's Master of Laws (LL.M.) program in taxation. Mr. Sarlis has been a guest lecturer at New York Law School on the subject of Will Drafting, and has taught Real Estate Law and Legal Writing in the ABA-governed paralegal program of the City University of New York. Mr. Sarlis is admitted to the New York State Bar, the Federal Courts for the Southern and Eastern Districts of New York, and the U.S. Tax Court. His household has included a lovable dog named Cody, and a playful cat named Snickers. His apartment while growing up in Hell's Kitchen was located right above a neighbor whose pets included monkeys, feral cats, pigeons and parrots. Mr. Sarlis is also a member of COAL.

**NYSBA Committee on Animals and the Law**  
**Member Spotlight: Kirk Passamonti, Esq.**

Interview by Breanna C. Kromer, Esq.

**Tell us a little bit about your background...**

I was born and bred in Brooklyn, NY – home of the world’s greatest pizza and bagels! I graduated from New York Law School.

**What made you decide to become an attorney?**

I was initially inspired to go to law school by a close friend. He was in law school at the time and suggested I sit in on a couple of his classes. He obtained permission from his professors, or so he told me, and I sat in. I recall him introducing me to one of the professors who said I could sit in on the class but, if asked, he would neither confirm nor deny that I did so. I then started doing some research and speaking to attorneys I knew, or had access to, about a career in law. I concluded that a law degree could really open doors and allow me to achieve a fulfilling career in areas that I was interested in. I was initially interested in environmental law as I was always an environmentally conscience person and found the legal issues challenging but interesting. I later became interested in elder law and entertainment law as well (no, I did not simply comb through the “E” section of a legal careers handbook).

**Take us through your legal career since graduating law school...**

When I graduated from law school, the legal job market was pretty bad. Entry level jobs were hard to come by, especially in the areas I was interested in. I started off doing some pro bono work and shadowing experienced attorneys, which led to per diem work. I am also very thankful to have had some great mentors. I eventually opened my own practice, which was not something that I originally planned. While it has its own set of challenges, there’s nothing like working for yourself.

**What does your current law practice consist of?**

I currently practice family and elder law.

**What sparked your interest in animal law?**

I always admired and respected animals and always had an interest in them. When I was a kid, I often read books about animals and even collected animal cards. Occasionally we would take family trips upstate New York and I remember the awe of seeing a deer grazing on the side of the road or a hawk flying overhead (though the Brooklyn pigeons and squirrels were pretty cool too).

As an adult, while visiting the Finger Lakes upstate New York, I visited Farm Sanctuary. In addition to meeting the animals up close and seeing first-hand how intelligent they were, there was an educational component to the tour that spoke about the laws in NY relating to factory farms. It touched on issues such as the environmental impact of factory farms, downed animals, meat and egg production, etc. I believe the experience bridged the gap between how I felt about animals and my interest in the laws that govern animals in NY. Unfortunately, I did not have the opportunity to take an animal law class in law school.

**Is there a particular area of animal law that you feel most passionate about?**

Factory farming, animal abuse and estate planning for pets come to mind. I feel the latter is not always a part of the estate planning conversation but should be (Pet Trusts in particular). I believe that most people do not know that Pet Trusts exist. There are many reasons to consider a Pet Trust. The first that comes to mind is not keeping the pet waiting in limbo for an executor or administrator of an estate to be appointed by the court to care for the pet after the pet owner dies. If anyone reading this is interested in learning about Pet Trusts, the NYSBA Committee On Animals and the Law and the NYSBA Elder Law Section co-sponsored a very informative CLE on Pet Trusts in November 2021 titled “Pet Trusts: Caring for Fluffy and Fido After You’re Gone,” which can be viewed on demand.

**Tell us about your involvement in NYSBA COAL...**

I have been a member of COAL since 2015. I discovered COAL during the NYSBA’s Annual Meeting when I came across a CLE on animal law. I attended the COAL CLE and recall speaking to the Chair and other attendees and immediately became interested in joining COAL. I then signed up, was accepted as a member, and am proud to have been part of COAL ever since. I was the Chair of the Publications Subcommittee for a few years, then the COAL Secretary, and now the COAL Vice-Chair. I am always inspired by the COAL members. We have productive and respectful discussions about animal law issues in NY and beyond. We also discuss pending NY bills that relate to animals.

**What do you enjoy doing for fun?**

Going to concerts and watching movies.

**Tell us one “fun fact” about you...**

I relax by watching horror movies. I especially like the classics from way back, such as the Universal Monster films. I am also a fan of Star Trek – surprise surprise!

**2023 Student Writing Competition 1<sup>st</sup> Place Finisher:**

**BANNING THE URBAN CARRIAGE HORSE INDUSTRY: WHY REINING  
IN THE INDUSTRY WITH MORE REGULATIONS  
FAILS TO CARRY THE DAY**

By: Tatum Daily  
Vermont Law School

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*“The fight over the working and living conditions of carriage horses is among the most overlooked battlegrounds in the war for legal protections for animals in the United States.”<sup>1</sup>*

## INTRODUCTION

On September 14, 2007, a New York City carriage horse named Smoothie took off running after being spooked by street performers.<sup>2</sup> Smoothie broke her leg and died of shock after her carriage ended up caught in a tree after she bolted.<sup>3</sup> On December 21, 2016, Cash was spooked when his handler prematurely removed his blinders while preparing to load him into a trailer.<sup>4</sup> Cash dragged an empty carriage along the St. Charles riverfront before falling into the Missouri River and drowning in frigid waters.<sup>5</sup> In 2022, Ryder collapsed on the streets of New York City in the August heat after working in the carriage industry for only four months.<sup>6</sup> Officials later determined that Ryder was 26 years old (the human equivalent of a senior citizen) and riddled with cancer.<sup>7</sup> He died in October.<sup>8</sup> The media has documented the plight of urban carriage horses for decades, and yet legal protections are minimal and enforcement is lacking. The time has come: a nationwide ban on the urban carriage horse industry is needed to protect both the welfare of horses and the safety of pedestrians on city streets.

The term “urban” is defined as “relating to, characteristic of, or constituting a city.”<sup>9</sup> The “many documented health and welfare issues”<sup>10</sup> plaguing the horses within this industry are endemic to the urban environments in which they are situated. Additionally, rising temperatures will only exacerbate these issues as the world continues to experience the impacts of climate change. This note will examine the shortcomings of current regulations in contrast to the already enacted and proposed bans in particular cities around the United States. Building on existing and proposed legislation, this note will outline a proposal for a nationwide ban on the urban carriage horse industry. This proposal will provide a multi-faceted approach that would address career alternatives for carriage drivers, alternatives to horse-drawn carriages for the tourist industry, and safe retirement options for horses. It will argue that this nationwide ban is the most effective and efficient solution in the long term as current regulations continue to fall short, and the effects of climate change make remedying this issue increasingly critical.

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<sup>1</sup> Katherine Hutchison, *Should They Go the Way of the Horse and Buggy? How the New York City Horse-Drawn Carriage Industry Has Survived Thirty Years of Opposition*, 17 ANIMAL L. 171, 172 (2010).

<sup>2</sup> Jessica Bennett, *Should Carriage Horses Be Banned?*, NEWSWEEK (Sept. 24, 2007), <http://www.newsweek.com/2007/09/24/should-carriage-horses-be-banned-100229>.

<sup>3</sup> *Id.*

<sup>4</sup> Denise Hollinshed, *Spooked Carriage Horse Drowns After Running into the Missouri River Along the St. Charles Riverfront*, ST. LOUIS POST-DISPATCH (Dec. 22, 2016), [https://www.stltoday.com/news/local/crime-and-courts/spooked-carriage-horse-drowns-after-running-into-the-missouri-river-along-st-charles-riverfront/article\\_6da8923d-3f15-5c62-aff0-d4d446c14183.html](https://www.stltoday.com/news/local/crime-and-courts/spooked-carriage-horse-drowns-after-running-into-the-missouri-river-along-st-charles-riverfront/article_6da8923d-3f15-5c62-aff0-d4d446c14183.html).

<sup>5</sup> *Id.*

<sup>6</sup> Sarah Maslin Nir, *The Horse Who Reignited New York’s Carriage Ride Controversy Has Died*, N.Y. TIMES (Oct. 17, 2022), <https://www.nytimes.com/2022/10/17/nyregion/carriage-ride-horse-dead.html>.

<sup>7</sup> Tracy Basile, *Abolish the Carriage Horse Industry and Ryder Will Not Have Died in Vain*, THE VILLAGE VOICE (Oct. 21, 2022), <https://www.villagevoice.com/2022/10/21/abolish-the-carriage-horse-industry-and-ryder-will-not-have-died-in-vain/>.

<sup>8</sup> *Id.*

Part I of this note will present a brief overview of the history of the horse and carriage within urban environments. Specifically, this section will discuss the transition from the original urban workhorse to today's modern urban tourist industry. Next, it will describe the numerous health and welfare concerns involving carriage horses and the related public safety issues involving pedestrians and tourists. Part II will provide an overview of the existing regulations, emphasizing their shortcomings and why more municipal and local regulations are not enough to resolve the problems besetting the industry. Part III briefly discusses the trend toward banning the industry that is beginning to take hold in cities around the world. Part IV introduces a proposal of a nationwide ban and an environmentally conscious and horseless alternative for the carriage industry.

## I. BACKGROUND

Before automobiles, cities relied on horses for all manners of transportation.<sup>11</sup> By the mid- 19<sup>th</sup> century, carriages, street railways, and delivery vehicles filled American cities – and they were all horse-powered.<sup>12</sup> Thus, the concept of the “urban horse”<sup>13</sup> was originally born of necessity during a period in history known as the Carriage Era.<sup>14</sup> The life of these horses was never pleasant: death, filth, and disease plagued urban horses throughout this era.<sup>15</sup> In the early 20<sup>th</sup> century, the advent of the automobile ushered in a new era and drove most horses out of American city life.<sup>16</sup> However, the carriage trade would reemerge in cities throughout the United States in response to gas rationing during World War II.<sup>17</sup>

By the end of the war, urban horse-drawn carriages had turned into a tourist attraction and soon evolved into the tourist industry it is today.<sup>18</sup> While the industry has expanded to include cities across the entire country, New York City was and continues to be the heart of the industry in the United States.<sup>19</sup> As the largest sector of the industry, New York City has approximately 200 carriage horses and 68 carriages allowed to operate in the city at once.<sup>20</sup> The number of carriage horses in other cities varies depending on numerous factors and is not documented by a singular entity.<sup>21</sup> Thus, one must inquire about each municipality to determine the industry's true size and scope.

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<sup>9</sup> *Urban*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/urban>.

<sup>10</sup> *Horse-Drawn Carriages*, ANIMAL WELFARE INST., <https://awionline.org/content/urban-carriage-horses-out-step-responsible-horse-welfare> (last visited Mar. 17, 2023).

<sup>11</sup> Tracy Hresko Pearl, *Hands Off the Wheel: The Role of Law in the Coming Extinction of Human-Driven Vehicles*, 33 HARV. J. L. & TECH. 427, 427 (2020).

<sup>12</sup> Clay McShane & Joel Tarr, *The Decline of the Urban Horse in American Cities*, 24 THE J. OF TRANSP. HIST. 177, 177-78 (2003).

<sup>13</sup> Clay McShane & Joel Tar, *The Horse in the City, Living Machines in the Nineteenth Century* 165 (2007).

<sup>14</sup> *Id.* at 84-89.

<sup>15</sup> *Id.* at 149, 154-55; Natasha Daly, *The Bitter Controversy Surrounding NYC's Carriage Horse Industry*, NAT'L GEOGRAPHIC (March 26, 2020), <https://www.nationalgeographic.com/animals/article/new-york-city-carriage-horse-industry-controversy#close>.

<sup>16</sup> Pearl, *supra* note 11, at 440.

<sup>17</sup> Hutchison, *supra* note 1, at 176.

<sup>18</sup> *Id.* at 184.

<sup>19</sup> Jerry Trapani, *NYC Carriage Horse Industry Steeped in Tradition*, AM. FARRIERS J. (May 5, 2014), <https://www.americanfarriers.com/articles/4992-nyc-carriage-horse-industry-steeped-in-tradition>; Linda Dowling Almeida, *From the Oral History Archive: Horse-Powered: The Irish and the New York City Carriage Trade*, 11 AM. J. OF IRISH STUD. 179 (2014).

<sup>20</sup> Sarah Maslin Nir, *Viral Video of Horse Collapse Reignites Debate: Do Carriages Belong?*, N.Y. TIMES (Oct. 4, 2022); Dowling Almeida, *supra* note 19, at 187.

<sup>21</sup> Bennett, *supra* note 2.

While urban horses' living and working conditions have been scrutinized to varying degrees since the Carriage Era,<sup>22</sup> it wasn't until the 1970s and '80s that the conditions began to emerge as a public issue.<sup>23</sup> The more obvious welfare concerns involve the noise, pollution, and heavy traffic characteristic of urban environments.<sup>24</sup> For instance, urban carriage horses are "exposed to near constant, high [noise levels]."<sup>25</sup> This chronic exposure likely affects the horses' stress levels and cardiovascular health.<sup>26</sup> The most visible impacts of street noise are evident in instances involving loud or sudden noises that spook carriage horses, provoking them to bolt into traffic – often causing accidents and capturing headlines.<sup>27</sup>

City traffic is also responsible for various health concerns affecting carriage horses.<sup>28</sup> Specifically, urban carriage horses spend their days breathing in exhaust fumes and other toxins from airborne and ground pollution.<sup>29</sup> Additionally, when they're not working, carriage horses are exposed to dust, mold, and other fungi while they rest in inadequately ventilated stalls.<sup>30</sup>

Long-term exposure leaves the horses vulnerable to countless respiratory conditions and other health issues.<sup>31</sup> While heavy city traffic contributes to pollution and noise concerns, it also presents safety hazards – for both urban carriage horses and the public.<sup>32</sup> In addition to "spooked" horses, collisions are also possible due to congested traffic and drunk driving.<sup>33</sup> Horses that survive auto collisions must often be euthanized due to the nature and extent of their injuries.<sup>34</sup> Carriage drivers, passengers, pedestrians, and other drivers are all at risk and often injured in such collisions.<sup>35</sup> Additionally, dense city traffic makes it difficult for veterinary services to reach horses that need emergency care.<sup>36</sup>

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<sup>22</sup> Hutchison, *supra* note 1, at 176.; Hilary J. Sweeney, *Pasture to Pavement: Working Class Irish and Urban Workhorses in Nineteenth Century New York City*, 11 AM. J. OF IRISH STUD. 125, 127 (2014).

<sup>23</sup> Hutchison, *supra* note 1, at 185.

<sup>24</sup> See Holly Cheever, *Conditions for Carriage Horses Are Abusive on Streets and in Stalls*, N.Y. TIMES (Jan. 17, 2014), <https://www.nytimes.com/roomfordebate/2014/01/17/horse-carriages-are-not-just-a-ride-in-the-park/conditions-for-carriage-horses-are-abusive-on-streets-and-in-stalls>.

<sup>25</sup> See ANIMAL WELFARE INST., *supra* note 10.

<sup>26</sup> *Id.*

<sup>27</sup> See Cheever, *supra* note 24; Bennett, *supra* note 2.

<sup>28</sup> See Cheever, *infra* note 41.

<sup>29</sup> See Cheever, *supra* note 24.

<sup>30</sup> *Id.*

<sup>31</sup> See Bennett, *supra* note 2.

<sup>32</sup> See Cheever, *supra* note 24; Hutchison, *supra* note 1, at 173, 190.

<sup>33</sup> See Cheever, *supra* note 24; Hutchison, *supra* note 1, at 179.

<sup>34</sup> Hutchison, *supra* note 1, at 190.

<sup>35</sup> Hutchison, *supra* note 1, at 173, 190.

<sup>36</sup> BLINDERS: THE TRUTH BEHIND THE TRADITION (McMoss Productions 2008).



A less visible health concern stems from the sourcing of horses used in the industry.<sup>37</sup> Carriage companies “purchase horses who are already accustomed to pulling a carriage.”<sup>38</sup> Amish farms often sell these types of horses once they are incapable of farm labor.<sup>39</sup> Consequently, many urban carriage horses enter the industry with preexisting injuries and illnesses resulting from their uses on farms.<sup>40</sup> These conditions “significant[ly] impact ... the horses’ well-being, suitability for, and longevity in their new occupation.”<sup>41</sup> This also raises concerns that once retired, these horses are again auctioned off, this time to slaughterhouses.<sup>42</sup>

Yet another health concern involves the proper care of the horses’ hooves.<sup>43</sup> Long workdays on hard pavement, the constant and heavy loads, and a lack of access to pasture can lead to damage and inadequate circulation within the hooves.<sup>44</sup> Damage to the hoof “walls” leaves the horses vulnerable to infections, particularly if their owners do not properly maintain and clean their stalls.<sup>45</sup>

Finally, one of the most pressing concerns for carriage horses is the wide range of temperatures and humidity levels they’re exposed to as they pull carriages in dense, urban environments.<sup>46</sup> Cold weather presents some issues as well – primarily the risk of frostbite from a combination of low temperatures, sweat (from pulling carriages loaded with tourists, for example), and lack of protection against wind.<sup>47</sup> However, extreme heat is most life-threatening as it “puts the horses at risk of dehydration and overheating” (hyperthermia).<sup>48</sup> In fact, hyperthermia is a leading cause of death in the carriage horse populations of New York, Atlanta, and Boston.<sup>49</sup> Significantly, horses pulling carriages in high heat require greater volumes of water than a typical horse (approximately fifteen-twenty gallons per day versus five-ten gallons per day) which is difficult to provide in urban settings.<sup>50</sup>

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<sup>37</sup> See Hutchison, *supra* note 1, at 186.

<sup>38</sup> See AMERICAN WELFARE INST., *supra* note 10.

<sup>39</sup> *Id.*; Matthew Kassel, *After Twelve Years, This Horse Is About to Retire from Pulling Tourist Carriages Around Central Park*, BUS. INSIDER (Apr. 6, 2012), <https://www.businessinsider.com/horse-drawn-carriages-in-central-park-2012-4>.

<sup>40</sup> See Cheever, *supra* note 24.

<sup>41</sup> Holly Cheever, *A 21<sup>st</sup> Century Anachronism*, HUMANE SOC’Y VETERINARY MED. ASS’N (Feb. 19, 2014), [https://www.hsvma.org/the\\_urban\\_carriage\\_horse\\_ride#](https://www.hsvma.org/the_urban_carriage_horse_ride#).

<sup>42</sup> Amelia Pollard, *Building a Retirement Home for NYC Carriage Horses*, BLOOMBERG (Dec. 23, 2022), <https://www.bloomberg.com/news/articles/2022-12-23/building-a-retirement-home-for-nyc-carriage-horses>.

<sup>43</sup> See Cheever, *supra* note 41.

<sup>44</sup> See Cheever, *supra* note 41.

<sup>45</sup> Cheever, *supra* note 41.

<sup>46</sup> See Hutchison, *supra* note 1, at 192.

<sup>47</sup> Dr. Valentina Ragno, *Preventing Frostbite in Horses*, UNIV. OF SASKATCHEWAN, W. COLL. OF VETERINARY MED. (Jan. 3, 2022), <https://wcvmtoday.usask.ca/articles/2022/01/preventing-frostbite-in-horses.php>.

<sup>48</sup> See ANIMAL WELFARE INST., *supra* note 10.

<sup>49</sup> Cheever, *supra* note 41.

<sup>50</sup> *Id.*

Additionally, levels of humidity impact a horse’s ability to properly cool themselves and thus further increase the risk of overheating.<sup>51</sup> Hot weather also causes the temperature of asphalt to rise which, after a certain point, can damage sensitive areas of the hooves.<sup>52</sup> Further compounding the problem are the effects of global warming due to climate change.<sup>53</sup> As temperatures rise, horses will continue to face heightened risks of dehydration and hyperthermia while pulling carriages in city streets.<sup>54</sup> Unfortunately, despite decades-long efforts to address these health and safety issues through regulation, these problems have become endemic to the urban carriage horse industry – and existing regulations continue to fall short.

## I. EXISTING REGULATIONS

Industry regulations at the local level have proven inadequate and ineffective for decades due to a lack of uniformity, lax enforcement, and limited resources. And while federal efforts demonstrate interest and concern for horses, the urban carriage horse industry remains unrecognized within the federal regulatory framework.

### A. *Local Level*

While there are some state laws that address the urban carriage horse industry, it is primarily governed by municipal and local ordinances.<sup>55</sup> Thus, the legal landscape in this area consists of a patchwork of regulations that vary by location.<sup>56</sup> For example, New York City prohibits carriage horses from operating when temperatures are 18 °F or below and 90 °F or above.<sup>57</sup> Charleston, South Carolina, on the other hand, requires a strict monitoring system when temperatures reach or exceed 85 °F “at any point during the carriage company’s hours of operation.”<sup>58</sup> Specifically, operators must take the rectal temperature of each working animal immediately after completing a tour if temperatures reach or exceed 85 °F.<sup>59</sup> Additionally, carriages must cease operating completely when temperatures reach 95 °F or the Heat Index reaches 110 °F.<sup>60</sup>

Conversely, New Orleans, Louisiana, doesn’t specify any parameters related to temperature – instead, regulations dictate that only mules (and not horses) may be used in the daytime before 5:00 pm between June 1 and August 31.<sup>61</sup> Further, animals are not allowed to work if they are subject to “any condition or treatment which will impair the good health and physical condition of the animal.”<sup>62</sup>

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Sarah Kaplan & John Muyskens, *The Past Seven Years Have Been the Hottest in Recorded History, New Data Shows*, THE WASH. POST (Jan. 13, 2022), <https://www.washingtonpost.com/climate-environment/2022/01/13/global-temperature-record-climate-change/>.

<sup>54</sup> See Cheever, *supra* note 41.

<sup>55</sup> Daly, *supra* note 15.

<sup>56</sup> See NYC ADMIN. CODE §§ 17-326–17-334 (2020); CHARLESTON, S.C. CODE OF ORDINANCES §§ 29-201–29-223 (2022); NEW ORLEANS, LA. CODE OF ORDINANCES §§ 162-496–162-551 (2022).

<sup>57</sup> NYC ADMIN. CODE §§ 17-330(o)(1) and (2) (2020).

<sup>58</sup> CHARLESTON, S.C. CODE OF ORDINANCES §§ 29-212(g)(2)–(6) (2022).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* § 29-212(g)(7).

<sup>61</sup> NEW ORLEANS, LA. CODE OF ORDINANCES § 162-543(a)(6) (2022).

<sup>62</sup> *Id.* § 162-543(a)(5).

Such vagueness is a double-edged sword; it provides enough leeway for carriage operators and animal advocates to argue for their own interpretations. However, like the operators and managers within other animal entertainment industries,<sup>63</sup> the carriage operators have financial incentives to pursue more conservative interpretations of any regulations aimed at protecting the health and safety of the horses.

Unfortunately, existing regulations have “historically proven to be inadequate and ineffective in ensuring that the horses are not exposed to inhumane conditions.”<sup>64</sup> Regulations often prove ineffective due to lax enforcement stemming from limited resources.<sup>65</sup> Specifically, agencies tasked with enforcement continue to be “understaffed, underfunded, and overwhelmed.”<sup>66</sup> Thus, violations can go unnoticed at the carriage horses’ expense.<sup>67</sup> For instance, a horse-drawn carriage company in Nashville was cited for animal-cruelty charges only “after a photo taken of a thin horse . . . went viral.”<sup>68</sup> Nashville’s Metro Animal Care and Control cited the carriage company owner for “overworking an underweight animal and . . . for failure to provide vet care.”<sup>69</sup> Officers also discovered a second underweight horse.<sup>70</sup> The horse was also suffering from an untreated abscess on its foot.<sup>71</sup>

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<sup>63</sup> See, e.g., Karin Brulliard, *The Trouble with Tigers in America*, WASH. POST (July 12, 2019), [https://www.washingtonpost.com/graphics/2019/investigations/captive-tigers-america/?itid=lk\\_inline\\_manual\\_8](https://www.washingtonpost.com/graphics/2019/investigations/captive-tigers-america/?itid=lk_inline_manual_8) (roadside zoos and cub-petting); Paige Noelle Topper, *Animal Abuse in the United States’ Circus Industry: A Comparative Case Study Analysis*, JAMES MADISON UNIV. (Fall 2013), <https://commons.lib.jmu.edu/cgi/viewcontent.cgi?article=1518&context=honors201019> (circus industry); Nicola van Wyk, *Greyhound Racing – What’s the Big Deal?*, LEWIS & CLARK L. SCH. CTR. FOR ANIMAL STUD. (2021), <https://law.lclark.edu/live/profiles/15696-greyhound-racing-whats-the-big-deal> (greyhound racing).

<sup>64</sup> Hutchison, *supra* note 1, at 171.

<sup>65</sup> *Id.* at 180; Alex Ruppenthal, *Horse Carriage Violations Spike, but Activists Say Oversight Lacking*, WTTW NEWS (Nov. 30, 2017).

<sup>66</sup> Animal Wellness Podcast, *Ending the Abuse for Carriage Horses*, ANIMAL WELLNESS ACTION (Nov. 26, 2022) (downloaded using iTunes); Ruppenthal, *supra* note 65.

<sup>67</sup> Tracy Basile, *When Ryder Fell, NYC’s Carriage Horse Industry Moved (Again) into the Spotlight*, THE VILL. VOICE (Oct. 4, 2022), <https://www.villagevoice.com/2022/10/04/when-ryder-fell-nycs-carriage-horse-industry-moved-again-into-the-spotlight/>; Natalie Neysa Alund, *Emaciated Nashville Carriage Horse: Viral Photo Leads to Animal Abuse Charges*, THE TENNESSEAN (July 19, 2017), <https://www.tennessean.com/story/news/2017/07/19/downtown-nashville-horse-and-buggy-company-slapped-animal-cruelty-related-charges/493757001/>; Savannah Louie, *Animal Activists Allege Animal Mistreatment at Atlanta Horse Carriage Company*, ATLANTA NEWS FIRST (May 31, 2022), <https://www.atlantaneewsfirst.com/2022/05/31/animal-activists-allege-animal-mistreatment-atlanta-horse-carriage-company/>.

<sup>68</sup> Alund, *supra* note 67.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

In another instance, in February 2022, the Georgia Animal Rights and Protection organization began documenting inhumane conditions at a “popular horse carriage ride facility” in Atlanta.<sup>72</sup> The organization witnessed horses “in small, muddy enclosures” filled with urine and feces and with minimal shelter “from pouring rain.”<sup>73</sup> Living in an unclean environment without adequate shelter can cause “bacteria in the hooves” leading to “very painful” abscesses.<sup>74</sup> However, despite these documented conditions, the carriage company apparently passed an inspection “earlier in 2022.”<sup>75</sup> The Georgia Animal Rights and Protection organization “question[s] whether inspections were properly conducted” and further insists that “there is no code enforcement, and . . . [the] Atlanta City Council should consider banning carriage horses.”<sup>76</sup>

Additionally, industry oversight is often decentralized and spread out among different agencies.<sup>77</sup> In New York City, for instance, the responsibility is delegated to a number of different agencies: the Department of Consumer Affairs and the Department of Health and Mental Hygiene regulate the industry; oversight and enforcement then fall on a number of public and private agencies including the Department of Parks and Recreation and the NYPD.<sup>78</sup> The American Society for the Prevention of Cruelty to Animals (ASPCA)<sup>79</sup> was also involved in enforcement efforts until 2014.<sup>80</sup> Consequently, promulgating more regulations will not provide a solution. Instead, it is just another way to continue to postpone decisive action. New York City provides the perfect case study. New York City politicians have employed this postponement method since the 1970s as a way to placate both sides of the controversy (and to pass the buck to the next administration).<sup>81</sup> Unfortunately, horses like Smoothie and Ryder, mentioned in the Introduction, are the collateral damage. Now, fifty years later, the city continues the vicious cycle: a carriage horse collapses on a public city street, widespread media coverage helps promote outrage, the city responds by proposing more regulations<sup>82</sup>, and public outrage simmers with the passage of time, but then . . . the cycle begins again.<sup>83</sup>

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<sup>72</sup> Louie, *supra* note 67.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Hutchison, *supra* note 1, at 180.

