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Reining in the Regulation of Performance Enhancing Drugs in Horseracing: Why a Federal Regulation is Needed to Effectively Discipline Trainers.

Kyle Cassidy

Introduction

On August 25, 2012, a little known gelding¹ named Willy Beamin won the highly prestigious Kings Bishop Stakes at the famous Saratoga Racecourse.² Receiving lukewarm support, the eleven-to-one shot had just won his second race in four days, a rare feat in modern horseracing.³ Notably absent from the winner's circle was the gelding's trainer, Rick Dutrow.⁴ Instead of hoisting the trophy, Dutrow watched the celebrations from a Chinese restaurant in Greenvale, New York.⁵ At the time of the race, Dutrow had accrued seventy violations throughout fifteen racetracks in nine states over the course of his career.⁶ Most recently, Dutrow was issued a ten year ban from racing horses in New York after hypodermic needles were found in his barn and one of his horses tested positive for a powerful painkilling drug.⁷ Dutrow was only allowed to continue training in New York after a lower court granted a stay of his suspension while he appealed.⁸ One year prior, Dutrow was also banned from running horses in

¹ A Gelding is a castrated male horse *Gelding Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/gelding> (last visited Mar. 6, 2013).

² Jack Shinar, *Willy Beamin Shoots to King's Bishop Surprise*, BLOODHORSE, (Aug. 28, 2012), <http://www.bloodhorse.com/horse-racing/articles/72342/willy-beamin-shoots-to-kings-bishop-surprise>.

³ *Id.*

⁴ Joe Drape, *Shadows and Victories Follow Trainer*, N.Y. TIMES (Aug. 29, 2012), <http://www.nytimes.com/2012/08/30/sports/trainer-richard-dutrow-keeps-winning-even-after-suspension.html>.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Jerry Bossert, *Rick Dutrow Jr. unfazed as he sets out to appeal 10-year suspension at the Court of Appelas*, N.Y. DAILY NEWS (July 21, 2012), http://articles.nydailynews.com/2012-07-21/news/32768159_1_train-horses-butorphanol-rick-dutrow.

Kentucky after he was denied a racing license.⁹ Considering Dutrow's scandalous reputation, it is no surprise that he rarely attends races at Saratoga, choosing instead to "stay out of the public eye."¹⁰ Unfortunately, horseracing cannot hide the fact that its current regulatory structure allows trainers to compete and win in some states, despite being banned from racing in others.

One of the primary reasons for trainer suspensions is the use of performance enhancing drugs. In 2009, only one of the top ten trainers by earnings did not have a prior drug related suspension.¹¹ However, these trainers' businesses suffered little while they were suspended. This is because each suspended trainer's stable of horses is allowed to compete under the name of the suspended trainer's assistant.¹² Cristophe Clement, a highly successful trainer stated that, "ten years ago, you were embarrassed to get a medication suspension...now trainers get suspended and go away, and when they come back they get more horses and more owners than they had before they left."¹³ If the horseracing industry continues to allow trainers to circumvent their suspensions through this practice, then the performance enhancing drugs issue will never be resolved.

This article will address the issue of performance enhancing drug use in the sport of horseracing. Specifically, it will consider the current fragmented regulatory scheme which allows each individual state to regulate itself, and contemplate the possibility of a federal regulation as

⁹ Drape, *supra* note 4 (Dutrow's license was denied for "misrepresentations on his application" and "conduct against the best interest of racing.").

¹⁰ *Id.*

¹¹ 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

¹² *Id.* In 2006, trainer Steve "Asmussen was suspended by Louisiana authorities when a filly he trained tested 750 times over the legal limit for the local anesthetic mepivacaine, which can deaden pain in a horse's legs, he turned his horses over to Scott Blasi, his longtime assistant. Blasi won 198 races in 2006 as the Asmussen stable finished the year with more than \$14 million in earnings."

¹³ *Id.* After serving his 2006 suspension, Asmussen was given two highly prominent horses to train. The first was two time Horse of the Year, Curlin, who won the Preakness in 2007. Asmussen was also given Rachel Alexandra, who had an undefeated season winning the Preakness, Woodward, and Haskell in 2009.

an alternative. In doing so, this article will highlight the inadequacy of disciplinary measures for the sport's trainers. Under the current regime, recidivism is tolerated and reciprocity is not always enforced. Part I will discuss current regulation of performance enhancing drugs in horseracing and how it fosters trainer misconduct. Part II will analyze proposed and current state regulations and consider their ability to more effectively discipline trainers nationally. Finally, Part III will argue for a stand-alone federal regulation that ensures medication uniformity, reciprocity, and a more stringent disciplinary system for repeat offenders and trainers who are suspended.

I. Current Regulation of Performance Enhancing Drugs and how the System Fosters Trainer Misconduct

A. Current Regulatory Format

American horseracing dates back to the sixteenth century and the settlement of the English colonies.¹⁴ The sport emerged as a popular recreational activity that occurred in both rural open pastures and major city streets.¹⁵ By the late seventeenth century, the sport began to become more organized when official race courses were created in New York and Virginia.¹⁶ As racing's popularity grew, participants sought to breed horses that were stronger and faster.¹⁷ This increased popularity was the impetus for importation of the Thoroughbred from England in 1730.¹⁸

¹⁴ JOAN S. HOWLAND & MICHAEL J. HANNON, A LEGAL RESEARCH GUIDE TO AMERICAN THOROUGHBRED RACING LAW FOR SCHOLARS, PRACTITIONERS AND PARTICIPANTS 1 (William S. Hein & Co. 1998).

¹⁵ *Id.* (so many races occurred on Sassafras Street in Philadelphia that it became known as "Race Street.").

¹⁶ *Id.* at 2.

¹⁷ *Id.*

¹⁸ *Id.*

The Thoroughbred's lineage originated more than three hundred years ago from three "foundation stallions – the Darley Arabian, the Godolphin Arabian and the Byerly Turk."¹⁹ These three stallions were bred to physically stronger, but slower mares that were native to England.²⁰ A new breed of horse resulted from these pairings that could support weight and maintain speed over long distances.²¹ This was due in large part to the progeny's physical makeup. In terms of structure, the Thoroughbred's legs are "clean and long" consisting of strong bones, muscles and tendons.²² While the horse is running, its rear legs "act as springs [when] they bend and straighten," propelling the horse forward.²³ The front legs then continue this motion as they help pull the horse forward.²⁴ Thoroughbreds also have a long neck which moves in rhythm with their legs.²⁵ This rhythm helps extend the stride fully, allowing the horse to reach and sustain speeds surpassing forty miles per hour.²⁶ Combined, all of these characteristics made the Thoroughbred the perfect breed of horse for racing.²⁷ Therefore, by the 1750s, Thoroughbred racing was organized to only allow "pedigreed horses" to participate.²⁸

Thoroughbred racing in America began during the late seventeenth century and grew in popularity from that time forward.²⁹ By 1860, racing was legalized in almost every state and racetracks were being built throughout the country.³⁰ However, by 1890, racetracks became a place of corruption and dishonesty. Trainers and jockeys were accused of cheating while illegal

¹⁹ The Jockey Club et al., *Thoroughly Thoroughbred, An Informational Guide to the Thoroughbred Industry*, 3 (2006), http://www.jockeyclub.com/pdfs/thoroughly_thoroughbred.pdf.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Jockey Club, *supra* note 19.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Howland & Hannon, *supra* note 14.

²⁹ *Id.* at 1-2.

