



## Responsibility in the “Sport of Kings”: Imposing an Affirmative Duty of Care on the Primary Financial Beneficiaries of the Thoroughbred Horseracing Industry

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*“The thinking man must therefore oppose all cruel customs, no matter how deep-rooted in tradition and surrounded by a halo.” – Dr. Albert Schweitzer<sup>1</sup>*

*“It is a side of the ‘sport of kings’ that most fans do not see where animals that fail to live up their owners’ dreams end their days neglected or on ‘killer vans,’ worth no more than their price per pound.” – Allen G. Breed<sup>2</sup>*

*Horseracing industry participants must be held accountable for the wellbeing of retired racehorses. In Part I of this article, I explore the historic role of the horse in American society, and explain how “unwanted horses” become neglected, abused, abandoned, or shipped across U.S. borders to be slaughtered. In Part II, I address the unique susceptibility of thoroughbred racehorses to becoming unwanted horses, and how the wealth and glamour associated with horseracing serves to mask the problem. In Part III, I outline the legislation pertaining to*

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<sup>1</sup> Pearl Twyne, *Horses*, in ANIMALS AND THEIR LEGAL RIGHTS: A SURVEY OF AMERICAN LAWS FROM 1641 TO 1990 126, 150 (Animal Welfare Institute ed., 1990).

<sup>2</sup> Allen G. Breed, *Slaughter Awaits Former Racehorses*, ASSOCIATED PRESS ONLINE, Nov. 20, 1999.

*horseracing, arguing that it does not adequately ensure the welfare of ex-racehorses. In Part IV, I explain that the burden for caring for these horses falls to under-funded private horse Rescue/Adoption/Retraining facilities (hereinafter “RAR facilities”). In Parts V and VI, I employ a loss-spreading rationale and the reasoning behind the “special relationship” doctrine, contending that the cost of providing adequate funds to RAR facilities should be imposed on the Primary Financial Beneficiaries (hereinafter “PFBs”) of the horseracing industry. In Part VII, I argue that this financial burden should be placed on PFBs in the form of “Participation Fees” proportional to the PFB’s level of investment in the industry. In Part VIII, I contend that this mandate could be carried out by either private state racing associations, the National Thoroughbred Racing Association, state governments, or the federal government. In Part IX, I further explore the logistics of implementing such a scheme.*

<b>I. Unwanted Horses.....</b>	<b>67</b>
<b>A. Americans and Horses.....</b>	<b>67</b>
<b>B. The Difference Between Equine Slaughter and the Slaughter of Livestock .....</b>	<b>68</b>
<b>C. Why Horses Become Unwanted .....</b>	<b>69</b>
<b>D. Auctions and Killer Buyers .....</b>	<b>70</b>
<b>E. Neglect and Abandonment .....</b>	<b>71</b>
<b>F. The Slaughterhouse.....</b>	<b>72</b>
<b>II. The American Thoroughbred Racehorse.....</b>	<b>73</b>
<b>A. The Vulnerability of Racehorses.....</b>	<b>73</b>
<b>B. Money and Status .....</b>	<b>74</b>
<b>C. The Slaughter of Racehorses .....</b>	<b>75</b>
<b>III. Relevant Legislation.....</b>	<b>76</b>
<b>A. Horseracing Laws and Regulations .....</b>	<b>76</b>
<b>B. State Anti-Cruelty Statutes and State Legislation Concerning</b>	

Slaughter .....	77
C. Federal Law.....	78
IV. Racehorse Rescue/Adoption/Retraining Organizations: Overworked and Underfunded .....	80
V. The Participation Fee Solution .....	81
VI. Loss-Spreading and the Ex-Racehorse Problem .....	82
A. The Theory of Loss-Spreading .....	82
B. Loss-Spreading and the PFBs of the Racing Industry .....	85
VII. Imposing Affirmative Duties on PFBs Based on the “Special Relationship” Theory .....	87
A. The Special Relationship Theory .....	87
B. The Special Relationship/Affirmative Duty Rationale in the Horseracing Context .....	88
VIII. Logistics of the Proportional Participation Fee Strategy.....	90
IX. Consensus and Implementation.....	91
X. Conclusion .....	94

## I. Unwanted Horses

Many ex-racehorses in the United States become “unwanted horses.” They are abandoned, neglected, sold at auctions to owners who overwork and abuse them, or shipped across U.S. borders and killed in slaughterhouses for human consumption in foreign countries.

The Animal Welfare Institute estimates that every five minutes an American horse is slaughtered for human consumption.<sup>3</sup> Americans no longer eat horsemeat,<sup>4</sup> but Europe and Asia have consumed horsemeat for centuries.<sup>5</sup> While there are currently no equine slaughterhouses in the United States, a multimillion-dollar horsemeat export industry sends tens of thousands of horses from the United States to Canada and Mexico for slaughter every year.<sup>6</sup> The slaughtered horses are then exported to Europe and Asia<sup>7</sup> where horsemeat is consumed in restaurants and in homes.<sup>8</sup>

### A. Americans and Horses

Why do Americans choose not to eat horses when we appear to have no qualms about eating, for example, cows or pigs? Why do Americans seem to revere horses in a way that Europeans and Asians do not? Commentators provide varying explanations as to why Americans view horses differently than certain other animals. Some have argued that the difference in treatment stems from the uniqueness of the horse-and-rider bond.<sup>9</sup> Others have pointed to the special place

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<sup>3</sup> *Horse Slaughter Prevention*, ANIMAL WELFARE INSTITUTE, <http://www.awionline.org/ht/d/sp/i/11222/pid/11222> (last visited March 7, 2011).

<sup>4</sup> Christa Weil, *We Eat Horses, Don't We?*, N.Y. TIMES, Mar. 5, 2007, at A19.

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

<sup>6</sup> *Horse Slaughter Prevention*, *supra* note 3.

<sup>7</sup> Horsemeat is most popular in Italy, France, Belgium, and Japan. *Id.*

<sup>8</sup> Mary Jacoby, *Why Belgians Shoot Horses in Texas for Dining in Europe*, WALL ST. J., Sept. 21, 2005, at A1 (“Foes of horse slaughter portray the meat as an exotic delicacy for foreigners, evoking images of Paris brassiers serving up American horse meat alongside foie gras and champagne. But many consumers of horse meat are more like Nicole Chaupin, a French homemaker in a skirt and sneakers who ordered a small container of Mr. Dhalluin’s freshly made horse tartar”).

<sup>9</sup> Weil, *supra* note 4 (“Our ability to commune wordlessly [with horses], with a shift in the saddle, the flick of a rein, a whistle, forges a transcendent relationship.”).

of the horse in American culture and history as the reason why Americans should not kill horses for human consumption.<sup>10</sup> In the same vein, Circuit Judge Benavides began the recent Fifth Circuit majority opinion upholding a Texas law prohibiting horse slaughter as follows: “The lone cowboy riding his horse on a Texas trail is a cinematic icon. Not once in memory did the cowboy eat his horse, but film is an imperfect mirror for reality.”<sup>11</sup> Others cite horses’ athleticism and their ability to perform; John Hettinger, a thoroughbred breeder, auction house owner and anti-horse slaughter activist from Saratoga Springs, N.Y. (home to the Saratoga racetrack, built in 1864 and host of the oldest thoroughbred horserace in the country<sup>12</sup>), reasoned “horses are not like other animals...I’ve seen a Clydesdale without a halter on performing intricate maneuvers in Madison Square Garden...I’d like a cattleman to show me a cow that can do the same thing.”<sup>13</sup>

Opposing horse slaughter in the United States, others have employed an economic rationale, arguing that since Americans do not consume horses, horse slaughter primarily benefits the foreign horsemeat industry and not the U.S. economy. In a House debate in June 2005 about whether U.S. equine slaughterhouses should be shut down, Rep. John Sweeney of New York argued: “Americans do not profit from slaughtering horses...Foreigners eat our horses, and foreign companies make money off the sale of meat.”<sup>14</sup> However, Jim Bradshaw, a lobbyist for Texas slaughterhouses (operating before the Fifth Circuit’s decision in *Empacadora de Carnes*<sup>15</sup>), countered that Texas slaughterhouses spent \$6 million a year exporting horsemeat to foreign countries, thereby benefitting U.S. airline carriers such as American Airlines.<sup>16</sup> Ultimately, legislators found the latter economic argument persuasive.

### ***B. The Difference Between Equine Slaughter and the Slaughter of Livestock***

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<sup>10</sup> See Jacoby, *supra* note 8.

<sup>11</sup> *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326, 328 (5th Cir. 2007).

<sup>12</sup> *The 141<sup>st</sup> Travers Stakes at Saratoga Race Course*, THE UNOFFICIAL GUIDE TO SARATOGA RACETRACK, <http://www.saratogaracetrack.com/Travers/> (last visited March 7, 2011).

