

# OATS, WATER, HAY, AND EVERYTHING ELSE: THE REGULATION OF ANABOLIC STEROIDS IN THOROUGHBRED HORSE RACING

By  
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*In May 2008, a horse named Big Brown won the Kentucky Derby, narrowly beating a filly named Eight Belles. Just as Eight Belles crossed the finish line, she collapsed and was put to her death in front of millions of viewers as a result of her two broken legs. As the world tried to make sense of the tragedy, the prominent trainer of Big Brown casually announced that he administered anabolic steroids before the race to enhance Big Brown's performance and that he would continue to give steroids before every other race for the same reason. Thus, the issue of anabolic steroids in horse racing, which had previously been confined to discussions among those involved in the industry, was thrust onto the national spectrum.*

*While the use of anabolic steroids is a relatively new issue, since the death of Eight Belles thirty-two of the thirty-six racing states have passed some regulation of the use of anabolic steroids in racing. This Article provides an overview of those anabolic steroid regulations in the context of the history of regulation in Thoroughbred horse racing. This Article concludes that while the current limitation on the effectiveness of anabolic steroid regulation is a lack of research and accurate laboratory testing, using a pervasive federal law might be the most effective way of ending the use of anabolic steroids in horse racing.*

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## I. INTRODUCTION

On May 2, 2009, while entering Churchill Downs to watch the 135th running of the Kentucky Derby, a crowd of 160,000 people passed a 1,500-pound bronze sculpture of a horse named Barbaro.<sup>1</sup> The sculpture, unveiled just one week earlier, cast a shadow on the race that Barbaro won with such brilliance and ease that he was referred to as a “superhorse.”<sup>2</sup> The sculpture represents a sorrowful memory of the fatal injury he suffered during his next race in the quest for the elusive Triple Crown of Thoroughbred horse racing.<sup>3</sup> In addition, the sculpture symbolizes why the 2009 Kentucky Derby was the first to be run under rules that ban the use of anabolic steroids (steroids)<sup>4</sup> from Thoroughbred racing.

In May 2008, more than a year after Barbaro’s life tragically ended, a horse named Big Brown won the Kentucky Derby, narrowly beating a filly named Eight Belles.<sup>5</sup> Just as Eight Belles crossed the finish line, she collapsed, and in front of millions of viewers, was put to death because of her two broken legs.<sup>6</sup> As the world tried to make sense of the tragedy, Big Brown’s trainer announced that he had administered steroids before the race to enhance Big Brown’s performance.<sup>7</sup> Thus, the issue of steroids in horse racing, which had previously been confined to discussions among those involved in the industry, was thrust into the national limelight.

The use of medication in horse racing in the United States has been a controversial issue plaguing the sport since the late 1800s, when “racetracks were hotbeds of rumors about illegal . . . doping, and

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<sup>1</sup> Will Graves, *Churchill Downs Unveils Barbaro Memorial*, <http://www.cbsnews.com/stories/2009/04/26/national/main4969744.shtml> (Apr. 26, 2009) (last accessed Nov. 21, 2009).

<sup>2</sup> Joe Drape, *Startling Injury at Preakness Ends Barbaro’s Quest*, <http://www.nytimes.com/2006/05/21/sports/othersports/21preakness.html> (May 21, 2006) (last accessed Nov. 21, 2009).

<sup>3</sup> *Id.* The “Triple Crown” refers to the three most prestigious races in American Thoroughbred racing: the Kentucky Derby, the Preakness, and the Belmont Stakes. The Horse Racing Channel, *The Triple Crown*, <http://www.horseracing.com/triple-crown/> (last accessed Nov. 21, 2009).

<sup>4</sup> There are several different forms of steroids. This Article uses the word “steroids” to refer *only* to anabolic steroids. Any other steroids will be referred to with a descriptive adjective to distinguish them from anabolic steroids.

<sup>5</sup> Jesse Halladay & Reid Cherner, *Death of Eight Belles Leaves Cloud over Race Track*, [http://www.usatoday.com/sports/horses/2008-05-04-eight-belles-cover\\_N.htm](http://www.usatoday.com/sports/horses/2008-05-04-eight-belles-cover_N.htm) (May 19, 2008) (last accessed Nov. 21, 2009).

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

<sup>7</sup> Bill Finley, *New York Unveils Steroid-Free Racing*, 158 N.Y. Times B8 (Jan. 2, 2009) (available at <http://www.nytimes.com/2009/01/02/sports/othersports/02racing.html> (Jan. 1, 2009) (last accessed Dec. 22, 2009); Tim Layden, *The Weight of the World: Big Brown’s Human Connections Complicate His Triple Crown Fairy Tale*, <http://sports.illustrated.cnn.com/vault/article/magazine/MAG1139176/index.htm> (June 9, 2008) (last accessed Nov. 21, 2009).