³⁰ *Id.* at 3

bookmaking was rampant.³¹ Distrust of the horseracing industry was so prevalent that “between 1897 and 1908 the number of racetracks in the United States decreased from 314 to a mere 25.”³²

By 1930, the public’s distrust towards the horseracing industry began to revert. During this time, President Franklin D. Roosevelt oversaw a growth in regulatory agencies that led to an increase in the allocation of power to state governments.³³ Seeing a need to safeguard the horseracing industry, states adopted rules to protect the “trainers, jockeys, owners, spectators, and the horses themselves.”³⁴ In order to make these rules, state racing commissions were formed.³⁵ These commissions, charged with protecting the integrity and fairness of the sport, adopted local rules to be followed by participants in their jurisdiction.³⁶ This resulted in a fragmented governing structure as each state abided by its own rules.³⁷

The fragmented nature of the sport was furthered when the New York Court of Appeals reached a decision in *Fink v. Cole*³⁸ making it “unconstitutional for state government to delegate licensing power to any private organization.”³⁹ This decision substantially diminished the authority retained by any private racing authority and gave even more power to the state racing commissions.⁴⁰ Each racing commission then became responsible for issuing licenses to its

³¹ *Id.* at 7

³² *Id.*

³³ Alexander M. Waldrop, Jarl M. Nobert & John W. Polonis, *Horse Racing Regulatory Reform Through Constructive Engagement by Industry Stakeholders with State Regulators*, 4 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 389, 393 (2012).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Fink v. Cole*, 97 N.E.2d 873, 876 (1951).

³⁹ Howland & Hannon, *supra* note 14 at 10 – 11.

⁴⁰ *Id.*

participants; implementing rules that govern the sport; enforcing these rules; and administering penalties for any rules violation.⁴¹

In 1978, Congress exerted some federal control over the industry when it passed the Interstate Horseracing Act of 1978 (IHA).⁴² This legislation granted the Federal Government authority to regulate “interstate off track-wagering on horseraces.”⁴³ This legislation was drafted to ensure cooperation among those states that participate in off track wagering; however, it did nothing to impose any strictures on the way in which the sport was regulated internally.⁴⁴ Today, the United States horseracing industry remains decentralized and each of its 38 racing jurisdictions continues to maintain individual authority to regulate the sport as it deems fit.⁴⁵

While state racing commissions maintain legal regulatory control of the horseracing industry, the Jockey Club serves as a private organization with some influence. The Jockey Club was founded in 1894 in order to preserve the integrity of the Thoroughbred breed of horses.⁴⁶ Prior to *Fink v. Cole*, the Jockey Club was the regulatory agency that governed racing.⁴⁷ However, today the organization serves as the breed registry.⁴⁸ Essentially, the Jockey Club

⁴¹ Waldrop, *supra* note 33, at 392.

⁴² Interstate Horseracing Act of 1978, 15 U.S.C. § 3001 (1978) (“Congress finds that – the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders; the Federal Government should prevent interference by one State with the gambling policies of another and should act to protect identifiable national interests...”).

⁴³ *Id.*; An “off track wager” is one that is made and accepted at one state’s betting facility, on a race that is being run in another state *Interstate Horseracing Act: Hearing on S.1185 Before the Comm. On Commerce, Science, & Transportation*, 94th Cong. 1 (1977) (statement of Sen. Wendell H. Ford) (This regulation was made due to the state racing commission’s fear that these off track wagering facilities would cause attendance at their racetracks to drop).

⁴⁴ *Id.*

⁴⁵ Waldrop, *supra* note 33 at 392-93.

⁴⁶ *Medication and Performance Enhancing Drugs in Horse Racing: Hearing Before the U.S. Senate Comm. On Commerce, Science, and Transportation*, 112th Cong. 26 (2012) [hereinafter Medication Hearings] (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>.

⁴⁷ Howland & Hannon, *supra* note 14 at 6.

⁴⁸ *About the Registry*, THE JOCKEY CLUB, <http://www.jockeyclub.com/registry.asp> (last visited Jan. 17, 2013).

ensures that each foal is a descendant of a registered male and female Thoroughbred.⁴⁹ Beyond this responsibility, the Jockey Club has also extended substantial resources and convened conferences in order to protect the integrity, safety and welfare of the sport.⁵⁰ Most recently, the Jockey Club has concerned itself with the growing problem of performance enhancing drugs.⁵¹ Specifically, the organization has funded a drug detection system, studied the use of drugs in the industry and issued rules recommendations to state racing commissions on how to test for and regulate the use of drugs.⁵² While these initiatives can be helpful, the organization has no actual authority to enforce them.⁵³ Thus, the Jockey Club uniformly regulates the breed of horses that participate in the sport, but has no actual authority to enact regulation governing the sport itself.

B. The Problem with the Current Regulatory Format

Because each of the thirty eight racing jurisdictions operates separately, they are inherently in competition with one another.⁵⁴ Specifically, each racing jurisdiction wants owners and trainers to run their horses at its racetracks.⁵⁵ When a racetrack features races with more horses in them, this typically leads to an increase in the handle.⁵⁶ Any increase in handle leads to an increase in tax revenue generated for the state.⁵⁷ Ultimately, this incentivizes state racing

⁴⁹ *Id.*

⁵⁰ *Id.*; *Round Table Conference*, THE JOCKEY CLUB, <http://www.jockeyclub.com/ROUNDTABLE.asp> (last visited Jan. 17, 2013).

⁵¹ *See generally* Medication Hearings, *supra* note 46 at 24.

⁵² *Id.*

⁵³ Howland & Hannon, *supra* note 14 at 10-11.

⁵⁴ Waldrop, *supra* note 33 at 397.

⁵⁵ *Id.*

⁵⁶ Mac McBride, *Record Purses, Big Fields, Handle Increases Highlight 2012 Del Mar Meeting*, DEL MAR THOROUGHBRED CLUB, (Sept. 5, 2012), http://www.dmtc.com/upload/2012eosrelease_updated.pdf; *Handle Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/handle> (last visited Jan. 26, 2013) (Definition of handle: the total amount bet on a race, game or event).

⁵⁷ *Gale Encyclopedia of US History: Horse Racing and Showing*, ANSWERS.COM, <http://www.answers.com/topic/horse-racing-and-showing>. (last visited Jan. 24, 2013).

commissions to implement more lenient regulations in order to attract more horses.⁵⁸ Prominent racehorse owner and CEO of Team Valor International, Barry Irwin,⁵⁹ characterized the situation when he testified before Congress. Irwin said that “states are in competition with other states. Racetracks are in direct competition with racetracks in other states for top horses. So trainers play states against one another, lobbying for more lax drug rules. States that appease trainers get the horses, the other states don’t.”⁶⁰ This ultimately leads to a system that is disjointed, lacking control and accountability.⁶¹ Without uniformity the system will continue to under-enforce its regulations and the problems that face the industry will persist.

C. The Problem of the Regulation of Performance Enhancing Drugs in Horseracing

Unlike Europe and the majority of the rest of the world, the United States allows horses to run on race-day medications. Specifically, horses are permitted to compete while using furosemide (Lasix), a drug that is believed to prevent exercise-induced pulmonary hemorrhaging of the lungs and phenylbutazone (Bute), an anti-inflammatory.⁶² While Lasix and Bute are permitted on race-day, hundreds of other drugs are not.⁶³ Jurisdictions draw distinctions between various drugs and the performance enhancing effect that they have on the horse.⁶⁴ Those drugs that have a primarily therapeutic effect receive a lower classification, and thereby a less serious

⁵⁸ Medication Hearings, *supra* note 46 at 5 (statement of Barry Irwin, C.E.O of Team Valor Int’l).

⁵⁹ *The Team*, TEAMVALOR.COM, <http://www.teamvalor.com/team.asp> (last visited Jan. 17, 2013).

⁶⁰ Medication Hearings *supra* note 46 at 5.

⁶¹ 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>.

⁶² 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); Joe Drape, *A Promise to Avoid Race-Day Drugs*, N.Y. TIMES (July 19, 2012), <http://www.nytimes.com/2012/07/20/sports/court-upholds-10-year-ban-for-horse-trainer-dutrow.html>.