<sup>13</sup> Jacoby, *supra* note 8.

<sup>14</sup> *Id.*

<sup>15</sup> 476 F.3d at 336-37 (upholding a legal ban on horse slaughter).

<sup>16</sup> See Jacoby, *supra* note 8.

Even if one opposes the slaughter of unwanted ex-racehorses whenever possible, one may still accept the breeding and slaughter of animals for the food industry. Beyond the unique role of the horse in American culture, the practice of breeding a large number of horses, training them to be race (thus depriving them the opportunity to gain other valuable skills), and sending those who disappoint to slaughter, cannot be justified in the same way as the raising and slaughtering of cattle for the beef industry. When American farmers raise animal stock to be slaughtered, their primary objective is to produce meat to be consumed as food. Thus, in order to serve the purpose for which they were bred, animals raised for food must be slaughtered. However, when the PFBs of the racing industry breed racehorses, they breed them in the hopes that the horses will win races and earn them money. The small percentage of horses who succeed in the competitive thoroughbred racing industry by winning prominent, high-stakes races typically retire on a farm (usually for breeding purposes).<sup>17</sup> Many less successful racehorses ultimately face neglect, abandonment, and slaughter.<sup>18</sup> Thus, in contrast with livestock, the slaughter of ex-racehorses does not serve the intended purpose of the animal's breeding. Slaughtered ex-racehorses typically failed to "make it" in the industry, and the PFBs who were responsible for them failed (or simply declined) to provide for or ensure their future care.

### *C. Why Horses Become Unwanted*

The Unwanted Horse Coalition ("UHC"), a group of equine organizations affiliated with the American Horse Council, educates the public about unwanted horse issues and how to protect equine interests.<sup>19</sup> In 2009, the UHC released a study that found, among other things, that while there are no perfectly accurate figures documenting the number, age, or sex of unwanted horses, approximately 170,000 such horses existed in the United States in 2007.<sup>20</sup> The Humane Society

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<sup>17</sup> *Retired Racehorses—What One New York Track is Doing to Help*, PONYBOX, (Dec. 17, 2009), [http://www.ponybox.com/news\\_details.php?title=Retired-Racehorses--What-One-New-York-Track-is-Doing-to-Help&id=226](http://www.ponybox.com/news_details.php?title=Retired-Racehorses--What-One-New-York-Track-is-Doing-to-Help&id=226) (last visited March 7, 2011).

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

<sup>19</sup> UNWANTED HORSE COALITION, <http://www.unwantedhorsecoalition.org/> (last visited March 7, 2011) (hereinafter UNWANTED HORSE COALITION).

<sup>20</sup> UNWANTED HORSE COALITION, 2009 UNWANTED HORSE SURVEY: CREATING ADVOCATES FOR RESPONSIBLE OWNERSHIP (2009), *available at*

estimates that the United States sent 98,363 horses to Canada and Mexico to be slaughtered in 2008.<sup>21</sup>

Horses become unwanted for a variety of reasons. The definition of “unwanted horses,” adopted in the American Association of Equine Practitioners (AAEP) 2005 initiative and subsequently endorsed by the UHC, is horses who are “old, injured, sick, unmanageable, fail to meet their owner’s expectations (e.g., performance, color, or breeding), or their owner can no longer afford them.”<sup>22</sup> The Unwanted Horse Survey adds several possible causes for the existence of unwanted horses, most significantly, the recent economic recession, the closing of U.S. processing (equine slaughter) facilities, the high costs of equine euthanasia; the group also cites owners who cannot find a buyer for a horse and the general lack of responsibility among horse owners as less significant factors.<sup>23</sup>

#### *D. Auctions and Killer Buyers*

Few horse owners intend their animals to meet the cruel end of slaughter, and many horse auction bidders want living horses. Owners often sell horses at auction because they want to buy younger, more athletic horses, or horses with abilities better suited to the owner’s purposes and goals.<sup>24</sup> Unbeknownst to these sellers, slaughterhouse middlemen called “killer buyers” buy horses at livestock auctions to sell to slaughterhouses, meaning most horses sold at such auctions meet their end in slaughter.<sup>25</sup> Killer buyers profit from buying as many horses as they can at auctions and then transporting the horses (typically in inhumane conditions) to Canada or to Mexico. Such killer buyers often outbid other legitimate buyers at auctions, thus undermining horse slaughter proponents’ arguments that slaughterhouses reduce the burden of unwanted horses.<sup>26</sup> As the American Horse Council explains, “the market for slaughter horses is set by the international demand for their meat in other countries, not by

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[http://www.unwantedhorsecoalition.org/resources/UHC\\_Survey\\_07Jul09b.pdf](http://www.unwantedhorsecoalition.org/resources/UHC_Survey_07Jul09b.pdf) (hereinafter UNWANTED HORSE SURVEY).

<sup>21</sup> Katie Zezima, *Surge in Abandoned Horses Renews Debate Over Slaughterhouses*, N.Y. TIMES, Apr. 16, 2009, at A16.

<sup>22</sup> UNWANTED HORSE SURVEY, *supra* note 20.

<sup>23</sup> *Id.* at 6.

<sup>24</sup> Twyne, *supra* note 1, at 139.

<sup>25</sup> See *Horse Slaughter Prevention*, *supra* note 3.

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

the number of supposedly unwanted horses.”<sup>27</sup> Furthermore, while slaughterhouse supporters claim that horse slaughter alleviates the resource strain of horses who are physically unfit for work and have no practical function, according to the U.S. Department of Agriculture’s Guidelines for Handling and Transporting Equines to Slaughter, 92.3% of horses arriving at previously operational U.S. slaughterhouses were classified as in “good” condition.<sup>28</sup> Thus the majority of the horses being sent to slaughter are *not* unfit for all practical purposes. Such horses should be given the chance to find a second career and to enjoy a happy, productive life.

### *E. Neglect and Abandonment*

Many horses end up neglected, mistreated, or abandoned.<sup>29</sup> Recently, state law enforcement agencies witnessed increasing numbers of abandoned horses, and struggled to respond. Kentucky saw “emaciated horses eating bark off trees . . . [a]bandoned horses tied to telephone poles,” and “[h]orses subsisting on feces, walking among carcasses.”<sup>30</sup> Officials in Nevada reported 63 abandoned horses, as compared with 11 in 2007.<sup>31</sup> In light of such horse abandonments, states have begun considering stricter enforcement of animal cruelty statutes. For example, in Oregon, the Senate passed a bill in 2008 expressly prohibiting horse abandonment.<sup>32</sup> Similarly, Washington makes it a misdemeanor for an owner, driver, or possessor of any old, maimed, or diseased horse to allow the horse to go loose for more than three hours without proper care and attention.<sup>33</sup>

Other states have taken a different track. Due to the increase in unwanted horses during the economic downturn, in 2009, states, including Missouri, Montana, and North and South Dakota, reconsidered equine slaughter as a way to alleviate the problem.<sup>34</sup> However, this is the wrong solution. Instead of facilitating slaughter, legislators should mandate greater responsibility from those who not

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<sup>27</sup> *Id.*

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

<sup>29</sup> UNWANTED HORSE COALITION, *supra* note 19.

<sup>30</sup> Zezima, *supra* note 21.

<sup>31</sup> *Id.*

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

<sup>33</sup> WASH. REV. CODE ANN. § 16-52-110 (West 2010).

<sup>34</sup> Zezima, *supra* note 21.



only are in the best position to take preventative measures to stop the problem of unwanted horses, but those who fairness dictates *should* take these measures because they profit financially from the use of horses.

### *F. The Slaughterhouse*

Since there are no longer slaughterhouses in the United States, buyers transport horses across our borders for slaughter, typically in horrific conditions. Such journeys can last more than twenty-four hours. The horses are rarely provided food, water, or rest. Frequently transporters substitute low-ceilinged, double-decked trailers primarily used for cattle for proper horse trailers.<sup>35</sup> These trailers have been involved in a number of serious accidents, including the 2007 “Wadsworth Crash” in which a trailer overturned in Illinois while carrying fifty-nine draft horses, fifteen of whom died as a result of the accident.<sup>36</sup> Upon arrival at the slaughterhouse, the horses face conditions far worse than those at previously existing U.S. slaughterhouses. They can be left in the hot, cramped trailer for long periods without water or food. After being forced off of the trailer, they are often beaten on their way into the “kill box.”<sup>37</sup> While waiting for their turn to be slaughtered, horses experience terror upon smelling blood and hearing other horses being beaten and killed.<sup>38</sup>

Horse slaughter is distinct from the humane euthanasia of a horse.<sup>39</sup> Humanely euthanizing pets, including horses, is a legal and accepted practice in many states.<sup>40</sup> According to the USDA Veterinary Services, 58,433 horses were euthanized in the United States in 2007.<sup>41</sup> By contrast, many consider “euthanasia for convenience,” – a decision to euthanize made for the owners’ convenience and not because of the

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<sup>35</sup> See *Horse Slaughter Prevention*, *supra* note 3.

