

LEGAL PROTECTION FOR HORSES: CARE AND STEWARDSHIP OR HYPOCRISY AND NEGLECT?

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Horses have a strong connection to America and Americans. They have played a pivotal role in our history, they have been a part of our work and our play, and we cherish them as companion animals. The legal system has made significant steps to protect horses in a number of ways. However, quite ironically, horse protection laws are often ineffective, unenforced, and sometimes non-existent. This article will explore America's relationship with the horse, horse protection laws—their strengths and their failures.

I. INTRODUCTION

The horse—both wild and domestic—has played a larger role in American life, culture, and mythology than any other animal. Bald eagles are often used as the symbol of the United States, and Bison frequently represent the noble tradition of Native Americans, yet neither rival the horse in importance to America and Americans. Horses have done everything from transporting pioneers and plowing fields to racing at tracks and acting as cherished companions. In addition to playing a practical role in our history, horses are also symbolic. Images and descriptions of horses are often used to represent the early days of the American West, as well as commonly admired traits, such as courage, speed, intelligence, and loyalty. Even with the advent of technology, which has rendered the horse as a working animal obsolete, Americans by the millions continue to own, use, ride, and admire horses.

Despite the great importance that horses have in our society and culture, the legal protections afforded wild and domestic horses are at best inconsistent and often lacking. While society purports to love and admire the horse, our legal system does not always reflect this love and admiration. Although many aspects of American law emphasize the importance of horses and the strong need to protect them, the in-

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consistent application and enforcement of the existing regime results in the death or abuse¹ of thousands of horses annually with little or no legal repercussions.² Indeed, the existence of these legal tools that ostensibly protect wild and domestic horses make the reality of widespread horse abuse and slaughter all the more ironic.³

This article seeks to bring to light and criticize the dualistic aspect of American law: powerful statements of stewardship and protection in theory, yet continued and widespread abuse and slaughter of horses in practice. Section II surveys the prominence of horses in our past and present society as work animals, companions, participants in entertainment, and symbols of cultural values, with an emphasis on the American tradition of holding horses in very high regard. Section III outlines some major sources of law aimed at protecting both wild and domestic horses, looking specifically at the intent of the lawmakers in creating these protections. Section IV demonstrates how the existing legal regime does not sufficiently provide for the protection of the horse, due to either gaps in laws or failure to enforce existing laws. These legislative shortfalls become evident in the examination of three American industries which routinely abuse or slaughter horses, yet are not legally curtailed or successfully regulated in their activities. Section V concludes by evaluating this paradoxical relationship that American law has with the horse and discusses the possible ways we can bring our legal system in line with our stated values.

II. SIGNIFICANCE OF THE HORSE IN AMERICA

As a beautiful and powerful animal, long domesticated but still retaining a certain potential for wildness, the horse symbolizes the range of interrelationships which bind mankind to the natural world.⁴

An anthropologist-veterinarian has pointed out, "the bonds which united people and horses do not represent utilitarian relationships alone, though they may first arise out of these, but are soon trans-

¹ For the purpose of this article, the term "abuse" and its synonyms will be used broadly to include many forms of horse mistreatment, cruelty, and neglect. The author recognizes, however, that the types of activities that constitute "abuse" will vary depending on the subjective views of the parties involved. See WEBSTERS THIRD NEW INT'L DICTIONARY 8-9(1986) (definition of "abuse" includes "misuse," "improper use of," "maltreat," and "to take unfair or undue advantage of.>").

² This article only discusses abuses which are institutional and patterned in nature, as opposed to those which are individual and random. Although the latter category is, of course, a serious problem and deserves attention, the problems and issues discussed here are less relevant to those forms of abuse.

³ Although the author is a great lover of horses and strongly opposes the abuse and slaughter of horses, that view is not the thrust of this article. Rather, its basic criticism focuses on the great disparity between how horses are treated by American culture and law as a theoretical matter and the actual treatment of horses by many American entities and institutions, which has been greatly unencumbered by our legal machinery.

⁴ ELIZABETH ATWOOD LAWRENCE, *HOOFBEATS AND SOCIETY: STUDIES OF HUMAN-HORSE INTERACTIONS* 196 (1985).

formed into affective ones as well.”⁵ Nowhere was this pattern more true than in the history of the United States.⁶ In addition to the functional roles played by horses in our history, equines in the United States have also acted as sources of entertainment, recreation, and companionship.⁷ Clearly, the relationship between America and the horse has long transcended the simple owner-worker model and has taken on a much more intimate and emotional quality.⁸ Probably the most significant indicator of the importance of horses in American society is the powerful role that horses continue to play in the symbolism and mythology of the nation.⁹ In addition to the horses’ prevalence in

⁵ *Id.* at ix.

⁶ The modern American horse descended from horses imported to the Americas originally by Christopher Columbus and later by Hernan Cortez in 1519. Kenneth P. Pitt. *The Wild and Free-Roaming Horses and Burros Act: A Western Meoldrama*, 15 ENVTL. L. 503, 505 (1985). As horses began to proliferate in the ensuing decades, many horses escaped, forced into a feral existence and found “an ecological niche with no natural predators, flourished on the western plains.” *Id.* The first role of the modern domesticated horse in America was as a working animal and means of transport—Native American Tribes began to appropriate horses for the transport of people and cargo by the 17th Century. ROBERT WEST HOWARD, *THE HORSE IN AMERICA* 46-47 (1st ed. 1965). Many tribes developed variations of the European breeds to suit their needs. ROBERT MOORMAN DENHARDT, *QUARTER HORSES: A STORY OF TWO CENTURIES* 4 (1980) (discussing ponies developed by the Cherokees and Chickasaws as “[o]ne of the most important strains to influence the Colonial Quarter Horse.”). Henceforth, horses participated in nearly every aspect of colonial and post-colonial American commerce, including transportation, manufacturing, communication, and agriculture. HOWARD, *supra*, at 73. The horse played a vital role in the dynamism and growth that marked the early American experience, from transporting mail and soldiers, to pulling plows and carrying vegetables. *Id.* Even after the horse’s necessity was eclipsed by mechanical means, the horse still plays a functional role today in both urban and rural settings. *Id.*

⁷ People of all socio-economic categories own, ride, or observe horses for pleasure. Horse shows are a common phenomenon. In the colonial era, horse racing was already established as a popular pastime. DENHARDT, *supra* note 6, at 7. The ownership of pleasure horses remains strong today. According to a National Economic Impact Study conducted in 1995, 6,931,000 domestic horses exist in the United States. The Jockey Club, *National Economic Impact Study* (visited May 20, 2000) <<http://www.jockeyclub.com/factbook/impact.html>> (excerpting the American Horse Council Study conducted by Barents Group LLC in 1995). Of that number, 725,000 were used in racing; 1,974,000 were in shows; and 2,970,000 were used for “[r]ecreation.” *Id.* (the remaining 1,262,000 horses were categorized as “other”). According to statistics from the Horse Industry Alliance, more than 10% of American households participate in riding horses and another 18% are “interested in riding.” Horse Industry Alliance, *Horse Industry Alliance (HIA): Online* (visited May 20, 2000) <<http://www.horseindustryalliance.com>>.

⁸ This, of course, is hardly a revolutionary or surprising idea. Throughout history, people have grown very attached emotionally to the animals that were supposed to merely fill functional needs. One need only to think of the strong bonds between many great figures in history—Alexander the Great, Julius Caesar, and George Washington to name a few—and their horses to be reminded of this phenomenon.

