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Racing to the Lab: Issues and Solutions for Abolishing Performance-Enhancing Drug Abuse in Horse Racing

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PART I. INTRODUCTION

The competitive zeal ingrained in the very fiber of American culture is perhaps never more clearly manifested than in the love of sports. This desire for competition begins in the childhoods of millions of young Americans, and drives the most dedicated and talented athletes into the zenith of whatever sport they choose to pursue.

Unfortunately, as has been evidenced by the recent performance-enhancing drug¹ [fn should be after comma] scandals in Major League Baseball, this competitive ambition can lead elite athletes to seek physiological advantages over their peers by immersing themselves in the experimental use of drugs.² The ethical quandaries this poses for the competitive integrity of the sports themselves are many; however, the athletes themselves are at the very least capable of making informed decisions on the possible benefits they could reap from such a course of action (such as better statistics, possible increase in salary, etc.) versus the risks (possible adverse physical side-effects, long-term damage, etc.).³

Alas, with respect to the “athletes” of one of the world’s oldest sports—that of horse racing—horses are unable to make such decisions based upon informed consent.⁴ It is indeed possible that if the highly decorated thoroughbred Big Brown could have

¹ Performance-enhancing drug (“PED”) is a broad, all-encompassing term that can refer to any number of traditional drugs (steroids, human growth hormone, etc.) or nontraditional (cobra venom) to bolster or augment existing physical prowess for training or performance purposes to gain an advantage on competition. Competitive sports leagues at every level have almost universally banned the use of PEDs, but as will be explored in the foregoing sections, horse racing has generally taken a far more passive posture towards banning these drugs.

² Daniel Engber, Hi-Ho, Steroids, Away!, Slate, (June 27, 2008), http://www.slate.com/articles/sports/sports_nut/2008/06/hiho_steroids_away.html.

³ *Id.*

⁴ *Id.*

spoken during his career, he too would have deemed it prudent to take Winstrol⁵ in the pursuit of winning a race, with the aim of being able to retire earlier to a lush farm replete with an abundance of hay and oats.⁶ It is this impropriety that allows horses to be exploited via the administration of PEDs solely to further the interests of the trainers, owners and jockeys (among others), thereby compromising the competitive integrity of the sport by obliterating any semblance of an even playing field, and more egregiously endangering the well-being of the animals.⁷ [Consequently?] This article will explore the prevalence of PEDs within the horse racing world, the significant issues this creates for the safety of the animals, as well as some proposed policy changes both via federal regulation and through industry reform for curbing this ever-increasing problem. [Besides the horses, aren't jockeys "athletes" in horseracing too, just as race drivers are in auto racing?]

Performance-enhancing drugs abuse may be the biggest issue facing horse racing in the United States.⁸ A 2012 investigation reported that 3,800 horses had tested positive for drugs, the majority for illegal levels of prescription drugs.⁹ The investigation indicated that approximately 24 horses a week die at racetracks in America, an exponentially greater number than in other countries.¹⁰ The wide-spread use of injury-masking and performance-enhancing drugs has led to the creation of a crisis in the industry that is destroying the reputation of the sport, along with the far worse

⁵ A very common and pervasive drug administered to horses to boost physical acumen. [Should be in sentence form—not just a clause]

⁶ Engber, *supra* note 2.

⁷ *Id.*

⁸ John T. Wendt, Article, Horse Racing in the United States: A Call for a Harmonized Approach to Anti-Doping Regulation, 25 J. Legal Aspects Of Sport 176 (2015).

⁹ *Id.* at 176.

¹⁰ *Id.*

consequence of sabotaging the health of these majestic animals.¹¹ Because there are 38 separate state racing commissions with different sets of rules and practices, the horse racing industry is struggling to reach any degree of uniformity with respect to testing standards and punishment for violations.¹²

This article and accompanying statistics will address the adverse effects of drug abuse in the three main types of horse racing: flat racing (which includes thoroughbred racing), harness racing (also known as “trotting” or “pacing” with a two-wheeled cart), and steeplechase.¹³ An in-depth analysis of the disjointed regulatory scheme affecting the various types of horse racing, and the accompanying issues it breeds, will be borne out in the foregoing sections. Part II of this article will provide an historical background of the sport itself, including its ancient origins and evolution over time, along with the rise of PEDs within the sport, highlighting some recent high visibility scandals that have brought renewed attention to this issue.

Part III will address the details around the PEDs themselves, including the effects they have on the animals. Part IV will examine the underlying reasons PED abuse has become so rampant in the sport, highlighting the influx of gambling money into the industry. This section will also touch on the general lack of a centralized system of oversight to govern and enforce anti-PED measures, including the lack of uniformity in penalties among the various racing jurisdictions. There will also be a discussion on the governance model employed by horse racing and an exploration of specific regulatory and legislative controls that already exist, as well as their shortcomings. Part V will

¹¹ *Id.*

¹² *Id.*

¹³ 9th Race, Types of Horse Races, <http://www.9thrace.com/handicapping/types-of-horse-races.html> (last visited Apr. 20, 2017).

propose a number of possible remedies to the aforementioned issues, including the implementation of a federal regulation, the establishment of a central governing body to oversee the sport on a quasi-independent basis from the government, a joint effort by the horse racing community and elected officials to fund new testing methods for PEDs, and a number of proposed penalties for violations. [Don't need to list each "remedy" in Intro] Part VI will offer a summation of key points and a final conclusion.

PART II. BACKGROUND: A BRIEF HISTORICAL OVERVIEW

A. Origins of and Rationale for Horse Racing

[Put this paragraph at end of section]The anatomy of the horse lends itself perfectly to competitive racing.¹⁴ A horse's legs are "clean and long" consisting of strong bones, muscles and tendons. "When running, its rear legs act as springs when they bend and straighten, propelling the horse forward".¹⁵ The front legs continue this motion as they pull the horse forward. "Thoroughbreds also possess a long neck which moves in rhythm with their legs".¹⁶ This rhythm allows the horses to extend their stride fully, enabling them to reach and sustain speeds surpassing forty miles per hour.¹⁷

[This paragraph should start section, not the prior one]The sport of horse racing is one of world's oldest, with records of it tracing as far back as 4500 BCE.¹⁸ Organized horse racing dates back as far as 638 BCE as an event in the ancient Greek Olympics.¹⁹

¹⁴ Kyle Cassidy, Comment, Reining in the Use of Performance Enhancing Drugs in Horseracing: Why a Federal Regulation is Needed, 24 Seton Hall J. Sports & Ent. L. 121, 125 (2014). [How different are your remedies from his?]

¹⁵ *Id.* at 125.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Luke P. Breslin, Comment, Reclaiming the Glory in the "Sport of Kings" – Uniformity is the Answer, 20 Seton Hall J. Sports & Ent. L. 297, 300 (2010).

¹⁹ *Id.* at 300.

Modern horse racing originated around the 12th century, when English knights returned from the Crusades with Arabian horses, which were known for their speed.²⁰ The history of thoroughbred horseracing in the United States, however, dates back to the mid-18th century.²¹ The first recorded instance of it took place in 1745 in Annapolis, Maryland, when Governor Samuel Oge "first staged a thoroughbred race in English Style," meaning a race of thoroughbred horses, with mounted jockeys, running a dirt or grass racecourse at distances ranging from three-quarters of a mile to two miles.²²

The popularity of horse racing continued to surge in the United States, with its peak arriving in the mid-Twentieth century. Spectator attendance at tracks between the years of 1946 and 1973 increased from 26 million to 53.3 million.²³ The last several decades have seen a decrease in attendance and general interest in the sport, although the seminal events of horse racing, especially the American Triple Crown and Breeder's Cup, continue to solicit enormous interest.²⁴

B. The Role of Gambling in Horseracing

In evaluating the primary reasons for the original rise in popularity of the sport and the [sustained level?] levels of interest that continue to be seen today, horse racing's inextricable link to gambling cannot be ignored. Historically, "bookmakers" would set the odds of a given horse winning a race and then solicit people to gamble against them based on those odds. This served as the original link between horse racing and gambling.²⁵ In the early Twentieth Century, bookmakers and prominent members of local

²⁰ *Id.*

²¹ *Id.* at 298.

