

# ARTICLES

## THE KENTUCKY HORSE: THE REALITY VS. THE MYTH AND WHAT COULD BE DONE TO CLOSE THE GAP

By  
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*The iconic status of the horse in Kentucky belies the bitter reality faced by the vast majority of horses in that state. This Article explains how multiple aspects of the current law enforcement system in the state permit the persistent failure to protect horses against gross neglect and abuse, as exemplified in particular by two case studies. The Kentucky Equine Health and Welfare Council, a legislative construct promoted by its backers as a unique safeguard for Kentucky horses, was in fact ill-suited ab initio for this role and has proved uninterested in it. Although there is no legislative cure for indifference on the part of those charged with enforcing laws against neglect and abuse, there are a number of legislative changes that would improve the now lamentable odds faced by Kentucky's horses. These changes, discussed in Part IV of this Article, are designed to increase the likelihood of action being taken against an offender, including through civil as well as criminal proceedings; secure immediate care for horses which have been victimized and prevent recidivism by offenders; increase the severity of the offense; dampen the current robust market for slaughter horses, and fund the costs inherent in creating a more effective enforcement system. All of the changes proposed are already law in at least some other states—in some instances in many other states—and these existing laws offer a ready model for Kentucky to follow if it so chooses. Although the focus of this Article is on Kentucky, all the legislative recommendations made are more broadly applicable to any state which does not yet have a statute as proposed in place.*

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## I. INTRODUCTION

The very word ‘Kentucky’ conjures up images of thoroughbreds and bluegrass; the iconic Kentucky Derby is unimaginable at any locus other than Churchill Downs. It is therefore ironic and deeply sad that the full picture is quite different: The cruel underbelly of the horse industry, a powerful force in the state, is also on manifest display. The state encourages breeding, yet does not regulate it. Most products of this activity turn out not to be prize-winning horses and are in due course culled to become part of the surfeit of horses, which the breeders and owners responsible for their procreation have no interest in keeping. Prize-winning show horses and racing thoroughbreds are likewise frequently discarded when they are no longer competitive in the ring or on the track.<sup>1</sup> These and other horses, many emaciated, are

<sup>1</sup> See Jane Allin, *Horse Racing through the Slaughter Pipeline*, THE HORSE FUND, <http://www.horsefund.org/horse-racing-through-the-slaughter-pipeline-part2.php> [<http://perma.cc/FA43-GB8Q>] (accessed Apr. 12, 2015) (analyzing data regarding the annual number of Thoroughbreds born and starting to race in the U.S., arriving at a conclusion that “[t]he numbers deliver a culpable portrayal of the waste and callousness that exist in the industry. Over 40% of the foals produced as registered Thoroughbreds never engage in a career on the track. . . .”); JANE ALLIN, THE INTERNATIONAL FUND FOR HORSES, *HORSE RACING—BREEDING BY THE NUMBERS 3* (Apr. 2011) (available at [http://www.horsefund.org/resources/Horse\\_Racing\\_Breeding\\_by\\_the\\_Numbers.pdf](http://www.horsefund.org/resources/Horse_Racing_Breeding_by_the_Numbers.pdf) [<http://perma.cc/G3GL-FGV3>] (accessed Apr. 12, 2015)) (“Depending on the country, in any given year on average only 60% to 65% of the Thoroughbreds foaled are destined for a career on the track of which even fewer . . . actually make it to their first race. Even

routinely sold at auction to slaughter buyers or to individuals who lack the knowledge, the will, or the means to maintain or, if and as required, rehabilitate them.<sup>2</sup> Foals of nurse mares,<sup>3</sup> another byproduct of the horse-racing industry, are from birth unwanted and destined to be killed or sold for whatever they can bring.<sup>4</sup> For every horse that races at Churchill Downs, there are many more that lead lives of misery.<sup>5</sup>

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more sobering is that only 5% of these Thoroughbreds will go on to win a larger-pursed stakes race and a mere 0.2% will win a Grade I stakes race. . . . Most importantly, what happens to the 35% to 40%, or more, of those who never see the track? Secondly, given that most of these horses only race until the age of 6, the question as to their fate for the remaining 20+ years of their lives emerges. The majority of those who don't make the grade are sold to slaughter, including foals.”); Emily Feldman, *Life After Racing: From Stud to Slaughter*, NBC BAY AREA, <http://www.nbcbayarea.com/news/sports/NATL-Where-Horses-Go-When-the-Racing-is-Over-206630691.html> [<http://perma.cc/XV8H-GTJ4>] (May 14, 2013) (accessed Jan. 30, 2015) (noting many retired racehorses quickly end up at slaughter auctions).

<sup>2</sup> The auction of emaciated or otherwise suffering horses to slaughter buyers at eight sites in Kentucky is chronicled in a stomach-churning report by Animals' Angels, a 501(c)(3) nonprofit organization. Animals' Angels, *Investigation of Kentucky Slaughter Buyers and Horse Auctions*, SPEAK UP FOR HORSES, <http://speakupforhorses.org/KY%20AA%20revised.pdf> [<http://perma.cc/7Y3C-JMX9>] (June/July 2011) (accessed Feb. 15, 2015). A follow-up report revisiting one of the sites nearly a year later is equally disturbing. See *Smiths Grove Horse Auction, KY 5/12/12*, ANIMALS' ANGELS, <http://www.animalsangels.org/investigations/horses/smiths-grove-horse-auction-ky-5-12-12> [<http://perma.cc/B394-AL3M>] (accessed Apr. 3, 2014) (reporting on the poor health of the horses and poor conditions of the Smiths Grove horse auction in Kentucky).

<sup>3</sup> A nurse mare is a lactating mare used to nurse a foal other than her own. A nurse mare may be used whenever the mother of a foal is unable to nourish her foal for any reason, but nurse mares are routinely used in the horse racing industry for an entirely different reason—to maximize profits. Removing a foal prematurely from the brood mare permits breeding the brood mare again shortly after she gives birth, or alternatively returning her promptly to the track. The nurse mare's original foal, whose birth is the cause of her lactation, is the unvalued by-product of this process. *Nursemare Foals*, PREGNANT MARE RESCUE, <http://www.pregnantmarerescue.org/nursemare-foals.html> [<http://perma.cc/B3U7-C9KK>] (accessed Mar. 8, 2015); *About Nurse Mare Foals*, LILLY POND FOAL RESCUE, [http://www.lillypond.info/About\\_Nurse\\_Mare\\_Foals.html](http://www.lillypond.info/About_Nurse_Mare_Foals.html) [<http://perma.cc/KM7A-MBZ6>] (2015) (accessed Mar. 8, 2015).

<sup>4</sup> See Jane Allin, *Milk of Death: The Dark Side of the Nurse Mare Industry*, TUESDAY'S HORSE, <https://tuesdayshorse.wordpress.com/2010/08/19/milk-of-death-the-dark-side-of-the-nurse-mare-industry/> [<http://perma.cc/P24Z-MKG6>] (Aug. 19, 2010) (accessed June 16, 2015) (“Many [excess foals produced to provide nurse mares for Thoroughbreds] are simply killed by clubbing or other means, some are starved to death and others are sold to the tanning industry for their hides . . . some eventually make it to the slaughterhouse ultimately ending up on a high-priced foreign menu as a delicacy item.” Jane Allin, the International Fund for Horses's chief research analyst, suggests that based on the amount of annual breeding taking place in the horseracing industry, a maximum just shy of “50,000 by-product foals on average per year [are born,] that the racing industry is accountable for.”).

<sup>5</sup> As shown through a 2013 undercover investigation by People for the Ethical Treatment of Animals (PETA) into the operation of Steve Asmussen, one of the most successful thoroughbred trainers in the country, even the finest racing thoroughbreds at the peak of their careers are not immune from lives of misery. Misery for these prized horses, however, comes from a different source: misuse of medications, cruel and painful performance-enhancing practices, and—in at least one case (involving a horse named

For all practical purposes, horses in Kentucky simply are not protected against the kind of treatment which in most other states would trigger criminal prosecution. The state's animal protection laws are among the most ineffective in the country, consistently ranked among the bottom five states for animal protection by the Animal Legal Defense Fund (ALDF).<sup>6</sup> In addition, enforcement is lax or nonexistent. The Kentucky Equine Health and Welfare Council (the Council), established by statute in 2010<sup>7</sup> and hailed by its backers as a pioneering step to further the welfare of horses in Kentucky,<sup>8</sup> was given no power to improve the day-to-day plight of horses in the state. In addition, its

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Nehro)—willful disregard of and failure to treat a known debilitating condition that should have resulted in the horse's withdrawal from competition. *Horse Racing Exposed: Drugs, Deception, and Death*, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, <https://secure.peta.org/site/Advocacy?cmd=display&pages=userAction&id=5345> [<http://perma.cc/V6UJ-UDEH>] (accessed Apr. 3, 2014). The reaction of the Kentucky Horse Racing Commission and the industry generally to the PETA investigation has been immediate, a striking contrast to the utter disregard shown for the rampant neglect of non-celebrity members of the species. Within one week after the investigation was first reported in the press, both the Kentucky Horse Racing Commission and the New York State Gaming Commission, with which PETA filed complaints, had launched investigations. Compare Joe Drape, *PETA Accuses Two Trainers of Cruelty to Horses*, N.Y. TIMES, [http://www.nytimes.com/2014/03/20/sports/peta-accuses-two-trainers-of-cruelty-to-horses.html?\\_r=0](http://www.nytimes.com/2014/03/20/sports/peta-accuses-two-trainers-of-cruelty-to-horses.html?_r=0) [<http://perma.cc/8Z3U-M2Z9>] (Mar. 19, 2014) (accessed Apr. 3, 2014) (first reporting the investigation in the press on March 19, 2014), with Joe Drape, *PETA Videos Prompt New York and Kentucky to Investigate Horse Trainers*, N.Y. TIMES, <http://www.nytimes.com/2014/03/21/sports/peta-videos-prompt-new-york-and-kentucky-to-investigate-horse-trainers.html> [<http://perma.cc/6UZ6-ZTLR>] (Mar. 20, 2014) (accessed Feb. 12, 2015) (showing that the Kentucky Horse Racing Commission and the New York State Gaming Commission launched investigations). The New Mexico Racing Commission voluntarily launched an investigation because Asmussen was licensed there; the National Museum of Racing withdrew Asmussen's pending nomination to its Hall of Fame; and Zayat Stables, owner of Nehro, announced that it would conduct its own investigation. Joe Drape, *Hall of Fame Removes Trainer from Ballot*, N.Y. TIMES, <http://www.nytimes.com/2014/03/22/sports/horse-trainer-removed-as-hall-of-fame-finalist.html> [<http://perma.cc/C58K-VCKU>] (Mar. 21, 2014) (accessed Feb. 12, 2015). Surprisingly, or perhaps not so, the Kentucky Horse Racing Commission has since concluded its investigation and cleared Asmussen, finding "no evidence of rules violations." Joe Drape, *Trainers Cleared in Cruelty Case*, N.Y. TIMES, <http://www.nytimes.com/2015/01/16/sports/kentucky-horse-racing-commission-clears-steve-asmussen-and-scott-blasi.html> [<http://perma.cc/85Y6-4WS6>] (Jan. 15, 2015) (accessed Feb. 13, 2015).

<sup>6</sup> See ANIMAL LEGAL DEF. FUND, 2014 U.S. ANIMAL PROTECTION LAWS RANKINGS 6 (Dec. 2014) (available at <http://aldf.org/wp-content/uploads/2014/12/2014-United-States-Animal-Protection-Laws-Rankings.pdf> [<http://perma.cc/39YY-EHN4>] (accessed Apr. 17, 2015)) (ranking Kentucky as the worst state for animal protection laws); ANIMAL LEGAL DEF. FUND, 2013 U.S. ANIMAL PROTECTION LAWS RANKINGS 4 (Dec. 16, 2013) (available at <http://aldf.org/wp-content/uploads/2013/12/2013-United-States-Animal-Protection-Laws-Rankings.pdf> [<http://perma.cc/ZEH7-WPP3>] (accessed Apr. 17, 2015)) (noting that Kentucky's 2013 ranking as last was the seventh time it had occupied that slot).

<sup>7</sup> KY. REV. STAT. ANN. § 257.472(1) (LexisNexis 2015).

<sup>8</sup> For instance, the Kentucky Farm Bureau described the "first-of-its-kind" legislation as a "monumental victory for Kentucky," which "has . . . returned the Commonwealth to the elite ranks of equine welfare." *Kentucky Equine Health & Welfare Council*

members, taken overwhelmingly from the hierarchy that is responsible for the status quo, have not surprisingly proved uninterested in doing so.<sup>9</sup>

This state of affairs is shameful, especially so for a state which touts its “legendary Horse Country and . . . America’s most storied thoroughbred racing.”<sup>10</sup> Steps desperately need to be taken, patterned on what has been done in other states, to strengthen animal cruelty laws, improve their enforcement, heighten deterrence and prevent recurrence by offenders, and immediately safeguard animals that are found in situations of abuse or neglect.

This Article first describes how complaints of neglect or cruelty to horses are currently handled in practice in Kentucky, drawing in part from records of the Kentucky Department of Agriculture (KDA).<sup>11</sup> As will be seen, the Council qua Council plays no role in this process, but KDA officials who also serve on the Council are among those who are participating in and thus perpetuating the current state of affairs. Finally, the Article discusses legislative changes that would make a meaningful difference.<sup>12</sup>

## II. OVERVIEW OF KENTUCKY ENFORCEMENT STRUCTURE

Kentucky’s laws against equine cruelty and abuse are enforced on a county-by-county basis. The duty to investigate complaints of this nature, including those involving horses, lies in the first instance with animal control officers (ACOs), which each county sheriff’s office is required to employ.<sup>13</sup> If the ACO’s investigative skills or willingness to use them in any given matter are lacking, that is typically the end of

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*Formed*, KY. FARM BUREAU, [www.kyfb.com/news/?i=6810](http://www.kyfb.com/news/?i=6810) [<http://perma.cc/Y4BJ-8XFW>] (July 1, 2010) (accessed Apr. 3, 2014).

<sup>9</sup> See *infra* Part III (describing the Council’s origin, failings, and membership).

<sup>10</sup> KY. DEP’T OF TRAVEL AND TOURISM, <http://www.kentuckytourism.com> [<http://perma.cc/F93P-LQX7>] (accessed Feb. 12, 2015). The Department’s logo on its website features a galloping horse above the words “unbridled spirit.” *Id.*

<sup>11</sup> *Infra* Part II. The records were supplied in response to a public records request by ALDF to produce “all incident reports, witness statements and correspondence related to each case of equine abuse, neglect or abandonment reviewed, investigated, addressed or otherwise evaluated by the [Department] in calendar years 2011 and 2012.” Letter from Scott A. Heiser, Sr. Attorney & Criminal Justice Program Dir., ALDF, to Ky. Equine Health & Welfare Council, Kentucky State Dep’t of Agric. (Jan. 7, 2013) (on file with *Animal Law*). In response to this request, the KDA provided records pertaining to 180 cases, which the author reviewed. E-mail from Virginia Coleman to Lora Dunn, Staff Attorney, ALDF (Mar. 13, 2015) (on file with *Animal Law*).

<sup>12</sup> The fact that this Article focuses on horses should not be taken as an indication that dogs, cats, and other domestic animals enjoy a significantly higher level of protection in Kentucky. However, unique to the horse is the painful contrast between its iconic status as a symbol of the Commonwealth and the grim fate so many face in reality.

<sup>13</sup> See KY. REV. STAT. ANN. § 258.195(1) (requiring each county to “employ, appoint, or contract with” ACOs); KY. REV. STAT. ANN. § 436.605 (authorizing ACOs to investigate matters, including by obtaining a search warrant).

the matter.<sup>14</sup> An ACO may obtain a search warrant, but has no power to arrest;<sup>15</sup> that power remains with peace officers (the county sheriff's office or state police) pursuant to an arrest warrant or—under certain circumstances—without a warrant.<sup>16</sup> An arrest warrant, if required, must be obtained by the county attorney, an elected official<sup>17</sup> responsible for handling misdemeanor offenses<sup>18</sup> If the county attorney is not interested in taking on an animal cruelty case, he need not seek an arrest warrant, no matter what supporting evidence is brought to his attention.<sup>19</sup>

Even in those cases for which an arrest is made, the county attorney, who would conduct any subsequent prosecution in the appropriate district court,<sup>20</sup> has tremendous discretion in how that prosecution proceeds.<sup>21</sup> Especially if the county attorney was not involved in the decision to arrest (because the arrest was made without a warrant), he might prefer not to pursue the matter, in which case a *pro forma* prosecution, with no meaningful consequence for the offender, will likely result.