⁹ American society and popular culture is replete with references to horses and use of horses as symbols. In the literary world, thousands of fiction and nonfiction books in print involve horses, everything from simple books that describe horse breeds, to instructional books on horse care and maintenance, to novels about the adventures of horses and their owners, to mystery novels revolving around the world of horse racing. See JANE KIDD, *INTERNATIONAL ENCYCLOPEDIA OF HORSE BREEDS* (1985); JUDY CHAPPLE,

popular media, horses have symbolic power in everyday communication. The English language contains many phrases and idioms that refer to horses.¹⁰ Moreover, horses are commonly portrayed and referred to in our media and culture, yet rarely in a negative light. The over six million domestic horses in the United States are almost invariably treated as strong, heroic, and faithful. Despite society's appreciation and reverence for the horse, the law fails to thoroughly embrace these ideals, only providing a patchwork of protections in force today.

III. LEGAL SOURCES OF HORSE PROTECTION

Since the arrival of European settlers to American shores, horses have played an important role in many facets of American life and mythology. But, what about our legal culture? Have the courts and legislatures of this country viewed horses as important? The answer is not simple. The horse has fared inconsistently under American law, both in theory and in practice, although our legal system has at least expressed a desire to offer the horse some protection. In American jurisprudence, there are many indications that lawmakers throughout history have had a congruent view with much of the ordinary citizens—that horses are valuable, important, and worthy of protection. Indeed, the law is full of examples of statements to this effect. One of the most powerful examples of these pro-horse expressions can be found in the legislative history accompanying the enactment of the

YOUR HORSE: A STEP-BY-STEP GUIDE TO HORSE OWNERSHIP (1984); BARBARA CORCORAN, A HORSE NAMED SKY (1986); MARGUERITE HENRY, MUSTANG: WILD SPIRIT OF THE WEST (1966); WALTER FARLEY, THE BLACK STALLION (1941). Titles such as *The Black Stallion*, *National Velvet*, *Phar Lap*, and *The Horse Whisperer* remind us of the numerous films involving horses. Western-themed shows such as *Rawhide* or *Bonanza*, and series where the horses are the main characters, such as *My Friend Flicka* or *Mr. Ed*, illustrate the significance of horses on television.

¹⁰ Examples of horse-oriented phrases are "strong as a horse" and "horse sense." As another illustration of the common use of horse-references in American English, when this author did an electronic search on Westlaw for law review titles containing the word "horse," 144 articles came up, only five of which actually involved horses. Examples of titles include: Alvin Sharp, *Nuclear Energy: the Fifth Horse of the Apocalypse*, 14 S.U. L. REV. 305 (1987); and Dr. Michael Norman & Dr. L. Kay Gillespie, *Changing Horses: Utah's Shift in Adjudicating Serious Juvenile Offenders*, 12 J. CONTEMP. L. 85 (1986).

Whether as a simple illustration for a child's poster, a book about the American West, or a performance of the famous Lippizaner Stallions, images of horses exemplifying power, grace, beauty, and freedom fills our society. It is possible to go on for pages giving examples of how we use and perceive horses as representing these positive traits, and anyone who looks for them out in the world will be amazed with the number of examples. Evidence of this phenomena can be seen on a movie screen, in the pages of a book, at a rodeo, or in a museum of American history. In fact, at the time of writing, this author happened upon a rather large exhibit at San Francisco International Airport furnished by the Smithsonian Institution all about the relationship between Native Americans and horses. Horses can be found in television commercials, on wine labels, cufflinks, and restaurant signs.

Wild Free-Roaming Horses and Burros Act of 1971.¹¹ A Senate report contains the following statement:

The wild and free-roaming horses and burros . . . belong to no one individual. They belong to all the American people. The spirit which has kept them alive and free against almost insurmountable odds typifies the national spirit which led to the growth of our Nation. They are living symbols of the rugged independence and tireless energy of our pioneer heritage.¹²

The legislators enacted legal protections with the intention of preventing cruelty, inhibiting needless suffering, and encouraging responsible use and ownership of horses. These legal safeguards are important on two levels. Foremost, they are substantive avenues by which abuses and inhumane behavior can be prohibited or halted by citizens or the government. A second, more subtle importance is what their existence represents—an affirmative desire by various lawmakers in various places at various times to assure that the horse enjoys a greater measure of protection than foregoing legal regimes were able to provide. This indicates a feeling, mirrored by the American population in general, of affinity for and stewardship of our horses.

A. Federal Law

1. *The Wild Free-Roaming Horses and Burros Act*

The source in Federal law for the protection and stewardship of the wild horses¹³ in the United States is the Wild Free-Roaming Horses and Burros Act ("Horses and Burros Act" or "Act").¹⁴ The wild horse in this country became an issue of concern for many following the Second World War, because the killing of wild horses (mainly for pet food) began to increase and became more publicized.¹⁵ As a result of this hunting, along with encroachment on the horses' range by humans and cattle, the wild horse population in America had dwindled to approximately 25,000 by the latter half of the twentieth century.¹⁶ In addition, information about the abusive methods used in catching and keeping these horses (such as tying horses to trucks to exhaust them or abandoning foals to die who did not weigh enough) had

¹¹ 16 U.S.C. §§ 1331-1340 (1996).

¹² S. REP. No. 242, 92d Cong., at 1 (1971). Also, the preamble of the statute contains the following passage: "Congress finds and declares that wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West; that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people . . ." 16 U.S.C. § 1331.

¹³ The discussion of this statute will focus on its protections as they relate to wild horses. This should not be understood to imply that the protections afforded our nation's wild and free-roaming burros are any less important. Indeed, due to the greater romantic appeal of horses, protecting the horse's smaller and more sturdy relative is probably as important.

¹⁴ 16 U.S.C. §§ 1331-1340 (1996).

¹⁵ Pitt, *supra* note 6, at 506.

¹⁶ *Id.*

reached members of the public, spurring many into action.¹⁷ The leader of this popular movement was Velma B. Johnston, head of the Wild Horse Organized Assistance, Inc. (WHOA).¹⁸ Johnston (or Wildhorse Annie, as she was known to many) and her growing number of supporters lobbied vigorously for the Federal government to take action to save the failing wild horse population.¹⁹ The first result of this public demand for protection was the so-called Wildhorse Annie Act in 1959, which prohibited the use of aircraft and other motor vehicles to hunt horses.²⁰ Since this law's protections were so limited in scope and the statute did not establish a sufficient enforcement mechanism, the Wildhorse Annie Act proved to be, in the words of one author, "totally ineffective."²¹ Consequently, the wild horse population continued to decline, falling to an estimated 9000 by 1971.²²

Due mainly to the continued efforts of WHOA and an accompanying large-scale letter writing campaign, Congress again took action to protect the wild horses in 1971, in the form of the Wild and Free-Roaming Horses and Burros Act.²³ Based upon congressional findings that the wild horse was a valuable natural feature of our nation and that "these horses and burros are fast disappearing from the American scene," the Act set out a scheme of protection and management of America's wild horses.²⁴ In particular, the Act declared all wild free-roaming horses and burros to be under the jurisdiction of the Secretary of the Interior, directing the Secretary "to protect and manage wild free-roaming horses and burros as components of the public lands."²⁵ The Secretary, with the consultation of a joint advisory board created under the Act,²⁶ was ordered to take necessary steps to "manage wild free-roaming horses and burros in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands."²⁷ The Secretary was also directed to "maintain a current inventory" of horses and burros on public lands, in order to keep the population at manageable levels.²⁸ With these provisions, the Wild and Free-Roaming Horses and Burros Act represented a significant step forward (at least in theory) in the protection of our nation's wild horses and burros, despite several problems with the proper implementation and enforcement.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 18 U.S.C. § 47 (1959).