²² *Id.* at 301.

²³ *Id.* at 302.

²⁴ *Id.*

²⁵ Bradley S. Friedman, Oats, Water, Hay and Everything Else: The Regulation of Anabolic Steroids in Thoroughbred Horse Racing, 16 Animal L.123, 128 (2009). [[Animal L. J.??]

jockey clubs²⁶ shared mutual benefits in this enterprise. By taking bets at the track, larger bookmakers would draw customers to the races and pay the track owners a fee for running their gambling operation on location.²⁷ The racetrack owners likely encouraged bookmakers because their presence attracted customers and allowed the owners to increase purse sizes for winning horses and thus attract more racers and greater esteem.²⁸

It was out of this culture that the American Jockey Club was born. The Jockey Club was founded (and continues to operate) as a private organization, with backing and support from industry officials and stakeholders.²⁹ It was initially tasked with the ostensible purpose to promote and improve the sport. In reality, it had the constructive purpose of regulating the rampant presence of gambling, a function it would serve until state racing commissions interceded later in the Twentieth Century.³⁰

Gambling on horse racing today is called pari-mutuel wagering, a system wherein the race track receives a fixed percentage of the total amount wagered in order to cover expenses, such as operating costs, racing purses and state and local taxes.³¹ Once these expenses are subtracted from the total amount, the balance is returned to a pool and shared among all winning bets.³² Given the robust enthusiasm for sports betting in the United States, as is evidenced not only with horse racing, but by the ever-growing “fantasy

²⁶ Decentralized organizations that oversee and register horses for racing events.

²⁷ Friedman, *supra* note 25, at 128, 129.

²⁸ *Id.* at 129.

²⁹ Medication and Performance Enhancing Drugs in Horse Racing: Hearing Before the U.S. Senate Comm. on Commerce, Science, and Transportation, 112th Cong. 26 (2012) (statement of James Gagliano, President and C.E.O of the Jockey Club), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112shrg76248/pdf/CHRG-112shrg76248.pdf>.

³⁰ Friedman, *supra* note 25, at 129.

³¹ Breslin, *supra* note 18, at 302.

³² *Id.*

sports”³³ industry, [fn should be placed after comma] it is of little surprise that pari-mutuel wagering occupies such an integral role in the vitality of the sport. Unfortunately, certain horse racing industry members resort to unethical or illegal means to gain a competitive advantage in the name of heightened earnings or the prestige of greater success. The most obvious way to achieve this has been through illicitly augmenting the physical characteristics of the horses via performance-enhancing drugs.

C. The Rise of Performance-Enhancing Drugs and Accompanying Scandals

It is unclear precisely when performance-enhancing drugs became a staple of modern horse racing, but all indications are it began as far back as the early Twentieth Century.³⁴ The New York Times reported the developments of drug use in horseracing during the 1890s.³⁵ The 1800s had seen the purification of cocaine and morphine and availability of these substances made the “acute stimulant medication” of racing horses a far more common occurrence.³⁶ Steroids³⁷ did not emerge as a performance-enhancing tool until the 1960’s. They were used in equine veterinary medicine to treat horses that suffered from dangerously decreased muscle mass, and were given to geldings³⁸ regardless of their physical state.³⁹ It is unclear when the use of steroids as a performance

³³ Although there is no consensus as to whether fantasy sports constitute formal wagering, the basic principle is that users select certain athletes to produce favorable statistics over a set period of time (single game, season) etc. Point values are assigned to statistical thresholds being met, and winners are determined by whoever earns the most points at the conclusion of the time period. *See generally* Louis Bien, Everything you ever wanted to know about daily fantasy sports and why they’re getting sued, SB Nation (Nov. 24, 2015), <http://www.sbnation.com/2015/11/24/9791608/draftkings-fanduel-daily-fantasy-sports-lawsuit-new-york-internet-gambling>. [Last visited?]

³⁴ Bennett Liebman, The Trainer Responsibility Rule in Horse Racing, 7 Va. Sports & Ent. L.J.1, 4 (2007).

³⁵ *Id.* at 5.

³⁶ *Id.* at 4.

³⁷ Generally considered to be any form of hormonal substance closely related to the male hormone testosterone. [Write in sentences] In addition to naturally occurring testosterone, steroids can be synthetically created in laboratories for a variety of medical purposes. *See* Friedman, note 97, at 136.

³⁸ Castrated male equines. [Write in sentences!]

³⁹ Friedman, *supra* note 25, at 136.

enhancer proliferated among trainers, but in 2003, Pennsylvania racing officials found that more than 60% of all horses racing in that state had been treated with at least one steroid.⁴⁰

Despite this apparently long and sordid history of doping in horse racing, it has only been within the past decade or so that the interest of the general public has been piqued. As was previously alluded to, the highly publicized steroid scandals in Major League Baseball around some of the sport's greatest players spurred the interest of both lawmakers and casual fans to at least consider the PED climate in other sports.⁴¹ Events emanating from within the horse racing world itself, however, are what have contributed to the recent impetus for change.

One such event occurred at the 2008 Kentucky Derby, where a horse named Eight Belles finished in second place at the race, but—having just passed the finish line, collapsed from two broken ankles.⁴² Disturbingly, Eight Belles was then euthanized on the track in front of 200,000 spectators and millions more watching on television at home.⁴³ A mere few days later, the trainer of the victorious horse from the Derby, Big Brown, glibly admitted that the horse was treated with the steroid Winstrol right before the race, and he would continue to treat Big Brown and other horses with steroids to enhance their performance prior to every race.⁴⁴

The shockingly casual nature of the trainer's admission raised eyebrows in the mainstream public, but perhaps the most damning high visibility event of recent years

⁴⁰ *Id.* at 137.

⁴¹ *Id.* at 140.

⁴² *Id.* at 141.

⁴³ Runner-up Eight Belles Breaks Front Ankles, Euthanized on Track, <http://sports.espn.go.com/sports/horse/triplecrown08/news/story?id=3380100> (May 3, 2008).

⁴⁴ Bill Finley, New York Unveils Steroid-Free Racing, 158 N.Y. Times B8 (Jan. 2, 2009) <http://www.nytimes.com/2009/01/02/sports/othersports/02racing.html>.

was an explosive PETA report on another prominent trainer, Steve Asmussen. Asmussen is one of the most highly recognizable trainers in the industry, and arguably the most successful. He ranks second in career victories, totaling more than 6,700, has earned more than \$214 million in winnings and was even included on the National Museum of Racing's Hall of Fame Ballot.⁴⁵ Over a period of several months, an undercover PETA employee clandestinely filmed the regular routines engaged in by his assistant trainers: practices that included administering multiple drugs daily to racehorses — “whether they (needed) them or not — by grooms and employees so they (could) pass veterinarians’ visual inspections, make it to the racetrack or perform at a higher level.”⁴⁶ This video contained more than seven hours of footage documenting various forms of mistreatment, including prominent New York veterinarians administering drugs to the horses.⁴⁷ The subsequent[public?] outrage called for wide-spread reform efforts, but also a desire by regulators and fans to gain a deeper understanding of the exact effects certain drugs can have on the animals.

