

HAIR TODAY, GONE TOMORROW: EQUINE COSMETIC CRIMES AND OTHER TAILS OF WOE

By
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Many invasive procedures, including surgery, are performed on horses' tails purely for cosmetic reasons. These procedures fall into a variety of categories from the arguably unethical to the undoubtedly criminal. Although criminal laws prohibiting certain cosmetic surgeries have been in existence for approximately one hundred years, they rarely have been enforced. This article reviews the current status of both American and international "anti-cosmetic" statutes, focusing on the constitutional problems that the current American statutes raise. The article proposes a model federal statute that is constitutionally sound, addresses all forms of cosmetic tail procedures, and provides a vehicle for enforcement.

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I. INTRODUCTION

Prior to the twentieth century, horses played a pivotal role in human history. They served as means of transportation, instruments of war, agricultural machinery, and even as sources of food.¹ Horses also have shared the stage with their human masters as the fashion trendsetters of their days. Since horses are symbols of social status and are sources of wealth, it is not surprising that while horses are utilitarian, they also reflect the prevailing standards of beauty in society. In fact, breeders have developed characteristics of some horses, such as the high-stepping Hackney, purely for aesthetic reasons.²

Unfortunately, the horse’s role in making “fashion statements” has led to cosmetic practices that are either criminal in nature or unethical. Horse tails are surgically shortened, tail muscles are cut, or tails are denerved, all for the sake of appearance. Surgically shortened tails have a “bobbed” look that is popular among some of the horse-driving disciplines. Cut tails, which produce an unnaturally high tail carriage, are common among gaited show horse breeds. Denerved tails appear to hug the horse’s rump, a preferred tail carriage among western pleasure riders.

This article surveys the American and international laws that ban these procedures, criticizes the failure of American criminal statutes to prevent these inhumane practices, and proposes a model federal statute to rectify the gap in existing law. Part II focuses on tail docking, the potential criminal liability that American statutes create, and international bans on the practice. Part III focuses on tail nicking, reviewing both American and international law. Part IV analyzes the most recent cosmetic procedure, tail blocking, reviews the gaps in current anti-cosmetic crime statutes both at the national and international levels, and explores an alternative statutory basis for banning the practice in the United States. Part V discusses the constitutional problems that current laws raise and reviews cases that have found statutes unconstitutional. Part VI proposes a model federal statute

¹ M.E. Ensminger, *Horses and Horsemanship* 8–11 (7th ed., Interstate Publishers 1999).

² *Id.* at 89.

that would encourage both interstate and international commerce, rectify the existing weaknesses in American law, and provide a method of enforcement.

II. DOCKING

A. *Definition and History of the Practice*

Of the three commonly performed cosmetic tail procedures, docking is the most readily apparent, even to the untrained eye. “Docking” is the surgical procedure in which a horse’s tail bone is cut, resulting in a shortened, or bobbed, tail.³ The tail comprises the fifth area of the horse’s vertebral column, the coccygeal region.⁴ The unaltered tailbone has between fifteen and twenty-one vertebrae, which reduce in size from the coccygeal vertebrae to the last.⁵ Docking removes a majority of the horse’s tail bone, originally about a foot long, leaving a tail bone that is only a few inches long.⁶

Docking horses’ tails is a very old practice. Harness horses—both draft horses used for hauling and logging operations and fancy harness horses pulling expensive carriages—often had docked tails.⁷ The generally accepted rationale was that docking ensured safety by preventing the horse’s tail from interfering with the harness equipment and machinery.⁸ Furthermore, wealthy owners appreciated that harness horses with shortened tails stayed cleaner because their tails were not so low to the often muddy roadways. Wrapping a braided tail serves essentially the same function as docking, but it is more time consuming, and the tail does not stay safely in place if the braiding and wrapping are not performed correctly. When horses were the prime means of transportation and “engine” power, braiding was not considered a reasonable alternative. Because harness equipment involves the entire horse, even a braided tail could become wrapped around the harness equipment, so a shorter tail was considered a safety feature.

With the introduction of the automobile around the beginning of the twentieth century, the horse’s importance waned significantly, and docking as a safety practice in working breeds declined. About the same time, state legislatures began to enact anti-docking laws. Although tail docking arguably benefited horse owners and carriage drivers in the past, it produces adverse consequences for horses.⁹ Horses

³ Cal. Penal Code Ann. § 597n (West 1999).

⁴ Ensminger, *supra* n. 1, at 26, 28 fig. 3-4.

⁵ Dr. Daniel R. Kamen, D.C., *The Well Adjusted Horse* 54 (Brookline Books 1999).

⁶ Right Lead Equestrian, *Horse Tails* <http://www.rightlead.com/Educational/horse_tails.htm> (accessed Feb. 20, 2003).

⁷ See Tom Ryder, *High Stepper* 7–9 (J.A. Allen 1979); Ensminger, *supra* n. 1, at 19 (“Bobtailed Hackneys attached to high-seat rigs made a dashing picture as they pranced down the avenue; they were a mark of social prestige.”).

⁸ Kenneth C. Sandoe, *The Draft Horse J., The Case of the Docked Tail* <<http://www.draffhorsejournal.com/legaladvice/autumn02/autumn02.htm>> (accessed Apr. 5, 2003).

⁹ See Kamen, *supra* n. 5, at 3.

with shortened tails cannot effectively swat at flies and other insects, thus tail docking deprives the horse of its natural flyswatter.¹⁰ Horses also use their tails to communicate a range of emotions such as excitement, submission, illness, anxiety, or anger.¹¹ Although fashion rules for certain breed shows require “the appearance of a shortened tail,”¹² because only the actual appearance counts, the rules do not require docking. Braiding is a humane alternative to surgery that makes the necessity of docking a moot issue even among traditionally docked breeds.

B. *United States Statutes*

Although every state has animal cruelty laws on the books,¹³ only a dozen jurisdictions specifically prohibit some form of cosmetic equine tail procedures.¹⁴ Of these twelve jurisdictions, not one bans all three of the most common procedures. However, docking is the most frequently banned cosmetic tail crime, probably because tail mutilation is so easily visible.

Despite the groundswell of anti-docking statutes nearly a century ago and a growing perception that tail docking is mutilation,¹⁵ currently only eleven jurisdictions expressly prohibit the practice. California,¹⁶ Connecticut,¹⁷ the District of Columbia,¹⁸ Illinois,¹⁹ Massachusetts,²⁰ Michigan,²¹ Minnesota,²² New Hampshire,²³ New York,²⁴

¹⁰ Sandoe, *supra* n. 8.

¹¹ Dr. Clive Dalton, *Horse Behavior* <http://www.lifestyleblock.co.nz/articles/670_horse_behavior.htm> (accessed Apr. 5, 2003); Ensminger, *supra* n. 1, at 388.

¹² Am. Hackney Horse Socy., *The Cobtail* <<http://www.hackneysociety.com/thehackney/cobtail/index.htm>> (accessed Apr. 5, 2003).

¹³ Margit Livingston, *Desecrating the Ark: Animal Abuse and the Law's Role in Prevention*, 87 Iowa L. Rev. 1, 29 (2001).

¹⁴ Cal. Penal Code Ann. § 597n (West 1999); Conn. Gen. Stat. § 53-251(a) (2001); D.C. Code Ann. § 22-1014 (2001); 720 Ill. Comp. Stat. § 315/1 (1993); Mass. Gen. Laws Ann. ch. 272, § 79A (West 2000); Mich. Comp. Laws § 750.60 (2001); Minn. Stat. § 343.25 (1990); N.H. Rev. Stat. Ann. § 644:8-b (1996); N.Y. Agric. & Mkts. Law § 368 (McKinney 1991); Ohio Rev. Code Ann. § 959.14 (West 1993); S.C. Code Ann. § 47-1-60 (1987 & Supp. 2002); Wash. Rev. Code § 16.52.090 (1992).

¹⁵ *Bland v. People*, 76 P. 359, 360 (Colo. 1904).