²¹ Pitt, *supra* note 6, at 507.

²² *Id.*

²³ 16 U.S.C. § 1331 (1996).

²⁴ *Id.* § 1331.

²⁵ *Id.* § 1333(a).

²⁶ *Id.* § 1337 (setting out appointment, membership, function, and qualifications standards for the creation of the joint advisory board).

²⁷ *Id.* § 1333(a).

²⁸ *Id.* § 1333(b).

2. *The Horse Protection Act*

A second source of Federal law designed to prohibit abuse and misuse of horses came with the Horse Protection Act (HPA) in 1970.²⁹ Despite its general name, the HPA focuses on the inhumane practice of "soring" horses for exhibition.³⁰ Soring enhances the performance of exhibition horses by applying chemicals, lacerating or burning, or injecting screws or other objects into a horses legs or feet.³¹ The statute mandates recordkeeping and reporting requirements and provides for inspections of exhibition horses by qualified officials.³² Horses found to be "sore" are disqualified.³³ In addition, the owners may be subjected to civil and criminal penalties.³⁴ Under the HPA, the United States Department of Agriculture (USDA) is charged with the promulgation of necessary regulations³⁵ and enforcement of the Act.³⁶

B. State Legislation

In addition to the various forms of Federal protection of wild and domestic horses, state statutes can be used to prohibit the inhumane treatment of horses. Every American jurisdiction has some form of criminal statute prohibiting cruelty to animals.³⁷ From a horse protec-

²⁹ 15 U.S.C. §§ 1821-1831 (1996).

³⁰ *Id.* § 1822.

³¹ *Id.* § 1821. The HPA gives a more complete and accurate definition of what constitutes soring:

(3) The term "sore" when used to describe a horse means that—

- (A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,
- (B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,
- (C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or
- (D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse, and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can be reasonably expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving

....

Id.

³² *Id.* § 1823(d).

³³ *Id.* § 1823(a).

³⁴ *Id.* § 1825.

³⁵ 9 C.F.R. §§ 11.1-.41 (1998) (USDA Horse Protection Regulations).

³⁶ 15 U.S.C. § 1821 (1996) (designating the Secretary of Agriculture as the enforcing official under the HPA).

³⁷ See CAL. PENAL CODE § 597 (West 1999); LA. REV. STAT. ANN. § 14:102.1 (West 1999); MASS. GEN. LAWS ANN. ch. 272, § 77 (West 1999); MICH. COMP. LAWS ANN. § 750.50 (West 1999); 1978 N.M. LAWS 30-18-1; WASH. REV. CODE § 16.52.205 (1999). For a discussion of the history and development of American anti-cruelty legislation see David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800's*, 1 DET. C. L. REV. 1 (1993). For an overview of what these anti-cruelty laws cover see Pamela Frasch et al., *State Animal Anti-cruelty Statutes: An Overview*, 5 ANIMAL L. 69 (1999).

tion standpoint, these laws are vital supplements to the Federal protections, since the congressional statutes are specific in scope and only cover a certain class of horses and horse treatment, such as wild horses or exhibition horses. State or local³⁸ laws are usually broad-based, general in terms, and are designed to prevent and punish all types of cruel practices against all types of animals.³⁹

Some statutes categorize certain abuses as felonies,⁴⁰ and most provide for both imprisonment and fines.⁴¹ Although the scope and force of these laws sometimes vary greatly, their coverage of abuses to horses is clear, as horses easily fall under even the narrowest statutory definition of "animal."⁴² Thus, at least in theory, the application of the

³⁸ Some state legislatures allocated police powers to municipalities which allows the local governments to either pass supplemental measures to the existing state animal cruelty law, *see* 1978 N.M. LAWS 3-18-3, or directs the municipality to generate anti-cruelty laws in lieu of statewide provisions, *see* S.D. CODIFIED LAWS § 9-29-11 (Michie 1998).

³⁹ For example, the Florida anti-cruelty statute, a fairly typical example, reads: A person who unnecessarily overloads, overdrives, torments, deprives of necessary sustenance or shelter, or unnecessarily mutilates, or kills any animal, or causes the same to be done, or carries in or upon any vehicle, or otherwise, any animal in a cruel and inhumane manner, is guilty of a misdemeanor of the first degree
FLA. STAT. ANN. § 828.12(1) (West 1999).

In addition to these criminal prohibitions, owners of abused horses have the ability to bring an action in civil court against the abuser under a common law property or tort claim. *See, e.g.,* Campbell v. Animal Quarantine Station, 63 Haw. 557, 632 P.2d 1066 (1981); Brousseau v. Rosenthal, 110 Misc. 2d 1054, 443 N.Y.2d 285 (1980); Corso v. Crawford Dog & Cat Hosp., Inc., 97 Misc. 2d 530, 415 N.Y.S.2d 182 (1979). It should be noted, however, that bringing such an action is usually only possible in cases of complete debilitation or killing of the animal and, even those cases are difficult to maintain successfully. *See* Gluckman v. American Airlines, Inc., 844 F. Supp. 151 (S.D.N.Y. 1994); Miller v. Peraino, 426 Pa. Super. 189, 626 A.2d 637 (1993). Although such a civil action may enable an owner to obtain some recompense for his damages, its availability does little to systematically protect horses or prevent their abuse generally.

⁴⁰ *See* CAL. PENAL CODE § 597(c); WASH. REV. CODE § 16.52.205(2).

⁴¹ *See* CAL. PENAL CODE § 597(c) (offense punishable by a fine of up to \$20,000 or by up to one year in jail, or both); LA. REV. STAT. ANN. § 14:102.1(A)(2)(a) (first offense punishable by fine of up to \$1000 and six months imprisonment); MICH. COMP. LAWS ANN. § 750.50(4) (first offense punishable by fine of up to \$1000 and 93 days imprisonment).

⁴² Although these statutes' definitions of protected "animals" vary greatly and are often more circumscribed than one might suspect, horses as common, domesticated mammals are easily within even these malleable definitional boundaries. *See* ALASKA STAT. § 11.61.140(c) (Michie 1998) ("[i]n this section, 'animal' means a vertebrate living creature not a human being, but does not include fish"); FLA. STAT. ANN. § 828.02 (West 1994) ("[i]n this chapter . . . the word 'animal' shall be held to include every living dumb creature"); N.H. REV. STAT. ANN. § 644.8(II) (1998) ("[i]n this section, 'animal' means a domestic animal, a household pet or a wild animal in captivity"); S.D. CODIFIED LAWS § 40-1-1 (Michie 1991) (defining "animal" as "any mammal, bird, reptile, amphibian or fish, except humans.").

anti-cruelty laws to any abusive treatment of horses is appropriate and appears to be an important way to achieve horse welfare.⁴³

IV. ARE THESE PROTECTIONS ENOUGH?

The important role horses have played in American history has led to both judicial and legislative protections for them. If the discussion were to end here, one might assume that this is a logical state of affairs: that horses are indeed very important to the people and lawmakers of this country and that, as a consequence, steps have been taken to protect horses from abuse and exploitation. A closer look, however, reveals that this is not necessarily the case. Although there are several sources of Federal and state law which are either designed or can be used to protect horses, these protections suffer from limited coverage and an even more limited application.