PART III. EFFECTS OF DRUG ABUSE

A. Common Uses of Performance-Enhancing Drugs

In conducting the analysis of the drugs used in horseracing, it is prudent to first point out that no uniform consensus exists on whether all drugs should be banned outright from the sport. Indeed, many drugs have therapeutic qualities that do not affect the racing performance of horses.⁴⁸ Two of the more commonly used permissible drugs are Lasix

⁴⁵ Joe Drape, PETA Accuses Two Trainers of Cruelty to Horses, N.Y. Times B13 (Mar. 20, 2014)

https://www.nytimes.com/2014/03/20/sports/peta-accuses-two-trainers-of-cruelty-to-horses.html?_r=2_

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Kimberli Gasparon, Comment, The Dark Horse of Drug Abuse: Legal Issues of Administering Performance-Enhancing Drugs to Racehorses, 16 Vill. Sports & Ent. L.J. 199, 206 (2009).

and Bute, both of which help to guard against excessive bleeding in the lungs. Phenylbutazone (an anti-inflammatory), and Corticosteroids (for pain) are also staples of most training stables.⁴⁹ Steroids, on the other hand, are anecdotally used for the express purpose of bolstering racing performance. Steroids increase protein synthesis and resultantly increase a horse's metabolism, which coupled with an increase in diet, can result in overall growth in muscle mass.⁵⁰ There is, however, little scientific or clinical data directly linking steroid use to the physical denigration of horses; the correlation lies in the fact that horses bred for racing possess relatively delicate skeletal frames that cannot support the massive addition of muscle mass spurred by consumption of steroids.⁵¹

B. Physical Consequences and Impact of Use

Unlike the use of steroids by humans, performance-enhancing drugs for horses can very quickly adversely impact the body of a horse. An increase in testosterone (or a synthetic alternative), for example, can create dangerous behavior in horses such as aggressiveness and “stallion-like” activity in otherwise perfectly trained and tamed mares.⁵² Most of the drugs allegedly used result in an exponential increase in blood volume, forcing a horse's heart to process 65% more volume than normal even when in a sedentary state.⁵³ While such side-effects are by no means trivial, they pale in comparison to the effects of drugs that can directly lead to fatal breakdowns on race days. “Two of the more common substances—phenylbuterol and demorphine (the key ingredient in

⁴⁹ Max Watman, So Far, So Good For Barbaro, N.Y. Sun (May 21, 2006) <http://www.nysun.com/sports/so-far-so-good-for-barbaro/33099/>.

⁵⁰Friedman, *supra* note 25, at 137, 138.

⁵¹ *Id.* at 140.

⁵² *Id.* at 139.

⁵³ *Id.*

cobra venom)—act as painkillers that mask a horse’s nervous system so that it can run harder and feel little pain.”⁵⁴ It is highly suspected that this was the precise causation of the tragic death of Eight Belles at the 2008 Kentucky Derby, (*i.e.* the horse was unable to heed bodily warnings to slow down, resulting in the breaking of both ankles and subsequent euthanasia).⁵⁵ [parenthetical info should be placed in fn]

In addition to concealing injuries, the administration of these types of drugs can also render pre-race health and safety examinations conducted on the horses moot.⁵⁶ California researchers have found that as many as 90 percent of horses that break down have pre-existing ailments or injuries.⁵⁷ It is therefore widely contended that even legal, therapeutic drugs that serve merely as pain medicine actually pose the greatest risk to the horse, and this contention served as the primary driving force in England’s ban of any type of drug use in the sport.⁵⁸ Significantly, the rate of horses fatally breaking down in England is now, on a percentage basis, [only?] half of what it is in the United States.⁵⁹ According to Dr. Manual Gilman, a New York racing steward, "any fair-minded person would say horses would be better off if they ran without medication," noting that "it's not natural. Any medication has side effects."⁶⁰

⁵⁴ Daniel Stone, [Should Congress Police Horseracing?](http://www.thedailybeast.com/articles/2012/07/12/should-congress-police-horseracing.html), The Daily Beast (Jul. 12, 2012), <http://www.thedailybeast.com/articles/2012/07/12/should-congress-police-horseracing.html>.

⁵⁵ *Id.*

⁵⁶ Walt Bogdanich, Joe Drape, Dara Miles and Griffin Palmer, [Mangled Horses, Maimed Jockeys](http://www.nytimes.com/2012/03/25/us/death-and-disarray-at-americas-racetracks.html?_r=0), N.Y. Times A1 (Mar. 25, 2012), http://www.nytimes.com/2012/03/25/us/death-and-disarray-at-americas-racetracks.html?_r=0.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Joseph Durso, [Horse Racing: Thoughts from The Glass Booth](http://www.nytimes.com/1991/12/05/sports/horse-racing-thoughts-from-the-glass-booth.html), N.Y. Times (Dec. 5, 1991), <http://www.nytimes.com/1991/12/05/sports/horse-racing-thoughts-from-the-glass-booth.html>. [Ancient history?]

Perhaps one of the more troubling facts of the state of drug abuse in the sport is that these types of incidents continue to occur at the highest level of racing—especially the Triple Crown races, which receive far more scrutiny and attention than the lower tier “claiming races.”⁶¹ It therefore begs the question of how pervasive and destructive an effect drug abuse is having away from the proverbial spotlight, where regulatory and public interest is even more scant. “Horses in (claiming) races are most vulnerable (to drug abuse), in part because regulators often give them less protection from potentially dangerous drugs.”⁶² In fact a New York Times study discovered horses in claiming races have a 22 percent greater chance of breaking down or showing signs of injury than horses in higher grade races, which strongly suggests that drug abuse is even more rampant and destructive at the lower levels of racing.⁶³ [What years were included in the study? This is important to determine if it’s a current problem] When considering the obvious perils of drug use on horses, in conjunction with the apparent extensive prevalence of this practice throughout the sport at all levels, it quickly becomes clear that reform is needed, and that the existing controls on the industry are not acceptable safeguards for combating this growing problem.

PART IV. SURVEY AND ANALYSIS OF EXISTING REGULATORY CONTROLS

Before addressing proposed remedies for eliminating or at the very least curbing the use of performance-enhancing drugs on racehorses, it is first necessary to examine the existing regulatory controls on the horse racing industry both internally and externally

⁶¹Bogdanich, *supra* note 56.

⁶²*Id.*

⁶³*Id.*

which seek to mitigate the use of performance-enhancing drugs. This section will address the underlying root causes behind the drug use, examine the major governance models and jurisdictional rules in place across several states, and finally identify the primary failures of these controls.

A. Factors Necessitating Regulation: Root Causes of Drug Abuse

i. The Influx of Money and Corresponding Corruptive Influence

Despite a comparative decline in popularity from its “heyday” in the mid-Twentieth Century, horse racing has still managed to become a \$10 billion annual industry, accounting for nearly 400,000 jobs.⁶⁴ A good portion of this growth is the direct result of a 1978 federal policy that permitted betting on the sport across state lines.⁶⁵ Between the late 1980’s and 2001, the gross amount wagered on horse racing domestically increased from \$9.385 billion (\$19.775 billion in today’s dollars after accounting for inflation) to \$14.550 billion (\$20.258 billion in today’s dollars).⁶⁶ “With this increase, purses for each race have climbed from \$ 700 million to over \$ 1 billion from 1990 to 2001.”⁶⁷ Accounting for inflation, in today’s dollars the \$1 billion figure from 2001 would be equivalent to nearly \$1.4 billion.⁶⁸ [Data is 16 years old??]