⁶³ *Id.*, at 206.

⁶⁴ *Uniform Classification Guidelines for Foreign Substances and Recommended Penalties and Model Rule*, ASSOCIATION OF RACING COMMISSIONERS INT’L, Inc., iv-vii (Dec. 2012) [hereinafter Guidelines], <http://www.arci.com/druglisting.pdf>.

punishment.⁶⁵ Those drugs that have a primarily performance enhancing effect receive a higher classification and a higher level of punishment.⁶⁶ For example, drugs that possess stimulant or depressant qualities or affect the nervous or neuromuscular system tend to have a high potential performance enhancing effect.⁶⁷ Such drugs “mask a horse’s nervous system so that it can run harder and feel little pain.”⁶⁸ This creates a great danger to the horse and jockey. The horse will not recognize the physiological warnings that its body is trying to send and the potential for a catastrophic injury is greatly exacerbated.⁶⁹ If the horse does breakdown, then the jockey is likely to fall off the horse and suffer injury.⁷⁰ A positive test for one of these drugs has the potential for a suspension of at least fifteen days, and in some cases multiple years.⁷¹

Drugs that have a therapeutic effect with a limited potential performance enhancing effect such as diuretics, antihistamines and skeletal muscle relaxants receive lesser punishment.⁷² This is because these drugs are administered “to treat injuries and infirmities” and are generally considered “necessary to keep a horse healthy.”⁷³ A violation connected to the use of such necessary therapeutic drugs might result in a monetary fine or written warning.⁷⁴

The classifications given to the various available drugs have been made by the Association of Racing Commissioners International (RCI). “RCI is a not-for profit trade

⁶⁵ See generally *id.* at 38-40.

⁶⁶ *Id.*

⁶⁷ *Id.* at iv.

⁶⁸ Daniel Stone, *Should Congress Police Horseracing?*, The Daily Beast (Jul. 12, 2012, 9:50 PM), <http://www.thedailybeast.com/articles/2012/07/12/should-congress-police-horseracing.html>.

⁶⁹ *Id.*

⁷⁰ Jennie Rees, *Jockey safety no sure bet, dangerous sport seeks improvements*, THE COURIER-JOURNAL (Apr. 24, 2010), <http://www.courier-journal.com/article/20100426/SPORTS08/4260307/Jockey-safety-no-sure-bet-dangerous-sport-seeks-improvements>.

⁷¹ Guidelines, *supra* note 64 at 38-9.

⁷² *Id.* at iv.

⁷³ Medication Hearings, *supra* 46 note at 14.

⁷⁴ Guidelines, *supra* note 64 at 40.

association with no regulatory authority. Its members individually possess regulatory authority within their jurisdictions and solely determine whether to adopt RCI recommendations on policies and rules or not.”⁷⁵ While many racing jurisdictions use the RCI’s model rules, jurisdictions maintain a right to use discretion and modify the rules in order to favor their particular circumstances.⁷⁶

In some instances, state racing commissions choose to allow certain therapeutic drugs to be administered at different time periods prior to a race. This form of regulation is called a “withdrawal time.”⁷⁷ For example, in Pennsylvania the administration of a medication called clenbuterol is permitted no closer than forty eight hours prior to a race.⁷⁸ In New York, clenbuterol cannot be administered within ninety six hours prior to a race.⁷⁹ In comparison, trainers and owners would favor the regulation imposed by Pennsylvania. This is because it permits the horse to be trained on clenbuterol closer to the time of the race, allowing for a stronger residual effect from the drug.⁸⁰

⁷⁵ RACING COMMISSIONS INTERNATIONAL, http://www.arci.com/Racing_Commissioners_International/About.html (last visited Jan. 1, 2013).

⁷⁶ Waldrop, *supra* note 33 at 396.

⁷⁷ FERNANDA CAMARGO ET AL, EQUINE DRUGS, MEDICATION AND PERFORMANCE ALTERING SUBSTANCES: THEIR PERFORMANCE EFFECTS, DETECTION, AND REGULATION, (Oct 21, 2005), *available at* <http://thomastobin.com/drugsmeds/drugsmeds.htm>.

⁷⁸ Administrative Policy Notice SHRC – 2008 – 02, Clenbuterol – Suggested Withdrawal Time Prior to Race Day (Sept. 24, 2008), http://www.agriculture.state.pa.us/portal/server.pt/gateway/PTARGS_6_2_75292_10297_0_43/AgWebsite/Files/Publications/Clenbuterol_Policy.pdf

⁷⁹ N.Y. COMP. CODES R. & REGS. tit. 9, § 4043.2 (2012).

⁸⁰ Clenbuterol is a drug used to treat respiratory diseases but it can also act as a muscle builder and stimulant. Some claim that it can improve a horses running time by one second. Additionally, horses can remain “muscled up for weeks afterward,” despite no longer being treated with the drug. Walt Bogdanich et al., *Racing Economics Collide with Veterinarians Oath*, N.Y. TIMES (Sept. 21, 2012), <http://www.nytimes.com/2012/09/22/us/at-the-track-racing-economics-collide-with-veterinarians-oath.html?pagewanted=all&r=0>

D. Enforcement of a trainer's suspension

When a state racing commission suspends a trainer, it must have the ability to enforce that suspension. Dutrow's recent ten year suspension from training horses in New York stipulates the following:

Richard E. Dutrow, Jr. shall not directly or indirectly participate in New York pari-mutuel horse racing, he is denied the privileges and use of the grounds of all racetracks, and he is forbidden to participate in any share of purses or other payment. Every horse is denied the privileges of the grounds and shall not participate in pari-mutuel racing in New York, further, that is (a) owned or trained by him, or any individual who serves as his agent or employee, during his revocation or (b) for which he, during his revocation, is involved, directly or indirectly, with its training, including by not limited to any arrangements made to care for, train, enter, race, invoice, collect fees or payments, manage funds, employ or insure workers, provide advice or information, or otherwise assist with any aspect of the training of the horse.⁸¹

However, Dutrow has openly admitted to violating the terms of his previous suspensions.⁸² For example, "In 2005, while serving a sixty day suspension for racing a horse under the name of an owner who did not actually own the horse, Dutrow ran another horse, St. Liam, in a Kentucky race under the name of [trainer] Bobby Frankel."⁸³ Also during this suspension, Dutrow continued to train another horse, Wild Desert.⁸⁴ "Because [Dutrow] had been advised by the New York Racing Secretary that Wild Desert would not be allowed on the grounds at Aqueduct Racetrack, where Dutrow trains his horses, Dutrow brought Wild Desert into the gate at

⁸¹ *Rulings: Richard E. Dutrow Jr.*, NEW YORK STATE GAMING COMMISSION (Jan. 1, 2013), <http://rulings.racing.ny.gov/searchrulings.detail.php?ID=30726>.

⁸² Ray Paulick, Hearing Officer: Dutrow Acts 'Corrupt Even in the Olden Days of the Wile West,' PAULICK REPORT (Feb. 4, 2013), <http://www.paulickreport.com/news/ray-s-paddock/hearing-officer-dutrow-acts-corrupt-even-in-the-olden-days-of-the-wild-west/>.

⁸³ Finding of Fact, Conclusions of Law and Recommended Order, Dutrow v. Kentucky Horse Racing Commission <http://blogs.courier-journal.com/horsebiz/files/2013/02/Dutrow-ruling1.pdf>.

⁸⁴ *Id.*

Aqueduct under a false name.”⁸⁵ Dutrow then “fabricated a workout for Wild Desert at Monmouth Park Racetrack in New Jersey, although the horse was not at Monmouth and did not train there.”⁸⁶ After establishing the fake workout, Dutrow then shipped Wild Desert to Canada in order to run in the Queen’s Plate⁸⁷ “under the name of Bobby Frankel.”⁸⁸ Throughout the time of his suspension, Dutrow billed the owners of St. Liam and Wild Desert for training costs and also received his share of each horse’s winnings.⁸⁹ Dutrow’s actions show that trainers will sometimes be able to train their horses while they are suspended. Therefore, racing commissions must implement policies and procedures that prevent trainers from doing so.