<sup>78</sup> *Id.*

<sup>79</sup> See John Kullberg, *One Hundred and Twenty Years in Defense of Animals*, 132 Cong Rec E 1191 (Apr. 16, 1986) (discussing the history of the ASPCA which was founded as a national animal protection organization with its earliest efforts typically directed toward remedying the mistreatment of nineteenth century horses).

<sup>80</sup> David B. Caruso, *NYPD Takes Over After ASPCA Closes Enforcement Unit*, ASSOCIATED PRESS (Jan. 7, 2014), <https://www.police1.com/police-jobs-and-careers/articles/nypd-takes-over-after-aspc-a-closes-enforcement-unit-0N6yH0Cnr5kOt255/>.

<sup>81</sup> Hutchison, *supra* note 1, at 171.

<sup>82</sup> See Ryder’s Law, NYC Council Int. 0573-2022 (proposing to phase out horse-drawn carriages by June 1, 2024, and replacing the industry with a horseless electric carriage program).

<sup>83</sup> *Death of Carriage Horse in NYC Leads to Renewed Demand for Action Against Industry*, ABC 7 (Oct. 18, 2022), <https://abc7ny.com/carriage-horse-euthanized-animal-rights-collapse-hells-kitchen/12341121/>; Gregg McQueen, *Drivers Unveil Plan to Improve Horse Carriage Industry*, MANHATTAN TIMES (Sept. 8, 2022), <https://www.manhattantimesnews.com/drivers-unveil-plan-to-improve-horse-carriage-industry-se-presenta-un-plan-para-mejorar-el-sector-de-los-carruajes-de-caballos/>; Elizabeth Titus, *NYC’s Odd Political Horse Fight*, POLITICO (Dec. 27, 2013), <https://www.politico.com/story/2013/12/new-york-city-political-brawl-carriage-horses-101555>.

## *B Federal Level*

At the federal level, multiple regulations focus on horses specifically. For instance, the Horse Protection Act<sup>84</sup> prohibits sored<sup>85</sup> horses from participating in shows, exhibitions, sales, or auctions. However, this law is very limited in scope and focuses on Tennessee Walking Horses<sup>86</sup> in particular. Additionally, the Wild Free-Roaming Horses and Burros Act<sup>87</sup> protects and directs the stewardship of wild horses in the United States.

Multiple proposed bills involving horse welfare and protection are currently undergoing review and moving through the various stages of the legislative process.

Past legislative efforts involving equine protection include the Prevent All Soring Tactics (PAST) Act<sup>88</sup> and the Protecting Horses from Soring Act,<sup>89</sup> both of which would have amended the Horse Protection Act. The PAST Act would expand soring regulation and enforcement by establishing a new system for inspecting horses for soring and increasing penalties for violations.<sup>90</sup> The Protecting Horses from Soring Act would revise requirements concerning the inspection of horse shows, exhibitions, sales, and auctions for sored horses.<sup>91</sup> It would also specifically replace a requirement for the Department of Agriculture to prescribe regulations governing the appointment of inspectors with a requirement for the Horse Industry Organization, which this bill would also establish, to appoint inspectors.<sup>92</sup>

Another major legislative effort focuses on protecting horses from slaughter. For instance, the Save America's Forgotten Equines (SAFE) Act<sup>93</sup> was a bipartisan bill that would have also amended the Horse Protection Act by permanently banning horse slaughter in the United States and prohibiting the exportation of horses for slaughter.<sup>94</sup> Additionally, the Wild Free-Roaming Horses and Burros Protection Act of 2022 would have amended the Wild Free-Roaming Horses and Burros Act to protect horses and burros from slaughter and ensure their humane management.<sup>95</sup> Other past legislative efforts to prevent horse slaughter have also been unsuccessful.<sup>96</sup>

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<sup>84</sup> 15 U.S.C. §§ 1821-1831.

<sup>85</sup> Soring is an inhumane practice used to accentuate a horse's gait. *See* 15 U.S.C. § 1821(3) (explaining the definition and restrictions on soring).

<sup>86</sup> Lafcadio H. Darling, *Legal Protection for Horses: Care and Stewardship or Hypocrisy and Neglect?* 6 ANIMAL L. 105, 116 (2000).

<sup>87</sup> 16 U.S.C. §§ 1331-1340.

<sup>88</sup> Prevent All Soring Tactics (PAST) Act, H.R. 5441, 117th Cong. (2021).

<sup>89</sup> Protecting Horses from Soring Act, H.R. 6341, 117th Cong. (2021).

<sup>90</sup> H.R. 5441, *supra* note 88.

<sup>91</sup> H.R. 6341, *supra* note 89.

<sup>92</sup> *Id.*

<sup>93</sup> SAFE Act, H.R. 3355, 117th Cong. (2021).

<sup>94</sup> *Id.*

<sup>95</sup> Wild Free-Roaming Horses and Burros Protection Act, H.R. 9154, 117th Cong. (2022).

<sup>96</sup> *See* Prevention of Equine Cruelty Act of 2009, H.R. 503, 111th Cong. (2009); Horse Slaughter Prevention Act, H.R. 2966, 112th Cong. (2011); Carter-Fitzpatrick Amendment to the INVEST in America Act, H.R. 3684, 117th Cong. (2021).

There are currently no United States Department of Agriculture inspected horse slaughter plants in the United States because the Food Safety and Inspection Service is barred under the Consolidated Appropriations Act from spending funds to inspect horses intended for human consumption.<sup>97</sup> However, a loophole in the law allows the continued export of thousands of horses each year to slaughterhouses in Mexico, Canada, or further abroad.<sup>98</sup> This loophole is problematic in the racing industry<sup>99</sup> and more recently for wild horses.<sup>100</sup> Additionally, as previously mentioned, it raises concerns about the fate of retired carriage horses.<sup>101</sup>

Other legislative efforts involve additional protections in the transportation of horses, horse racing, and population management of wild horses and burros. The Horse Transportation Safety Act of 2021 would have prohibited a person from transporting a horse in interstate commerce in a motor vehicle containing two or more levels stacked on top of one another.<sup>102</sup> The Horseracing Integrity and Safety Act of 2020 would have required a uniform anti-doping and medication control program as well as racing safety standards consistent with the humane treatment of horses.<sup>103</sup> The Wild Horse and Burro Protection Act of 2022 would have prohibited the Bureau of Land Management from using or contracting for the use of helicopters to gather or transport horses and burros under the Wild Free-Roaming Horses and Burros Act.<sup>104</sup> Finally, the most recent proposed bill, introduced in February 2023, seeks to amend the Wild Free-Roaming Horses and Burros Act to direct the Secretary of the Interior to implement fertility controls to manage populations of wild free-roaming horses and burros.<sup>105</sup>

Despite the fact there is more federal law specifically about horses than most other species, there are no federal regulations that specifically address horses used in the carriage industry.<sup>106</sup> The Animal Welfare Act (AWA), an expansive statute with “a central role in animal protection law,”<sup>107</sup> requires humane treatment of certain animals used for research, in exhibitions, and as pets.<sup>108</sup> However, the Act specifically excludes “horses not used for research purposes.”<sup>109</sup>

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<sup>97</sup> Consolidated Appropriations Act of 2023, Pub. L. 117-328, § 761.

<sup>98</sup> Stephanie Strom, *Shipping U.S. Horses for Slaughter*, N.Y. TIMES (Feb. 25, 2013), <http://www.nytimes.com/interactive/2013/02/26/business/shipping-us-horses-for-slaughter.html>.

<sup>99</sup> Josh Peter, *Horses Go From Racetracks to Slaughterhouses: 'It's Just a Job to Me,'* USA TODAY (Oct. 31, 2019), <https://www.usatoday.com/story/sports/horseracing/2019/10/31/breeders-cup-horses-go-racetracks-slaughterhouses/2485345001/>.

<sup>100</sup> Dave Philipps, *Wild Horses Adopted Under a Federal Program Are Going to Slaughter*, N.Y. TIMES (July 20, 2021), <https://www.nytimes.com/2021/05/15/us/wild-horses-adoptions-slaughter.html>.

<sup>101</sup> See Pollard, *supra* note 42.

<sup>102</sup> Horse Transportation Safety Act, H.R. 921, 117th Cong. (2021).

<sup>103</sup> Horseracing Integrity and Safety Act, H.R. 1754, 116th Cong. (2020).<sup>104</sup>

Wild Horse and Burro Protection Act, H.R. 6635, 117th Cong. (2022).<sup>105</sup>

Veterans for Mustangs Act, H.R. 726, 118th Cong. (2023).

<sup>106</sup> Craig M. Smith, *Detailed Discussion of Horse Related Legal Issues*, ANIMAL LEGAL AND HIST. CTR., MICH. STATE UNIV. COLL. OF L. (2009), <https://www.animallaw.info/article/detailed-discussion-horse-related-legal-issues#id-10>; Darling, *supra* note 86, at 106.

<sup>107</sup> Erin H. Ward, *Federal Statutes Protecting Domesticated and Captive Animals*, CRS REPORT (February 5, 2021).

<sup>108</sup> 7 U.S.C. §§ 2131-2159.

<sup>109</sup> *Id.* § 2132(g).

## II. EXISTING AND PROPOSED BANS

Efforts to ban the industry are gaining momentum in municipalities across the country. For instance, the City Council in Chicago, Illinois, recently voted to ban horse-drawn carriages.<sup>110</sup> The ordinance, effective January 1, 2021, instituted a phase-out by preventing operators from renewing their licenses as well as putting an end to the issuance of new ones.<sup>111</sup> Chicago joined a handful of other cities in the United States that have already banned the industry, including Las Vegas, Nevada;<sup>112</sup> Biloxi, Mississippi;<sup>113</sup> Salt Lake City, Utah;<sup>114</sup> Camden, New Jersey;<sup>115</sup> Santa Fe, New Mexico;<sup>116</sup> and several cities in Florida such as Palm Beach and Key West.<sup>117</sup>

Additionally, cities around the world have also started instituting bans, including Montreal, Barcelona, Rome (partial ban), and Beijing.<sup>118</sup> Montreal instituted a permanent ban on December 31, 2019, due to safety concerns related to heat waves, extreme cold, and the number of vehicles on the city streets.<sup>119</sup> Carriage (or “calèche”) owners have the option to receive compensation from the city and assistance in transitioning to new jobs in the tourism industry.<sup>120</sup> The city has also set up a program that will allow the horses to be adopted into permanent retirement homes.<sup>121</sup>

Cities such as Philadelphia, Pennsylvania,<sup>122</sup> San Antonio, Texas,<sup>123</sup> and Atlanta, Georgia,<sup>124</sup> are currently considering bans as protests against the industry continue to grow louder. For instance, two members of San Antonio’s City Council have recently submitted a proposal to the Council seeking to “establish a plan to phase out the use of horses with . . . carriages.”<sup>125</sup>

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<sup>110</sup> Mariel Padilla, *Chicago Bans Horse-Drawn Carriages Starting in 2021*, N.Y. TIMES (Apr. 25, 2020), <https://www.nytimes.com/2020/04/25/us/horse-drawn-carriage-chicago.html>.

<sup>111</sup> *Id.*

<sup>112</sup> *Worldwide City Carriage Ride Bans*, CHARLESTON CARRIAGE HORSE ADVOC., <https://charlestoncarriagehorseadvocates.com/worldwide-city-carriage-rides-ban/> (last visited Dec. 21, 2022).

<sup>113</sup> BILOXI, MISS. CODE OF ORDINANCES § 20-1-12 (codified through ordinance No. 2479, Supp. No. 54) (Apr. 26, 2022).

<sup>114</sup> Christopher Smart, *Salt Lake City Bans Horse-Drawn Carriages*, THE SALT LAKE TRIBUNE (Dec. 1, 2014), <https://archive.sltrib.com/article.php?id=1886489&itype=CMSID>.

<sup>115</sup> Padilla, *supra* note 110.

<sup>116</sup> CHARLESTON CARRIAGE HORSE ADVOC., *supra* note 112.

<sup>117</sup> Padilla, *supra* note 110.

<sup>118</sup> CHARLESTON CARRIAGE HORSE ADVOC., *supra* note 112.

<sup>119</sup> CBC News, *Calèches Will Be Banned by 2020 Under Montreal’s New Animal Control Bylaw*, CBC NEWS (June 14, 2018), <https://www.cbc.ca/news/canada/montreal/calèche-horse-industry-banned-1.4706640>.

<sup>120</sup> Alison Northcott, *As Montreal’s Calèche Ban Comes Into Effect, Horses Face Uncertain Future*, CBC NEWS (Dec. 30, 2019), <https://www.cbc.ca/news/canada/montreal/calèche-horses-montreal-ban-1.5405151>.

<sup>121</sup> *Id.*

<sup>122</sup> Tom MacDonald, *Protest Calls for End to Carriage Horses on Philadelphia Streets*, WITF NEWS (Sept. 27, 2022), <https://www.witf.org/2022/09/27/protest-calls-for-an-end-to-carriage-horses-on-philadelphia-streets/>.

<sup>123</sup> Priscilla Aguire, *San Antonio May Ban Horse-Drawn Carriages by Next Year*, MY SAN ANTONIO (Dec. 1, 2022), <https://www.mysanantonio.com/news/local/article/san-antonio-horse-carriage-ban-17623954.php>.

<sup>124</sup> Dave Huddleston, *Atlanta Split on Future of Horse Carriages in City, as New Legislation Awaits*, WSB-TV ATLANTA (July 23, 2022), <https://www.wsbtv.com/news/local/atlanta/atlanta-split-future-horse-carriages-city-new-legislation-awaits/5DTU525VZZHA7HYFNFOP2L5VYA/>.

<sup>125</sup> Alicia Neaves, *City Leaders Propose Ban on Horse Drawn Carriages, Citing Animal Cruelty. Drivers Say They Treat the Animals Like Royalty.*, KENS 5 (Dec. 1, 2022), <https://www.kens5.com/article/life/animals/horse-carriages-san-antonio-proposed-ban-city-council-downtown/273-bbe3359f-997c-44d1-b8f1-14eb3b04e76d>.

The proposal's key elements include "a prohibition of the use of horses with carriage rides," the "establishment of a program to support a workforce transition from horse drawn carriages to electric carriages and pedicabs," and the "[i]mmediate cessation of the issuance of all new horse drawn carriage permits, medallions, and/or Special Event Permits."<sup>126</sup> Current permits and medallions would then eventually expire. While not all cities have been successful,<sup>127</sup> there is decidedly a growing trend in that direction.<sup>128</sup> Other cities may follow suit as consumers become more aware and knowledgeable on animal welfare issues.<sup>129</sup>

### III. NATIONWIDE BAN

The AWA defines "exhibitor" as a person who exhibits any animals to the public for compensation.<sup>130</sup> However, it includes carnivals, circuses, and zoos regardless of whether they operate for profit.<sup>131</sup> Critics often draw comparisons between the carriage horse industry and these other forms of entertainment that exploit animals.<sup>132</sup> In fact, Congress has already amended the AWA multiple times in the past to ban other forms of entertainment that exploit animals.

For instance, Congress amended the AWA in 1976 to explicitly ban "animal fighting venture[s]."<sup>133</sup> The Act defines "animal fighting venture" as "any event . . . that involves a fight conducted or to be conducted between at least 2 animals for purposes of sport, wagering, or entertainment. . . ."<sup>134</sup> Congress amended the prohibition several more times to expand its scope. As of 2018, Congress banned attendance at all animal fighting ventures and made it unlawful "for any person to knowingly sell, buy, possess, train, transport, deliver, or receive any animal for the purposes of . . . participat[ing] in an animal fighting venture."<sup>135</sup> Thus, expanding the AWA to prohibit certain entertainment industries that exploit animals is nothing new. Expanding the definition of "exhibitor" to explicitly include the urban carriage horse industry would open the door to either ban the industry nationwide or, in the alternative, to resituate this activity within the sphere of federal regulation.

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<sup>126</sup> *Id.*

<sup>127</sup> Briana Rice, *The Neighs Have It: Cincinnati City Council Will Not Be Banning Horse-Drawn Carriages After All*, CINCINNATI ENQUIRER (Nov. 10, 2021), <https://www.cincinnati.com/story/news/2021/11/10/cincinnati-city-council-not-banning-horse-drawn-carriages/6371042001/>.

<sup>128</sup> See Carl Campanille, *Seventy-One Percent Want NYC Horse Carriage Ban After Ryder's Collapse: Poll*, N.Y. POST (Sept. 1, 2022), <https://nypost.com/2022/09/01/71-want-nyc-horse-carriage-ban-after-ryders-collapse-poll/>; Janet White, *It's Long Past Time to Ban Carriage Horses in Philadelphia*, PHILA. INQUIRER (Jan. 2, 2022), <https://www.inquirer.com/opinion/commentary/ban-horse-drawn-carriages-philadelphia-20220102.html>.

<sup>129</sup> Brion Shreffler, *Even with a Developer Looming over the Last Horse-Drawn Carriage Company in the City, this Local Activist Wants a Law in Place that Protects Horses*, GRID (Apr. 26, 2021), <https://gridphilly.com/archives/6734>.

<sup>130</sup> 7 U.S.C. 2132(h); 9 CFR § 1.1

<sup>131</sup> *Id.*

<sup>132</sup> Hutchison, *supra* note 1, at 174.

<sup>133</sup> 7 U.S.C. § 2156; Animal Welfare Act Amendments of 1976, Pub. L. No. 94-279, 90 Stat. 417, 421-22.

<sup>134</sup> 7 U.S.C. § 2156(f).

<sup>135</sup> 7 U.S.C. § 2156(a)(2), (b).



While federal regulation would provide a uniform set of standards for the industry, enforcement issues would continue to hinder oversight efforts.<sup>136</sup> The United States Department of Agriculture (USDA) is the federal agency responsible for enforcing the AWA.<sup>137</sup> However, the same issues that plague state enforcement agencies also plague agencies at the federal level.<sup>138</sup> In fact, enforcement issues are more problematic among federal agencies.<sup>139</sup> For example, a 2010 audit of the Animal and Plant Health Inspection Service’s (APHIS) administration of the Horse Protection Act found numerous deficiencies.<sup>140</sup> Most notably, the audit found that “APHIS’ program for inspecting horses . . . is not adequate to ensure that these animals are not being abused.”<sup>141</sup> In 2007, the Horse Protection Program’s budget was “only sufficient to send APHIS veterinarians to approximately 30 of the 463 sanctioned [horse] shows.”<sup>142</sup> Significantly, poor enforcement of the AWA “has actually limited the ability of states to enforce their own laws to protect certain animals and to protect the public.”<sup>143</sup>

Additionally, the USDA has faced accusations of prioritizing business interests over animal welfare in recent years.<sup>144</sup> For example, the USDA’s attempts to “collaborate” with facilities it regulates to help “minimize costs” have instead “amounted to ‘a systematic dismantling of [the] animal welfare inspection process and enforcement.’”<sup>145</sup> Such “systemic failure”<sup>146</sup> at the USDA demonstrates why federal regulation of the carriage horse industry is not the answer. Instead, the AWA should include the industry within its definitions, and thus within the ambit of its authority, and then prohibit the industry from operating in the United States.

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<sup>136</sup> ASS’N OF THE BAR OF THE CITY OF N.Y., *Report of the Committee on Legal Issues Pertaining to Animals of the Association of the Bar of the City of New York Regarding Its Recommendation to Amend the Animal Welfare Act*, 9 ANIMAL L. 345, 346-349 (2003); Rachel Fobar, *USDA Accused of Ignoring Animal Welfare Violations in Favor of Business Interests*, NAT’L GEOGRAPHIC (Oct. 13, 2021), <https://www.nationalgeographic.com/animals/article/usda-accused-of-ignoring-animal-welfare-for-business-interests>; Rachel Fobar, *Toothless and ‘Paltry’: Critics Slam USDA’s Fines for Animal Welfare Violations*, NAT’L GEOGRAPHIC (Dec. 12, 2022), <https://www.nationalgeographic.com/animals/article/toothless-and-paltry-critics-slam-usda-fines-for-animal-welfare-violations>.

<sup>137</sup> ASS’N OF THE BAR OF THE CITY OF N.Y., *supra* note 136, at 346.

<sup>138</sup> *Id.* at 346-348.

<sup>139</sup> *Id.* at 346-349; Fobar, *supra* note 136.

<sup>140</sup> OIG, *USDA APHIS Administration of Horse Protection Program*, Audit Rep. 33601-2-KC, 1 (2010).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> ASS’N OF THE BAR OF THE CITY OF N.Y., *supra* note 136, at 347; Accord Justin Marceau, *How the Animal Welfare Act Harms Animals*, 69 HASTINGS L. J. 925, 948, 952-53, 955 (2018).

<sup>144</sup> Rachel Fobar, *USDA Accused of Ignoring Animal Welfare Violations in Favor of Business Interests*, NAT’L GEOGRAPHIC (Oct. 13, 2021), <https://www.nationalgeographic.com/animals/article/usda-accused-of-ignoring-animal-welfare-for-business-interests>.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

Furthermore, to address the chronic enforcement issues, the Department of Justice (DOJ) could be responsible for enforcing the ban as it is for animal fighting prohibitions under the AWA.<sup>147</sup> To address criminal prosecutions, the DOJ “works with investigatory agents from the Department of Agriculture’s Office of the Inspector General, the Federal Bureau of Investigation, and other law enforcement agencies”<sup>148</sup> to “ensure that full effect is given to the federal statutes and enforcement regimes that provide for the humane treatment of captive, farmed, and companion animals across the United States.”<sup>149</sup> To address civil violations, the DOJ “brings civil judicial enforcement actions that support and complement the administrative enforcement actions taken by the relevant federal agencies”<sup>150</sup> (i.e., the USDA). Currently, the DOJ is responsible for litigation arising from various federal animal protection laws,<sup>151</sup> including the Animal Welfare Act,<sup>152</sup> the Horse Protection Act,<sup>153</sup> the Humane Methods of Slaughter Act,<sup>154</sup> the Twenty-Eight Hour Law,<sup>155</sup> the Animal Crush Video Statute,<sup>156</sup> and the Animal Fighting Venture Prohibition Act.<sup>157</sup>

Additionally, adding a citizen suit provision to the AWA is another avenue to address enforcement issues. As currently enacted, the AWA “provides no implied private cause of action” for citizens seeking enforcement.<sup>158</sup> Thus, citizens lack standing to seek redress through the courts, which creates a “fundamental problem for those who would like to see the AWA better enforced”<sup>159</sup> and “there are, therefore, no obvious plaintiffs who may bring actions when the agency charged with its enforcement is unable, or unwilling, to do the job.”<sup>160</sup>

The Endangered Species Act (ESA) contains “a broadly worded citizen suit provision . . . which permits ‘any person’ to bring such a suit against any person or the government alleged to be in violation of the ESA or regulations issued thereunder.”<sup>161</sup> Critics of the AWA have argued the necessity of a citizen-suit provision (such as the ESA’s provision) for decades.<sup>162</sup> Without such a provision, “private citizens seeking to increase the AWA’s bite are forced to litigate under the Administrative Procedure Act, opening up specific procedural difficulties for advocates.”<sup>163</sup>

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<sup>147</sup> *Animal Welfare*, DEP’T OF JUST., <https://www.justice.gov/enrd/animal-welfare> (last accessed Dec. 21, 2022).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> 7 U.S.C. § 2131, et seq.

<sup>153</sup> 15 U.S.C. § 1821, et seq.

<sup>154</sup> 7 U.S.C. § 1901, et seq. (requiring humane treatment and handling of food animals at slaughterplants).

<sup>155</sup> 49 U.S.C. § 80502 (setting humane standards for the transportation of livestock).

<sup>156</sup> 18 U.S.C. § 48 (prohibiting animal crush videos which depict animals being intentionally crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury).

<sup>157</sup> 18 U.S.C. § 49 (prohibiting animal fighting ventures that involve interstate or foreign commerce, prohibits attending fighting events, and imposes additional penalties for bringing minors to fighting events).

<sup>158</sup> ASS’N OF THE BAR OF THE CITY OF N.Y., *supra* note 136, at 349.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> ASS’N OF THE BAR OF THE CITY OF N.Y., *supra* note 136, at 351.

<sup>162</sup> See Rob Roy Smith, *Note: Standing on Their Own Four Legs: The Future of Animal Welfare Litigation After Animal Legal Defense Fund, Inc. v. Glickman*, 29 ENVTL. L. 989 (1999); Katharine M. Swanson, *Note: Carte Blanche for Cruelty: The Non-Enforcement of the Animal Welfare Act*, 35 U. MICH. J.L. REFORM 937 (2002); Trevor J. Smith, *Note: Bullhooks and the Law: Is Pain and Suffering The Elephant in the Room?*, 19 ANIMAL L. 423 (2013); Rebecca L. Jodidio, *Article: The Animal Welfare Act is Lacking: How to Update the Federal Statute to Improve Zoo Animal Welfare*, 12 GOLDEN GATE U. ENVTL. L.J. 53 (2020).

<sup>163</sup> Bryan Vayr, *Note: Of Chimps and Men: Animal Welfare vs. Animal Rights and How Losing the Legal Battle May Win the Political War for Endangered Species*, 2017 U. ILL. L. REV. 817, 838 (2017).

Proponents of the industry “defend it as an important source of tourist revenue, civic pride, and livelihood for immigrant entrepreneurs and small businesses.”<sup>164</sup> Opponents have answered critics with a safer and more environmentally friendly alternative that would provide job security for the carriage operators *and* end the exploitation of horses: electric horseless carriages (or “e-carriages”).<sup>165</sup> Other earlier variations included antique cars powered by “alternative fuel,” which advocates first promoted in 2008.<sup>166</sup> However, cities have hesitated to make the change because “many lawmakers have been reluctant to touch an issue they consider politically risky and a low priority.”<sup>167</sup>

While most U.S. cities have yet to take the step, cities in other countries have already started making the transition from horse to e-carriage.<sup>168</sup> In Guadalajara, Mexico, for example, the city’s 55 traditional carriages were phased-out and replaced with “electric-powered replicas” over a 2- year-period.<sup>169</sup> The new electric carriages operate under “an updated set of regulations.”<sup>170</sup> Carriage horse owners had “the option of keeping [their horses] or donating them to animal shelters or interested individuals.”<sup>171</sup> Notably, the city’s “municipal animal protection office will monitor the condition of the [horses] once they are retired.”<sup>172</sup>

In Palma de Mallorca, Spain, the city will “gradually” replace horses with electric vehicles until a full ban goes into effect in 2024.<sup>173</sup> The city council “will establish a line of subsidies to facilitate the purchase of the new modes of transport.”<sup>174</sup> Additionally, until the transition is complete, the city will no longer allow horse-drawn carriages to operate if there is a heat warning in place.<sup>175</sup>

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<sup>164</sup> Hutchison, *supra* note 1, at 174.

<sup>165</sup> See Hutchison, *supra* note 1, at 191; Eric Loveday, *New York City’s Horseless e-Carriage Gets Test Driven*, INSIDE EVS (June 22, 2014), <https://insideevs.com/news/321839/new-york-citys-horseless-e-carriage-gets-test-driven-video/>.

<sup>166</sup> Emily B. Hager, *Meet the Contraption that Wants to Replace Central Park Horses*, N.Y. TIMES (Oct. 7, 2011), <https://archive.nytimes.com/cityroom.blogs.nytimes.com/2011/10/07/meet-the-contraption-that-wants-to-replace-central-park-horses/>; Hutchison, *supra* note 1, at 191.

<sup>167</sup> Erin Durkin, *De Blasio Plan Would Replace Horse Carriages with Electric Cars*, POLITICO (Nov. 30, 2021), <https://www.politico.com/states/new-york/city-hall/story/2021/11/30/de-blasio-plan-would-replace-horse-carriages-with-electric-cars-1396373>.

<sup>168</sup> César Hernández, *City Says Goodbye to Horse-Drawn Carriages*, MEX. NEWS DAILY (Aug. 10, 2017), <https://mexiconewsdaily.com/news/city-says-goodbye-to-horse-drawn-carriages/>; SPANISH NEWS TODAY, *Palma de Mallorca to Ban Horse-Drawn Carriages from 2024* (July 29, 2022), [https://spanishnewstoday.com/palma-de-mallorca-to-ban-horse-drawn-carriages-from-2024\\_1807454-a.html](https://spanishnewstoday.com/palma-de-mallorca-to-ban-horse-drawn-carriages-from-2024_1807454-a.html); Elizabeth Forel & Susan Wagner, *Just as Other Places Have Done, New York City Can Preserve Jobs and Tradition with Electric ‘Horseless’ Carriages*, GOTHAM GAZETTE (May 11, 2021), <https://www.gothamgazette.com/130-opinion/10455-new-york-city-preserve-jobs-tradition-electric-horseless-carriages> (Mumbai, India; Cologne, Germany; and Dubai, UAE).