The sport has also benefitted from so-called “racinos” in several states that have converted race tracks into casinos (or merged them); several states have used these new venues as a way to “expand gambling, and that require the more-popular and profitable casino operations to effectively subsidize the racing purses.”⁶⁹ The betting attention

⁶⁴ Stone, *supra* note 54.

⁶⁵ *Id.*

⁶⁶ Encyclopedia of American History, Horse racing and showing, <http://www.answers.com/topic/horse-racing-and-showing> (last visited Apr. 8, 2017).

⁶⁷ *Id.*

⁶⁸ CPI Inflation Calculator, <https://data.bls.gov/cgi-bin/cpicalc.pl> (last visited Apr. 27, 2017).

⁶⁹ Stone, *supra* note 54.

focused on winning horses as purses in smaller races has dramatically increased due to the casino money now poured into them, resulting in the horses oftentimes being run or chemically augmented beyond their natural capacity.⁷⁰ As noted in the prior section when discussing the claiming races, smaller racing venues that operate far away from the national stage merit more attention from regulators and policy makers because there are a far greater number of horse races at these types of forums than the large events, such as the Triple Crown, but the general attention and scrutiny is far less. [Break up long, multic-clause sentences!] As such, drug abuse is even more prevalent. As will be discussed further in the foregoing sections, smaller racing venues [should] require the same level of standards and penalties as the major events.

ii. Challenges of Current Drug Testing Systems

The myriad of drugs and medications now readily available for horses has proven to be highly cumbersome for existing testing structures to protect against because there are legitimate medical uses for steroids in racehorses. “Unlike with humans, where a medication can often be traced back to a doctor or prescription, it is not always possible to distinguish whether a steroid was given to a horse for a therapeutic purpose or as a performance enhancer.”⁷¹

There currently exist only two processes for testing horses for steroids, urinalysis and blood tests. The problem with each is that neither has been fully developed, nor has either been clinically proven to have the accuracy required to enforce existing rules.⁷² Moreover, there are other related issues that make the accuracy of both forms of testing

⁷⁰*Id.*

⁷¹ Friedman, *supra* note 25, at 143.

⁷² Kimberly S. Brown, [TheHorse.com: The Steroid Debate](http://www.thehorse.com/ViewArticle.aspx?ID=11789), (May 1, 2008), <http://www.thehorse.com/ViewArticle.aspx?ID=11789>.

tenuous. Not enough is known about how quickly or completely steroids pass through a horse's system.⁷³ In addition, not enough research has been done to accurately determine which steroids are present in positive samples.⁷⁴

Perhaps the biggest challenge to the current testing system, however, lies in the fact that laboratories are unable to keep up with the newest “cutting-edge” drugs made available by illicit chemists.⁷⁵ Furthermore, trainers continue to try to evade the restrictions of the testing protocol by experimenting with “anything that might give them an edge, including cobra venom, Viagra, blood doping agents, stimulants and cancer drugs.”⁷⁶ To this end, racing officials have long maintained that a great deal of illegal doping “occurs on private farms before horses are shipped to the track”, which is by design since few states are legally able to test horses there.⁷⁷

B. Summary of Existing Regulatory Controls and their Shortcomings

Racing's lack of a powerful, central authority is a primary reason for the performance-enhancing drug issues that are plaguing the sport.⁷⁸ Given the gravity and size of the sport, there are shockingly few restrictions on drugs in horse racing, due to the fact that there is no broad “oversight agency to regulate industry practices, police offenders, and levy fines, and in part because the athletes are animals. Most regulation

⁷³ Frank Angst, [Steroid Study Reveals Wide Variance in Steroid Residue](http://www.thoroughbredtimes.com/national-news/2009/March/04/Steroid-study-reveals-wide-variance-in-steroid-residue.aspx), (Mar. 4, 2009), <http://www.thoroughbredtimes.com/national-news/2009/March/04/Steroid-study-reveals-wide-variance-in-steroid-residue.aspx>.

⁷⁴ Masayuki Yamada et al., [Detection of Urinary Metabolites Common to Structurally Related 17a-Alkyl Anabolic Steroids in Horses and Application to Doping Tests in Racehorses: Methandienone, Methandriol, and Oxymetholone](#), 32 J. Analytical Toxicology 387, 387-91 (June 2008).

⁷⁵ Bogdanich, *supra* note 56.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Breslin, *supra* note 18, at 315.

falls to individual state boards that issue a mosaic of sometimes conflicting rules on how a horse should be raised, run, and tested.”⁷⁹

While many of the jurisdictions prohibit the use of certain drugs, relatively few tests exist to test the horses for those drugs.⁸⁰ Trainers that do not face any sort of criminal penalty therefore have little incentive to keep their horses free from performance-enhancing drugs when they know they cannot and will not be caught.⁸¹ Furthermore, as previously alluded to, the existing tests are unreliable and frequently result in false positives that unnecessarily penalize innocent trainers and owners.⁸²

i. State Racing Commissions

Unlike other major professional sports leagues such as Major League Baseball or the National Football League, there is no national standard of rules [rule-making and enforcing authority?] for drug testing in horse racing.⁸³ Horse racing is governed in the United States at the state and local levels through state racing commissions, which thereby allow each state to regulate the sport as it sees fit. Indeed, the commissions generally have wide-ranging authority that includes the power of rulemaking and enforcement.⁸⁴ Commissions, however, often pass regulations without having the resources to test for illicit drug use and/or enforce the law.⁸⁵ Furthermore, the general lack of uniformity in the regulation and implementation of standards and enforcement of

⁷⁹ Stone, *supra* note 54.

⁸⁰ Gasparon, *supra* note 48, at 208.

⁸¹ *Id.*

⁸² *Id.*

⁸³ John Drape, Horse Racing: Amid the Run for the Roses, a new race to curb drug use, N.Y. Times (May 5, 2005), http://www.nytimes.com/2005/05/05/sports/horse-racing-amid-the-run-for-the-roses-a-new-race-to-curb-drug-use.html?_r=0.

⁸⁴ Friedman, *supra* note 25, at 144.

⁸⁵ *Id.*

penalties has allowed the proliferation of performance-enhancing drugs and abuse of medication.⁸⁶

By virtue of the fact that the thirty-eight racing jurisdictions operate autonomously, they are virtually by definition in some level of competition with one another for profits. Tracks with more horses and races naturally lead to higher sales and thus higher tax revenues generated for the local and state governments.⁸⁷ Many racetracks and local/state commissions are thus highly keen [incentivized?] to implement as friendly conditions as possible for owners and trainers with an eye towards attracting more paying customers. As one might expect, this oftentimes leads to more lenient regulations with respect to drug testing.⁸⁸ This is not to say that every state and local commission are prone to overly lenient regulatory controls, but it does help foster a system that is “disjointed and lacking in [uniform] control and accountability.”⁸⁹

Beyond the governance hierarchy of the sport, the actual testing methodologies that are performed in an effort to flush out the use of performance-enhancing drugs are themselves riddled with inconsistencies. There are eighteen different labs in the United States that are used to vet and test blood or urine samples from horses in the search for [for the discovery of?] drug use; the problem is they employ eighteen different drug-testing protocols.⁹⁰ Even under a hypothetical "zero tolerance" rule towards any offenders, "zero tolerance" would not have the same criteria across all of the labs.⁹¹ In

⁸⁶ Breslin, *supra* note 18, at 299.

⁸⁷ Cassidy, *supra* note 14, at 129.