E. The Problem of the Lack of Reciprocity

Reciprocity is “a mutual exchange of privileges, specifically, a recognition by one of two countries or institutions of the validity of licenses or privileges granted by the other.”⁹⁰ One particular problem facing the regulation of drugs in horseracing is that not every jurisdiction reciprocally enforces the suspensions or license denials imposed on violating trainers by other states. Recall Dutrow’s denial of a trainer’s license in the State of Kentucky during April 2011.⁹¹ The Kentucky Horse Racing Commission (KHRC) denied the license after it found that Dutrow “ha[d] shown a consistent disregard for the rules of racing.”⁹² Under the cited regulation, the KHRC had the power to deny a license when it would be in the public’s best interest, where the

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ The Queen’s Plate is “the first jewel in Canada’s Triple Crown of Thoroughbred Racing and the longest continuously run stakes race in North America” *2013 Queen’s Plate – Event Details*, WOODBINE ENTERTAINMENT, <http://www.woodbineentertainment.com/Queensplate/Pages/EventDetails.aspx>.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Reciprocity Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/reciprocity> (last visited Jan. 18, 2013).

⁹¹ Frank Angst, *Trainer Dutrow Denied Racing License*, THOROUGHBRED TIMES (Apr. 13, 2011), <http://www.thoroughbredtimes.com/national-news/2011/04/13/trainer-dutrow-denied-racing-license.aspx>

⁹² *Id.*

trainer fraudulently falsified application documents or where the trainer was previously suspended in Kentucky or other racing jurisdictions.⁹³ At the time of his application, Dutrow had amassed nearly seventy prior violations and was in the process of appealing a suspension issued in New York.⁹⁴ Ultimately, the KHRC reviewed Dutrow's long history of prior indiscretions and deemed him unfit to receive a Kentucky racing license.

After Dutrow was denied a trainer's license in Kentucky, his barn continued to flourish. In 2012, Dutrow competed in 520 races, winning 131 times and totaling earnings of \$7,232,708.⁹⁵ Additionally, Dutrow "was the leading trainer at the Belmont spring/summer meet"⁹⁶ and also earned \$1,023,609 in purse money at prestigious Saratoga Racecourse.⁹⁷ Aside from New York, Dutrow has also started horses in other states such as Florida and Pennsylvania.⁹⁸ Certainly, Kentucky's denial of a trainer's license did not impact Dutrow's ability to win elsewhere.

In order to understand why Dutrow was not precluded from running elsewhere, one must first look at the types of regulations drafted by each state racing commission. In New York for example, "the board may refuse to issue or revoke a license if it shall find that the applicant...has

⁹³ *Id.*

⁹⁴ Drape, *supra* note 4.

⁹⁵ *Trainer Profile Page Richard E. Dutrow, Jr.*, EQUIBASE.COM, <http://www.equibase.com/profiles/Results.cfm?type=People&searchType=T&eID=110865> (last visited Jan. 18, 2013).

⁹⁶ Jenny Kellner, *Dominguez, Dutrow, Ramseys win Belmont Meet Titles*, N.Y. RACING ASSOC. (July 15, 2012), <http://www.nyra.com/belmont/dominguez-dutrow-ramseys-win-belmont-meet-titles/>

⁹⁷ *Leading Trainers at Saratoga*, EQUIBASE.COM, <http://www.equibase.com/premium/eqbTopLeadersByTrackDisplay.cfm?TRK=SAR&CY=USA&STAT=T&STYL S=SAR> (last visited Jan. 18, 2013).

⁹⁸ *See generally* Tom LaMarra, *Redeemed Posts Record Greenwood Cup Victory*, BLOODHORSE (JULY 17, 2012), <http://www.bloodhorse.com/horse-racing/articles/71255/redeemed-posts-record-greenwood-cup-victory>; Blood-Horse Staff, *Boys at Tosconova Takes Gulfstream Allowance*, BLOODHORSE (Jan. 31 2012), <https://www.bloodhorse.com/horse-racing/articles/67191/boys-at-tosconova-takes-gulfstream-allowance>; David Grening, *Rick Dutrow Looking at Busy Week with Preakness Longshot, Court Date*, THE DAILY RACING FORM (May 17, 2012), <http://www.drf.com/news/rick-dutrow-looking-busy-week-preakness-longshot-court-date>.

violated or attempted to violate any law with respect to racing in any jurisdiction...⁹⁹ Under this regulation, New York is not bound by the suspensions or license denials made by other racing jurisdictions. Rather, the racing commission is afforded discretion as it *may*, not *must* refuse a license when another jurisdiction has done so.¹⁰⁰ Other prominent states that allow the use of discretion include Kentucky, Pennsylvania and Florida.¹⁰¹ Ultimately, it is this discretion that has allowed Dutrow to race elsewhere despite being denied a license in Kentucky.

While many states afford their racing commission's discretion in enforcing other state's disciplinary measures, there are some states that mandate reciprocity. For instance, New Jersey's regulation stipulates that "full force and effect shall be given to the denial, revocation or suspension of any license by any other racing commission or turf governing body."¹⁰² Similarly, Ohio mandates that:

If a person or horse is *suspended*, expelled, ruled off, or otherwise ineligible, or if a person's license is revoked, *or application for a license has been denied* or if a person or horse is under any other current penalty pursuant to the rules of a racing authority of any other state or country, such person and/or horse shall stand suspended, expelled, ruled off or denied a license at all tracks operating under permit from the Ohio state racing commission until the ruling be withdrawn by the originating authority.¹⁰³

In both of these regulations, the state's racing commissions are afforded no discretion whatsoever. Both Ohio and New Jersey are obligated to enforce other racing commission's licensing denials or suspensions.

⁹⁹ N.Y. COMP. CODES R. & REGS. tit. 9, § 4002.9.

¹⁰⁰ *Id.*

¹⁰¹ 58 PA. CODE § 165.35; 810; KY. ADMIN. REGS. 1:025; FLA. ADMIN. CODE ANN. r. 61D-2.021 (silent on other jurisdictions).

¹⁰² N.J. ADMIN. CODE § 13:70-1.29 (1982).

¹⁰³ OHIO ADMIN. CODE 3769-7-43 (2012).

In practice, the discretionary regulations have allowed Mr. Dutrow to compete in New York, Pennsylvania, Maryland and Florida while the mandatory regulations have precluded him from running in New Jersey and Ohio.¹⁰⁴ Certainly, deterrence and the sport's integrity are compromised when a trainer is permitted to compete and win races in another venue while they are suspended or denied licenses elsewhere. Onlookers perceive that state racing commissions inadequately enforce prohibitions on the use of performance enhancing drugs.

F. The Problem of Trainers giving their horses to their assistants while they are suspended.

When a trainer is ultimately suspended, the disciplinary effect of this suspension is minimized as the suspended trainer is often permitted to give his or her horses to their assistant trainer.¹⁰⁵ On September 22, 2012, a colt named Handsome Mike won the \$1 million Pennsylvania Derby for listed trainer Leandro Mora.¹⁰⁶ Handsome Mike had previously raced for trainer Doug O'Neill.¹⁰⁷ However, O'Neill was serving a forty five day suspension imposed on him by the California Horse Racing Board for "elevated carbon-dioxide levels" in the blood of one his horses.¹⁰⁸ It is believed that this is a result of a procedure known as "milkshaking," whereby a "bicarbonate of soda, sugar and electrolytes" is fed to a horse through a tube.¹⁰⁹ This prohibited practice is believed to negate the buildup of lactic acid and prevent fatigue.¹¹⁰ Despite serving the suspension for this infraction, O'Neill was permitted to assign Handsome Mike and

¹⁰⁴ Grening, *supra* note 98.