¹⁶ Cal. Penal Code Ann. § 597n.

¹⁷ Conn. Gen. Stat. § 53-251(a).

¹⁸ D.C. Code Ann. § 22-1014.

¹⁹ 720 Ill. Comp. Stat. § 315/1.

²⁰ Mass. Gen. Laws Ann. ch. 272, § 79A (West 2000).

²¹ Mich. Comp. Laws § 750.60 (2001).

²² Minn. Stat. § 343.25 (1990).

²³ N.H. Rev. Stat. Ann. § 644:8-b (1996).

²⁴ N.Y. Agric. & Mkts. Law § 368 (McKinney 1991).

Ohio,²⁵ and Washington²⁶ ban the practice of docking separately from their general animal anti-cruelty laws. Of the twelve jurisdictions that prohibit some form of cosmetic tail procedures, only South Carolina does not ban tail docking.²⁷ Docking a horse's tail is a misdemeanor in all jurisdictions except Massachusetts, where a violation is punished either as a misdemeanor or an infraction.²⁸ Only Ohio does not specify the nature of the punishment within the statute itself.²⁹

The anti-docking statutes show little uniformity in drafting; liability for different classes of people varies tremendously. Depending on the particular state, the statutes create liability for multiple classes of persons: (1) perpetrators, (2) assistants, (3) those present at a cosmetic procedure, (4) possessors of horses, (5) owners of horses, and finally, (6) landowners and those with a possessory interest in property. Each of these classes is discussed in turn below.

1. *Perpetrators*

Without fail, anti-docking statutes apply to "anyone" who performs the procedure, unless the docking falls within a statutory exception.³⁰ The statutes are split regarding exceptions from liability. The first category exempts those in a professional capacity (veterinarians) from liability for performing the surgery.³¹ The second category focuses on the rationale for the procedure. Under this exception, criminal liability extends to both laypersons and veterinarians who do not comply with the specific exemptions.

²⁵ Ohio Rev. Code Ann. § 959.14 (West 1993). This statute is drafted awkwardly at best. The prohibition against docking applies to "owner[s] or person[s] having the custody, control, or possession of a horse . . . [And] an agent or employee of such owner or custodian." Arguably, under this statute and others like it, a relationship with either the horse or the horse's owner is a required element of the offense. Thus, a total stranger could not be criminally responsible for cutting off a horse's tail. However, other criminal laws that do not require any type of relationship to either the owner or the animal could arguably be the basis for conviction because docking a horse's tail is mutilating conduct.

²⁶ Wash. Rev. Code § 16.52.090 (1992).

²⁷ S.C. Code Ann. § 47-1-60 (1987 & Supp. 2002).

²⁸ Mass. Gen. Laws Ann. ch. 272, §§ 79A-B (West 2000). Massachusetts distinguishes between the perpetrators and other criminally liable parties. Those who perform the surgery are subject to imprisonment, whereas those who merely exhibit docked horses are only fined.

²⁹ Ohio Rev. Code Ann. § 959.14.

³⁰ Cal. Penal Code Ann. § 597n (West 1999); Conn. Gen. Stat. § 53-251(a) (2001); D.C. Code Ann. § 22-1014 (2001); 720 Ill. Comp. Stat. § 315/1 (1993); Mass. Gen. Laws Ann. ch. 272, § 79A; Mich. Comp. Laws § 750.60 (2001); Minn. Stat. § 343.25 (1990); N.H. Rev. Stat. Ann. § 644:8-b (1996); N.Y. Agric. & Mkts. Law § 368 (McKinney 1991); Ohio Rev. Code Ann. § 959.14; Wash. Rev. Code § 16.52.090.

³¹ Conn. Gen. Stat. § 53-251(c); Mich. Comp. Laws § 750.60; N.H. Rev. Stat. Ann. § 644:8-b. Horsemen (not veterinarians) commonly performed tail dockings. The horsemen who cared for breeds that commonly had docked tails had greater expertise and were the preferred "surgeons."

Although an animal's health and safety would create a common-sense exception to anti-docking laws, this exception is not regularly stated within the statutes. The plain meaning of a statute that makes "anyone" liable for docking a horse's tail arguably imposes liability upon veterinarians who dock tails in California,³² Massachusetts,³³ Minnesota,³⁴ New York,³⁵ and Washington.³⁶ Only in these states, however, might veterinarians be liable for performing docking operations regardless of the rationale.³⁷

Many statutes do contain exemptions, but most of those specifically exempt only veterinarians from liability. The similarity among statutes ends here. Connecticut permits a "registered veterinarian" to perform the surgery when it is "necessary for the health of the horse or is the means of effecting the natural carriage of its tail."³⁸ New Hampshire also requires approval; to qualify for the exemption, veterinarians must obtain *written* permission from the state veterinarian prior to performing the surgery.³⁹

Other statutory exceptions are based on the reason for the procedure rather than the professional capacity of the person performing the surgery. Under these types of exceptions, veterinarians receive no greater protection from criminal liability than do nonveterinarians. For example, the District of Columbia permits anyone to dock a tail if it "is proved to be of benefit to the horse."⁴⁰ Because the statute does not limit the exception to any class of persons, it only protects persons performing the tail docking (including veterinarians) if the procedure is performed for the horse's "benefit."⁴¹ Illinois's exception mirrors the District of Columbia's.⁴² Under Ohio's exception, a person who performs the surgery is not liable when it is done because "accident, mal-

³² Cal. Penal Code Ann. § 597r.

³³ Mass. Gen. Laws Ann. ch. 272, § 79B.

³⁴ Minn. Stat. § 343.25.

³⁵ N.Y. Agric. & Mkts. Law § 368.

³⁶ Wash. Rev. Code § 16.52.090 (1992).

³⁷ Assuming that a veterinarian were prosecuted under one of these statutes, it seems highly unlikely that the veterinarian would not be able to rely on his or her professional judgment as to whether the procedure was in the horse's best interest. However, unlike statutes that clearly provide for health and/or safety exceptions, the plain language of these statutes does not permit exceptions under these circumstances.

³⁸ Conn. Gen. Stat. § 53-251(c) (2001) (emphasis added). Connecticut is unique in allowing the operation as a remedial measure to improve tail carriage.

³⁹ N.H. Rev. Stat. Ann. § 644:8-b (1996). The statutory language uses the mandatory "shall." Furthermore, the statute imposes a duty on the state veterinarian to set forth standards by which authorizations will be granted.

⁴⁰ D.C. Code Ann. § 22-1014 (2001).

⁴¹ What constitutes "beneficial" docking is ambiguous. If docking is done for a horse's health and welfare, as in an amputation performed to remove a crushed tail, the procedure clearly benefits the horse. On the other hand, when docking is done to enhance a horse's appearance and improve its show record, it may not be "beneficial" to the horse. A better show record enhances the horse's market value, but it is the horse's owner who truly benefits, not the horse.

⁴² 720 Ill. Comp. Stat. § 315/1 (1993).

formation, or disease” affects the horse’s tail.⁴³ Similarly, Michigan permits docking when “a regularly qualified veterinary surgeon” certifies, prior to the surgery, that docking is required for “health or safety” reasons.⁴⁴

2. Assistants

Consonant with traditional notions of party liability, those who assist in a docking procedure are criminally liable. Some states, however, do not solely rely on concepts of party liability and include those who “assist” as specifically enumerated parties that fall within the direct purview of anti-docking laws. Connecticut,⁴⁵ Illinois,⁴⁶ Massachusetts,⁴⁷ Michigan,⁴⁸ Minnesota,⁴⁹ and New Hampshire⁵⁰ all unequivocally impose liability on anyone who assists in a docking procedure.