The chief executive for the county, called a judge/executive, has no formal role in the criminal process.<sup>22</sup> However, as a practical matter, as will be seen in one of the examples discussed below, the judge/executive can exert considerable influence on the decision to take enforcement action. The sheriff, county attorney, and judge/executive are all elected offices, the holders of which are not accountable to anyone at a higher level in state government.<sup>23</sup>

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<sup>14</sup> See KY. REV. STAT. ANN. § 258.195(3) (authorizing ACOs to issue citations and notices).

<sup>15</sup> *Id.* § 436.605.

<sup>16</sup> See *id.* § 431.005 (outlining when peace officers are authorized to make arrests). A few ACOs are also peace officers and as peace officers may make arrests, but an ACO qua ACO cannot. *Id.* § 436.605.

<sup>17</sup> KY. CONST. § 97.

<sup>18</sup> Cases of equine abuse are handled exclusively at the county level, by the county attorney, because under current Kentucky law any act of cruelty or abuse against a horse, no matter how extreme, is a misdemeanor and cannot rise to the level of a felony. KY. REV. STAT. ANN. §§ 525.130, 525.135. See *infra* Part IV.C.1 (suggesting Kentucky expand felony-level animal protections). County attorneys appear in district courts. LESLIE W. ABRAMSON, KENTUCKY PRACTICE SERIES, CRIM. PRAC. & PROC. § 6:1 (5th ed., 2014); see also KY. REV. STAT. ANN. § 15.725(2) (granting the county attorney authority to prosecute within the jurisdiction of the district court).

<sup>19</sup> See generally Celesta A. Albonetti, *Prosecutorial Discretion: The Effects of Uncertainty*, 21 LAW & SOC'Y REV. 291, 292 (1987) (discussing the scope of prosecutorial discretion); Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. 643, 643–47 (2002) (noting that prosecutorial discretion extends to not bringing charges as well as withdrawing charges).

<sup>20</sup> See *supra* note 18 and accompanying text (prosecutorial role of county attorneys).

<sup>21</sup> See *supra* note 19 and accompanying text (scope and impact of prosecutorial discretion).

<sup>22</sup> See KY. REV. STAT. ANN. § 67.710 (listing responsibilities of judge/executive, none of which explicitly calls for involvement in criminal proceedings).

<sup>23</sup> KY. CONST. § 99. To be sure, the Prosecutors Advisory Council established under KY. REV. STAT. ANN. § 15.705 may authorize the state Attorney General to intervene in

This enforcement structure in and of itself invites the ineffective enforcement endemic in the state. There are 120 counties in Kentucky, the most of any state in the country after Texas and Georgia.<sup>24</sup> Some of these counties are very poor, and prosecution of animal cruelty cases is expensive.<sup>25</sup> Quite apart from the expense involved, one or more of the relevant elected officers—sheriff, county attorney, and judge/executive—may not be interested in or even hostile toward animal crimes, may be friendly with an offender, or may be concerned that prosecution would jeopardize his reelection. And if any one of these officers does not wish a given prosecution to be pursued, for any reason, it probably will not happen.

Furthermore, the Kentucky Department of Agriculture (KDA) reports reviewed indicate that many complaints die at an initial investigative stage before getting as far as the sheriff's office or the county attorney.<sup>26</sup> Most ACOs, who as noted above are charged with responsibility for the initial investigation, are ill-suited for the job of criminal investigations in general and investigation of equine complaints in particular. ACOs involve themselves primarily with dogs and cats and other small domestic animals, and within that purview, ACOs overwhelmingly focus on protecting the public from nuisance animals rather than protecting animals from abusive humans.<sup>27</sup> Even were that not so, there are no statutory training or educational requirements for ACOs,<sup>28</sup> and as a result the overwhelming majority, espe-

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any case in the district court “[i]n the event of the incapacity, refusal without sufficient grounds, inability, conflict of interest of the local prosecutor, or his failure to act.” Ky. REV. STAT. ANN. § 15.715(1). As a practical matter, the likelihood that this remedy could be successfully invoked against a county attorney who was lax in the prosecution of cases of equine neglect or cruelty is slim to none.

<sup>24</sup> See generally Vincent L. Marando & Mavis Mann Reeves, *County Government Structural Reform: Influence of State, Region, and Urbanization*, 23 PUBLIUS 41, 41–44 (1993) (listing the number of counties in each state).

<sup>25</sup> See Louis Jacobson, *Are 97 of The Nation's 100 Poorest Counties in Red States?*, POLITIFACT.COM, <http://www.politifact.com/truth-o-meter/statements/2014/jul/29/facebook-posts/are-97-nations-100-poorest-counties-red-states/> [<http://perma.cc/YA7S-4S36>] (July 29, 2014) (accessed Mar. 6, 2015) (listing the nation's ten poorest counties—of which five are in Kentucky).

<sup>26</sup> See *supra* note 11 and accompanying text (describing public record request, resulting documents provided by KDA, and author's review of documents).

<sup>27</sup> One Kentucky community describes the “typical day” of an animal control officer as “filled with responding to nuisance complaints, such as barking dogs, stray cats, dogs running at large, and possible animal neglect” and suggests “[m]ost problems can be dealt with civilly.” *Animal Control*, FORT THOMAS POLICE DEPT., <http://www.ftthomas.org/Police/AnimalControl.html> [<http://perma.cc/K44S-LYQN>] (accessed Apr. 3, 2014).

<sup>28</sup> See KY. REV. STAT. ANN. §§ 257.100, 258.005, 258.015, 258.095, 258.119, 258.195, 258.212, 258.215, 258.225, 258.235, 258.245, 258.265, 258.505, 436.605, 436.610 (Kentucky statutes mentioning ACOs—none of which address training or educational requirements). Some counties impose training requirements, but typically the only specialized training required is a Level I and Level II Certification from the National Animal Control Association (NACA). *Training Schedule*, NAT'L ANIMAL CARE & CONTROL ASS'N, [http://www.nacanet.org/?page=training\\_Schedule](http://www.nacanet.org/?page=training_Schedule) [<http://perma.cc/4TU2-6DB6>] (accessed Jan. 31, 2015). Of the thirty-six topics listed on the NACA's course

cially in rural counties, lack the necessary skills to investigate a case of neglect or to interpret what they find.<sup>29</sup> In the case of horses in particular, a key baseline skill is evaluating the horse's Body Condition Scoring (BCS): a measure of the amount of fat on the body ranging from 1, which is extremely emaciated and near death, to 9, which is very fat.<sup>30</sup> An ideal BCS will depend on a horse's type and circumstances, such as exposure to cold and use in breeding, but a healthy horse's score will generally range between 4 and 6.<sup>31</sup> The overwhelming majority of ACOs have no training in rating horses and, as a result, their ratings in those equine neglect situations which they do evaluate are all but worthless.<sup>32</sup>

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website, only three, "Livestock Identification & Behavior, Livestock Investigations . . . [and] Body Condition Scoring" would appear to even touch upon horses and none explicitly relates to equine abuse issues. *NACHO Training Academy*, NAT'L ANIMAL CARE & CONTROL ASS'N, <http://www.nacanet.org/?page=NACA100> [<http://perma.cc/9DP6-NHLR>] (accessed Jan. 31, 2015). At the state level, Kentucky has an Animal Control and Care Fund, administered by an Animal Control Advisory Board, which is to be used "for the creation and support of statewide programs related to animal control and care, and for training animal control officers." KY. REV. STAT. ANN. § 258.119. The video training library that the Board has established for county animal control officers does not touch upon enforcement of animal cruelty laws. *See ACO and Shelter Staff Training*, KENTUCKY ANIMAL CONTROL ADVISORY BOARD, <http://www.kyspayneuter.com/dvd.htm> [<http://perma.cc/5EXF-M7JL>] (accessed Feb. 13, 2015) (listing the seven training subjects covered by the video library, of which none involve animal cruelty). While the Board's Animal Control Officer Training Manual's list of approved continuing education options does include two courses on "Livestock Abuse Investigation" offered through the Kentucky Horse Council, it is otherwise silent on the matter of equine abuse. KENTUCKY ANIMAL CONTROL ADVISORY BOARD, ANIMAL CONTROL OFFICER TRAINING MANUAL 8 (2011) (available at <http://www.kacca.org/StateACOTrainingManualFinalDraft.pdf> [<http://perma.cc/JDG5-H4E4>] (accessed Mar. 7, 2015)).

<sup>29</sup> E-mail from Shelly Price, Sec'y/Treasurer, Speak Up For Horses, to author (Apr. 24, 2015) (on file with *Animal Law*).

<sup>30</sup> D. R. Henneke et al., *Relationship between Condition Score, Physical Measurements and Body Fat Percentage in Mares*, 15 EQUINE VETERINARY J. 371, 372 (1983). The BCS System, developed by Don Henneke, PhD, and first published in 1983, "has been peer reviewed and is generally accepted within veterinary practices for equines." *State v. Meduna*, 794 NW.2d 160, 170 (Neb. Ct. App. 2011).

<sup>31</sup> David W. Freeman, *Body Condition of Horses*, in OKLAHOMA COOPERATIVE EXTENSION FACT SHEETS, at 3920-1, 3920-1 to -2 (Okla. Cooperative Extension Service, Ser. No. ANSI-3920, 2013) (available at [http://pods.dasnr.okstate.edu/docushare/dsweb/Get/Document-8661/ANSI-3920web color.pdf](http://pods.dasnr.okstate.edu/docushare/dsweb/Get/Document-8661/ANSI-3920web%20color.pdf) [<http://perma.cc/X4M4-AWPN>] (accessed Jan. 29, 2015)). A low BCS score is not by itself proof of criminal neglect, as Dr. Henneke has himself warned in recent years, especially when the determination is made by one with no formal training. Don Henneke, *(Mis)use of the Body Condition Score in Alleged Neglect*, RUTGERS EQUINE SCI. CENTER, [http://esc.rutgers.edu/downloads/MisuseBCS\\_Henneke.pdf](http://esc.rutgers.edu/downloads/MisuseBCS_Henneke.pdf) (accessed Jan. 29, 2015) (site no longer available). However, as a variety of jurisdictions have noted, a BCS score made by a qualified evaluator is a valuable indicator of a horse's overall condition and, as such, is highly relevant in any criminal investigation involving alleged equine neglect. *See, e.g., Meduna*, 794 NW.2d at 170; *State v. Fessenden*, 310 P.3d 1163 (Or. Ct. App. 2013), *aff'd*, 333 P.3d 278 (Or. 2014); *Stanton v. State*, 395 S.W.3d 676 (Tenn. 2013) (all prosecutions for equine criminal neglect citing BCS scores made by a veterinarian or other qualified professional).

<sup>32</sup> *See supra* note 28 (discussing the lack of required equine or animal cruelty law enforcement training ACOs receive).



A further complication at the threshold level of enforcement is the involvement of the KDA, which, as further discussed below, lacks both personnel with investigational skills and statutory enforcement authority.<sup>33</sup> Indeed, there is no statutory basis for the involvement of the KDA at all, but in practice, complaints about equine neglect or abuse are nonetheless routinely referred to the KDA by the county sheriff's office or addressed to the KDA by private citizens—sometimes because complaints to the county sheriff's office or animal control have gone unheeded.<sup>34</sup> This practice is given an official imprimatur of sorts by the Kentucky Animal Welfare Alliance, which states on its website that “horse abuse and livestock abuse cases” are to be reported to the KDA, giving the link for the State Veterinarian's Office in the KDA.<sup>35</sup> During the two-year period examined for the preparation of this Article, the KDA handled more than 150 equine complaints, the vast majority of which involved allegations of cruelty, neglect, or starvation.<sup>36</sup>

By statute, the duties of the KDA are to “protect and promote the livestock, poultry, fish, and animal *industries*,” a role quite distinct from enforcing anti-cruelty laws.<sup>37</sup> Nonetheless, upon receipt of a complaint, the KDA routinely sends a staff investigator to the site to follow up and report any findings.<sup>38</sup> The investigator cannot take any action against the individual cited in the complaint precisely because the KDA has no enforcement powers. In the words of one KDA investigator's report:

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<sup>33</sup> Cf. KY. REV. STAT. ANN. § 258.195(3) (expressly granting enforcement authority to *animal control officers*).

<sup>34</sup> See, e.g., STEVEN S. MITCHELL, KY. DEP'T AGRIC., #348, INVESTIGATION/COMPLAINT FORM (July 12, 2011) (on file with *Animal Law*) (showing that the sheriff contacted KDA to respond to a complaint of horse neglect) (note: ‘Stephen Mitchell’, ‘Shane Mitchell’, and ‘S. Mitchell’ are all names used by KDA Investigator #1303; for the purposes of this Article, he will hereinafter be referred to simply as ‘Mitchell’); STOVALL, KY. DEP'T AGRIC., #315, INVESTIGATION/COMPLAINT FORM (Apr. 5, 2012) (on file with *Animal Law*) (explaining that the complainants contacted KDA because “she and several other neighbors had been reporting this location for 3 years or more to Bullitt County Sheriff's Office and Animal Control, but nothing is ever done”).

<sup>35</sup> *How to Report Animal Cruelty*, KENTUCKY ANIMAL WELFARE ALLIANCE, <http://ky-awa.org/laws.html> [<http://perma.cc/GN46-VEBU>] (accessed Jan. 29, 2015).

<sup>36</sup> The second-most frequent type of complaint pertained to improper disposal of a dead horse. The Department *is* charged with enforcing KY. Rev. Stat. § 257.160, governing the disposal of horse (and other livestock) carcasses. KY. REV. STAT. ANN. § 257.020 (“The board [of Agriculture] shall enforce the provisions of this chapter” pertaining to livestock and poultry disease control). Complaints to the Department about a dead horse which had not been properly disposed of were promptly and efficiently handled, with citations entered and fines imposed where the facts showed a violation of the statute. In no instance, so far as one can tell, did the Department make any inquiry as to how it was that a dead horse came to be on the premises. See *supra* note 11 (describing review of open records requests).

<sup>37</sup> KY. REV. STAT. ANN. § 257.020(2) (emphasis added).

<sup>38</sup> See, e.g., ED HALL, KY. DEP'T AGRIC., #293, INVESTIGATION/COMPLAINT FORM (Feb. 21, 2012) (on file with *Animal Law*) (showing investigator responded to complaint of starving horses, noting body conditions and lack of proper food provision for horses at site).

[The complainant] called the State Vet's office as a last resort and wanted to know if I could do anything about [the neglected horse that was the subject of the complaint]. I informed her that the State Vet's office didn't want us to get involved until after the animal was dead but I didn't mind going and talking to the woman about the condition of the horse although I could not make her surrender the horse to a rescue organization against her will because that can only be done by a real Judge . . . .<sup>39</sup>

Thus, if the investigator concludes that a cruelty or neglect complaint warrants follow-up, the most he can do is notify the sheriff's office, which may already be aware of it.<sup>40</sup> In the one case reviewed (No. 404) in which the report shows that the KDA investigator attempted to take out a warrant directly after a site visit, the investigator found that as an employee of the KDA he was unable to do so.<sup>41</sup>

But any such efforts at all by a KDA investigator are rare indeed. Extrapolating from the reports reviewed, in the vast majority of situations the investigator determines that no further action is warranted. That essentially means the end of the matter. Even if law enforcement were inclined to go beyond the KDA investigator's findings, it would be an uphill fight in the face of a report that found an inadequate basis to pursue charges against the purported offender.

One cannot say, solely on the basis of the KDA investigators' reports, that none of the complaints summarily dismissed warranted such treatment. In a few instances, the evidence provided by the complainant was insufficient to enable meaningful follow-up, and in many instances the report lacked photos of the animals in question, making an independent evaluation of the horses' condition impossible.<sup>42</sup> Having said that, a perfunctory, laissez-faire attitude pervades the reports. There is no appetite for finding cruelty or neglect in the one-off situation, where only one or a few horses are involved,<sup>43</sup> nor for interfering

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<sup>39</sup> ROGER OGG, KY. DEP'T AGRIC., #114, INVESTIGATION/COMPLAINT FORM (Feb. 8, 2011) (on file with *Animal Law*).

<sup>40</sup> In one case in particular, Dr. Ed Hall, Assistant Director of Animal Health for the KDA, flatly concluded that in his professional opinion the horses in question were starving. ED HALL, KY. DEP'T AGRIC., #293, INVESTIGATION/COMPLAINT FORM (Feb. 21, 2012) (on file with *Animal Law*). His report states that he had communicated this opinion to a sergeant in Louisville Metro Animal Services. *Id.* As of this writing, more than two years later no charges had been brought.

<sup>41</sup> See KY. REV. STAT. ANN. § 436.605(2) (by implication limiting those who may apply for a search warrant in animal cruelty matters to peace officers, ACOs, and humane officers under contract to a local governmental entity).

<sup>42</sup> See *supra* note 11 and accompanying text (describing reports reviewed).