¹⁰⁵ Drape, *supra* note 11.

¹⁰⁶ Claire Novak, *Handsome Mike Wins Pennsylvania Derby*, BLOODHORSE (Sept. 26, 2012), <http://www.bloodhorse.com/horse-racing/articles/72999/handsome-mike-wins-pennsylvania-derby>.

¹⁰⁷ *Id.*

¹⁰⁸ Associated Press, *Doug O'Neill not the only trainer with history of drugging horses*, SPORTS ILLUSTRATED (June 8, 2012), <http://sportsillustrated.cnn.com/more/news/20120608/belmont-stakes-trainers-drugs/>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

the other horses in his barn to his assistant Mora.¹¹¹ When asked about his suspension and Mora assuming his position, O’Neill said that “Leandro will keep it as consistent and smooth sailing as possible.”¹¹² While stepping in for O’Neill, Mora did just that. Mora entered horses in eighty nine races, winning fifteen and accumulating \$1,332,137 in purse money.¹¹³ Ultimately, state racing commissions issue licensing suspensions as one of its most heavy handed disciplinary measures. When a suspended trainer’s operation is able to uninterruptedly persist, the disciplinary effect of this measure is diminished and onlookers perceive the punishment as nothing but a farce.

II. Proposed and Current Regulation of Horseracing that could be applied nationally.

A. Interstate Horseracing Improvement Act of 2011.

Currently, the IHA stipulates that the Federal Government only has the ability to regulate inter-state wagering.¹¹⁴ However, in 2011, Senator Tom Udall put forth an amendment to the IHA that would provide Federal oversight to the entire industry.¹¹⁵ This Amendment is called the Interstate Horseracing Improvement Act of 2011 (IHIA).¹¹⁶ The IHIA calls for a uniform ban on all race-day medications, implements a “three strikes and you’re out penalty” for all participants and “requires drug testing of race horses by independent, accredited labs.”¹¹⁷ Ultimately, the IHIA would leave the enforcement of performance enhancing drugs to state racing

¹¹¹ Ron Mitchell, *Doug O’Neill to Serve Suspension*, ESPN (July 11, 2012), http://espn.go.com/horse-racing/story/_/id/8157510/doug-oneill-serve-suspension.

¹¹² *Id.*

¹¹³ *Trainer Profile Page Leandro Mora*, EQUIBASE.COM, <http://equibase.com/profiles/Results.cfm?type=People&searchType=T&eID=1290> (last visited Jan. 27, 2013).

¹¹⁴ 15 U.S.C. § 3001 (1978).

¹¹⁵ Tom LaMarra, *Federal Regulation Gets Push with Caveats*, BLOODHORSE (July 13, 2012), <http://www.bloodhorse.com/horse-racing/articles/71210/federal-regulation-gets-push-with-caveats>

¹¹⁶ Interstate Horseracing Improvement Act 2011, H.R. 1733, 112th Cong. (2011) *available at* <http://thomas.loc.gov/cgi-bin/query/z?c112:S.886>.

¹¹⁷ *Fact vs. Fiction: Ending Race Horse Doping*, TOMUDALL.SENATE.GOV, (April 5, 2012) http://www.tomudall.senate.gov/?p=press_release&id=1051.

commissions.¹¹⁸ The IHIA would then allow for the Federal Trade Commission to shut down off-track wagering in states that do not adequately enforce the regulation.¹¹⁹ Today, the IHIA has not been up for vote and has been referred to committee.¹²⁰ The IHIA must therefore be reintroduced in order for it to have any possibility of enactment.

Despite the stalled status of the IHIA, an analysis of its goals and how it achieves them can provide helpful insight into the remedial needs of the industry. Primarily, the IHIA provides uniformity through its blanket prohibition on the use of performance enhancing drugs.¹²¹ The legislation then defines a performance enhancing drug as “any substance capable of affecting the performance of a horse at any time...” including those drugs listed by the RCI “Uniform Classification Guidelines for Foreign Substances.”¹²² The regulation also mandates that each state’s disciplinary measures be reciprocally enforced.¹²³ Concerning discipline, the proposed bill states that “a person that provides a horse with a performance-enhancing drug...shall be ...suspended for a period of not less than 180 days from all activities relating to any horserace that is the subject of an interstate off-track wager.”¹²⁴ Therefore, this suspension would apply in all states that allow interstate wagering and cure the ill that allows trainers suspended in one jurisdiction to compete in another. Lastly, this proposed bill’s punitive measures are far more stringent than those that currently exist. Under the bill, a first time offender would receive a 180 day suspension and \$5000 fine; a second time offender would receive at least a 1 year suspension and \$20,000 fine; and a third time offender would be permanently banned from horseracing and

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ GOVTRACK.US, H.R. 1733 (112TH): INTERSTATE HORSERACING IMPROVEMENT ACT OF 2011, <http://www.govtrack.us/congress/bills/112/hr1733> (last visited Jan. 27, 2013).

¹²¹ *Supra* note 116 at § 9(b).

¹²² *Id.* §9(a)(2)(A-B).

¹²³ *Id.* § (d)(1)(A)(ii).

¹²⁴ *Id.*

subject to a \$50,000 fine.¹²⁵ Certainly these measures pose a significant threat to the trainer if they are violated.

B. Jockey Club Reformed Racing Medication Rules

Similar to the IHIA, the Jockey Club has also put forth its own reformed rules that address the problem of performance enhancing drugs in horseracing. These rules were formulated by the Jockey Club after it commissioned a study of the sport in 2001.¹²⁶ This study determined that “animal safety, welfare and medication” were the major factors that were contributing to the sport’s overall public decline in popularity.¹²⁷ The Jockey Club’s Reformed Racing Medication Rules were thereby announced in 2012 “in order to clean up racing” and restore popularity.¹²⁸ Concerning implementation, the Jockey Club does not have regulatory authority to implement the rules themselves, but has advocated strongly that these rules be adopted by the state racing commissions and other industry agencies.¹²⁹ Under this model, uniformity could only be achieved if every state racing commission adopts the Jockey Club’s rules.

Among its goals, the rules put forth a uniform medication policy,¹³⁰ ensure a system of reciprocity, prevent suspended trainers from giving their horses to their assistant, implement policies that allow suspensions to be enforced and more stringently punish recidivists.¹³¹ The proposed rules accomplish uniformity through implementation of a list of prohibited substances

¹²⁵ *Id.* § (d)(A)(i-iii).

¹²⁶ Medication Hearings *supra* note 46 at 24.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ REFORMED RACING MEDICATION RULES at 3 (August 12, 2012) available at http://www.jockeyclub.com/pdfs/reformed_rules.pdf.

¹³¹ *Id.* at 4.

and allowable limits of “controlled therapeutic medications.”¹³² Each state would no longer have discretion to manipulate withdrawal times or allow higher levels of certain therapeutic drugs on race day. Next, the rules ensure reciprocity through language which states that: “all racing regulatory authorities shall mutually and reciprocally enforce all points and penalties assessed against trainers...”¹³³ Therefore, any state racing commission’s disciplinary measure would be reciprocally enforced in another jurisdiction. Furthermore, the proposed rules state that “any penalty which includes suspension of 30 days or more shall require the transfer of all horses in training to unassociated persons subject to approval of the relevant regulatory authority.”¹³⁴ This would do away with the custom that allows trainers to give their horses to their assistants while they are suspended.