To illustrate the deficiency of our present system of horse protection laws and the need for a change in the application of those laws, this Part will examine three areas in which the legal system is not working efficiently to protect horses: 1) wild horse protection, 2) abuse in the Tennessee Walking Horse industry, and 3) Premarin harvesting. While it should be emphasized that systematic abuse and mistreatment of horses is by no means confined to these three areas, they are demonstrative of the problem at hand.⁴⁴ The presence and operation of certain industries in the United States which cause (or allegedly cause) the widespread mistreatment, abuse, and deaths of thousands of horses seems to fly in the face of both the populist view of horses as valuable and worthy of protection, and the apparent legal policy to prevent abusive or exploitative conduct. In other words, regardless of the adoration and stewardship of horses that American society projects, the reality is in dissonance with those widely-held beliefs and goals.

A. *Problems with Protections of Wild Horses*

The enactment of the Wild and Free-Roaming Horses and Burros Act by Congress in 1971 certainly marked a strong and positive step towards the protection and preservation of the nation's wild horses.⁴⁵ The Act set forth broad prohibitions on the capture and killing of wild horses, and mandated government action designed to protect the wild horse population; however, the Act depended on the Bureau of Land

⁴³ Anti-cruelty statutes exempt many practices that many consider cruel, greatly limiting these anti-cruelty laws. See Pamela Frasch et al., *State Animal Anti-cruelty Statutes: An Overview*, 5 ANIMAL L. 69 (1999).

⁴⁴ Other industries implicating horse abuse problems include Three-Day Eventing, rodeos, and horse racing. THE HUMANE SOCIETY OF THE UNITED STATES, HSUS FACT SHEET: HORSE RACING (1993), THE HUMANE SOCIETY OF THE UNITED STATES, HSUS ON RODEO: RODEO FACT SHEET (1996).

⁴⁵ See discussion *infra* Part III.A.2.

Management (BLM) for actual implementation.⁴⁶ The implementation of the policy has proven to be a source of great difficulty and controversy.

The passage of the Act had more widespread effects than altering the actual treatment of wild horses by government and private entities. The Act requires that BLM manage the wild horse and burro populations by maintaining and protecting their ranges,⁴⁷ that necessitated a change in BLM's existing rangeland policy.⁴⁸ Prior to the passage of the Act, ranchers used the wild horses' territory to graze their cattle.⁴⁹ The Act, and the protections for the horses, caused a direct conflict over the use of public lands between the wild horses and burros, and the ranchers.⁵⁰ Objections by the ranching industry and BLM's attempts to accommodate the ranchers' interests have led to a more tentative application of the Act than the language of the statute seems to require.

BLM's conflict of interests also created a controversy among ranchers and horse supporters as to the proper application of the Act, causing several deficiencies in the Act's implementation. The most prominent problem with BLM's implementation of the Act was the Agency's administration of the Adopt-A-Horse Program. The Program allows recreational riders or ranchers to adopt wild horses and burros with the goal that the animals would be end up in humane homes.⁵¹ Not long after the Program's implementation, complaints about the administration of the Program emerged.⁵² Specifically, critics claimed that many of the animals adopted ended up in slaughterhouses,⁵³ an event that the Wild and Free-Roaming Horses and Burros Act was specifically enacted to prohibit.⁵⁴ In response to these problems with the Adopt-A-Horse Program, Congress added special provisions to the

⁴⁶ BLM, a sub-agency of the United States Department of the Interior, is responsible for administering the Act, under the Secretary of the Interior's direction. See 16 U.S.C. § 1332 (1996).

⁴⁷ Pitt, *supra* note 6, at 508.

⁴⁸ *Id.* at 515 (stating that "the Act essentially reversed BLM's grassland management policy.").

⁴⁹ Prior to the passage of the Act the rangeland policy followed a "successive ecology" model, that reflects "a value system . . . which demands ever higher yields and measures 'progress' as a value in itself." *Id.* [quoting *Protection, Management and Control of Wild Free-Roaming Horses and Burros: Hearings Before the Subcomm. on Public Lands and Reserved Water of the Comm. on Energy and Natural Resources on S.457*, 98th Cong. 1st Sess. 331 (1983) (statement of Ron Smith,)]. One summation of this policy stated that "[m]aintaining a perpetual grasslands supply for [cattle] grazing purposes requires artificial control but is economically desirable." *Id.* The creation of the Act forced the Federal agency to alter this artificial pro-grazing policy and change the status quo of rangeland management. *Id.*

⁵⁰ *Id.* at 513-17.

⁵¹ *Id.* at 521-22.

⁵² *Id.*

⁵³ *Id.* at 529.

⁵⁴ *Id.*

Public Rangelands Improvement Act (PRIA) in 1978.⁵⁵ These provisions made substantive changes to the Program itself, and created additional responsibilities for the BLM.⁵⁶ Changes to the Adopt-A-Horse Program limited the number of adoptions to four horses per year per owner, and delayed the passage of title to the adopter for one year.⁵⁷ These sections of the PRIA “also spelled out in some detail BLM’s responsibilities for 1) inventorying the wild herds, 2) determining appropriate population levels, and 3) determining whether excess animals should be removed from a given area.”⁵⁸

Despite attempts to change and reform the Adopt-A-Horse Program, problems remain. According to a 1998 article, “[o]ver the past 15 years, the [BLM] has come under heavy criticism for allowing wild animals included in its ‘Adopt-a-Horse or Burro Program’ to be sold to slaughterhouses.”⁵⁹ The BLM insists that it “closely screens potential buyers for their intentions, requiring proof that they are capable of caring for the animals and that they have experience in taming them.”⁶⁰ Nonetheless, critics “charge[] that the agency is still primarily concerned with controlling the animal population on the ranges and not taking the steps to find them appropriate homes.”⁶¹ However, both the Agency and protection groups agree that insufficient funding remains one of the main problems in the BLM enforcement of the Act.⁶² Indeed, since the birth of the Act, the BLM has struggled with shortages in funds and personnel; yet, according to the Agency, Congress fails to respond. An ambiguous message from Congress—a strong Federal statute with clear terms alongside the lack of funding to support it—is not unique to this area of the law, but does give rise to several questions. Is Congress really serious about protecting the wild horses and burros? If not, why was the Act passed? Why does it still exist? Is this really reflective of the wishes of the voting public, a public which mobilized a huge grassroots movement to get the Act passed? The truth about how effective the BLM’s management of the wild horse population and treatment of the horses remains in dispute. While the onus of blame for these problems and abuses may not rest in one place, clearly this instability leaves the fate of the wild horses and burros uncertain.

⁵⁵ 43 U.S.C. §§ 1901-1908 (1996).

⁵⁶ See Pitt, *supra* note 6, at 521-22.

⁵⁷ *Id.*

⁵⁸ *Id.* (citing 16 U.S.C. §§ 1332-1333).

⁵⁹ Antonio Olivo, *Activists Worry Over Upcoming Horse Auction: Animals Rights Groups Tell Concerns About Future of 100 Wild Mustangs and Burros to Be Sold at Pierce College Starting Oct. 16*, L.A. TIMES, Oct. 1, 1998, at B1.

⁶⁰ *Id.* (paraphrasing Doran Sanchez, spokesperson for the BLM).

⁶¹ *Id.*

⁶² *Id.*

B. *Soring of Walking Horses: The Horse Protection Act*

The horse exhibition industry is another area where horse abuse and mistreatment are a serious problem. In recent decades, the practice of soring show horses has become sufficiently widespread to trigger congressional action in the form of the HPA.⁶³ Yet, despite the HPA's strong terms, many argue that due to lax enforcement and widespread practice, the abuses continue in great numbers.⁶⁴ This Section discusses the practice of soring in horse exhibitions, the Federal government's response and enforcement patterns, and the position taken by those in the horse showing industry. This discussion highlights the sometimes illogical relationship between horses, their owners, and the law.