3. Possessors and Custodians of Horses

Some statutes extend criminal liability beyond the person who performs the docking to anyone who is in possession of or has custody of a docked horse. Such an extension reaches far beyond horse owners. For example, California extends liability to anyone who “drives, works, [or] uses . . . any unregistered docked horse.”⁵¹ Massachusetts and New York both prohibit exhibiting or showing horses with docked tails. This type of extension can reach such persons as horse trainers or professional riders who are in possession or custody of a docked horse.⁵² However, the Massachusetts law is drafted more narrowly than its New York counterpart, because one can “show or exhibit” a horse with a docked tail if the horse owner has filed an affidavit that the horse was (1) docked in a state in which tail docking is not prohibited, and (2) in fact owned by a legal resident of that state at the time of the surgery.⁵³

Some of these statutes also attempt to snare violators by incorporating evidentiary burdens within the statutes themselves. For example, under California law, it is “deemed prima facie evidence of the fact

⁴³ Ohio Rev. Code Ann. § 959.14 (West 1993).

⁴⁴ Mich. Comp. Laws § 750.60 (2001).

⁴⁵ Conn. Gen. Stat. § 53-251(c) (2001).

⁴⁶ 720 Ill. Comp. Stat. § 315/1.

⁴⁷ Mass. Gen. Laws Ann. ch. 272, § 79A (West 2000).

⁴⁸ Mich. Comp. Laws § 750.60.

⁴⁹ Minn. Stat. § 343.25 (1990).

⁵⁰ N.H. Rev. Stat. Ann. § 644:8-b (1996).

⁵¹ Cal. Penal Code Ann. § 597n (West 1999). California’s registration requirements are “that a description of each such animal [with a docked tail] so brought into the State, together with the date of importation and the name and address of importer, be filed with the county clerk of the county where such animal is kept, within 30 days after the importation of such animal.” Cal. Penal Code § 597r (West 2003).

⁵² Mass. Gen. Laws Ann. ch. 272, § 79B; N.Y. Agric. & Mkts. Law § 368 (McKinney 1991).

⁵³ Mass. Gen. Laws Ann. ch. 272, § 79B.

that the party driving, working, keeping, racing, or using such unregistered docked horse, or horses, docked the tail of such horse or horses.”⁵⁴ This language imposes potential liability upon any person who uses the horse, even if the person is only showing the horse or putting it through training or exercise at the stable. Similarly, Minnesota places an evidentiary burden on anyone who has custody of a horse with a docked tail.⁵⁵ New York also creates an evidentiary burden, but it only extends criminal liability to the show ring, creating liability for one who exhibits or shows a docked horse (if the horse owner has not complied with the necessary filing requirements).⁵⁶ More narrowly tailored than California’s law, the New York statute does not extend liability to possessors or custodians outside of the show ring.

4. Horse Owners

Few statutes impose liability on the basis of ownership alone. Instead, most base liability on possession and control of docked horses. Only three jurisdictions specifically discuss horse owners within their statutes: California, Massachusetts, and New York.⁵⁷ These states, however, part company in their views regarding the role of ownership in creating—or remediating—liability. Of these three states, only California clearly imposes liability based on ownership alone.⁵⁸ In Massachusetts and New York, however, horse ownership plays a unique role in exculpating those who could otherwise be liable under the statute. In both states, a horse owner can *relieve* an exhibitor of liability by furnishing an affidavit in compliance with specific statutory requirements.⁵⁹ The affidavit must include a statement that the tail was cut in a state in which docking was legal.⁶⁰ In addition, Massachusetts’ law requires the affidavit to state that the cutting was done while the

⁵⁴ Cal. Penal Code § 597q.

⁵⁵ Minn. Stat. § 343.25 (1990) (“Whenever a horse is found so cut, upon the premises or in the custody of any person, and the wound is unhealed, that fact shall constitute prima facie evidence that the offense was committed by the person.”).

⁵⁶ New York and Massachusetts have similar filing requirements. Massachusetts allows either the owner or a licensed veterinarian to file a “form approved by the state department of agriculture and markets” substantiating that the horse’s tail was docked either prior to the enactment of the statute or that “it was so cut in a state wherein such cutting was not then specifically prohibited by the laws thereof.” Mass. Gen. Laws Ann. ch. 272, § 79B. New York law permits the horse owner to specify on the horse show entry form the “name and address of a central registry office designated by the state department of agriculture and markets” where the affidavit is available for inspection. N.Y. Agric. & Mkts. Law § 368.

⁵⁷ Cal. Penal Code § 597r; Mass. Gen. Laws Ann. ch. 272, § 79A; N.Y. Agric. & Mkts. Law § 368.

⁵⁸ Cal. Penal Code § 597r. California permits ownership of docked purebred stallions and mares imported from foreign countries or other states for breeding or exhibition purposes. Thus, an owner of (1) a horse docked in California, (2) imported docked geldings (neutered males), or (3) docked horses used only for pleasure purposes could still run afoul of the prohibition. *Id.*

⁵⁹ Mass. Gen. Laws Ann. ch. 272, § 79B; N.Y. Agric. & Mkts. Law § 368.

⁶⁰ Mass. Gen. Laws Ann. ch. 272, § 79B; N.Y. Agric. & Mkts. Law § 368.

horse was actually owned by a legal resident of a state that permitted tail docking.⁶¹

5. *Landowners and Others with Possessory Property Interests*

Some criminal statutes base third-party liability on a person's status as landowner or land occupier. Generally, two types of landowner liability statutes exist. The first category is the "horsekeeping" group. An example of a horsekeeper is a boarding stable operator who rents either simple space or full board and care to a horse owner, usually on a month-to-month basis. California's anti-docking statute prohibits "keeping" a docked horse unless the keeping falls within stated exceptions.⁶² Presumably, liability is based on the assumption that landowners exercise custody and control over the animals on their property. Therefore, this type of statute imposes criminal responsibility on landowners by prohibiting the keeping of animals as opposed to the ownership of animals.

Other statutes impose liability on the person who owns the land where the procedure takes place, instead of where the horse is housed. These statutes create liability for landowners who "knowingly permit" the docking to be performed on their premises.⁶³ Under this "procedure" type of statute, the potential for landowner liability can be high. For example, Connecticut imposes liability on anyone "who knowingly permits docking upon premises of which he is the owner, lessee, proprietor or user."⁶⁴ Although the statute itself does not define the word "user" of property, the language is broad enough to apply to permissive users and persons who do not have an interest in the property.

In addition to broad landowner liability, some of the statutes contain an evidentiary presumption whereby the presence of a horse with a docked tail is *prima facie* evidence that the person who occupies or has use of the premises has committed the offense.⁶⁵ In Connecticut, a person who "occupies or has the use of the premises on which such horse [with a docked tail] is so found" is presumptively guilty.⁶⁶

⁶¹ Mass. Gen. Laws Ann. ch. 272, § 79B.

⁶² Cal. Penal Code § 597q.

⁶³ Conn. Gen. Stat. § 53-251(a) (2001).

⁶⁴ *Id.*

⁶⁵ *Id.*; Mich. Comp. Laws § 750.60 (2001); Mass. Gen. Laws Ann. ch. 272, § 79A.

⁶⁶ Conn. Gen. Stat. § 53-251(b).

C. *International Statutes*

International prohibitions against docking are common. Ireland,⁶⁷ Northern Ireland,⁶⁸ Norway,⁶⁹ and the United Kingdom⁷⁰ all prohibit docking horses' tails. In Great Britain, horses with docked tails are virtually nonexistent; the ban has effectively halted the practice, and no recorded violation has occurred during the last few decades.⁷¹ In Australia, many provinces have enacted anti-docking laws. South Australia,⁷² the Northern Territory,⁷³ Queensland,⁷⁴ New South Wales,⁷⁵ and Victoria⁷⁶ all prohibit horse tail docking. Interestingly, the Canadian provinces, save one, have not addressed the issue.⁷⁷ Only Alberta's provincial statute mentions horse tail docking. Its statute addressing professional veterinarian standards specifies that horse tail docking need not be performed by a "registered veterinarian."⁷⁸

⁶⁷ *Protection of Animals (Amendment) Act* (Ireland), § 5 (1965) (available at <http://www.irishstatutebook.ie/1965_10.html>).