<sup>169</sup> Hernández, *supra* note 168.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> SPANISH NEWS TODAY, *supra* note 168.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

Recently, however, Mount Dora, Florida, is perhaps the first municipality in the U.S. to unanimously pass an electric carriage ordinance.<sup>176</sup> The electric carriages are “humanely designed, energy sensitive,”<sup>177</sup> and “clean and green.”<sup>178</sup> The Mount Dora carriage company is “able to offer many different types of services all year round without the limitations of a traditional horse-drawn carriage.”<sup>179</sup> Electric carriages have thus far proven to be popular and unique alternatives for consumers.<sup>180</sup> The carriage company has even been fielding questions from other municipalities “eager to join the horseless bandwagon.”<sup>181</sup> Other U.S. cities are, in fact, starting to seriously consider the idea, albeit to varying degrees. For example, cities in Florida and South Carolina are considering offering electric carriages *in addition to* horse-drawn carriages.<sup>182</sup> Some companies have even considered adding modern amenities to attract tourists who may be wary of the transition. Such possible amenities include on-board dining experiences,<sup>183</sup> heated seats,<sup>184</sup> and USB chargers.<sup>185</sup>

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<sup>176</sup> Maria Sonnenberg, *Travel: Horseless Carriages Take Guests Through Mount Dora in Elegant Style*, FLORIDA TODAY (Dec. 22, 2022), <https://www.floridatoday.com/story/life/2022/12/22/mount-dora-company-proves-quaint-carriage-rides-dont-require-horses/69744689007/>.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> Deb Hickok, ‘No More Horsing Around’: Mount Dora Council to Consider Allowing Electric Carriages Downtown, DAILY COM. (June 28, 2022), <https://www.dailycommercial.com/story/news/local/mount-dora/2022/06/28/mount-dora-council-consider-horseless-electric-carriages-downtown/7754309001/>; Sophie Brams & Katie Augustine, *Horseless E-Carriages May Soon Hit the Streets of Downtown Charleston*, WCBD (May 10, 2022), <https://www.counton2.com/news/local-news/horseless-e-carriages-may-soon-hit-the-streets-of-downtown-charleston/>.

<sup>183</sup> Hickok, *supra* note 182.

<sup>184</sup> Alex Davies, *These Old-Timey Electric Cars Should Replace NYC’s Horse Carriages*, WIRED (Dec. 10, 2014), <https://www.wired.com/2014/12/10-evs-to-replace-new-york-carriages/>.

<sup>185</sup> Hernández, *supra* note 168.

These alternative carriages present perks for the carriage operators as well. In addition to “ensur[ing] their livelihood, . . . [they] will most likely make more money.”<sup>186</sup> In New York City, plans envision the city buying e-carriages for \$50,000 to \$100,000 each and then leasing them to drivers for a fee.<sup>187</sup> Alternatively, drivers could surrender their horses to be rehabilitated and retired in exchange for an electric carriage.<sup>188</sup> Electric carriages would provide carriage operators with a job with fewer restrictions<sup>189</sup> and lower costs<sup>190</sup> (specifically in terms of maintenance of the vehicle vs. maintenance of a horse). A nationwide ban would allow access to federal funds and, thus, more resources directed toward the transition and any related contingencies. For instance, job training for carriage operators that want to leave the industry completely instead of learning how to operate the e-carriages. Additionally, more resources would be available to help find retirement homes – whether through sanctuaries or private ownership – for the horses.

The primary counterargument to a nationwide ban involves constitutional implications regarding the boundaries between state and federal authority.<sup>191</sup> However, while the urban carriage horse industry operates intrastate, the sourcing of the horses specifically implicates interstate commerce because most horses used in the carriage trade are purchased from out-of- state Amish farms.<sup>192</sup>

Under the Commerce Clause, Congress has authorized power to regulate “the channels of interstate commerce, persons or things in interstate commerce, and those activities that substantially affect interstate commerce.”<sup>193</sup> Furthermore, “[i]n assessing the scope of Congress’ authority . . . [w]e need not determine whether [those] activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”<sup>194</sup>

A recent 1<sup>st</sup> Circuit decision concluded that a federal statute prohibiting individuals from sponsoring or exhibiting cocks in cockfighting did not exceed Congress’ authority because “the prohibitions in the statute are about activities which substantially affect interstate commerce.”<sup>195</sup> Specifically, the court emphasized the “commercial aspect” of cockfights, stating “the sponsorship and exhibition of cockfights for profit is clearly economic and commercial.”<sup>196</sup> Additionally, animal fighting ventures, such as cockfighting, “attract fighting animals and spectators from numerous states.”<sup>197</sup> Thus, even if horses used in the industry were purchased solely intrastate, the carriage horse tourist industry itself is an activity that substantially affects interstate commerce.

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<sup>186</sup> Jonathan Gonzalez, *Santa Clarita Nonprofit Organization Unveils ‘Horseless’ Carriages*, NBC LOS ANGELES (Dec. 5, 2022), <https://www.msn.com/en-us/news/us/santa-clarita-nonprofit-organization-unveils-horseless-carriages/ar-AA14Us5C>.

<sup>187</sup> Durkin, *supra* note 167.

<sup>188</sup> Jonathan Gonzalez, *Santa Clarita Nonprofit Organization Unveils ‘Horseless’ Carriages*, NBC L.A. (Dec. 5, 2022), <https://www.msn.com/en-us/news/us/santa-clarita-nonprofit-organization-unveils-horseless-carriages/ar-AA14Us5C>.

<sup>189</sup> Hutchison, *supra* note 1, at 191.

<sup>190</sup> Forel & Wagner, *supra* note 168.

<sup>191</sup> See David Favre, *Overview of U.S. Animal Welfare Act*, ANIMAL LEGAL AND HIST. CTR., MICH. STATE UNIV. COLL. OF L. (2002), <https://www.animallaw.info/article/overview-us-animal-welfare-act>.

<sup>192</sup> See Cheever, *supra* note 41; Kassel, *supra* note 39.

<sup>193</sup> *United States v. Morrison*, 529 U.S. 598, 609 (2000).

<sup>194</sup> *United States v. Lopez*, 514 U.S. 549, 557 (1995).

<sup>195</sup> *Hernández-Gotay v. United States*, 985 F.3d 71, 79 (2021).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

Specifically, the AWA provides (under the definition of exhibitor) that exhibited animals are either “purchased in commerce or the intended distribution of which affects commerce, or will affect commerce....”<sup>198</sup> In 2012, the U.S. Court of Appeals for the 11<sup>th</sup> Circuit broadly interpreted the term “distribution” by stating that a museum “‘distributes’ . . . cats in a manner affecting commerce every time it exhibits them to the public for compensation.”<sup>199</sup>

Thus, the court concluded that a museum’s exhibition of cats substantially affected interstate commerce because “the local character of an activity does not necessarily exempt it from federal regulation.”<sup>200</sup> Furthermore, and most significantly, the court added that “it is well-settled that, when local businesses solicit out-of-state tourists, they engage in activity affecting interstate commerce.”<sup>201</sup>

Additionally, after expanding the AWA’s definition of “exhibitor” to include the urban carriage horse industry, federal case law would also foreclose the issue of whether there is authority to federally regulate the industry. For instance, the court cites a 1990 administrative agency decision in which the Secretary of Agriculture “found that a person acts as an exhibitor simply by making animals available to the public.”<sup>202</sup> The court gave deference to this broad interpretation, explaining “the USDA has relied upon this interpretation to apply the AWA to . . . intra-state exhibitors” for over 20 years.<sup>203</sup> Specifically, the court stated that “given Congress’s intent to regulate zoos . . . which are notably stationary, and which could potentially exhibit animals that are neither purchased nor transported in commerce, we cannot see how the Secretary’s [broad] interpretation of ‘exhibitor’ is unreasonable.”<sup>204</sup>

#### CONCLUSION

In conclusion, the problems troubling the urban carriage horse industry are not going away. In fact, the effects of climate change guarantee that we will likely see more horses suffer as temperatures continue to rise around the world.

Furthermore, certain carriage operators will continue prioritizing financial gain over animal welfare – as has been the case in comparable animal entertainment industries.<sup>205</sup> Directing resources toward promulgating more state regulations is not the answer. Additional regulations have continuously failed to address the problem. Moreover, enforcement issues will continue to derail oversight efforts. Thus, the best and most logical solution is a nationwide ban accompanied by alternative e-carriages for carriage operators and organized efforts to relocate horses to sanctuaries and other safe and humane retirement locations. For these reasons, the safety and well-being of the horses depend on federal intervention in the form of a nationwide ban on the urban carriage horse industry.

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<sup>198</sup> 7 U.S.C. § 2132(h).

<sup>199</sup> 907 *Whitehead St., Inc. v. Gipson*, 701 F.3d 1345, 1350 (11th Cir. 2012).

<sup>200</sup> *Id.* at 1351.

<sup>201</sup> *Id.* (citing *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 573 (1997)).

<sup>202</sup> 907 *Whitehead St., Inc.*, 701 F.3d at 1350.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Supra* note 63.

**2023 Student Writing Competition 2<sup>nd</sup> Place Finisher:**

**Fenced In:**

**How Criminal Law Structures the Animal Industry**

By: Steffan A. Seitz  
Yale Law School

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## Introduction

Recently, a nine-year-old girl in California received a young goat through 4-H, the agriculturally-focused youth organization.<sup>1</sup> The girl was supposed to tend the goat and then hand him over to the county fair for slaughter. But she came to love and care for the goat, whom she named Cedar. When it came time for the girl to say goodbye to Cedar, she sat beside him and embraced him and sobbed. Unable to bear her daughter's sorrow, her mother took Cedar and brought him to a site far away for safekeeping. The fair executives reportedly accused the mother of committing a felony by stealing Cedar, and they insisted that Cedar must be slaughtered. The executives contacted the county sheriff's office, which obligingly sent two deputies on a 500-mile roundtrip to seize Cedar. Cedar was then promptly slaughtered.

The story of Cedar and his nine-year-old caretaker produced widespread backlash. It was covered in *The Washington Post*, *USA Today*, *CNN*, *CBS News*, and elsewhere.<sup>2</sup> As Nicholas Kristof put it in *The New York Times*: "I am astonished that the best use of Shasta County taxpayers' money was to dispatch two deputies on a full day's journey not to fight crime or addiction . . . but to ensure the slaughter of a girl's pet goat."<sup>3</sup> Indeed, astonishment seemed to be the consensus response: how could law enforcement get involved in something so minor and heartless?<sup>4</sup>

But actually, law enforcement often gets involved in protecting animal agriculture, even when the economic loss is inconsequential.<sup>5</sup> The animal industry routinely employs criminal law and the specter of its enforcement to shield itself from scrutiny.

There is an emerging literature on how animal law has disproportionately relied on criminal law.<sup>6</sup> But the flip side—how the animal industry relies on criminal law—has yet to be explored. This paper aims to fill that gap in legal scholarship. It argues that criminal law plays an essential role in structuring animal exploiting industries. A web of criminal statutes shields the animal industry from transparency, while simultaneously creating the conditions to prey on a powerless labor force.

This paper proceeds in three parts. Part I discusses "anti-activist laws": the Animal Enterprise Terrorism Act; ag gag laws; and ordinary trespass, theft, and burglary statutes, which are increasingly weaponized against activists. Part II profiles "anti-labor laws": criminal immigration statutes that create a vulnerable workforce for the meatpacking industry, as well as laws that force justice-involved people to labor in meatpacking plants.

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<sup>1</sup> All of the facts about the nine-year-old girl and her pet goat are taken from Nicholas Kristof, *Opinion: What A Girl's Goat Teaches Us About Our Food*, N.Y. TIMES (Apr. 15, 2023), <https://www.nytimes.com/2023/04/15/opinion/goat-girl-slaughtered-california.html>.

<sup>2</sup> Greg Henderson, *A Girl, a Goat and the Law: The Shasta County, CA, Boondoggle*, DROVERS (Apr. 17, 2023), <https://www.drovers.com/opinion/girl-goat-and-law-shasta-county-ca-boondoggle>.

<sup>3</sup> Kristof, *supra* note 1.

<sup>4</sup> See, e.g., Carla Hall, *Commentary: Where's the Humanity? Shasta fair chose to slaughter a girl's goat to teach her a lesson*, L.A. TIMES (Apr. 7, 2023), <https://www.latimes.com/opinion/story/2023-04-07/commentary-a-girl-shouldnt-have-had-to-leave-a-fair-in-tears-and-her-goat-shouldnt-have-come-back-as-meat>.

<sup>5</sup> See, e.g., notes 97-102 and accompanying text.

<sup>6</sup> See, e.g., Justin Marceau, *Comment: Palliative Animal Law: The War on Animal Cruelty*, 134 HARV. L. REV.F. 250, 260 (2021); JUSTIN MARCEAU, *BEYOND CAGES: ANIMAL LAW AND CRIMINAL PUNISHMENT* (2019); Justin Marceau & William Dewey, *Friends of Every Friendless Beast: Carceral Animal Law and the Funding of Prosecutors*, 5 CAN. J. COMP. & CONTEMP. L. 233 (2019); Kelly Struthers Montford & Eva Kasprzycka, *The "carceral enjoyments" of animal protection* in *BUILDING ABOLITION* (Kelly Struthers Montford & Chloë Taylor eds., 2021).



Part III provides analysis of the preceding two parts. It demonstrates how criminal law advances the interests of the animal industry at the expense of animals, workers, and the public. Criminal law shapes the political economy of animal agriculture by protecting the industry from accountability and promoting the exploitation of workers and animals.

## I. Anti-Activist Laws

Anti-activist laws shield the animal industry from transparency and accountability. This Part will profile three sets of anti-activist laws: the Animal Enterprise Terrorism Act; ag gag laws; and ordinary criminal statutes like burglary and theft, which are increasingly used against activists. As the three Sections below demonstrate, the emergence and enforcement of these criminal laws follow a similar pattern. In each case, animal advocates won significant victories against animal operations—often by forcing unwanted transparency—and then the animal industry mobilized to pass new criminal statutes or enforce existing criminal statutes to specifically target activists.

### A. Animal Enterprise Terrorism Act

#### 1. *The Statute*

The Animal Enterprise Terrorism Act (AETA) criminalizes a wide swathe of animal activist activity. The AETA makes it a federal offense to use the facilities of interstate commerce “for the purpose of damaging or interfering with the operations of an animal enterprise,” and in connection with that purpose to damage property “used by an animal enterprise, or any . . . person or entity having a connection to . . . an animal enterprise”; intentionally place someone in “reasonable fear” of injury; or conspire to do so.<sup>7</sup> The statute allows for lost profits to determine the penalty, and violators can serve up to 20 years in prison even if no one was hurt during the commission of the crime.<sup>8</sup> Perhaps aware of the expansive criminal liability it creates, the AETA also directs courts to construct the statute in a manner that does not “prohibit any expressive conduct . . . protected from legal prohibition by the First Amendment.”<sup>9</sup>

Despite this rule of construction, the AETA casts an unusually wide net. First, the AETA merely requires an intent “to damage[e] or interfer[e] with the operations of an animal enterprise”—a low bar that nearly every animal activist will meet simply by protesting an animal enterprise.<sup>10</sup> After all, every protest intends to interfere with the object of the protest. Notably, the AETA’s predecessor, the Animal Enterprise Protection Act (AEPA), required a higher standard— an intent to cause “physical disruption” to an animal enterprise.<sup>11</sup>

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<sup>7</sup> 18 U.S.C.A. § 43.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Kimberly E. McCoy, *Subverting Justice: An Indictment of the Animal Enterprise Terrorism Act*, 14 ANIMAL L. 53, 57 (2007).

Second, the AETA creates liability for targeting any “person or entity having a connection to, relationship with, or transactions with an animal enterprise.”<sup>12</sup> It thus reaches secondary and tertiary protests, in which activists target entities doing business with the primary target. Secondary and tertiary protests were used by activists to shut down Europe’s largest animal testing lab.<sup>13</sup> Third, the AETA criminalizes placing someone “in reasonable fear” of death or serious bodily injury via, among other things, harassment or intimidation.<sup>14</sup> “Reasonable fear” is a malleable standard, especially in a political climate suffused with fearmongering about animal activism. Raucous protests, done against the backdrop of illegal activity like property damage, could inspire “reasonable fear” of bodily harm.<sup>15</sup> Finally, the AETA creates unusually expansive conspiracy liability. Ordinarily, the government must prove that at least one conspirator committed an “overt act” in furtherance of the conspiracy.<sup>16</sup> But given the AETA’s loose language, the Third Circuit has held that it does not require proof of an overt act.<sup>17</sup>

The AETA has withstood several legal challenges, some of which have forced narrow readings of the statute. Courts have held that the AETA does not criminalize speech that merely results in lost profits.<sup>18</sup> The statute is also not unduly vague in defining “animal enterprise”,<sup>19</sup> “interfering with”,<sup>20</sup> or conspiracy.<sup>21</sup>

In addition, the AETA does not criminalize protesting at the homes of employees of animal enterprises or posting news about demonstrations or unlawful acts.<sup>22</sup> This activity is protected by the First Amendment. But the First Amendment does not protect inciting speech, so the Third Circuit upheld convictions under the AETA<sup>23</sup> for “electronic civil disobedience”—essentially, overloading servers, fax machines, and phone lines.<sup>24</sup> The court also upheld convictions for threatening to burn an employee’s house down because the threats were unprotected “true threats” given the totality of the activist’s actions.<sup>25</sup>

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<sup>12</sup> 18 U.S.C.A. § 43.

<sup>13</sup> Justin F. Marceau, *Ag Gag Past, Present, and Future*, 38 SEATTLE U. L. REV. 1317, 1322–23 (2015).

<sup>14</sup> 18 U.S.C.A. § 43.

<sup>15</sup> Will Potter, *Analysis of the Animal Enterprise Terrorism Act (AETA)*, GREEN IS THE NEW RED, <http://www.greenisthenewred.com/blog/aeta-analysis-109th> (last visited May 4, 2023).

<sup>16</sup> Julia Cheung, Maria T. Pelaia & Christopher J. Sullivan., *Federal Criminal Conspiracy*, 31 AM. CRIM. L. REV. 591, 595 (1994).

<sup>17</sup> *United States v. Fullmer*, 584 F.3d 132, 160n.13 (3d Cir. 2009).

<sup>18</sup> *Blum v. Holder*, 744 F.3d 790, 801 (1st Cir. 2014); *United States v. Johnson*, No. 14-CR-390, 2015 WL 1058087, at \*3–4 (N.D. Ill. Mar. 5, 2015), *aff’d*, 875 F.3d 360 (7th Cir. 2017); *United States v. Buddenberg*, No. CR-09-00263 RMW, 2009 WL 3485937, at \*6 (N.D. Cal. Oct. 28, 2009).

<sup>19</sup> *Johnson*, 2015 WL 1058087, at \*7–8.

<sup>20</sup> *Buddenberg*, 2009 WL 3485937, at \*7–8.

<sup>21</sup> *Blum*, 744 F.3d at 802–03.

<sup>22</sup> *Fullmer*, 584 F.3d at 155.

<sup>23</sup> Technically, these convictions were under AETA’s predecessor statute, the Animal Enterprise Protection Act (AEPA), which was a slightly narrower version of the AETA.

<sup>24</sup> *Fullmer*, 584 F.3d at 155.

<sup>25</sup> *Id.* at 157.

Importantly, every offense listed in the AETA is already an established crime.<sup>26</sup> What makes the AETA unique is that it drastically increases penalties for petty activist crimes and it brands activists as terrorists. While non-animal enterprises must make do with the standard provisions of criminal law, animal enterprises receive special, heightened criminal protections.

## 2. *The History*

The AETA was passed at the behest of animal-exploiting industries to crack down on animal activism. Though the animal rights movement of the 1980s and 90s was not monolithic in its aims or methods, it was “characterized by a substantial number of effective, illegal actions.”<sup>27</sup> Activists released captive dolphins into the open ocean,<sup>28</sup> sabotaged bird hunts,<sup>29</sup> and put their lives on the line to protect seals and whales.<sup>30</sup> The most notorious actions were conducted by the Animal Liberation Front (ALF), a decentralized group of activists—essentially “a name and a strategy”—who rescued animals; destroyed property that had been used to abuse the animals; and, in the process, took “all reasonable precautions” to avoid harming any living beings.<sup>31</sup> Throughout the 1980s and 90s, self-styled ALF members broke into labs to rescue lab animals and into fur farms to rescue minks and foxes.<sup>32</sup> Some more aggressive members burned labs and farms to the ground.<sup>33</sup> As harm to the industry’s bottom line grew, industry groups pressured Congress to pass anti-activist legislation.<sup>34</sup> The legislative response was swift. In 1992, Congress passed the Animal Enterprise Protection Act (AEPA), which criminalized “causing a physical disruption to the functioning of an animal enterprise.”<sup>35</sup> Though this early animal activism primarily targeted labs and fur farms, the AEPA covered actions against *any* animal enterprise, including farms that raised animals for food. Despite the AEPA’s draconian penalties—activists could face up to life in prison—industry groups continued to push for more expansive and punitive measures.<sup>36</sup> In the wake of September 11th, they found a receptive audience in the FBI and Department of Homeland Security (DHS).<sup>37</sup> Flush with post-9/11 funds and a mandate to root out domestic terrorism, the FBI and DHS eagerly collaborated with industry groups like the National Association for Biomedical Research, the Fur Commission, and the American Feed Industry Association.

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<sup>26</sup> See McCoy, *supra* note 11, at 65.

<sup>27</sup> Marceau, *supra* note 13, at 1320.

<sup>28</sup> NORM PHELPS, *THE LONGEST STRUGGLE: ANIMAL ADVOCACY FROM PYTHAGORAS TO PETA* 265 (2007).

<sup>29</sup> See *id.* at 243-49.

<sup>30</sup> *Id.* at 254-58.

<sup>31</sup> See *id.* at 237-40, 264-65.

<sup>32</sup> See *id.* at 266-68.

<sup>33</sup> See *id.*

<sup>34</sup> Alleen Brown, *The Green Scare: How a Movement That Never Killed Anyone Became the FBI's No. 1 Domestic Terrorism Threat*, *THE INTERCEPT* (Mar. 23, 2019), <https://theintercept.com/2019/03/23/ecoterrorism-fbi-animal-rights>.

<sup>35</sup> McCoy, *supra* note 11, at 57.

<sup>36</sup> Brown, *supra* note 34.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

Industry groups also made a renewed legislative push to counter animal activists. In 2003, the American Legislative Exchange Council (ALEC) proposed new model legislation targeting animal activists.<sup>39</sup> ALEC is an organization of state legislators and private sector representatives that drafts model legislation to further the interests of its member corporations, including pharmaceutical and food processing companies.<sup>40</sup> ALEC's proposed bill served as the blueprint for several states' ag gag statutes and the AETA, which was passed in 2006.<sup>41</sup> At the same time, the FBI announced that the investigation of "animal rights extremists and eco-terrorism matters" was its "highest domestic terrorism investigation priority."<sup>42</sup>

This crackdown had a predictable effect on animal activists. A small number were arrested, and infighting destroyed some groups as a climate of fear and distrust set in.<sup>43</sup> But likely the most significant effect was that the activities of ordinary activists were chilled. As one longtime animal activist recalls, "People would show up to their first protest ever . . . and that weekend the FBI would knock on their door, asking for the names of fellow protesters."<sup>44</sup> Confronted with zealous law enforcement and the threat of criminal prosecution, animal activists "pivoted away from grassroots activism toward an institutional, 'within the system' approach."<sup>45</sup>

## B. Ag Gag Laws

### 1. The Statutes

So-called "ag gag laws" prohibit activists from entering agricultural facilities without permission or under false pretenses, documenting the facilities' conditions, and disseminating footage and photographs of the conditions.<sup>46</sup> In effect, they "criminalize the conduct that is necessary to facilitate whistleblowing and reporting about the production of food in this country."<sup>47</sup> More than 40 ag gag laws have been proposed in 24 states.<sup>48</sup> Currently, six states have ag gag laws, though an additional five states have had their ag gag statutes struck down as unconstitutional.<sup>49</sup>

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<sup>39</sup> WILL POTTER, GREEN IS THE NEW RED 184-85 (2011).

<sup>40</sup> *Id.* at 184 (naming companies with a "vested financial interest" in passing legislation "labeling activists as terrorists," including Johnson & Johnson, Procter & Gamble, Aventis Pharmaceuticals, Bayer, Eli Lilly & Company, GlaxoSmithKline, Pfizer, Wyeth, Merck, Cargill, the National Pork Producers Council, Wendy's and McDonald's). <sup>41</sup> *Id.* at 185-190; McCoy, *supra* note 11, at 58-59.

<sup>42</sup> POTTER, *supra* note 39, at 40.

<sup>43</sup> Brown, *supra* note 34.

<sup>44</sup> Andrew Schwartz, *Animal Rights Activists Rescued Two Piglets From Slaughter. They Wanted to Get Caught.*, NEW REPUBLIC (Feb. 23, 2022), <https://newrepublic.com/article/165468/animal-rights-dxe-smithfield>.

<sup>45</sup> *Id.*

<sup>46</sup> Sonia Weil, *Big-Ag Exceptionalism: Ending the Special Protection of the Agricultural Industry*, 10 DREXEL L. REV. 183, 199 (2017).

<sup>47</sup> Marceau, *supra* note 13, at 1332.

<sup>48</sup> Kelsey Piper, "Ag-gag laws" hide the cruelty of factory farms from the public. Courts are striking them down., VOX (Jan. 11, 2019), <https://www.vox.com/future-perfect/2019/1/11/18176551/ag-gag-laws-factory-farms-explained>.

<sup>49</sup> *What Is Ag-Gag Legislation?*, ASPCA, <https://www.aspc.org/improving-laws-animals/public-policy/what-ag-gag-legislation>.

Ag gag laws tend to share a few features. Nearly all of them prohibit making false statements as part of an application for employment at an agricultural facility.<sup>50</sup> Some are even more targeted, prohibiting applying for employment at an agricultural facility “with the intent to record an image of, or sound from, the agricultural operation.”<sup>51</sup> Some criminalize not just undercover investigators and whistleblowers but also publishers. Alabama’s ag gag law, for example, prohibits the possession of records related to an animal facility if the person knows or reasonably believes that the records were obtained by deception.<sup>52</sup> Finally, some ag gag laws have introduced mandatory reporting provisions, which require individuals to turn over footage of animal abuse within twenty-four hours of recording.<sup>53</sup> Though ostensibly an animal welfare measure, these provisions effectively criminalize undercover investigations.<sup>54</sup> Chris Green, the executive director of Harvard Law School’s Animal Law & Policy Program, explained the effect of these reporting requirements: “Say you have a DEA agent who spends months undercover to infiltrate a drug cartel. . . . This is like requiring them to reveal themselves the first time they see a \$5 drug buy.”<sup>55</sup>

Ag gag laws have faced significant legal challenges, and five have been struck down as unconstitutional.<sup>56</sup> Courts have applied strict scrutiny to ag gag laws because they “target speech based on its communicative content.”<sup>57</sup> Accordingly, they have struck down provisions criminalizing obtaining employment by deceit because they sweep too broadly, prohibiting egregious falsehoods and common interview exaggerations alike.<sup>58</sup> But courts have upheld access provisions, which criminalize obtaining access to agricultural facilities by false pretenses, because such a provision narrowly prohibits only a legally cognizable harm, namely trespass.<sup>59</sup>

But judicial intervention is often only a temporary solution for animal activists. Legislatures continue to re-enact and expand ag gag laws, even after earlier attempts are invalidated. For example, Iowa passed an ag gag law in 2012 that was struck down by a federal court in 2019.<sup>60</sup> Two months later, Iowa passed a new ag gag law.<sup>61</sup> When this revised statute was preliminarily enjoined, Iowa passed yet another ag gag law—its third attempt at getting the statute right.<sup>62</sup> And now, the Iowa legislature is seeking to expand its ag gag statute even further, as the Iowa House recently passed a bill restricting drone surveillance of animal operations.<sup>63</sup> In short, ag gag laws remain a subject of vexed litigation, as conservative legislatures and industry groups continue to expand criminal liability for activists, investigators, and whistleblowers.