Concerning enforcement, the rules expand the racing commission’s jurisdiction to include “any location that conducts, records and/or submits official timed workout information under jurisdiction of the relevant racing regulatory authority.”¹³⁵ This broader language would bring a vast number of training centers¹³⁶ under each racing commission’s authority. Therefore, racing commissions would have the ability to look beyond the racetracks themselves and ensure that suspended trainers are not continuing to train their horses at an off-track training facility. Additionally, the rules propose that “racing associations should develop comprehensive training programs that enable backstretch security personnel to expand their knowledge and abilities in policing and securing the stable area.”¹³⁷ These policing measures should be supported by the

¹³² *Id.* at 8-9.

¹³³ *Id.* at 11.

¹³⁴ *Id.* at 10.

¹³⁵ *Id.* at 4, 8.

¹³⁶ *Official Training Centers*, EQUIBASE.COM, <http://www.equibase.com/tracks/training.cfm>.

¹³⁷ *Supra* note 130 at 14.

Thoroughbred Racing Protective Bureau (TRPB)¹³⁸ and the Organization of Racing Investigators (ORI); both of which serve as agencies that work to preserve the integrity of horseracing.¹³⁹

Lastly, the Jockey Club's Reformed rules more stringently punish recidivists through its use of a points system. This system has seven different levels, whereby, if a trainer accumulates a certain amount of points in a three year period, then he or she will be subject to that corresponding point value's level of punishment.¹⁴⁰ This helps impede recidivism as those who are repeat offenders will be treated more harshly than those non-prior offenders. Furthermore, recidivism would not be limited to one jurisdiction, but would instead apply in all prior offenses in any racing state.¹⁴¹

C. State Regulations

A number of states have implemented regulations that can better control the use of performance enhancing drugs in the industry. For instance, an Indiana regulation explicitly prohibits "a trainer suspended for more than fifteen days" from transferring his or her horses "to a spouse, member of the immediate family, assistant, employee, or household member of the

¹³⁸ The TRPB is a "private investigative agency whose principal mission [is] to address issues of integrity and security in the Thoroughbred horseracing industry...TRPB continues to provide member tracks of the [Thoroughbred Racing Association (TRA)] with a wide variety of investigative, security, and analytic services...Upon request, TRPB supervises the security and policing operations at TRA-member racetracks during their live race meeting. TRPB's Information System, a repository which maintains, catalogues, and disseminates racing and wagering investigative, intelligence, and security information, is without parallel in the racing industry. Taken together, TRPB's array of services creates an ongoing self-policing effort." *History*, THOROUGHBRED RACING PROTECTIVE BUREAU, <http://www.trpb.com/history.htm>.

¹³⁹ *Supra* note 130 at 14; "ORI is a stand-alone Organization and is not affiliated with any Racing Industry participant. ORI's forum is solely designed to educate and benefit pari-mutual racing investigators whose primary mission is to ensure the integrity of racing through regulatory enforcement actions. The membership, through their attendance at the annual training conference, determines ORI's focus and direction by majority vote. Its primary focus to date has been to facilitate the exchange of information among its members." *Our Focus*, ORGANIZATION OF RACING INVESTIGATORS, <http://racinginvestigators.org/index.php/about/our-focus/>.

¹⁴⁰ *Id.* at 10-11.

¹⁴¹ *Supra* note 130 at 10-11.

trainer.”¹⁴² This regulation ultimately would prevent the practice that allows trainers to give their horses to their assistants, thereby feeling no residual negative effects upon their return.

Concerning enforcement, Texas maintains a regulation that allows its state racing commission to audit suspended trainers.¹⁴³ From an audit, the racing commission can prevent money from being funneled by the assistant to the suspended trainer. This promotes enforcement because the suspended trainer will not be allowed to benefit from the continued efforts of their assistant.

D. Licensing Regulation in other fields.

Horseracing can also gain valuable insight into licensure regulation through the consideration of reciprocal discipline in other fields. When a lawyer is suspended in one jurisdiction, other jurisdictions where the lawyer is licensed will typically levy the same sanction.¹⁴⁴ In order to reciprocally enforce another state’s disciplinary measures, a lawyer is required to give notice of their discipline to every state where that attorney is licensed.¹⁴⁵ This then allows each of those jurisdictions to consider the appropriateness of reciprocal discipline.¹⁴⁶ In Massachusetts for example, another jurisdiction’s findings of misconduct “may be treated as establishing the misconduct for purposes of a disciplinary proceeding.”¹⁴⁷ The court will ultimately grant reciprocal enforcement of the other jurisdiction’s disciplinary measure: “unless (a) the procedure in the other jurisdiction did not provide reasonable notice or opportunity to be heard; (b) there was significant infirmity of proof establishing the misconduct; (c) imposition of

¹⁴² 71 IND. ADMIN. CODE 10-2-8 (2012).

¹⁴³ 16 TEX. ADMIN. CODE § 311.104 (2012).

¹⁴⁴ LISA G. LERMAN & PHILIP G SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW*, 95 (Vicki Breen et. al. eds., 3rd ed. 2012).

¹⁴⁵ Legal Ethics, Law. Deskbk. Prof. Resp. § 8.5-1 (2012-2013 ed).

¹⁴⁶ *Id.*

¹⁴⁷ *In re Mitrano*, 906 N.E.2d 340, 342 (Mass. 2009).

the same discipline would result in grave injustice; or (d) the misconduct established does not justify the same discipline” in Massachusetts.¹⁴⁸

Ultimately, Massachusetts courts typically enforce other jurisdictions disciplinary measures.¹⁴⁹ However, the four factor analysis ensures that reciprocal discipline is not unfair to the attorney.¹⁵⁰ For example, it would be wholly unfair for an attorney to be reciprocally punished in State A for an offense that occurred in State B, when the offense that occurred in State B is not an offense in State A. Factor (d) of the analysis serves as a check on this potential problem. Aside from Massachusetts, other states like Wisconsin and North Dakota also employ a similar factored analysis that preserves fairness.¹⁵¹ Ultimately, the use of these factors favors reciprocal discipline but ensures the protection of attorneys from an unfair reciprocal disciplinary holding.

Similar to attorneys, physicians can also have their license revoked for conduct that occurs in another jurisdiction. When a physician made willful misrepresentations on his license application to practice in Maryland, his application was denied by the Maryland State Board of Physicians.¹⁵² Prior to filing the Maryland application, the physician had been licensed to practice in New York.¹⁵³ In response to the Maryland license denial, the New York State Board for Professional Medical Conduct levied a one year suspension pursuant to Education Laws § 6530(9)(b) and § 6530(9)(d).¹⁵⁴ Both laws mandate that New York punish conduct that occurred

¹⁴⁸ Alan M. Colvin, *Reciprocal Discipline: Double Jeopardy or A State's Right to Protect Its Citizens?*, 25 J. Legal Prof. 143, 146 (2001).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 144-45.

¹⁵² *Bursztyn v. Novello*, 838 N.Y.S.2d 733, 734 (N.Y. Sup. Ct. 2007).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

in another state, if that same conduct would have constituted misconduct in New York.¹⁵⁵ Ultimately, the physician’s willful misrepresentation on his license application would have constituted professional misconduct in New York. Under New York’s Education Law § 6530(21), professional misconduct is established when a physician “willfully mak[es] or fil[es] a false report...”¹⁵⁶ On Appeal, a New York Supreme Court concluded that the one year suspension was valid.¹⁵⁷ First, the court reasoned that the physician received a proper hearing in Maryland.¹⁵⁸ The physician received proper notice, a full evidentiary hearing, an opportunity to be heard, and representation by counsel.¹⁵⁹ Second, the Court determined that the one year suspension was not arbitrary, capricious or unsupported by the record.¹⁶⁰ Ultimately, this case demonstrates that a physician can have their license suspended in one state for the reasons associated with the denial of a license application in another state.