The soring of horses has long been a problem in horse showing competitions,⁶⁵ specifically, in the Tennessee Walking Horse circuit. The modern Tennessee Walking Horse originates from the plantation horses of the American South, who were known for their "exaggerated, unnatural high stepping gaits."⁶⁶ Owning and showing Tennessee Walkers has become a large and popular industry in certain parts of the country, with horses selling for up to \$1.2 million, and champions commanding \$15,000 for stud services.⁶⁷ Soring involves the application of chemical irritants, such as diesel fuel or mustard oil, or driving devices, such as nails or tacks, into sensitive areas of the horse's feet.⁶⁸ Horse's legs are often wrapped in plastic to "force the penetration of these irritants," which causes further foot pain.⁶⁹ The effect of the intentionally inflicted foot pain is that the sore horses "raise their hooves immediately after touching the ground and thus produce the high step," giving an advantage in a Tennessee Walking competition.⁷⁰ Soring is not necessary for successful showing, since the distinctive gait of the Tennessee Walker can be produced and enhanced humanely with the use of small weights and training. Soring simply provides a "short-cut" to success in competition, akin to a human athlete's use of steroids to become larger or stronger.⁷¹

This practice has been a major problem in the Tennessee Walking Horse industry for decades, and continues to raise concerns about the

⁶³ 15 U.S.C. § 1822 (1996).

⁶⁴ THE HUMANE SOCIETY OF THE UNITED STATES, HSUS FACT SHEET: TENNESSEE WALKING HORSE ABUSE (1998) [hereinafter WALKING HORSE FACT SHEET].

⁶⁵ See discussion *infra* Part III.A.2.

⁶⁶ WALKING HORSE FACT SHEET, *supra* note 64.

⁶⁷ *Walking Horse Season Postponed Amid Controversy about 'soring'*, THE COMMERCIAL APPEAL MEMPHIS, TN, Mar. 24, 1998, available in 1998 WL 3669153.

⁶⁸ WALKING HORSE FACT SHEET, *supra* note 64.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See *id.* Some note that the gait produced through more humane methods is "a less dramatic, more natural motion[.]" which may prove to be a disadvantage for a horse who is competing with horses who are subject to soring and thus have exaggerated gaits.

potentially inhumane conduct of many trainers.⁷² The American Show Horse Association, a group which governs and sanctions all American and English riding competitions, eliminated the Tennessee Walking Horse from its list of recognized breeds.⁷³ This is the only time the Association has ever taken this sort of action.⁷⁴ Congress responded to the sorning problem by enacting the Horse Protection Act (HPA) in 1970.⁷⁵ Congress created the statute in response to a finding that sorning was a sufficiently large problem, with insufficient enforcement, to merit legislation. As discussed above,⁷⁶ the HPA bans the practice of sorning outright and contains civil and criminal penalties for violators.⁷⁷ Under the HPA, the USDA is empowered to promulgate anti-sorning regulations, conduct inspections of potentially abused horses, and enforce the Act's provisions against violators.⁷⁸

This Section discusses two main aspects to the horse sorning controversy. The first involves the extent of the problem in the industry and the appropriate level of government regulation, while the second regards the adequacy of agency enforcement under the HPA against abusers.

Although the sorning issue has been around for decades, and the problem was severe enough to invoke congressional action, debate as to whether sorning constitutes a major problem in the Tennessee Walking circuit, and how common the practice actually is, remains. Most of those in the Tennessee Walking Horse industry claim that sorning is not in fact a widespread problem in showing circles; rather, they claim that the extent of sorning has been exaggerated by animal rights groups.⁷⁹ In the words of a vice chairman of the National Horse Show Commission (a Tennessee Walking Horse Association), animal rights activists "put out a lot of propoganda" and use the sorning problem "as a whipping boy to raise money."⁸⁰ The Commission claims that the distinctive gait of the horses is the product of breeding and training, not abuse.⁸¹

Animal rights and welfare groups, certain USDA officials, and some who participate in the industry disagree with the Commission and believe sorning is a major source of abuse. Groups such as the American Society for the Prevention of Cruelty to Animals (ASPCA) have long charged the Tennessee Walking Horse industry with tolerat-

⁷² *Id.*

⁷³ Rachel Zoll, *WALKING on the Edge; Sorning Claims Exaggerated, Say Insiders in Show Horse Circles*, KNOXVILLE NEWS-SENTINEL, July 5, 1998, at B3.

⁷⁴ *Id.*

⁷⁵ 15 U.S.C. §§ 1821-1831 (1994).

⁷⁶ *See supra* Part III.A.2.

⁷⁷ 15 U.S.C. §§ 1821-1831 (1994).

⁷⁸ *Id.* § 1823.

⁷⁹ Zoll, *supra* note 73.

⁸⁰ *Id.*

⁸¹ *Id.*

ing soring in competition, and have pushed for stricter government regulation of the shows and trainers.⁸²

Despite the widespread denial in the industry, people have come forward. In 1997, Dr. Pam Reband, an executive committee member of the Tennessee Walking Horse Breeders and Exhibitors Association and longtime trainer, admitted to soring.⁸³ Dr. Reband admitted to "sanctioning torture for 30 years," saying she "never held a drop of mustard oil with my hand, but I've paid a hell of a lot of men to do it for me."⁸⁴ This was an unprecedented allocution by the industry, as Dr. Reband is "believed to be the first industry representative in [sixty] years to publicly confess to the practice."⁸⁵ This is not the only indication from participants in the Tennessee Walking Horse industry that soring is indeed a problem. Another example, from 1996, exists in the form of an anonymous letter sent to the Hooved Animal Humane Society. The writer was a person who claimed to know the circuit and have over ten years of training experience. Using the name "A Lover of the Breed," the individual detailed the three main methods of soring used by the "industry;" called the current enforcement program "a joke," because it is incapable of detecting many types of cheating; and said, "I refuse to subject my animals to this brutality, therefore, I am not competitive in the show ring."⁸⁶ Further, "[i]n response to a questionnaire

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Letter to the Hooved Animal Humane Society (on file with author). The entire letter reads:

This letter concerns the walking/racking horse. The 1996 show season is about to start, and once again, I worry about all the horses subjected to brutal "training." I speak from experience; I know what I am talking about. I have been showing padded horses in Alabama for over 10 years and I'm a well known by trainers. The industry (and it is a big business), is riddled with politics and motivated by money. Owners bring promising young horses to trainers wanting a World Grand Champion at any cost. Unfortunately, the cost is not so much money, but inhumane treatment for the horse. This abuse, masquerading as training, takes several forms:

1. Oil, known as "hitting, touching or taking to the well" - this involves putting mustard oil (often mixed with lighter fluid and jet fuel) on the horse's foot just above the coronet band and behind in the pocket. The foot is then wrapped in plastic, sealing the oil against the foot. The plastic is covered with leg wraps and electrical tape is put on the top and bottom so the horse cannot pull off the wraps. This results in severe burning. The pain is so intense that some horses are unable to walk or stand in their stalls. When the trainer comes to get the horse he often has to whip the horse to its feet and beat it to get it to walk out of the stall. The horse will stand like he is in a small basket - the front feet are so sore it hurts the horse to put any weight on them. Unfortunately, there is more to this. The horse is saddled and chains are put on the front ankles. The horse is ridden (trained) with heavy chains flopping up and down on the sore front feet. I personally have seen horses fall to their knees only to be whipped to their feet. Every couple of days scurf is removed. "Scurf" is the burned dead skin that peels off the front feet. Sometimes the scurf is so bad that the horse is "set up in acid" to burn off the dead skin. The acid used is salicydic acid and the procedure is very painful.