<sup>36</sup> *Id.*

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

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

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

<sup>40</sup> Susan Hankin, *What is the Scope of the Duty to Provide Veterinary Care?*, 43 MD. B.J. 18, 22 (2010) (claiming that it is difficult to argue that an owner’s decision to have an animal humanely euthanized when the animal has a treatable condition the owner cannot afford “run[s] afoul of any state’s animal cruelty laws”).

<sup>41</sup> UNWANTED HORSE SURVEY, *supra* note 20.

animal's health<sup>42</sup>— to be unacceptable. For example, Delaware's animal cruelty statute prohibits "convenience euthanasia" by defining "unnecessarily kill[ing] . . . any animal" to include killings "not required to terminate an animal's suffering, to protect the life or property of the actor or another person or if other means of disposing of an animal exist which would not impair the health or well being of that animal."<sup>43</sup> However, Delaware is an outlier in this sense. Because many prefer humane euthanasia by a licensed veterinarian to horses being trucked across the border and cruelly slaughtered, the focus of this article will be on the problem of horse slaughter, and not on the issue of humane euthanasia of unwanted pets.

## II. The American Thoroughbred Racehorse

Current law establishes apportions neither responsibility nor accountability to U.S. racehorse owners, breeders, racetrack owners, and racetrack patrons for the lives and wellbeing of racehorses after their short racing careers are over. As a result, very few racehorses retire to a life of proper care and pasture grazing.<sup>44</sup> As discussed, many thus end up neglected, abused, abandoned,<sup>45</sup> or shipped to either Canada or Mexico to be slaughtered for the foreign horsemeat industry.<sup>46</sup>

### A. The Vulnerability of Racehorses

Several factors explain why thoroughbred racehorses are particularly susceptible to neglect, abandonment, and/or inhumane slaughter. First, as discussed above, the thoroughbred racing industry is extremely competitive. Because of the costs of training, keeping, and racing thoroughbreds, very few racehorses turn a profit over their

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<sup>42</sup> See Hankin, *supra* note 40, at 22 (citing Clinton R. Sanders, *Killing with Kindness: Veterinary Euthanasia and the Social Construction of Personhood*, 10 SOC. F. 195 (1995)).

<sup>43</sup> *Id.* at 23 (citing DEL. CODE ANN. tit. 11., § 1325(b)(4) (West 2010)).

<sup>44</sup> *The Horseracing Industry: Drugs, Deception and Death*, PETA MEDIA CENTER, <http://www.peta.org/issues/Animals-in-Entertainment/the-horseracing-industry-drugs-deception-and-death.aspx>[http://www.peta.org/mc/factsheet\\_display.asp?ID=65](http://www.peta.org/mc/factsheet_display.asp?ID=65) (last visited March 7, 2011).

<sup>45</sup> UNWANTED HORSE SURVEY, *supra* note 20.

<sup>46</sup> UNWANTED HORSE COALITION, *The Issue*, <http://www.unwantedhorsecoalition.org/?id=2> (last visited March 7, 2011).

lifetime, or even allow investors to break even.<sup>47</sup> Second, because most thoroughbred racehorses do not race beyond age six or seven<sup>48</sup> yet live for an average of 25 years,<sup>49</sup> if a thoroughbred disappoints on the racetrack, he or she still requires many years of care. Third, retraining racehorses for other equestrian fields takes effort, patience, and experience,<sup>50</sup> thus suppressing demand among equestrians for retired racehorses.

### *B. Money and Status*

Thoroughbred horseracing is a multi-billion dollar industry,<sup>51</sup> one that supported 193,000 full-time jobs in 2005.<sup>52</sup> Many consider racehorse ownership to be a symbol of prestige, and thus the wealthy and status-conscious invest in the racing industry.<sup>53</sup> Thoroughbred enthusiasts include celebrities like Bo Derek, Wayne Gretzky, Michael Jordan, Teri Hatcher, Salma Hayek, Toby Keith, Jack Nicholson, Joe Pesci, Rick Pitino, Steven Spielberg, George Strait, Joe Torre, and Serena Williams.<sup>54</sup>

Unfortunately, the glitz and glamour of the racetrack grandstands masks the suffering of many of the horses who keep the

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<sup>47</sup> Sherry Boeckh, *Investing in Thoroughbred Racehorses*, 127 CAN. MED. ASS'N J. 644, 645 (1982) (“For every Cinderella story there are 100 losers. Less than 30% [of Thoroughbred Investors] manage to break even.”).

<sup>48</sup> *How many years can a racehorse race? What is the career life?* SPORTS COMET, <http://www.sportscomet.com/Horse-Racing/153959.htm> (last visited March 7, 2011); Paul Post, *New York Reinstates Retired Racehorse Task Force*, THOROUGHBRED TIMES, Feb. 28, 2008, available at <http://www.thoroughbredtimes.com/national-news/2008/February/28/New-York-reinstates-retired-racehorse-task-force.aspx>.

<sup>49</sup> *Life Expectancy of a Horse*, BUZZLE.COM, <http://www.buzzle.com/articles/life-expectancy-of-a-horse.html> (last visited March 7, 2011).

<sup>50</sup> See generally Jayne D. Wilson, *Retraining Ex-Racehorses*, EQUISEARCH, [http://www.equisearch.com/horses\\_care/health/rescue/exracehorse071800b/](http://www.equisearch.com/horses_care/health/rescue/exracehorse071800b/) (last visited Feb. 6, 2011).

<sup>51</sup> *Congress to Investigate Horseracing Industry*, RACEBOOK INSIDER: THE WORLD OF HORSE BETTING, June 18, 2008, available at <http://racebook-insider.blogspot.com/2008/06/congress-to-investigate-horse-racing.html> (estimating the industry to be worth \$40 billion). Another source suggests the direct economic impact of the Thoroughbred industry is about 13.1 billion. THE JOCKEY CLUB, THOROUGHLY THOROUGHBRED: AN INFORMATIONAL GUIDE TO THE THOROUGHBRED INDUSTRY 1, 14 (2006), available at [http://www.jockeyclub.com/pdfs/thoroughly\\_thoroughbred.pdf](http://www.jockeyclub.com/pdfs/thoroughly_thoroughbred.pdf) (estimating a “direct economic impact” approaching 13.1 billion).

<sup>52</sup> See THE JOCKEY CLUB, *supra* note 51.

<sup>53</sup> See Boeckh, *supra* note 48, at 652.

<sup>54</sup> See THE JOCKEY CLUB, *supra* note 51, at 6.

industry alive. In 2008, after several highly publicized horseracing accidents, Congress decided to hold hearings regarding the ethics of the horseracing industry. Speaking of the coming discussions, Congressman Ed Whitfield of Kentucky stated:

When you talk about the Kentucky Derby, Belmont, Preakness, the whole country focuses on those, they attract stars from Hollywood, and it's all pretty romantic and wonderful... But in everyday racing, there are horses going down, and then the horses unable to fulfill their promise going to slaughter. The greed has trumped the concern for the horse, it's trumped the safety of the jockeys, and it's trumped the integrity of the sport.<sup>55</sup>

Similarly, Pearl Twyne writes, “[a]reas that are very hard to control involve the socially accepted cruelties, generally participated in or supported by influential people.”<sup>56</sup> These “influential people” who may subjugate equine welfare to their own financial gain include both the powerful, wealthy figures who invest in the racing industry, and lobbyists for the equine slaughter business. For example, although anti-slaughterhouse activist John Hettinger spent \$160,000 in an effort to ban the slaughter of horses, Texas slaughterhouse lobbyists matched his efforts by spending about the same amount in order to protect the practice.<sup>57</sup>

### *C. The Slaughter of Racehorses*

Data suggest that a number of the horses slaughtered are ex-racehorses. One Colorado State University study found that of 1,348 horses sent to slaughter, 58 were known to be former racehorses.<sup>58</sup> Further studies indicate that many of these horses led successful racing careers, earning their previous owners a significant profit. For example, after earning a record amount in prize money, winning the Kentucky Derby in 1986, and earning the title of Horse of the Year in 1987, the racehorse “Ferdinand” was retired to a breeding farm, where he proved

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<sup>55</sup> *Congress to Investigate Horseracing Industry*, *supra* note 55.

<sup>56</sup> Twyne, *supra* note 1, at 150.

<sup>57</sup> See Jacoby, *supra* note 8.