⁶⁸ *Welfare of Animals Act* (N. Ireland), § 18 (1972) (available at <<http://www.hmso.gov.uk/legislation/northernireland/nisr.101202/yeargroups/1970-1979/1972/1972anip/aos/c7.htm>>).

⁶⁹ *Animal Welfare Act* (Norway), ch. II, § 13(2) (1974) (available at <<http://www.os-lovet.veths.no/act.html>>). This portion of the act applies specifically to tails: "It is forbidden . . . to dock ears or tail and to show any animal that has had its ears or tail docked after the Act has entered into force."

⁷⁰ *Docking & Nicking of Horses Act 1949* (U.K.), ch. 70 (Butterworths UK Stats. 2002) (available at <<http://www.wales-legislation.org.uk/agriculture/acts/DockingandNickingofHorsesAct1949.html>>).

⁷¹ Personal communication with Dr. Barry Peachey, Chairman, Equine Laws. Assn. of Brigg, England (Feb. 7, 2003).

⁷² *Prevention of Cruelty to Animals Regs. (No. 2)* (S. Australia) (2000) (available at <<http://www.parliament.sa.gov.au>>).

⁷³ *Animal Welfare Act* (N. Territory), § 9 (2001) (available at <http://www.austlii.edu.au/au/legis/nt/consol_act/awa128/s9.html>).

⁷⁴ *Animal Care & Protection Act* (Queensland), § 27 (2001) (available at <<http://www.dpi.qld.gov.au/animalwelfare/10201.html>>).

⁷⁵ *Prevention of Cruelty to Animals Act No. 200* (New S. Wales), § 21B (1979) (available at <<http://www.legislation.nsw.gov.au/maintop/scanact/inforce/NONE/0>>).

⁷⁶ *Prevention of Cruelty to Animals Act* (Victoria), § 9 (1986) (available at <http://www.austlii.edu.au/au/legis/vic/consol_act/poacta1986360/s9.html>). Interestingly, this statute contains an exception based on the model of a horse as a beast of burden. It recognizes the old safety consideration that horses and driving lines may become entwined by specifically exempting docking done for the safety of a "working horse." *Id.* § 9(1)(m)(ii) (emphasis added).

⁷⁷ Canada's absence from the list of governments that ban docking may be a result of the strong presence of harness breed shows and carriage driving in Canada. To name just a few, Canada is home to the Royal Canadian Driving Society, the Ontario Combined Driving Society, and the prestigious Royal Agricultural Winter Fair. The Canadian Veterinary Medical Association, however, unequivocally opposes surgical alteration for cosmetic reasons, including equine tail docking and tail nicking. Canadian Veterinary Med. Assn., *Animal Welfare Position Statements* <<http://www.cvma-acmv.org/welfare1.asp?subcat=Priorities&Num=4>> (accessed Apr. 5, 2003).

⁷⁸ *Veterinary Prof. Act* (Alberta), R.S.A. 2000 ch. V-2, § (2)(f) (2000).

III. NICKING

A. Introduction and History

Nicking involves cutting the horse's tail tendons to affect tail carriage, generally creating an artificially higher carriage.⁷⁹ Certain breeds, such as Saddlebreds,⁸⁰ traditionally have had their tails nicked for show purposes. Show horses with nicked tails must wear "tail-sets"⁸¹ when they are not in the show ring. Because tail-sets irritate horses, stalls often are equipped with tail boards or electric wires to prevent horses from trying to rub the cumbersome apparatus off on the sides of stalls.⁸²

B. United States Statutes

Less than half of the U.S. jurisdictions that ban tail docking also ban tail nicking (Connecticut,⁸³ Massachusetts,⁸⁴ New York,⁸⁵ Ohio,⁸⁶ and South Carolina⁸⁷). The majority of these statutes do not use the specific term "tail nicking" in their prohibitions, so that the prohibition derives from generic descriptions of criminal conduct within the statute itself. Connecticut's law is an example of a tail nicking ban that is buried within the statutory language. It is titled Docking of Horses' Tails, yet the plain language of the statute prohibits both docking ("cuts the bone of the tail") and nicking ("cuts the muscles or tendons").⁸⁸ Although the title of the statute applies only to docking, the legislature obviously also intended to ban nicking by including of a description of the procedure. Massachusetts' law is more descriptive than most, prohibiting "cut[ting] the muscles or tendons of the tail of a horse for the purpose of setting up the tail."⁸⁹

The states that prohibit nicking impose liability on the same classes of persons upon whom they impose liability for docking. The exception is South Carolina, which has no tail docking prohibition. There, liability for nicking extends to three classes of persons: (1) any person who performs the procedure, (2) any person who procures the procedure or knowingly permits its performance, and (3) any person who

⁷⁹ Lance Phillips, *The Saddle Horse* 113 (A.S. Barnes & Co. 1964).

⁸⁰ Ensminger, *supra* n. 1, at 81-82, 107.

⁸¹ A tail-set is "[a] crupperlike contrivance, with a shaped section for the tail, which brings the tail so high that it can be tied down, to give it an arch and extremely high carriage; but a tail so set must first be nicked to give such results." *Id.* at 531.

⁸² *Id.* at 392.

⁸³ Conn. Gen. Stat. § 53-251(a) (2001).

⁸⁴ Mass. Gen. Laws Ann. ch. 272, § 79A (West 2000).

⁸⁵ N.Y. Agric. & Mkts. Law § 368 (McKinney 1991).

⁸⁶ Ohio Rev. Code Ann. § 959.14 (West 1993).

⁸⁷ S.C. Code Ann. § 47-1-60 (1987 & Supp. 2002).

⁸⁸ Conn. Gen. Stat. § 53-251(a) (2001).

⁸⁹ Mass. Gen. Laws Ann. ch. 272, § 79A.

assists in the procedure or is voluntarily present when it is performed.⁹⁰

C. *International Statutes*

Internationally, the Anglo Saxon countries of Ireland,⁹¹ Northern Ireland,⁹² and Great Britain⁹³ expressly prohibit tail nicking. In Australia, only New South Wales⁹⁴ and South Australia⁹⁵ have banned the practice. Canadian law is silent on the issue.⁹⁶

IV. TAIL BLOCKING

A. *Definition and History*

Tail blocking by injection, which came into vogue about thirty years ago, is the newest of the cosmetic procedures. Variouslly called “doing a horse’s tail,” “blocking a horse’s tail,” or “nerving a horse’s tail,”⁹⁷ it involves an alcohol injection into the major nerves that control the horse’s ability to lift its tail.⁹⁸ The procedure apparently came into practice after certain breed registries disqualified horses with surgically nicked tails from the show ring. Because surgical nicking produces a tell-tale bump from the incision, the injection method was devised to avoid disqualification for nicking while achieving the goal of stabilizing the horse’s tail. Furthermore, blocking makes it difficult for a horse to swish its tail in response to cues, such as leg pressure, from its rider. Judges view a horse that swishes its tail as having a bad attitude, contrary to certain show standards.⁹⁹

Blocking is performed almost exclusively among Western riding disciplines. The purpose of the procedure is to have the horse’s tail lie

⁹⁰ S.C. Code Ann. § 47-1-60. Violation of the statute is a misdemeanor.

⁹¹ *Protection of Animals (Amendment) Act* (Ireland), § 5 (1965) (available at <http://www.irishstatutebook.ie/1965_10.html>).

⁹² *Welfare of Animals Act* (N. Ireland), § 18. (1972) (available at <<http://www.hmso.gov.uk/legislation/northernireland/nisr.101202/yeargroups/1970-1979/1972/1972anip/aos/c7.htm>>).

⁹³ *Docking & Nicking of Horses Act 1949* (U.K.), ch. 70 (Butterworths UK Stats. 2002) (available at <<http://www.wales-legislation.org.uk/agriculture/acts/DockingandNickingofHorsesAct1949.html>>).

⁹⁴ *Prevention of Cruelty to Animals Act No. 200* (New S. Wales), § 21B (1979) (available at <<http://www.legislation.nsw.gov.au/maintop/scanact/inforce/NONE/0>>).