<sup>50</sup> See, e.g., UTAH CODE ANN. § 76-6-112; IOWA CODE ANN. § 717A.3A.

<sup>51</sup> UTAH CODE ANN. § 76-6-112.

<sup>52</sup> ALA. CODE § 13A-11-153.

<sup>53</sup> See, e.g., MO. ANN. STAT. § 578.013.

<sup>54</sup> Weil, *supra* note 46, at 205–06.

<sup>55</sup> Piper, *supra* note 48.

<sup>56</sup> *What Is Ag-Gag Legislation?*, *supra* note 49.

<sup>57</sup> *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 822 (S.D. Iowa 2019), *aff’d in part, rev’d in part and remanded*, 8 F.4th 781 (8th Cir. 2021); see also *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1211 (D. Utah 2017) (applying strict scrutiny).

<sup>58</sup> *Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781, 787 (8th Cir. 2021).

<sup>59</sup> *Id.* at 785–86.

<sup>60</sup> *What Is Ag-Gag Legislation?*, *supra* note 49.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Paige Carlson, *Iowa Legislation Seeks to Limit Drone Flight Over Livestock Operations*, PORK (Apr. 17, 2023), [https://www.porkbusiness.com/news/ag-policy/iowa-legislation-seeks-limit-drone-flight-over-livestock-operations?mkt\\_tok=ODQzLVlHQi03OTMAAAGLMv7Y3-xnLwpxs6ybs3hsBoujvK5nvT1yLrKw\\_RBGiUToS0C0XZ4vom7F5PobKgXzjtBTgX4XqYJ0b067MwSB79\\_IXEfH0R2mUCHXWDcP4QVzHltSJv\\_w](https://www.porkbusiness.com/news/ag-policy/iowa-legislation-seeks-limit-drone-flight-over-livestock-operations?mkt_tok=ODQzLVlHQi03OTMAAAGLMv7Y3-xnLwpxs6ybs3hsBoujvK5nvT1yLrKw_RBGiUToS0C0XZ4vom7F5PobKgXzjtBTgX4XqYJ0b067MwSB79_IXEfH0R2mUCHXWDcP4QVzHltSJv_w).

## 2. *The History*

Ag gag laws were passed in direct response to successful undercover investigations of factory farms. By the late aughts and early 2010s, several animal organizations had developed expertise in infiltrating factory farms and documenting their horrible conditions.<sup>64</sup> Organizations like the Humane Society of the United States, Mercy for Animals, and Animal Outlook conducted undercover investigations that required substantial planning and resources.<sup>65</sup> These investigations require an animal advocate—ideally one with a small digital footprint—to obtain employment with a factory farm and then surreptitiously record what happens inside the facility.<sup>66</sup> The investigations often involve months of lonely, difficult, and traumatic work.<sup>67</sup>

The videos produced by these undercover investigations have had a tremendous impact on the animal agriculture industry. They have caused retailers to pull products from their shelves,<sup>68</sup> prompted federal regulation,<sup>69</sup> and changed farming practices.<sup>70</sup> One investigation by the Humane Society of the United States led to the largest beef recall in American history.<sup>71</sup>

In response to these successful investigations, animal industries have mobilized to pass ag gag legislation. Idaho's ag gag law, for example, was a "direct response" to footage obtained via an undercover investigation by Mercy for Animals.<sup>72</sup> Mercy for Animals' video showed workers beating, kicking, and stomping on cows at Idaho's largest dairy farm.<sup>73</sup> One downed cow was dragged across concrete by chain around her neck.<sup>74</sup> The video prompted criminal charges and public outcry.<sup>75</sup> Almost immediately, the Idaho Dairymen's Association, which represents every dairy producer in Idaho and wields significant political influence, drafted an ag gag bill.<sup>76</sup> The bill was introduced, passed, and signed into law in less than three weeks.<sup>77</sup>

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<sup>64</sup> Gabriela Wolfe, *Anything but Ag-Gag: Ending the Industry-Advocate Cycle*, 66 SYRACUSE L. REV. 367, 380 (2016).

<sup>65</sup> *Investigations and reports*, HUMANE SOCIETY OF THE U.S., <https://www.humanesociety.org/resources/investigations-and-reports>; *Undercover Investigations*, MERCY FOR ANIMALS, <https://mercyforanimals.org/investigations>; *Investigations*, ANIMAL OUTLOOK, <https://animaloutlook.org/investigations>.

<sup>66</sup> Caroline Abels, *Going undercover in the American factory farm*, GRIST (Nov. 26, 2012), <https://grist.org/food/going-undercover-in-the-american-factory-farm>.

<sup>67</sup> See, e.g., Elizabeth Pachaud, *Working Undercover on a Factory Farm Traumatized Me*, MEDIUM (May 18, 2020), <https://tenderly.medium.com/working-undercover-on-a-factory-farm-traumatized-me-31e10f97a89c>.

<sup>68</sup> Leighton Akio Woodhouse & David Zlutnick, *In Iowa, Politicians Protect the Meat Industry by Making Animal Rights Activists Criminals*, INTERCEPT (Oct. 12, 2019), <https://theintercept.com/2019/10/12/meat-industry-ag-gag-laws>.

<sup>69</sup> Andy Bromage, *Bushway Owner Charged with Animal Cruelty*, SEVEN DAYS (June 4, 2010), <https://www.sevendaysvt.com/vermont/bushway-owner-charged-with-animal-cruelty/Content?oid=2204369>.

<sup>70</sup> Abels, *supra* note 66.

<sup>71</sup> Marceau, *supra* note 13, at 1332–33.

<sup>72</sup> *Id.* at 1337.

<sup>73</sup> Associated Press, *Idaho workers charged with animal cruelty at Bettencourt Dairies' Dry Creek Dairy*, N.Y. DAILY NEWS (Oct. 11, 2012), <https://www.nydailynews.com/news/national/watch-animal-cruelty-filmed-idaho-dairy-article-1.1180094>.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Melissa Cronin, *How The Dairy Industry Strong-Armed A State Into Silencing Whistleblowers*, DODO (Oct. 25, 2014), <https://www.thedodo.com/ag-gag-idaho-dairy-industry-781488969.html>.

<sup>77</sup> Marceau, *supra* note 13, at 1337.

As one lobbyist who drafted the bill put it, the ag gag law was necessary because farmers and dairymen felt threatened by “extremist groups . . . who masquerade as employees to infiltrate farms in the hope of discovering and recording what they believe to be animal abuse.”<sup>78</sup> Legislators and animal lobbyists routinely justify ag gag laws as protection against misinformation by radical activists.<sup>78</sup> But liability already exists for producing and publicizing falsehoods; farms could sue investigators for defamation if their videos were untruthful.<sup>80</sup> Rather, ag gag laws exist to prevent investigations in the first place. In this way, ag gag statutes provide the animal industry with an “unprecedented layer of secrecy.”<sup>81</sup> Every other industry must rely on ordinary trespass and theft-of-trade-secrets statutes.<sup>82</sup> Only the animal industry enjoys broad, industry-specific anti-whistleblower protections that apply regardless of whether trade secrets or intellectual property is threatened.<sup>83</sup>

## C. Trespass, Theft, and Burglary Laws

### 1. *The Statutes*

In recent years, prosecutors have deployed ordinary trespass, theft, and burglary statutes against animal activists. As an example of these statutes, consider Utah’s trespass and theft statutes. Utah’s trespass statute forbids unlawfully entering or remaining on property with an intent to commit a crime.<sup>84</sup> Its theft statute criminalizes exercising “unauthorized control over the property of another with a purpose to deprive him thereof.”<sup>85</sup> These statutes have been used against activists who conduct “open rescues,” in which activists enter an animal operation, document its conditions, and remove a few ailing animals.<sup>86</sup> To date, open rescuers have been prosecuted under ordinary criminal statutes in several states, including Hawaii,<sup>87</sup> North Carolina,<sup>88</sup> Utah,<sup>89</sup> and California,<sup>90</sup> with additional trials coming up in California (again) and Wisconsin.<sup>91</sup>

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<sup>78</sup> *Id.* at 1338.

<sup>79</sup> *Id.* at 1338-39.

<sup>80</sup> Sarah Hanneken, *Principles Limiting Recovery Against Undercover Investigators in Ag-Gag States: Law, Policy, and Logic*, 50 J. MARSHALL L. REV. 649, 694–95 (2017).

<sup>81</sup> Marceau, *supra* note 13, at 1335.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> UTAH CODE ANN. § 76-6-206.

<sup>85</sup> *Id.* at § 76-6-404.

<sup>86</sup> See *Open Rescue*, HUMANEMYTH.ORG: DECONSTRUCTING THE MYTH OF HUMANE ANIMAL AGRICULTURE., <https://www.humanemyth.org/glossary/1061.htm>.

<sup>87</sup> *Hawaii v. LeVasseur*, 613 P.2d 1328 (Haw. Ct. App.), *cert. denied*, 449 U.S. 1018 (1980).

<sup>88</sup> Adrienne Matei, *A US activist took a sick goat from a meat farm—now he faces seven years in jail*, THE GUARDIAN (Dec. 6, 2021), <https://www.theguardian.com/world/2021/dec/06/wayne-hsiung-activist-goat-animal-welfare-trial>.

<sup>89</sup> Andrew Jacobs, *Animal Rights Activists Are Acquitted in Smithfield Piglet Case*, N.Y. TIMES (Oct. 18, 2022), <https://www.nytimes.com/2022/10/08/science/animals-rights-piglets-smithfield.html>.

<sup>90</sup> Marina Bolotnikova, *The fight against factory farming is winning criminal trials*, VOX (Mar. 21, 2023), <https://www.vox.com/future-perfect/23647682/factory-farming-dxe-criminal-trial-rescue>.

<sup>91</sup> *Recent Updates*, RIGHT TO RESCUE, <https://righttorescue.com>.

Some state legislatures have begun to expand liability for animal activists under these ordinary criminal statutes. For example, Utah recently amended its criminal code to “provide[] that it is not a defense to theft of livestock that the livestock is sick, injured, or a liability to the owner.”<sup>92</sup>

## 2. *The History*

Unlike the AETA or ag gag laws, ordinary criminal statutes long predate animal activism, and their primary target is ordinary lawbreaking. But the influence of the animal ag industry is plainly visible in the *enforcement* of these statutes. In response to high-profile “open rescues,” meat companies have begun pressuring state and federal law enforcement to zealously surveil and prosecute animal activists.

The most illustrative example of this new frontier in criminalizing animal activism was the so-called “Smithfield Trial.” In 2017, several animal activists entered a massive Smithfield-owned hog operation in rural Utah.<sup>93</sup> The activists documented Smithfield’s continued use of gestation and farrowing crates, despite a company pledge to stop that practice, and they removed two sick and starving piglets.<sup>94</sup> The investigators brought the piglets to a veterinarian and then to an animal sanctuary.<sup>95</sup> Later, they released footage of the rescue, which received widespread attention, including in the *New York Times*.<sup>96</sup> Soon after footage of the rescue went public, Smithfield asked the FBI and Department of Justice to intervene, and they obliged.<sup>97</sup> The FBI assigned eight agents to the case, and the agents engaged in a massive multi-state investigation to surveil the activists and track down the rescued piglets.<sup>98</sup> Later at trial, one of the agents testified that he could not think of a single other instance in which multiple FBI agents investigated a theft case involving less than \$100 worth of property.<sup>99</sup> The agent also testified that he spoke with several people at Smithfield, including the company’s CEO, general counsel, and a PR and communications director.<sup>100</sup> And he testified that he spoke with a high-level executive at Costco, even though Costco was not a victim in the case.<sup>101</sup> The agent admitted that Costco was invested in the case because it was worried about secondhand reputational harm since Smithfield is one of its largest suppliers.<sup>102</sup> In other words, the trial revealed that law enforcement zealously investigated and prosecuted this case only because powerful animal interests demanded it.

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<sup>92</sup> Theft Defense Amendments, 2023 General Session, UTAH, <https://le.utah.gov/~2023/bills/static/HB0114.html>.

<sup>93</sup> Marina Bolotnikova, *Activists Acquitted in Trial for Taking Piglets From Smithfield Foods*, INTERCEPT (Oct. 8, 2022), <https://theintercept.com/2022/10/08/smithfield-animal-rights-piglets-trial>.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Stephanie Strom, *Animal Welfare Groups Have a New Tool: Virtual Reality*, N.Y. TIMES (July 6, 2017), <https://www.nytimes.com/2017/07/06/dining/animal-welfare-virtual-reality-video-meat-industry.html>.

<sup>97</sup> Glenn Greenwald, *The FBI’s Hunt for Two Missing Piglets Reveals the Federla Cover-Up of Barbaric Factory Farms*, THE INTERCEPT (Oct. 5, 2017), <https://theintercept.com/2017/10/05/factory-farms-fbi-missing-piglets-animal-rights-glenn-greenwald>.

<sup>98</sup> Bolotnikova, *supra* note 93.

<sup>99</sup> *Id.*

<sup>100</sup> Smithfield Trial (@SmithfieldTrial), TWITTER (Oct. 5, 2022), <https://twitter.com/SmithfieldTrial/status/1577704962095689735?s=20>; *id.* at <https://twitter.com/SmithfieldTrial/status/1577704569101987848?s=20>.

<sup>101</sup> *Id.* at <https://twitter.com/SmithfieldTrial/status/1577705464384565254?s=20>.

<sup>102</sup> *Id.* at <https://twitter.com/SmithfieldTrial/status/1577707796174233600?s=20>.



And then, in response to the activists’ stunning acquittal in the Smithfield Trial, the Utah legislature promptly expanded liability for animal activists specifically. The activists won their acquittal by demonstrating that the piglets they removed from the Smithfield factory farm had no commercial value to Smithfield,<sup>103</sup> yet theft requires the stolen property to have some value.<sup>104</sup> In response, the Utah legislature immediately passed HB 114, which amended the Utah Criminal Code “to say that it is not a defense to take livestock from an owner if it is sick, injured or a liability to their owner.”<sup>105</sup> The bill’s sponsor admitted that the bill was a direct response to the Smithfield acquittal: “The court case alerted us to a loophole. . . . We want to make sure we’re protecting those farmers and ranchers.”<sup>106</sup>

## II. Anti-Labor Laws

Meatpacking companies use criminal law to discipline and discredit their workers. Conditions in meatpacking plants are dangerous. Workers must contend with struggling animals, fast line speeds, sharp knives, and hazardous machinery. As a result, over the past forty years, meatpacking companies have sought an ever more vulnerable and exploitable workforce, and they have become increasingly reliant upon undocumented and justice-involved workers. Undocumented workers are always subject to the threat of deportation, and justice-involved workers are always subject to the threat of prison. This Part explores the criminal laws that make this exploitation possible and thus create the conditions for the modern meatpacking industry.

### A. Crimmigration Law

The animal ag industry has weaponized immigration law to create a permanently powerless and precarious workforce. In particular, meatpacking plants have relied on the criminalization of undocumented immigrants, an intersection of immigration and criminal law sometimes referred to as “crimmigration” law.<sup>107</sup> The Immigration Reform and Control Act of 1986 makes it a crime to “knowingly” hire undocumented immigrants.<sup>108</sup> It also requires workers to fill out an I-9 form in which they declare, under penalty of perjury, that they are authorized to work.<sup>109</sup> Employers are not required to be document experts,<sup>110</sup> and the stringent mens rea—“knowingly”—means that employers are rarely prosecuted for employing undocumented workers, while the workers themselves are easily prosecuted for making false declarations.<sup>111</sup> Taken together, this legal structure allows meatpacking plants to hire undocumented workers, subject them to intolerable conditions, and then use law enforcement against them if they organize, complain, or otherwise create trouble for the company.

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<sup>103</sup> Bolotnikova, *supra* note 93.

<sup>104</sup> UTAH CODE ANN. § 76-6-401(5) (“‘Property’ means anything of value. . .”).

<sup>105</sup> Chris Reed, *Utah Legislature passes bill that bans taking sick animals from farms in pig trial aftermath*, ST. GEORGE NEWS (Feb. 10, 2023), <https://www.stgeorgeutah.com/news/archive/2023/02/10/cdr-lg123-utah-legislature-passes-bill-that-bans-taking-sick-animals-from-farms-in-pig-trial-aftermath/#.ZFE7EezML0o>.

<sup>106</sup> *Id.*

<sup>107</sup> See Juliet P. Stumpf, *Crimmigration and the Legitimacy of Immigration Law*, 65 ARIZ. L. REV. 113, 119 (2023); Kati L. Griffith & Shannon M. Gleeson, *The Precarity of Temporality: How Law Inhibits Immigrant Worker Claims*, 39 COMP. LAB. L. & POL’Y J. 111, 121–22 (2017).

This exploitative arrangement has its origins in the 1980s, when a confluence of factors led to a rising demand for cheap labor in meatpacking plants.<sup>112</sup> The plants were located in rural areas, mostly across the South, to take advantage of cheap real estate and escape urban union organizers.<sup>113</sup> The work was dangerous, difficult, and poorly compensated, and domestic workers increasingly refused to tolerate the bad conditions and pay.<sup>114</sup> As a result, meatpacking plants turned to migrant labor. They actively recruited undocumented workers.<sup>115</sup> Some companies bused workers to their facilities with the promise of pay and housing.<sup>116</sup> Others went so far as to generate false social security numbers for their undocumented employees.<sup>117</sup>

The conditions in meatpacking plants are horrific. Workers on a poultry slaughter line must work in the dark and are “cut, pecked, and urinated and defecated on by the birds.”<sup>118</sup> Those who process the animals’ corpses contend with frigid temperatures and also become covered in “chicken blood, juices, and various cleaning and disinfectant chemicals.”<sup>119</sup> Workers operate alongside dangerous heavy machinery, and many wield knives, often making the same cut more than 20,000 times in a single shift.<sup>120</sup> One in three employees reports having carpal tunnel syndrome; three in four have signs of nerve damage similar to carpal tunnel syndrome.<sup>121</sup> Workers have lost limbs or even been killed by the dangerous slaughterhouse machinery.<sup>122</sup> Despite these conditions, most undocumented workers “do not receive support like health insurance, overtime pay, or unemployment aid.”<sup>123</sup> Human Rights Watch has declared that there “are systematic human rights violations embedded in meat and poultry industry employment” in the United States.<sup>124</sup>

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<sup>108</sup> Pamela D. Nichols, *The United States Immigration Reform and Control Act of 1986: A Critical Perspective*, 8 NW. J. INT’L L. & BUS. 503 (1987).

<sup>109</sup> Michael Grabell, *Sold for Parts*, PROPUBLICA (May 1, 2017), <https://www.propublica.org/article/case-farms-chicken-industry-immigrant-workers-and-american-labor-law>.

<sup>110</sup> Nichols, *supra* note 108, at 524n.63 (“‘Good faith’ compliance is an affirmative defense to any allegations that the employer knew the employee was an undocumented alien.”).

<sup>111</sup> Grabell, *supra* note 109.

<sup>112</sup> The factors include: the growth of mass market meat products like nuggets, fingers, and buffalo wings; the consolidation of the meatpacking industry; political destabilization in foreign, cheap-labor markets like Central America; and the growth of factory farms. See Kelsea Kenzy Sutton, *The Beef with Big Meat: Meatpacking and Antitrust in America’s Heartland*, 58 S.D. L. REV. 611 (2013); Jarod S. Gonzalez, *Employment Law Remedies for Illegal Immigrants*, 40 TEX. TECH L. REV. 987, 998–99 (2008).

<sup>113</sup> Erik Camayd-Freixas, *Raids, Rights and Reform: The Postville Case and the Immigration Crisis*, 2 DEPAUL J. FOR SOC. JUST. 1, 5–6 (2008).

<sup>114</sup> *Id.*

<sup>115</sup> Courtney G. Lee, *Racist Animal Agriculture*, 25 CUNY L. REV. 199, 216 (2022).

<sup>116</sup> Grabell, *supra* note 109.

<sup>117</sup> Lee, *supra* note 115, at 216.

<sup>118</sup> Bruce Friedrich, Stefanie Wilson, *Coming Home to Roost: How the Chicken Industry Hurts Chickens, Humans, and the Environment*, 22 ANIMAL L. 103, 133 (2015).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 135.

<sup>122</sup> Grabell, *supra* note 109.

<sup>123</sup> Lee, *supra* note 115, at 217.

<sup>124</sup> HUMAN RIGHTS WATCH, BLOOD, SWEAT AND FEAR: WORKERS’ RIGHTS IN U.S. MEAT AND POULTRY PLANTS 2 (2004), <http://www.hrw.org/reports/2005/usa0105/usa0105.pdf>.

But crimmigration law largely prevents workers from pushing back against these conditions. To work, undocumented laborers must submit fraudulent documents, which make them vulnerable to prosecution and deportation.<sup>125</sup> When workers “have fought for higher pay and better conditions,” meatpacking companies have “used their immigration status to get rid of vocal workers, avoid paying for injuries and quash dissent.”<sup>126</sup>

As an example, consider organizing efforts at Case Farms, the subject of a 2017 exposé by *ProPublica*:

In 1993, around 100 Case Farms employees refused to work in protest against low pay, lack of bathroom breaks and payroll deductions for aprons and gloves. In response, Case Farms had 52 of them arrested for trespassing. In 1995, more than 200 workers walked out of the plant and, after striking for four days, voted to unionize. Three weeks after the protest, Case Farms requested documents from more than 100 employees whose work permits had expired or were about to expire. . . . In July 2008, more than 150 workers went on strike. . . . [Eventually,] the union received a letter saying that it had come to the company’s attention that nine of its employees might not be legally authorized to work in the United States. Seven were on the union organizing committee. . . . All were fired.<sup>127</sup>

Crimmigration statutes have created a simple playbook for the meatpacking industry: hire vulnerable workers and then selectively fire those who demand better.

To make matters worse for workers, the Supreme Court has undercut undocumented workers’ abilities to hold exploitative employers accountable. In *Hoffman Plastic v. NLRB*, the Court held that undocumented workers had the right to engage in union organizing, but they did not have access to the remedy of backpay if they were illegally fired for their activities.<sup>128</sup> As Justice Breyer noted in dissent, this holding effectively incentivized employers to hire undocumented immigrants “with a wink and a nod,” knowing that they could “violate the labor laws at least once with impunity.”<sup>129</sup> Another way crimmigration laws create worker precarity is through “spectacular immigration enforcement” at meatpacking plants.<sup>130</sup>

Spectacular immigration enforcement occurs when immigration authorities conduct a highly-visible raid with hundreds of agents and heavy armaments.<sup>131</sup>

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<sup>125</sup> See *supra* notes 109-111 and accompanying text.

<sup>126</sup> Grabell, *supra* note 109.

<sup>127</sup> *Id.*

<sup>128</sup> *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 146 (2002); see also Griffith & Gleeson, *supra* note 107, at 124 (analyzing *Hoffman*).

<sup>129</sup> *Hoffman Plastic Compounds*, 535 U.S. at 154-56 (Breyer, J., dissenting).

<sup>130</sup> See Jennifer M. Chacón, *Spectacular Immigration Enforcement in Hidden Spaces*, in *CARCERAL LOGICS: HUMAN INCARCERATION AND ANIMAL CAPTIVITY* 105, 105-27 (eds. Lori Gruen & Justin Marceau 2022).

<sup>131</sup> *Id.* at 115-16.

Perhaps the most notorious such raid was on a slaughterhouse in Postville, Iowa, in 2008, when law enforcement arrested 389 people, three-quarters of whom were ethnic Mayans from Guatemala and only five (1.2%) of whom had criminal records.<sup>132</sup> But all were arraigned on felony charges of identity theft, jailed, and eventually deported.<sup>133</sup> These spectacles help justify the crimmigration regime and the continued exploitation of undocumented workers. At the press conference after a 2019 spectacular enforcement that arrested 680 immigrant workers, the US Attorney in charge condemned the indicted workers for “victimiz[ing]” American workers “by identity fraud.”<sup>134</sup> Depicting the arrested immigrants as criminals and “real Americans” as victims is a familiar refrain in these spectacular enforcements.<sup>135</sup> There is also an unmistakable racial subtext to this language and these enforcements.<sup>136</sup> In fact, these raids routinely engage in racial profiling, sometimes lining Hispanics up on one side of the factory and non-Hispanics on the other.<sup>137</sup> As scholars have noted, the goal of these spectacular enforcements is not to meaningfully enforce immigration laws—the expensive raids would be an extremely poor use of resources if that were the goal—but to strike fear into workers.<sup>138</sup> The goal is to create a “peripheral . . . workforce that, in the aggregate, rationally accepts and then tolerates substandard terms and conditions of work and rarely exercises worker power or voice.”<sup>139</sup>

## B. Labor in the Shadow of the Prison

In recent years, the meatpacking industry has also begun employing criminal justice- involved workers. Meatpacking plants across the South have contracted with state departments of correction to directly employ incarcerated people through work-release programs. And in some states, meatpacking companies have taken advantage of alternatives to incarceration that require individuals to work to avoid prison.

Across the “chicken belt” of the southeast, poultry companies have employed hundreds of incarcerated workers to process chickens.<sup>140</sup> These poultry processors contract with departments of correction in at least seven states to employ incarcerated workers in work-release programs.<sup>141</sup> Treated as expendable by both the state and poultry companies, the incarcerated workers are often poorly trained and equipped, and violent accidents are commonplace.<sup>142</sup> When accidents inevitably occur, money tends to be paid to the state instead of the worker or their loved ones.<sup>143</sup>

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<sup>132</sup> Camayd-Freixas, *supra* note 113, at 2.

<sup>133</sup> *Id.*

<sup>134</sup> Chacón, *supra* note 130, at 123.

<sup>135</sup> *Id.* at 123-26.

<sup>136</sup> *Id.*

<sup>137</sup> Camayd-Freixas, *supra* note 113, at 14–15.

<sup>138</sup> Charlotte S. Alexander, *Explaining Peripheral Labor: A Poultry Industry Case Study*, 33 BERKELEY J. EMP. & LAB. L. 353, 387 (2012).

<sup>139</sup> *Id.*

<sup>140</sup> Will Tucker, *The Kill Line*, S. POVERTY L. CTR. (July 26, 2018), <https://www.splcenter.org/news/2018/07/26/kill-line>.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*; see also Elizabeth Whitman, *How a Giant Egg Farm Made Money Off Women Prisoners in Dangerous Conditions*, COSMOPOLITAN (Feb. 15, 2023), <https://www.cosmopolitan.com/lifestyle/a42710907/women-prisoners-at-hickmans-farms>.

<sup>143</sup> Tucker, *supra* note 140.

Echoing the practices of convict leasing, the arrangement is lucrative for both the poultry companies and the state. The poultry industry benefits from “perhaps the most vulnerable workforce in the country”—a workforce that is literally captive, unable to organize, complain, or leave.<sup>144</sup> The state, meanwhile, collects a sizable cut of the workers’ wages. The Alabama Department of Corrections, for example, takes 40% of incarcerated workers’ gross minimum wage pay, plus additional fees and costs.<sup>145</sup> Thus, in 2012, when incarcerated workers earned \$25 million processing chickens, they only received \$3.3 million.<sup>146</sup>

Some meatpacking companies have also contracted with rehabilitation programs. For example, Simmons Foods, a poultry processing company that supplies Walmart, KFC, and Popeyes, contracts with Christian Alcoholics & Addicts in Recovery (CAAIR), an Oklahoma-based rehabilitation program.<sup>147</sup> Defendants who are sent to CAAIR work full-time in Simmons’s processing plant without pay.<sup>148</sup> Those who complain or get hurt are often expelled from CAAIR and sent to prison.<sup>149</sup> As one graduate of CAAIR put it, “It’s a work camp. They know people are desperate to get out of jail, and they’ll do whatever they can do to stay out of prison.”<sup>150</sup> CAAIR also requires all program participants to sign a form stating that they are clients, not employees, and thus forfeit the right to workers’ compensation.<sup>151</sup> When someone inevitably gets hurt, CAAIR files for workers’ compensation and pockets the payouts; the injured person receives nothing.<sup>152</sup>

Though some of CAAIR’s former “clients” have challenged the program in court, nothing has come of their claims yet.<sup>153</sup> CAAIR and Simmons Foods continue to operate, just as states and meatpacking companies continue to profit off incarcerated labor.<sup>154</sup> Both types of programs are likely protected by the Thirteenth Amendment’s Punishment Clause, which permits involuntary servitude “as a punishment for crime whereof the party shall have been duly convicted.”<sup>155</sup>

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<sup>144</sup> *Id.*

<sup>145</sup> Neveen Hammad, *Shackled to Economic Appeal: How Prison Labor Facilitates Modern Slavery While Perpetuating Poverty in Black Communities*, 26 VA. J. SOC. POL’Y & L. 65, 85 (2019).