fraudulent races.”<sup>8</sup> Today, racing horses are lawfully and routinely given a range of drugs, many of which are used to preemptively combat the severe physiological reactions to the physical strain of racing. These drugs include strong non-steroidal anti-inflammatory medications, bronchodilators, anti-bleeding medication, and many others.<sup>9</sup> Although the administration of some drugs is medically substantiated, it has become a hackneyed practice to treat healthy horses with drugs merely to enhance their performance and training.<sup>10</sup> Those who take issue with this practice—including owners, trainers, and veterinarians—argue that medication affects the fairness of the competition, the health of the animals, and the integrity of the breed.<sup>11</sup>

Perhaps the most poignant reality of medicating horses is that the use of these various medications has been linked to the fact that there are more on-track racing deaths in the United States than in any other racing country.<sup>12</sup> The result of the controversy surrounding the use of medication in racing horses is the promulgation of rules regulating or prohibiting the use of the most objectionable medications. While the use of steroids is a new issue, since the death of Eight Belles, thirty-two of the thirty-eight racing states have passed some regulation of the use of steroids in racing.<sup>13</sup> This Article provides an overview of those steroid regulations in the context of the history of regulation in Thoroughbred horse racing.

In order to fully understand the complexity of the issues surrounding horse racing regulation, both generally and as applied to prohibited substances, this Article first provides perspective on the evolution of the sport from an ancient pastime of the wealthy to an industry earning billions of dollars for states. Part II addresses the history of the sport, the rise of its informal regulation by private parties, and the inextricable role that gambling played in the evolution of the sport. Part III addresses the modern regulation of the sport under the state administrative-control model. That Part will describe the various rules used to regulate non-steroidal medications during the past decades.

Part IV describes the presumptive medical benefits of the use of steroids in horses, the harm of using steroids as performance enhancers, and the evolution of steroids into one of the most eminent

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<sup>8</sup> Joan S. Howland, *Let's Not "Spit the Bit" in Defense of "the Law of The Horse": The Historical and Legal Development of American Thoroughbred Racing*, 14 Marq. Sports L. Rev. 473, 495–96 (2004).

<sup>9</sup> Joe Drape, *Many Derby Owners Silent on Drug Issue*, <http://www.nytimes.com/2009/04/30/sports/othersports/30racing.html> (Apr. 29, 2009) (last accessed Nov. 21, 2009).

<sup>10</sup> For example, a prominent trainer was recently investigated for giving a powerful cough medicine to an otherwise perfectly healthy horse before a race in New York. ESPN Horse Racing, *Mullins Says Medication on Horse Was Mistake*, <http://sports.espn.go.com/espn/wire?section=horse&id=4047335> (last updated Apr. 6, 2009) (last accessed Nov. 21, 2009).

<sup>11</sup> Drape, *Many Derby Owners Silent on Drug Issue*, *supra* n. 9.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

issues in Thoroughbred horse racing. Part V provides a detailed analysis of the difficulties of regulating steroid use in horse racing. That Part provides an overview of the current forms of steroid regulation used in racing states and will critically address their shortcomings. Finally, this Article proposes the use of a federal law as the most effective means of regulating the use of steroids in the sport. This Article concludes that effective steroid regulation is hindered by lack of research and accurate laboratory testing and that a pervasive federal law might be the most effective way of ending non-medicinal use of steroids in horse racing.

## II. A HISTORY OF THOROUGHBRED RACING

### A. *A History of Thoroughbred Racing from Ancient Times through the Nineteenth Century*

Horse racing is widely considered one of the oldest sports in the world, with its first written account coming from the *Iliad*.<sup>14</sup> By 400 B.C.E., the Romans had created the first “major league of racing.”<sup>15</sup> Horse racing continued in various forms throughout Europe; however, it was not until the seventeenth and eighteenth centuries that the basic structure of the modern racing industry emerged.<sup>16</sup> During that time, two significant events occurred in England that allowed the sport to evolve into its current state: (1) the Thoroughbred breed was introduced in England, and (2) the sport “received true acceptance as a ‘gentle’ pastime under the reign of Queen Anne . . . .”<sup>17</sup> The Thoroughbred breed was created by breeding local mares with three stallions who arrived in England between 1630 and 1730: the Byerly Turk, the Darley Arabian, and the Godolphin Arabian.<sup>18</sup> In 1791, James Weatherby, the nephew of then-secretary of the British Jockey Club, published the *General Stud Book*, a meticulous recording of Thoroughbred bloodlines.<sup>19</sup> The British Jockey Club was the original exclusive association of Thoroughbred owners and trainers.<sup>20</sup> Today, every Thoroughbred horse can be traced back to the three original stallions who

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<sup>14</sup> Jordan Curnutt, *Animals and the Law: A Sourcebook* 258 (ABC-CLIO 2001).

<sup>15</sup> *Id.*

<sup>16</sup> 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).