⁸⁸ *Id.*

⁸⁹ William Rhoden, Uncontrolled Sport May Not Merit Triple Crown Glory, N.Y. Times (May 27, 2012), <http://www.nytimes.com/2012/05/28/sports/horse-racing-may-not-deserve-triple-crown-glory.html?adxnnl=1&ref=tomudall&adxnnlx=1348668021-SC+dh6BGh1iHRC+S0VKgUw>.

⁹⁰ Christy West, AAEP 2008: Medication in Racing and Performance Horses, (Feb. 15, 2009), <http://www.thehorse.com/ViewArticle.aspx?ID=13614>.

⁹¹ *Id.*

addition to a lack of uniform procedures, research conducted in the field has to date provided no definitive answers regarding how long it takes a horse to reduce the levels of a drug in its body to the legal limit.⁹²

The testing criteria utilized among various officially sanctioned laboratories, however, are not the extent of the inconsistency. Among the thirty-eight states that have some form of horse racing, twenty-eight have no regulations whatsoever with respect to anabolic steroids (interestingly, this includes the three states that host Triple Crown races of Kentucky, Maryland and New York).⁹³ [paraentetical info should be placed in fn]“The remaining 10 states have a partial ban that makes an exception for four drugs—including the steroid Winstrol. And in the states with more stringent rules, the prohibitions apply only on race day, not during the months of training that come before.”⁹⁴

Because there is no federal law regulating drug use in racing, let alone a clearly defined industry-wide standard, regulators and commissions in individual states can be as harsh or lenient as they wish in punishing violators.⁹⁵ Take, for example, New Mexico. Tests conducted on horses in New Mexico for the potent pain-killing medication Flunixin yielded results over “104 nanograms on 68 occasions since 2009, with some registering 1,000 and even 2,400, records show.”⁹⁶ These levels are so high that regulatory veterinarians in other states say [have claimed that?] the horses must have been drugged on race day, a practice that is forbidden.⁹⁷ To give this example more context, it should be noted that most test results for Flunixin register in between 35 and 50 nanograms.⁹⁸

⁹² *Id.*

⁹³ Engber, *supra* note 2.

⁹⁴ *Id.*

⁹⁵ See Bogdanich, *supra* note 56.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

Despite these dizzying numbers, the current penalties in New Mexico for trainers who overmedicate their horses with the drug receive **no punishment** on their first violation, a mere \$200 fine on the second and \$400 for the third.⁹⁹ Additionally, New Mexico removes any record of Flunixin violations every 12 months, thus allowing trainers to again overmedicate horses without penalty. Dozens of huge Flunixin overdoses have resulted in warnings only.¹⁰⁰

By contrast, other states have taken far more punitive postures with regard to drug offenses. Iowa, for instance, has implemented a blanket ban on steroid use in all racehorses.¹⁰¹ In Indiana, all winnings must be forfeited after the first drug offense. The rationale, as explained by Joe Gorajec, the executive director of the Indiana Horse Racing Commission, is “If someone who violates the rule thinks the penalties are going to be mild or nonexistent, then breaking the rules is just a cost of doing business.”¹⁰² By hitting the offenders where it really hurts (*i.e.* their wallets) Indiana positions itself to be a far more hostile environment towards would-be drug offenders. There is [appears to be?] no clear-cut reason as to why certain states are comfortable taking such relaxed approaches to drug enforcement whereas others are far less lenient.

The decentralized, state-centric model allows for this, however, and perhaps is reflective of the cultural and demographic differences that define the United States [break up long sentences]. [In fact, it seems to replicate other defiations, as manifested?] in the various approaches to marijuana legalization, for example. The histories and local cultures of various regions in the country inform the legislative appetite [approach?]for

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Finley, *supra* note 44.

¹⁰² *Id.*

any number of policies, and it seems the regulation of horse racing is no different. [So, notwithstanding?] the noble and even effective measures taken in states like Iowa and Indiana, the sport will never see [undergo?] the wholesale change to its culture it so desperately needs unless uniform standards are adopted--a task that has yet to come to fruition.

ii. Legislative Efforts

Despite the pervasive nature of drugs in the sport, the issue has not been unilaterally ignored by policy-makers either domestically or abroad. “The World Anti-Doping Code unanimously was adopted¹⁰³ by more than 600 sports organizations¹⁰⁴ and governments of the world in Copenhagen in March 2003 with 665 signatories binding anti-doping regulation across all continents and sports.”¹⁰⁵ Unfortunately, American horse racing is not one of the signatories, primarily due to the fact that many stakeholders in the industry either refuse to seek a harmonization of medication standards or deny that there is a problem altogether.¹⁰⁶ Although as is the case with many voluntary international treaties, the actual enforcement measures are not particularly strong; the issue with the lack of signage is the larger message being sent that the horse racing industry has to date not viewed this drug epidemic as a problem worthy of greater attention. The possible benefits associated with an international coalition such as this are admittedly more symbolic; it is domestically and within the sport itself that true remedial measures need to be taken.

¹⁰³ Aharon Zorea, *Steroids: Health and Medical Issues Today* 77-83 (Greenwood Press, 2014).

¹⁰⁴ This includes international sports federations, national anti-doping organizations, the International Olympic Committee, the International Paralympic Committee, and several professional leagues in various nations.

¹⁰⁵ Wendt, *supra* note 8, at 179.

¹⁰⁶ *Id.*

Legislative attempts in Congress to curb the destructive effects of drug abuse in horse racing have not been met with much success. The Horseracing Integrity and Safety Act of 2013 proposed the United States Anti-Doping Agency (“USADA”) as “the authority to permit/prohibit the drugs and medications that may be administered to a horse in a race subject to an interstate off-track wager and set the withdrawal period for its administration.”¹⁰⁷ Under this proposal, any horse receiving **any** drug within 24 hours of a race [would be] prohibited from racing. Additionally, race tracks “must have an agreement with USADA that includes terms and conditions regarding compliance with rules”.¹⁰⁸

The proponent of the bill, Congressman Joseph Pitts, stressed the need for a uniform approach to fighting performance-enhancing drug abuse in the United States. [break up long sentences. “He stated], “Despite promises and assurances, state and industry groups have been unable to come together to develop uniform rules to police doping. . . . Congress must step in to offer a sound national framework to protect the horses, the riders, and the public.”¹⁰⁹ [It should be noted that?] The bill does not necessitate the establishment of any new federal agencies, and calls for funding to come from the industry through a percentage of the gambling bets or a series of fees from racetracks, horsemen groups, breeders, and owners.¹¹⁰ A portion of the financing would be collected from the racing associations, who before conducting a race with interstate, off-track betting, must enter into an agreement with USADA and comply with its anti-

¹⁰⁷ Joseph Pitts, Horseracing Integrity and Safety Act of 2013 (House of Representatives 2013).

¹⁰⁸ *Id.*

¹⁰⁹ Wendt, *supra* note 8, at 186.

¹¹⁰ See generally Pitts, *supra*.

doping rules.¹¹¹ Unfortunately, [and] despite some initial bi-partisan support,¹¹² it never even succeeded in obtaining a vote in the House, let alone consideration in the Senate. A revised version of the bill was proposed by the same sponsor in 2015, where it was referred to the House Subcommittee on Commerce, Manufacturing, and Trade, where it has not advanced.¹¹³ [This is a new Session—2017-18. Has it been resubmitted???