<sup>58</sup> *The Horseracing Industry: Drugs, Deception and Death*, *supra* note 45.

to be sterile.<sup>59</sup> Five years later he was sent to a breeding farm in Japan, where he again disappointed.<sup>60</sup> In 2003, reports surfaced that Ferdinand was shipped to a Japanese slaughterhouse to be killed.<sup>61</sup> Similarly, “Exceller,” the only horse to beat two Triple Crown winners, and who was inducted into the National Racing Museum’s Hall of Fame, met his end in a slaughterhouse after being sold and sent to Sweden in 1991.<sup>62</sup> Today the Exceller Fund, founded in Exceller’s memory, works to retire horses at risk for slaughter through sponsorships, and to find ex-racehorses second careers through adoption.<sup>63</sup>

### III. Relevant Legislation

#### A. Horseracing Laws and Regulations

Horseracing is legal in 43 states.<sup>64</sup> In these states, State Racing Commissions govern horseracing through complex rules and regulations.<sup>65</sup> For example, in 1975, Illinois enacted the Illinois Horse Racing Act prohibiting, *inter alia*, the use of “any battery, buzzer, electrical, mechanical or other appliances other than the ordinary whip or spur for the purpose of stimulating or depressing a horse or affecting its speed in a race or workout or at any time.”<sup>66</sup> Strict rules also govern the “doping,” or drugging, of racehorses.<sup>67</sup> A similar Indiana state law prohibits the administration of a controlled substance to a horse within twenty-four hours before a race.<sup>68</sup>

The Indiana law regulating horseracing adopts an enforcement mechanism similar to the participation fee approach advocated here.

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<sup>59</sup> Margaret Baird, *The Sport of Kinds Can’t Provide a Royal Ending for Derby Winner Ferdinand*, HUMANE SOCIETY OF THE UNITED STATES, <http://www.manesandtailsorganization.org/ferdie.html> (last visited March 7, 2011).

<sup>60</sup> *Id.*

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

<sup>62</sup> Mike Mullaney, *Unique Superstar Exceller Met Tragic End*, DAILY RACING FORM, July 20, 1997, <http://www.excellerfund.org/story-of-exceller.html>.

<sup>63</sup> THE EXCELLER FUND: OUR MISSION, <http://www.excellerfund.org/> (last visited March 7, 2011).

<sup>64</sup> Twyne, *supra* note 1, at 149.

<sup>65</sup> *Id.*

<sup>66</sup> 230 ILL. COMP. STAT. ANN. 5/37 (West 2010).

<sup>67</sup> Twyne, *supra* note 1, at 149.

<sup>68</sup> *Id.* at 150 (citing to IND. CODE ANN. § 15-19-3-5 (West 2011)). Massachusetts and Wisconsin have enacted similar statutes regulating the administration of drugs to horses in weight pulling contests (although not these regulations do not apply to racehorses). *Id.*

The law establishes an “alternative fine” to the criminal sanction of a Class B misdemeanor, stating: “In the alternative to the provisions concerning fines in this article, a person may be fined a sum equal to twice his pecuniary gain, or twice the pecuniary loss sustained by victims of the offense he committed.”<sup>69</sup> This alternative penalty proportionally links the amount of the violation to the perpetrator’s financial gain. Similarly, as will be further discussed in Part VIII, the “participation fee” strategy links the imposed financial burden on a PFB to the PFB’s financial investment in the industry.

### ***B. State Anti-Cruelty Statutes and State Legislation Concerning Slaughter***

State laws protect horses in a variety of ways other than through regulation of the horseracing industry. Horses are protected to a degree by general state anti-cruelty statutes. There are also some anti-cruelty statutes directed specifically toward horses; for example, many state statutes prohibit riding or working a horse unfit for labor, or in some states, riding, driving, or even offering a “disabled” horse for sale.<sup>70</sup>

Recently, the Kentucky Senate Agricultural Committee unanimously approved legislation forming the Kentucky Equine Health and Welfare Council, which would create regional facilities to care for unwanted horses and would establish standards and guidelines for existing rescue facilities.<sup>71</sup> Explaining the motivation behind the bill to lawmakers, Frank D. Marcum, a Lexington veterinarian, suggested that the tough economy had exacerbated the problem of horse overpopulation, causing owners who could no longer feed their horses to abandon them on public lands.<sup>72</sup> Raquel Ferotti, founder of Mountain View Rescue in Columbia, Kentucky, blamed the state’s overpopulation problem on the state’s failure to enforce its abuse and neglect laws.<sup>73</sup>

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<sup>69</sup> IND. CODE ANN. § 35-50-5-2 (West 2011).

<sup>70</sup> *Id.* at 139-40.

<sup>71</sup> Roger Alford, *Kentucky Ponders Measures to Help Unwanted Horses*, ASSOCIATED PRESS, Mar. 26 2010, available at <http://www.theleafchronicle.com/article/20100326/NEWS01/3260348/Kentucky-ponders-measure-to-help-unwanted-horses>.

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

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

Many states have also restricted and even prohibited the practice of horse slaughter. Before *Empacadora de Carnes* in 2007,<sup>74</sup> there were only three operating equine slaughterhouses in the United States (two in Texas and one in Illinois, although horse slaughter was, and remains, legal in several other states). Two of the three remaining slaughterhouses were shut down in 2007 after the Fifth Circuit in *Empacadora de Carnes* upheld a Texas law making it unlawful for anyone to slaughter a horse if that person knows or should know that any of that horse's meat would be used for human consumption.<sup>75</sup> The last remaining Illinois slaughterhouse was forced out of business pursuant to the Seventh Circuit's decision in *Cavel International, Inc. v. Madigan*, in which the court upheld an amendment of the Illinois Horse Meat Act against the slaughterhouse's challenge that the law, *inter alia*, violated the commerce clause of the federal Constitution.<sup>76</sup> The amendment made it illegal for anyone in Illinois either to "slaughter a horse if that person knows or should know that any of the horse meat will be used for human consumption,"<sup>77</sup> or to "import or export from this State, or to sell, buy, give away, hold, or accept any horse meat if that persons knows or should know that the horse meat will be used for human consumption."<sup>78</sup> The Seventh Circuit reasoned: "the curtailment of foreign commerce by the amendment is slight and we are naturally reluctant to condemn a state law, supported if somewhat tenuously by a legitimate state interest, on grounds as slight as presented by [the slaughterhouse] *Cavel*."<sup>79</sup> Other states such as California, Mississippi, and Oklahoma have enacted similar prohibitions on horse slaughter and sale for human consumption.<sup>80</sup>

### C. Federal Law

Federal law prohibits the export of horses for slaughter by sea, once a common practice.<sup>81</sup> However, currently no federal legislation

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<sup>74</sup> *Empacadora de Carnes*, 476 F.3d 326.

<sup>75</sup> *Id.* at 336-37.

<sup>76</sup> *Cavel Int'l, Inc. v. Madigan*, 500 F.2d 551 (7th Cir. 2007).

<sup>77</sup> Illinois Horse Meat Act, 225 ILL. COMP. STAT. ANN. § 635/1.5(a) (West 2010).

<sup>78</sup> *Id.* § 635/1.5(b).

<sup>79</sup> *Cavel Int'l*, 500 F.2d at 558.

<sup>80</sup> BRUCE A. WAGMAN, SONIA S. WAISMAN & PAMELA D. FRASCH, *ANIMAL LAW: CASES AND MATERIALS* 505 (2010).

<sup>81</sup> The practice of shipping horses overseas to be slaughtered ended when the Senate added Section 109 to the Export Administration Act. P.L. 95-52; 91 STAT. 235 (1977) (stating "no

prohibits either horse slaughter within the United States, or shipping horses by *land* to other countries (i.e. Canada and Mexico) for slaughter.

Without federal legislation prohibiting horse slaughter in the United States, the possibility that horse slaughterhouses could be re-opened in the United States cannot be ruled out. In 2009, after the Seventh Circuit's ruling in *Cavel International*, the state of Montana, probably due to an economic interest in the international horsemeat industry no longer being served by Cavel, enacted a law specifically permitting the practice of horse slaughter for human consumption.<sup>82</sup> While no horse slaughterhouses have opened as a result, Montana has propped the door open for further domestic slaughter.

The American Slaughter Prevention Act, introduced in Congress in 2002, was designed to ban the interstate transport of horses for slaughter for human consumption.<sup>83</sup> Despite the support of 228 House members in the 108<sup>th</sup> Congress, the bill failed.<sup>84</sup> This legislative effort continued in 2005 when Congressman John Sweeney (R-NY) introduced the Prevention of Equine Cruelty Act (H.R. 503) (a proposed amendment to the Horse Protection Act, codified at 15 U.S.C. §1821), which was designed to "prohibit the shipping, transporting, moving, delivering, receiving, possessing, purchasing, selling, or donation of horses and other equines to be slaughtered for human consumption, and for other purposes."<sup>85</sup> Sweeney stated that "[t]his inhumane and disgusting practice, which serves only to promote animal cruelty, needs to be brought to an end."<sup>86</sup> Pitching the bill to supporters of the horseracing industry, Sweeney went on to argue:

[m]any horses are hauled to slaughter and killed under inhumane conditions...some of the horses who are killed for this industry have been stolen or acquired under false pretenses (the families who owned the horses were told

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horse may be exported by sea from the United States, its territories and possessions, unless such horse is part of a consignment of horses with respect to which a waiver has been granted under paragraph (2) of this subsection"). This provision was then made part of the United States Code, Title 46, which governs shipping. Twyne, *supra* note 1, at 148.