<sup>17</sup> *Id.*

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

<sup>19</sup> Weatherbys, *Historical Overview*, [http://www.weatherbys.co.uk/historical\\_overview](http://www.weatherbys.co.uk/historical_overview) (last accessed Nov. 21, 2009); Weatherbys, *Stud Book History*, [http://www.weatherbys.co.uk/-stud\\_book\\_history\\_divisional](http://www.weatherbys.co.uk/-stud_book_history_divisional) (last accessed Nov. 21, 2009). James Weatherby's uncle, appointed secretary of the Jockey Club in 1770, founded Weatherbys Thoroughbred Ltd., which today owns, compiles, and publishes the *General Stud Book* every four years. *Id.*

<sup>20</sup> Curnutt, *supra* n. 14, at 259. The Jockey Club still exercises control over British horse racing and breeding. *Id.*

arrived in England in the 1600s and 1700s,<sup>21</sup> the significance of which is discussed *infra*.

Early British colonists brought recreational horse racing to the New World.<sup>22</sup> In 1665, the first permanent racetrack in America was set up on Long Island, just miles from the current location of the Belmont Stakes.<sup>23</sup> Although racetracks and local jockey clubs proliferated throughout America, it was not until the decades prior to the outbreak of the Civil War that a sustained interest in the development of a distinctly American breed of Thoroughbred emerged.<sup>24</sup> After years of debate about whether to create a national organization whose rules and decisions on racing and breeding would be universally accepted, the Civil War resulted in two critical developments in American racing.<sup>25</sup> First, the sport's social, legal, and financial center transferred from the South to New York.<sup>26</sup> Second, in the decade after the Civil War, fighting among the local New York jockey clubs and the emergence of gambling on races led to increased controversy among the leaders in the sport.<sup>27</sup> This controversy paved the way for the development of a national jockey club.<sup>28</sup>

*B. The Inextricable Role of Gambling in Horse Racing and Its Tie to the Rise of the Jockey Club: 1894–1951*

*1. The Problems with Unregulated Gambling and Local Jockey Clubs*

Although wealthy members of the jockey clubs provided the impetus for the post-Civil War growth of horse racing<sup>29</sup>—just as the English monarchs wagered on “the speed of their horses” in the Middle Ages<sup>30</sup>—gambling was the fuel for that growth.<sup>31</sup> A figure known as the “bookmaker,” whose business was to set odds on each horse in a race and solicit people to gamble *against* him based on those odds, emerged as the original link between racing and gambling.<sup>32</sup> The bookmakers and prominent members of local jockey clubs shared mutual benefits. By taking bets at the track, larger bookmakers would draw customers to the races and pay the track owners a fee for running their

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<sup>21</sup> Howland & Hannon, *supra* n. 16, at 1.

<sup>22</sup> *Id.*

<sup>23</sup> David M. Haugen, *Legalized Gambling* 118 (Lib. in a Bk., Facts on File 2006).

<sup>24</sup> Howland & Hannon, *supra* n. 16, at 3.

<sup>25</sup> *Id.* at 4–5.

<sup>26</sup> *Id.* at 5.

<sup>27</sup> *Race-Horse Owners Aroused; To Organize a Club for Their Own Protection*, N.Y. Times, (Dec. 29, 1893) (available at <http://query.nytimes.com/gst/abstract.html?res=9E00E6D8173EEF33A2575AC2A9649D94629ED7CF> (last accessed Nov. 21, 2009)).

<sup>28</sup> Howland & Hannon, *supra* n. 16, at 6.

<sup>29</sup> Haugen, *supra* n. 23, at 16.

<sup>30</sup> William N. Thompson, *Legalized Gambling: A Reference Handbook* 4 (ABC-CLIO 1994).

<sup>31</sup> Haugen, *supra* n. 23, at 16.

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

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gambling operation on location.<sup>33</sup> Unlike the smaller bookmakers, who worked from saloons and poorer neighborhoods, the racetrack bookmakers were content with paying fees to the owners in return for the wealthier clientele who gathered at the races.<sup>34</sup> The racetrack owners encouraged bookmakers because their presence attracted customers.<sup>35</sup> This likely allowed racetrack owners to increase purse sizes for winning horses and thus attract more racers and greater esteem.

Gambling formed a superstructure for the racing industry in the late nineteenth century that was mutually beneficial to the members of the local jockey clubs and the bookmakers. However, by the early 1890s, the tracks were so afflicted with corrupt “bookmakers, poor management, and dishonest trainers and jockeys”<sup>36</sup> that the local jockey clubs could not address the amount of reported and unreported abuses.<sup>37</sup> As one of the founders of the Jockey Club explained in the months before the organization’s founding, “[the race] judges were employed by the men who owned the tracks . . . They knew which side their bread was buttered on.”<sup>38</sup> As the problem persisted, steps were taken in New York to create an organization that would have “supreme control of racing on all the tracks.”<sup>39</sup> Thus, in 1894, the Jockey Club, in the “fashion of the Jockey Club in England,” was founded in New York.<sup>40</sup>

## 2. *The Early Role of the Jockey Club and the Illegality of Bookmaking*

The American Jockey Club was formed with the ambition to promote improvement of the Thoroughbred breed (for example, by publishing the *American Stud Book*), to elevate the public’s opinion of the sport, and to serve as the authority on racing matters throughout the country.<sup>41</sup> However, those ambitions became secondary to the true function of the private organization: to regulate the rampant gambling occurring throughout the end of the nineteenth century.<sup>42</sup> Thus, the history of the regulation of American horse racing is inextricably tied to the broader evolution of gambling and the role of the Jockey Club in its regulation.