⁹⁵ *Prevention of Cruelty to Animals Regs. (No. 2)* (S. Australia) (2000) (available at <<http://www.parliament.sa.gov.au>>).

⁹⁶ *Veterinary Prof. Act* (Alberta), R.S.A. 2000 ch. V-2, § (2)(f) (2000).

⁹⁷ Although horsemen use the term “nerving,” the procedure actually desensitizes the nerves of a horse’s tail. Properly speaking, the tail nerves in a nerve blocking procedure should not be permanently disabled, while a neuroectomy, which actually cuts the nerves, permanently disables the tail.

⁹⁸ Lindsay Turcotte, Jr. *Riders J., What About the Horse? Controversy in the Equine Show Scene* <<http://www.horse-country.com/jriders/papers/lindsay/>> (accessed Apr. 5, 2003).

⁹⁹ *Id.*

flat, with no tail elevation.¹⁰⁰ Because the effect of the injection is usually not permanent, the horse may have its tail “done” numerous times. Although it is not a surgical procedure, it is not risk-free. Some horses develop ataxia (incoordination of gait) after having their tails blocked, others developed very hard tails, and some developed crooked or kinked tails after the procedure. Although most horses regain some tail function after a few months, the nerve damage remains, resulting in only partial use of the tail.¹⁰¹

B. American Law

Although the procedure of injecting tails for cosmetic purposes runs afoul of breed registry and horse show rules, injections are not specifically prohibited by law. The blocking procedure is invasive because it involves inserting a needle into the horse’s flesh (similar to a human injection). Therefore, Washington’s statute, which bans any “operation for the purpose of . . . changing the carriage of the tail,” most closely approaches a ban on tail nerving.¹⁰² However, a tail injection is unlikely to be classified as an “operation.”¹⁰³ Absent a specific ban on tail nerving, general prohibitions against animal abuse could be interpreted to prohibit tail injections under common catch-all provisions in animal cruelty statutes.¹⁰⁴ However, there is no case law to support this theory.

The argument that equine tail injections violate general animal abuse statutes is weak because the results are not necessarily permanent, it is minimally invasive, and it does not result in readily apparent mutilation. From a legal perspective, a strong case against tail injections as a criminally abusive practice does not seem to exist under existing statutes. The strongest argument against tail injection may be on ethical, rather than criminal, grounds. Opposition to tail injections probably has a broader base of support within the horse industry itself than any other cosmetic tail procedure. Although docked tails are still relatively common among some draft horses, and nicked tails are generally accepted among certain gaited breed shows, tail blocking is not acceptable in the equine show world. It is the industry itself, instead of the criminal law, that opposes tail injections.

¹⁰⁰ Some horses naturally elevate their tails when they move. If a horse elevates its tail, it does not give the “flat” look that is the current preference. *Id.*; Personal communication with Sandy Arledge, Sandy Arledge Quarter Horses, Inc. (July 22, 2002).

¹⁰¹ Personal Communication with Sandy Arledge, *supra* n. 100.

¹⁰² Wash. Rev. Code § 16.52.090 (1992).

¹⁰³ “A surgical procedure for remedying an injury, an ailment, a defect, or a dysfunction.” Am. Heritage College Dictionary 957 (3rd ed., Houghton Mifflin Co. 1997).

¹⁰⁴ Probably the most common catch-all provision in animal cruelty laws is the language imposing liability upon a person who “overdrives, overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether belonging to himself or to another.” N.Y. Agric. & Mkts. Law § 353 (McKinney 1991). For examples of statutes with similar language, see Cal. Penal Code Ann. § 597 (West 1999); Colo. Rev. Stat. § 18-9-202 (2002); Conn. Gen. Stat. § 53-247 (2001); Nev. Rev. Stat. § 574.100 (2001).

Two equine breed registries have taken a firm stance against the practice of “doing a horse’s tail,” and this could be the catalyst for legislation prohibiting the practice. Tail injection has been particularly troublesome in the Quarter Horse and Paint Horse breeds.¹⁰⁵ The American Quarter Horse Association (AQHA) has banned horses with altered tails, including tail injections, from the show ring.¹⁰⁶ Similarly, the American Paint Horse Association (APHA) bans surgical tail procedures, as well as any injections that would alter the natural carriage of the horse.¹⁰⁷ Although the AQHA and APHA have denounced these practices, enforcement of the ban has been less than successful.¹⁰⁸ Lack of enforcement may be due in part to the fear of civil liability that could result from false accusations of animal cruelty.¹⁰⁹

Other Anglo Saxon countries lack equine tail nerving legislation. No Canadian, British, or Australian laws have language that would encompass a ban on tail nerving.¹¹⁰ This gap may be more practical than philosophical; because western riding has, until recently, been a uniquely American pursuit, tail blocking may not have been occurring in other countries. However, as western riding grows in popularity outside the United States,¹¹¹ the practice of tail nerving may accom-

¹⁰⁵ Personal Communication with Sandy Arledge, *supra* n. 100.

¹⁰⁶ Am. Quarter Horse Assn., *Official Handbook of Rules & Regulations* Rule 441(g) (AQHA 2003) (available at <<http://www.aqha.com/association/registration/rulebook.html>>).

¹⁰⁷ Am. Paint Horse Assn., *Official APHA Rule Book* 84 (APHA 2002). These registries are not alone in denouncing inhumane cosmetic equine practices. A registry of recent origin, the Renai Horse Registry, prohibits a wide variety of surgical cosmetic alterations. However, tail injections do not appear to fall within the strict language of the rules as there is no “surgery” involved in the procedure. Although the Renai Horse Registry does not specifically ban tail injections, the registry as a whole takes a dim view of cosmetic enhancement alterations. Should the appearance of a “flat” tail become a fashion in Renai show circles, the registry would likely revise its rules and ban that procedure as well, given its emphatic prohibition against other cosmetic alterations. Renai Horse Registry, *General Information, Rules, and Policies* <<http://www.renaihorsereregistry.com/premium/7.asp>> (accessed Apr. 5, 2003).

¹⁰⁸ A discussion on “e-reiner” asked whether the NRHA (National Reining Horse Association) should make tail blocking illegal and how prevalent the readers thought the practice was. Of the fourteen participants, eleven were opposed to the practice, two were not opposed, and one was noncommittal. Many of the contributors voiced the opinion that self-policing within the industry is not working. e-reiner, *Controversial* <<http://www.e-reiner.com/Ontheotherhand/TailBlocking.htm>> (accessed Apr. 5, 2003).

¹⁰⁹ Assuming that nerving a horse’s tail is not criminal conduct, an allegation of cruelty could create civil liability. See Elizabeth Cazden, *Liability for Statement or Publication Charging Plaintiff with Killing of, Cruelty to, or Inhumane Treatment of Animals*, 69 A.L.R. 5th 645 (1999). In the context of horses, *Lundquist v. Reusser*, 875 P.2d 1279 (Cal. 1994), involved a defamation suit based on an allegation of cosmetic surgical alteration to a horse’s neck.

¹¹⁰ Similar to American law, international bans on tail docking and nicking generally refer to “cutting” or “operating” on a horse’s tail. Injections would not appear to fall within the language of these statutory provisions.

¹¹¹ Not only are Western riding and Western riding events becoming more popular internationally, but Europeans are starting to excel in Western riding. See generally Equisearch, *Team Italy Earns the Gold in Reining* <<http://horses.about.com/cs/results/a/>>

pany the trend. If so, foreign jurisdictions may need to decide upon the legality of the practice. Given the fact that these jurisdictions have banned cosmetic tail docking, it is likely that they would be opposed to other cosmetic procedures that hamper the horse's natural tail function.