from the Tennessee Walking Horse Breeders and Exhibitors Association, the head of the largest industry competition held annually in Shelbyville, TN, stated that *every* trainer of Tennessee Walking Horses sores them with chemical irritants, heavy chains, or painful shoeing practices.⁸⁷

Evidence that soring is actually a significant problem also comes from government sources. A 1998 article reports that USDA veterinarians have found 673 cases of soring since 1987, even though they have attended only ten percent of the Tennessee Walker shows.⁸⁸ In the same article, the acting deputy administrator for USDA's Animal Care Division stated, "I can say clearly that the practice of soring continues."⁸⁹ Additionally, nine of the last sixteen winners of the Trainer of the Year award and nine of the past eleven presidents of the Walking

2. Quicking - This is done mostly to padded horses. The band that goes over/ across the hoof that helps hold the padded shoe is removed. A nail is driven into the hoof to the quick of the foot. When the horse flinches the nail head is cut off and the nail is counter-sunk. The area over the nail is filled in, spray painted black and the band is put back.

3. Pressure Shoeing - This is done to the bottom of the horse's hoof; the sole. An area about the size of a quarter is dug out deep enough and high enough to reach the nerve endings. A ball bearing is inserted followed by a strong heavy spring. The pad and shoe is then nailed on covering the spring. The horse is unable to put his front feet down without excruciating pain. Some horses have been found dead in their stalls the next day from this "training." The pain is so intense they have pushed their intestines out.

These are just three of the most popular training methods; there are many more, including nuts, bolts and screws. The current DQP program is a joke. Horses that are quicked or pressured have no pain when the foot is picked up for exam. The big joke among the exhibitors is that the only sure way to get past "The Man" (DQP) is to quick or pressure your horse. Also, these horses are routinely beaten (whips, axe handles, baseball bats) if they even flinch at foot pain. The beatings continue until the horse learns to stand still while his front feet are examined. The only way to stop this is to examine each horse before every class.

The DQP program doesn't work for many reasons. What is needed is a truly independent examiner with an X-ray machine and enough guts to pull the pads off every horse. If this was done, I would bet my farm that there would be NO horses in the World Grand Championship classes in Shelbyville, Tennessee and Decatur, Alabama. I no longer show padded horses. I refuse to subject my animals to this brutality, therefore, I am not competitive in the show ring. I am also unable to sign my name as I would be putting myself and my animals in danger. This is not an overreaction. You have no idea how serious these people are. Please do not disregard this letter. Everything is factual.

Signed,

A Lover of the Breed

Another Walking Horse owner sent a letter describing how her show horse had been subjected to "tail-blocking" which is a procedure designed to prevent competition horses from holding their tails off-center. As a result of this procedure, the owner's horse lost over 100 pounds and was twice hospitalized from the consequent injuries and illness. Letter to *Hooved Animal Humane Society* (on file with author).

⁸⁷ WALKING HORSE FACT SHEET, *supra* note 64.

⁸⁸ Zoll, *supra* note 73.

⁸⁹ *Id.*

Horse Trainers Association have either been suspended for soring or have charges pending against them.⁹⁰

Moreover, the continued prevalence of the soring problem is suggested by USDA's 1998 imposition of the "scar rule," which uses a stricter definition of what constitutes a "sore" horse, and increases penalties for those found in violation of the HPA.⁹¹ This regulatory intensification has had significant repercussions within the industry. Although walking horse owners and trainers have stridently protested the USDA's new rule⁹² by claiming that the new rule is arbitrary and does not actually detect abusive conduct, the Agency appears committed to new, stricter methodology.⁹³ Further, the threat of increased enforcement by the USDA spurred the cancellation of the opening of the 1997-98 Walking Horse season by the National Horse Show Commission.⁹⁴ These facts, in combination, seem to strongly indicate that soring does occur with some frequency in the Walking Horse industry. From a horse protection standpoint, therefore, a strong regulatory and punitive presence is required in order to prevent abuses.

The second controversial Walking Horse issue is the government's inadequate enforcement of the HPA. Although in 1998 the USDA has promised to establish enforcement procedures, use stricter guidelines, and better prevent abuses,⁹⁵ these changes come twenty-eight years after the enactment of the HPA by Congress, and at the prompting of outside influences. Since the advent of the HPA, animal rights advocates have contended that the USDA was not upholding its duties under the statute. In an informational fact sheet, The Humane Society of the United States (HSUS) contends that USDA inspectors "have not been willing or able to responsibly enforce the Act."⁹⁶ In 1984, "outraged by the USDA's apathetic enforcement" of the HPA,⁹⁷ the Washington, D.C.-based American Horse Protection Association (AHPA) filed suit against the Agency, alleging that allowing the use of padded shoes and chains was a violation of the Act's mandate.⁹⁸ Eventually, the United States Court of Appeals for the District of Columbia found

⁹⁰ WALKING HORSE FACT SHEET, *supra* note 64.

⁹¹ Zoll, *supra* note 73.

⁹² *Id.*

⁹³ *Id.* This was not the first time that the Tennessee Walking Horse industry has opposed USDA efforts to prevent soring. *Id.* For example, in 1994, several horse owners challenged the imposition of USDA sanctions for soring by suing in Federal court, seeking review of the agency's decision. See *United States Dep't of Agriculture v. Kelly*, 38 F.3d 999 (7th Cir. 1994). On appeal, the Eighth Circuit rejected the owners' challenge and upheld the USDA's sanctions as supported by substantial evidence. *Id.* at 1002-03.

⁹⁴ Zoll, *supra* note 73.

⁹⁵ WALKING HORSE FACT SHEET, *supra* note 64.

⁹⁶ *Id.*

⁹⁷ The Humane Society of the United States, *Dark Days in Shelbyville*, HUMANE SOCIETY NEWS, Summer 1998, at 20 [hereinafter *Dark Days*].

⁹⁸ *American Horse Protection Assoc. v. Lying*, 812 F.2d 1 (D.C. Cir. 1987).

in favor of the AHPA and ordered USDA to promulgate new, more protective regulations.⁹⁹

The insufficient inspection and enforcement under the Act by USDA cannot be entirely attributed to unwillingness. As is true of the Wild and Free-Roaming Horses and Burros Act scenario, a major cause for these agency shortcomings is a lack of adequate funding. According to the HSUS, since 1970, USDA has received no more than \$500,000 annually to implement and enforce the Act, with a 1997 low of \$350,000—levels which are “inadequate to ensure proper enforcement.”¹⁰⁰ Nonetheless, as with the wild horse problem, the governmental bodies charged with the protection of walking horses use strong words and theories of protection, but their actions fail to live up to the rhetoric.

C. *The Premarin Harvesting Problem*

Another area in which a Federal statute does not directly apply, but demonstrates the breakdown of the American legal horse protection regime, is the use of horses in harvesting the drug Premarin. As its descriptive name suggests, Premarin (short for PREgnant MAREs' urINE)¹⁰¹ is a drug made from conjugated horse urine.¹⁰² Manufactured by Wyeth-Ayerst Pharmaceuticals, Premarin is most commonly used in estrogen replacement therapy for women who suffer from negative symptoms associated with menopause or a hysterectomy.¹⁰³ Premarin, which has been manufactured for over fifty years, is the single most prescribed drug in the United States, holding over 80% of the estrogen replacement market¹⁰⁴ with over nine million current users.¹⁰⁵ Despite the popularity of the Premarin prescription and its long history, most people (including many of those who actually take the drug) are unaware of its nature and of the methods used to collect the required urine.¹⁰⁶ These collection methods are the subject of much concern and debate regarding the ethics and legality of the Premarin harvesting business in its present form.