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Howland & Hannon, *supra* n. 16, at 7.

<sup>37</sup> Haugen, *supra* n. 23, at 17.

<sup>38</sup> *Race-Horse Owners Aroused; To Organize a Club for Their Own Protection*, *supra* n. 27.

<sup>39</sup> *Racing Reform Demanded, Halfway Measures Not to Be Tolerated*, *NY Times* 3 (Jan. 5, 1894).

<sup>40</sup> *Id.*

<sup>41</sup> Howland & Hannon, *supra* n. 16, at 6.

<sup>42</sup> See *Racing Reform Demanded*, *supra* n. 39 (citing plans of the new Jockey Club to rescue the sport of racing from those who had turned it into “little more than a gambling game”); see generally Howland & Hannon, *supra* n. 16, at 7 (from 1890 to 1930, illegal gaming surfaced at almost every major racetrack).

After its creation, the Jockey Club immediately began to license competitors, hire officials, and investigate corruption on all the major race courses.<sup>43</sup> However, the same problem that afflicted the earlier local jockey clubs persisted under the Jockey Club: the inability to stay current on the constant flow of gambling-related issues. Bookmakers and trainers often worked together to fix odds or even dope or poison horses in order to fix races.<sup>44</sup> As a result, the criminal element that surrounded gambling operations present at nearly all of the 314 racetracks in the country became a focal point of campaigns by politicians and lobbyists known as the “antigambling crusaders.”<sup>45</sup> The shift in public opinion resulted in the death of the bookmaking industry.<sup>46</sup> This was epitomized by the fact that in 1908, only 25 of the original 314 tracks in the country remained open.<sup>47</sup> Bookmaking had essentially become a criminal activity in every horse-racing state, either by statute or ridicule, and horse racing suffered as a result.

### 3. *The Arrival of Pari-Mutuel Gambling in Place of Bookmaking*

The emigration of trainers and jockeys to Europe to find work, along with the overall shrinking of the industry, forced the remaining markets where the sport still survived to find potential legal alternatives to the crime-ridden bookmaking system.<sup>48</sup> The savior of American horse racing came in 1908 when a Kentucky court of appeals held in *Grinstead v. Kirby*<sup>49</sup> that pari-mutuel wagering at racetracks was not illegal under the state statute that outlawed bookmaking. In the pari-mutuel wagering system, developed in France in the 1870s, players place their bets on selected horses, and then all bets are pooled and the winners are paid from the pool.<sup>50</sup> Thus, gamblers bet directly against each other.<sup>51</sup> Accordingly, the track became responsible for pooling the money and dispensing the winnings.<sup>52</sup> The benefit of the system was that the track did not participate in the gambling as a bookkeeper would; rather, it would take a percentage of the pool, thus removing the criminal incentive of fixing odds or races.<sup>53</sup> Moreover, because pari-mutuel wagering involved placing bets with a machine that printed a ticket,<sup>54</sup> there were likely fewer violent disputes over

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<sup>43</sup> Haugen, *supra* n. 23, at 17.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

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

<sup>48</sup> Howland & Hannon, *supra* n. 16, at 7–8.

<sup>49</sup> 110 S.W. 247, 247–48 (Ky. App. 1908).

<sup>50</sup> Howland & Hannon, *supra* n. 16, at 8.

<sup>51</sup> *Id.*

<sup>52</sup> Thompson, *supra* n. 30, at 194.

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

<sup>54</sup> Howland & Hannon, *supra* n. 16, at 8.



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payouts. Perhaps the most significant aspect of the new system was that the state could easily tax a piece of the earnings.<sup>55</sup>

In 1908, armed with the recent appellate court decision, the organizers of the Kentucky Derby reemployed old pari-mutuel ticket machines that had been stored in basements years earlier and proved to the United States that organized, legal gambling was a possibility at racetracks.<sup>56</sup> The pari-mutuel system caused two significant results with regard to regulation: (1) it gave the state the incentive to use horse racing as a method of raising money through income tax, and thus, (2) it allowed track owners, states, and the Jockey Club to emphasize the perceived fairness in order to make the sport less offensive.<sup>57</sup>

The pari-mutuel system was officially recognized by state legislatures shortly after the 1908 Kentucky Derby, with nearly every racing state legalizing it by the 1930s.<sup>58</sup> During the years following *Grinstead* and the 1908 Kentucky Derby, pari-mutuel betting spread throughout the nation, restoring the public's and lawmakers' confidence in the racing business.<sup>59</sup> By the end of 1942, aggregate annual purses were more than \$18 million nationally.<sup>60</sup> States fully supported the tracks because they could tax the tracks' pari-mutuel wagering earnings.<sup>61</sup>