<sup>82</sup> Tim Nichols, *Montana Horse Slaughter Bill Becomes Law*, THOROUGHBRED TIMES, May 1, 2009, available at <http://www.thoroughbredtimes.com/national-news/2009/may/01/montana-horse-slaughter-bill-becomes-law.aspx>.

<sup>83</sup> See WAGMAN, *supra* note 80.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 504.

<sup>86</sup> *Rep. Sweeney Reintroduces Horse Slaughter Legislation*, U.S. FED. NEWS, Feb. 1, 2005.



they were going to a good home) and other animals may be wild horses illegally sold for their meat. The American people want the cruelty to end and the American Horse Slaughter Prevention Act will do that.<sup>87</sup>

The amendment was re-introduced by Congressman John Conyers (D-MI) in January of 2009, and referred to the House Committee on Crime, Terrorism, and Homeland Security in March 2009. Since then, Congress has taken no major action with respect to this bill.<sup>88</sup>

The Horse Transportation Safety Act, which would ban transporting horses in dangerous double-decker trucks like the one involved in the Wadsworth Crash, was introduced in the House in January 2009, and was subsequently approved by the Committee on Transportation and Infrastructure.<sup>89</sup> The Act is now cleared for a vote by the House of Representatives.

#### **IV. Racehorse Rescue/Adoption/Retraining Organizations: Overworked and Underfunded**

The responsibility of finding homes for retired racehorses, for re-training retired racehorses for a possible second career, and for educating the public about responsible horse ownership, often falls to RAR facilities. These organizations exist at both local and national levels, and have facilitated the transitions of countless racehorses into second careers. The largest equine rescue organization of this kind, the Thoroughbred Retirement Foundation, cares for about 1,200 racehorses a day, and prepares racehorses for adoption at training facilities throughout the country.<sup>90</sup>

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<sup>87</sup> *Legislation Reintroduced to Ban Horse Slaughter*, BLOODHORSE, Feb. 13, 2003, available at <http://www.bloodhorse.com/horse-racing/articles/14081/legislation-reintroduced-to-ban-horse-slaughter>.

<sup>88</sup> See *Prevention of Equine Cruelty Act of 2009*, AMERICAN HORSE COUNCIL, <http://www.horsecouncil.org/legislation/PrevofEqCrueltyAct111.php> (last visited March 7, 2011); *H.R. 503, The Prevention of Equine Cruelty Act of 2009*; WASHINGTONWATCH.COM, [http://www.washingtonwatch.com/bills/show/111\\_HR\\_503.html#toc1](http://www.washingtonwatch.com/bills/show/111_HR_503.html#toc1) (last visited March 7, 2011).

<sup>89</sup> *The HSUS Applauds Passage of Horse Transportation Safety Act in House Committee*, THE HUMANE SOCIETY OF THE UNITED STATES, July 29, 2010, [http://www.humanesociety.org/news/press\\_releases/2010/07/horse\\_transport\\_bill\\_advances\\_072910.html](http://www.humanesociety.org/news/press_releases/2010/07/horse_transport_bill_advances_072910.html) (last visited March 7, 2011).

<sup>90</sup> THOROUGHBRED RETIREMENT FOUNDATION, <http://www.trfinc.org/>.

Unfortunately, RAR facilities lack the resources to care for all the unwanted horses in need.<sup>91</sup> Representatives of these facilities who responded to the Unwanted Horses Survey indicated they rely heavily on public and private donations, and on average one-fourth of the financing they need to stay in operation must be supplied by the facility owner's personal income.<sup>92</sup> As reported by the survey, "with an average annual budget need of \$2,300 to care for one horse, the [RAR] industry will need a minimum of \$25,714,000 just to care for the horses that are currently being turned away."<sup>93</sup>

## V. The Participation Fee Solution

Racehorse owners, breeders, investors, and racetrack owners and patrons (PFBs) should be required to pay "participation fees" in order to fund approved RAR facilities and thus alleviate the problem of retired racehorses becoming unwanted horses. This theory is based on a combination of a cost-spreading rationale (that the cost of protecting retired racehorses should be spread among the PFBs of the horseracing industry who should in fairness collectively bear the cost), and a theoretical affirmative duty argument based on the "special relationship" model (that those in a special position of control to protect against harm have a duty to protect against foreseeable third-party harm).

An unwanted horse has various options. Someone can buy or adopt the horse in view of retraining the horse for a second career, or in order to use him or her as a pasture companion.<sup>94</sup> An owner can also negotiate a full or partial lease of the horse, or arrange for the horse's care at an equine retirement facility.<sup>95</sup> Finally, an owner can donate the horse to an organization, such as a riding program (therapeutic or otherwise), equine college or university, or police department. An owner also has the option of turning the horse over to a horse rescue group, or having the horse humanely euthanized.<sup>96</sup>

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<sup>91</sup> UNWANTED HORSE SURVEY, *supra* note 20, at 24.

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

<sup>93</sup> *Id.* at 26.

<sup>94</sup> *Own Responsibly*, UNWANTED HORSE COALITION, <http://www.unwantedhorsecoalition.org/?id=3> (last visited March 7, 2011).

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

<sup>96</sup> While I do not specifically advocate this option, I concede that it could be used as a last resort, and believe it is preferable over allowing the horse to go to a slaughterhouse, where it

RAR facilities, when adequately funded, can provide owners with information about their options, facilitate the adoptions of unwanted racehorses by new owners, or arrange for the horse's continued care in the event that adoption and/or retraining efforts fail.

Either private institutions or government could implement the participation fee system, and would thus govern the approval of individual RAR facilities. If the participation fee model were adopted at the federal or state government level, RAR facilities could either be public institutions or private institutions selected by the government, mirroring numerous other government grant programs. If this approach were implemented by private organizations such as federal or local racing associations, the associations would contract with or create private RAR facilities.

## VI. Loss-Spreading and the Ex-Racehorse Problem

### A. *The Theory of Loss-Spreading*

The theory of "loss-spreading," also known as risk-spreading or risk-distribution, suggests that the costs of harm resulting from a particular activity should be imposed on those in the best position to spread those costs among a large number of parties, assuming the parties are still within the class of actors that could reasonably be held responsible for the injury. Guido Calabresi described this theory as "enterprise liability," characterized by the idea that "it's only fair that an industry should pay for the injuries it causes" and thus the "losses should be borne by the doer, the enterprise, rather than distributed on the basis of fault."<sup>97</sup> Courts typically invoke loss-spreading rationale in the tort context, especially with respect to products liability and ultra-hazardous activities.

There is a lack of consensus, however, on the reasoning behind this theory. Do we impose the cost of the harm on the "enterprise" (in this case, the racing industry as a whole) (a) because it is best *able to spread* the loss over a large number of people, such that the burden to

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would be killed in a much less humane manner. The average equine euthanasia fee is \$66, which does not include carcass removal; fees for burial range from \$75-250, while fees for incineration can be up to \$2000. *Id.*

<sup>97</sup> Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 500 (1961).

each is minimal,<sup>98</sup> (b) because it is best *able to pay* for the loss due to its financial circumstances, or (c) because it is only *fair* (when the enterprise played a role in creating the harm, or at least in creating a *risk* of that harm)?<sup>99</sup>

Discussions based on the third rationale (theory (c)) dispense with the idea of “fault” vis-à-vis a *particular* harm, instead implying an inherent level of fault in the choice to engage in an activity reasonably likely to produce a certain kind of harm. This more generalized idea of fault justifies imposing liability for the cost of accidents on all industry participants. For example, Ernest J. Weinrib, in describing the rise of strict liability theories in the nineteenth century, argued that society began to impose liability on the “cheapest cost avoider” (or risk-spreader) based on the

premise that a certain type of loss should not be seen in terms of fault but seen rather as the more or less inevitable by-product of desirable but inherently dangerous (or “risky”) activity. . . it is argued that it may well be just to distribute its costs among all who benefit from that activity, and conversely unfair to impose it upon individuals who. . . are viewed as the ‘fault-less’ instruments causing the loss.<sup>100</sup>

Indeed, in the nineteenth century, many began to embrace the idea of imposing liability on those primarily responsible for creating a *risk* of harm to others (as opposed to being specifically, causally linked to the ultimate harm), and who were capitalizing on the activity creating that risk. The “growing strength of industry and its ability to distribute the cost of tort losses by insurance and price calculation,” pushed legal theorists away from a sentiment of “no liability without fault” and shifted toward theories of the “compensatory aspect of tort law and . . . the social value of shifting accident losses by widely distributing their cost among those who profit from the accident-producing activity.”<sup>101</sup> In analyzing the loss-spreading rationale and its applicability to the rise

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<sup>98</sup> *Id.* at 501 (discussing the problem of the “should” in enterprise liability, and asking: “If the ‘should’ were merely a way of saying, ‘because this is a handy way of spreading losses through the price mechanism to a broad group of people—the consumers,’ one would wonder why workmen’s compensation or master-servant liability should be so limited”).