V. QUESTIONABLE CONSTITUTIONALITY OF EXISTING ANTI-COSMETIC STATUTES

Show ring rules and breed standards within the industry are the impetus behind any decrease in cosmetic tail procedures that has occurred to date. Because the criminal statutes are rarely enforced, their existence does not hamper performance of unethical and illegal cosmetic procedures. Lack of enforcement may result from ignorance of the law, the nature of the procedure, or mere disinterest among law enforcement professionals. The real problem, however, is with the statutes themselves. Most, if not all, of the current statutes are constitutionally suspect. Of the twelve jurisdictions that ban some form of cosmetic tail procedures, only the District of Columbia, Illinois, Minnesota, and Ohio statutes do not suffer from obvious due process problems. The remaining statutes violate either the Due Process Clause or the dormant Commerce Clause.¹¹²

A. Due Process Violations

The above survey of anti-cosmetic crime statutes demonstrates the nearly limitless potential for liability that some statutes create. Such expansive liability, however, is likely to be constitutionally suspect on due process grounds. The Supreme Court has long held that due process requires that a defendant have fair warning of the conduct that is punishable as a crime.¹¹³

That the terms of a penal statute . . . must be sufficiently explicit to inform those who are subject to it and what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law.¹¹⁴

Statutes that impose potential liability on a person who is merely present at a docking or nicking procedure plainly violate due process.¹¹⁵ Mere presence is an insufficient basis upon which to premise

eqreining2156.htm> (accessed Apr. 5, 2003). Europeans also have started raising traditionally Western breeds, such as the Appaloosa. See *Western Riding in Europe* <<http://www.angelfire.com/country/theranch/horselinks1.html>> (accessed Apr. 5, 2003). Western-riding style trainers also have been gaining ground in Europe. See Equiworld, *Hardy Oelke: Western Training* <<http://www.equiworld.net/uk/sports/western/hardyoeelke/>> (accessed Apr. 5, 2003).

¹¹² U.S. Const. amend. XIV § 1; U.S. Const. art. 1, § 8.

¹¹³ *E.g. Connally v. General Constr. Co.*, 269 U.S. 385 (1926).

¹¹⁴ *Id.* at 391.

¹¹⁵ Connecticut, Massachusetts, Michigan, and New Hampshire all prohibit "presence" at a tail docking and/or nicking. Conn. Gen. Stat. § 53-251(a) (2001); Mass Gen.

criminal liability. "Presence" commonly means proximity in space.¹¹⁶ Applying the concept of presence to a typical show barn scenario without raising questions of constitutional infirmity would be next to impossible. If a tail docking were in progress, would a person working on a horse in an adjoining stall, five to six feet away, be "present"? Would a stable hand walking past a stall where a nicking operation was being performed be "present" within the meaning of the statute? Would a visitor to the barn, such as the owner of another horse, be "present" if he or she stopped to "rubberneck" at the procedure in progress? Although presence in the form of assistance (aiding and abetting) is certainly punishable on both constitutional as well as ethical grounds—and rightly so—punishment based on mere happenstance is neither morally justifiable nor constitutionally defensible. There must be some nexus between the perpetrator and an accomplice that goes beyond mere presence in order to impose criminal liability.¹¹⁷ Statutes that impose liability on the basis of mere presence do not inform the public of "what the State commands or forbids."¹¹⁸

Due process problems also arise from attempts to use general animal cruelty statutes to prosecute tail docking, as evidenced by a recent case involving dog tail docking. In *People v. Rogers*,¹¹⁹ the defendant was prosecuted for personally docking his puppies' tails when he used a process called "banding" on his newborn puppies' tails.¹²⁰ Unlike horse docking, which is clearly illegal in New York, there is no specific anti-docking statute that applies to dogs. Because New York lacks a specific dog tail docking statute, the prosecution was forced to rely on the portion of the state's general animal cruelty provisions stating that any "person who . . . tortures . . . or unjustifiably injures, maims, mutilates or kills any animal . . . is guilty of a misdemeanor."¹²¹ New York law defines "torture" or "cruelty" as encompassing "every act, omission, or neglect, whereby unjustifiable physical pain, suffering, or death is caused or permitted."¹²²

Laws Ann. ch. 272, § 79A (West 2000); Mich. Comp. Laws § 750.60 (2001); N.H. Rev. Stat. Ann. § 644:8-b (1996). "Voluntary presence" is banned in New York and South Carolina. N.Y. Agric. & Mkts. Law § 368 (McKinney 1991); S.C. Code Ann. § 47-1-60 (1987 & Supp. 2002).

¹¹⁶ Presence is defined as "immediate proximity in time or space." Am. Heritage College Dictionary, *supra* n. 103, at 1082.

¹¹⁷ See e.g. *Commr. v. Gendrai*, 774 N.E.2d 167, 175 (2002) (under a party theory liability, the aider and abettor must share the same mental state as the perpetrator; mere presence is not enough).

¹¹⁸ *Lanzetta v. N.J.*, 306 U.S. 451, 453 (1939).

¹¹⁹ 703 N.Y.S.2d 891 (2000).

¹²⁰ Banding is a tail-docking method whereby one uses a rubber band wound tightly around the tail to cut off circulation to the end of the tail. Eventually, the end of the tail "shrivels up and falls off." Sandoe, *supra* n. 8.

¹²¹ N.Y. Agric. & Mkts. Law § 353 (McKinney 1991).

¹²² *Id.* § 350.

The court found that the words “unjustifiable” and “unjustifiably” violated the Due Process Clause¹²³ because they did not provide adequate notice to a reasonable person that docking a dog’s tail was prohibited conduct.¹²⁴ First, the court noted that docking a dog’s tail is not a “comprehensible course of conduct” proscribed by Agriculture and Markets Law sections 350 and 353.¹²⁵ Second, while it acknowledged that both tail docking and ear clipping were common practices resulting in pain,¹²⁶ the court implied that the pain and suffering caused by ear docking was statutorily permissible as long as it was a *veterinarian* inflicting the pain.¹²⁷ Finally, the court noted that while the law specifically bans horse tail docking¹²⁸ and restricts the practice of dog ear clipping to veterinarians,¹²⁹ it does not specifically ban dog tail docking.¹³⁰ The court declined the opportunity to expand the impermissible scope of cosmetic procedures, remarking, “If the Legislature wants to prohibit the practice of docking a dog’s tail (as in the case of a horse), or prescribe how it can be done legally (as in the case of clipping a dog’s ears), then appropriate legislation should be passed.”¹³¹

Although the court’s distinction between “unjustifiable” and “unjustifiably” as a basis for its decision appears to be hairsplitting, the court’s decision is defensible under the Due Process Clause and New York law. Whether the argument the defendant raised in *Rogers* would be less defensible in another jurisdiction with different laws is unclear. However, because the vast majority of states have no statutes specifically addressing cosmetic crimes in horses, the typical generic animal cruelty statute, with its catch-all provision, may offer horses their only protection until specific legislation is enacted.

B. Commerce Clause Violations

Two cases spanning nearly sixty years in time and decided on opposite sides of the country have reached the same conclusion: statutes that ban docking may impermissibly interfere with interstate commerce, a power reserved for Congress alone.¹³²

¹²³ U.S. Const. amend. XIV.

¹²⁴ *Rogers*, 703 N.Y.S.2d at 896.

¹²⁵ *Id.* at 895–896.

¹²⁶ *Id.* at 894.

¹²⁷ *Id.*

¹²⁸ N.Y. Agric. & Mkts. Law § 368 (McKinney 1991).

¹²⁹ *Id.* § 361(1).

¹³⁰ *Rogers*, 703 N.Y.S.2d at 895–96.

¹³¹ *Id.* at 896.