Applying Dutrow’s violations to the regulation’s governing attorneys, it is fairly certain that his 2011 Kentucky license denial would have been reciprocally enforced. In regards to notice and an opportunity to be heard, Dutrow met with the licensing committee and was granted

¹⁵⁵ Each of the following is professional misconduct and any licensee found guilty of such misconduct under the procedures prescribed in section two hundred thirty of the public health law shall be subject to penalties as prescribed in section two hundred thirty-a of the public health law except that the charges may be dismissed in the interest of justice: Having been found guilty of improper professional misconduct by a duly authorized professional disciplinary agency or another state where the conduct upon which the finding was based would, if committed in New York state, constitute professional misconduct under the laws of New York state N.Y. Educ. Law § 6530(9)(b) (2008); Having his or her license to practice medicine revoked, suspended or having other disciplinary action taken, or having his or her application for a license refused, revoked or suspended or having voluntarily or otherwise surrendered his or her license after a disciplinary action was instituted by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the revocation, suspension or other disciplinary action involving the license or refusal, revocation or suspension of an application for a license or the surrender of the license would, if committed in New York state, constitute professional misconduct under the laws of New York state N.Y. Educ. Law § 6530(9)(d) (McKinney) (2008).

¹⁵⁶ N.Y. Educ. Law § 6530(21) (McKinney) (2008).

¹⁵⁷ Bursztyn, 838 N.Y.S.2d at 735.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

an opportunity to speak on his behalf.¹⁶¹ Concerning proof of misconduct, Dutrow had been given a suspension in New York for possession of hypodermic needles and administering a power painkiller to one of his horses.¹⁶² Furthermore, Kentucky suspended Dutrow in 2008 and determined that he made misrepresentations on his 2011 license application.¹⁶³ Regarding any potential “grave injustice” that reciprocal discipline would perpetuate, each state maintains the ability to reciprocally enforce the license denials imposed by other states.¹⁶⁴ Therefore, the courts would be acting well within their power to discipline Dutrow for his Kentucky racing license denial. Lastly, Dutrow’s prior possession of a hypodermic needle and misrepresentations on his trainer’s application would have been punishable in Maryland; a state where Dutrow was permitted to compete in 2012.¹⁶⁵ Accordingly, an application of these factors would have probably resulted in Dutrow’s reciprocal suspension by Maryland.

Similarly, Dutrow’s 2011 Kentucky license denial would likely have resulted in a suspension under New York’s regulations governing physicians. The physician in *Bursztyn* was denied a Maryland physician’s license after he made willful misrepresentations on his application.¹⁶⁶ Because this conduct also constituted misconduct in New York, the New York State Board of Professional Medical Conduct suspended the physician’s license for one year.¹⁶⁷ Like the physician in *Bursztyn*, Dutrow also made misrepresentations on his Kentucky license

¹⁶¹ Angst *supra* note 91.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ See generally *Supra* note 99; *supra* note 101; *supra* note 102; *supra* note 103.

¹⁶⁵ The following acts are prohibited if committed on the grounds of a facility under the jurisdiction of the Commission... Except as otherwise provided in this regulation, using or possessing, actually or constructively, any of the following items: (a) A drug, or (b) A hypodermic needle, hypodermic syringe, or other device which could be used for injection; MD. CODE REGS. 09.10.03.03; The following acts are prohibited if committed on the grounds of a facility under the jurisdiction of the Commission... making false or misleading statements to a racing official or submitting false or misleading statements on a license. MD. CODE REGS. 09.10.03.03.

¹⁶⁶ *Bursztyn*, 838 N.Y.S.2d at 734.

¹⁶⁷ *Id.*

application.¹⁶⁸ Furthermore, Maryland – a state where Dutrow was previously licensed - prohibits making false or misleading statements to a racing official.¹⁶⁹ However, unlike *Bursztyn*, Maryland did not levy any sort of sanction against Dutrow for his misrepresentation to the KHRC.¹⁷⁰

Taken together, an application of Dutrow’s violations to the regulations imposed on the medical and legal fields demonstrates that they should have been reciprocally disciplined. Additionally, both analyses highlight the extent to which the horseracing industry’s rules are inferior when compared to others.

III. Argument for a Federal Regulation of Horseracing

A. Industry support for a Federal Regulation

In order for the horseracing industry to better regulate the use of performance enhancing drugs, the sport must have a uniform system of medication standards and maintain uniformity of enforcement and discipline. The best way to ensure this change is through the use of a federal regulation. While it has been argued that the industry would only accept federal regulation “as a last resort,”¹⁷¹ the racing community appears to have warmed up to the idea. Among its supporters are the Water Hay Oats Alliance (WHOA), “a grassroots organization that opposes use of medication on race day.”¹⁷² This group consists of prominent owners, Arthur and Staci Hancock, Gretchen and Roy Jackson, George Strawbridge, Barry Irwin, and Charlotte C.

¹⁶⁸ Angst, *supra* note 91.

¹⁶⁹ *Supra* note 165

¹⁷⁰ Grening *supra* note 98.

¹⁷¹ Drape, *supra* note 11.

¹⁷² Tom LaMarra, *Group Wants Racing Act to Regulate Medication* (Aug. 2, 2012, 12:42 PM), <http://www.bloodhorse.com/horse-racing/articles/71698/group-wants-racing-act-to-regulate-medication>

Weber.¹⁷³ Arthur Hancock accentuated the group's support saying that "the time has come to accept the federal government's offer to help us clean up our sport. We need to work with them, not against them, if we are serious."¹⁷⁴ Another prominent owner, Satish Sanan, also sees federal intervention an immediate way to cure the ills that face racing.¹⁷⁵ Thus, it appears that industry leaders are recognizing the dire need for a remedy to the sport and now see federal regulation as a welcomed measure.

B. Ways of Achieving a Federal Regulation

Ultimately, a federal regulation can be achieved through a stand-alone bill or an amendment to the IHA.¹⁷⁶ Currently, the Jockey Club favors a stand-alone federal bill as opposed to amending the IHA. Jockey Club CEO, James Gagliano, stated the organization's position citing fear that "the crucial medication issue could get lost should lawmakers decide to add other provisions" to the IHA.¹⁷⁷ Ultimately, the Jockey Club would support a federal law

¹⁷³ *Id.* Arthur Hancock III is the founder of Stone Farm in Kentucky and the grandson of Arthur Hancock Sr., the founder of Claiborne Farms, *History/A Brief Family History*, STONE FARM, <http://stonefarm.com/history-family.shtml> (last visited Jan. 27, 2013), the farm featured many preeminent stallions including Mr. Prospector, Bold Ruler and Secretariat, *History*, CLAIBORNE FARMS, <http://www.claibornefarm.com/history/> (last visited Jan. 27, 2013). Roy and Gretchen Jackson are the owners of Lael Stables who famously campaigned Barbaro, the winner of the 2006 Kentucky Derby who tragically broke his rear leg in the Preakness, Tom Pedulla, *Five Years After Barbaro, Pains and Gains*, USA TODAY (May 10, 2011, 3:06 AM), http://usatoday30.usatoday.com/sports/horses/2011-06-08-race-day-drug-ban-barbaro_n.htm. George Strawbridge is the owner of Augustin Stables, "the most successful steeplechase operation of all time," *Augustin Stables Bio*, NATIONAL STEEPLECHASE, <http://www.nationalsteeplechase.com/owners/augustin-stables/> (last visited Jan. 25, 2013). Charlotte C. Weber is the granddaughter of John Dorrance, the founder of Campbell Soup Co., and owner of Live Oak Plantation, a farm in Ocala Florida, *Charlotte Weber*, THOROUGHBRED TIMES (Jun. 30, 2010, 11:05 AM), <http://www.thoroughbredtimes.com/women-of-influence/profiles/charlotte-weber.aspx>.