<sup>99</sup> *Id.* (explaining that others have justified the risk-spreading theory by calling upon “some ‘innate sense of fairness’”).

<sup>100</sup> See ERNEST J. WEINRIB, TORT LAW: CASES AND MATERIALS 420 (2d ed. 2003).

<sup>101</sup> JOHN G. FLEMING, THE LAW OF TORTS 307 (1957).

of strict liability in tort law, John G. Fleming comments that “letting accident losses lie where they fall is not only to impoverish the victim but ultimately to *throw the loss on the community as a whole, which must foot the bill of rehabilitation through social benefit payments or otherwise . . .* [I]t seems better public policy...to devise legal rules that will require each to bear the burden of its own costs.”<sup>102</sup>

“Deep-pocket rationale” (theory (b)) provides that when an individual, business, enterprise, or franchise is very profitable, he/she/it is better able to cover the costs of accidents than faultless victims – and thus *should* cover those costs. Proponents of the deep-pocket theory have argued that the financial status of a franchisor should, in certain circumstances, be considered in assessing liability. For example, plaintiffs often cite deep-pocket theory as a basis for *respondeat superior*, which holds employers liable for unauthorized actions of employees within the scope of employment.<sup>103</sup> And although, “the deep pocket rationale, like the loss prevention theory, fails to define appropriate limits to the scope of vicarious liability, many people find it a legitimate and attractive justification for imposing vicarious liability on franchisors.”<sup>104</sup>

Legal theorists often consider the deep-pocket rationale alongside loss-spreading theory as parallel methods of resource allocation. This is in part because, as discussed above, discourse on loss-spreading often conflates the goals of (a) spreading losses as broadly as possible to minimize individual burdens; of (b) imposing the burden of losses on those who are most *able* to pay, and of (c) imposing the burden on those who *should* bear it (because they created or contributed to the risk that led to the harm at issue).<sup>105</sup> Considering this confusion (while also adding to it), Guido Calabresi argued: “the answer, I suppose, is that sometimes they mean each of these things, and at other times all of them.”<sup>106</sup> However, whatever the murkiness of the relationship between the deep-pocket theory and loss-spreading,

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<sup>102</sup> *Id.* (emphasis added).

<sup>103</sup> Randall K. Hanson, *The Franchising Dilemma: Franchisor Liability for Actions of a Local Franchisee*, 19 N.C. CENT. L.J. 190, 192 (1991).

<sup>104</sup> Brett A. Brosseit, Note, *Buyers, Beware: The Florida Supreme Court's Abrogation of the Apparent Authority Doctrine Leaves Plaintiffs Holding the Tab for Torts of Franchisees - Mobil Oil Corp v. Bransford*, 23 FLA. ST. U. L. REV. 837, 855 (1996).

<sup>105</sup> Calabresi, *supra* note 97, at 499.

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

the deep-pocket theory is relevant to a discussion of loss-spreading, and will be considered here as well.

### *B. Loss-Spreading and the PFBs of the Racing Industry*

In *Cavel International*, Judge Posner, writing for the majority, stated: “Illinois could do much more for horses than it does – could establish old-age pastures for them, so that they would never be killed (except by a stray cougar), or provide them with free veterinary care.”<sup>107</sup> Posner went on to qualify this suggestion: “But [Illinois] is permitted to balance its interest in horses’ welfare against the other interests of its (human) population; and it is also permitted to take one step at a time on a road toward the humane treatment of our fellow animals.”<sup>108</sup> Despite Posner’s recognition of Illinois’ (supposedly) legitimate right *not* to take the progressive step of mandating a state role in the retirement and veterinary care of horses, his statement suggests that government would be justified in taking a more active role in furthering equine welfare and the protection of unwanted horses, and indeed such steps would be commendable. Thus Posner argued, “[s]tates have a legitimate interest in prolonging the lives of animals that their population happens to like.”<sup>109</sup>

One might conclude that Posner’s proposal is untenable because society lacks both sufficient resources and the desire to prioritize equine interests over human interests. However, there is a critical distinction between Posner’s suggestion and the approach advocated here. . Posner’s argument envisions the taxpayer footing the bill for equine pasture retirement and veterinary care. The participation fee strategy assesses these costs to those specifically involved in (and, in general, those profiting from) the multi-billion dollar horseracing industry. Requiring only PFBs to bear the costs of financially supporting RAR facilities is more attractive, equitable, and viable than Posner’s suggestion because it limits the burden to those responsible for the harm at issue.

The three bases underlying Calabresi’s loss-spreading justification further support the requiring the racing industry to

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<sup>107</sup> *Cavel Int’l, Inc. v. Madigan*, 500 F.2d 551 (7th Cir. 2007) (upholding Illinois state law banning both the slaughter of horses for human consumption and the import and export of horsemeat for human consumption).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

shoulder the cost of ensuring retired racehorses' welfare: (a) loss-spreading serves to *spread* losses as broadly as possible; (b) loss-spreading serves to impose the burden on those who are most *able* to pay; and (c) it serves to impose the burden on those who *should* bear it.

Theory (a): First, if the burden of providing for ex-racehorses were imposed on the racing community, the financial burden could be spread among a broad pool of actors (PFBs) involved in the industry. This approach imposes a burden on those who actually invest in the horseracing industry (in expectation of profit, regardless of whether they ultimately turn a profit from their investments), and it imposes fees *in proportion to* the level of investment the PFB makes in the industry (and thus in proportion to the amount of profit the PFB expects or hopes to make), thus furthering basic principles of equity. In Fleming's words, the loss-spreading rationale makes "permission to conduct such an activity . . . conditional on its absorbing the cost of the accidents it causes, as an appropriate item of its overhead costs."<sup>110</sup> Because of the ability of the racing industry to *absorb* the cost of preventing harm by spreading the cost among a variety of actors, this proposal meets the criteria of the first possible rationale behind loss-spreading.

Theory (b): Next, the risk spreading rationale supports the participation fee proposal because the proposal "tend[s] to put the burden of accidents on rich classes of litigants rather than on the poor."<sup>111</sup> First, the thoroughbred horseracing industry is a multi-billion dollar industry, which attracts wealthy investors and celebrities. Second, although one could argue that that wealth garnered by horseracing is by no means evenly distributed among all of the actors involved in the industry, participation fees would be commensurate to a PFB's degree of investment and the corresponding level of their expected/hoped for profit, thereby allaying any distributional fairness concerns.

Theory (c): Finally, a loss-spreading rationale in this context imposes the financial burden on the actors who *should* be held accountable for the neglect, abuse and slaughter of ex-racehorses. The financial burden of the participation fee program falls on the PFBs of the racing industry – those who create the demand for racehorses, and consequently create the *risk* to these same horses at the end of their careers. Since racehorses are bred and trained to race, when their

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<sup>110</sup> Fleming, *supra* note 101, at 273.

<sup>111</sup> Calabresi, *supra* note 97, at 527.

careers end (whether due to unsoundness, lack of success, or the financial interests of the owner), the skills which the horses have developed through training are no longer useful, and the horses must be re-trained for a different purpose, adopted, and/or provided for in some way.<sup>112</sup> Those who have created this risk deprived the horse of other useful skills and, in so doing derived financial gain from the first segments of these horses' lives should shoulder these costs.

## VII. Imposing Affirmative Duties on PFBs Based on the "Special Relationship" Theory

### A. *The Special Relationship Theory*

Based on the legal theory of the "special relationship," an affirmative duty should be imposed on PFBs to help prevent third party harm to ex-racehorses. According to the Restatement (Second) of Torts, "[t]here is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless . . . a special relation exists between the actor and the other which gives to the other a right to protection."<sup>113</sup> The Restatement (Third) of Torts takes a similar approach: "an actor in a special relationship with another owes a duty of reasonable care to third persons with regard to risks posed by the other that arise within the scope of the relationship."<sup>114</sup> The special relationship theory has been used to justify imposing affirmative duties of care to prevent third party harms within the contexts of parent-child relationships,<sup>115</sup> landlord-tenant relationships,<sup>116</sup> and relationships between gun distributors and victims

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<sup>112</sup> Breed, *supra* note 2 (quoting Wilson, a racehorse owner: "It's a real thorny and horrible, absolutely unavoidable consequence of that whole industry, which breeds for one thing – speed and not anything else. . . . And when you put those kinds of demands, you're just going to end up with a tremendous number of horses that fail or can't make it . . . Who pays for that when it's over?").