¹³² U.S. Const. art. 1, § 8. Because the Commerce Clause grants Congress the power to regulate interstate commerce, the Supreme Court has inferred that state laws that burden interstate commerce are unconstitutional. Erwin Chemerinsky, *Constitutional Law* 317 (Aspen L. & Bus. 2001). This principle is known as the “dormant” Commerce Clause. *Id.*

In the 1907 case of *Stubbs v. People*,¹³³ the defendant, who was convicted of driving a dock-tailed horse, successfully challenged the constitutionality of Colorado's anti-docking statute. Reaching the constitutional issue in the case, the Colorado Supreme Court first referenced an earlier Colorado case, *Bland v. People*,¹³⁴ in which there was a similar criminal prosecution for violation of the state's anti-docking law and a constitutional challenge. The *Bland* court upheld the statute as a constitutional exercise of the state's police powers.¹³⁵ That court did not, however, reach the section of the act that dealt with importation of docked horses, and the discussion was conspicuously absent from the *Bland* court's decision-making process.¹³⁶ The *Stubbs* court moved beyond the narrow confines of *Bland* and agreed with the defendant that the Colorado statute violated the dormant Commerce Clause.¹³⁷ The court pointedly noted that

whatever may be the nature and reach of police power of the state, it cannot be exercised over a subject confided exclusively to Congress by the federal Constitution . . . [the] power cannot be conceded to a state to exclude directly or indirectly the lawful subjects of interstate commerce, or, by the imposition of burdens thereon, to regulate such commerce without congressional permission.¹³⁸

Over fifty years later, in *People v. Teter*,¹³⁹ a representative of the Anti-Vivisection League filed a complaint against Earl Teter,¹⁴⁰ who was arguably the most famous Saddlebred trainer of the twentieth century, for allegedly violating New York's anti-nicking law. At the time, New York law banned nicking and docking by providing that "any person who owns, possesses or shows . . . a horse . . . the tail of which has been so cut or operated shall be guilty of a violation whether the cutting or operation has been performed within or without the state of New York."¹⁴¹ The law forbid exhibition of docked horses in New York, even if the horses' tails had been altered in a state that did not ban tail nicking.¹⁴² The defendant, a resident of Lexington, Kentucky, who exhibited Kentucky horses with surgically altered tails, challenged the law as unconstitutional and violative of both the federal Commerce Clause and the due process clauses of the federal and New York constitutions.¹⁴³ Though the court was hesitant to rule on consti-

¹³³ 90 P. 1114 (Colo. 1907).

¹³⁴ 76 P. 359 (Colo. 1904).

¹³⁵ *Id.* at 362-63.

¹³⁶ *Id.*

¹³⁷ *Stubbs*, 90 P. at 1117.

¹³⁸ *Id.* The offending statute was repealed in 1971.

¹³⁹ 231 N.Y.S.2d 651 (N.Y. Misc. 2d 1962).

¹⁴⁰ The defendant's name was misspelled in the court opinion. The proper spelling is "Teater." To avoid confusion, I have adopted the incorrect spelling of the published opinion.

¹⁴¹ *Teter*, 231 N.Y.S.2d at 652.

¹⁴² *Id.*

¹⁴³ *Id.*

tutional grounds,¹⁴⁴ it ruled that the law violated the Commerce Clause without reaching the defendant's Due Process argument.¹⁴⁵ In dismissing the complaint, the court held that subdivision 2 of section 195-a, as applied to the facts of the case before it, violated the federal constitution.¹⁴⁶

No further nicking or docking opinions have been published, either at the trial or appellate court levels, since the *Teter* decision in 1962. The lack of published opinions may be the result of a fortuitous (for defendants) lack of prosecution; on the other hand, it may indicate a tacit understanding that anti-cosmetic crimes as currently drafted are likely unconstitutional and therefore unenforceable. At present, docking continues even in states in which the practice is plainly criminal. Although not legally defensible, ignorance of the law, rather than a flagrant disregard of it, is likely the culprit in states that do prohibit the practice.¹⁴⁷ Even owners of horse breeds that have commonly been subjected to the practice of docking are apparently unaware that docking laws exist in their own states.¹⁴⁸

As *Teter* and *Stubbs* demonstrate, many of these statutes, drafted nearly one hundred years ago, would likely be found unconstitutional if challenged today. Some of the statutes are questionable on their face because they extend criminal liability to mere presence during the performance of a docking, and they also appear unconstitutional as applied because enforcement of the statute would violate the Commerce Clause. While the statutes cast a wide net of criminal liability, as presently written they are virtually powerless to protect horses. However, abolishing the existing statutes is not an acceptable solution, because society's interest in animal welfare is likely higher than ever before.¹⁴⁹

¹⁴⁴ *Id.* at 653.

¹⁴⁵ *Id.* at 656.

¹⁴⁶ *Id.*

¹⁴⁷ Examples of the lack of awareness are abundant on the web sites of draft horse breeders and registries. One draft horse breeder's site was particularly poignant. The breeder made a scathing declaration that docking is inhumane, and he declared that he would not follow breed practices by docking his horses' tails. Missing from his web site, however, was the truly critical point: docking is illegal in his state. The breeder was obviously unaware of this detail.

¹⁴⁸ One draft breed registry located in a non-docking state asks applicants to note whether the horse has a natural or docked tail. Although breed registries do not exclude horses from outside states, the existence of a registry in a given state usually correlates with a large number of horses in that state. N. Am. Spotted Draft Horse Assn., *Application for Registration* (Jan. 1, 2002) (available at <http://nasdha.net/nasdha_forms.htm>).

¹⁴⁹ For example, animal law is becoming recognized as a valid discipline. The first law school textbook on the subject was published in 2000. Pamela Frasch et al., *Animal Law* (Carolina Academic Press 2000).

VI. RELIANCE ON FEDERAL LAW AND MODEL STATUTE PROPOSAL

A. *Reliance on Federal Law*

As both a theoretical and practical matter, a single federal statute against cosmetic practices would provide the best vehicle for enforcement. A federal statute banning all forms of cosmetic tail practices would be advantageous for several reasons. First, a federal law would create a single standard banning all three forms of cosmetic cruelty instead of the patchwork prohibitions that currently exist at the state level. A new federal statute would likely be more consonant with constitutional limitations than existing laws. As discussed above, current criminal statutes do not expressly prohibit tail injections, therefore, criminal prosecution for tail injection falls under the catch-all provisions of state animal abuse statutes. A new federal statute could unequivocally and uniformly ban all inhumane tail procedures to defeat the states' inconsistent statutes.

Second, a new federal statute would more likely be harmonious with due process considerations. Although cosmetic tail procedures may be considered animal cruelty under catch-all animal cruelty provisions, as the *Rogers* case points out, a defendant may have insufficient notice under general animal abuse statutes.¹⁵⁰ Furthermore, industry prohibitions may be insufficient to give a defendant notice that cosmetic tail alternations are criminal conduct.

Third, a federal ban would abolish any lingering Commerce Clause issues that may remain under some state laws. Uniformity in banning cosmetic practices would remove any current restrictions on the interstate movement of horses. At present, horses with cosmetically altered tails can move freely between most, but not all, states. For example, in California, a state with one of the nation's largest equine populations, horses with docked tails are not permitted into the state except for showing or breeding purposes. Docked horses that are physiologically or surgically infertile, too old to be used for breeding, or to be used for pleasure purposes only are not permitted to enter the state.¹⁵¹

Fourth, a federal ban on cosmetic tail practices could enhance international trade, which currently restricts importation of horses with cosmetically altered tails.¹⁵² Fifth, a federal law already on the books bans other inhumane equine practices. The Horse Protection Act,¹⁵³

¹⁵⁰ *People v. Rogers*, 703 N.Y.S.2d 891, 896 (2000).

¹⁵¹ Cal. Penal Code Ann. § 597r (West 1999).

¹⁵² For example, England, the home of the hackney horse and hackney pony (many of which traditionally had docked tails), prohibits importation of docked horses unless the horse is to be used for breeding or exported immediately. Dept. for Env., Food, and Rural Affairs (U.K.), *Equine Industry Guidelines Compendium for Horses, Ponies, and Donkeys* 15 (2002) (available at <<http://www.defra.gov.uk/animalh/welfare/farmed/othersps/#horses>>).

¹⁵³ 15 U.S.C §§ 1821–1831 (2000).

aimed at inhumane cosmetic practices on horses' hooves, bans the practice of soring¹⁵⁴ horses.¹⁵⁵ Creating a new section within the Horse Protection Act that bans cruel cosmetic tail procedures would be consistent with existent provisions of the act.