<sup>146</sup> *Id.*

<sup>147</sup> Amy Julia Harris & Soshana Walter, *They thought they were going to rehab. They ended up in chicken plants*, REVEAL (Oct. 4, 2017), <https://revealnews.org/article/they-thought-they-were-going-to-rehab-they-ended-up-in-chicken-plants>.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*; see also Noah D. Zatz, *Get to Work or Go to Jail: State Violence and the Racialized Production of Precarious Work*, 45 LAW & SOC. INQUIRY 304, 327 (2020).

<sup>152</sup> Harris & Walter, *supra* note 147.

<sup>153</sup> Copeland v. C.A.A.I.R., Inc., No. 17-CV-564-TCK-JFJ, 2020 WL 7265847, at \*9 (N.D. Okla. Dec. 10, 2020), *rev’d and remanded sub nom.* Copeland v. C.A.A.I.R., No. 21-5024, 2023 WL 3166345 (10th Cir. May 1, 2023).

<sup>154</sup> See *Welcome to CAAIR*, CAAIR, <https://caair.org>.

<sup>155</sup> U.S. CONST. amend. XIII. *But see* Harris & Walter, *supra* note 147 (noting that some rehabilitation programs may not pass muster under the Thirteenth Amendment because many defendants sent to programs like CAAIR have not yet been convicted of crimes).

### III. Analysis

Criminal law structures the animal industry in two important ways: first, it deters activists from holding animal enterprises accountable; and second, it enables animal enterprises to exploit workers and animals. Criminal law thus operates as both shield and sword for the animal industry. For both functions, it is essential that it is *criminal* law protecting the animal industry. Criminal law reflects “the moral condemnation of the community.”<sup>156</sup> Civil statutes may deter, inflict hardship, or even punish, but they do not give voice to the moral opprobrium of the community in the way that criminal statutes do.<sup>157</sup> Because criminal law condemns, criminal statutes allow the animal industry to brand activists and workers as criminals—or even terrorists. They give the animal industry a rhetorical edge in the court of public opinion, which allows the industry to quash or marginalize calls for accountability.

Each of the anti-activist laws discussed in Part I originated with important victories for transparency and accountability. The AETA came in the wake of massive protests against animal-abusing labs, ag-gag statutes responded to successful undercover investigations, and the modification of ordinary theft laws was passed in direct response to a high-profile open rescue. As a mountain of legal scholarship has indicated, much of this legislation is constitutionally dubious.<sup>158</sup> But a narrow focus on the constitutionality of particular statutes or provisions risks missing the bigger picture. The goal of all of these anti-activist laws is to deter activism—and thereby to avoid public scrutiny. Perhaps for this reason, the animal industry has so often sought *criminal* protections. If the industry were protected only by civil liability, then a well-funded animal organization could test dubious statutes and simply pay damages if they lose in court. But when *criminal* laws target activism, the chill is deeper and wider. Testing a criminal law requires putting one’s freedom on the line.

Likewise, anti-labor laws shield the animal industry by creating a captive workforce. Undocumented immigrants are always at risk of deportation, and justice-involved workers are always at risk of being sent to prison. In this way, anti-labor laws achieve the same concealment ends as anti-activist laws: precarious workers are especially unlikely to become whistleblowers. Indeed, the state provides more than just labor discipline. It also engages in an ideological project, constructing workers as racialized, criminal “others” who threaten American workers and American industries.

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<sup>156</sup> United States v. Bass, 404 U.S. 336, 348 (1971).

<sup>157</sup> See Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 207 (1996).

<sup>158</sup> See, e.g., Jessalee Landfried, *Bound & Gagged: Potential First Amendment Challenges to "Ag-Gag" Laws*, 23 DUKE ENVTL. L. & POL’Y F. 377, 380-91 (2013); Samantha Darnell, *The Chilling Effect of Ag-Gag Laws on Unexpected Parties & the Free Market*, 33 NOTRE DAME J.L. ETHICS & PUB. POL’Y 453, 458-63 (2019); Meredith Kaufman, *The Clash of Agricultural Exceptionalism and the First Amendment: A Discussion of Kansas’ Ag-Gag Law*, 15 J. FOOD L. & POL’Y 49, 54 (2019); Andrew N. Ireland Moore, *Caging Animal Advocates’ Political Freedoms: The Unconstitutionality of the Animal and Ecological Terrorism Act*, 11 ANIMAL L. 255, 270-74 (2005); Oscar A. Morales Lugo & Isabelle C. Oria Calaf, “Don’t Shoot the Messenger!” *First Amendment Implications of the Animal Enterprise Terrorism Act*, 42 REV. JUR. U.I.P.R. 407, 410 (2008); Dane E. Johnson, *Cages, Clinics, and Consequences: The Chilling Problems of Controlling Special-Interest Extremism*, 86 OR. L. REV. 249, 269-92 (2007); Odette J. Wilkens, *The Animal Enterprise Terrorism Act: An Unjust Law and the Case for Repeal*, 54 S. TEX. L. REV. 535, 543-77 (2013).

The labor playbook for the meatpacking industry over the past forty years has been as simple as it has been nefarious. The industry has consistently sought out more vulnerable and discreditable workers. Case Farms, for example, once hired poor domestic workers, most of whom were white, rural American citizens.<sup>159</sup> From the 1980s onward, it began preying on undocumented workers, routinely using immigration status to fire those who caused trouble.<sup>160</sup> Recently, the company has turned to an even more vulnerable labor pool: incarcerated people from the local prison.<sup>161</sup> By creating a vulnerable and exploitable workforce, criminal law allows meatpacking companies like Case Farms to wield state violence against defiant workers.

Importantly, criminal law regulates in only one direction. It constrains animal advocates and workers, but it does not meaningfully constrain the animal industry itself. The Clean Water Act (CWA), which ostensibly ought to govern large factory farms, makes it a crime to “knowingly” violate its terms.<sup>162</sup> But most animal farming operations are exempt from the CWA,<sup>163</sup> and the minority of concentrated animal feeding operations that are subject to it benefit from lax enforcement.<sup>164</sup> Indeed, quantitative research shows that only the most flagrant and repeated violations of the CWA result in prosecution, and even then the consequences for environmental crimes tend to be more lenient than for other crimes.<sup>165</sup> Likewise, anti-cruelty statutes are notoriously under-enforced against animal-exploiting industries. No federal statute regulates the treatment of animals while they are on the farm,<sup>166</sup> and most states exempt farms from their anti-cruelty codes altogether.<sup>167</sup> The industry also enjoys effective exemptions from prosecution, as animal cruelty prosecutions against farms are virtually unheard of.<sup>168</sup> As Nicholas Kristof put it: “Abuse one animal, and you can be charged with a felony; abuse a million, and you have a business model.”<sup>169</sup>

In summary, the animal industry is marked by an asymmetry in criminal liability. Activists and workers must contend with comprehensive and punitive criminal prohibitions, while their wealthier, more powerful corporate adversaries face little *de jure* criminal liability and virtually no *de facto* criminal liability. In this way, the criminal law effectively protects animal agriculture from meaningful scrutiny and promotes the exploitation of animals and workers.

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<sup>159</sup> Grabell, *supra* note 109.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> Mary Hofmann, *Criminal Liability in Environmental Statutes: A Comparative Analysis of the Interpretations of "Knowingly" in the Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act*, 52 U. TOL. L. REV. 467, 467–68 (2021).

<sup>163</sup> Margot J. Pollans, *Regulating Farming: Balancing Food Safety and Environmental Protection in A Cooperative Governance Regime*, 50 WAKE FOREST L. REV. 399, 409–10 (2015).

<sup>164</sup> Carol Clayton et. al., *Minimizing Risk Under the Clean Water Act*, 36 ENERGY L.J. 69, 84 (2015).

<sup>165</sup> See David M. Uhlmann, *Prosecutorial Discretion and Environmental Crime Redux: Charging Trends, Aggravating Factors, and Individual Outcome Data for 2005-2014*, 8 MICH. J. ENVTL. & ADMIN. L. 297, 302, 357–58 (2019).

<sup>166</sup> Sonia Weil, *Big-Ag Exceptionalism: Ending the Special Protection of the Agricultural Industry*, 10 DREXEL L. REV. 183, 213 (2017).

<sup>167</sup> Mary Maerz, *Corporate Cruelty: Holding Factory Farms Accountable for Animal Cruelty Crimes to Encourage Systemic Reform*, 16 ANIMAL & NAT. RESOURCE L. REV. 137, 145 (2020).

<sup>168</sup> David N. Cassuto & Cayleigh Eckhardt, *Don't Be Cruel (Anymore): A Look at the Animal Cruelty Regimes of the United States and Brazil with A Call for A New Animal Welfare Agency*, 43 B.C. ENVTL. AFF. L. REV. 1, 13 (2016).

<sup>169</sup> Kristof, *supra* note 1.

## Conclusion

Criminal law structures animal agriculture. It shields the industry from accountability and facilitates its exploitation of workers and animals. Notably, criminal law is public law; it expresses the moral condemnation of the community. The asymmetry in criminal liability thus reveals something about our moral economy. In effect, the state constructs the animal industry as vulnerable and worthy of heightened protection. And it simultaneously constructs activists and workers as potentially criminal, even terroristic. In other words, criminal law shapes not only the political economy of animal agriculture, but also the ideology that obscures this political economy.

While this paper has not offered solutions to the imbalance in criminal liability, it does reveal potential avenues for activists seeking to build a united front against the animal industry. Animal advocates could forge alliances with labor, immigrant, and environmental justice groups. Because criminal law systematically advantages the industry at the expense of each of these groups, the opportunities for coalition-building are enormous. Perhaps a broad coalition could expose how the law is routinely stacked in favor of animal agriculture and how this systematic imbalance hurts everyone, from animals to workers to the public at large.



## **2023 Student Writing Competition 3<sup>rd</sup> Place Finisher:**

### **“Ruff” Justice in Pet Custody Disputes: Should a Best Interests of the Pet Standard be “Adopted?”**

By: Amelia Gallay  
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#### **I. INTRODUCTION**

Many couples adopt or care for pets together and many couples break up. When people fail to come to an agreement themselves about who should “get” the family dog or cat they, at increasing rates, enlist the courts’ assistance in settling the matter.<sup>1</sup>

Ensuring the fair and just adjudication of pet custody disputes between ex-spouses or ex-partners may seem relatively unimportant to some legal scholars, attorneys and judges. When confronted with such a proceeding, Cook County Circuit Judge Porcellino had these choice words for the parties involved: “Go out and buy another dog. . . . [Do not] take up a judge’s time when there are children to be cared for and support to be enforced, don’t ever bring a stupid issue like that before me.”<sup>2</sup>

Judge Porcellino’s admonishment, while harsh, illuminates several key issues which bear discussion. Judge Porcellino’s statement is in keeping with the traditional legal approach to pet custody disputes: the strict property model.<sup>3</sup> Under this model, the courts consider pets personal property to be dealt with using traditional principles of equitable distribution during divorce cases and other principles of property and contract law during the separation of unmarried couples. This approach is predicated on a patently false belief that companion animals are, like a dining room table or a Toyota Corolla, worth no more than their fair market value. This perception underpins Judge Porcellino’s advice that the party divested of their pet simply replace them with another. If the law sees pets as mere household objects, it follows to conceive of them as relatively interchangeable. Finally, Judge Porcellino clearly sees adjudication of pet custody disputes as beneath the court, offensive to judicial economy, and still worse, taking time away from more meritorious matters: the determination of custody and support of human children.

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<sup>1</sup> Nicole Pallotta et al., *California’s New “Pet Custody” Law Differentiates Companion Animals from Other Types of Property*, ALDF Blog (Nov. 5, 2018), <https://aldf.org/article/californias-new-pet-custody-law-differentiates-companion-animals-from-other-types-of-property/>.

<sup>2</sup> Briggs Adams, *Judge Blends Street Smarts, Law and Compassion in Divorce Call*, 20 CHI. LAW. 4 (Mar 1997).

<sup>3</sup> Eric Kotloff, *All Dogs Go To Heaven... Or Divorce Court: New Jersey Unleashes a Subjective Value Consideration to Resolve Pet Custody Litigation in Houseman v. Dare*, 55 Vill. L. Rev. 447, 457 (2010).

While the strict property model has largely fallen into disfavor both on and off the bench,<sup>4</sup> it still reflects the current pet custody approach in most states and there is much to be done to properly align courts' treatment of companion animals with the realities of pet ownership in America. First off, there have been striking upward trends in pet ownership in this country. Around the turn of the century, between 1996 and 2006, pet ownership increased nearly 19%.<sup>5</sup> As of 2023, 66% of U.S. households own a pet.<sup>6</sup> The increase in pet ownership may be due to couples having fewer children, and having children later in life.<sup>7</sup> Childless couples may assign more emotional significance to their pets, and likely have more time, money, and energy to spend on a furry friend.

Not only are more people taking pets into their homes, the way they relate to their pets has changed as well. Today, 85% of dog owners and 76% of cat owners consider their pets to be members of the family.<sup>8</sup> Americans are also keenly aware of the reciprocal relationship pet owners share with their pets; 60% of people think pet owners lead more satisfying lives than non-pet owners.<sup>9</sup> Judges also recognize and acknowledge how this reciprocity is incompatible with the pets as property framework: "Pets may be distinguished from other chattel by the mutual relationship: Pet owners love their pets and their pets love them back."<sup>10</sup>

Lastly, companion animals may be closer to human children in cognitive ability, relational capacity, and overall sentience than they have historically been given credit for, and certainly beyond what the law conceptualizes in understanding pets as property. Dogs, for example, possess mental abilities close to a two and a half year old human child and the "average dog can learn 165 words, including signals."<sup>11</sup> Dogs and humans also have "similar sensitivities to vocal cues of emotional valence"<sup>12</sup> and there is much research on the role of oxytocin in developing pet-person emotional bonds.<sup>13</sup> While of course there are important and irrefutable differences between pets and children, the ability to communicate for practical and emotional purposes facilitates the creation of real interpersonal bonds between pets and their people and speaks to the legitimacy of a relationship not currently afforded appropriate legal weight.

The combination of growing pet ownership, heightened pet significance, and the impact of new scientific findings relating to the intellectual and emotional capacities of companion animals all underscore the importance of finding better, more workable, and fairer standards moving forward.

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<sup>4</sup> *Id.* at 457.

<sup>5</sup> Ann H. Britton, *Bones of Contention: Custody of Family Pets*, 20 J. Am. Acad. Matrim. Law. 10.

<sup>6</sup> American Pet Products Association National Pet Owners Survey (2023-2024), [https://www.americanpetproducts.org/pubs\\_survey.asp](https://www.americanpetproducts.org/pubs_survey.asp).

<sup>7</sup> Cara Tabachnick, *U.S. birth rates drop as women wait to have babies*, CBS NEWS (Jan. 12 2023, 8:08 PM) <https://www.cbsnews.com/news/u-s-birth-rate-decline-national-center-for-health-statistics-report/>.

<sup>8</sup> American Veterinary Medical Association, *Pet Ownership and Demographics Sourcebook* (2018); American Veterinary Medical Association, *Pet Ownership and Demographics Sourcebook* (2022)

<sup>9</sup> Frank Newport et al., *Americans and Their Pets*, GALLUP (Dec. 21, 2006), <https://news.gallup.com/poll/25969/americans-their-pets.aspx>.

<sup>10</sup> *Goodby v. Vetpharm, Inc.*, 182 Vt. 648 (Vt. 2007).

<sup>11</sup> American Pet Products Association National Pet Owners Survey (2023-2024), [https://www.americanpetproducts.org/pubs\\_survey.asp](https://www.americanpetproducts.org/pubs_survey.asp).

<sup>12</sup> Attila Andics et al., *Voice-Sensitive Regions in the Dog and Human Brain Are Revealed by Comparative fMRI*, 24 *Current Biology* 574 (2014).

<sup>13</sup> Maria Petersson et al., *Oxytocin and Cortisol Levels in Dog Owners and Their Dogs Are Associated with Behavioral Patterns: An Exploratory Study*, *Frontiers in Psychology* (Oct. 13, 2017), <https://www.frontiersin.org/articles/10.3389/fpsyg.2017.01796/full>.

This is a topical and pressing issue. As mentioned earlier, pet custody cases are being brought before the court more and more often. In 2014, the American Academy of Matrimonial Lawyers found that more than 25% of respondents had seen an increase in such cases between 2009-2014, and 22% remarked that “courts are more frequently allowing these cases.”<sup>14</sup> While developing better guidelines for the judges who make these difficult decisions will undoubtedly benefit pet owners and their companion animals, moving away from the “pets as property” framework may also serve to move the needle towards more just treatment of animals in other areas of the law.

This paper will first cover the historical and contemporary legal treatment of pets during the dissolution of marital and non-marital relationships. After reviewing relevant case law and state statutes that provide guidance to judges tasked with deciding pet custody disputes, this paper will advocate for the adoption of a legal standard that prioritizes the best interests of the pet in determining which party is awarded custody. Finally, this paper will interrogate the counterarguments against the “best interests of the pet” standard and discuss potential positive and negative implications of the standard were it to be implemented.

## II. HISTORICAL AND CONTEMPORARY APPROACHES TO PET CUSTODY DISPUTES

### A. Relevant Case Law

As discussed briefly above, the historical approach to marital pet custody disputes was to treat companion animals as property subject to equitable distribution. However, even in cases where judges have been bound by such a standard, they sometimes indicate explicitly or implicitly their moral or emotional discomfort with the status quo, perhaps even calling on the legislature or higher courts to rectify the unjust and inaccurate framework they have been called on to implement. For example, the court in *Akers v. Sellers* referred to the monetary valuation of the parties’ Boston bull terrier as a “fictitious standard of value” and described the use of legal title as determinative of ownership as “brutal and unfeeling.”<sup>15</sup> In that 1944 case, the dog was impliedly awarded to the wife as incident to her keeping the house post-divorce. Even though she failed to file an answer to her ex-husband’s appeal (seeking possession of the dog) or otherwise indicate any interest in the case, the judgment stood and she maintained possession of the dog. It is clear from the court’s language and tone that it wished the husband had legal recourse, but that none was provided under the law at the time.

In *Bennett v. Bennett*, a Florida District Court reversed a trial court order awarding the former wife visitation with the parties’ dog, Roddy. While the court recognized that the lower court was “endeavoring to reach a fair solution under difficult circumstances” it found that the trial judge “lacked authority to order visitation with personal property.”<sup>16</sup> Here, the court was more comfortable with its ruling than the court in *Akers*, citing judicial economy concerns which echo Judge Porcellino’s remarks, although perhaps more diplomatically: “Our courts are overwhelmed with the supervision of custody, visitation, and support matters relating to the protection of our children. We cannot undertake the same responsibility to animals.”<sup>17</sup>

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<sup>14</sup> Nicole Pallotta et al., *California’s New “Pet Custody” Law Differentiates Companion Animals from Other Types of Property*, ALDF Blog (Nov. 5, 2018), <https://aldf.org/article/californias-new-pet-custody-law-differentiates-companion-animals-from-other-types-of-property>.

<sup>15</sup> *Akers v. Sellers*, 114 Ind. App 660, 54 N.E.2d 779, 780 (1944).

<sup>16</sup> *Bennett v. Bennett*, 655 So. 2d 109, 110, 111 (Fla. Dist. Ct. App. 1st Dist. 1995).

<sup>17</sup> *Id.* at 110.

Beginning in the late 1990s and early 2000s, some courts began to deviate from the strict property model. However, the shift has been gradual, with few courts endorsing an approach that takes into account the best interest of the pet. In 1997, the Vermont Supreme Court held that pets are somewhere in between a legal person and a piece of property.<sup>18</sup> In *Houseman v. Dare*, the New Jersey Superior Court, Appeals Division reversed a trial court ruling that “pets are personal property that lack the unique value essential to an award of specific performance” as erroneous as a matter of law.<sup>19</sup> The *Houseman* court considered and rejected a “best interests of the pet” standard, instead instructing courts to consider the interests of the parties asserting competing claims and the public policies implicated by an award of possession.<sup>20</sup>

While some legal scholars herald the *Houseman* decision as providing a “straightforward, logical approach” to resolving pet custody disputes,<sup>21</sup> the court’s analysis and holding leave something to be desired. To its credit, the court did recognize that pets have “special subjective value” to their owners and that the parties’ stipulation to the value of the dog did not mean that money alone was an adequate remedy to being deprived of the dog’s company.<sup>22</sup> However, the court quickly concluded with very little discussion that, aside from cases of abuse and neglect, there are no “judicially discoverable and manageable standards for resolving questions of possession from the perspective of a pet.”<sup>23</sup>

In *Travis v. Murray*, the New York Supreme Court moved still further away from the strict property model than the *Houseman* court, developing a holistic set of factors to be considered in pet custody awards.<sup>24</sup> Though the court did voice concerns regarding the unworkability of a “best interest of the pet standard” (are you going to look for a “tail wag” to see which party the dog shares a stronger bond with?) the “best interest of the pet standard” was effectively incorporated into the court’s ultimate holding, which puts forth that judges consider “the best interests of *all concerned*.”<sup>25</sup> The court remanded the case, and suggested several factors as being relevant to the ultimate determination of who should be awarded custody of Joey, the long-haired dachshund. In addition to why each party would benefit from having the dog in her life, the lower court was instructed to consider who bore the major responsibility for meeting the dog’s needs (for example, who took care of meals, walks, grooming, and vet care) and who spent more quality time with the dog.<sup>26</sup> In the interest of efficiency, the court provided that judges should spend no longer than a day on pet custody proceedings. Additionally, the court mandated that orders be final, absent appeal, and must award possession of the pet to one spouse, not both. *Travis v. Murray* was effectively overruled in when the New York State Legislature modified its Domestic Relations Code to require that matrimonial courts consider pet’s best interest when determining possession in a divorce or separation proceeding (effective October 2021).<sup>27</sup>

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<sup>18</sup> *Morgan v. Kroupe*, 167 Vt. 99, 103 (1997).

<sup>19</sup> *Houseman v. Dare*, 405 N.J. Super. 538, 540 (Super. Ct. App. Div. 2009).

<sup>20</sup> *Id.* at 545.

<sup>21</sup> Eric Kotloff, *All Dogs Go To Heaven... Or Divorce Court: New Jersey Unleashes a Subjective Value Consideration to Resolve Pet Custody Litigation in Houseman v. Dare*, 55 Vill. L. Rev. 447, 467 (2010).

<sup>22</sup> *Houseman v. Dare*, 405 N.J. Super. 538, 546 (Super. Ct. App. Div. 2009).

<sup>23</sup> *Id.* at 545.

<sup>24</sup> *Travis v. Murray*, 42 Misc. 3d 447, 460 (N.Y. Sup. Ct. 2013).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> N.Y. CLS Dom. Rel. § 236(b)(5)(d)(15) (2021).

In *L.B. v. C.C.B.*, the Kings County Supreme Court applied the best interest of the pet standard, in keeping with New York’s recent legislative mandate.<sup>28</sup> In considering who should retain possession of the former couple’s two rottweilers, Kane and Cleo, the court reviewed evidence and testimony which established that defendant C.C.B was primarily responsible for the caretaking and health maintenance of the dogs post-separation. Additionally, the court remarked that while L.B. was “nonchalant” regarding what should happen to the dogs, C.C.B was “impassioned and heartfelt” referring to her dogs as her “‘family’ and ‘emotional support.’”<sup>29</sup> Unsurprisingly, the court awarded sole custody of Kane and Cleo to C.C.B.<sup>30</sup> This case shows the interrelated nature of the best interests of the pets and those of the human litigants; because C.C.B was more emotional and thoughtful in describing her connection to Kane and Cleo, the court believed her to be the better caretaker.

Of all the published cases on point, only *Placey v. Placey* expressly considered the best interests of the pet in making its custody award without prior statutory direction.<sup>31</sup> The court relied on an Alabama animal protection statute in its decision,<sup>32</sup> which illustrates how different areas of animal law can inform each other, and how improvement of animals’ legal status in one area can help further protect and advance the rights of other animals in other parts of the law.

As family law cases are often unreported for the protection of the parties’ privacy, it is difficult to gain a full understanding of the breadth and variance of trial court adjudication of pet custody disputes. However, the above cases paint an adequate picture of how the discussion has evolved over time and the various considerations courts have weighed in determining the appropriate standard.

## **B. Changes to Pet Custody Guidelines via State Statute**

Currently, five states have passed statutory amendments to include instructive language on how best to evaluate competing claims for pet custody: Alaska,<sup>33</sup> Illinois,<sup>34</sup> California,<sup>35</sup> New Hampshire,<sup>36</sup> and, as discussed above, New York.<sup>37</sup> The changes are all relatively recent, with the California amendment effective as of 2019 and New Hampshire’s amendment going into effect this year, 2023.

The states have taken two different approaches to implementing “best interest of the pet” guidance: directive and permissive. New York, Illinois and New Hampshire have adopted directive statutory language, requiring judges to consider the companion animal’s interests in making pet custody determinations. In contrast, Alaska and California have adopted more moderate, permissive language. California’s Family Code § 2605 “empowers” judges to utilize their discretion in considering “the care of the pet animal.”<sup>38</sup> The original text of California’s amendment was worded

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<sup>28</sup> *L.B. v. C.C.B.*, 77 Misc. 3d 429, 435 (2022).

<sup>29</sup> *Id.* at 438.

<sup>30</sup> *Id.* at 439.

<sup>31</sup> *Placey v. Placey*, 51 So. 3d 374, 379 (Ala. Ct. Civ. App. 2010).

<sup>32</sup> *Id.*

<sup>33</sup> Alaska Div. Code § 25.24.160(a)(5) (2007).

<sup>34</sup> Ill. Code Sec. § 503 (2017).

<sup>35</sup> Cal. Fam. Code § 2605 (2019).

<sup>36</sup> N.H. Rev. Stat. § 458:16-a (2023).

<sup>37</sup> N.Y. CLS Dom. Rel. § 236(b)(5)(d)(15) (2021).

<sup>38</sup> Nicole Pallotta et al., *California’s New “Pet Custody” Law Differentiates Companion Animals from Other Types of Property*, ALDF Blog (Nov. 5, 2018), <https://aldf.org/article/californias-new-pet-custody-law-differentiates-companion-animals-from-other-types-of-property>.

more strongly to require courts to take the animal's well-being, rather than just their "care," into account, and it is unclear why the bill did not pass in its original form.<sup>39</sup> Alaska's statute does use stronger wording, referring to the "the well-being of the animal," but still leaves it up to judges' discretion in deciding whether or not to consider that factor.

While the above states have committed to a "best interests of the pet standard" to varying degrees, New York, Illinois and New Hampshire have decided that they do have the judicial resources and wherewithal to mandate such a standard, and that the standard is best suited to ensure just resolution of pet custody conflicts.

### **III. EVALUATING THE "BEST INTEREST OF THE PET" STANDARD**

#### **A. Factors courts should consider in determining the pet's best interest**

Animal rights activists, most notably the Animal Legal Defense Fund (ALDF), staunchly advocate for a "best interest of the pet" standard. The ALDF has been filing amicus briefs in favor of the standard in custody cases for the past two decades, most notably in the *Houseman v. Dare* case.<sup>40</sup> The ALDF proposes the following set of factors to consider when evaluating which placement would be in the pet's best interest:

[h]ow might moving the dog impact his well-being?; [w]hich home is likely to provide the best living experience for the dog?; [h]ave both parties shown a commitment to the dog's health and well-being, including regular veterinary appointments, high quality food, and adequate exercise?; and [d]oes either home have other residents (human or nonhuman) who might scare or intimidate the dog, or alternatively, provide a positive impact?<sup>41</sup>

The majority of the above factors, some very similar to those discussed in *Travis v. Murray*, can be determined without attempting the impossible task of reading the pet's mind. The "best interest of the pet" standard also implicitly considers each party's connection to the pet when it comes to care of and quality time spent with the animal. While the fact-finding required to answer the ALDF's proposed questions will certainly take time, they can be addressed via the testimony of the parties and other witnesses and by entering into evidence any documentation regarding vet appointments and other costs incurred in providing for the pet's wellbeing. As in *Travis v. Murray*, limits can be placed on the amount of time parties can spend arguing the issues to protect against protracted litigation and preserve judicial economy.