<sup>43</sup> For example, the complainant in No. 315 told the investigator that she and other neighbors had been reporting the particular location for at least three years to the county sheriff's office and animal control and no action had been taken. STOVALL, *supra* note 34. If nothing was done, she was "ready to go to the Governor, the media and to post videos online." *Id.* On visiting the site, the investigator found three horses and a donkey. *Id.* He rated the horses at 3-4 to 4-5, while noting their "shaggy coat[s] made exact BCS difficult." *Id.* There were "remnants" of a round bale in the pasture, and per the owner another expected that evening. *Id.* Based on the remnants, the fact that bark was not stripped off the trees and that grass was outside the fence, through which the

with the large-scale business of the sale and transport of horses for slaughter described in the *Animals' Angels* report described in note 2.<sup>44</sup> Repeatedly, the concern for the proper disposal of horse carcasses outweighs the concern for horses that are still alive.<sup>45</sup>

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horses could have pushed, the investigator concluded that the horses "were not hungry to the point of starvation or neglect." *Id.* He further stated there was "no evidence or probable cause to believe that evidence exists that meets the elements of a violation of KRS 525.130." *Id.*

<sup>44</sup> In addition to the Browning case discussed in detail below, three complaints over the period reviewed were made against one Billy Wigglesworth, a self-described buyer of slaughter horses, and referred to the KDA by the Harrison County Sheriff's Department. See MITCHELL, KY. DEP'T OF AGRIC., #127, INVESTIGATION/COMPLAINT FORM (Mar. 10, 2011) (on file with *Animal Law*) (alleging animal abuse); MITCHELL, #348 (alleging cruelty to animals); and MITCHELL, KY. DEP'T OF AGRIC., #377, INVESTIGATION/COMPLAINT FORM, (Sept. 9, 2012) (on file with *Animal Law*) (alleging neglected equine). Mitchell took no action except to advise Wigglesworth of the proper disposal of the six dead horses observed on the first visit. MITCHELL, #127; MITCHELL, #348; MITCHELL, #377. On the second and third visits an "inventory" of fifty-five and sixty-seven horses, respectively, was noted. MITCHELL, #348; MITCHELL, #377. The handling of another, unrelated complaint (No. 244) is also telling in this regard: A Brad Branstetter "(AGR)" responded to the complaint not with the usual report but rather with an internal e-mail almost two months after the complaint was made—and only when prompted by a Shannon Sparks "(AGR)" who e-mailed that a report was needed "asap." Mr. Branstetter's e-mail stated in full: "I took care of this case. The Horses were at Horse Cave Stockyard being shipped by Buck Ryan. It was brought to his attention that these horses needed to be watched more closely because of the number of them. He had a guy watering and feeding [them] for him. And it was encouraged that these horses needed to have adequate hay and water because *there is people always watching.*" See e-mail from Bart Branstetter, AGR, KDA, to Shannon Sparks, AGR, KDA (Jan. 24, 2012 11:59 EST) (on file with *Animal Law*) (responding to request; e-mail from Sandy Harper, AGR, KDA, to Bart Branstetter, AGR, KDA, Shannon Sparks, AGR, KDA, and Bobby Bell, AGR, KDA (Nov. 30, 2011, 02:22 EST) (on file with *Animal Law*) (showing that Branstetter was first alerted to complaint almost two months prior); e-mail from Shannon Sparks, AGR, KDA, to Bart Branstetter, AGR, KDA (Jan. 23, 2012 02:57 EST) (on file with *Animal Law*) (finally requesting report "asap"); e-mail from Bart Branstetter, AGR, KDA, to Shannon Sparks, AGR, KDA (Jan. 24, 2012 11:59 EST) (on file with *Animal Law*). The *Animals' Angels* Report for June/July 2011 notes that the Ryan family, of which the Buck Ryan named in the complaint is a member, has been in the slaughter business for a long time. *ANIMALS' ANGELS*, *supra* note 2.

<sup>45</sup> A particularly striking, indeed mind-boggling, example of this phenomenon was the KDA investigator's response to complaint No. 320, made against a man who was shooting horses and feeding them to his dogs. STOVALL, KY. DEP'T OF AGRIC., #320, INVESTIGATION/COMPLAINT FORM (Apr. 27, 2012) (on file with *Animal Law*). The man admitted to this activity, saying he killed the horses by shooting them with a high-powered rifle. *Id.* Contrary to Kentucky law, which defines cruelty to animals as including the intentional killing of an animal (other than certain domestic animals killed by poisoning), the investigator was adamant in the face of the complainant's outrage that killing the horses was not a violation of Kentucky law so long as it was done quickly and as painlessly as possible, as would be the case if they were killed with a rifle. See *id.* (Stovall told complainant that "absent proof that [O'Connor] was killing them cruelly, [Stovall] could do nothing"); see also KY. REV. STAT. ANN. § 525.130(1)(c) (a person is guilty of cruelty to animals if "he intentionally or wantonly . . . kills any animal other than a domestic animal killed by poisoning"). The KDA investigator was at pains, however, to advise the man as to proper disposal of the carcasses. STOVALL, #320. The response to complaint No. 274 is less egregious but typical. The KDA investigator's report

Two of the situations reviewed are particularly egregious and deserve more extended discussion in order to give the full flavor of the level of protection afforded to horses in Kentucky. In both instances, the evidence of gross neglect was unequivocal, and KDA personnel high and low as well as county officials turned a blind eye to it or were even instrumental in the failure to act.

#### A. *Larry Browning*

The first of these situations involved a high-volume, high-turnover slaughter buyer named Larry Browning, whose operation in Pendleton County was one of the nine described in the *Animals' Angels* report cited above.<sup>46</sup> Their investigators, visiting the premises in early July 2011, found horses with "life threatening body score[s] of 1.5 or less," and the report includes photos which support this statement.<sup>47</sup> Two weeks earlier, however, KDA Investigator Mitchell had visited the premises in response to a complaint from Henry Bertram, judge/executive for the county.<sup>48</sup> Mitchell was accompanied by Steve Johnson, a county animal control officer.<sup>49</sup> Mitchell and Johnson, who took no photos, reported that all horses had a BCS of 3.5 or above, none were in "alarming . . . condition," and the complaint was "unfounded."<sup>50</sup>

On October 3, 2011, Mitchell was back on the premises.<sup>51</sup> This time he reported seventy horses on the property with BCS scores ranging from 1.5 to 6.<sup>52</sup> Browning stated that "he was having a problem with animals being dropped off . . . in poor condition" and that he had been in touch with county officials (Judge Bertram and ACO Johnson) "concerning a solution to the problem."<sup>53</sup>

On October 5, 2011, Dr. Ed Hall, Assistant Director of Animal Health for the KDA, visited the Browning premises with Judge Bertram and ACO Johnson.<sup>54</sup> Dr. Hall reported 70 to 100 horses on the property, with at least twenty-five having a BCS of 1.<sup>55</sup> The "hay"

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notes that there were two dead horses at the site and that the other horses appeared to have a BCS of 1, 2, or 3. M. AVERY, KY. DEP'T OF AGRIC., #274, INVESTIGATION/COMPLAINT FORM, (Dec. 30, 2012) (on file with *Animal Law*). The sole communication mentioned with the horse owner was about the dead horses, and the investigator followed up the next day "to confirm that the animals had been buried." *Id.*

<sup>46</sup> ANIMALS' ANGELS, *supra* note 2.

<sup>47</sup> *Id.*

<sup>48</sup> MITCHELL, KY. DEP'T OF AGRIC., #188, INVESTIGATION/COMPLAINT FORM (June 23, 2011) (on file with *Animal Law*).

<sup>49</sup> *Id.*

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

<sup>51</sup> MITCHELL, KY. DEP'T OF AGRIC., #223, INVESTIGATION/COMPLAINT FORM (Oct. 4, 2011) (on file with *Animal Law*).

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

<sup>53</sup> *Id.*

<sup>54</sup> EDMOND S. HALL, KY. DEP'T AGRIC., #224, INVESTIGATION/COMPLAINT FORM (Oct. 6, 2011) (on file with *Animal Law*).

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

available to the horses was of “marginal nutrient content.”<sup>56</sup> The report concludes, rather oddly, that “[a]n agreement between Judge Bertram and Mr. Browning to resolve the problem for the 25 horses in immediate danger would be implemented within 6 days. Judge Bertram and Mr. Larry Browning agreed upon a plan to minimize a recurrence of this problem.”<sup>57</sup> There is no mention in the report of the other horses or of Browning’s responsibility in the matter.

The day after that meeting, on October 6, Dr. Hall received a lengthy, impassioned e-mail from Margo Gresham, who described at the outset her long history in large animal rescue work and was at pains to point out that she was involved with groups that worked quietly and professionally, not to attract media attention or to bring in “animal ‘rights’ activists.”<sup>58</sup> Having established her credentials, if you will, she got to the point, which was the condition of the animals at the Browning property. Below are highlights of what she had to say:

[A] few weeks ago I was driving down a road that I had never been on before and I came upon a field full of some of the most neglected horses I’ve seen in my 40+ years with horses. . . . I realized that I could not turn a blind eye to this so the following day I drove back to the property for a closer look. . . . To my surprise the conditions were even worse than I thought and there were many more horses than I had originally thought. . . . I learned that a non-profit group called Animals[?] Angels had investigated the property back in July and their report reflected the exact same things that I was observing; horses with a BCS no greater than 1.5 at best, bare fields, horses standing in lots that are nothing but mud and manure with exposed sheet metal and various other dangerous debris in with the horses. . . .

. . . .  
Dr. Hall, excuse my French but [Mitchell’s report from June 2011] is the biggest bunch of bs I’ve ever seen! . . . [T]he investigator was either at the wrong location or everything he put in the report is a blatant lie. . . .

. . . .  
. . . I’m contacting you because I’m appalled at what has taken place with this case so far. . . . [T]he report filed by Mr. Mitchell is inexcusable and his actions have resulted in the death of an unknown number of horses and the ongoing suffering of many more. If he had reported the truth back in June then something could have been done and many of these horses would have had a chance of being nursed to health but since he filed a false report there is no way many of these horses can survive the winter and they will die a slow miserable death. . . .

Browning has to be stopped. The horses have to have relief of some sort. Stephen Mitchell needs to be removed from his position at the very least. He really should be charged for filing false reports and basically contributing to the neglect of these horses . . . [I]f it became necessary I would

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

<sup>57</sup> *Id.*

<sup>58</sup> E-mail from Margo Gresham to Edmond S. Hall, DVM, Assistant Director of Animal Health, KDA (Oct. 6, 2011, 04:42 EST) (on file with *Animal Law*).

testify against Browning, Mitchell and even our ACO Steve Johnson who seems to be just as guilty as Mitchell.<sup>59</sup>

Dr. Hall forwarded this e-mail to Rusty Ford, Equine Programs Manager at the KDA Office of the State Veterinarian; Dr. Robert Stout, State Veterinarian and Executive Director of the KDA Division of Animal Health; and Dr. Sue Billings, Deputy State Veterinarian at the KDA.<sup>60</sup> In the face of this urgent call for action, one would have thought that action would follow: action in the form of charges against Browning, prompt steps to rehabilitate the horses that could possibly be saved, and euthanasia of those that could not. Instead, as Dr. Hall's report suggests, the only one of these steps that occurred was to euthanize ten of the twenty-five horses that were considered starving,<sup>61</sup> amid considerable concern on the part of Rusty Ford of the KDA that the proper statutory prerequisites for euthanasia (in KY. Rev. Stat. 257.100) be met and that Browning execute a written waiver consenting to the euthanasia and agreeing that he would not be compensated for the horses killed.<sup>62</sup> The action taken was duly reported by Judge Bertram to the county fiscal court, the legislative body for the county.<sup>63</sup>

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

<sup>60</sup> E-mail from Edmond S. Hall, DVM, Assistant Director of Animal Health, KDA, to Sue Billings, DVM, Deputy State Veterinarian, KDA, Edward S. 'Rusty' Ford, Equine Programs Manager, KDA, and Robert Stout, DVM, Exec. Dir. & State Veterinarian, Division of Animal Health, KDA (Oct. 6, 2011, 08:36 EST) (on file with *Animal Law*) (Edwards S. 'Rusty' Ford will hereinafter be referred to as Rusty Ford); see also KY. POULTRY FED'N, RESOURCE GUIDE (Dec. 2007) (available at <http://www.kypoultry.org/media/PDF/resourceguide.pdf> [<http://perma.cc/Z894-2EDR>] (accessed Jan. 28, 2015)) (showing positions of Dr. Robert Stout and Dr. Sue Billings); Letter from Rusty Ford, Equine Programs Manager, KDA, to Governor Steve Beshear (Jan. 9, 2012), in 2011 KENTUCKY EQUINE HEALTH AND WELFARE COUNCIL ADMINISTRATIVE, PROGRAMMATIC AND FINANCIAL ACTIVITY REPORT (2012) (available at [http://www.kyagr.com/equine-health-welfare-council/documents/osv\\_eq\\_hwc\\_2011\\_report.pdf](http://www.kyagr.com/equine-health-welfare-council/documents/osv_eq_hwc_2011_report.pdf) [<http://perma.cc/T6RM-YA96>] (accessed Jan. 30, 2015)) (showing Rusty Ford's preferred name on official documents and his position).

<sup>61</sup> Dr. Hall determined that all twenty-five of the starving horses were beyond saving and should be euthanized. HALL, *supra* note 54. Rusty Ford, who is not a veterinarian, reduced the number to ten, while visiting the site with Nathan Glaze (DVM) and an ACO. PENDLETON CNTY. FISCAL COURT, COUNTY MINUTES, at 110 (Oct. 25, 2011) (available at <http://pendletoncounty.ky.gov/government/Documents/10%20October%2025.pdf> [<http://perma.cc/XXX2-LUYT>] (accessed Jan. 30, 2015)). The fate of the remaining fifteen is not known. See *id.* (giving no indication of plans for the other horses).

<sup>62</sup> See E-mail from Edmond S. Hall, DVM, Assistant Director of Animal Health, KDA to Judge Henry Bertram (Oct. 5, 2011, 16:15 EST) (recommending that a euthanasia waiver stipulating no compensation be signed by Browning before "the next phase of this mitigation action") (on file with *Animal Law*); see also E-mail from Rusty Ford, Equine Programs Manager, KDA, to Edmond S. Hall, DVM, Assistant Director of Animal Health, KDA, and Shannon Sparks, AGR, KDA (Oct. 10, 2011, 12:44 EST) (on file with *Animal Law*) (stating that he had not yet seen signed consent from Browning as required by KY. Rev. Stat. 257.100 authorizing euthanasia).

<sup>63</sup> PENDLETON CNTY. FISCAL COURT, *supra* note 61.

Remarkably, no criminal investigation was undertaken.<sup>64</sup> The reason given, as stated by Rusty Ford, was that the horses did not belong to Browning.<sup>65</sup> In an extraordinary leap across a yawning credibility gap, KDA personnel—whose lack of cooperation would have made it difficult for the sheriff's office to proceed with an investigation—at least ostensibly believed that Browning was a victim of others dropping emaciated horses off on his property, rather than the perpetrator responsible for their condition.<sup>66</sup> a position implicitly belied by the absence of any report of abandoned horses from Browning to Animal Control and by the care taken to obtain a waiver of liability from him.<sup>67</sup> These facts strongly suggest that the ACO for the county was unwilling to act, and wanted no part in any investigation of Browning.<sup>68</sup>

After this incident, Larry Browning's operation continued unabated.<sup>69</sup> A follow-up visit to the premises by Animals' Angels in July 2013 concluded that nothing had changed since 2011.<sup>70</sup> To its credit, the county government in due course made efforts to put Browning's operation down. In January 2013, the fiscal court passed the detailed Pendleton County Ordinance 841.1, which is designed to "help prevent the starving and/or total neglect of an equine and/or equines by their owners, guardians, caretakers and/or harborers within Pendleton

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<sup>64</sup> See Alison Montoya, *Deputies Find 49 Dead Horses on Pendleton Co. Farm; Man Charged*, WLWT CINCINNATI, <http://www.wlwt.com/news/Deputies-find-49-dead-horses-on-Pendleton-Co-farm-man-charged/25368098> [<http://perma.cc/2HKR-BZC2>] (Apr. 8, 2014) (accessed Mar. 9, 2015) ("WLWT talked to Browning in 2011 when he was investigated after malnourished horses were found on his property. Back then, 10 horses were found in bad health and had to be euthanized but Browning was not charged."); *Kentucky's Walking Dead: Larry Browning's Horses*, RATE MY HORSE PRO, <http://www.ratemyhorsepro.com/news/kentuckys-walking-dead-larry-brownings-horses.aspx> [<http://perma.cc/Y7HW-7FWH>] (June 17, 2014) (accessed Mar. 9, 2015) (noting that in the aftermath of the 2011 KDA visit to Browning's site, "No action was taken").