¹⁷⁴ *Id.*

¹⁷⁵ Jerry Bossert, *Satish Sanan, Owner of Curlin and Other Winners, Eyes Reform in Thoroughbred Racing*, THE DAILY NEWS (Apr. 29, 2012, 2:33 PM), http://articles.nydailynews.com/2012-04-29/news/31480624_1_ntra-horses-and-jockeys-horse-farms. Satish Sanan was part owner in Curlin, winner of the 2007 Horse of the Year and Breeders Cup Classic winner, Curlin.

¹⁷⁶ Luke P. Breslin, *Reclaiming the Glory in the "Sport of Kings" - Uniformity Is the Answer*, 20 Seton Hall J. Sports & Ent. L. 297, 324 (2010).

¹⁷⁷ Medication Hearings *supra* note 46 at 25.

“with a comprehensive funding solution and a coordinated prosecution structure” modeled after its Reformed Racing Medication Rules.¹⁷⁸

Alternatively, an amendment to the IHA would create a uniform set of rules that govern every facet of the sport.¹⁷⁹ If a state fails to enforce these uniform rules, the federal government would have the authority to then suspend wagering in that state.¹⁸⁰ Principally, the difference between the two methods is its way of enforcement. While a stand-alone bill would establish its own enforcement and regulatory regime, an amendment of the IHA would use the threat of suspending interstate wagering as leverage to enact its regulations.

C. Proposed Regulation

In order to draft an effective federal regulation, its drafters should focus on implementing uniform drug regulations, ensuring reciprocity, impeding recidivism, advancing enforcement and disallowing suspended trainers from giving their horses to their assistants. The best way to bring about these goals is to consider the IHIA, Jockey Club Reformed Medication Rules, current state regulations and regulatory methods of other fields.

1. Implement Uniform Drug Regulations

Regulatory drafters should look to the Jockey Club’s Reformed Racing Medication Rules so that a uniform drug policy can be achieved. These rules specifically layout which performance enhancing substances are prohibited and which therapeutic medications are permitted.¹⁸¹

Furthermore, the Reformed Racing Medication Rules establish uniform withdrawal times for

¹⁷⁸ Breslin *supra* note 176 at 324.

¹⁷⁹ *Id.* at 325.

¹⁸⁰ *Id.*

¹⁸¹ *Supra* note 130 at 8-10.

each of the permitted therapeutic medications.¹⁸² In contrast, the IHIA prohibits the general use of performance enhancing drugs entirely.¹⁸³ The IHIA broadly defines performance enhancing drugs to include “any substance capable of affecting the performance of a horse at any time...”¹⁸⁴ Such general language could thereby preclude the use of valuable therapeutic drugs that assist the horse’s welfare and allow the horse to compete safely. Furthermore, such a broad definition does nothing to prevent confusion regarding which medications are prohibited. This confusion could cause trainers who believe they are administering legal medications to their horses to suffer penalties due to the imprecision of such a broad definition. Therefore, regulation drafters should use the Jockey Club’s Reformed Rules as their model due to its specificity and allowance of certain levels of therapeutic medications.

2. Advance Enforcement

In order to prevent trainers from influencing the training of their horses while they are suspended, legislators should adopt the Jockey Club’s Reformed Rules provision which expands a racing commission’s jurisdiction to include “any location that conducts, records and/or submits official timed workout information.”¹⁸⁵ This language would broaden the racing commission’s jurisdiction to include many off-track facilities where a suspended trainer could train their horses in secrecy. Additionally, legislators should mandate uniform backstretch security protocols. All security personnel should undergo comprehensive training similar to that proposed in the Jockey Club’s Reformed Rules. Such procedures should allow security staff to investigate and better identify evidence of performance enhancing drugs at the track. Each racing commission’s security staff should also share information with every other racing commission, the TRPB and

¹⁸² *Id.* at 9-10.

¹⁸³ *Supra* note 116 at § 9 (2).

¹⁸⁴ *Id.*

¹⁸⁵ *Supra* note 135.

ORI. This would create a uniform and comprehensive database that each racing commission could access in order to investigate performance enhancing drug use and uphold suspensions. Lastly, all legislators should look to the Texas legislation which allows its racing commission to audit suspended trainers.¹⁸⁶ This provision advances enforcement because it would prevent suspended trainers from receiving proceeds from the continuation of their stable under the name of their assistant. Additionally, legislators should include a mandate for further punishment, including a fine and more suspension time, if this provision is violated. Together, these regulations would better enforce the use of performance enhancing drugs and trainer suspensions.

3. Ensure Reciprocity

One major benefit to passing a federal legislation is that it would inherently allow for reciprocal enforcement. Because every trainer in every jurisdiction would have to abide by the same rules, each trainer's violation, regardless of the state that it occurred, would intrinsically violate each of the other jurisdictions rules. Racing commissions would no longer have to consider whether the underlying offense would be an offense in its jurisdiction. Instead reciprocal discipline would flow logically across each and every racing jurisdiction. In order to ensure that states comply with this practice, the legislation should be drafted to mandate disclosure of a trainer's violation to every racing jurisdiction, as is done in the reciprocal disciplinary process of lawyers. Once a violating trainer begins serving his or her suspension, every other state will be expected to provide similar force and effect to the underlying state's suspension. Any state that receives disclosure but allows a suspended trainer to compete would then be subject to having their inter-state wagering suspended. Through the enactment of a

¹⁸⁶ *Supra* note 143.

system that mandates reciprocity, trainers will not be permitted to avoid punishment by competing elsewhere and the integrity of the sport will ultimately be preserved.

4. Impede Recidivism

To effectively impede recidivism, regulators should look to the structure proposed by the Jockey Club's Reformed Racing Medication Rules. These rules establish a points system that takes all violations into account, regardless of jurisdiction.¹⁸⁷ For each violation, there is an attached point value.¹⁸⁸ Ultimately, the system calls for heavier punishments for those who accrue enough points to surpass the next threshold. For example, if a trainer commits enough violations to amass seventy five points, that trainer would be subject to a sixty day suspension.¹⁸⁹ If that same trainer accumulates an additional twenty five points, thereby graduating to the next level of punishment, then the suspension would be lengthened to 180 days.¹⁹⁰ This system would effectively impede recidivism because each offense would not be viewed in a stand-alone fashion. Rather, every additional offense could lead to more serious punishment. As a result, trainers such as Dutrow, who amass a multitude of violations in their careers, will no longer be allowed to compete.

5. Disallow suspended trainers from giving their horses to their assistants

In order to effectively punish a suspended trainer, regulators must ensure that a trainer will not be permitted to give their horses to their assistant throughout the duration of their suspension. Regulators should therefore draft language similar to Indiana's which prohibits "a trainer suspended for more than fifteen days" from transferring their horses "to a spouse,

¹⁸⁷ *Supra* note 130 at 11 (§ 6c).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* (c)(4).

¹⁹⁰ *Id.* (c)(5).

member of the immediate family, assistant, employee, or household member of the trainer.”¹⁹¹

Such language has also been included in the Jockey Club’s Reformed Racing Medication Rules for trainers suspended for more than 30 days.¹⁹² Ultimately it is essential that regulators draft language that does away with the practice as it does nothing but perpetuate a farce.

IV. Conclusion

Ultimately, horseracing will need uniform regulation of performance enhancing drugs in order to preserve the sport’s integrity. The best way to achieve this goal is to remove state discretion in drafting and enforcing medication regulations. The Federal Government must impose a set of standard medication rules that will be reciprocally followed and strictly enforced. In addition, trainers should not be permitted to give their horses to an assistant while they are serving a suspension. This allows trainers to avoid the negative consequences, such as losing their horses to another trainer, that a suspension is designed to impose. If the sport of horseracing imposes these regulations, it can begin a process of restoring integrity and fairness.

¹⁹¹ *Supra* note 142.

¹⁹² *Supra* note 130 at 10 §6 (b)(iii).