#### **B. Is the "best interest of the pet" standard preferable to the "best interests of all concerned" standard provided in *Travis v. Murray*?**

The purest form of the "best interest of the pet" standard advocated by animal rights activists appears to be functionally equivalent to the "best interest of the child" standard used during child

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<sup>39</sup> *Id.*

<sup>40</sup> Nicole Pallotta et al., *California's New "Pet Custody" Law Differentiates Companion Animals from Other Types of Property*, ALDF Blog (Nov. 5, 2018), <https://aldf.org/article/californias-new-pet-custody-law-differentiates-companion-animals-from-other-types-of-property>.

<sup>41</sup> Eric Kotloff, *All Dogs Go To Heaven... Or Divorce Court: New Jersey Unleashes a Subjective Value Consideration to Resolve Pet Custody Litigation in Houseman v. Dare*, 55 Vill. L. Rev. 447, 458 n.55 (2010).

custody proceedings in family court.<sup>42</sup> While the best interest of the child standard does take into account “the wishes of the child’s parent or parents as to [their] custody” and “the mental and physical health of all individuals involved,” the wishes and wellbeing of the child remain of paramount importance to a judge’s decision.<sup>43</sup>

In deciding which standard is preferable, the ultimate question is whether the interests of the pet should be prioritized over the interests of the parties or if they should all be afforded relatively equal weight. It may be that both standards would yield practically similar results. As mentioned in section II, the guidance in *Travis v. Murray* gives serious consideration to who would take better care of the animal while the court’s analysis in *L.B. v. C.C.B.* takes a party’s love for the animal to count in favor of placement with them being in the pet’s best interest. However, under a “best interests of all concerned” regime, the interests of the pets run the risk of being deprioritized by judges inured to the pets as property framework or by judges skeptical that a pet’s interests are worthy of being incorporated into judicial considerations. It is telling that the California legislature was unable to pass a statute mandating consideration of the pet’s interests. Evidently, resistance to the concept is strong even in more progressive spaces.

Therefore, as it is more likely that the pet’s interests would be lost in a “best interest of all concerned” standard than the parties’ interests would be lost in a “best interest of the pet” standard, the latter is better suited to ensure just results. The “best interests of the pet” standard would also provide a stronger basis for attorneys and activists to challenge the legal status of animals in other areas of the law and to further advance the equitable and compassionate treatment of animals more generally.

### **C. Should a “best interest of the pet” standard allow for joint custody awards?**

One of the thorniest issues to grapple with when advocating for a “best interests of the pet” standard is whether judges should grant joint custody of the companion animal. Is awarding joint custody of a pet ever in the pet’s best interests? Is it ever in the parties’ best interests? Judicial opinions are “littered” with concerns about ex-partners fighting and the likely inability of exes to comply with a visitation schedule or to devise an equitable visitation agreement amongst themselves.<sup>44</sup> Indeed, while some couples do manage to separate amicably, the fact that the parties in these disputes are looking for the court to settle the issue indicates that they are unable to resolve it themselves. Joint custody awards also make it more difficult for courts to imbue orders with a sense of finality, as changed circumstances or noncompliance may bring the parties back to court seeking new orders.

Nonetheless, there are strong arguments in favor of granting joint custody of companion animals. It may be that the pet enjoys a meaningful and loving bond with both parties, and that both

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<sup>42</sup> Nicole Pallotta et al., *California’s New “Pet Custody” Law Differentiates Companion Animals from Other Types of Property*, ALDF Blog (Nov. 5, 2018), <https://aldf.org/article/californias-new-pet-custody-law-differentiates-companion-animals-from-other-types-of-property>.

<sup>43</sup> UMDA § 402.

<sup>44</sup> See *Bennett v. Bennett*, 655 So. 2d 109, 110 (1995) (the court predicted “continued squabbling” were the trial court’s joint visitation order to stand); See also *Travis v. Murray*, 42 Misc. 3d 447, 460 (2013) (proscribing joint custody out of fear that such orders would serve only as a “invitation for endless post-divorce litigation...keeping the parties needlessly tied to one another and to the court”).

parties sincerely love and care for their pet and would like to be able to stay in the pet's life. Ideally, the desire to enjoy time with the pet would dissuade people from failing to comply with the order. The Illinois,<sup>45</sup> New Hampshire,<sup>46</sup> and California<sup>47</sup> statutes all allow for the possibility of a joint custody order, which indicates that the states believe that such orders will be practicable and worthwhile for all concerned. There is a dearth of research and scholarship on how viable joint pet custody orders end up being, which is unsurprising given how recently these statutes were enacted and how rarely courts publish family law cases.

Regardless, there is much to learn from family courts on the implementation and implications of joint custody orders. Joint child custody legislation, ushered in by a father's rights movement in the late 1970s, has been passed in virtually every state.<sup>48</sup> Some states have a "presumption" in favor of joint custody, some have a "preference," but the majority of states include joint custody as an "option in the best interests determination."<sup>49</sup> While most would agree that a child should have both parents in their life whenever possible, a joint custody order for children can be highly problematic when the parties struggle to communicate or cooperate with each other or follow the prescribed visitation schedule. In such situations, joint custody may not actually be in the child's best interest, especially in cases where Intimate Partner Violence (IPV) has occurred.

To that point, there is a very strong argument against joint pet custody in cases where one party has been found to have abused the other. Not only is there a documented connection between violence against animals and general violence against people, the IPV-specific correlation is even stronger.<sup>50</sup> Further, a joint custody order would provide abusive individuals with opportunities to further harm and harass their ex-partner during custody exchanges. The "best interest of pet" standard could avoid conflict with IPV concerns if courts could be trusted to identify and understand intimate partner violence. Sadly, most domestic violence law practitioners and scholars that investigate how well court professionals and judges understand domestic violence would say "don't bet on it."<sup>51</sup> Even in jurisdictions that have rebuttable presumptions against joint custody when one parent has been found to have committed domestic violence, judges often fail to apply the presumption and abusers end up with sole or joint custody regardless.<sup>52</sup>

How family courts perceive and address IPV provides insight into how a "best interests of the pet" standard should be crafted. To protect against situations where bias would lead a judge to order sole or joint custody to an abusive party, an express prohibition against joint or sole custody when one party has been found to have committed IPV must be included. British Columbia, which recently incorporated "best interest of the pet" language into its Family Law Act, directs courts to

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<sup>45</sup> Ill. Code Sec. § 503 (2017).

<sup>46</sup> N.H. Rev. Stat. § 458:16-a (2023).

<sup>47</sup> Cal. Fam. Code § 2605 (2019).

<sup>48</sup> Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 Va. L. Rev. 79 (2016).

<sup>49</sup> Kelly D. Weisberg, *Modern Family Law: Cases and Materials* 694 (7th ed. 2020)

<sup>50</sup> *The Link Between Cruelty to Animals and Violence Towards Humans*, ALDF Blog (May 10, 2023), <https://aldf.org/article/the-link-between-cruelty-to-animals-and-violence-toward-humans-2/>.

<sup>51</sup> Daniel G. Saunders, *State Laws Related to Family Judges' and Custody Evaluators' Recommendations in Cases of Intimate Partner Violence: Final Summary Overview*, National Criminal Justice Reference Service (March 2017), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/state-laws-related-family-judges-and-custody-evaluators>.

<sup>52</sup> Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 Am. U. J. Gender Soc. Pol'y & L. 657, 662 (2003).



take into account “any history of family violence,” “the risk of family violence,” and “a spouse’s cruelty, or threat of cruelty, towards an animal.”<sup>53</sup> While British Columbia’s Family Law Act stops short of explicitly disallowing sole or joint custody orders in cases with IPV, their legislature clearly recognized the importance of protecting animals and survivors from those who have been found to have committed acts of abuse.

Hopefully, time and practitioner experience will shed light on the workability of joint pet custody orders in the states with statutes allowing for such orders. In the interim, this paper stops short of advocating for joint custody provisions and instead recommends that, in jurisdictions that allow for joint custody orders, judges and lawmakers ensure that abusive parties are not given sole or joint custody of the companion animals they once shared with the survivor.

#### **IV. ARGUMENTS AGAINST THE “BEST INTEREST OF THE PET” STANDARD AND POTENTIAL IMPLICATIONS**

Critics of the best interest of the pet standard argue that the standard would offend judicial economy, would be impossible to implement, and that the standard would dangerously challenge the status quo in animal law by elevating the legal status of companion animals. This section will address each argument in turn.

Many judicial opinions and law review articles considering changing pet custody standards share a common thread: if pet custody disputes are heard in family court with a best interest of the pet standard, valuable judicial resources will be misallocated, perhaps at the expense of human children. Even commentators who believe that pets should be afforded significantly more rights than they currently enjoy have serious reservations against spending too much of the court’s valuable time discussing which party is better suited to care for the animal long term. This concern should not be rejected out of hand. Devising policy changes to existing laws can often have unintended consequences for those navigating the courts and their ever-changing rules and practices. Any jurisdiction implementing such a change would likely be obligating themselves to spend more time and money to hear disputes they previously did not have the framework to properly address.

However, there is also reason to believe that a well-implemented best interest of the pet standard would not have such a dire effect on judicial economy. For starters, divorce court is already such a contentious arena. Spouses often litigate or attempt to litigate matters far pettier than what happens to their beloved companion animals (for example, who gets a particular rug or sofa during the distribution of marital property). Judges are expected to exercise control over the amount of time spent hearing each issue, and there is little reason to believe that deciding which party the family pet be awarded to should be treated any differently. Implementing a time-limit like the one set in *Travis v. Murray* is one way to protect against judicial overextension. Additionally, there are elements of child custody determinations that are clearly inappropriate to include in pet custody proceedings and making it clear what practices should not be carried over can also address judicial economy concerns. For instance, it would be inappropriate to allow parties to request order modifications based on

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<sup>53</sup> Amy M, *Pet Custody at Separation: 2023 Family Law Changes in British Columbia*, YLAW Blog (Apr. 19, 2023), <https://www.ylaw.ca/blog/pet-custody-at-separation-2023-family-law-changes-in-british-columbia/>.

changed circumstances as is the case with child custody orders. Additionally, contentious child custody disputes often involve court-appointed child custody evaluators. The routine involvement of such experts would be unsuitable in pet custody proceedings and would certainly lead to lengthier and more expensive litigation.

Another argument against the “best interest of the pet” standard is that it tasks judges with doing the impossible: reading a pet’s mind and determining what the pet would prefer. This argument carries notably less weight. The “best interest of the pet” standard includes numerous concrete and provable variables. It is true that parties may have conflicting answers to the questions of who typically fed the animal, who made sure the animal’s physical health was tended to via veterinary care and exercise, who spent more quality time with the animal, and so on. However, it has always been the responsibility of a fact finder, whether judge or jury, to sift through the available evidence and testimony and determine which party is more credible. In some ways, a joint custody award would provide relief in situations where both parties have demonstrated commitment and care for the pet to virtually indistinguishable degrees.

Finally, there are those who take issue with a “best interest of the pet” standard based on worries that the standard would problematically raise the legal status of companion animals and have negative implications for other legal areas. In his piece “All Dogs Go to Heaven...Or Divorce Court,” Eric Kotloff discusses the positive reception the *Houseman v. Dare* decision enjoyed from veterinary organizations.<sup>54</sup> According to Kotloff, such organizations were relieved that the court declined to “elevate animals’ legal status to the point that vets would be exposed to increased liability for tort claims.”<sup>55</sup> Kotloff posits that increased liability would negatively impact access to quality veterinary care, with vets practicing more defensively in order to avoid being slapped with damages and insurance companies charging higher rates to providers, which would then be passed along to consumers.<sup>56</sup>

In addition to potentially allowing plaintiffs to recover non-economic damages in negligence claims against veterinary practices, requiring courts to take into consideration the best interests of companion animals may lead directly or indirectly to changes in the standards of treatment for non-companion animals. Generally, maintenance of the legal status quo is often motivated by powerful private interests, but there is very little in the judicial opinions or law review articles on this topic that explicitly discuss how treating companion animals as more than property would challenge and disrupt other areas of animal law (most notably relating to agribusiness and scientific research). If the courts were required to conceive of companion animals as creatures with their own needs and recognize their intrinsic value and sentience in pet custody disputes, there is a chance that a “best interest of the animal” consideration could bleed into other areas of the law.

While this outcome would be welcome from the standpoint of animal rights activists, it is also unlikely, at least in the short-term. Animal law is already, in many ways, an incongruous hodgepodge of conflicting laws and regulations.<sup>57</sup> What protections we afford animals depends on

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<sup>54</sup> Eric Kotloff, *All Dogs Go To Heaven... Or Divorce Court: New Jersey Unleashes a Subjective Value Consideration to Resolve Pet Custody Litigation in Houseman v. Dare*, 55 Vill. L. Rev. 447, 472 (2010).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Hope Bigda-Peyton, *David Wolfson Speaks About Legal Strategies to Protect Farm Animals*, YLS Today (Oct. 22, 2019), <https://law.yale.edu/yls-today/news/david-wolfson-speaks-about-legal-strategies-protect-farm-animals>.

the perceived utility of the animal in question and how closely enmeshed the species is in people's daily lives or in commerce. Most Americans are quite used to compartmentalizing when it comes to which animals we adore and cherish and which we see as necessary casualties of human dietary preferences, the food industry, or scientific advancement. Still, the more we can codify the rights of animals, and the more cognitive dissonance is sown, the more likely universal standards for animal welfare will improve.

## **V. CONCLUSION**

In summary, when ex-partners are incapable of privately coming to an agreement regarding pet custody, the courts should utilize a standard which prioritizes the best interests of the companion animal while still taking into account each parties' interests. This framework should include prohibitions against awarding sole or joint custody to individuals found to have abused their ex-partner. Implementation of the "best interest of the pet" standard may be difficult at first, but the strict property model is not serving pets, their owners, or the interests of justice. Courts deserve common-sense and fair guidance on how to adjudicate such claims.

# 2023 Student Writing Competition 4<sup>th</sup> Place Finisher:

## With a History of Scandal will HISA be Horseracing's Saving Grace?

By: Delaney Hamill  
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“A horse gallops with his lungs, perseveres with his heart, and wins with his character.”<sup>1</sup>  
–Federico Tesio<sup>2</sup>

### I. Introduction

For more than five decades, scandal has plagued the horseracing industry in the United States.<sup>3</sup> Motivated by their sole desire to win, professionals administer performance enhancing drugs to racehorses<sup>4</sup> and push them to the brink.<sup>5</sup> After more than 4,000 racehorse fatalities between 2017 and 2021, the government has finally had enough of the tricks and the trades of these professionals.<sup>6</sup> The Federal Trade Commission<sup>7</sup> (“FTC”) has introduced the Horseracing Integrity and Safety Act (“HISA”).<sup>8</sup>

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<sup>1</sup> See Sarah A. Reid, *Horses as athletes: the road to success*, 12 *Animal Frontiers* 3 (2022) (quoting Federico Tesio).<sup>2</sup> John Berry, *Ribot: Tesio's Crowning Glory*, THOROUGHBRED DAILY NEWS (Feb. 27, 2022)

<https://www.thoroughbreddailynews.com/ribot-tesios-crowning-glory/> (explaining that Federico Tesio came to be one of the greatest owner and breeder of racehorses in history and was famously known as the only person to successfully operate in the breeding world).

<sup>3</sup> See Sara Kettler, *10 Famous Horse Racing Scandals*, HISTORY (Jun. 10, 2021)

<https://www.history.com/news/horse-racing-scandals-list> (reporting on various horseracing scandals).

<sup>4</sup> Press Release, U.S. Attorney's Office Southern District of New York, New York Racehorse Veterinarian and Standardbred Trainer Plead Guilty in Federal Doping Case (May. 11, 2022) (on file with author) (reporting veterinarian Louis Grasso and racehorse trainer Richard Banca together used their positions to acquire, distribute and administer prohibited performance enhancing drugs to their racehorses).

<sup>5</sup> See Miles Henry, *Are Racehorses Abused? The Cruel Facts of Horseracing*, HORSE RACING SENSE, <https://horseracingsense.com/are-racehorses-abused-facts/> (last visited Nov. 26, 2022) (stating that horses are commodities in the horse racing industry and their sole purpose is to win races. Some trainers even go too far in the pursuit of winning and abuse their horses).

<sup>6</sup> Jill Riepenhoff et al, *Betting on Change: Horseracing long plagued with scandals and equine fatalities*, INVESTIGATE TV (May. 9, 2022) <https://www.investigatetv.com/2022/05/09/betting-change-horseracing-has-long-been-plagued-with-scandals-equine-fatalities/>.

<sup>7</sup> See *About the FTC* FEDERAL TRADE COMMISSION <https://www.ftc.gov/about-ftc> (last visited Oct. 17, 2022) (the FTC's purpose is to protect consumers and competition by preventing “anticompetitive, deceptive, and unfair business practices through law enforcement, advocacy, and education without unduly burdening legitimate business activity”).

<sup>8</sup> See *Horseracing Integrity and Safety Act of 2021 Consolidated Appropriations Act*, FEDERAL TRADE COMMISSION <https://www.ftc.gov/legal-library/browse/statutes/horseracing-integrity-safety-act-2021-consolidated-appropriations-act> (last visited Dec. 3, 2022) (explaining that HISA is a private self-regulatory organization which must develop rules related to horseracing, including anti-doping, medication control and racetrack safety rules).

HISA was introduced to correct the years of doping scandals, unsafe conditions, and lack of uniformity that have run rampant through the horseracing industry.<sup>9</sup> HISA will use an arbitration fault system to sanction doping violators, thereby creating a cohesive protocol for the future of the sport.<sup>10</sup>

Since its invention, horseracing<sup>11</sup> has undergone virtually no change.<sup>12</sup> The first hint of horseracing took place during the Olympic games of Greece between 700 to 40 B.C.<sup>13</sup> However, during this time, horseracing occurred in the form of chariot racing and had few mounted riders.<sup>14</sup> It was not until the thirty-third Olympiad that horseracing became what it is today, where men appear on horseback.<sup>15</sup> Today, these men are known as jockeys.<sup>16</sup> Horseracing found its way to the United Kingdom during the Romans' quest to conquer the world.<sup>17</sup> Despite the Roman Empire collapsing, horseracing survived and continued to flourish.<sup>18</sup> In 1649, Great Britain saw the ban of horseracing,<sup>19</sup> but it was relatively short-lived; it was restored by King Charles II in 1660.<sup>20</sup> King Charles II became known as "the father of the English turf"<sup>21</sup> and inaugurated the King's plates races, where prizes were awarded to winners.<sup>22</sup>

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<sup>9</sup> *Id.* (explaining how HISA was given broad regulatory authority over the horseracing industry and can develop a sanction system as they see fit).

<sup>10</sup> *Arbitration*, CORNELL L. SCH.: LEGAL INFO. INST., <https://www.law.cornell.edu/wex/arbitration> (last visited Nov. 26, 2022) (quoting that "arbitration refers to an alternative dispute resolution method where the parties in dispute agree to have their case heard by a qualified arbitrator out of court. Under the Federal Arbitration Act, decisions reached through arbitration are binding just like a court case is and pursuing a claim through arbitration precludes you from also raising it in the traditional court system. Arbitration is used because it is often much less expensive than litigation due to its less stringent procedural requirements.").

<sup>11</sup> Horseracing is "a sport in which people race on horses, usually to win money for the horses' owners."

*Horseracing*, THE CAMBRIDGE DICTIONARY (4th ed. 2013).

<sup>12</sup> *Horse racing*, ENCYCLOPEDIA BRITANNICA <https://www.britannica.com/sports/horse-racing> (last visited Nov. 6, 2022) (reporting that horseracing has rarely undergone change since its inception).

<sup>13</sup> *A Brief History of Horse Racing*, America's Best Racing <https://www.americasbesttracing.net/the-sport/2021-brief-history-horse-racing> (last visited Nov. 27, 2022).

<sup>14</sup> *Id.*; Jockeys are "a person who rides or drives a horse especially as a professional in a race." *Jockey*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2003).

<sup>15</sup> *Horse Racing*, NEW WORLD ENCYCLOPEDIA [https://www.newworldencyclopedia.org/entry/Horse\\_Racing](https://www.newworldencyclopedia.org/entry/Horse_Racing) (last visited Nov. 6, 2022).

<sup>16</sup> *Id.*; Jockeys are "a person who rides or drives a horse especially as a professional in a race." *Jockey*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2003).

<sup>17</sup> *Horse Racing*, NEW WORLD ENCYCLOPEDIA [https://www.newworldencyclopedia.org/entry/Horse\\_Racing](https://www.newworldencyclopedia.org/entry/Horse_Racing) (last visited Nov. 6, 2022).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* (explaining that some countries leaders would ban horse racing because it was so popular).

<sup>20</sup> *Id.* (reporting that Charles II brought back horseracing because he was an avid fan, gambler, and a competitive rider).

<sup>21</sup> *Horse Racing*, ENCYCLOPEDIA BRITANNICA <https://www.britannica.com/sports/horse-racing> (last visited Nov. 6, 2022) (explaining he was the father of the English turf because he inaugurated races for which prizes were earned).

<sup>22</sup> *Id.* (explaining that king plates races are where prizes are won).

It was not until Queen Anne<sup>23</sup> took the throne in 1702 that horseracing began to include spectators placing bets.<sup>24</sup>

In North America, organized racing began in 1664 when the British occupied New Amsterdam, now known as New York City.<sup>25</sup> The first racetrack in the United States was established in 1665,<sup>26</sup> the American Stud Book<sup>27</sup> was created in 1868,<sup>28</sup> and the American Jockey Club<sup>29</sup> was founded in 1868.<sup>30</sup>

Annually, horseracing contributes \$25 billion in GDP<sup>31</sup> and generates 380,000 domestic jobs.<sup>32</sup> These horses create a demand for jobs because they are trained from the minute they are born until the minute they retire.<sup>33</sup>

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<sup>23</sup> See Anne, ENCYCLOPEDIA BRITANNICA <https://www.britannica.com/biography/Anne-queen-of-Great-Britain-and-Ireland> (last visited Nov. 6, 2022) (providing that Anne was the Queen of Great Britain and Ireland, and was born on February 6, 1665, and died on August 1, 1714).

<sup>24</sup> *The History of Horse Racing*, HORSERACING.COM <https://www.horseracing.com/reference/history-of-horse-racing/> (last visited Nov. 26, 2022)

<sup>25</sup> *Horse Racing*, ENCYCLOPEDIA BRITANNICA <https://www.britannica.com/sports/horse-racing> (last visited Nov. 6, 2022); See *The First Horse Race: A Look at the History of Horse Racing*, HORSERACINGSENSE.COM <https://horseracingsense.com/when-first-horse-race-history/> (last visited Nov. 26, 2022) (reporting that the first horse race was held in 1823 at Union Course on Long Island).

<sup>26</sup> *The History of Horse Racing*, HORSERACING.COM <https://www.horseracing.com/reference/history-of-horse-racing/> (last visited Nov. 26, 2022).

<sup>27</sup> A Studbook is an “an official record (as in a book) of the pedigree of purebred animals (such as horses or dogs).” *Studbook*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2003). See *The Jockey Club, The American Studbook Principal Rules and Requirements*, 5 (Aug. 2022) (maintaining the registry for The Jockey Club for all Thoroughbreds foaled in the United States, Puerto Rico, and Canada and for all Thoroughbreds imported into the United States, Puerto Rico, and Canada from countries that have a stud book approved by The Jockey Club and the International Stud Book Committee).

<sup>28</sup> *The History of Horse Racing*, HORSERACING.COM <https://www.horseracing.com/reference/history-of-horse-racing/> (last visited Nov. 26, 2022).

<sup>29</sup> THE JOCKEY CLUB <https://www.jockeyclub.com/> (last visited Nov. 26, 2022) (explaining the Jockey club is an association that ensures order in the racing world); *Id.* (explaining the Jockey Club is a regulatory body in the racing world which ensures horse welfare is put at the front of every mission in the industry, they are dedicated to the improvement of Thoroughbred breeding and racing, and its core belief is that horses should compete only when they are free from the influence of medication).

<sup>30</sup> *The History of Horse Racing*, HORSERACING.COM <https://www.horseracing.com/reference/history-of-horse-racing/> (last visited Nov. 26, 2022).

<sup>31</sup> Gross Domestic Product is “the gross national product excluding the value of net income earned abroad.” *Gross Domestic Product*, MERRIAM- WEBSTER DICTIONARY (11th ed. 2003).

<sup>32</sup> Conor R. Crawford, *Nutraceuticals in American Horseracing: Removing the Substantive Blinkers From National Racing Legislation*, 23 *Animal L.* 163, 164 (2016).

<sup>33</sup> See Emily Feldman, *Life After Racing: From Stud to Slaughter*, NBC Washington (2013) <https://www.nbcwashington.com/news/national-international/natl-where-horses-go-when-the-racing-is-over/> (discussing racehorses lives after the racetrack when they retire around age 6 or 7); See *Horse Racing Tracks in the US – Employment Statistics 2005-2028*, IBIS WORLD (last visited Dec 4, 2022)(reporting that as of 2022, 21,668 people are employed in the horse racing tracks industry in the united states alone) <https://www.ibisworld.com/industry-statistics/employment/horse-racing-tracks-united-states/>.

Most racehorses compete between the ages of 3 to 6 years old,<sup>34</sup> but start their training at a mere 18 to 24 months old.<sup>35</sup> This is because racehorses peak at a young age, usually at 4.5 years old.<sup>36</sup> Despite the generous revenue that horseracing generates each year, hundreds of racehorses die at American racetracks.<sup>37</sup> In 2018 alone, over 493 thoroughbred<sup>38</sup> racehorses died on American racetracks.<sup>39</sup>

In 2019, 49 horses died at a single racetrack in Santa Anita, California.<sup>40</sup> Year after year, these horses die due to the lack of uniformity in drug use and lack of safety standards amongst the racetracks.<sup>41</sup> Since racing's inception, each state established its own racing commission<sup>42</sup> which set its own independent rules.<sup>43</sup> This resulted in thirty-eight independent state racing jurisdictions that set their own racing standards,<sup>44</sup> including anti-doping regulations.<sup>45</sup> These thirty-eight independent commissions have set their own regulations to prevent doping, implemented their own testing programs, and issued different sanctions.<sup>46</sup>

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<sup>34</sup> Miles Henry, *Why are Race Horses So Young? Does Age Matter in a Race?*, HORSE RACING SENSE <https://horseracingsense.com/why-are-racehorses-so-young/> (last visited Nov. 26, 2022).

<sup>35</sup> *Id.*

<sup>36</sup> Toshiyuki Takahashi, *The Effect of Age on the Racing speed of Thoroughbred racehorses*, 26 J Equine Sci 43, 43-48(2015) (examining how the age and development of racehorses affect their abilities and performance).

<sup>37</sup> Megan Guthrie, *Get off your high horse: Drugs, Breeding, and Law of the Modern American Racehorse*, 25 DRAKE J. AGRIC. L. 425, 425 (2020).

<sup>38</sup> Thoroughbred means "any of an English breed of light speedy horses kept chiefly for racing that originated from crosses between English mares of uncertain ancestry and Arabian stallions" *Thoroughbred*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2003).

<sup>39</sup> Megan Guthrie, *Get off your high horse: Drugs, Breeding, and Law of the Modern American Racehorse*, 25 Drake J. Agric. L. 425, 425 (2020).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 426 (explaining where certain drugs are allowed and others are not, causes deaths amongst horses).

<sup>42</sup> See LOUISIANA RACING COMMISSION, <http://horseracing.louisiana.gov/> (last visited Nov. 27, 2022) (explaining that the racing commission is responsible for reviewing, regulating, governing, and supervising all forms of horse racing and parimutuel wagering in Louisiana).

<sup>43</sup> Valerie Pringle, *Horse racing industry needs uniform regulation*, BALTIMORE SUN (May. 17, 2019) <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0519-horse-racing-20190516-story.html> (reporting on the 38 jurisdictions that oversee approximately 100 United States racetracks, make their own rules, and run their own testing and penalty programs).