<sup>65</sup> E-mail from Rusty Ford, *supra* note 62; see Maxim Alter & Tom McKee, *Man with 49 Dead Horses on Farm Claims Innocence*, WCPO CINCINNATI, <http://www.wcpo.com/news/region-northern-kentucky/man-with-49-dead-horses-on-farm-claims-innocence-says-horse-owners-thank-him> [<http://perma.cc/G54P-RTFY>] (updated Apr. 9, 2014) (accessed Feb. 13, 2015) (Browning claims that people abandon horses on his property and he "get[s] them fat again"); see also E-mail from Shelly Price to author, *supra* note 29 (noting that Rusty Ford spoke highly of Browning, and accepted Browning's explanation for the horses' presence and condition).

<sup>66</sup> EDMOND S. HALL, KY. DEP'T OF AGRIC., OFFICE OF THE STATE VETERINARIAN, INVESTIGATION/COMPLAINT FORM, #224 (Oct. 3, 2011) (on file with *Animal Law*).

<sup>67</sup> Indeed, the reason Rusty Ford gave for his concern that Browning consent to euthanasia in writing was that Dr. Hall's report did not include "any language stating that the horses have been determined to [have] been abandoned." E-mail from Rusty Ford, *supra* note 62.

<sup>68</sup> E-mail from Shelly Price to author, *supra* note 29 (noting that local ACOs were unwilling to "investigate Larry Browning in 2014").

<sup>69</sup> *Premises of Larry Browning, Butler, KY 7/14/13*, ANIMALS' ANGELS, <http://www.animalsangels.org/investigations/horses/premises-larry-browning-butler-ky-7-14-13> [<http://perma.cc/36S5-RT7D>] (July 14, 2013) (accessed Jan. 24, 2015).

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

County,<sup>71</sup> and Judge Bertram hired an ACO from another county specifically to investigate Browning.<sup>72</sup> However, the ordinance was not self-executing and the special ACO's authority was limited. Browning had deep roots in the community and many friends.<sup>73</sup> It therefore speaks for itself that Browning was able to continue his operation, with the knowledge of the county attorney and law enforcement, for another two and one-half years.

Finally, in April 2014, the special ACO was able to obtain a search warrant and entered Browning's property with a state police officer.<sup>74</sup> At the back of the property, mired in mud, they found the carcasses of forty-nine horses; an additional fifteen horses were found alive but emaciated and thirty more not yet emaciated but without intervention likely destined for the same fate.<sup>75</sup> Browning was arrested by the of-

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<sup>71</sup> Pendleton County, Ky., Ordinance 841.1 (Jan. 29, 2013), (available at [http://pendletoncounty.ky.gov/government/Documents/841.1 Starving Horse.pdf](http://pendletoncounty.ky.gov/government/Documents/841.1%20Starving%20Horse.pdf) [<http://perma.cc/8LV6-87Y7>] (accessed Jan. 27, 2015)). Notably, the ordinance defines a "harborer," against whom charges may be brought, as anyone who claims the horses that are the subject of a complaint were abandoned on his property, and any harborer may be held liable unless he makes a written report of the abandonment to an ACO within 24 hours of actual or constructive notice thereof. *Id.* It thus specifically addresses and eliminates the pretext which enabled Browning to avoid prosecution in 2011.

<sup>72</sup> See E-mail from Shelly Price to author, *supra* note 29 (explaining that after local ACOs failed to investigate Browning, Judge Bertram asked Shelly Price to recommend an outside ACO, causing her to refer him "to Scott Pracht of Kenton County"); see also *infra* note 78 and accompanying text (outlining the narrative of Scott Pracht, the ACO brought in to investigate Browning). Steve Johnson, the Pendleton County ACO who had been involved in the 2011 incident and who effectively refused to investigate Browning, remains the Pendleton County ACO as of this writing. See MITCHELL, KY. DEP'T OF AGRIC., #188, INVESTIGATION/COMPLAINT FORM (June 20, 2011) (on file with *Animal Law*) (commenting on interaction with Steve Johnson regarding complaints about Browning); *Kentucky Animal Care and Control Association Board of Directors*, KY. ANIMAL CARE & CONTROL, <http://www.kacca.org/board.htm#advisory> [<http://perma.cc/QCP7-K8PT>] (accessed Jan. 27, 2015) (showing that Steve Johnson continues to work as an ACO for Pendleton County).

<sup>73</sup> See Further Response to Request for Discovery at 3–5, *Commonwealth v. Larry Browning*, No. 14-M-0086 & 14-M-0087 (Pendleton Cnty. Cir. Ct. Nov. 7, 2014) (listing forty seven community members—including multiple law enforcement officers—who were willing to testify on Browning's behalf); see also Brian Mains, *Animal Control Officer: Pendleton County Drops 14 Animal Abuse Charges against Butler, Ky. Man*, WCPO, <http://www.wcpo.com/news/region-northern-kentucky/larry-browning-man-pendleton-county-man-animal-control-officer-pendleton-county-drops-14-animal-abuse-charges-against-butler> [<http://perma.cc/752N-N8LM>] (Jan. 11, 2015) (accessed Jan. 30, 2015) (a neighbor of Larry Browning's describes him—and the horses she had purchased from him—in positive terms, noting that he has been working with horses in the community for a long time).

<sup>74</sup> See Montoya, *supra* note 64 (reporting ACOs and others examined Browning's property); see also E-mail from Shelly Price to author, *supra* note 29 (noting ACO Scott Pracht obtained the warrant allowing search of Browning's property).

<sup>75</sup> Glenn Hartong et al., *Horse Farm 'Worst Case of Animal Cruelty I've Seen'*, CINCINNATI.COM, <http://www.cincinnati.com/story/news/2014/04/07/horses-found-dead-on-pendleton-county-property/7441131/> [<http://perma.cc/PG75-RA39>] (Jan. 29, 2015) (accessed Jan. 30, 2015). A local news outlet captured Browning's reaction: "I have not done one thing wrong." *Id.*



ficer and charged with fifteen counts of animal cruelty in the second degree,<sup>76</sup> a Class A misdemeanor.<sup>77</sup>

The full count of horses that suffered and died at the hands of Browning between October 2011 and April 2014 will no doubt never be known. Nor is it a foregone conclusion that Browning's arrest will result in the shutdown of his operation or a punishment more than a slap on the wrist.<sup>78</sup> It should be noted that the arrest, having been made without an arrest warrant,<sup>79</sup> did not require the prior buy-in of the county attorney.<sup>80</sup>

### B. *The Risers*

In the second case, law enforcement personnel of Harrison County, Kentucky, rather than the KDA, conducted the initial investigation of neglected horses<sup>81</sup> but the investigation was in essence

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<sup>76</sup> See Montoya, *supra* note 64 (stating the charges brought against Browning and his then-upcoming court date). The circumstances were such that an arrest warrant was not required. See KY. REV. STAT. ANN. § 436.605(2) (authorizing an immediate arrest in certain animal cruelty cases).

<sup>77</sup> KY. REV. STAT. ANN. § 525.130. Browning was also charged with forty-nine counts for the improper disposal of the horse carcasses that were found dead on the property. Montoya, *supra* note 64; see also KY. REV. STAT. ANN. § 263.090 (requiring proper disposal within forty-eight hours).

<sup>78</sup> Sadly, it can now be reported that the result was in fact a slap on the wrist, a stunning example of the power of a county attorney to block an animal cruelty prosecution from going forward. In January 2015, the week the trial was scheduled to begin, the county attorney entered into a plea agreement with Browning under which Browning was allowed to plead guilty to four counts of improper disposal of carcasses and all remaining charges against him, including the fourteen counts of animal cruelty, were dropped. Mains, *supra* note 73. His punishment was a 30-day suspended sentence, 18 months diversion, and a fine of \$7,500 payable in \$100/month installments. *Id.* Inexplicably, Browning was also allowed to keep five of the horses that had been confiscated from his property. *Id.* In response, the special ACO for Pendleton County, who had made the arrest and prepared the case against Browning, resigned from his position, saying he was "disgusted." *Id.*; see also *Equine Cruelty Investigator Quits Due to "Lack of Prosecution" of Larry Browning Case*, RATE MY HORSE PRO, <http://www.ratemyhorsepro.com/news/equine-cruelty-investigator-quits-due-to-lack-of-prosecution-of-larry-browning-case.aspx> [<http://perma.cc/WZ2F-4VHX>] (Jan. 15, 2015) (accessed Jan. 30, 2015) (quoting ACO Scott Pracht: "I didn't have a chance to present evidence to try to get a conviction. The judge and jury never saw the evidence. This lies solely on the county attorney. . . It is a waste of tax dollars." ACO Pracht further noted that Browning was in violation of a court order preventing him from owning more than five horses: "[Browning] should already be in contempt of court. I notified the prosecutor's office Friday that he has seven horses. We'll see what they do about it.").

<sup>79</sup> See *supra* note 76 (explaining an arrest warrant was unnecessary in these circumstances).

<sup>80</sup> See *supra* notes 19–21 and accompanying text (discussing the decreased likelihood of a county attorney bringing a case when the attorney did not issue an arrest warrant).

<sup>81</sup> See e-mail from Nicole T. W. Liberto, AGR, KDA, to Terry Torrance (Nov. 29, 2011) (on file with *Animal Law*) (noting initial investigative work conducted by the Harrison County Sheriff's department, and the KDA's subsequent decision not to take further action—though the KDA protested that Harrison County enforcement personnel should not have characterized the KDA's role as "taking over" . . . [the] investigation").

squelched by KDA personnel. The KDA concluded, despite abundant evidence to the contrary, that the standard of care provided was “acceptable.”<sup>82</sup>

The case involved the Risners, who had pled guilty in 2008 to eight counts of second-degree animal cruelty stemming from their profound neglect of thirty-six horses on their property.<sup>83</sup> As part of their plea bargain in that case, they were barred from owning horses for a two-year period.<sup>84</sup> However, just over a year after the prohibition expired they began buying up horses on the cheap in need of major rehabilitation, most likely for breeding, and turned the horses out onto their property with no available sustenance.<sup>85</sup>

In April of 2011, Deputy Robert Peak from the Harrison County Sheriff's office visited the Risner property in response to a complaint about the condition of the horses there and found two horses down, one of which was lying in the road.<sup>86</sup> Deputy Peak reported that “[t]here was no grass, no hay, no water” and the horses on the lot were “obviously in poor condition,” with missing hair, sores, lice, and significant weight loss.<sup>87</sup> Peak told reporters that charges were pending against the Risners following his visit.<sup>88</sup>

But it was not to be.<sup>89</sup> Rusty Ford, the same Rusty Ford from the KDA who had been involved in the Browning matter, also responded to

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

<sup>83</sup> Court Docket at 16–18, *Commonwealth v. Risner*, No. 07-M-00634 (2008) (unpublished case from Harrison County District Court) (on file with *Animal Law*); see also e-mail from Rusty Ford, Equine Programs Manager, KDA, to Edmond S. Hall, DVM, Assistant Director of Animal Health, KDA (Apr. 25, 2011) (on file with *Animal Law*) (recounting the details of the 2008 case). This earlier prosecution developed reluctantly, amidst rebuffed efforts from animal welfare advocates to encourage action. See Press Release, Animal Legal Def. Fund, ALDF Calls for Sweeping Reform in Laws Protecting Bluegrass State Horses (Apr. 30, 2008) (available at <http://aldf.org/press-room/press-releases/aldf-calls-for-sweeping-reform-in-laws-protecting-bluegrass-state-horses/> [<http://perma.cc/HLB5-Q7J8>] (accessed Jan. 30, 2015)) (ALDF made offers to assist authorities with the 2008 Risner case, which went unaccepted). County authorities failed to act until the state police, having concurrent jurisdiction, intervened. See *Arrests Made in Animal Cruelty Case*, WKYT, <http://www.wkyt.com/home/headlines/10978626.html> [<http://perma.cc/6PS5-2PBE>] (updated Nov. 2, 2007) (accessed Jan. 30, 2015) (noting that state police secured the search warrant and arrest warrants for the Risners).

<sup>84</sup> E-mail from Rusty Ford to Edmond Hall, *supra* note 83.

<sup>85</sup> Becky Barnes, *Officials Question Condition of Horses*, CYNTHIANA DEMOCRAT, 5 (available at <http://sections.lcni5.com/pdfs/081/3852.pdf> [<http://perma.cc/ZYE2-6ZSU>] (Apr. 28, 2011) (accessed Jan. 30, 2015)) (noting that Mrs. Risner indicated the horses found on her property without food had been acquired at Paris Stockyards on March 19, 2010; one horse was given to the Risners for free and two others were bought for \$2.50 each).

<sup>86</sup> E-mail from Rusty Ford, Equine Programs Manager, KDA, to Edmond S. Hall, DVM, Assistant Director of Animal Health, KDA (Apr. 25, 2011, 09:01 EST).

<sup>87</sup> Barnes, *supra* note 85.

<sup>88</sup> *Id.*

<sup>89</sup> See E-mail from Nicole Liberto, AGR, KDA, to Terry Torrance (Nov. 29, 2011, 18:07 EST) (showing no actions taken at least as of November, six months after the investigation).

the scene in response to a request from the Sheriff's Department.<sup>90</sup> Rusty Ford's subsequent report to Dr. Hall acknowledges the criminal history of the Risners and the poor condition of the horses, but makes no recommendation as to follow-up of any kind.<sup>91</sup> In a later e-mail in response to a citizen inquiry, Deputy Peak reported that Rusty Ford had "stated [at the time] that his office would handle the investigation and any forthcoming charges would be filed by the [Kentucky Department] of Agriculture, Law Enforcement division."<sup>92</sup> There is no law enforcement division in the KDA, which, as noted above, has no authority to file charges.<sup>93</sup> Deputy Peak acknowledged in the same e-mail that he was "able to file cruelty to animal charges," but added that "whenever horses are involved our policy is to refer the case to the [Kentucky Department] of Agriculture."<sup>94</sup>

The final chapter in this sad saga was written in July 2011, when Rusty Ford again responded to two more complaints about the Risners.<sup>95</sup> This time, per his report, three of the horses previously seen "remain[ed] in a less than ideal body condition,"<sup>96</sup> and for one horse, which had not improved, he suggested "additional supplemental nutrients."<sup>97</sup> Since one of the complaints was from a neighbor who had witnessed and photographed the Risners dragging a dead horse with their truck,<sup>98</sup> Rusty Ford asked the Risners about their disposal of horse carcasses and was told no horses had recently died.<sup>99</sup> Rusty Ford concluded that the allegation of equine abuse was "unfounded."<sup>100</sup> He did not speak to the neighbor who had witnessed and photographed the dead horse being dragged away.<sup>101</sup>

The statute of limitations for any charges against the Risners on account of the condition of the horses observed in April 2011 expired

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<sup>90</sup> E-mail from Rusty Ford to Edmond Hall, *supra* note 83.

<sup>91</sup> *Id.*

<sup>92</sup> E-mail from Robert Peak, Deputy, Harrison Cnty. Sheriff's Office, to Terry Torrance (Jan. 24, 2012) (on file with *Animal Law*).

<sup>93</sup> See *supra* notes 33–34 and accompanying text (explaining the limited capacity of the KDA).

<sup>94</sup> E-mail from Robert Peak, to Terry Torrance, *supra* note 92.

<sup>95</sup> See Memorandum from Rusty Ford, Equine Programs Manager, KDA, to Robert Stout, DVM, Exec. Dir. & State Veterinarian, Division of Animal Health, KDA (July 18, 2011) (on file with *Animal Law*) (reporting Rusty Ford's response to two calls).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> The neighbor, Ronald L. Perkins, wrote a hand-written letter on March 28, 2012, describing how he observed a dead horse on the Risners' land, photographed the Risners using a truck to drag the horse's body away, and subsequently lodged complaints with local law enforcement and the KDA. E-mail from Virginia Coleman to Lora Dunn, Staff Attorney, ALDF (Apr. 17, 2015) (on file with *Animal Law*).

<sup>99</sup> Memorandum from Rusty Ford to Robert Stout, *supra* note 95.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* See also E-mail from author to Lora Dunn, *supra* note 98 (Ronald Perkins explains that Rusty Ford never spoke with him regarding his observation of a dead horse on the Risner property).

the following year.<sup>102</sup> The Risners have since moved their horses to a location that is not visible from the public road.<sup>103</sup>

So where does the Council fit into enforcement of the law against those who abuse and neglect horses? The answer is, it does not. That was not the purpose of the Council and it has not assumed any such role. Beyond that, the composition of the Council as a practical matter all but guarantees that it will do nothing to change the status quo.<sup>104</sup>

### III. ORIGIN AND OPERATION OF THE COUNCIL

The impetus for the Council came from the Equine Health & Welfare Alliance, Inc., a charitable, tax-exempt organization with the stated purpose of “represent[ing] the horse’s best interests alone.”<sup>105</sup> It was conceived “not . . . to investigate horse owners and confiscate abused or neglected horses,” but rather “to help someone who has good intentions and has the best interest of that horse at heart.”<sup>106</sup> Such a purpose, while well and good, does nothing to alleviate the plight of the many horses at the hands of those who do not have their best interest at heart.