Sixth, a federal ban on inhumane practices would likely result in increased enforcement of the law. More cases have been prosecuted in the last thirty years under the Horse Protection Act than have been prosecuted in the nearly 100 years since states began banning cosmetic tail operations. There have been twenty-two anti-soring decisions under the Horse Protection Act of 1970,¹⁵⁶ as opposed to only three for docking violations under state law.¹⁵⁷ Notably, only one of these state cases has been in the last fifty years.¹⁵⁸ When one considers that soring is not even as widespread a practice across multiple equestrian disciplines as are cosmetic tail procedures, it seems probable that a federal law aimed at cosmetic tail procedures would also result in greater numbers of prosecutions. Although the Horse Protection Act has been criticized as being only marginally effective, it certainly has been much more successful as a vehicle for prosecuting offenders than the hodge-podge of laws in the few states with anti-cosmetic statutes.¹⁵⁹

Seventh, a federal law could eliminate the procedure of "banding" a young horse's tail, a procedure in which a rubber band is placed tightly around the tail bone, and the resulting lack of circulation

¹⁵⁴ Soring is a procedure designed to accentuate a horse's normal gait by applying chemical irritants to the front of a horse's hooves. The resulting irritation makes the horse lift its front hooves quickly to relieve the pain. The practice, which began about 50 years ago, was developed to give horse owners an edge in the show ring. It is particularly prominent among Tennessee Walking Horses, a breed known for its rolling gait. Ensminger, *supra* n. 1, at 397.

¹⁵⁵ 15 U.S.C. § 1824.

¹⁵⁶ *Reinhart v. U.S. Dept. of Agric.*, No. 01-3283 (6th Cir. July 10, 2002); *Lewis v. Sec. of Agric.*, 73 F.3d 312 (11th Cir. 1996); *Young v. U. S. Dept. of Agric.*, 53 F.3d 728 (5th Cir. 1995); *Martin v. U.S. Dept. of Agric.*, 57 F.3d 1070, 1995 U.S. App. LEXIS 13606 (6th Cir. 1995); *Bobo v. U.S. Dept. of Agric.*, 52 F.3d 1406 (6th Cir. 1995); *Crawford v. U.S. Dept. of Agric.*, 50 F.3d 46 (D.C. Cir. 1995); *Baird v. U.S. Dept. of Agric.*, 39 F.3d 131 (6th Cir. 1994); *Gray v. U.S. Dept. of Agric.*, 39 F.3d 670 (6th Cir. 1994); *U.S. Dept. of Agric. v. Kelly*, 38 F.3d 999 (8th Cir. 1994); *Am. Horse Protection Assn. v. Yeutter*, 917 F.2d 594 (D.C. Cir. 1990); *Am. Horse Protection Assn. v. Lyng*, 812 F.2d 1 (D.C. Cir. 1987); *Stamper v. Sec. of Agric.*, 722 F.2d 1483 (9th Cir. 1984); *Thornton v. U.S. Dept. of Agric.*, 715 F.2d 1508 (11th Cir. 1983); *Fleming v. U.S. Dept. of Agric.*, 713 F.2d 179 (6th Cir. 1983); *Burton v. U.S. Dept. of Agric.*, 683 F.2d 280 (8th Cir. 1982); *U.S. v. Holcomb*, 651 F.2d 231 (4th Cir. 1981); *Becker v. Celebration, Inc.*, 541 F.2d 156 (6th Cir. 1976); *Gray v. Madigan*, 796 F. Supp. 1093 (M.D. Tenn. 1992); *Am. Horse Protection Assn. v. Lyng*, 681 F. Supp. 949 (D.D.C. 1988); *Lewis v. Natl. Horse Show Reg. Comm.*, 1988 Tenn. App. LEXIS 265 (Apr. 29, 1988); *RRR Farms v. Am. Horse Protection Assn.*, 957 S.W.2d 121 (Tex. 1997).

¹⁵⁷ *Bland v. People*, 76 P. 359, 360 (Colo. 1904); *Stubbs v. People*, 90 P. 1114 (Colo. 1907); *People v. Teter*, 231 N.Y.S.2d 651 (N.Y. Misc. 2d 1962).

¹⁵⁸ *Teter*, 231 N.Y.S.2d 651.

¹⁵⁹ Clark Case, *No Rule of Thumb: The Conflict of Digital Palpation Under the Horse Protection Act*, 90 Ky. L.J. 661 (2001-2002).

makes the distal portion of the tail bone slough off in time.¹⁶⁰ Current anti-docking laws only prohibit “cutting” a horse’s tailbone; narrowly construed, they do not prohibit banding. In a legal advice column, one attorney suggests that tail banding would not fall within the strict prohibitions of anti-docking laws.¹⁶¹ However, it is the resulting detriment to the horse from having its tail shortened (inability to swat flies, limited inter-equine communication) that constitutes the harm to the horse, not the manner in which the shortening has occurred. A federal law could update existing laws to prohibit both banding of tail bones and surgical tail cutting.

B. A Model Statute

The following model statute comports with existing provisions of the Horse Protection Act,¹⁶² extending its protections to reach cosmetic tail procedures.

Prohibition against docking, nicking, and tail blocking of horses.

1. The cosmetic alteration of a horse’s tail is cruel and inhumane.
2. Horses that are shown or exhibited with cosmetically altered tails compete unfairly against horses with unaltered tails.
3. Under current state laws, the movement, showing, exhibition, or sale of horses with cosmetically altered tails adversely affects and burdens interstate and foreign commerce.
4. Regulation of the provisions under this Chapter by the Secretary of Agriculture is appropriate to prevent and eliminate burdens upon commerce and to effectively regulate commerce.
5. Performing, procuring, or assisting in the docking, nicking, and tail blocking of horses is prohibited, except as provided in section (6).
 - (a) Docking is the intentional removal of any bone or part of a bone from a horse’s tail.
 - (b) Nicking is the intentional cutting of the muscles or tendons of a horse’s tail.
 - (c) Tail blocking is the intentional injection of a horse’s tail with any substance intended to interfere with a horse’s natural tail movement or function.
 - (d) “Horse” includes any stallion, gelding, colt, filly, mare, pony, mule, ass, or hinny.
6. The docking, nicking and tail blocking of horses may be lawfully performed only when the procedure complies with each of the following:
 - (a) The procedure is done by a licensed veterinarian,
 - (b) The procedure follows an examination of the horse for disease or injury to the tail, and

¹⁶⁰ Sandoe, *supra* n. 8.

¹⁶¹ *Id.*

¹⁶² 15 U.S.C. §§ 1821–1831 (2000).

- (c) The veterinarian certifies in writing that, in his or her professional opinion, the operation is necessary for the health of the horse because of injury or disease to the tail.
7. Violation of this provision may result in any of the following: (1) penalties up to \$5,000; (2) two years in prison; and (3) disqualification from the right to show, exhibit, or sell horses for two or more years.

This model provision supplements existing federal law banning inhumane practices and removes any restrictions on trade that exist under current state laws. Existing provisions of The Horse Protection Act would remain unchanged, including (1) notification of violations to the Attorney General, (2) utilization of Department of Agriculture personnel and officers and employees of consenting states for enforcement, (4) disqualification of horses with cosmetically altered tails from horse shows and exhibitions, and (5) preemption of state law by federal law.

VII. CONCLUSION

Few states have enacted laws prohibiting the criminal or unethical cosmetic procedures commonly performed on horses' tails. Even where statutes have been enacted, they are largely unenforced and likely unenforceable. Federal law would best remedy the current gaps in laws that protect horses. Congress has, on other occasions, enacted laws that require humane treatment of horses, most notably the Horse Protection Act, which bans unnecessary cosmetic procedures.¹⁶³ A federal ban on tail docking, tail nicking, and tail blocking would eliminate the current Commerce Clause problems with existing state laws and enhance the marketability of American horses in international trade. Most importantly, it would provide meaningful protection for horses against cosmetic procedures that are widely recognized as cruel.

¹⁶³ *Id.*