<sup>113</sup> Restatement (Second) of Torts § 315(b) (1965).

<sup>114</sup> Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 41 (Proposed Official Draft 2005).

<sup>115</sup> See Restatement (Second) of Torts § 316 (1965); Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 42(a)(1) (Proposed Official Draft 2005).

<sup>116</sup> *E.g.*, *Kline v. 1500 Mass. Ave. Apt. Corp.*, 439 F.2d 477 (D.C. Cir. 1970) (holding that a landlord had an affirmative duty to minimize risks of third party crime to tenants, when crimes were reasonably foreseeable and landlord was in a special position of control to protect against them).



of gun crimes.<sup>117</sup> Special relationships imposing affirmative duties exist when one party (here, the PFB) is in a position of control such that it should reasonably be expected to protect the other party from a foreseeable third party act of harm. In the well-known case *Kline v. 1500 Massachusetts Avenue Apartment Corp.* the U.S. Court of Appeals for the D.C. Circuit explained that a duty of care arises in a relationship involving a substantial degree of control because of “the ability of one of the parties to provide for his own protection has been limited in some way by his submission to the control of the other.”<sup>118</sup> When an actor is in such a position of control over another to which that other has submitted, the actor has an affirmative duty not to create, and to protect against, reasonably foreseeable risks to that other. As Richard Epstein explains, “the law today imposes on any D[efendant] who has created a risk and is in a position to mitigate its effects a duty of reasonable care toward P[laintiff], to give D[efendant] the fresh incentive to take prompt and effective action to mitigate P’s injuries or to forestall the threat of harm.”<sup>119</sup>

### ***B. The Special Relationship/Affirmative Duty Rationale in the Horseracing Context***

The relationship between PFBs and racehorses satisfies both prongs of the special relationship test. Therefore, protecting against future third party harms should be considered a part of a PFB’s duty of care toward racehorses. First, racehorses are clearly put *under the control* of PFBs; racehorses must depend not only on their owners for their physical well being and protection, but also on the investments of all PFBs in the financial health of the racing industry on which they depend for their continued maintenance. Second, because of available data about the large number of ex-racehorses being sent to slaughter,<sup>120</sup> future third party harms to racehorses are *reasonably foreseeable* to the PFBs.

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<sup>117</sup> See *Ileto v. Glock*, 349 F.3d 1191 (9th Cir. 2003) (holding that the defendant gun distributor did have a duty of care toward the victim because the defendant put the victim at an unreasonable risk of harm from reasonably foreseeable third party acts).

<sup>118</sup> 439 F.2d at 483.

<sup>119</sup> RICHARD A. EPSTEIN, TORTS § 11.3.1 (1999).

<sup>120</sup> In 1998, about 7100 registered thoroughbreds went to slaughter, which is about 22% of the 1998 U.S. thoroughbred foal crop. Breed, *supra* note 2.

The proposed affirmative duty to protect against third party harm is not constrained to the specific time period of a PFB's control over a particular horse: Since the third-party harm at issue occurs after the conclusion of the horse's racing career, it is by nature a future harm. Because of PFBs' unique position of control over racehorses, the financial benefits of their involvement in the racing industry, and the high rate at which racehorses change hands,<sup>121</sup> PFBs should discharge any duty of care at the time they invest in the industry. As Epstein explains, the "basic negligence principle says that the level of precaution should be in proportion to the level of anticipated risk."<sup>122</sup> In essence, the participation fee strategy requires PFBs to meet a higher and more appropriate standard of care, in light of the increased risk racehorses face and the PFBs' participation in (and thus perpetuation of) the racing industry that contributes to that risk.

There exist within the law other examples of affirmative duties imposed on individuals with "special relationships" to animals. Many state animal cruelty laws impose affirmative duties on those in control of an animal's care.<sup>123</sup> As Susan Hankin notes, "laws imposing affirmative duties for proper housing, veterinary care and feeding animals are becoming increasingly common."<sup>124</sup> For example, California law makes it a misdemeanor for an owner to fail to provide an animal with "proper care and attention,"<sup>125</sup> and animal cruelty laws in Maryland, the District of Columbia, and Virginia explicitly mandate a certain level of veterinary care.<sup>126</sup> Furthermore, courts have supported the imposition of these kinds of affirmative duties. For example, a D.C. district court upheld the D.C. animal cruelty law imposing an affirmative duty on animals' custodians to provide them with

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<sup>121</sup> See Breed, *supra* note 2 (claiming that owners may buy and/or sell the "second-tier racehorses of the claiming ranks" as often as every 25 days).

<sup>122</sup> EPSTEIN, *supra* note 119.

<sup>123</sup> Hankin, *supra* note 40, at 20.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* (citing CAL. PENAL CODE § 597(f)(a) (West 1999)).

<sup>126</sup> *Id.* (citing MD. CODE ANN., CRIM. LAW § 10-604(a)(5) (LexisNexis Supp. 2009) (prohibiting person in custody of an animal from "unnecessarily fail[ing] to provide the animal with...necessary veterinary care..."); D.C. CODE § 22-1001(a)(1) (Supp. 2009) (containing nearly identical language to the Maryland statute); MICH. COMP. LAWS ANN. §§ 750.50(1)(a), (2)(a) (West 2004) (requiring that animals receive "adequate care" which includes "veterinary medical attention in order to maintain an animal in a state of good health"))).

veterinary care against a 2007 class action suit challenging the law's constitutionality.<sup>127</sup>

## VIII. Logistics of the Proportional Participation Fee Strategy

The thoroughbred horseracing industry should force PFBs to apportion funds for the welfare of ex-racehorses in the form of "participation fees," which would support RAR facilities. These fees would be built into race entry fees, breeding fees ("stud" and "broodmare" fees), racehorse sales transactions, racetrack licensing/operation fees, race purses (winnings), admission fees to racetracks, and individual patrons' bets. The size of the fee would vary according to the amount of money involved in the transaction (only a few pennies in the case of a one-dollar bet at a racetrack, and a larger sum in the case of a purchase of an expensive racehorse), and would thus impose a burden on PFBs proportional to their level of involvement in, and their potential to profit from, the horseracing industry. The fees would also force potential investors and racehorse owners to consider the long-term responsibilities of horse ownership, and to become more aware of the issues surrounding the problem of unwanted horses.<sup>128</sup> Furthermore, the fees could encourage breeders to reevaluate how many animals they are breeding, and could discourage unrealistic "Cinderella story" expectations of thoroughbred investors.<sup>129</sup>

A similar initiative has recently proven to be successful in California. The California Retirement Management Account (CARMA) persuaded the California Horseracing Board to approve an automatic purse deduction program to generate funds for equine retirement facilities in California.<sup>130</sup> Although owners are permitted to opt out of the program, many have chosen to participate.<sup>131</sup> Similarly, in 2006 the

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<sup>127</sup> *Id.* (citing *Daskalea v. Washington Humane Society*, 480 F. Supp. 2d. 16 (D.D.C. 2007)).

<sup>128</sup> The Unwanted Horse Coalition believes that teaching people to own horses responsibly will help lower the number of unwanted horses. UNWANTED HORSE SURVEY, *supra* note 20, at Preface.

<sup>129</sup> Boeckh, *supra* note 47, and accompanying text.

<sup>130</sup> *CARMA Race Horse Retirement*, O'NEILL RACING, <http://www.dougoneillracing.com/trainers/oneill/public/index.cfm?menuid=406> (last visited February 23, 2011).

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

New York Owners and Breeder's Association instituted the "Ferdinand Fee" (based on the tragic fate of the famous racehorse "Ferdinand, discussion *supra* Part II), which is a voluntary per-race fee funding ex-racehorse welfare initiatives.<sup>132</sup> Likewise, the idea of deducting a small portion of racing licenses and breeder awards to be used for racehorse retirement facilities was introduced to the Sunset Advisory Committee of the Texas legislature in 2009, and was reportedly well received.<sup>133</sup>

As discussed above in Part VII, participation fees would not be directly connected to the future welfare of *specific* racehorses. Because racehorses are frequently bought and sold, it would be difficult for PFBs to track the whereabouts of a particular horse until that horse's retirement. Thus one could argue that a PFB's special relationship to an individual racehorse is dissolved upon an owner's sale or an investor's termination of financial support of that horse. However, it is much more difficult to say that a PFB has no special relationship to the fate of racehorses as a group, since all PFBs depend upon the livelihood of racehorses used in the racing industry. Furthermore, the CARMA and the California Racing Board addressed this problem; to strengthen the measure's justification, the Board restricted the group of horses that could benefit from the funds to horses who have raced in California.<sup>134</sup>

## IX. Consensus and Implementation

Laws and regulations on animal cruelty, whether at the federal level, the state level, or within private associations,<sup>135</sup> are difficult to implement,<sup>136</sup> and are often problematically under-enforced.<sup>137</sup>

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<sup>132</sup> *Retired Racehorses*, *supra*, note 17.