There is not one clearly defined reason why progress on these efforts has stalled and support has been minimal. However, there are a few theories. One is that industry support for these measures is mixed as best, with a general reticence towards supporting federal interventionist regulation, which has resulted in strong lobbying against passage.¹¹⁴ “Separate from the racing industry’s split views on the anti-doping legislation, another obstacle to passage might be the political climate of Washington, D.C. itself,” [break up long sentences]. [“ The bill was assigned in both of its”]as the assignment of both iterations of the bill to the House Subcommittee on Commerce, Manufacturing, and Trade [“This has resulted in”]has presented lawmakers who possess only a passing familiarity with “racing’s highly specialized wants and needs,” a comprehensive proposal saturated with subject matter that is likely beyond their normal areas of expertise.¹¹⁵

Should some version of the Horseracing Integrity and Safety Act pass [be enacted], it would be the deepest and most meaningful foray Congress has made into the regulation of horse racing beyond wagering. To date, the federal government has given

¹¹¹ *Id.*

¹¹² The bill had 35 total co-sponsors, 30 Democrats and 5 Republicans. *See* Congress (May 17, 2013), <https://www.congress.gov/bill/113th-congress/house-bill/2012/cosponsors?q=%7B%22party%22%3A%22all%22%7D>.

¹¹³ Congress (Jun. 3, 2015), <https://www.congress.gov/bill/114th-congress/house-bill/2641/all-actions?overview=closed#tabs>.

¹¹⁴ T.D. Thornton, What’s Next for Competing Anti-Doping Bills?, *Thoroughbred Daily News*, (July 21, 2015), <http://www.thoroughbreddailynews.com/whats-next-for-competing-anti-doping-bills/>.

¹¹⁵ *Id.*

little indication it has the ability (or motivation) to regulate the industry. The Interstate Horseracing Act of 1978 (amended in 2007) holds that "it is the policy of the Congress in this Act to regulate interstate commerce with respect to wagering on horse racing, in order to further the horse racing and legal off-track betting industries in the United States."¹¹⁶ This statute has limited the involvement of Congress to merely regulating racing, solely with respect to wagering, thereby enabling discord by allowing each state to draft its own regulations.

iii. *The Racing and Medication Testing Consortium ("RMTC"): Model Rules*

In 2001, the American Association of Equine Practitioners¹¹⁷ met to determine if an agreement could be reached regarding the need for a uniform policy for racehorse medication in the United States.¹¹⁸ The result of the summit was the Racing and Medication Testing Consortium ("RMTC"), created to develop an industry-wide uniform medication policy statement.¹¹⁹ The RMTC is comprised of 25 racing industry stakeholders and organizations that represent all types of horse racing in the United States, including trotters.¹²⁰ "The RMTC has promulgated uniform model rules regarding anabolic steroids that have been adopted by 26 states."¹²¹ Most of these states that currently regulate the use of steroids in horse racing have adopted the Model Rule either

¹¹⁶ Interstate Horseracing Act, 15 U.S.C. § 3001, et seq. (2007).

¹¹⁷ A non-profit organization based in Lexington, KY, comprised of 9,300 veterinarians and veterinary students from 61 countries with the stated mission to "improve the health and welfare of the horse, to further the professional development of its members, and to provide resources and leadership for the benefit of the equine industry". See About AAEP, <https://aaep.org/about-aaep> (last visited Apr. 25, 2017). [Good]

¹¹⁸ American Association of Equine Practitioners, Text of Racehorse Medication Summit Report (Jan. 4, 2002), <http://www.bloodhorse.com/horse-racing/articles/7399/text-of-racehorse-medication-summit-report>.

¹¹⁹ *Id.*

¹²⁰ Hallie Roach, Drug testing task force provide updates (Feb. 12, 2009), <http://www.harnesslink.com/News/Drug-testing-task-force-provide-updates-70298?highlight=harmonization>.

¹²¹ Alan Foreman, Racing Medication and Testing Consortium (Aug. 12, 2012), http://www.jockeyclub.com/roundtable_05.asp?section=8.

in their entirety or in a slightly altered form.¹²² Others, such as Kentucky, Maryland, Pennsylvania and Washington have used the Model Rule as a baseline and either strengthened or loosened many of its regulations.¹²³

Despite the best intentions behind these efforts, however, there is no actual binding, coercive legal authority that holds anyone [any of the potential violaters?] accountable. The model rules provide a worthwhile standard of conduct to strive towards, but arguably amount to little more than grandiose rhetoric lacking any tangible enforcement authority. There also are some logistical issues with the Model Rules themselves as they relate to the guidance around performance-enhancing drugs. “The inability to distinguish the specific use of the steroid, for either therapeutic or performance-enhancing purposes, coupled with the fact that there is a requalification carve-out involving the veterinarian's list, causes major enforcement issues.”¹²⁴

C. Insufficient Deterrence To Recalcitrant Trainers and Owners

It is self-evident from the preceding analysis that the existing testing procedures and penalties for violation do not create an ample enough deterrent to trainers and owners who seek to circumvent the rules. The actual tangible impact to the trainer's long term disposition in the sport is minimal even when punitive measures are enacted because in many cases, upon being suspended, they can simply transfer control of the horse to their assistant.¹²⁵ It might be naïve to suspect the trainer's assistant would for some reason

¹²² See e.g. 1 Colo. Code Regs. 208-1-5.331 (2009); Ill. Admin. Code tit. 11, pt. 603.210 (2008); 71 Ind. Admin. Code 8-1-8 (2008); 205 Code Mass. Regs. 3.19 (2009); Nev. Gaming Regs. 30.404 (2008); 9 N.Y. Comp. Codes, R. & Regs. 4043.15 (2009); Or. Admin. R. 462-160-0130 (2009); Tex. Admin. Code tit. 16, § 319.364 (2009); and 11 Va. Admin. Code 10-180-75 (2008).

¹²³ See e.g. 810 Ky. Admin. Regs. 1:018 (2009); Code Md. Regs. 09.10.03.04 (2009); Pa. SHRC-2008-01 (2008); and Wash. Admin. Code 260-70-630 (2009).

¹²⁴ Friedman, *supra* note 25, at 147.

¹²⁵ Joe Drape, Barred for Drugs, Horse Trainers Return to Track, N.Y. Times (Nov. 4, 2009), http://www.nytimes.com/2009/11/05/sports/05horses.html?_r=1.

adopt a more ethical posture towards the treatment of the horses in the primary trainer's absence, but even if that were the case, the trainer's access and right to the stable is fully restored upon completion of their suspension.¹²⁶ Therefore, more sweeping, corrective actions must take place in order to curb this problem.

PART V. PROPOSED REMEDIAL MEASURES

As [demonstrated?], it is evident from the vastly disjointed and disparate nature of horse racing jurisdictions that the lack of uniformity in regulations and enforcement is the primary underlying cause that enables rampant drug abuse to saturate the sport, endangering the well-being of the animals. While there is admittedly no guaranteed remedy available that would instantly [quickly?] rectify all of the outstanding drug issues, what is beyond dispute is the current de-centralized, mostly unregulated model is woefully inadequate in preserving the health of the horses and the competitive integrity of the sport. Therefore, This section will propose several action steps that can be enacted (ideally in concert with one another) to help cleanse the sport of its performance-enhancing drug issues.

A. Implementation of Uniform, Federal Legislation

The most obvious solution to cure the untenable inconsistency in regulation and application of enforcement measures would be to have the United States Congress enact a law that would explicitly outline standards, guidelines and punishments for drug offenses in all forms of horse racing. This of course presupposes a functional, operational Congress, something that has been conspicuously absent from the political landscape in

¹²⁶ *Id.*

the recent past.¹²⁷ As has been discussed, some states have been more diligent in attempting to combat this problem than others, but because there has not been any sort of uniform coalition among the states to impose stricter sanctions on the industry as a whole, federal legislation may be the best opportunity at doing so.