Wyeth-Ayerst purchases the conjugated mare urine it requires for manufacturing Premarin from Pregnant Mare Urine (PMU) farms in the United States and Canada.¹⁰⁷ Although the majority of the esti-

⁹⁹ *Id.*

¹⁰⁰ WALKING HORSE FACT SHEET, *supra* note 64.

¹⁰¹ Int'l. Generic Horse Assoc., *I.G.H.A. / HorseAid's Premarin(e) Q & A's* ¶ 1 (visited, May 22, 2000) <http://www.igha.org/pmu_link.html> [hereinafter *HorseAid Sheet*].

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ THE HUMANE SOCIETY OF THE UNITED STATES, *PREMARIN®/PREGNANT MARE URINE (PMU) FARMS ISSUE SUMMARY* [hereinafter *PREMARIN ISSUE SUMMARY*]. As noted in the HSUS press release, predicting that this figure of 9 million will likely increase in coming years as the “Baby Boom” segment of the American population grows older. *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

mated five hundred PMU farms in North America are found in western Canada, there are approximately forty farms in North Dakota and "some talk of starting up PMU farm operations in Minnesota . . ." ¹⁰⁸ In total, these farms receive an estimated ninety million dollars per year for the harvested urine. ¹⁰⁹ The urine is collected from pregnant mares in collection barns on the PMU farms. The mares, in their third or fourth month of an eleven month pregnancy, are brought into the barns in late September or October and remain there for approximately six months. ¹¹⁰ The stalls are approximately eight feet long, three and a half feet wide, and five feet high. ¹¹¹ Ropes or chains tether the mare and her vulva is fitted with a rubber collection cup. ¹¹² Due to this arrangement, the horse is limited in her ability to turn around, move backward or forward, or lie down. ¹¹³ The mares are "rarely, if ever, taken off line and out of the harnesses for even a few brief hours of exercise." ¹¹⁴ Each mare produces approximately 0.5 to 0.75 gallons of urine per day, totaling ninety-one-hundred gallons for the entire collection season. ¹¹⁵ The mares are taken off the production line just before they come to term and are allowed to foal in outdoor paddocks. ¹¹⁶ Generally, the mares are impregnated again within a few weeks of foaling and nurse for three to four months, instead of the normal six month nursing period, and are returned to the collection barn in the fall. ¹¹⁷ Estimates indicate that somewhere between 50,000 and 75,000 mares are used in Premarin production. ¹¹⁸ If born foals, breeding stallions, premature mares, and replacement mares are included, "the total is considerably greater than 100,000." ¹¹⁹

Animal protection and horse groups in the United States have long opposed this harvesting method. These groups argue that PMU farms are harmful and cruel in several different ways. The restriction in the small stalls for long periods without much, if any, free movement, is a major source of controversy. ¹²⁰ HSUS claims these long periods of confinement are very harmful to these naturally active animals such and that, as a result, "PMU mares exhibit an abnormally high frequency of hoof and leg injuries." ¹²¹ Horse advocates also claim that the mares "typically are not provided with adequate bedding" in

¹⁰⁸ *HorseAid Sheet*, *supra* note 101, ¶ 12.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Mark Paulhus, *A Bitter Pill*, HSUS News, Winter 1996.

¹¹³ *Id.*

¹¹⁴ *Id.* at ¶ 7.

¹¹⁵ *HorseAid Sheet*, *supra* note 101.

¹¹⁶ *Id.*

¹¹⁷ Paulhus, *supra* note 112.

¹¹⁸ *Id.* The 50,000 figure is from a statement by a spokesperson for the PMU farms, while the 75,000 is an estimate made by animal protection groups. *Id.*

¹¹⁹ PREMARIN ISSUE SUMMARY, *supra* note 105.

¹²⁰ *Id.* see also *HorseAid Sheet*, *supra* note 101.

¹²¹ Paulhus, *supra* note 112.

their stalls, making their on-line existence even more uncomfortable and inhumane.¹²²

Depriving mares of sufficient water is another common problem associated with the Premarin harvesting.¹²³ "PMU farm managers are compensated, on a sliding scale, depending on the grade of the urine produced which is determined by the concentration of estrogen in it."¹²⁴ Thus, "[t]he grading system seems to provide an economic incentive to restrict water."¹²⁵ Although Wyeth-Ayerst "flatly denies" they encourage water deprivation,¹²⁶ there is some evidence to the contrary. For instance, one inspection report from a USDA veterinarian "criticized the drug company's water restriction policy and cited evidence that it may be the cause of apparent increases in liver and kidney disorders among PMU mares."¹²⁷ Additionally, representatives from the World Society for the Protection of Animals witnessed "mares [in adjacent stalls] sometimes fight and injure themselves as they struggle[d] at water distribution times."¹²⁸

Another major concern of the practices of Premarin farmers is the disposal of the excess foals as "byproducts of Premarin production."¹²⁹ HSUS characterizes the general pattern on PMU farms as follows:

A few females may be kept for future PMU production. Some farmers breed registered horses hoping to sell the foals as riding prospects. And though a few have succeeded, many thousands of foals still go to unsheltered feedlots until they reach desirable market weight. Then they are slaughtered and their carcasses shipped for human consumption in Europe and Asia.¹³⁰

The chance of a filly foal not going to a slaughterhouse is less than one in ten, whereas, a colt foal's chances are less than one in fifty.¹³¹ Further, there is the charge that many PMU farmers simply neglect the foals (because of their limited value to the PMU producers), resulting in widespread sickness and death.¹³² According to a "research study published by the *Canadian Veterinary Journal*, twenty-two percent of foals born on PMU farms in Western Manitoba, [Canada], between April 18 and May 31, 1994, had died."¹³³ However, these characterizations may not be entirely accurate or reflect precisely the entire industry, since they are based on sample observations, extrapo-

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* ¶ 9.

¹²⁵ *Id.* ¶ 9.

¹²⁶ *Id.* ¶ 9.

¹²⁷ *Id.* ¶ 9.

¹²⁸ *Id.* ¶ 9 (quoting WSPA report).

¹²⁹ PREMARIN ISSUE SUMMARY, *supra* note 105.

¹³⁰ *Id.*

¹³¹ See *HorseAid Sheet*, *supra* note 101.

¹³² Marc Paulhus, *Seeing Fear*, HSUS NEWS, Winter 1998.

¹³³ *Id.*

lation, and incomplete data.¹³⁴ Nonetheless, the sheer volume of Premarin production, combined with the information that is available, compels a conclusion that the annual crop of unwanted foals is substantial and that serious concerns over animal welfare are justified.