<sup>133</sup> *Texas on the Forefront of Helping Retired Racehorses*, MY THOROUGHBRED BLOG, <http://mythoroughbredblog.blogspot.com/2009/01/texas-on-forefront-of-helping-retired.html> (Jan. 7, 2009, 3:12 EST).

<sup>134</sup> *CARMA Race Horse Retirement*, *supra* note 130.

<sup>135</sup> *See, e.g.*, NATIONAL THOROUGHBRED RACING ASSOCIATION HOME PAGE, <http://www.ntra.com>.

<sup>136</sup> The Prevention of Equine Cruelty Act (H.R. 503), re-introduced by Representative John Conyers (D-MI) in January of 2009, which would make it illegal to transport horses with the intent that they be slaughtered for consumption by humans, was referred to the House Committee on Crime, Terrorism, and Homeland Security in March 2009. No major action has been taken in regards to this bill since. *H.R. 503, The Prevention of Equine Cruelty Act of 2009*; WASHINGTONWATCH.COM, [http://www.washingtonwatch.com/bills/show/111\\_HR\\_503.html#toc1](http://www.washingtonwatch.com/bills/show/111_HR_503.html#toc1) (last visited March 7, 2011).

Previous efforts to protect equine welfare have been thwarted and/or rendered ineffective. For example, Congress amended the FY 2006 Agricultural Appropriations Act in 2005 to ban the use of funds under the Act to finance the federal meat inspections of horses required by the Federal Meat Inspection Act.<sup>138</sup> The amendment was designed to stunt the ability of equine slaughterhouses to comply with federal regulations, and thus force them to shut down. However, the USDA (at the horse slaughterhouses' request) released an interim rule that allowed those facilities simply to pay for federal inspections,<sup>139</sup> thus effectively gutting Congress' creative strategy.

Proponents of the participation fee model should rely on the strategy used by WildAid, a nonprofit organization seeking to end the illegal wildlife trade, to convince the horseracing community, private racing associations, state governments, or even the federal government to adopt this proposal.<sup>140</sup> Instead of focusing solely on implementing laws regulating how the resources are *supplied* to consumers, WildAid uses a 21st century media/venture model to raise public awareness about the problem, and thereby reduce the *demand* for resources and products that require the killing of endangered animal species.

By enlisting public support for proposed solutions to previously unknown or ignored problems of animal mistreatment, animal welfare organizations derive leverage against those profiting from the mistreatment. In regards to the plight of retired racehorses, the individuals in the position to control their fate, and the individuals in the position to mandate industry participant accountability in controlling their fate (such as racing associations, racetracks, or the government) will be more likely to do so when faced with the threat of investors withdrawing financial support from the industry, or the threat of the public refusing to patronize racetracks until racehorses are treated more like dignified beings and less like expendable commodities to be "discarded" when their careers as money-generators are complete.

There is a good chance private racing associations would espouse such a scheme, as they have voluntarily adopted equine

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<sup>137</sup> See Margit Livingston, *Desecrating the Ark: Animal Abuse and the Law's Role in Prevention*, IOWA L. REV. 1, 3 (2001) (arguing that "the flaw in the legal system lies with inadequate penalties for animal abuse and apathetic enforcement of existing laws").

<sup>138</sup> See WAGMAN, *supra* note 80, at 504.

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

<sup>140</sup> WILDAID HOME PAGE, <http://www.wildaid.org> (last visited March 7, 2011).

welfare initiatives in the past. For example, in a show of concern for equine welfare, the National Thoroughbred Racing Association, the American Quarter Horse Association, the Kentucky Thoroughbred Association, the U.S. Equestrian Federation, and the U.S. Trotting Association, endorsed the American Horse Council Welfare Code of Practice.<sup>141</sup> The Code of Practice sets forth a variety of objectives based on responsibility in breeding; education on equine welfare in training, care, use and enjoyment of horses; safety in equine competition and in transportation of horses; support for horse retirement initiatives and after-competition careers; and increased transparency in all horse-related activities.<sup>142</sup> Among the provisions of the Code are the following:

We are committed to the continual review, evaluation and improvement of all rules, regulations, policies and practices in all equine activities, based on science (where indicated). *When warranted, they should be refined or changed*  
...

We are committed to ensuring that our horses will have an *opportunity to transition to additional careers, uses or activities as the need arises*. When necessary, owners and veterinarians may have to consider end-of-life decisions. *The welfare, safety and dignity of the horse must continue to be the guiding principle in deciding how and when to provide a humane death.*

We are committed to *being transparent about our activities* in order to ensure the public, the media, federal, state and local officials and the various segments of the horse community understand what we do, why we do it, and support it.<sup>143</sup>

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<sup>141</sup> Tom LaMarra, *Groups Endorse 'Welfare Code of Practice'*, BLOOD-HORSE, Nov. 18, 2009, available at <http://www.bloodhorse.com/horse-racing/articles/53471/groups-endorse-welfare-code-of-practice>.

<sup>142</sup> *Id.*; see also *National Code of Practice Endorsed*, AMERICAN HORSE COUNCIL, [http://www.horsecouncil.org/pressreleases/2009\\_WelfareCode.php](http://www.horsecouncil.org/pressreleases/2009_WelfareCode.php) (last visited March 7, 2011).

<sup>143</sup> *National Code of Practice Endorsed*, *supra* note 142.

The New York Racing Association recently adopted a new policy of refusing to rent stalls at racetracks to thoroughbred owners who have sold a horse, directly or indirectly, for slaughter.<sup>144</sup> In 2007, the Finger Lakes Gaming and Racetrack in New York even established the “Purple Haze Center,” a facility at which sixteen retired racehorses at a time are housed and re-trained in other disciplines by specialized trainers.<sup>145</sup> Potential adopters (who must go through a screening process) can come to the facility to try out the horses.<sup>146</sup> The thoroughbred industry has also established funds to provide benefits for jockeys, breeders and even behind-the-scenes track workers like grooms.<sup>147</sup> These acts of concern suggest that a call for greater protection would not fall on deaf ears.

Additionally, I believe that the public will support this initiative and will put pressure on racing authorities to adopt it. Many Americans oppose to the practice of horse slaughter for human consumption. Recent polls conducted in Kentucky, Texas, and Utah showed that 82, 72, and 69 of those polled, respectively, were against it.<sup>148</sup> The results of a separate recent national poll also showed that almost 70% of Americans favor a federal ban on horse slaughter.<sup>149</sup>

## X. Conclusion

Most people are ignorant of the horrors that can befall a racehorse when she passes her physical prime and becomes an unwanted animal. Many think that because of the wealth and privilege on display in the grandstands of thoroughbred racetracks that all aspects of and all players involved in the racing industry are equally advantaged. However, that is not the case, and by raising awareness of the reality of the situation (for example, through advertisement campaigns run in areas where racetracks are located), at least some

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<sup>144</sup> *Retired Racehorses*, *supra* note 17.

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

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

<sup>147</sup> Breed, *supra* note 2. Other countries have also taken measures to protect jockey welfare; in February, the Philippine House of Representatives approved the Race Horse Jockeys’ Retirement Act which would allow jockeys to retire at the age of 55. *Bill Pushed to Benefit Racehorse Jockeys*, abs-cbsNEWS.com, Feb. 18, 2010, <http://www.abs-cbnnews.com/sports/02/18/10/bill-pushed-benefit-racehorse-jockeys>.

<sup>148</sup> *Facts and FAQs About Horse Slaughter*, ANIMAL WELFARE INSTITUTE, <http://www.awionline.org/ht/d/sp/i/12919/pid/12919> (last visited March 20, 2011).

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

members of the public will rethink their decision to support an industry that permits such practices. In turn, the demand for horseracing as entertainment will decrease. At this point, one of two things will happen: either the demand will decrease to the point that fewer and fewer investors will invest in racehorses, leading to thoroughbred breeders breeding fewer and fewer thoroughbreds each year, and in turn a decrease in the number of ex-racehorses exported to foreign slaughterhouses. Alternatively, public pressure could force the racing industry to adopt the participation fee solution articulated here, and spread the cost of providing for retired racehorses across racehorse owners, breeders, investors, racetrack owners, and racetrack patrons.