C. *The Replacement of the Jockey Club with State Commissions*

1. *The Replacement of the Jockey Club with State Commissions as the Regulators of Gambling*

As a result of states taking large percentages of gambling revenues, state racing commissions emerged and eliminated the central authority of the Jockey Club as a gambling regulator.<sup>62</sup> These state commissions were the precursors of today's racing commissions. Although the number of states that had these commissions is unclear, their purpose was well known: to regulate gambling and to collect taxes from pari-mutuel betting. Thus, the Jockey Club's authority was limited to maintaining the integrity of the Thoroughbred breed and acting as the official means of qualifying horses to race.<sup>63</sup>

The Jockey Club, relieved of dealing with gambling-related issues, was able to focus on making sure that the training of Thoroughbreds and the sport of racing remained fair through the licensing of owners and trainers.<sup>64</sup> Critical developments included saliva testing horses in

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

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

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

<sup>58</sup> *Id.* at 8–9.

<sup>59</sup> Howland, *supra* n. 8, at 497.

<sup>60</sup> Howland & Hannon, *supra* n. 16, at 9.

<sup>61</sup> Haugen, *supra* n. 23, at 18.

<sup>62</sup> Howland & Hannon, *supra* n. 16, at 9.

<sup>63</sup> *Id.*

<sup>64</sup> Thompson, *supra* n. 30, at 19, 67, 131; Howland, *supra* n. 8, at 499.

order to reduce drugging by fellow competitors and large-stake gamblers and testing for restricted substances like pain killers and amphetamines.<sup>65</sup> Likewise, the Jockey Club began creating rules for identifying horses, such as tattooing their inner lip to ensure tested horses were not switched at the gate.<sup>66</sup> In other words, the privately held Jockey Club regulated horse racing to ensure that all trainers had a neutral playing field.

2. *The Replacement of the Jockey Club with State Commissions as the Sport's General Regulatory Authority*

Thoroughbred racing continued to thrive, especially when television broadcasts of races began in the 1950s.<sup>67</sup> During this time, the dual structure of states—which garnished taxes from racing and oversaw the track owners' pari-mutuel system—and the Jockey Club—which regulated the sport—continued. However, in 1951 a decision by the New York Court of Appeals ended the dual structure by severely limiting the authority of the Jockey Club. In *Fink v. Cole*,<sup>68</sup> a New York appellate court held that it was unconstitutional for the state government to delegate licensing power to any private organization. Throughout the country, state administrative agencies began to assume many of the responsibilities of the Jockey Club.<sup>69</sup> As such, these state agencies not only regulated gambling operations but also every other aspect of horse racing. Thus, the modern state-administrative model for the regulation of Thoroughbred racing was born.

III. MODERN REGULATION IN HORSE RACING UNDER THE STATE ADMINISTRATIVE AGENCY MODEL

A. *The Granting of Broad Regulatory Authority in State Administrative Agencies*

The decision by the New York Court of Appeals in *Fink v. Cole* was followed by similar decisions in other racing states. Various state appellate courts held that the delegation of licensing power to the Jockey Club, a private organization, was an abdication of legislative power in violation of state constitutions.<sup>70</sup> This resulted in new statutes giving state commissions very broad delegations of power including licensing, rulemaking authority, determining civil penalties, and enforcing rules.

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<sup>65</sup> Howland & Hannon, *supra* n. 16, at 9.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 10.

<sup>68</sup> 97 N.E.2d 873, 876 (N.Y. 1951).

<sup>69</sup> Howland & Hannon, *supra* n. 16, at 11.

<sup>70</sup> *Fink*, 97 N.E.2d at 876; see also *Costanzo v. N.J. Racing Commn.*, 313 A.2d 618, 620 (N.J. Super. Ct. App. Div. 1974) (holding that incorporation by the state racing commission of regulations by the U.S. Trotting Association into its licensing decisions would be an invalid delegation of legislative power).

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The rulemaking authority is mandatory and pertains to all aspects of racing, including wagering.<sup>71</sup> For example, the California statute provides that the California Horse Racing Board's responsibilities include "[a]dopting rules and regulations for the protection of the public and the control of horse racing and pari-mutuel wagering" and the "[a]dministration and enforcement of all laws, rules, and regulations affecting horse racing and pari-mutuel wagering."<sup>72</sup> Thus, their power is derived solely from the legislative grant of authority written in the state racing statutes.<sup>73</sup> Likewise, some states provide the governor the power to abolish racing commissions and re-appoint new ones.<sup>74</sup>

*B. The Regulation of Drugs and Illegal Substances through Trainer-Responsibility Rules by State Racing Commissions*