Even in its origin, then, the Council was not intended to be a tool to prevent equine neglect and abuse.<sup>107</sup> By the time the Council came out of the legislative meat-grinder, it had gone considerably farther afield from any such mission, having morphed into a joint effort of the

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<sup>102</sup> See E-mail from Robert Peak to Terry Torrance, *supra* note 92 (explaining if a charge was to be brought, it would have to be before the statute of limitations expired in 2012).

<sup>103</sup> Animals’ Angels visited the Risners’ property in December 2011. *Premises of Mr. & Mrs. Risner, Cynthia, KY 12/3/11*, ANIMALS’ ANGELS, <http://www.animalsangels.org/investigations/horses/premises-mr-mrs-risner-cynthia-ky-12-3-11> [<http://perma.cc/2G8Z-VTQ3>] (Jan. 23, 2012) (accessed Apr. 3, 2014). The horses visible were too far away to judge their condition, but trash and pieces of metal were “dumped throughout the premises,” putting the horses at risk for injury. *Id.* Water tubs were visible but had been turned over. *Id.* No hay was visible at the outset of the visit but while the group was filming someone came out of the house and tossed some hay to three mules also on the premises. *Id.* See also E-mail from Shelly Price to author, *supra* note 29 (noting reports from neighbors that the Risners had moved their horses “onto a piece of property where the horses could not be seen from the road,” and adding that she had personally confirmed that horses were not visible from the public road).

<sup>104</sup> See *infra* Part III (describing the Council’s origin, limitations, and membership).

<sup>105</sup> Denise Steffanus, *New Advocacy for Horses: Bill to Protect Kentucky’s Horses Moves through Legislature*, EQUINE HEALTH & WELFARE ALLIANCE, [www.equinehealthandwelfare.org/2010/04/05/new-advocacy-for-horses.html](http://www.equinehealthandwelfare.org/2010/04/05/new-advocacy-for-horses.html) [<http://perma.cc/HE2U-ZXYK>] (Apr. 5, 2010) (accessed Feb. 18, 2015). See also *Kentucky Equine Health & Welfare Council Formed*, KY. FARM BUREAU, <https://www.kyfb.com/news/2010/Kentucky-Equine-Health-Welfare-Council-formed-6810/> [<http://perma.cc/VUR3-K7E9>] (July 1, 2010) (accessed Mar. 7, 2015) (noting the Equine Health & Welfare Alliance’s critical role in securing passage of HB 398, which created the Council); *About*, EQUINE HEALTH & WELFARE ALLIANCE, <http://www.equinehealthandwelfare.org/about> [<http://perma.cc/9FSY-6UM7>] (May 8, 2011) (accessed Mar. 7, 2015) (“The Equine Health and Welfare Alliance, Inc. is a Kentucky based 501 (c) 3 corporation.”).

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

<sup>107</sup> *Id.*

equine industry and equine veterinarians: groups with considerable but quite distinct interests in horses. Of the thirteen voting members of the Council, only one is required to be from the horse rescue community; the other twelve are governmental, academic, or private representatives from the agriculture industry, the equine industry, or veterinary practitioners.<sup>108</sup>

The duties and functions of the Council, which are vaguely described in terms of promoting the “health, welfare and safety of equines,”<sup>109</sup> do not include the ability to adopt binding rules and regulations of any kind.<sup>110</sup> The Council can only make suggestions for statutory changes to the Kentucky Livestock Care Standards Commission (the Commission),<sup>111</sup> a body created at the same time as the Council, through an amendment of the same enacting bill.<sup>112</sup>

The impetus for the Commission came from the Kentucky Farm Bureau,<sup>113</sup> the self-described “voice of Kentucky agriculture.”<sup>114</sup> The purview of the Commission extends to all “on-farm livestock and poultry;” its thirteen voting members include no representatives of farm animal welfare groups or animal welfare groups of any kind.<sup>115</sup> The stated purpose of the Commission is to recommend “standards governing the care and well-being of on-farm livestock and poultry” to the Board of Agriculture, which then has ninety days to approve or reject them.<sup>116</sup>

In short, what the legislature created in the Council was a group dominated by representatives of the equine industry, reporting to a group created by and composed of representatives of the agricultural industry.<sup>117</sup> Such a group with such a process was not likely to produce

<sup>108</sup> KY. REV. STAT. ANN. § 257.472(2).

<sup>109</sup> *Id.* § 257.472(1).

<sup>110</sup> *Id.* § 257.474.

<sup>111</sup> *Id.* § 257.474(4).

<sup>112</sup> See *HB398-10RS*, KY. LEG., <http://www.lrc.ky.gov/record/10rs/HB398.htm> [<http://perma.cc/C5WZ-R8WN>] (showing legislative history of enactment); see also Tim Thornberry, *Horse Council Supports New Kentucky Livestock Care Bills*, FARM WORLD, <http://www.farmworldonline.com/News/NewsArticle.asp?newsid=9829> [<http://perma.cc/9Z7F-2G8M>] (Mar. 31, 2010) (accessed Mar. 1, 2015) (reporting on the combining of bills, H.B. 398 and S.B. 105).

<sup>113</sup> *Legislative Report #13—Final Report*, KY. FARM BUREAU, [https://www.kyfb.com/media/files/fed/legislative-affairs/2010/Final Report13.pdf](https://www.kyfb.com/media/files/fed/legislative-affairs/2010/Final%20Report13.pdf) [<http://perma.cc/547E-CUPD>] (Apr. 28, 2010) (accessed Mar. 7, 2015) (“Kentucky Farm Bureau was involved in many pieces of legislation this session. . . . We were able to secure passage of one of our priority issues this year, when the Livestock Care Standards Commission legislation was signed into law on April 12, 2010.”).

<sup>114</sup> KY. FARM BUREAU, <https://www.kyfb.com/federation> [<http://perma.cc/Y4Z6-VGU6>] (accessed Jan. 30, 2015).

<sup>115</sup> KY. REV. STAT. ANN. § 257.192(3).

<sup>116</sup> *Id.* § 257.196(1).

<sup>117</sup> Note in particular that the Council is chaired by none other than Rusty Ford, whose views on equine abuse and neglect are abundantly evident from his participation in the Browning and Risner cases discussed above. See Audio CD: Kentucky Equine Health and Welfare Council Meeting, 00:57:35 (Sept. 28, 2011) (on file with *Animal Law*) (noting Rusty Ford chairs the Council).

measures to safeguard the welfare of abused and neglected horses in Kentucky, and indeed it has not. The only feeler in that direction—a proposal by member Dr. Frank Marcum in 2011 to establish a subcommittee to review complaints referred to the Council regarding KDA investigations—was rejected as unnecessary.<sup>118</sup>

What Kentucky needs instead are changes in the law that will create an environment more conducive to enforcement of the animal cruelty laws against equine abusers, provide immediate relief and care for horses in the hands of offenders, and strengthen existing animal cruelty laws. In addition, since much of the abuse occurs incidental to the business of slaughter, statutes to inhibit or eliminate the sale of unwanted and uncared for horses, often destined for slaughter, would be a step forward.<sup>119</sup>

#### IV. LEGISLATIVE RECOMMENDATIONS

##### A. *Increase Incidence of Prosecution of Abuse or Neglect*

As shown in Part II above, the deck is now stacked against the prosecution of equine abusers in Kentucky. County law enforcement is reluctant or unwilling to take action and refers complaints to the Kentucky Department of Agriculture (KDA), which likewise has no interest in pursuing criminal action. Those odds could be significantly altered by the following changes in the law.

##### 1. *Require Reporting by Veterinarians*

Throughout the United States, state laws require medical professionals to report to child welfare authorities cases of injury to a child that they suspect involve abuse or neglect on the part of the child's caregiver.<sup>120</sup> The analogy between an abused or neglected child and an abused or neglected animal is immediate and compelling: both are, by definition, innocent and undeserving of such treatment while, at the same time, helpless to defend against it or to seek help on their own. Accordingly, just as medical professionals have a duty to report child abuse, so in a number of states veterinary professionals are statutorily required to report suspected animal abuse or neglect.<sup>121</sup> Many states

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<sup>118</sup> *Id.*

<sup>119</sup> See Jessica Brockway, Legislative Review, *2014 Federal Legislative Review*, 21 Animal L. 373–75 (2015) (describing unsuccessful legislative efforts to halt transport of horses from the U.S. abroad for slaughter).

<sup>120</sup> See CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERV., MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT (2014) (available at <https://www.childwelfare.gov/pubPDFs/manda.pdf> [<http://perma.cc/ZFX7-NFWC>] (accessed Feb. 4, 2015)) (compiling state laws for professionals required to report suspected child abuse or neglect).

<sup>121</sup> See, e.g., ARIZ. REV. STAT. ANN. § 32-2239 (2014) (mandating reporting of suspected dog fighting or animal abuse); CAL. BUS. & PROF. CODE § 4830.5, 4830.7 (West 2014) (mandating reporting of animal fighting and animal cruelty); COLO. REV. STAT. § 12-64-121 (2014) (mandating reporting of suspected animal cruelty or animal fighting); 225 ILL. COMP. STAT. 115/25.19 (2014), 510 ILL. COMP. STAT. 70/3.07, 70/4.01 (man-

which do not mandate reporting implicitly encourage it by providing for immunity from criminal or civil liability if such a report is made in good faith.<sup>122</sup> On the other end of the spectrum, standing by itself, is Kentucky, where veterinarians are *prohibited* by law from releasing “information concerning . . . care of a client’s animal” except with the client’s consent or “[a]n appropriate court order or subpoena.”<sup>123</sup> Thus, a veterinarian is required to be complicit in acts of animal abuse or neglect—a silent abettor, if you will—unless and until an investigation into the matter is instigated in some other way and a court order received.<sup>124</sup>

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dating reporting of aggravated cruelty or torture, injuries or wounds resulting from fighting); KAN. ADMIN. REGS. § 70-8-1(p) (2014) (mandating reporting of cruel or inhumane treatment of animals if veterinarian has direct knowledge); ME. REV. STAT. tit. 7, § 4018 (2015) (mandating reporting of suspected aggravated cruelty); MINN. STAT. § 346.37(6) (2014) (mandating reporting of known or suspected cases of abuse, cruelty, or neglect); NEB. REV. STAT. § 28-1020 (2015) (mandating reporting of suspected cases of abandonment, cruel neglect, or cruel mistreatment); N.D. CENT. CODE, § 36-21.2-10 (2014) (mandating report of neglect, abuse, and cruel treatment); OKLA. STAT. tit. 21, § 1680.3 (2014) (mandating reporting of suspected animal abuse); OR. REV. STAT. § 686.455 (2013) (mandating report of aggravated animal abuse); W. VA. CODE § 7-10-4a (2014) (mandating reporting of suspected abandonment, neglect, or cruel treatment); WIS. STAT. § 173.12(1) (2015) (mandating reporting of animal fighting). Of the states which have some form of mandatory reporting, only three—Kansas, Minnesota, and Wisconsin—do not provide for immunity, and require reporting only in narrow circumstances. See KAN. ADMIN. REGS. § 70-8-1(p) (mandating reporting where veterinarian has direct knowledge); MINN. STAT. § 346.37(6) (mandating reporting where veterinarian knows or suspects cruelty is occurring); WIS. STAT. § 173.12(1) (mandating reporting where there is reason to believe the animal has been in a fighting exhibition). The American Animal Hospital Association supports mandatory reporting, coupled with immunity. *Animal Abuse Reporting*, AM. ANIMAL HOSP. ASS’N, <https://www.aahanet.org/Library/AnimalAbuseRpt.aspx> [<http://perma.cc/KSQ9-DM34>] (updated Oct. 2009) (accessed Jan. 30, 2015). The American Veterinary Medical Association recognizes the duty to report as “necessary to protect the health and welfare of other individuals or animals.” *Principles of Veterinary Medical Ethics of the AVMA*, AM. VETERINARY MED. ASS’N, <http://www.avma.org/KB/Policies?Pages?Principles-of-Veterinary-Medical-Ethics-of-the-AVMA.aspx> [<http://perma.cc/U938-289P>] (Jan. 2015) (accessed Jan. 30, 2015).

<sup>122</sup> See, e.g., FLA. STAT. § 828.12 (2014) (holding state-licensed veterinarians “harmless from either criminal or civil liability for any decisions made or services rendered under the provisions of [Florida’s animal cruelty statute]. Such a veterinarian is, therefore, . . . immune from a lawsuit for his or her part in an investigation of cruelty to animals.”). Similarly, while Delaware generally forbids veterinarians from revealing privileged communications regarding an animal in their care, the state explicitly flags as non-privileged sharing an animal’s medical information with law enforcement, animal control, or humane society officers. See 24 DEL. ADMIN. CODE § 3300-3.0 (2014) (“Veterinarians must . . . not willfully [reveal] privileged communications regarding the diagnosis and treatment of an animal. . . . sharing of veterinary medical information . . . [with] peace officers, humane society officers, or animal control [is not considered privileged communication].”).

<sup>123</sup> KY. REV. STAT. ANN. § 321.185(3)(b).

<sup>124</sup> The statutory prohibition on veterinarian reporting dates back only to 2009 (Senate Bill 151); an effort by Representative Tom McKee to amend the bill to provide immunity from liability for good faith reporting of suspected animal cruelty was unsuccessful. Compare S. 151, 2009 Reg. Sess. (Ky. 2009) (codified at KY. REV. STAT. ANN. § 321.185) (available at <http://www.lrc.ky.gov/Statrev/ACTS2009RS/0039.pdf>)

Such a rule is not only indefensible on its face but also inconsistent with Kentucky's own Code of Ethical Conduct for veterinarians, the violation of which can lead to suspension or revocation of a veterinarian's license.<sup>125</sup> Section 16 of the Code prohibits a veterinarian from practicing "so as to endanger the health and welfare of his patients;"<sup>126</sup> Section 23 requires the veterinarian to maintain confidentiality with his clients except as "required by considerations related to public health or animal health."<sup>127</sup> If a veterinarian is muzzled by law from taking steps to alleviate the abuse of a patient at the hands of its caregiver, is that veterinarian not endangering the health and welfare of that patient? Similarly, do not considerations related to animal health require reporting of such a circumstance?

No other state prohibits reporting in all circumstances absent a court order or client consent.<sup>128</sup> Since veterinary professionals are subject to a duty to safeguard the health and welfare of their patients, it follows that reporting of suspected cases of torture, fighting, or cruel neglect, all terms used in the applicable anti-cruelty statutes,<sup>129</sup> should be mandatory, and anyone who reports in good faith should be immune from liability. Making reporting mandatory rather than merely permissive is important because it would impose a duty on those equine veterinarians who, sadly, are more friends of the horse industry than of horses themselves and who, left to their own devices, might otherwise choose not to report.

## 2. *Improve Level of Enforcement*

The single biggest reason for the abysmal level of equine protection in Kentucky is the failure on the part of those charged with enforcing the existing laws, such as they are, to actually do so. The reasons for this lack of enforcement, to a great extent, stem from the enforcement structure itself: the fact that enforcement occurs at the county level, thus dispersed among 120 jurisdictions, by elected officials, with

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[<http://perma.cc/HG49-SL2P>] (accessed Mar. 31, 2015)), with SB 151-09RS, KY. LEG., <http://www.lrc.ky.gov/record/09rs/SB151.htm> [<http://perma.cc/44AU-2EST>] (accessed Mar. 31, 2015) (showing proposed amendment by T. McKee). Perhaps not coincidentally, Rep. McKee's district includes Pendleton County, home of the Browning operation. See STATE REPRESENTATIVE TOM MCKEE, <http://tomckee.com/> [<http://perma.cc/JZ97-WML4>] (accessed Mar. 1, 2015) (noting his service to Pendleton since 1997). A similar amendment was proposed but likewise failed to pass in 2010. H.R. 238, 2010 Reg. Sess. (Ky. 2010) (available at <http://www.lrc.ky.gov/record/10rs/HB238.htm> [<http://perma.cc/73LL-WZYL>] (accessed Jan. 27, 2015)).

<sup>125</sup> 201 KY. ADMIN. REGS. 16:010 (2014).

<sup>126</sup> *Id.* at 16:010(16).

<sup>127</sup> *Id.* at 16:010(23).

<sup>128</sup> See *Veterinarian's Role in Reporting Animal Cruelty*, ANIMAL LEGAL DEF. FUND, <http://aldf.org/resources/laws-cases/veterinarians-role-in-reporting-animal-cruelty> (click "Download") [<http://perma.cc/ES4C-T5YD>] (accessed Jan. 28, 2015) (listing Kentucky as the only state prohibiting veterinarian reporting of animal abuse).