<sup>44</sup> Conor R. Crawford, *Nutraceuticals in American Horseracing: Removing the Substantive Blinkers From National Racing Legislation*, 23 ANIMAL L. 163, 164 (2016).

<sup>45</sup> Valerie Pringle, *Horse racing industry needs uniform regulation*, BALTIMORE SUN (May. 17, 2019) <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0519-horse-racing-20190516-story.html>.

<sup>46</sup> *Id.* (explaining the various tactics racehorse professionals use to cheat their way out of drug violations).

For example, in New York, the state Gaming Commission is in charge of pursuing cheaters at the racetracks.<sup>47</sup> The Gaming Commission employs investigators, administrative judges, and attorneys to handle drug use and other rule violations.<sup>48</sup> However, the operators of racetracks, including the New York Racing Association (“NYRA”),<sup>49</sup> Vernon Downs,<sup>50</sup> and Tioga Downs,<sup>51</sup> employ their own investigators.<sup>52</sup> This calls into question the integrity of the purported investigations because the states allow racetracks and racing associations to employ their own investigators to handle their own scandals, which is why information regarding these investigations tends to vary.<sup>53</sup>

After constant scandals published in the tabloids about the racing industry,<sup>54</sup> in 2020, the Horseracing Integrity and Safety Act was signed into federal law.<sup>55</sup> HISA’s purpose is to enact change in the horseracing industry by uniting all thirty-eight racing jurisdictions into one single federal regulatory authority.<sup>56</sup> HISA is now responsible for drafting and enforcing a uniform safety and integrity rule system for thoroughbred racing in the United States.<sup>57</sup>

This note contends that HISA’s approach of implementing an arbitration system to govern doping violations and implement penalties that arise from them is an appropriate response to unite the industry and create a better future for the sport.<sup>58</sup>

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<sup>47</sup> Emilie Munson, *State Investigators Struggle to catch cheaters in horse racing*, TIMES UNION (Feb. 13, 2022) <https://www.timesunion.com/news/article/horse-racing-investigations-16771286.php>.

<sup>48</sup> *Id.*

<sup>49</sup> NYRA, <https://www.nyra.com/aqueduct/> (last visited Nov. 26, 2022).

<sup>50</sup> VERNON DOWNS, <https://www.vernondowns.com/racing/> (last visited Nov. 26, 2022) (explaining that Vernon Downs is a racetrack in Vernon, New York).

<sup>51</sup> TIOGA DOWNS, <https://www.tiogadowns.com/racing> (last visited Nov. 26, 2022) (showcasing that Tioga Downs is a racetrack in Nichols, New York).

<sup>52</sup> Emilie Munson, *State Investigators Struggle to catch cheaters in horse racing*, TIMES UNION (Feb. 13, 2022) <https://www.timesunion.com/news/article/horse-racing-investigations-16771286.php>.

<sup>53</sup> *Id.*

<sup>54</sup> See Sara Kettler, *10 Famous Horse Racing Scandals*, HISTORY (Jun. 10, 2021)

<https://www.history.com/news/horse-racing-scandals-list> (explaining ten famous scandals in one single article).

<sup>55</sup> See HORSE INTEGRITY AND SAFETY AUTHORITY, <https://www.hisaus.org/about> (last visited Oct. 17, 2022) (explaining what the Horse Racing Integrity and Safety Act is responsible for and how it was created).

<sup>56</sup> Richard Gross, *HISA: THE GREATEST REGULATORY CHANGE IN THOROUGHBRED RACING HISTORY*, HORSE NETWORK (Jul. 7, 2022) <https://horsenetwork.com/2022/07/hisa-the-greatest-regulatory-change-in-american-racing-history/>.

<sup>57</sup> See HORSE INTEGRITY AND SAFETY AUTHORITY, <https://www.hisaus.org/about> (last visited Oct. 17, 2022) (explaining what the Horse Racing Integrity and Safety Act is responsible for and how it was created).

<sup>58</sup> See Chris Hayward, *Why HISA model will transform US racing- in both business and safety terms*, THOROUGHBRED RACING COMMENTARY (Oct. 27, 2022) <https://www.thoroughbredracing.com/articles/5621/why-hisa-model-will-transform-us-racing-both-business-and-safety-terms/> (explaining how HISA is the appropriate response to many years of lack of regulation).



However, if HISA intends to resolve the lack of uniformity within the industry, it will need to create a cohesive system of regulation. Since the racing industry deals with young,<sup>59</sup> unpredictable<sup>60</sup> and underdeveloped<sup>61</sup> horses, arbitration is an appropriate system because each case will have its own set of unique facts.<sup>62</sup> This note will analyze how HISA operates, and how it intends to address the problems it claims to resolve. Part I of this note will discuss the history of scandals and doping events. Part II of this note will discuss the absolute need for HISA to establish uniformity. Finally, Part III will analyze how creating sound precedent within the arbitration process is possible and must be implemented. HISA will only be successful in shaping the future of horseracing if it follows the arbitration system of the Fédération Équestre Internationale (“FEI”)<sup>63</sup> and the Court of Arbitration for Sport (“CAS”).<sup>64</sup>

## **I. Non-Existent Regulation Has Caused Major Issues Within the Racing Industry**

Horseracing has an addiction to doping.<sup>65</sup> During the 1920s, to give horses a competitive edge, jockeys and trainers would give their horses cocaine and caffeine.<sup>66</sup> The first laboratory tests conducted on racehorses were not introduced until the 1930s.<sup>67</sup> Nonetheless, these tests were conducted to determine whether racing rivals had sabotaged their horses by doping them with morphine, heroin, and strychnine; not to determine if professionals were doping their own horses.<sup>68</sup>

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<sup>59</sup> RACING EXPLAINED, [racingexplained.co.uk](http://racingexplained.co.uk) (last visited Nov. 6, 2022) (reporting that the most prestigious races often have three-year-old racehorses but generally, flat racehorses tend to be at their peak at ages four or five).

<sup>60</sup> GET ACTIVE WITH ANIMALS, [getactivewithanimals.com](http://getactivewithanimals.com) (last visited Nov 6, 2022) (discussing how animals are unpredictable in nature because they have minds and emotions of their own).

<sup>61</sup> Chris Rogers et al., *Growth and Bone Development in the Horse: When is a Horse Skeletally Mature?*, 11 MDPI 3402, 3402 (2021) (discussing the maturity levels in the growth of horses from the time they are a foal to being fully grown).

<sup>62</sup> See Practical Law Arbitration, *Why arbitrate?*, PRACTICAL LAW UK PRACTICE NOTE 1-204-0032 (2022) (explaining that arbitration provides for great flexibility to resolve various disputes).

<sup>63</sup> FÉDÉRATION ÉQUESTRE INTERNATIONALE, [inside.fei.org](http://inside.fei.org) (last visited Nov 6, 2022) (“Founded in 1921, the Fédération Equestre Internationale (FEI) is the world governing body for Jumping, Dressage & Para Dressage, Eventing, Driving & Para Driving, Endurance and Vaulting. The FEI’s mission is to drive and develop equestrian sport globally in a modern, sustainable and structured manner with guaranteed integrity, athlete welfare, equal opportunity and a fair and ethical partnership with the horse. It establishes the regulations and approves equestrian schedules for Championships, Continental and Regional Games as well as the Olympic & Paralympic Games.”).

<sup>64</sup> See COURT OF ARBITRATION FOR SPORT (last visited Oct. 17, 2022) <https://www.tas-cas.org/en/general-information/frequently-asked-questions.html>; See Stuart C McInnes, *User Guide to the Court of Arbitration for Sport*, SQUIRE PATTON BOGGS (last visited Dec 3, 2022) <https://media.squirepattonboggs.com/pdf/misc/User-Guide-to-the-Court-of-Arbitration-for-Sports-Booklet.pdf> (providing that the CAS started its institution in 1984 as an initiative of the International Olympic Committee to provide a procedure that was flexible, quick, and inexpensive, when an increasing number of sports-related disputes required adjudication by specialists within the field of sports law).

<sup>65</sup> Ryan Goldberg, *The Long History of Horse Racing’s Addiction to Doping*, PACIFIC STANDARD (Jun. 14, 2017) <https://psmag.com/social-justice/derby-win-horse-racings-doping-addiction-80640>.

<sup>66</sup> Megan Guthrie, *Get off your high horse: Drugs, Breeding, and Law of the Modern American Racehorse*, 25 DRAKE J. AGRIC. L. 425, 425 (2020).

<sup>67</sup> Ryan Goldberg, *The Long History of Horse Racing’s Addiction to Doping*, PACIFIC STANDARD (Jun. 14, 2017) <https://psmag.com/social-justice/derby-win-horse-racings-doping-addiction-80640>.

<sup>68</sup> *Id.*

Unsurprisingly, there is a long list of legal drugs that riders and owners can give their horses, including Lasix<sup>69</sup> and Phenylbutazone.<sup>70</sup> The major issues arise from the exotic and illegal drugs that professionals administer to their horses to get a competitive edge.<sup>71</sup> Drugs like growth hormones,<sup>72</sup> anabolic drugs that increase testosterone,<sup>73</sup> and blood doping drugs,<sup>74</sup> all of which allow the horses' body to send more oxygen to the muscles, are outright banned in horseracing.<sup>75</sup> Doping officials have seen various tactics when it comes to doping racehorses.<sup>76</sup>

One of the most notorious cases of doping comes from Richard Banca ("Banca").<sup>77</sup> In February 2020, federal agents raided Mt. Hope Training Center, a racehorse training facility in Middletown, Virginia.<sup>78</sup> Agents found handwritten ledgers with a list of horses' names with a syringe on top that instructed how to administer a custom drug concoction through a tube inserted down a horse's nose and throat.<sup>79</sup> Banca and his assistant trainer, Conor Flynn, were administering these performance enhancing drugs to their horses to gain a competitive edge.<sup>80</sup> This incident was such a big shock because the incident was handled as a criminal case, normally, a doping violation would trigger an administrative or disciplinary proceeding within the industry.<sup>81</sup>

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<sup>69</sup> Tom Goldman, *Should Racehorses be Medicated?*, NPR (Jun. 5, 2019)

<https://www.npr.org/2019/06/05/729344390/should-racehorses-be-medicated#:~:text=Nearly%20all%20horses%20that%20race,Phenylbutazone%2C%20or%20%22bute.%22>  
(reporting that people use Lasix to control the bleeding in horses' lungs).

<sup>70</sup>*Id.*; See also Sarah A. Reid, *Horses as athletes: the road to success*, 12 *Animal Frontiers* 3 (2022) (discussing how horses have become athletes in their own right and deserve to be treated as such).

<sup>71</sup> Megan Guthrie, *Get off your high horse: Drugs, Breeding, and Law of the Modern American Racehorse*, 25 *Drake J. Agric. L.* 425, 425 (2020) (reporting on "frog juice," also known as dermorphin, a drug so popular because it was 40 times more powerful than any regular pain killer and allowed the horses to run through an injury and not feel pain).

<sup>72</sup> Ludovic Bailly-Chouriberry et al., *Identification of Recombinant equine Growth Hormone in Horse Plasma by LC-MS/MS: A confirmatory analysis in doping control*, 80 *Analytical Chemistry* 21, 21(2008) (reporting on how growth hormones are used and are illegally administered to racehorses to improve physical performance and the speed of wound healing).

<sup>73</sup> EQUID MED <https://equimed.com/drugs-and-medications/reference/anabolic-steroids> (Last visited Nov. 6, 2022) (examining the side effects of administering anabolic steroids to horses).

<sup>74</sup> Jennifer Gershman, *Medication Use in Horse Racing: Yea or Neigh?*, *PHARMACY TIMES* (Apr. 10, 2018) <https://www.pharmacytimes.com/view/medication-use-in-horse-racing-yea-or-neigh> (reporting on approved controlled therapeutic medications like Lasix).

<sup>75</sup> Amy McKeever, *It's Triple Crown season: Here's what to know about horse doping*, *NATIONAL GEOGRAPHIC* (May. 14, 2021) <https://www.nationalgeographic.com/animals/article/racehorse-doping-explained>.

<sup>76</sup> *Id.*

<sup>77</sup> Emilie Munson, *State Investigators Struggle to catch cheaters in horse racing*, *TIMES UNION* (Feb. 13, 2022) <https://www.timesunion.com/news/article/horse-racing-investigations-16771286.php>.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

Most recently, federal prosecutors brought charges against twenty-seven people in a doping scheme that involved performance-enhancing drugs.<sup>82</sup> This doping scheme involved racehorse trainers, veterinarians, and other professionals who distributed and received adulterated and misbranded performance enhancing drugs; all of which were being secretly administered to racehorses.<sup>83</sup> These professionals were administering the drugs in a way that was incredibly difficult or almost impossible to detect in anti-performance enhancing drug tests.<sup>84</sup>

These specific substances stimulated endurance, deadened nerves, increased oxygen intake and reduced inflammation.<sup>85</sup> These scandals prove that racing professionals will do whatever it takes at whatever cost to win, regardless of the welfare of the horse.<sup>86</sup>

Unfortunately, the racing industry struggles with regulating and punishing professionals who administer and use performance enhancing drugs.<sup>87</sup> Before HISA, each state had a racing commission which established its own anti-doping rules and developed its own system on how to deal with drug violators.<sup>88</sup> The lack of uniformity and regulation regarding drug use has plagued the industry with scandal.<sup>89</sup> The scandals led to a large movement to regulate the industry.<sup>90</sup> It was not until animal rights groups and the public got involved that the industry pushed for regulation and punishment for those who have doped their horses.<sup>91</sup> Previously, the fragmented system gave each state who was a member of the Association of Racing Commissioners International (“ARCI”)<sup>92</sup> the freedom to regulate drug usage in horseracing as they deem appropriate.<sup>93</sup>

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<sup>82</sup> Matt Bonesteel, *Feds charge horse racing trainers, veterinarians over ‘widespread corrupt’ doping scheme*, WASHINGTON POST (Mar. 9, 2020) <https://www.washingtonpost.com/sports/2020/03/09/horse-racing-doping-indictment/>.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> See PETA, *Drug Use*, <https://www.peta.org/issues/animals-in-entertainment/horse-racing-2/horse-racing-industry-cruelty/drugs/#:~:text=Performance%2Denhancing%20drugs%20often%20mask,to%20painful%20to%20run%20o> n (explain that performance enhancing drugs mask pain, allowing horses to race and train with injuries that would otherwise be too painful to run on)

<sup>87</sup> Amy McKeever, *It’s Triple Crown season: Here’s what to know about horse doping*, NATIONAL GEOGRAPHIC (May. 14, 2021) <https://www.nationalgeographic.com/animals/article/racehorse-doping-explained>.

<sup>88</sup> *Id.*

<sup>89</sup> See Sara Kettler, *10 Famous Horse Racing Scandals*, HISTORY (Jun. 10, 2021)

<https://www.history.com/news/horse-racing-scandals-list> (reporting on various scandals within the industry).

<sup>90</sup> See ANIMAL LEGAL AND HISTORICAL CENTER <https://www.animallaw.info/article/avoiding-triple-frown-need-national-horse-racing-commission> (Last visited Nov. 6, 2022) (discussing the need to regulate the industry, the infamous racehorses who died right after their biggest career wins, and why it is important); See Valerie Pringle, *Horse racing industry needs uniform regulation*, BALTIMORE SUN (May. 17, 2019)

<https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0519-horse-racing-20190516-story.html> (explaining the various tracks that started coalitions to reform racing standards).

<sup>91</sup> See PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, <https://www.peta.org/issues/animals-in-entertainment/horse-racing/> (last visited Oct. 17, 2022) (reporting that PETA has long been an advocate for changing the way horse racing is regulated and conducted).

<sup>92</sup> Association of Racing Commissioners International, <https://www.arci.com/> (last visited Nov. 26, 2022) (describing their commission as an umbrella organization of the official governing rule making bodies for professional horse racing).

<sup>93</sup> Cody M. Conner, *Thoroughbred Horse Racing: Why a Uniform Approach to Drug Regulations is Necessary*, 10 KY. J. EQUINE AGRIC. & NAT. RESOURCES L. 111, 115 (2018).

The ARCI offers the industry guidance for national standards, but each state regulates their individual activities.<sup>94</sup> Specifically, in New York, the NYRA handles all racing disputes through the New York Code, Rules and Regulations Title 9, Executive Subtitle T, New York State Racing and Wagering Board.<sup>95</sup> New York has no tolerance for doping racehorses and it results in immediate disqualification.<sup>96</sup> Title 9 provides that “the presence in or administration to a horse of the following doping agents or drugs,<sup>97</sup> in the absence of extraordinary mitigating circumstances ... is prohibited at any time.”<sup>98</sup> The NYRA provides that if any horse has been found in violation of the prohibitions contained in the rules or has a sample that resulted in a positive test, “may be disqualified from the race and from any share of the purse in the race and such share shall be redistributed among the remaining horses in the race entitled to same.”<sup>99</sup> New York state has a strict scheme of no tolerance whereas California has tiered scheme of sanctions, whereas the number of offenses grow so do the punishments.<sup>100</sup> Each violation is categorized by classes and the number of times the violation or offence has occurred.<sup>101</sup> As the number of offenses and severity of the offense go up, so do the punishments.<sup>102</sup> Since both states are so different in the way that they treat doping offenses, it can often make things confusing for riders, owners, and trainers.<sup>103</sup>

For example, Bob Baffert,<sup>104</sup> was banned from Churchill Downs<sup>105</sup> for two years after his Kentucky Derby-winning Medina Spirit<sup>106</sup> had failed a drug test and tested positive for betamethasone.<sup>107</sup> The ban that was implemented restricted Baffert and any trainer in his employment from entering the next two Kentucky Derbies.<sup>108</sup>

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<sup>94</sup> *Id.*

<sup>95</sup> N.Y. Comp. Codes R. & Regs. tit. 9, § 4000.2 (granting the New York Racing Commission powers and duties).

<sup>96</sup> *See id.* § 4043.12.

<sup>97</sup> *Id.* (including blood doping agents, gene doping agents, and any other protein or peptide-based agent or drug that may produce analgesia or enhance the performance of a horse beyond its natural ability, including but not limited to toxins, venoms, and allosteric effectors).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at § 4012.1(a)(1) (stating that only veterinarians are allowed to carry banned drugs and tools for injection).

<sup>100</sup> Cal. Bus. & Prof. Code § 19582 (providing the violation scheme for punishments in California if a doping offense has occurred).

<sup>101</sup> *Id.* at § 19582.

<sup>102</sup> *Id.* § 19582.

<sup>103</sup> *See* Amanda L. Busch, *Teach Me How to Derby: The Need for Standardized Regulations in Horse Racing*, 20 GAMING LAW REVIEW AND ECONOMICS 516, 520 (2016) (explaining how the state-by-state drug laws are a messy system that only leads to confusion and unfair competition for horse owners who travel over state lines).

<sup>104</sup> *Bob Baffert*, ENCYCLOPEDIA BRITANNICA <https://www.britannica.com/biography/Bob-Baffert> (last visited Nov. 6, 2022) (providing Bob Baffert is an American Thoroughbred racehorse trainer who was one of the most successful trainers in American horse-racing history).

<sup>105</sup> CHURCHILL DOWNS <https://www.churchilldowns.com/visit/about/churchill-downs/> (Last visited Nov. 6, 2022) (providing Churchill Downs is a racetrack located in Louisville, Kentucky and is home of the Kentucky Derby, one of the most prestigious races in the horse racing industry).

<sup>106</sup> *See* Matt Bonesteel, *Disputed Kentucky Derby Winner Medina Spirit has died. Here's what to know*, WASHINGTON POST (Dec. 6, 2021) <https://www.washingtonpost.com/sports/2021/12/06/medina-spirit-history/> (reporting on Medina Spirit, the racehorse who won the Kentucky Derby May 1, 2021).

<sup>107</sup> *See* MAYO CLINIC <https://www.mayoclinic.org/drugs-supplements/betamethasone-dipropionate-topical-application-route/description/drg-20073667> (Last visited Nov. 6, 2022) (characterizing Betamethasone as a topical cream known as a corticosteroid that is used to help relieve redness, itching, swelling or other discomforts caused by certain skin conditions).

<sup>108</sup> Greg Joyce, *Bob Baffert gets two-year Churchill Downs suspension over Kentucky Derby Scandal*, NEW YORK POST (Jun. 2, 2021) <https://nypost.com/2021/06/02/bob-baffert-suspended-two-years-by-churchill-downs-over-scandal/>.

However, because Kentucky had its own independent racing commission,<sup>109</sup> Baffert was only banned from entering races in Kentucky and was free to enter races in other states.<sup>110</sup> In 2021 alone, Baffert's horses failed five drug tests, but he never received a suspension from the prior tests.<sup>111</sup>

Since each state established their own methods for dealing with doping matters, they were free to sanction Baffert how they wished.<sup>112</sup> Since many rules, regulations, and punishments were different, it caused confusion and pushed the industry towards a federal regulation.<sup>113</sup> What started as Senate Bill 4547 has now transformed into the Horseracing Integrity and Safety Act of 2020.<sup>114</sup> Introduced by the FTC, HISA finds its statutory basis in 15 U.S.C 3051 through 3060.<sup>115</sup>

HISA consists of a Chief Executive Officer and nine board members, from outside the horseracing industry and four from the industry who have experience in each regulated area.<sup>116</sup> HISA is comprised of two components: the first is the Racetrack Safety Program<sup>117</sup> which came into effect on July 1, 2022 and the second is the Anti-Doping and Medication Control Program (ADMC),<sup>118</sup> which will go into effect in January 2023.<sup>119</sup>

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<sup>109</sup> KENTUCKY HORSE RACING COMMISSION <https://khrc.ky.gov/> (Last visited Nov. 6, 2022) (“The Kentucky Horse Racing Commission (KHRC) is an independent agency of state government charged with regulating the conduct of horse racing and pari-mutuel wagering on horse racing and related activities within the Commonwealth of Kentucky.”).

<sup>110</sup> See Matt Bonesteel, *Disputed Kentucky Derby Winner Medina Spirit has died. Here's what to know*, WASHINGTON POST (Dec. 6, 2021) <https://www.washingtonpost.com/sports/2021/12/06/medina-spirit-history/>.

<sup>111</sup> Dan Mangan, *Churchill Downs bans Bob Baffert after 2nd positive drug test for Kentucky Derby winner Medina Spirit*, CNBC (Jun. 2, 2021) <https://www.cnbc.com/2021/06/02/churchill-downs-suspends-bob-baffert-for-2-years-as-kentucky-derby-winner-medina-spirit-fails-2nd-drug-test.html>.

<sup>112</sup> See Amanda L. Busch, *Teach Me How to Derby: The Need for Standardized Regulations in Horse Racing*, 20 GAMING LAW REVIEW AND ECONOMICS 516, 520 (2016) (explaining the various racing commissions of New York, Kentucky, and California and how they deal with rule violations).

<sup>113</sup> *Id.* at 520-522 (providing for the various techniques that New York, California, and Kentucky racing commissions use to deal with racing violations).

<sup>114</sup> Richard Gross, *HISA: THE GREATEST REGULATORY CHANGE IN THOROUGHBRED RACING HISTORY*, HORSE NETWORK (Jul. 7, 2022) <https://horsenetwork.com/2022/07/hisa-the-greatest-regulatory-change-in-american-racing-history/>.

<sup>115</sup> Horseracing Integrity and Safety Authority, 87 Fed. Reg. 4023 (proposed Dec. 20, 2021) (to be codified at 87 C.F.R. §29862 (2022) (stating that HISA finds its statutory basis through 15 U.S.C. 3051 through 3060).

<sup>116</sup> Richard Gross, *HISA: THE GREATEST REGULATORY CHANGE IN THOROUGHBRED RACING HISTORY*, HORSE NETWORK (Jul. 7, 2022) <https://horsenetwork.com/2022/07/hisa-the-greatest-regulatory-change-in-american-racing-history/>.

<sup>117</sup> Horseracing Integrity and Safety Authority, 87 Fed. Reg. 4023 (proposed Dec. 20, 2021) (to be codified at 87 C.F.R. §29862 (2022) (finding its purpose in establishing specific safety rules and requirements designed to enhance equine and Jockey safety in horse racing such as uniform racetrack speculations).

<sup>118</sup> Press Release, Paulick Report, Horseracing Integrity & Welfare Unit Focused On Communication To Plan For HISA's Anti-doping And Medication Control Program (Sept. 27, 2022) (on file with author) (providing what the ADMC responsibility and how they will implement their procedures).

<sup>119</sup> See HORSE INTEGRITY AND SAFETY AUTHORITY, <HTTPS://WWW.HISAUS.ORG/ABOUT> (last visited Oct. 17, 2022).

The Racetrack Safety Program finds its roots in already implemented safety standards of the National Thoroughbred Racing Association<sup>120</sup> Safety and Integrity Alliance Code of Standards (“NTRA”).<sup>121</sup> The Racetrack Safety Program will include: Racetrack Safety and Welfare Committee,<sup>122</sup> Required Safety Personnel: Safety Director,<sup>123</sup> Race Horse Inspections and Monitoring,<sup>124</sup> Racetrack and Racing Surface Monitoring and Maintenance,<sup>125</sup> Emergency Preparedness,<sup>126</sup> Necropsies,<sup>127</sup> Safety Training and Continuing Education,<sup>128</sup> and Jockey Health.<sup>129</sup>

The ADMC will include: General Provisions,<sup>130</sup> a prohibited list of substances, rules of proof, and testing & investigations section,<sup>131</sup> Anti-Doping Rules,<sup>132</sup> Equine Controlled Medication Rules,<sup>133</sup> and Other Violations and General Procedure/Administration section.<sup>134</sup> HISA will govern all possible disputes that may arise within the industry, because it created a diverse Racetrack Safety Program.

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<sup>120</sup> See NATIONAL THOROUGHBRED RACING ASSOCIATION, <https://ntra.com> (last visited Nov. 26, 2022) (comprising its association of “the largest tracks and horsemen’s groups in the U.S. and Canada, was developed to function as a certification/accreditation body for the purpose of recognizing and incentivizing compliance by all stakeholders. Since its inception, the alliance has helped spearhead reforms in the areas of improved medication and testing policies, guidelines for injury reporting and prevention, safety research, providing a safer racing environment, and post-racing care for retired racehorses”).

<sup>121</sup> Horseracing Integrity and Safety Authority, 87 Fed. Reg. 4023 (proposed Dec. 20, 2021) (to be codified at 87 C.F.R. §29862 (2022) (relying heavily on the National Thoroughbred Racing Association Safety and Integrity Alliance Code of Standards when promulgating this rule).

<sup>122</sup> Racetrack Safety Program, 87 Fed. Reg. 65292 (proposed Aug. 17, 2022) (to be codified at 87 Fed. Reg. 4023 §2121) (stating that the Welfare Committee finds its purpose in regulating injury assessment and risk management protocols to investigate equine and human injuries, to identify contributing factors, to educate participants, and to identify risk prevention and risk management measures to reduce the incidence/ prevalence of injuries).

<sup>123</sup> *Id.* at § 2130 (designating that an individual that is responsible for overseeing risk assessment, risk management, and interacting with the Authority for Racetrack Safety Accreditation compliance).

<sup>124</sup> *Id.* at § 2140 (requiring racehorses to be screened and inspected by regulatory veterinarians at several times to detect horses that are unsound, injured or medically compromised).

<sup>125</sup> *Id.* at § 2150 (requiring that racetracks are designed, configured, tested, maintained, and monitored to optimize the racing surface for safety of the racehorse and jockey).

<sup>126</sup> *Id.* at §2160 (including accreditation requirements that racetracks adequately undertake various emergency preparedness steps with respect to catastrophic injuries, fire safety, hazardous weather, infectious disease outbreaks and emergency drills).

<sup>127</sup> *Id.* at 4023 §2170 (requiring that a necropsy be performed on all horses that die or are euthanized at covered racetracks and training centers to learn from the death).

<sup>128</sup> *Id.* at §2190 (requiring participating State Racing Commissions use a uniform national trainer’s test as part of the requirements for an individual to be a trainer to have a standardized test amongst all jurisdictions. Additionally including continuing education requirements for the purpose of enhancing knowledge and conveying new knowledge to industry participants).