*1. Overview and Explanation of Trainer-Responsibility Rules*

The trainer-responsibility rules, which focus on the prevention of drug use in horse racing, are the pertinent regulations within the vast authority delegated to the commissions in racing states.<sup>75</sup> The rules serve the same purposes that the Jockey Club served earlier in the century: to prevent the use of illegal drugs to alter the outcome of races and to protect the integrity of the horse-racing industry and public confidence in the sport.<sup>76</sup> Certain aspects of horse racing have led to rules and case law placing strict accountability on the trainer, often irrespective of fault: the large amount of money, which historically attracts corruption; the fact that pari-mutuel wagering depends on public confidence that races are not corrupted by illegal practices such as drug use; and the states' strong financial interest in protecting the pari-mutuel system.<sup>77</sup> Thus, from as early as the 1940s, courts began subjecting trainers to a unique form of strict liability called the "absolute insurer rule,"<sup>78</sup> which serves as the background for many modern rules and regulations.<sup>79</sup>

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<sup>71</sup> *Cramer v. N.Y. State Racing Assn.*, 525 N.Y.S.2d 938, 941 (App. Div. 1988) (holding that the Racing and Wagering Board is statutorily required to promulgate rules for the regulation of pari-mutuel wagering).

<sup>72</sup> Cal. Bus. & Prof. Code Ann. § 19440(a) (West 2009).

<sup>73</sup> Howland & Hannon, *supra* n. 16, at 51.

<sup>74</sup> *Kentucky Governor Dissolves State's Horse Racing Authority*, [http://www.usatoday.com/sports/horses/2008-07-03-kentucky-racing-authority\\_N.htm](http://www.usatoday.com/sports/horses/2008-07-03-kentucky-racing-authority_N.htm) (July 3, 2008) (last accessed Nov. 21, 2009).

<sup>75</sup> Howland & Hannon, *supra* n. 16, at 16 (These are also called "trainer insurer rules.").

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 16–17.

<sup>78</sup> See *id.* at 17–18 (citing *Carrol v. Cal. Horse Racing Bd.*, 93 P.2d 266 (Cal. App. 1939), *rev'd*, 105 P.2d 110 (Cal. 1940) (holding that a trainer had absolute final responsibility for the condition of his drugged horse)).

<sup>79</sup> See N.J. Admin. Code 13:70-14A.6(a) (2009) ("A trainer shall be the absolute insurer of and is responsible for the condition of a horse within his care and custody.").

Trainer-responsibility rules generally fall into three categories: (1) absolute strict-liability rules;<sup>80</sup> (2) rules creating an affirmative duty to safeguard a horse from tampering;<sup>81</sup> and (3) rebuttable-presumption rules, under which a trainer is liable unless the trainer rebuts the evidence of the use of illegal substances.<sup>82</sup> One rule can fall into more than one of these categories. For example, the Colorado rule related to laboratory tests for banned substances imposes an affirmative duty on the trainer as well as absolute insurer liability with a “rebuttable presumption that the trainer and/or assistant trainer of the animal were responsible for the administration of the unauthorized medication.”<sup>83</sup> As previously mentioned, although the substance of the rules is similar among the racing states, the seemingly subtle nuances in the creation of duties and impositions of liability might drastically alter the perceived incentives to break the rules.

Trainer-responsibility rules deter and restrict three basic types of modern day drugging: drugging to lose, accidental doping, and drugging to win. Drugging to lose consists of the use of substances to reduce a horse’s speed in order to increase a competitor’s chance of winning.<sup>84</sup> Accidental doping cases are rare and tend to include extraneous happenstance such as contamination of food sources.<sup>85</sup> Rules deterring and restricting drugging to win are most pertinent for the purposes of this Article. These rules apply to the use of stimulants, such as steroids; powerful and dangerous pain medication or tranquilizers that allow an injured horse to run faster; therapeutic drugs; and a range of substances that alter various physiological functions of the horse.<sup>86</sup> Rather than specifically allowing or restricting the use of substances, however, the regulations tend to be both intricate and interwoven, often relying on criteria that are impossible to measure.

## 2. *Examples of Modern Non-Steroid Drug Regulations and Testing*

The New York regulations provide a useful example of how a drugging-to-win rule functions. One of the highly regulated and controver-

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<sup>80</sup> See *id.* at (b) (imposing absolute trainer liability for use of illegal substances).

<sup>81</sup> See *id.* at (d) (“The trainer, owner, veterinarian, groom or other person charged with the custody, care and responsibility of a horse are all obligated to protect and guard the horse against administration of any drug or substance foreign to the natural horse . . .”).

<sup>82</sup> Howland & Hannon, *supra* n. 16, at 16; see e.g. 9 N.Y. Comp. Codes, R. & Regs. I.4043.4 (2009) (imposing absolute insurer liability with a rebuttable presumption for positive drug tests).

<sup>83</sup> 1 Colo. Code Regs. 208-1, at 5.500 (2009).

<sup>84</sup> Howland & Hannon, *supra* n. 16, at 23.

<sup>85</sup> See *id.* at 23–24 (citing *Grismore v. Ohio State Racing Commn.*, Report and Recommendation of Hearing Officer (Oct. 16 1989) (finding that positive drug tests were caused by contamination at the grain elevator where the horse’s food originated)).