<sup>129</sup> See KY. REV. STAT. ANN. §§ 525.125, 525.130, 525.135 (stating charges regarding animal fighting, neglect, and torture of dogs and cats, respectively).



no oversight.<sup>130</sup> The very reliance on the KDA to investigate equine complaints illustrates the utter failure of the system to protect horses, inasmuch as the KDA by law has no enforcement authority and, as the record shows, no inclination to assume such a role.<sup>131</sup>

As an initial step to change this inadequate system, Kentucky could extend the ability to obtain a search warrant in animal cruelty matters to concerned citizens, following the lead of states like Minnesota, which authorizes “[a]ny person who has reason to believe that a violation of [animal cruelty laws] has taken place or is taking place” to apply to the court having jurisdiction for a warrant and an investigation.<sup>132</sup> If the court determines that there is probable cause, it will issue a search warrant and “command” law enforcement “to proceed promptly to the location of the alleged violation” to investigate.<sup>133</sup>

By itself, such a change to the search warrant application process—though useful in particular situations such as the Risner case discussed above in which law enforcement took no action—still would leave in place a grossly inadequate criminal enforcement structure. A change to that structure itself would likely be necessary in order to make a significant difference in the level of enforcement statewide. As a practical matter, a fundamental revamping of the criminal enforce-

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<sup>130</sup> See *supra* notes 18, 24, and accompanying text (noting both the county-by-county enforcement system and county system in Kentucky). This structure and the resulting failure to enforce Kentucky’s current laws also serve as a convenient excuse for the legislature to do nothing to remedy the situation. As one Kentucky senator told WKYT News in response to a request for comment on the state’s last-place animal protection ranking: “It doesn’t matter what laws we pass here in Frankfort if they’re not enforced in the communities where these acts are taking place. . . . If the law’s not enforced, KRS doesn’t really matter. . . . And we can’t enforce the law, we make the law. So if our prosecutors throughout Kentucky are not enforcing the law . . . there’s nothing we can do about that. We basically have no oversight authority over our law enforcement officers or over our prosecutors. We can pass law, but ultimately it’s their responsibility to carry out enforcement of the law and the prosecution of the people who offend.” Kristin Kennedy, *Reality Check: Why Kentucky Is in Dog House for Animal Abuse*, WYMT TV, [http://www.wkyt.com/wytm/home/headlines/Kentucky\\_worst\\_in\\_nation\\_at\\_fighting\\_animal\\_abuse\\_138760019.html](http://www.wkyt.com/wytm/home/headlines/Kentucky_worst_in_nation_at_fighting_animal_abuse_138760019.html) [<http://perma.cc/27KD-XNPY>] (Feb. 8, 2012) (accessed Jan. 27, 2015). Such blithe acceptance of the status quo ignores, willfully or not, the kinds of legislative steps discussed in this Part that would at the least challenge the status quo and make it more difficult for law enforcement to turn a blind eye: mandatory reporting of abuse by veterinarians, authorizing citizen application for search warrants, and mandating enforcement by those authorized to investigate, arrest, and prosecute.

<sup>131</sup> See Kennedy, *supra* 130 (noting State Senator Ray S. Jones’s criticism of Kentucky prosecutors and law enforcement for failing to implement current animal abuse laws).

<sup>132</sup> MINN. STAT. § 343.22.

<sup>133</sup> *Id.*; see also, e.g., CONN. GEN. STAT. § 54-33a (2015) (allowing warrant issuance “upon complaint . . . by any two credible persons”); FLA. STAT. § 933.06 (2012) (describing warrant application by “some person”); IOWA CODE § 808.3 (2015) (allowing “[a] person” to “make application for the issuance of a search warrant”); KAN. STAT. ANN. § 22-2502 (2012) (“A search warrant shall be issued only upon the oral or written statement . . . of any person under oath or affirmation”); MISS. CODE ANN. § 99-15-11 (2014) (allowing warrant issuance “on the affidavit of a credible person”).

ment structure is unlikely. It is suggested, therefore, that the restructuring be limited to the lowest level, which is also unique to the enforcement of crimes against animals: the animal control officer (ACO).<sup>134</sup> Most ACOs in Kentucky lack the training to recognize equine abuse, much less investigate it in such a way as to facilitate rather than jeopardize prosecution. Enforcement assistance should be put in the hands of individuals who have satisfied mandatory educational requirements in animal cruelty investigations or have otherwise demonstrated proficiency in the requisite skills.<sup>135</sup> These individuals should also have arrest authority, which ACOs do not have. They should be employed as efficiently and effectively as possible, which might well mean having authority to act in, say, a district rather than a single county.<sup>136</sup> Finally, they should be required by statute to perform their jobs, just as is recommended below for regular law enforcement.

A logical source for individuals to function in this capacity is recognized animal welfare organizations operating in the state. In a number of states, designated agents of such organizations, given specific enforcement powers by statute, play a valuable role on the frontline in responding to complaints of animal abuse, investigating the situation, interceding as required, and laying the groundwork for prosecution.<sup>137</sup>

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<sup>134</sup> In an ideal world, crimes against animals would be handled by regular law enforcement officers just like all other crimes. Arguably, removing the responsibility of enforcing animal crimes from the county sheriff's departments, as Kentucky and a number of other states have done, implicitly labels these crimes as being of lesser importance and sanctions their lax or nonexistent enforcement by regular law enforcement. However, given the indifference so regularly shown by regular law enforcement in Kentucky, as a practical matter it would be more effective to put the powers to investigate *and* arrest in the hands of skilled, committed individuals than to eliminate ACOs entirely and rely on county sheriffs to assume this role directly.

<sup>135</sup> See, e.g., N.J. REV. STAT. §§ 4:19-15.16a, 4:22-11.11 (West 2015) (outlining the training necessary for ACOs and other law enforcement to be adequately prepared to address animal abuse); see also N.C. GEN. STAT. § 19A-49 (2013) (requiring ACOs to attend a course to familiarize them with methods of responding to complaints relating to animal welfare issues).

<sup>136</sup> See *supra* note 18 and accompanying text (discussing difference between districts and counties).

<sup>137</sup> Connecticut, Delaware, Florida, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont, Washington, and Washington D.C. all have such statutes. CONN. GEN. STAT. § 29-108B (appointing members of the Connecticut Humane Society as "special police officers"); 3 DEL. CODE ANN. tit. 3, §§ 7901-7902 (2015) (creating the Delaware Society for the Prevention of Cruelty to Animals, and authorizing it to "enforce all laws enacted for the protection of animals"); D.C. CODE § 22-1005 (2015) (search warrants relating to alleged violations of D.C. animal cruelty laws authorize marshals, police officers, and Washington Humane Society officers to conduct lawful searches); FLA. STAT. § 828.03, 828.073 (allowing groups organized in prevention of animal cruelty to appoint investigatory agents with seizure powers, subject to approval by mayors or judges); MD. CODE ANN., CRIM. LAW § 10-609 (LexisNexis 2012) (allowing humane society officers outside of Baltimore County who witness misdemeanor animal cruelty to arrest the offender); MASS. GEN. LAWS CH. 22C, 57 (2014) (allowing the colonel of state police to designate agents of various private animal rescue groups as "special state police officers" with

This is one—if not the only—model that Kentucky could adopt; the key is to put in place knowledgeable, vigorous first responders to animal abuse.

Such a change would not solve the problem of the county sheriff who turns a blind eye to animal offenses, or the county attorney who chooses not to prosecute them: issues which are addressed below. However, it would at least ensure that cases were put in the pipeline and, as a result, put pressure on law enforcement to take further steps.

### 3. *Require Enforcement by Those Authorized to Arrest and Prosecute*

Kentucky requires the arrest of an animal cruelty offender only in narrow circumstances: where a peace officer,<sup>138</sup> pursuant to the execution of a search warrant, “finds that an act of cruelty, mistreatment, or torture of animals is being perpetrated.”<sup>139</sup> In such a case, “the of-

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arrest and detention powers specific to acts of suspected animal cruelty); MINN. STAT. § 343.01, 343.06, 343.10 (giving state and local animal cruelty prevention groups authority to appoint trained and experienced agents “for the purpose of investigating or otherwise assisting . . . in the prosecution of persons charged with cruelty to animals”); NEV. REV. STAT. § 574.040 (2015) (setting out procedure by which members of state corporations organized “for the purpose of preventing cruelty to animals” may be granted arrest powers, with judicial approval); N.H. REV. STAT. § 105:18 (2015); (allowing county sheriffs to designate members of anti-animal cruelty corporations as special deputies, with arrest powers); N.J. REV. STAT. § 4:22-11.4, 4:22-44; (giving the New Jersey Society for the Prevention of Cruelty to Animals statutory authority to “appoint agents for enforcing all laws and ordinances enacted for the protection of animals and for the investigation of alleged acts of cruelty to animals within the State”; such agents have arrest powers); N.Y. AGRIC. & MKTS. LAW § 371 (McKinney 2014), N.Y. CRIM. PROC. 2.10(7) (McKinney 2014) (designating “officers or agents of a duly incorporated society for the prevention of cruelty to animals” as peace officers, and allowing them to “lawfully intervene to prevent the perpetration of any act of cruelty upon any animal in [their] presence”); OHIO REV. CODE ANN. (West 2013) § 1717.06 (authorizing county humane societies to appoint agents with arrest powers “for the purpose of prosecuting any person guilty of an act of cruelty to persons or animals;” such agents must complete a required amount of training and are subject to executive or judicial approval); 22 PA. CONS. STAT. §§ 3701–3718 (2014) (state regulations concerning “humane society police officers,” who’s authority is limited to enforcing “animal cruelty laws only within the particular county” for which they are appointed); R.I. GEN. LAWS § 4-1-21 (2014) (giving agents of “the Rhode Island society for the prevention of cruelty to animals . . . the same power and authority to arrest [and execute search warrants] as any officer . . . for the purpose of enforcing any of the laws of this state in relation to cruelty to animals”); TENN. CODE ANN. § 39-14-210 (2015) (authorizing “agents of any society . . . incorporated for the prevention of cruelty to animals . . . [to] make arrests . . . [of] offenders found violating” animal cruelty laws against non-livestock animals); 13 VT. STAT. §§ 351(4), 354(B) (2014) (authorizing “any humane officer”—including humane society employees—to enforce the state’s animal cruelty laws); WASH. REV. CODE § 16.52.020, 16.52.025 (2014) (authorizing humane societies and societies for the prevention of animal cruelty to appoint agents—subject to judicial approval—who have enforcement powers vis-à-vis state animal cruelty laws).

<sup>138</sup> Peace officers in this context would include the county sheriff, deputy sheriffs, and state police but, as mentioned in note 15, would not include ACOs, who do not have arrest powers.

<sup>139</sup> KY. REV. STAT. ANN. § 436.605.

fender or offenders *shall be* immediately arrested by the peace officer and brought before the court for trial.”<sup>140</sup> Given the demonstrated reluctance of law enforcement to take action against equine abusers in Kentucky, a broader duty on the part of law enforcement to arrest and prosecute violators of the state’s animal cruelty laws (including arrest without a warrant in those circumstances when constitutionally permissible) would be a salutary step.<sup>141</sup>

Several states explicitly impose a duty to investigate, arrest, and/or prosecute violators of the animal cruelty laws.<sup>142</sup> Further, in Michigan, a violation of the duty to “arrest and prosecute” is a misdemeanor,<sup>143</sup> and in West Virginia failure to investigate and take proper measures “may constitute good cause for removal from employment.”<sup>144</sup> Simply imposing the duty would, at a minimum, enhance the likelihood of success of a mandamus action, if it should come to that, against a county sheriff or county attorney who consistently turned a blind eye to complaints of equine cruelty or neglect, although the likelihood of success would in any event be far from assured.<sup>145</sup>

<sup>140</sup> *Id.* (emphasis added).

<sup>141</sup> Section 258.225 provides that it is “unlawful” for a peace officer or ACO to “refuse to perform his duties under the provisions of this chapter.” *Id.* § 258.225. However, “this chapter” does not include the animal cruelty statutes; in addition, even if it did, “refuse” would create a high bar. Compare KY. REV. STAT. ANN. § 258.225 (stating refusal to perform duties is unlawful under chapter 258), with KY. REV. STAT. ANN. §§ 525.125, 525.130, 525.135 (showing various animal cruelty statutes under chapter 525).

<sup>142</sup> See, e.g., FLA. STAT. § 828.17 (“Any [law enforcement officer] shall arrest without warrant any person found violating any of the provisions of [the animal cruelty statutes.]”); MD. CODE ANN., CRIM. LAW § 10-609 (“[I]f an officer of a humane society sees a person committing a misdemeanor that involves cruelty to an animal, the officer shall arrest . . . the person committing the misdemeanor.”); MICH. COMP. LAWS § 750.52 (2014) (“It shall also be the duty of all [law enforcement officers] to arrest and prosecute all persons of whose violation of the [animal cruelty statutes] they may have knowledge or reasonable notice. . . .”); MINN. STAT. § 343.12 (“[I]t shall be the duty of any [law enforcement officer] to investigate any alleged violation of the law relative to cruelty of animals, and to arrest any person found violating those laws.”); N.Y. AGRIC. & MKTS. LAW § 371 (“A constable or police officer must . . . summon or arrest . . . any person offending against any of the provisions of [the animal cruelty statutes]”); OR. REV. STAT. § 133.379 (“It shall be the duty of any peace officer to arrest and prosecute any violator of [the animal cruelty statutes] for any violation which comes to the knowledge or notice of the officer.”); R.I. GEN. LAWS § 4-1-20 (“Any [law enforcement officer] shall prosecute all violations of this chapter which come to his or her knowledge. . . .”); VA. CODE § 3.2-6567 (2014) (Law enforcement “shall enforce the provisions of [the animal care chapter] to the same extent other laws in the Commonwealth are enforced.”); and W.VA. CODE § 7-10-1 (LexisNexis 2015) (“[All humane officers] shall investigate all complaints . . . of cruel or inhumane treatment of animals . . . and . . . shall personally see that the law relating to the prevention of cruelty to animals is enforced.”).

<sup>143</sup> MICH. COMP. LAWS § 750.52.

<sup>144</sup> W.VA. CODE ANN. § 7-10-1. Unfortunately, the fact that a county sheriff and county attorney in Kentucky are elected officers rather than employees precludes the use of the West Virginia approach in Kentucky. See *supra* text accompanying note 18 (noting Kentucky’s officials are elected).

<sup>145</sup> Compare *In re Jurnove v. Lawrence*, 832 N.Y.S.2d 655 (App. Div. 2007), and *State ex rel. Ginsburg v. Naum*, 318 S.E.2d 454, 454–456 (W. Va. 1984) (suggesting the viability of such an action), with *Dix v. Superior Court*, 807 P.2d 1063, 1066 (Cal. 1991)

#### 4. Authorize Civil Action by Private Citizens<sup>146</sup>

The criminal system is not the only recourse to stop animal abuse; with proper legislation the civil system may be used as well. Furthermore, a civil proceeding carries with it fewer procedural safeguards for the defendant: a lower burden of proof, no right to a jury trial, no exclusionary rule, and no right to counsel.<sup>147</sup> Thus, the civil system is inherently a forum in which the plaintiff is more likely to prevail. In Kentucky, where enforcement of the criminal animal cruelty laws is ineffective at best, the availability of a civil remedy could make an especially meaningful difference.

North Carolina leads the way in authorizing such a civil action, providing “a civil remedy for the protection and humane treatment of animals in addition to any criminal remedies that are available.”<sup>148</sup> Any person, regardless of residence, may bring an action under the statute, seeking a preliminary injunction to provide care for the animal and take possession of it.<sup>149</sup> If the court finds that the evidence supports the allegation of cruelty, the court may make the injunction permanent or terminate the defendant’s ownership rights and may also award the costs of providing care to the animal in the costs allowed to the plaintiff.<sup>150</sup> Finally, the defendant may be enjoined from acquiring new animals for a specified period of time or may be limited in the number of animals that may be acquired.<sup>151</sup>

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(“[N]either a crime victim nor any other citizen has a legally enforceable interest, public or private, in the commencement, conduct or outcome of criminal proceedings against another.”).

<sup>146</sup> This section draws heavily on material presented by Scott Heiser, Director of the Criminal Justice Program at the Animal Legal Defense Fund, at the 2013 Animal Law Conference at Stanford Law School. Scott Heiser, *Finding New Ways to Protect Animals: Civil Legislative Solutions for Criminal Acts*, 2013 Animal Law Conference (Oct. 26, 2013) (available at <https://youtu.be/p1WJmloKiUY> [<http://perma.cc/66FD-P56Y>] (accessed Apr. 17, 2015)).

<sup>147</sup> See *U.S. v. Janis*, 428 U.S. 433 (1976) (ruling that the exclusionary rule is inapplicable to civil trials); Jacob R. Fiddelman, Note, *Protecting the Liberty of Indigent Civil Contemnors in the Absence of a Right to Appointed Counsel*, 46 COLUM. J.L. & SOC. PROBS. 431, 434 (2012) (discussing the lower burden of proof and no right to appointed counsel at civil proceedings); Randy J. Holland, *State Jury Trials and Federalism: Constitutionalizing Common Law Concepts*, 38 VAL. U. L. REV. 373, 398–99 (2004) (noting that the Seventh Amendment’s guarantee of jury trials in civil proceedings has not been incorporated under the Fourteenth Amendment, so the right to jury trial in civil proceedings depends on state law).