Not surprisingly, Wyeth-Ayerst and the PMU farmers deny the existence of such widespread abuse and mistreatment of the horses used in the production of Premarin.¹³⁵ In particular, Wyeth-Ayerst commonly points to the *Recommended Code of Practice for the Care and Handling of Horses in PMU Operations*¹³⁶ (hereinafter "Code of Practice"), put out by the drug company as a guide to PMU farms. Prompted by "considerable attack from Canadian animal protection groups,"¹³⁷ the Code of Practice sets forth detailed guidelines for the care and maintenance of PMU horses, including required stall dimensions,¹³⁸ nutrition instructions,¹³⁹ water intake tables,¹⁴⁰ and handling guidelines.¹⁴¹

Overall, the Code of Practice recommends a high standard of care and diligent maintenance and handling of the horses. The generous terms of the Code of Practice may, however, be illusory. For example, the Code of Practice is merely "recommended" and does not provide for any consequences to those PMU farms that do not comply with its voluntary guidelines.¹⁴² Further, many argue that even strict adherence to the Code of Practice would not assure the humane treatment of horses.¹⁴³ The HSUS states, "the Code recommends narrow stalls and water restrictions, . . . condones the premature separation of mares and foals, . . . [and] fails to even mention the humane disposition of the unwanted foals and unproductive mares."¹⁴⁴ Although the promulgation of the Code of Practice by Wyeth-Ayerst may be a step in the right direction, its utility as a forceful method to curtail any abuses of PMU horses is quite limited.

The Premarin controversy is yet another example of a familiar phenomenon: the theoretical existence of legal protection for horses, coupled with the actual failure of the legal system to effectively pre-

¹³⁴ *Id.* One problem with accurately assessing the nature and size of PMU operations—aside from the inherent difficulty in quantifying and recording any such industries—is that Wyeth-Ayerst is reluctant to cooperate with outside observers. *Id.* As one HSUS article states, "Wyeth-Ayerst has refused to allow the HSUS access to PMU farms to independently verify conditions." *Id.*

¹³⁵ *HorseAid Sheet*, *supra* note 101.

¹³⁶ WYETH-AYERST PMU STUDY COMM., RECOMMENDED CODE OF PRACTICE FOR THE CARE AND HANDLING OF HORSES IN PMU OPERATIONS (1990) [hereinafter CODE OF PRACTICE] (available from the Animal Industry Branch of the Agricultural Services Complex in Manitoba or Ayerst Organics Ltd. of Canada).

¹³⁷ PREMAREN ISSUE SUMMARY, *supra* note 1015.

¹³⁸ CODE OF PRACTICE, *supra* note 136, at 2.

¹³⁹ *Id.* at 5-8.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 9.

¹⁴² PREMAREN ISSUE SUMMARY, *supra* note 105.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

vent or punish horse abuse and mistreatment. Indeed, the Premarin situation is the most extreme of those discussed in this article since there has been virtually no action taken to investigate or prosecute reported abuses. Although, there is no legislation or rulemaking specifically aimed at this allegedly abusive conduct, as in the wild horse and Tennessee Walking Horse contexts, a strong argument can be made that the treatment received by PMU horses is a violation of the state anti-cruelty statutes.¹⁴⁵ It is difficult to determine whether specific conduct falls under the language of an individual state law. However, the alleged conduct on the PMU farms, if true, would violate most state anti-cruelty laws. Take, for example, the charge of excessive confinement and failure to give necessary exercise. Under the Florida anti-cruelty statute, these charges would qualify as a violation of the "excessive or repeated infliction of unnecessary pain or suffering" clause.¹⁴⁶ Under Alaska law, this conduct might be characterized as "knowingly inflict[ing] severe physical pain or prolonged suffering on an animal," subjecting the actor to criminal penalty.¹⁴⁷ This simple comparison illustrates the general point that there is a genuine question as to whether some of the conduct involved in Premarin harvesting is illegally cruel or inhumane to horses. Despite this, no attempts by local district attorneys to prosecute such conduct nor any discussion of the application of these laws to the conduct on PMU farms has occurred in any serious manner.¹⁴⁸ Although anti-cruelty laws may abstractly apply to abuses in the PMU industry, in practice there are no protective mechanisms to inhibit or regulate alleged the cruel or inhumane treatment of these horses.

V. CONCLUSION: WHAT DOES ALL THIS MEAN AND WHAT (IF ANYTHING) CAN BE DONE ABOUT IT?

A discernible pattern or legal trend becomes evident when the history of horse protection law is traced. Horses are highly-regarded animals in American society, lauded for both their practical contributions to the building of this nation and their characteristics of strength, beauty, and nobility. In order to reflect this high regard, the legal system in the United States has acted, at least in theory, to protect horses from abuse and mistreatment, mostly through the enactment of statutes such as the Horse Protection Act and the Wild and Free-Roaming Horses and Burros Act.

Despite this positive perception of horses and the existence of legal protections, protections which are facially stronger than those afforded most animals, numerous industries in the United States systematically abuse and mistreat large numbers of horses. This is a disturbing phenomenon; even those animals that we purport to care

¹⁴⁵ For a more complete discussion of state anti-cruelty laws, see *supra* Part III.B.1.

¹⁴⁶ FLA. STAT. ANN. § 828.12(2) (West 1999).

¹⁴⁷ ALASKA STAT. § 11.61.140(a)(1) (Michie 1999).

¹⁴⁸ The author is unaware of any case law regarding this issue.

for and legally protect are not immune from inhumane treatment on an institutional level.

The scenarios discussed above indicate a fundamental gap between what we, as a legal system, say and what we actually do. If an outsider were to do a study of horses in American society by looking at books, news media, popular culture, and our laws, would that person ever guess (or even believe) that every year, tens of thousands of horses are slaughtered; that we tolerate forms of entertainment which treat horses abusively; or that we keep thousands of horses confined in small stalls for six months at a time? The answer must be no. Unlike some areas of the law where such inconsistencies merely lead to illogical rules, this gap results in tangible victims (the horses themselves) and increases the potential for the abuse and inhumane killing of these animals we purport to value so highly.

The next logical question is, what can or should be done to remedy this troublesome inconsistency in our system? Unfortunately, the simplistic solution of passing more horse protection laws or ordering agencies to vigorously enforce existing protections may not be the answer. The continued existence of these abusive practices in the face of strong attempts by Congress and other lawmakers to protect horses shows that more legislation, although desirable as a legal basis for protective action, may do little under the current system.

Instead, the solution to this legal problem may be one that is not particularly legalistic. If we truly desire a system which effectively protects horses (or other animals), we must reexamine our underlying assumption about animal rights and commercial rights, expressly reconciling them as they come into conflict.¹⁴⁹ Although many desire protections for horses and other animals, many do not connect the implementation of this protection with a possible limitation on their lifestyle and abilities. In other words, while a person may support a fight against cruel treatment of horses, they may not realize that this may cause the price of dog food, rodeo tickets, or Premarin prescriptions to go up, and will often resist such economic consequences.

The disparity between product prices and protection leads to the lack of horse protection laws and their application, while more laws might indicate a greater willingness to expend additional time, money, and effort to effectively protect the horses, the actual willingness must exist before any regime of protection will be effective. This notion should be emphasized to and by courts and legislators, so that the protection choices made are real ones and the legal solutions arrived at

¹⁴⁹ Although the factual predicate is quite different, the author is reminded of this nation's ongoing attempts to achieve racial equality. Although many federal anti-racism laws—such as the Fourteenth Amendment to the U.S. Constitution, 42 U.S.C. §§ 1981, 1983, and Title VII—were passed many decades ago., it was not until the middle of this century, when the desire for racial equality began to gain momentum, that these laws had any real force. Once a majority of citizens and lawmakers started to support civil justice for Americans of all races, the laws took on a new life and began to have the effects desired by the Congress many years before.

will be honestly upheld. It is axiomatic that in order to get something of value, you must give something of value away. Until citizens, lawmakers, and enforcement agencies in the United States come to terms with this idea in the animal rights context, the effectiveness of horse protection measures will remain greatly impaired, no matter what the text of any statute or holding of any case may say.