<sup>86</sup> Howland & Hannon, *supra* n. 16, at 23.

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sial forms of medication<sup>87</sup> is non-steroidal anti-inflammatory drugs (NSAIDs). The New York rule provides that “[e]ither one . . . of the following two non-steroidal anti-inflammatory drugs may be administered by intravenous injection until 24 hours before the scheduled post time of the race in which the horse is to compete: (1) flunixin; (2) phenylbutazone.”<sup>88</sup> Therefore, within twenty-four hours of the race only one of the two stated drugs can be given to a racehorse intravenously.<sup>89</sup> Yet the following subsection states that “[t]he following substances are permitted to be administered *by any means* until 48 hours before the scheduled post time of the race in which the horse is to compete: . . . Phenylbutazone [and] Flunixin . . . .”<sup>90</sup> It is often impossible to determine through testing the time or form that the regulated NSAID was administered.

The final aspect of rules prohibiting or regulating the use of drugs is the testing of a horse. Testing is performed through the collection of urine and blood and is done either pre-race or post-race, depending on the type of drug and the specific regulation.<sup>91</sup> For example, the New York regulations provide specifics for both pre-race and post-race testing at the track, including who can be present with the horse, which veterinarian must administer the test, and where the gathering of samples must take place.<sup>92</sup>

Generally, all horses are tested for certain drugs before each race.<sup>93</sup> With regard to post-race testing, the New York rules provide that the “winner and at least one other horse designated by the [commission] shall be sent to the testing facility immediately after each race.”<sup>94</sup> Testing regulations provide the commission and veterinarians the right to seize and analyze “samples of any medicine or other materials which may be found in stables or elsewhere on racetracks or in the possession of any person connected with racing.”<sup>95</sup> The party in charge of testing also must allow a horse that tests positive to requalify by taking part in a physical workout or testing negative for a substance after the race.<sup>96</sup> Such “requalification” rules grant considerable discretion to the commission to provide second and third chances to otherwise violative trainers to qualify their horses.

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<sup>87</sup> William C. Rhoden, *Horse Racing Begins Reform, but Legal Drugs Are Still an Issue*, 158 N.Y. Times B13 (Mar. 20, 2009) (available at <http://www.nytimes.com/2009/03/20/sports/othersports/20rhoden.html>) (Mar. 19, 2009) (last accessed Nov. 21, 2009)).

<sup>88</sup> 9 N.Y. Comp. Codes R. & Regs. I.4043.2(d) (2009).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at (e) (emphasis added).

<sup>91</sup> See 9 N.Y. Comp. Codes R. & Regs. 4012.3 (2009) (providing for pre- and post-race blood and urine testing).

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

<sup>93</sup> *Id.* at (a)(1).

<sup>94</sup> *Id.* at (b)(1).

<sup>95</sup> *Id.* at (d).

<sup>96</sup> *Id.* at (e).

IV. THE USE OF STEROIDS IN HORSE RACING: HISTORY OF STEROID USE IN HORSE RACING, THERAPEUTIC USES, PRESUMPTIVE BENEFITS, POTENTIAL HARMS, AND THE EMERGENCE OF STEROIDS AS AN ISSUE IN HORSE RACING

A. *History of Steroid Use in Horse Racing*

Generally, steroids are any form of hormonal substance closely related to the male hormone testosterone.<sup>97</sup> In addition to naturally occurring testosterone, steroids can be synthetically created in laboratories for a variety of medical purposes.<sup>98</sup> In the 1930s, testosterone was first synthetically produced in order to treat a variety of growth-related ailments in human males.<sup>99</sup> It was not until the 1956 Olympics, when Soviet athletes were visibly outperforming nearly every other competitor, that the performance-enhancement capabilities of steroids became widely known.<sup>100</sup> Research into creating more effective synthetic forms of steroids was fueled not only by the hope of finding new medical applications but also by the desire to improve the performance of Olympic athletes.<sup>101</sup> However, the stigma that is today associated with the use of steroids did not emerge until 1975, when the International Olympic Committee banned the use of steroids by Olympic athletes.<sup>102</sup>

The use of steroids in horse racing generally mimics the history of the drug. Since the proliferation of synthetic testosterone in the 1950s, steroids have been used in horses for either therapeutic purposes or as performance-enhancers. Historically, steroids were used in equine veterinary medicine to treat horses who suffered from dangerously decreased muscle mass.<sup>103</sup> In addition, the drugs were given to geldings—castrated male equines—regardless of their physical state.<sup>104</sup> The use of steroids as a performance enhancing supplement in professional horse racing first emerged in the 1960s.<sup>105</sup> It is unclear

<sup>97</sup> Center for Substance Abuse Research, U. of Md., *Anabolic Steroids*, <http://www.cesar.umd.edu/cesar/drugs/steroids.asp> (last updated May 2, 2005) (last accessed Nov. 21, 2009).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

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

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Kimberly S. Brown, *TheHorse.com: The Steroid Debate*, <http://www.thehorse.com/ViewArticle.aspx?ID=11789> (May 1, 2008) (last accessed Nov. 21, 2009); see also H.R. Subcomm. on Com., Trade, and Consumer Protec. of the Comm. on Energy and Com., *Breedings, Drugs, and Breakdown: The State of Thoroughbred Horse Racing and the Welfare of the Thoroughbred Racehorse*, 110th Cong. 2–3 (June 19, 2008) [hereinafter Subcommittee] (testimony of Lawrence R. Soma, VMD, DACVA stating that “many practicing veterinarians attest to the gains in physical strength . . . when anabolic steroids are used . . .”).