<sup>129</sup> *Id.* at §2190 (requiring State Racing Commissions or Racetracks to conduct drug and alcohol testing for jockeys to ensure that jockeys are not impaired when riding in a race).<sup>130</sup> Horseracing Integrity and Safety Authority, 87 Fed. Reg. 4023 §1000 (proposed Aug. 17, 2022) (to be codified at 87 C.F.R. pt. 29862) (setting out the general purpose, scope and organization of the protocol of HISA).

<sup>131</sup> Horseracing Integrity and Safety Authority, 87 Fed. Reg. 4023 (proposed Dec. 20, 2021) (to be codified at 87 C.F.R. §29862 (2022) (providing a list of prohibited substances, the burden of proof, and testing and investigations lists).

<sup>132</sup> *Id.* (providing a guideline of what happens when drugs are found in the system, what HISA will do, and what sanctions the rider is subjected to).

<sup>133</sup> Horseracing Integrity and Safety Authority, 87 Fed. Reg. 4023 (proposed Dec. 20, 2021) (to be codified at 87 C.F.R. §29862 (2022) (A list of controlled medications that racehorses can use out of competition).

<sup>134</sup> *Id.*

Another equestrian field that has seen a successful implementation of uniform rules is the FEI.<sup>135</sup> The FEI rules govern the sport on the field of play,<sup>136</sup> officials,<sup>137</sup> and provide General Regulations and Statutes.<sup>138</sup> These rules also include Veterinary and Anti-doping Regulations for both horses and humans.<sup>139</sup> The FEI system has worked well for many years for many different equestrian athletes because the FEI provides for well-established procedural due process.<sup>140</sup> For instance, when an athlete does not believe that the findings of the FEI are fair, the athlete can appeal his case to the CAS.<sup>141</sup> Athletes often find relief from external institutions such as the CAS<sup>142</sup> when they have a dispute with their sports industry.<sup>143</sup>

Invented in 1984, the CAS now has 300 arbitrators from 87 countries that have special knowledge of arbitration and sports law.<sup>144</sup> The CAS resolves legal disputes that arise from the field of professional sports and award arbitral awards that have the same enforceability as judgements from legal courts.<sup>145</sup> The CAS follows the standard model of arbitration and is successful in resolving sports related disputes.<sup>146</sup>

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<sup>135</sup> See FÉDÉRATION ÉQUESTRE INTERNATIONALE (last visited Oct. 17, 2022) <https://inside.fei.org> (providing the international regulatory FEI rules which governs showjumping, dressage and Para dressage, eventing, driving, and para driving, endurance, and vaulting.).

<sup>136</sup> See Mark Lebbon, *Field of Play Decisions and Fairness: Lessons from Sirengate*, 7 Australian and New Zealand Sports L.J. 121, 122 (2012) (explaining that the application and interpretation of the rules that set out and govern how the sport is to be played and officiated are known as field of play decisions).

<sup>137</sup> See FÉDÉRATION ÉQUESTRE INTERNATIONALE (last visited Oct. 17, 2022) (explaining that FEI Officials ensure that different aspects of the sport are run according to the General Regulations, the Veterinary Regulations, and the rules of the relevant equestrian discipline) [https://inside.fei.org/sites/default/files/FEI%20Officials\\_0.pdf](https://inside.fei.org/sites/default/files/FEI%20Officials_0.pdf).

<sup>138</sup> *Id.* (providing rules and general regulations for the international equestrian sport).

<sup>139</sup> *Id.* (providing the regulatory rules for horses, humans, and veterinarians).

<sup>140</sup> Fédération Équestre Internationale, *New Internal Regulations of the FEI Tribunal*, 12-17 (Mar. 2, 2018) (setting out the procedure from start to finish on how the FEI handles claims); Procedural due process means “Due process of law in each particular case means such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.” *Procedural Due Process*, BLACKS LAW DICTIONARY (2nd ed. 1910).

<sup>141</sup> Fédération Équestre Internationale, *Statutes*, 28 (Mar. 2, 2018) (providing Article 39 of the FEI statutes which explain the process for submitting appeals to the CAS).

<sup>142</sup> See *Frequently Asked Questions*, COURT OF ARBITRATION FOR SPORT (last visited Oct. 17, 2022) <https://www.tas-cas.org/en/general-information/frequently-asked-questions.html> (providing their mission to be an independent institution which provides for services in order to facilitate the settlement of sports-related disputes through arbitration or mediation by means of procedural rules adapted to the specific needs of the sports world).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

## II. HISA must set Precedent for the Industry

HISA finds its statutory authority from 15 U.S.C. 3053(a), which “directs the authority to developed proposed rules relating to ... (8) a description of safety, performance, and anti-doping and medication control rule violations applicable to covered horses and covered persons; (9) a schedule of civil sanctions for violations; and (10) a process or procedures for disciplinary hearings.”<sup>147</sup> It will further establish uniform rules that “(A) take into account the unique aspects of horseracing; (B) be designed to ensure fair and transparent horseraces; and (C) deter safety, performance, and anti-doping and medication control rule violations.”<sup>148</sup>

HISA intends to resolve disputes within the racing industry through arbitration.<sup>149</sup> Due to the unpredictable nature of horseracing, arbitration seems to be an appropriate procedure to handle these issues.<sup>150</sup> However, the biggest challenge facing HISA is that it is the first attempt to regulate a largely corrupt industry and is doing so without precedent. The horseracing industry has been regulated by individual racing commissions since its inception, which means that every state has dealt with violations and punishments differently and the outcome of sanctions were different.<sup>151</sup> HISA bases its mission for these uniform rules on the fact that they want to create uniformity within the industry.<sup>152</sup> By using arbitration, they are not creating a uniform system.<sup>153</sup> HISA will now create precedent for years to come within the racing industry, but if they do not look to other comparable industries for guidance, they will be creating their own court of law.

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<sup>147</sup> Horseracing Integrity and Safety Authority, 87 Fed. Reg. 4023 (proposed Dec. 20, 2021) (to be codified at 87 C.F.R. §29862 (2022)).

<sup>148</sup> 15 U.S.C. § 3057(d)(2).

<sup>149</sup> Horseracing Integrity and Safety Authority, 87 Fed. Reg. 4023 (proposed Dec. 20, 2021) (to be codified at 87 C.F.R. §29862 (2022)).

<sup>150</sup> *Arbitration*, CORNELL L. SCH.: LEGAL INFO. INST., <https://www.law.cornell.edu/wex/arbitration> (last visited Nov. 26, 2022) (“Arbitration refers to an alternative dispute resolution method where the parties in dispute agree to have their case heard by a qualified arbitrator out of court. Under the Federal Arbitration Act, decisions reached through arbitration are binding just like a court case is and pursuing a claim through arbitration precludes you from also raising it in the traditional court system. Arbitration is used because it is often much less expensive than litigation due to its less stringent procedural requirements.”).

<sup>151</sup> See David Wenner, *To deal with ‘plague’ of racehorse injuries and deaths, Pa. adds rules, abuse hotline*, Penn Live (Jan. 26, 2022 at 8:45am)(providing that the Pennsylvania racing commission sets its own racing rules); See Amanda L. Busch, *Teach Me How to Derby: The Need for Standardized Regulations in Horse Racing*, 20 GAMING LAW REVIEW AND ECONOMICS 516, 520 (2016)(explaining how New York, California, and Kentucky all deal with rule violations differently).

<sup>152</sup> See HORSE INTEGRITY AND SAFETY AUTHORITY, <https://www.hisau.org/about> (last visited Oct. 17, 2022) (explaining their mission is to create a uniform system).

<sup>153</sup> See W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51, CAROLINA LAW SCHOLARSHIP REPOSITORY 1895, 1895(2010) (explaining that arbitrators can but do not always create precedent).



Many other equestrian disciplines have created uniform rules for their human and equestrian athletes to prevent unfair competition, doping both the horse and rider, and to ensure a safe environment.<sup>154</sup> Since its founding in 1921 the FEI has successfully implemented an arbitration system to deal with issues arising out of rule violations.<sup>155</sup> This is known as the FEI Tribunal.<sup>156</sup> The Tribunal decides all cases submitted to it; this includes appeals or matters that are not otherwise under the jurisdiction of the Ground Jury<sup>157</sup> of the FEI.<sup>158</sup> The FEI Tribunal is successful in governing disputes arising from rule violations. Although the FEI Tribunal does not have a precedent<sup>159</sup> system per se, but they have implemented a level of fault scheme which can help offenders predict how their sanctions will result.<sup>160</sup> The three levels are: No Fault/Negligence,<sup>161</sup> No Significant Fault/Negligence,<sup>162</sup> and Fault/Negligence.<sup>163</sup> After the FEI Tribunal has reviewed all the facts and evidence submitted, they will determine the fault of the Person Responsible.<sup>164</sup> The level of fault will reduce the sanction of the Person Responsible, which in turn creates precedent.<sup>165</sup> Equestrian Athletes can review past cases to determine how they will be sanctioned for certain doping violations and the FEI Tribunal can refer back to similar repeat cases.<sup>166</sup> This creates a level of predictability within the FEI Tribunal that has proven to be successful over the many years of the FEI's existence.

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<sup>154</sup> See FÉDÉRATION ÉQUESTRE INTERNATIONALE (last visited Oct. 17, 2022) <https://inside.fei.org/fei/about-fei> (providing the FEI's mission is to drive and develop equestrian sport globally in a modern, sustainable and structured manner with guaranteed integrity, athlete welfare, equal opportunity and a fair and ethical partnership with the horse. It establishes the regulations and approves equestrian schedules for Championships, Continental and Regional Games as well as the Olympic & Paralympic Games).

<sup>155</sup> *Id.* (classifying cases into Equine Anti-doping, Consent awards, Human Anti-doping, and other FEI Tribunal decisions. This system has worked for many years and continues to be how the FEI resolves disputes.).

<sup>156</sup> *Id.* (formatting the FEI tribunal to be composed of a Chair and a minimum of six (6) other members, each with legal expertise and appropriate knowledge and experience of equestrian sport).

<sup>157</sup> *Id.* (explaining that principal duty of the Ground Jury is the technical judging of all competitions and the determination of their final results).

<sup>158</sup> *Id.*

<sup>159</sup> Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse*, 23 *Arbitration International* 357, 358(2007) (using 'precedent' is her argument to refer to a binding precedent under the doctrine of stare decisis, which literally means 'to stand by what is decided').

<sup>160</sup> Fédération Équestre Internationale, *FEI Guidelines for Fines and Contributions Towards Legal Costs*, 3 (May. 5, 2021).

<sup>161</sup> *Id.* at 4 (Nov. 23, 2020)(providing no fault as "the Person Responsible and/or member of the Support Personnel and/or other Person establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had administered to the Horse, or the Horse's system otherwise contained, a Banned or Controlled Medication Substance or he or she had Used on the Horse, a Banned or Controlled Medication Method or otherwise violated an EAD or ECMRule.").

<sup>162</sup> *Id.* at 4 (providing no significant fault or negligence as "The Person Responsible and/or member of the Support Personnel establishing that his fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the EADCM Regulation violation.").

<sup>163</sup> *Id.* at 4 (explaining fault to be where the person is solely responsible for the rule violation).

<sup>164</sup> Fédération Équestre Internationale, *FEI Guidelines for Fines and Contributions Towards Legal Costs*, 3 (May. 5, 2021); Person Responsible means "meaning that if your horse tests positive, you will be responsible for the violation." *Person Responsible*, CLEAN SPORT @ THE FEI (2022).

<sup>165</sup> Fédération Équestre Internationale, *FEI Equine Anti-Doping and Controlled Medication Regulation*, 30-32(Nov. 23, 2020) (providing how sanctions are reduced based on level of fault).

<sup>166</sup> Fédération Équestre Internationale, <https://inside.fei.org/fei/your-role/athletes/fei-tribunal> (last visited Nov. 26, 2022) (providing all decisions of previous rule violations under the FEI rules for all disciplines).

HISA intends to adjudicate Anti-Doping Rules Violations arising out of the Rule 3000 series<sup>167</sup> and violations of Rule 3229<sup>168</sup> (together “EAD Violations”) through an independent arbitral body.<sup>169</sup> This arbitral body shall have a pool of five members to adjudicate the matter.<sup>170</sup>

Controlled Medication Violations<sup>171</sup> arising out of the Rule 3000 series, violations of Rule 3329,<sup>172</sup> and violations of Rule 3510<sup>173</sup> shall be adjudicated by an internal adjudication panel.<sup>174</sup> This internal adjudication panel shall consist of a group of impartial members who are appointed by the agency themselves.<sup>175</sup> Once a violation occurs, the agency must charge the Covered Person<sup>176</sup> by a writing to be filed with the applicable parties and the Internal Adjudication panel or Arbitral body.<sup>177</sup> From there, the evidence is gathered, the fault is determined and the sanction is imposed upon the Covered Person.<sup>178</sup> HISA has structured their fault system like the FEI, it will provide sanctions based on Fault,<sup>179</sup> No Fault or Negligence,<sup>180</sup> and No Significant Fault or Negligence.<sup>181</sup>

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<sup>167</sup> Equine Anti-Doping and Controlled Medication Protocol, 87 Fed. Reg. 65292 (proposed Aug. 17, 2022) (to be codified at §3000) (to be codified at 87 C.F.R. pt. 29862) (providing an extensive background for the equine anti-doping and controlled medication protocol).

<sup>168</sup> *Id.* at §3229 (providing what a professional’s status is after a rule violation. If a profession violates a sanction, there can be additional consequences).

<sup>169</sup> Arbitration Procedures, 87 Fed. Reg. 65292 (proposed Aug. 17, 2022) (to be codified at §7020) (to be codified at 87 C.F.R. pt. 29862) (delegating duties to the Arbitral Body to adjudicate doping matters).

<sup>170</sup> Horseracing Integrity and Safety Authority, 87 Fed. Reg. 4023 §7030 (proposed Aug. 17, 2022) (to be codified at 87 C.F.R. pt. 29862) (setting parameters for the arbitral body, requiring there to be a minimum of five members, who serve four-year terms, and cannot have served as an officer, director, trustee, employee, consultant, or official for any Equine Constituency or agency).

<sup>171</sup> GLOBAL SPORTS ADVOCATES, [HTTPS://WWW.GLOBALSPORTSADVOCATES.COM/LIBRARY/HISA-UNVEILS-PROPOSED-ANTI-DOPING-AND-CONTROLLED-MEDICATION-PROTOCOL.CFM](https://www.globalsportsadvocates.com/library/hisa-unveils-proposed-anti-doping-and-controlled-medication-protocol.cfm) (last visited Nov. 26, 2022) (providing examples of controlled medications, and what controlled medication rule violations can include).

<sup>172</sup> Equine Anti-Doping and Controlled Medication Protocol, 87 Fed. Reg. 65292 (proposed Aug. 17, 2022) (to be codified at §3329) (providing what a professional’s status is after a rule violation).

<sup>173</sup> *Id.* at §3510 (providing what constitutes another violation under the protocol).

<sup>174</sup> Horseracing Integrity and Safety Authority, 87 Fed. Reg. 4023 (proposed Dec. 20, 2021) (to be codified at 87 C.F.R. §29862 (2022)).

<sup>175</sup> Arbitration Procedures, 87 Fed. Reg. 65292 (proposed Aug. 17, 2022) (to be codified at §7040) (providing how IAP members are elected).

<sup>176</sup> HISA *Requirements for Owners*, [https://jockeyclub.com/pdfs/HISA/HISA\\_Owners.pdf](https://jockeyclub.com/pdfs/HISA/HISA_Owners.pdf) (last visited Dec. 3, 2022) (defining covered persons all as owners, trainers, and jockeys).

<sup>177</sup> Arbitration Procedures, 87 Fed. Reg. 65292 (proposed Aug. 17, 2022) (to be codified at §7070).

<sup>178</sup> *Id.*

<sup>179</sup> Fault means “any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing a Covered Person’s degree of Fault include (but are not limited to) the Covered Person’s experience and special considerations such as impairment, the degree of risk that should have been perceived by the Covered Person, and the level of care and investigation exercised by the Covered Person in relation to what should have been the perceived level of risk...” *Fault*, HISA RULE SERIES 1000 (2022) <https://www.hisaus.org/regulations>.

<sup>180</sup> No Fault or Negligence means “the Covered Person establishing that he or she did not know or suspect, and could not reasonably have known or suspected, even with the exercise of utmost caution, that he or she had administered to the Covered Horse (or that the Covered Horse’s system otherwise contained) a Banned Substance or a Controlled Medication Substance, or that he or she had Used on the Covered Horse a Banned Method or a Controlled Medication Method, or otherwise committed an Anti-Doping Rule Violation or Controlled Medication Rule Violation...” *No Fault or Negligence*, HISA RULE SERIES 1000 (2022) <https://www.hisaus.org/regulations>.

<sup>181</sup> No Significant Fault or Negligence means “the Covered Person establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the Anti-Doping Rule Violation or Controlled Medication Rule Violation in question...” *No Significant Fault or Negligence*, HISA RULE SERIES 1000 (2022) <https://www.hisaus.org/regulations>.

When HISA determines the fault of the Covered Person, it will determine their sanction.<sup>182</sup> However, HISA's system will only be successful if it implements this fault system in a way that creates precedent.<sup>183</sup> This will allow stakeholders within the industry to become familiar with how HISA will operate when it is fully implemented and how sanctions will be handled in the future. By implementing precedent, HISA will create a uniform system of how violations are dealt with and how harsh the punishment will be. This will allow for a smoother implementation of the rules and overall acceptance of the new system.

It is completely viable for HISA to implement precedent through arbitration.<sup>184</sup> Arbitration is viewed as an ad hoc forum<sup>185</sup> in which arbitrators decide distinct legal issues outside a regular court system.<sup>186</sup> Arbitration systems have proven to be successful for many sports due to their ability to resolve distinct legal disputes.<sup>187</sup> However, arbitrators are known to neither follow nor make precedent.<sup>188</sup> This leads to the concern that over time, widespread use of arbitration "will result in the decay or destruction of the law itself."<sup>189</sup> Arbitration is often preferred for niche industries, such as horseracing, because parties wish to create a different type of precedent that would be better suited to their needs than those created by the government.<sup>190</sup>

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<sup>182</sup> See Horseracing Integrity and Safety Authority, 87 Fed. Reg. 4023 §3325(a) (proposed Aug. 17, 2022) (proving the general rule that "where the Covered Person establishes that he or she bears No Significant Fault or Negligence for the Anti-Doping Rule violation in question, then ... the period of ineligibility shall be fixed between three (3) months and two (2) years, depending on the Covered Person's degree of fault.").

<sup>183</sup> See Horseracing Integrity and Safety Authority, 87 Fed. Reg. 4023 §3324 (proposed Aug. 17, 2022); *See Also* Fédération Équestre Internationale, *New Internal Regulations of the FEI Tribunal*, 12-17 (Mar. 2, 2018) (setting out the fault system).

<sup>184</sup> W.C. Weidemaier, *Judging-lite: How Arbitrators use and create precedent*, 90 U.N.C L.REV. 1091, 1091(2012) (explaining that arbitrators can set precedent).

<sup>185</sup> Ad hoc is "these phrases mean 'for this purpose only.' Its literal translation from the Latin is 'to this'." *Ad Hoc*. CORNELL LAW SCHOOL [https://www.law.cornell.edu/wex/ad\\_hoc](https://www.law.cornell.edu/wex/ad_hoc); See *Schmidt v. Contra Costa Cty.*, 693 F.3d 1122, 1136 (9th Cir. 2012) (stating an ad hoc decision is one taken based on the circumstances of a particular case. An 'ad hoc' decision is made 'with a particular end or purpose,' as distinguished from 'a coordinated policy').

<sup>186</sup> Arbitration is "an alternative dispute resolution method where the parties in dispute agree to have their case heard by a qualified arbitrator out of court." *Arbitration*. CORNELL LAW SCHOOL <https://www.law.cornell.edu/wex/arbitration>.

<sup>187</sup> See COURT OF ARBITRATION FOR SPORT (last visited Oct. 17, 2022) <https://www.tas-cas.org/en/general-information/frequently-asked-questions.html> (Providing a large case log to see how many decisions it has successfully arbitrated).

<sup>188</sup> W.C. Weidemaier, *Judging-lite: How Arbitrators use and create precedent*, 90 U.N.C L.REV. 1091, 1091(2012) (explaining that arbitrators do not make precedent or follow it because their decisions are ad hoc).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 1097-98 (explaining that many people prefer arbitration because they can create a different type of precedent which is better suited to their needs).

The EAD Violations procedures can set precedent through their fault system;<sup>191</sup> which follows the argument that arbitration can set precedent.<sup>192</sup> The biggest obstacle in trying to set precedent in arbitration is that normally, the proceedings are entirely confidential.<sup>193</sup> Since many arbitration proceedings and awards are kept private, confidentiality denies the public information about past proceedings.<sup>194</sup> However, HISA has no intentions of keeping its decisions private.<sup>195</sup> Under Rule 7370, once the final decision is rendered in the arbitration proceeding, the decision will be publicly disclosed and will not be considered confidential.<sup>196</sup> So, stakeholders can have access to information about who received sanctions and why.<sup>197</sup> This means that HISA can create precedent because they will have access to previous arbitration decisions.

Furthermore, in a recent study published by the CAS, where they reviewed a series of cases since 2003, nearly every award contained one or more reference to an earlier CAS decision.<sup>198</sup> Although there is not a principle of binding precedent within the CAS, the CAS “will obviously try, if the evidence permits, to come to the same conclusion on matters of law as a previous CAS Panel. Whether that is considered a matter of comity, or an attempt to build a coherent corpus of law, matters not.”<sup>199</sup> The principle of referring to previous arbitral decisions has created precedent for future disputes within the CAS.<sup>200</sup> For example, the CAS has consistently upheld its strict liability rule without deviation for doping offenses, which occur whenever a prohibited substance is found in an athlete’s body regardless of the athlete’s intention or negligence in ingesting the banned substance.<sup>201</sup>

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<sup>191</sup> Horseracing Integrity and Safety Authority, 87 Fed. Reg. 4023 (proposed Dec. 20, 2021) (to be codified at 87 C.F.R. §29862 (2022) (setting out the standards for procedure of EAD violations in rule 7170).

<sup>192</sup> W.C. Weidemaier, *Judging-lite: How Arbitrators use and create precedent*, 90 U.N.C L.REV. 1091, 1091(2012) (explaining how arbitrators can set precedent).

<sup>193</sup> LEXOLOGY, <https://www.lexology.com/library/detail.aspx?g=a0655987-d19c-49b1-b78f-5e2b9b6d7b58> (last visited Nov. 6, 2022); AMERICAN ARBITRATION ASSOCIATION, <https://www.adr.org/StatementofEthicalPrinciples> (last visited Dec. 3, 2022) (explaining that the arbitration process is entirely confidential unless agreed to otherwise). <sup>194</sup> Mark C. Weidemaier, *Toward A Theory of Precedent in Arbitration*, 51 UNC L.J., 1895, 1899 (2010) (discussing the issues arbitrators face why trying to use past decisions because of the confidentiality element).

<sup>195</sup> Paulick Report Staff, *HISA Has Issued Total of 64 Riding Crop Violations Since Implementation*, PAULICK REPORT (Jul. 25, 2022, 5:58pm) <https://paulickreport.com/news/the-biz/hisa-has-issued-total-of-64-riding-crop-violations-since-implementation/> (providing the list of published violations of the HISA riding crop rule).

<sup>196</sup> Horseracing Integrity and Safety Authority, 87 Fed. Reg. 4023 (proposed Dec. 20, 2021) (to be codified at 87 C.F.R. §29862 (2022)).

<sup>197</sup> *Id.* (providing that a full opinion of the rule violation will be published after it is adjudicated)

<sup>198</sup> Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARBITRATION INTERNATIONAL 357, 365 (2007) (reporting on the recent case study done by the Court of Arbitration for Sport).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 365.

<sup>201</sup> *Id.* at 366.

The concept of a fault scheme in arbitration further supports the precedent argument; since no-significant fault or negligence in the arbitral procedures creates predictability, it can create rules.<sup>202</sup> Since a finding of non-significant fault or negligence can reduce a sanction term, it provides for predictability within the system and the implementation of this procedure can be seen as precedent.<sup>203</sup> This proves that it is possible for sports arbitration to create precedent in which they can follow for future cases. Like the CAS, once HISA starts publishing their arbitration decisions, it would be beneficial to refer to previous decisions when deciding future disputes. This will ensure HISA creates precedent. If HISA can follow the fault systems that are in place and successfully operating for the FEI and CAS, then they will be able to successfully implement their new rules.

### III. Conclusion

Horseracing is unlike any other sport, it provides an incredible atmosphere for professionals and spectators, and it continues to thrive centuries after its creation. Horseracing has been based on the idea that each competing horse has been created equal. However, this was curtailed by industry professionals who used drugs to gain a competitive advantage. The drug abuse enabled professionals to build artificially enhanced horses that would be impossible to beat, essentially destroying the horses and the sport simultaneously. After years of different rules and regulations in the racing industry, the FTC has finally introduced HISA, which will successfully regulate the horseracing industry and provide professionals with a uniform set of rules to reference for best practices.<sup>204</sup> HISA will prove to be a successful and beneficial program for the horseracing industry. However, it has many kinks to work out. Due to the unpredictability of racehorses and the racing industry, arbitration was chosen to resolve the disputes because it allows for flexibility in its decisions. The arbitration system will be a successful dispute resolution process for the industry,<sup>205</sup> but only if HISA can create a precedent system like the FEI and CAS. By 2023, HISA will be introduced entirely into the racing world, it will finally start to address all the doping and safety issues within the industry, and it will show no mercy on those who have cheated their way to the top for many years.

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<sup>202</sup> *Id.* (discussing how the concept of no significant fault or negligence plays a pivotal role in the argument for precedent in arbitration by creating predictability within the system).

<sup>203</sup> *Id.*

<sup>204</sup> See Chris Hayward, *Why HISA model will transform US racing- in both business and safety terms*, THOROUGHBRED RACING COMMENTARY (Oct. 27, 2022) <https://www.thoroughbredracing.com/articles/5621/why-hisa-model-will-transform-us-racing-both-business-and-safety-terms/> (explaining how HISA will transform the racing industry in terms of business and in safety).

<sup>205</sup> See Practical Law Arbitration, *Why arbitrate?*, PRACTICAL LAW UK PRACTICE NOTE 1-204-0032 (2022) (explaining that arbitration is appropriate because of its flexibility in adjudicating many different topics).

Laws & Paws Word Search, by Adam N. Lepzelter, Esq.

**Instructions:**

Each of the words in the word bank below can be found in the puzzle horizontally, vertically, diagonally, or backwards. Circle the letters of each of the words below when found. When all the words have been found, the remaining non-circled letters will reveal a special message.

K	I	L	L	E	R	W	H	A	L	E	J	E	W
I	C	A	N	I	S	L	U	P	U	S	U	Q	I
R	D	N	O	R	T	H	G	L	A	W	S	U	L
K	E	P	A	P	T	U	R	T	L	E	E	U	D
P	B	A	S	S	R	M	C	O	U	R	T	S	L
A	L	W	S	S	N	A	P	P	I	N	G	C	I
S	U	S	O	N	B	N	B	I	L	L	S	A	F
S	E	E	I	N	G	E	Y	E	D	O	G	B	E
A	B	A	Y	H	O	S	W	H	E	T	E	A	R
M	I	S	E	A	C	O	M	M	T	N	E	L	B
O	R	T	A	S	P	C	A	S	A	N	S	L	E
N	D	E	E	A	N	I	B	E	A	R	E	U	A
T	I	R	L	I	V	E	S	T	O	C	K	S	V
I	M	N	K	A	S	T	R	I	P	E	D	L	E
T	H	E	N	E	W	Y	O	R	K	B	A	R	R

**WORD BANK:**

ASPCA	SEEING EYE DOG	KIRK PASSAMONTI	WILDLIFE	BILLS
ELK	HUMANE SOCIETY	THE NEW YORK BAR	LIVESTOCK	COURT
BEAR	KILLER WHALE	CANIS LUPIS	STRIPED BASS	LAWS
GEESE	EASTERN BLUEBIRD	EQUUS CABALLUS	NORTH BEAVER	PAWS
COMMON SNAPPING TURTLE				

**SPECIAL MESSAGE:**

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(ADAPTED FROM BETTY WHITE)