The Horseracing Integrity and Safety Act of 2013 (and a later iteration proposed in 2015) [but what about its status in 2017 Congressional Session?] offers the most comprehensive and reasonable solution towards establishing a coherent anti-drug culture in horse racing. To reiterate, the chief aim of the law would be to “police thoroughbred doping and medication abuse via the establishment of a federal, non-governmental racing regulatory organization headed by the United States Anti-Doping Agency (USADA).”¹²⁸ Despite the bi-partisan nature of the proposed law, it has struggled to solicit the necessary support to even come close to a vote, let alone receive passage. “GovTrack, a government transparency organization that uses logistic regression analysis to rank the likelihood of passage of the 10,000 bills that come up annually in Congress,” gives the Bill a 5% chance of getting past committee and a 2% chance of being enacted.¹²⁹ [This data should be put in fn] Simply put, the passage of this bill would offer the most holistic and substantive reform of drug abuse in horse racing. Even in this era of divided government and finite resources, one would hope the revival of this bill would not be too ambitious of a goal for our elected representatives.

¹²⁷ Congressional “gridlock” has worsened over the last 50 years, and increased even more over the last half decade. For context, between 1947 and 2000, conference committees (groups appointed by both the House and Senate to resolve disagreements on a particular bill) averaged roughly 100 resolutions per congressional session. Between 2001 and 2012 this number dropped to 20. Between 2011 and 2013, only 7 agreements were reached by conference committee. *See* Political Gridlock: Unprecedentedly dysfunctional, The Economist (Sep. 22, 2014), <http://www.economist.com/blogs/democracyinamerica/2014/09/political-gridlock>. [Good, but it’s now 2017, so what’s up now??]

¹²⁸Thornton, *supra*, note 114.

¹²⁹ *Id.*

[But] Should the passage of this bill prove too cumbersome [difficult?] for Congress, another solution could be the amendment of an existing law, *i.e.* the Interstate Horseracing Act. Specifically, the law could be amended to broaden the federal government's authority over the entire horse racing industry by adding required layers of compliance with drug prevention standards. Although realistically spurring Congress to act decisively on any issue may be an ambitious goal, the recently elected President has professed a strong appetite for cutting back on perceived superfluous regulations.¹³⁰ As such, the chances of amending an existing regulation, rather than adding a new one dealing with similar subject matter, may be slightly more palatable. Furthermore, the chief aim would be to mitigate the effects of drug abuse on horses in the sport, which could still be achieved by incentivizing certain behaviors and barring others in the existing law which ostensibly is only concerned with gambling.

According to the Interstate Horseracing Act, the federal government has interstate commerce authority over wagering and off-track betting.¹³¹ To allow for the federal government to regulate the entire horse racing industry, Congress could [would have?] amend the Interstate Horseracing Act to include language establishing a uniform regulatory structure around drug testing (including language allowing testing to be conducted off-site on the private training farms of the racehorses), and the permissibility of certain types of medication/treatment, etc.[avoid "etc." in formal writing] Penalties for violation could include a complete ban on taking interstate bets on races that include horses that have failed drug tests. This could be facilitated by mandating a pre-race

¹³⁰ Steven Mufson, Trump wants to scrap two regulations for each new one adopted, Washington Post (Jan. 30, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/01/30/trump-wants-to-cut-two-regulations-on-businesses-for-every-new-one-imposed/?utm_term=.8bce6380c92d.

¹³¹ Interstate Horseracing Act, 15 U.S.C. § 3001, et seq. (2007).

testing requirement for all horses participating in races with interstate wagering. Furthermore, should a given jurisdiction or state become a repeat offender in failure to fully comply, the federal government would have the authority to suspend all wagering on horse racing in that state altogether. Although this may seem like a hard-line approach, the threat of cutting off wagering profits would unequivocally garner the attention of the local states and their respective racing commissions, and would force them to take the issue seriously.¹³²

Although neither of the above proposals is currently being actively discussed [considered?] within Congress, this could quickly change with the engagement of appropriate lobbying and advocacy efforts. Organizations such as the American Society for the Prevention of Cruelty to Animals¹³³ and PETA¹³⁴ already actively participate in grassroots and political lobbying to advance legislative and policy agendas that call for the more favorable treatment of animals. Should these two collaborate to raise public and political awareness, perhaps [in collaboration with] other like-minded organizations within the animal rights field [sector?], traction could be gained within Congress to support one or both of the legislative efforts proposed above.

B. Establish a Centralized Office to Oversee and Police the Sport

¹³² A crippling shortcoming in some of the performance-enhancing drug testing in Major League Baseball has been the general perception of a lack of deterrence. For example, when a player is suspended for a fixed amount of time for a violation, he is often able to return and continue to earn income from his contracted salary. There have been calls to have a player's contract instantly voided following a failed test, which the player's union has rejected. This is the underlying rationale, however, behind the proposed penalties for horse racing.

¹³³ ASPCA Advocacy Center, <https://www.aspc.org/take-action/advocacy-center> (last visited Apr. 28, 2017).

¹³⁴ PETA: Passing Animal-Friendly Legislation, <http://www.peta.org/action/activism-guide/passing-legislation/> (last visited Apr. 28, 2017).

There have been calls from those both within the horse racing industry and external to it, to create a national governing body in the mold of the organizational structures of other professional sports leagues. This would allow a clear system of rules across jurisdictions to be implemented, with a uniform testing and penalty system for which all industry participants would be held accountable.

There currently exists a loosely interconnected bureaucracy of organizations within the sport that could be leveraged as a basis for formulating this new central office. The Jockey Club already controls the breeding and licensing of all domestic racehorses.¹³⁵ The National Thoroughbred Racing Association (NTRA) currently serves as "both league office for a big sport and trade association for a big industry, including related businesses like breeding."¹³⁶ Additionally, the basic framework for uniform rules and regulations in horse racing is already in place via organizations such as the RMTC, ARCI, and the Thoroughbred Safety Committee.

The creation of a new organization by leveraging existing structures and rules would serve as the most efficient allocation of time and resources to combat the issue. There is likely no existing federal body that could assume this role as easily as the amalgam of existing organizations within the industry forging together into a single entity. By establishing a national organization, the industry would be drastically better positioned to implement uniform and effective drug regulations. The organization could also establish a system of penalties that would have the same effect nationally, and dedicate resources to research new and effective ways of combating drug abuse. As

¹³⁵ Jockeyclub.com, About the Jockey Club, http://www.jockeyclub.com/about_tjc.asp (last visited Apr. 12, 2017).

¹³⁶ NTRA.com, A letter from the CEO, available at <http://www.ntra.com/industry.aspx> (last visited Apr. 12, 2017).

already alluded to, the challenge with this approach would likely be finding the requisite support among the various jurisdictions for coming together and forging a single entity.

In evaluating what other existing sports league could serve as useful templates for horse racing to mirror in terms of corporate structure, the most apt analogy may actually be the National Collegiate Athletic Association (“NCAA”).¹³⁷ “The NCAA is an unincorporated organization composed of nearly 1,000 voluntary members, which are four-year college institutions with competitive athletic programs”.¹³⁸ The NCAA has a central authority body which has the ability to create committees dedicated to specific programs, however, each member school maintains the ability to govern and rule within its own parameters to some degree, thereby not totally eliminating their autonomy. Adopting something similar in horse racing would allow “state agencies to retain their power while also implementing uniform rules,” most obviously those around performance-enhancing drugs.¹³⁹ DOUBLE-SPACE

This would also allow for changes or updates to the rules, based upon updated research or testing techniques, to be more easily implemented than a system with pure federal oversight that would need congressional approval for any change.