<sup>148</sup> N.C. GEN. STAT. ANN. § 19A-2.

<sup>149</sup> *Id.* § 19A-2, A-3.

<sup>150</sup> *Id.* § 19A-4.

<sup>151</sup> *Id.*; see also ARIZ. REV. STAT. ANN. §11-1006 (giving “a private individual or other entity that is specially damaged by a violation of an animal statute” the right to bring an action to prevent or abate the violation); N.J. STAT. ANN. § 4:22-26, 4:22-28 (imposing fines of \$250 to \$5,000 for various acts of animal cruelty, enforceable through a civil action by “any person” in the name of the state or county SPCA, apart from and in addition to any criminal proceeding which may be brought).

Another way to create a private cause of action would be simply to declare as “public nuisances” places in which animal cruelty or abuse is occurring on an ongoing basis and to provide a procedure for abatement by citizen action. The effect would be to specifically confirm by statute the application of the longstanding common law concept of a public nuisance in this context.<sup>152</sup> This approach is used in Michigan, which defines a nuisance as any place in which a variety of criminal conduct, including animal fighting, is being conducted and gives “any resident of the county” the right to maintain an action to abate the nuisance and enjoin those associated with the place from permitting it to be used for the illegal purpose.<sup>153</sup> Florida, Arizona, and South Carolina have similar statutes, but are less helpful legislative models in that their definitions of nuisance do not specifically reference criminal conduct against animals, although all three could be read to encompass such conduct.<sup>154</sup> Washington law states that every place in which animal or bird fighting is conducted is a public nuisance.<sup>155</sup> Although the statute does not provide for a citizen abatement action, such a cause of action arises from common law principles and should not need to be specified by statute.<sup>156</sup>

The public nuisance concept is well-established in Kentucky; unlicensed medical laboratories and billboard advertising on interstate highways in violation of applicable state restrictions have each been declared a public nuisance.<sup>157</sup> Legislation stating that cruelty to horses and other animals in violation of the animal cruelty statutes constituted a public nuisance, even if nothing more, would be a step forward by opening the door for citizen action.

### *B. Authorize Intervention on Behalf of Victims of Abuse*

The following changes would bring immediate relief to horses and other animals suffering abuse or neglect and would reduce the incidence of recurrence by offenders.

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<sup>152</sup> At common law, a public nuisance was an activity that offended the public at large as opposed to a single person or persons, and any private citizen harmed by the activity could bring an action to abate it. See generally F. William Brownell, *State Common Law of Public Nuisance in the Modern Administrative State*, 24 NAT. RESOURCES & ENV'T 34, 34 (2010) (describing the history of public nuisance torts vis-à-vis private interests, state sovereignty, and the social contract).

<sup>153</sup> MICH. COMP. LAWS §§ 600.3801, 600.3805, 750.49.

<sup>154</sup> ARIZ. REV. STAT. ANN. §12-991, -998 (2014) (residential property or commercial building or place “regularly used in the commission of a crime”); FLA. STAT. §§ 60.05, 823.05; S.C. CODE ANN. § 15-43-10 (2014) (“place used for . . . continuous breach of the peace,” meaning “a pattern of repeated acts or conduct which . . . directly disturbs the public peace”).

<sup>155</sup> WASH. REV. CODE § 9.66.010.

<sup>156</sup> Brownell, *supra* note 152, at 34–35.

<sup>157</sup> KY. REV. STAT. ANN. §§ 177.870, 333.250.

### 1. Provide for Pre-Conviction Confiscation and Care of Animals

The animals subjected to cruelty are often in urgent need of care and major rehabilitation. Particularly in the case of horses, this is an expensive process.<sup>158</sup> Kentucky law is silent as to how to address these circumstances, except in the case of animals on the premises where animal fighting for pleasure or profit occurs.<sup>159</sup> In that instance, the animals are to be confiscated and turned over to the county animal control officer “if there are reasonable grounds to believe that the animals were on the property for the purpose of fighting.”<sup>160</sup> This language leaves virtually all situations of equine abuse uncovered. By contrast, many other states allow for the seizure of an animal that shows signs of severe abuse or neglect so that the animal may receive care.<sup>161</sup> Typically, the owner or caretaker is given the opportunity at a hearing to demonstrate that the animal should be returned to him and that he is able to, and would in fact, provide adequate care; otherwise, the animal is not returned.<sup>162</sup> The owner remains financially responsible for the care of the animal and must post a bond to cover the associated costs pending resolution of any criminal charges.<sup>163</sup> If the owner is unable to post bond, the animal may be forfeited.<sup>164</sup> Forfeiture can

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<sup>158</sup> For example, the Humane Society of the United States has estimated the costs of care of 130 rescued Arabian horses over a 10-month period at more than \$1 million. James Hettinger, *Cost of Care: Bonding, Forfeiture Laws Force Wrongdoers to Pay for Cruelty Cases*, ALL ANIMALS Sept–Oct. 2013, at 8.

<sup>159</sup> KY. REV. STAT. ANN. § 436.610.

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

<sup>161</sup> This is, for example, the case in Arkansas, Connecticut, Delaware, Washington D.C., Florida, Georgia, and Hawaii. ARK. CODE ANN. § 5-62-106 (West 2013); CONN. GEN. STAT. ANN. § 29-108e; DEL. CODE ANN. tit. 3, § 7905 (2014); D.C. CODE § 22-1004; FLA. STAT. ANN. § 828.073; GA. CODE ANN. § 4-11-9.2 (West 2013); HAW. REV. STAT. § 711-1109.1 (2014).

<sup>162</sup> *See, e.g.*, CONN. GEN. STAT. ANN. § 29-108g (“If, after hearing, the court finds that the animal is neglected or cruelly treated, it shall vest ownership of the animal in any . . . agency which is permitted by law to care for neglected or cruelly treated animals or with any person found to be suitable . . . [If not], it may cause the animal to be returned to its owner or owners. . .”).

<sup>163</sup> *See, e.g.*, ALASKA STAT. ANN. § 03.55.130 (2014) (stating that the “court shall require the owner of the animal to pay by bond or otherwise for the custodian’s continuing costs of care for the animal until a final disposition of the animal is made by the court”).

<sup>164</sup> Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Washington D.C., Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming all have statutes providing for a system of this sort. Ala. Code § 13A-11-245 (2015); ALASKA STAT. § 03.55.120, § 03.55.130; ARIZ. REV. STAT. ANN. § 11-1029(B); ARK. CODE ANN. § 5-62-106; COLO. REV. STAT. § 18-9-202.5; CONN. GEN. STAT. § 22-329, 29-108e; D.C. CODE § 22-1004(b); DEL. CODE ANN. tit. 3, § 7905; FLA. STAT. § 828.073; GA. STAT. ANN. § 4-13-5–4-13-7 (applicable to equines only), 4-11-9.2–4-11-9.5 (animals generally); HAW. REV. STAT. § 711-1109.1, 711-1109.2; IDAHO CODE ANN. § 25-3520B (2014); 510 ILL. COMP. STAT. 70/3.04(a); IND. CODE § 35-46-3-6 (2014); KAN. STAT. ANN. § 21.6412(e); LA. REV. STAT. ANN. § 14:102.2 (2014); ME.

also occur if no owner or caretaker of an abused or neglected animal can be found, and no one claims the animal for a period of time after notice.<sup>165</sup>

Kentucky needs to enact a procedure for seizure and potential pre-conviction forfeiture comparable to those already in effect in other states, so that necessary care can be immediately provided to horses and other animals suffering from abuse and neglect, and the animals freed for adoption as soon as possible if the owner cannot or will not fund their care.<sup>166</sup>

## 2. *Provide for Post-Conviction Forfeiture and Ban on Further Possession of Animals*

If the defendant is found guilty and the animal that he has victimized has not already been forfeited, forfeiture should occur at that time. A number of states so provide, or at least permit a judge to order forfeiture upon conviction.<sup>167</sup> Kentucky law is silent on this point.

As the Risner case demonstrates, recidivism is a common characteristic of animal abusers.<sup>168</sup> The sad fact is also that in Kentucky

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REV. STAT. tit. 17, § 1021, 1027; MD. CODE ANN., CRIM. LAW § 10-615(b),(c), § 10-617; MASS. GEN. LAWS ch. 272, § 104; MICH. COMP. LAWS § 750.50(3); MINN. STAT. § 343.235; MISS. CODE ANN. § 97-41-2; MO. REV. STAT. § 578.018 (2014); MONT. CODE ANN. § 27-1-434 (2014); NEB. REV. STAT. § 28-1012(3),(4), § 54-906(3); NEV. REV. STAT. § 574.055; N.H. REV. STAT. § 644:8(IV-a); N.M. STAT. ANN. § 30-18-1.1 (2014), § 30-18-1.2; N.Y. Agric. & Mkts. Law § 373; N.C. GEN. STAT. § 19A-46, § 19A-70; N.D. CENT. CODE § 36-21.2-05-36.21.2.07; OHIO REV. CODE ANN. § 959.132; OKLA. STAT. tit. 21, § 1680.4; OR. REV. STAT. § 167.347; TENN. CODE ANN. § 39-14-210(g); TEX. HEALTH & SAFETY CODE ANN. § 821.022-821.023 (West 2014); VT. STAT. ANN. tit. 13 § 354(d)-(f); VA. CODE ANN. § 3.2-6569; WASH. REV. CODE § 16.52.085; W.Va. Code § 7-10-4(c); WIS. STAT. § 173.19, § 173.23(1m), (2), (6); WYO. STAT. ANN. § 11-29-114 (2014).

<sup>165</sup> See, e.g., TENN. CODE ANN. § 37-14-210(g) (2014) (providing ten business days for an owner to post security before deeming the animal abandoned and forfeited).

<sup>166</sup> Local ordinances expressly authorizing pre-conviction forfeiture have been met with fierce opposition from those who use animals to make a living. See, e.g., *Louisville Kennel Club, Inc. v. Louisville/Jefferson County Metro Gov't*, No. 3:07-CV-230-S, 2009 U.S. Dist. LEXIS 92328 (D. Ky. Oct. 1, 2009) (showing opposition by “pet-owners’ groups, pet-related businesses, veterinarians, and individual pet owners” who brought suit against a local county for an ordinance permitting a judge to authorize pre-conviction forfeiture).

<sup>167</sup> California, Colorado, Hawaii, Illinois, Massachusetts, New Jersey, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, and West Virginia all provide for post-conviction animal forfeiture. CAL. PENAL CODE § 597(g) (West 2014); COLO. REV. STAT. ANN. § 18-9-208; HAW. REV. STAT. § 711-1110.5; 510 ILL. COMP. STAT. ANN. §§ 70/3.04(c), 70/3.06; MASS. GEN. LAWS ANN. ch. 272, § 77; N.J. STAT. ANN. § 4:22-26.1; OHIO REV. CODE ANN. § 959.99(D); OR. REV. STAT. § 167.350; 18 PA. CONS. STAT. ANN. LAWS § 5511(m); R.I. GEN. LAWS ANN. §§ 4-1-2(b), 4-1-22(b); S.C. CODE ANN. § 47-1-170; TENN. CODE ANN. § 39-14-202(e); W. VA. CODE ANN. § 61-8-19(d).

<sup>168</sup> See Sharon L. Peters, *Legislation Targets People Convicted of Animal Cruelty*, USA TODAY, [http://usatoday30.usatoday.com/life/lifestyle/pets/2010-02-24-abuse24\\_ST\\_N.htm](http://usatoday30.usatoday.com/life/lifestyle/pets/2010-02-24-abuse24_ST_N.htm) [<http://perma.cc/6PDG-JCHH>] (Feb. 23, 2010) (accessed Mar. 7, 2015) (“Research shows the recidivism rate among hoarders is almost 100%. . . . Recidivism rates among other categories of animal abusers is not as well documented, but most experts say anecdotal experience shows a large percentage re-offend.”); see also Gary J. Patronek,



there is a profit to be made in the acquisition and sale of horses for slaughter.<sup>169</sup> Those convicted of equine cruelty should therefore be barred from owning or possessing horses for a period of time, the length of which would depend on the severity of the offense and the prior history of the offender.

Kentucky law is also silent on this point, although, again as in the Risner case, at least as part of a plea bargain a judge may in his discretion prohibit an offender from owning any animals for a period of time.<sup>170</sup> Many other states are more explicit in barring convicted offenders from further contact with animals, up to and including for life.<sup>171</sup>

### C. Strengthen Anti-Cruelty Laws

The animal cruelty laws in Kentucky are weak and ineffective. They could be strengthened by increasing the severity of the offense and ensuring that each animal abused or neglected gives rise to a separate offense.

#### 1. Increase Severity of the Offense

In Kentucky, the only offenses against animals which rise to the level of a felony (Class D) are involvement in dog fighting and certain instances of torture of a dog or cat.<sup>172</sup> Torture of any other animal in-

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*Hoarding of Animals: An Under-Recognized Public Health Problem in a Difficult-to-Study Population*, 114 PUB. HEALTH REP. 81, 85-87 (1999) (noting that the likelihood of an animal abuser abusing an animal in the future is close to 100%).

<sup>169</sup> See, e.g., Clifton Merritt, *New Study Shows the Value of Slaughter to Horse Breeders*, ANIMALS 24-7, <http://www.animals24-7.org/2015/01/16/new-study-shows-the-value-of-slaughter-to-race-horse-breeders/> [<http://perma.cc/QPF9-QSFJ>] (Jan. 16, 2015) (accessed Feb. 28, 2015) (discussing slaughter's profit and "importan[ce] to horse breeders because it permits the industry to continue high-volume speculative breeding").

<sup>170</sup> See *supra* note 83 and accompanying text (discussing the Risners' plea bargain and ban from owning animals).

<sup>171</sup> See, e.g., ALASKA STAT. ANN. § 11.61.140(h) (offender may be barred from owning animals for up to 10 years); DEL. CODE tit. 11, 1325(c),(d) (for five or 15 years, depending on severity of the offense); 510 ILL. COMP. STAT. § 70/3.04(c) ("for a period of time that the court deems reasonable"); KAN. STAT. ANN. § 21-6415 (for five years); LA. REV. STAT. ANN. § 14:102.1(2)(b) ("for a period of time deemed appropriate by the court"); ME. REV. STAT. ANN. tit. 17, § 1031(3-B) ("for a period of time, up to and including permanent relinquishment"); MASS. GEN. LAWS ANN. ch. 272, § 77 (West 2014) (prohibition from working in any capacity involving contact with an animal); MICH. COMP. LAWS ANN. § 750.50(9) (on second or subsequent conviction, "for any period of time, including permanent relinquishment of animal ownership"); N.H. REV. STAT. 644:8(IV) ("for any period of time the court deems reasonable"); OR. REV. STAT. 167.332 (for five or 15 years, depending on severity of the offense); TENN. CODE § 39-14-202(e) ("for any period of time the court determines to be reasonable"); 13 VT. STAT. § 353(b)(3) ("for a period which the Court deems appropriate"); VA. CODE 3.2-6569, 3.2-6570 (future ownership or possession of companion or farm animals); W.VA. CODE 61-8-19(i) (for five or 15 years, depending on severity of the offense).

<sup>172</sup> KY. REV. STAT. ANN. § 525.125 (when "a four-legged animal is caused to fight for pleasure or profit" its owner, anyone participating in organizing the fight, and—if aware of the fight—the owner of the property where the fight occurred are guilty of a

cluding a horse, regardless of the number of times the crime is committed or any prior offenses, constitutes cruelty to animals in the second degree, which is a Class A misdemeanor.<sup>173</sup> The maximum punishment for a Class A misdemeanor is imprisonment for one year and a fine of \$500.<sup>174</sup> By contrast, a Class D felony is punishable by imprisonment for one to five years and a fine of up to \$10,000.<sup>175</sup>

The punishment for a Class A misdemeanor is barely a slap on the wrist; especially for one who purchases and sells horses on a large scale basis for slaughter, it might almost be viewed as a cost of doing business. There are several steps that could be taken to heighten the now *de minimis* deterrent effect of Kentucky's animal cruelty laws, even when enforced, on those who abuse and neglect horses.

First, Kentucky needs to extend the protection of its felony animal cruelty statute to horses and other animals, as well as dogs and cats, thus aligning it with the vast majority of other states.<sup>176</sup> Kentucky's ethos is so inextricably tied to the horse that there can be no justification for allotting the horse a lesser level of protection than that accorded to dogs and cats. Such a change would have the ancillary consequence of moving prosecutorial responsibility in cases of severe equine abuse from the county attorney to the commonwealth attorney, and jurisdiction over the offense from the district court for the district in which the offense occurred to the commonwealth court for the judicial circuit in which the offense occurred.<sup>177</sup> Although such a shift is by no means a guarantee of greater prosecutorial responsiveness, the result could hardly be worse than the current situation.

Second, the legislature should broaden the felony animal cruelty statute to include not just "torture"—an extremely narrow standard,

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Class D felony); KY. REV. STAT. ANN. § 525.135 (torture of a cat or dog is a Class D felony upon a second or subsequent conviction, or if the dog or cat suffers physical injury or death as a result of the torture).

<sup>173</sup> KY. REV. STAT. ANN. § 525.130.

<sup>174</sup> *Id.* §§ 532.090(1), 534.040(2)(a).

<sup>175</sup> *Id.* §§ 532.060(2)(d), 534.030.

<sup>176</sup> It is telling that although Kentucky denies the protection of its felony animal cruelty statute to horses, it has accorded felony status to offenses that would adversely affect the horse-racing industry. Thus, 'running ringers' (i.e. racing a horse under a false certificate, typically used to have a faster horse run in the place of—and with the same name as—a slower horse) and misrepresenting or concealing the prior performance of a horse to be entered into a race are both Class D felonies. KY. REV. STAT. ANN. §§ 230.070, 230.080(3), 230.990(1). Tampering with a horse race is an even more serious offense—a Class C felony punishable by up to ten years imprisonment. KY. REV. STAT. ANN. §§ 230.990(6), 532.060(2)(c).

<sup>177</sup> Felonies are excluded from Kentucky District Court jurisdiction, making them triable in the Circuit Court, which "has original jurisdiction of all justiciable causes not exclusively vested in some other court." KY. REV. STAT. ANN. §§ 120A.110, 23A.010. Criminal cases in the Circuit Court are handled by a Commonwealth Attorney, who like the county attorney is an elected official. KY. CONST. § 97. There are fifty-seven judicial circuits in Kentucky by comparison with sixty districts. *See* KY. REV. STAT. ANN. § 23A.020 (listing the fifty-seven judicial circuits and corresponding counties); KY. REV. STAT. ANN. § 24A.030 (listing the sixty judicial districts and corresponding counties).

limited by statute to “intentional infliction or subjection to extreme physical pain or injury, motivated by an intent to increase or prolong the pain of the animal.”<sup>178</sup> Alternatively, the legislature could broaden the definition of “torture” to include conduct such as prolonged deprivation of food, water, and shelter. Over time, this kind of behavior can be just as painful for the animal victim as torture in its more classic form, as at least seven states (California, Illinois, Michigan, New Hampshire, North Carolina, Oklahoma, and Texas) and the District of Columbia have wisely recognized.<sup>179</sup> Moreover, it is this kind of abuse that a horse is more likely to experience.<sup>180</sup>

Obviously, severe punishment is not appropriate for every instance of failure to provide care. However, in circumstances such as the Browning case discussed above, involving many animals and flagrant, knowing violations of minimum standards of care, such a penalty is surely warranted. The ability to invoke it, where appropriate, would be a step forward.

Finally, Kentucky could follow the lead of a number of states and provide for a higher level of punishment for repeat offenders.<sup>181</sup>

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<sup>178</sup> KY. REV. STAT. ANN. § 525.135. This statutory definition of torture encompasses the classic connotations of the term, such as severe beating or wounding, as well as extreme neglect—if those activities are accompanied by intent to cause or continue the animal’s pain.

<sup>179</sup> These jurisdictions all provide that failure to provide adequate care (food, water, and shelter) constitutes a felony at least in some circumstances. CAL. PENAL CODE § 597(b), (d) (West 2014) (felony conduct can include “depriv[ation] of necessary sustenance, drink, or shelter”); D.C. CODE § 22-1001(a), (d) (failure to provide proper food, drink, air, light, space, veterinary care, shelter, or protection from weather “under circumstances manifesting extreme indifference to animal life”); 510 ILL. COMP. STAT. 70/3 (for second and subsequent violations); MICH. COMP. LAWS § 750.50(4)(c) (if second or subsequent conviction, or if four or more animals were involved); N.H. REV. STAT. ANN. § 644:8 (if a second or subsequent offense); N.C. GEN. STAT. § 14-360(a1) (if “intentional deprivation of necessary sustenance” and death results); OKLA. STAT. tit. 21, § 1685 (depriving any animal “of necessary food, drink, shelter, or veterinary care to prevent suffering”); TEX. PENAL CODE ANN. § 42.09(a)(2), (c) (if prior convictions exist); *see also* OR. REV. STAT. §§ 167.325, 167.330 (making animal neglect in the second degree a felony offense if the criminal episode involves ten or more animals).

<sup>180</sup> *See* AAEP Equine Welfare Committee, *FAQs: Equine Cruelty, Abuse and Neglect*, AAEP 1, 2, <http://www.aaep.org/custdocs/aaepfaqsequineabuse.pdf> [<http://perma.cc/TC76-UWCH>] (2012) (accessed Jan. 30, 2015) (explaining that veterinarians are less often confronted with the intentional abuse of a horse than with neglect).

<sup>181</sup> Twenty three states enhance penalties for repeat offenders. COLO. REV. STAT. § 18-9-202(2)(b); CT. GEN. STAT. § 53-247(a) (2013); FL. STAT. § 828.12(2)(b) (2013); GA. CODE § 16-12-4(b), (c); IDAHO CODE § 25-3520A; 510 ILL. COMP. STAT. 70/3-70/3.02, 70/5; IND. CODE § 35-46-3-7, § 35-46-3-12; KAN. STAT. ANN. § 21-6412(b)(2)(B); LA. REV. STAT. ANN. § 14:102.1(A); ME. REV. STAT. tit. 17, § 1031; MISS. CODE ANN. § 97-41-16(2)(b); MO. REV. CODE § 578.012; MONT. CODE ANN. § 45-8-211(2)(a); NEB. REV. STAT. § 28-1009; NEV. REV. STAT. § 574.100(7); N.H. REV. STAT. § 644:8(III); N.M. Stat. Ann. § 30-18-1(D); S.C. CODE ANN. § 47-1-40(A); TENN. CODE ANN. § 39-14-202(g); UTAH CODE ANN. § 76-9-301.7 (West 2014); VT. STAT. ANN. tit. 13, § 353; WIS. STAT. 951.18(2); WYO. STAT. ANN. § 6-3-203(e).

## 2. *Specify a Separate Offense for Each Animal Involved*

Among the grossest offenders against horses are individuals who do so on a large scale; they may have in their possession dozens of emaciated horses at any given time. If this conduct can be merged into a single offense, the penalty for each animal which has suffered is correspondingly diluted, and the large scale offender effectively immunized against any adverse consequence for neglecting or abusing horses en masse rather than just one at a time. A statute specifying that each animal subjected to abuse or gross neglect is a separate victim, giving rise to a separate offense for each victim, would by itself expose such individuals to a significantly greater penalty. Alaska, Louisiana, Montana, and Wyoming have enacted such statutes.<sup>182</sup>

### D. *Inhibit or Eliminate Sale of Distressed Horses*

Horses are expensive animals;<sup>183</sup> overbreeding results in a surfeit of horses for which the horse industry has been unwilling to take responsibility.<sup>184</sup> Foals of nurse mares are unwanted from birth.<sup>185</sup> These dispensable animals are likely to end up being sold for nominal sums, frequently to be transported for slaughter.<sup>186</sup> If the grim business of sale and transport for slaughter were curtailed, at a minimum those in the industry responsible for the surplus would need to think twice about continuing to produce animals with no regard to their eventual fates.

California has taken significant steps in this regard. Cal. Penal Code 598c makes it a felony to sell, buy, or hold any horse that is to be killed if the person “knows or should have known that any part of that horse will be used for human consumption.”<sup>187</sup> Cal. Penal Code 597x prohibits the sale or transport of a “disabled” horse for commercial slaughter out of state; “disabled” for this purpose includes without limitation broken limbs, inability to stand or balance itself without assis-

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<sup>182</sup> ALASKA STAT. § 11.61.140(b); LA. REV. STAT. § 14:102.1(A)(3), (B)(7); MONT. CODE ANN. § 45-8-211(2)(c); WYO. LEGIS. SERV. § 6-3-203(k) (2013); *see also* CAL. PENAL CODE § 597(f) (“[E]ach act of malicious and intentional maiming, mutilating, or torturing a separate specimen . . . is a separate offense.”). The Oregon Supreme Court reached a similar conclusion as a matter of statutory interpretation in *State v. Nix*. *State v. Nix*, 334 P.3d 437, 448 (Or. 2014) *rev’d on other grounds*, 345 P.3d 416 (Or. 2015). Although the decision was subsequently reversed on the basis that the matter was not properly before the court, the reversal does not bear on the substance of the decision and it would be surprising if the court were to rule differently in a future case presenting the same issue. *State v. Nix*, 345 P.3d 416, 424 (Or. 2015).

<sup>183</sup> *See supra* note 158 (noting the high costs of caring for rescue horses).

<sup>184</sup> *See supra* note 1 and accompanying text (describing the oversaturated market for horses).

<sup>185</sup> *See supra* notes 3–4 and accompanying text (foals of nurse mares are considered unwanted byproducts of the industry).

<sup>186</sup> Allin, *supra* note 4.

<sup>187</sup> CAL. PENAL CODE § 598c (West 2014).

tance, inability to walk, or severe injury.<sup>188</sup> Finally, under Cal. Penal Code 597.2, the minimum sale price for a horse sold by a pound, humane society, or governmental agency must be above the current slaughter price of the animal, thus ensuring that at least in those settings a horse will not be sold for slaughter.<sup>189</sup>

In other states, it is unlawful to sell a horse which could not be worked without violating the state's animal cruelty laws.<sup>190</sup> Such a statute by itself in Kentucky would limit the market that currently exists for excess, unwanted horses.

### *E. Supply Funding*

A number of the recommendations made in this article require funding in order to be operative or effective. If the position of ACO is to be upgraded as suggested, those undertaking this expanded role, no matter how well-intentioned, must be adequately trained or the effort may well prove counterproductive. If abused and neglected horses are to be rehabilitated, they need proper facilities and personnel with the skills to provide the necessary care; these do not come cheap.<sup>191</sup> The latter financial burden should be imposed on the owner in the first instance, but in many cases the owner will be unable and/or unwilling to meet it. Private horse rescue groups are not in a position to fill this gap from their own resources, nor is it fair to ask them to.

Securing funding is admittedly a difficult problem, and we live in a time of scarce resources. However, Kentucky has found the means to lavish extraordinary financial rewards on those involved in the horse industry in the state. The sales tax on breeding fees is used to fund the Kentucky Breeders' Incentive Fund,<sup>192</sup> and the excise tax on pari-mutuel betting is used to fund the companion Kentucky Thoroughbred Development Fund.<sup>193</sup> These two funds together distributed more than \$210 million through 2011 in awards to breeders of winning Kentucky-bred horses and in prize purse supplements on designated Ken-

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<sup>188</sup> CAL. PENAL CODE § 597x.

<sup>189</sup> CAL. PENAL CODE § 597.2.

<sup>190</sup> Massachusetts, Maine, Nevada, New Jersey, New York, and Pennsylvania all have such laws. MASS. GEN. LAWS ch. 272, 78; ME. REV. STAT. ANN. tit.17 § 1012 (2015); NEV. REV. STAT. § 574.140; N.J. STAT. 4:22-21; N.Y. AGRIC. & MKTS. LAW 358; 18 PA. CONS. STAT. 5511(d).

<sup>191</sup> See *supra* note 158 (noting the expense of caring for rescue horses).

<sup>192</sup> KY. REV. STAT. ANN. §§ 139.531(1)(a), 230.800.

<sup>193</sup> *Id.* §§ 138.510, 230.400. There are also separate development funds, likewise funded by the tax on pari-mutuel betting though on a smaller scale, for Standardbreds and, since 2010, for Quarter Horses, Appaloosa, and Arabian horses. KY. REV. STAT. ANN. §§ 138.510, 230.445, 230.770, 230.3771. These two funds play the same role with respect to their particular breeds as does the Thoroughbred Development Fund for thoroughbreds. There is only a single Incentive Fund, 80% of which is allocated to thoroughbreds and the balance to other breeds, including non-race breeds. For non-race breeds, distributions are based on success in the show ring. *Kentucky Breeders Incentive Fund*, THE KENTUCKY HORSE COUNCIL, <http://www.kentuckyhorse.org/incentive-fund> (accessed Apr. 8, 2014).

tucky races, all in order to “provide incentives for breeding and racing in Kentucky.”<sup>194</sup> The mind boggles at what just a small fraction of that money might have accomplished had it instead been used to safeguard the welfare of those members of the species which turned out not to be prize winners, or whose winning days are over.

Given this precedent, if the legislature were willing, the resources could surely be found to establish a fund to defray the costs associated with investigating and prosecuting equine abuse and rehabilitating its victims. A strong case could be made as a matter of simple justice that some of the money now allocated to the existing Incentive and Development Funds from the taxes on breeding fees and on pari-mutuel betting, or other moneys flowing to the state from the horse industry, should be dedicated to an equine protection fund. Such a move would force the industry to bear some responsibility for the totality of the horses it produces and not just reap the rewards from the winners. An additional source of funding could be voluntary check-off donations made by Kentucky residents on their tax returns, such as Massachusetts has provided for the funding of its recently established Homeless Animal Prevention and Care Fund.<sup>195</sup> Fines levied for abuse of horses could also be earmarked for the fund, similar to what has been done in other states.<sup>196</sup>

As previously noted, Kentucky has an Animal Control and Care Fund,<sup>197</sup> which has been funded with a portion of the fees received from the issuance of special spay neuter license plates.<sup>198</sup> The funds so received, ranging since 2009 from \$30,000 to \$120,000 per year, have been used to make modest grants to shelters and counties for existing or planned “animal control and care program[s],”<sup>199</sup> and to sponsor “training sessions in the areas of animal control, animal behavior, and

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<sup>194</sup> This quotation, and the information as to distributions made, is taken from an enthusiastic description of the Funds, under the double heading *Rein in the Winnings, Reap the Rewards*, which may be found on the website of the KTA KTOB (Kentucky Thoroughbred Association/Kentucky Thoroughbred Owners and Breeders, Inc.), <http://www.kentuckybred.org/Domains/www.kentuckybred.org/CMSFiles/Docs/KBIF%20KTDF%20Bookmark.pdf> [<http://perma.cc/V88V-C4L9>] (accessed Feb. 20, 2015). The breakdown of the \$210 million as between the two Funds is \$134 million from the Thoroughbred Development Fund, which has been in existence since 1995 and \$76.8 million from the Incentive Fund, which is of more recent vintage, 2006. *Id.*

<sup>195</sup> MASS. GEN. LAWS ch. 10, § 35WW.

<sup>196</sup> Delaware, Maine, New Jersey, Ohio, Rhode Island, South Carolina, Washington, and Washington D.C. all have such laws. D.C. CODE § 22-1006; DEL. CODE tit. 7903; ME. REV. STAT. tit. 17, 1015; N.J. REV. STAT. 4:22-55; OHIO REV. CODE 959.13(C), 959.131(G); R.I. GEN. LAWS 4-1-20; S.C. CODE ANN. § 47-1-160(1); WASH. REV. CODE § 16.52.200(7).

<sup>197</sup> See *supra* note 28 (discussing the Animal Control Advisory Board and ACO trainings).

<sup>198</sup> See KY. REV. STAT. ANN. § 186.162(2)(y) (directing funds from special license plates to “the animal control and care fund established under KRS 258.119”).

<sup>199</sup> See KY. REV. STAT. ANN. § 258.119 (describing the funded “animal control and care program”); KY. REV. STAT. ANN. § 285.117 (making the Animal Control Advisory Board responsible for the fund).

the humane administration of euthanasia.”<sup>200</sup> Focused as it is on domestic animals such as cats and dogs, and on issues other than the prevention of cruelty and abuse, and extremely modestly funded, the existing Animal Control and Care Fund could not feasibly be used as a vehicle to defray the costs associated with a vigorous program for the protection of horses from abuse and the prosecution of offenders. However, it demonstrates a policy decision on the part of the legislature that the welfare of domestic animals matters. How much more, then, should the legislature be responsive to the welfare of horses, whose importance as a symbol of the Commonwealth and a driver of its prosperity cannot be matched by other animals? Horses deserve their own, dedicated fund.

## V. CONCLUSION

Kentucky needs to better the lives of its horses. The citizens of Kentucky cannot in good conscience continue to present themselves to the world as the owners and breeders of the finest representatives of the species and at the same time tolerate the pervasive abuse of so many more. The status quo is not inevitable or inescapable; there is much that can be done if there is the will to do it.

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<sup>200</sup> *About the ACAB*, KY ANIMAL CONTROL ADVISORY BOARD, [www.kspayneuter.com/about.htm](http://www.kspayneuter.com/about.htm) [<http://perma.cc/Z6QC-SC8A>] (accessed Apr. 7, 2015).