Because it seems apparent there will likely not be a cultural epiphany within the sport to begin collectively addressing this issue via the formation of a centralized authority under its own volition, it seems the only effective motivation could be from the threat of the previously mentioned congressional intervention. This would not be without precedent. Following gamblers “fixing” the outcome of the 1919 World Series, Major League Baseball adopted a more formal organizational structure, including the appointment of its first commissioner to oversee the league and enforce its rules more stringently,¹⁴⁰ with the implicit understanding this would stave off congressional intervention. Many industry stakeholders have long opposed the idea of federal

¹³⁷ Gasparon, *supra* note 48, at 217.

¹³⁸ See Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 183 (1988) (describing organization of NCAA).

¹³⁹ Gasparon, *supra* note 48, at 217.

¹⁴⁰ Evan Andrews, The Black Sox Baseball Scandal, 95 Years Ago, History in the Headlines (Oct. 9, 2014), <http://www.history.com/news/the-black-sox-baseball-scandal-95-years-ago>.

oversight,¹⁴¹ thus much like the pressure applied to other sports leagues that forced them to act on their internal issues, this may prove to be the only ample incentive to spark true reform in horse racing via the formation of a central league.

C. Forge a Collaborative Effort Between Regulators and Industry Officials to Fund New Testing Methods and Enact Harsher Penalties

In addition to establishing a uniform system of rules and regulations, along with a strong, centralized body to enforce them, the horse racing industry must also work to develop innovative and effective testing procedures. It is therefore imperative that the labs used to vet test samples coordinate their efforts to eliminate the inconsistent testing methods. “Currently, in the United States racehorses' test samples are submitted to one of a number of labs, both privately and state funded. It is difficult for the various states and private organizations to develop the best testing procedures, primarily due to insufficient funding.”¹⁴² It is therefore recommended that the industry foot the majority of the cost for heightened testing procedures. It is submitted that they probably have far greater expertise in the nuances of the sport and what needs to be guarded against. Moreover, as a matter of public policy, it would seem irresponsible for an excessive amount of taxpayer funds to be directed to a problem that the private sector should be equipped to handle. Despite the relative popularity the sport still enjoys among fans, the public’s interest by no means is so great as to warrant a significant expenditure of taxpayer dollars. If there is one uniform regime that defines the standards and penalties, whether from federal regulation or industry-specific rulemaking, the laboratories could simply be

¹⁴¹Thornton, *supra* note 114.

¹⁴² Breslin, *supra* note 18, at 328.

instructed to follow the guidelines put in place as a means to permanently eliminate the disparate testing protocols that plague the sport today.

Following an agreed upon baseline of rules and testing procedures, it then becomes critical--whether by federal regulation or drastically increased internal industry rules--the punishments for offenders becomes severe. The model employed in England seems to be particularly effective, wherein there is a complete ban on all drugs for horses. As was discussed earlier,¹⁴³ the rate of fatal horse breakdowns in England is much lower than in the United States; with all other conditions being more or less equal it then becomes reasonable to deduce their far divergent handling of drug abuse is the primary driver of this disparity. This may be viewed as an overly-conservative approach, however, as there are certain drugs that can provide therapeutic value to horses.¹⁴⁴ Break up long sentences. “But such harsh action”] would dispel any sort of ambiguity around what drugs would qualify as a policy violation.

One need not look as far as “across the pond” for templates on how to curb this issue, however. As discussed earlier, models employed by states such as Iowa and Indiana take a far harsher stance on drug abuse in horse racing than others, with the former employing a complete ban on all drugs and the latter mandating the forfeiture of winnings for horses that test positive for drugs.¹⁴⁵ Incorporating elements of the regulatory regimes utilized in those two states, and/or England, would likely create potent enough standards and penalties to serve as ample deterrence to the continued abuse of the animals.

¹⁴³ Bogdanich, *supra* note 56.

¹⁴⁴ Gasparon, *supra* note 48, at 206.

¹⁴⁵ Finley, *supra* note 44.

[As to the resultant penalties?], it is submitted that for an initial offense of a horse failing a drug test, a one year suspension from all organized racing activity be levied on the jockey, trainer, owner and the horse itself. This would include a formal ban on access to all tracks and racing facilities associated with the newly formed league. The prospect of losing a full year of racing out of a horse, whose prime racing years are very limited to start, would be a devastating consequence for any ownership/training group. Additionally, there would be a two-year “look-back” provision embedded in the rules which would force all earnings won with that horse over the prior two years to be forfeited. The money would be provided to the central league office and then dedicated toward further drug testing research. This would instill a culture of accountability, where all interested parties would be forced to be extremely mindful of the conduct of every member on their teams, from top (owners) to bottom (jockeys).

To further enforce this accountability, the second offense for a failed test would result in an immediate lifetime ban from the sport for all parties involved (jockey, trainer, owner and horse). All intervening winnings between the first failed test and the second failed test would again be forfeited. Furthermore, in addition to mandatory testing on the day of each race, horses would be subject to random drug testing at any time of year, with only 24 hours notice. This would include the ability for testing authorities to administer drug tests on the farms/trainer facilities where the horses are kept, thereby eliminating another venue where drug abuse is widely believed to be taking place.¹⁴⁶ These efforts would further mitigate the risk of trainers simply timing the horse’s drug cycle to synchronize with known testing dates and locations.

¹⁴⁶ Bogdanich, *supra* note 56.

As an added layer of defense to guard against [persistent,] rampant abuse, it is submitted that racetracks could be mandated to have their licenses revoked if more than 5% of their registered horses fail drug tests in a calendar year. The threat of closure and subsequent loss of business would invariably stir more interest in ensuring the horses are racing clean, and would place even more pressure on the general culture of the sport to evolve in such a way that will protect against drug use. Racetracks would presumably be far more cautious in vetting the horses/ownership groups being invited to compete, and would likely invest far more time and effort in performing due diligence before races to ensure the participants are fully compliant with the rules.

As a final recommendation, should the threat of pecuniary penalty not serve as a powerful enough motivation to halt this behavior, harsher penalties must be [imposed?] contemplated. If after a five year period with the aforementioned penalties in place yields little to no change in the fatal breakdown numbers of horses at American racetracks, and/or more than 10% of all test samples come back positive,¹⁴⁷ criminal sanctions must be implemented holding jockeys, trainers and owners criminally liable for the well-being of their horses. This is of course presupposing federal or legislative cooperation, whether at the onset of these rules or after the five year period has elapsed. All of these proposed penalties are unquestionably harsh. But, if the possibility of inflicting irreparable damage or death to these innocent animals is not enough of a deterrent to industry stakeholders who intentionally pump them full of drugs, perhaps [loss of employment or ownership?] the prospect of needing to find another source of income or the threat of incarceration will suffice.

¹⁴⁷ The newly formed governing body would be responsible for monitoring and tracking these figures.

PART VI. CONCLUSION

Unlike the all-stars and pro bowlers [professionals?] of other major sports, the animal athletes in horse racing do not naturally seek the fame, glory and attention sought by their human counterparts. Indeed, an ideal day for a stallion would probably be comprised of a hearty romp through a meadow to a grove of readily available carrots and oats. It is therefore reprehensible that so many of them are flagrantly abused with various chemical concoctions--all in the name of furthering the success of their owners and trainer within the horse racing industry. The reasons for the prevalence of this abuse are many, but the more pressing concern for industry officials and policy makers should be finding solutions to curbing the problem before it envelops [damages?] more innocent horses. A uniform federal law defining standards and penalties, ideally in conjunction with the establishment of a central office of the sport to carry out and enforce agreed-upon testing standards with better funded testing protocols and clearly defined, harsher penalties, would be a tremendous start to rectifying the litany of performance-enhancing drug issues that have been plaguing professional horse racing for years.