<sup>104</sup> Subcommittee, *supra* n. 103, at 5.

<sup>105</sup> Bill Finley, *In Horse Racing, Test of Beefed-Up Champions*, 157 N.Y. Times D1 (June 2, 2008) (available at <http://www.nytimes.com/2008/06/02/sports/othersports/02steroids.html> (June 2, 2008) (last accessed on Nov. 21, 2009)).

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when the use of steroids as a performance 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.<sup>106</sup> This widely cited statistic is often used by the horse-racing industry to demonstrate how widespread the use of steroids is in the sport.<sup>107</sup>

Veterinary use of anabolic steroids is still legal in the United States. However, only four types of these steroids are approved for veterinary use in horses: testosterone, boldenone (Equipoise), stanozolol (Winstrol), and nandrolone (Durabolin).<sup>108</sup> Of these four, boldenone and nandrolone occur naturally in intact male horses, and testosterone occurs naturally in all horses.<sup>109</sup>

*B. Medical Benefits and Presumptive  
Performance-Enhancement Benefits*<sup>110</sup>

Anabolic steroids are synthetic derivatives of naturally occurring testosterone that have been modified to improve their anabolic rather than androgenic actions.<sup>111</sup> The anabolic effects of these drugs are those promoting protein synthesis, muscle growth, and the production of red blood cells.<sup>112</sup> The therapeutic or medical benefits and the presumptive performance-enhancement benefits are both results of those effects.

Veterinarians use steroids to treat horses for essentially one purpose: to remedy “poorly-doing horses.”<sup>113</sup> Steroids increase protein synthesis and as a result increase a horse’s metabolism.<sup>114</sup> As such, steroids have been used by veterinarians to treat ill horses or injured horses who suffer from chronic or acute atrophy because of poor appetite.<sup>115</sup> An increase in appetite, along with the resultant increase of

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<sup>106</sup> Subcommittee, *supra* n. 103, at 3.

<sup>107</sup> See Don Clippinger, *Pennsylvania Testing Reduces Steroid Positives*, <http://www.thoroughbredtimes.com/national-news/2008/July/19/Pennsylvania-testing-reduces-steroid-positives.aspx> (July 19, 2008) (last accessed Nov. 21, 2009) (reporting statistics).

<sup>108</sup> Finley, *In Horse Racing, Test of Beefed-Up Champions*, *supra* n. 105; Esther Marr, *Ky. Talks Timing of Steroid Rules*, BloodHorse.com, <http://www.bloodhorse.com/horse-racing/articles/43806/ky-talks-timing-of-steroid-rules> (last updated Feb. 27, 2008) (last accessed Nov. 21, 2009).

<sup>109</sup> Marr, *Ky. Talks Timing of Steroid Rules*, *supra* n. 108.

<sup>110</sup> The terms “medical” and “therapeutic” are used throughout regulations and literature on the use of steroids. Generally, both terms both refer to the same thing: a use meant to improve the poor health of a horse.

<sup>111</sup> L.R. Soma et al., *Pharmacokinetics of Boldenone and Stanozolol and the Results of Quantification of Anabolic and Androgenic Steroids in Race Horses and Nonrace Horses*, 30 *J. Vet. Pharmacol. Therap.* 101, 101 (2007).

<sup>112</sup> *Id.* (citing D.R. Mottram & A.J. George, *Anabolic Steroids*, 14 *Best Prac. & Research Clinical Endocrinology & Metabolism* 55 (2000)).

<sup>113</sup> Brown, *supra* n. 103.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

protein synthesis caused by the drug, results in overall growth in muscle mass.<sup>116</sup>

Another medical benefit of steroids is the increase in erythropoiesis, or red blood cell creation in bone marrow.<sup>117</sup> An increase in the volume of red blood cells allows the lungs to deliver more oxygen to the rest of the body. However, this effect is limited or nonexistent in healthy or male horses with normal plasma testosterone concentrations.<sup>118</sup> One of the few peer-reviewed medical studies on steroid use in horses concluded that a short treatment with a pharmacological level of nandrolone improves a horse's ability to replete muscle glycogen after exercise as a result of, *inter alia*, this increased volume of blood cells.<sup>119</sup> This seems to be the only steroid study in horses that identifies a possible physical benefit to healthy horses from the use of steroids after strenuous activity. However, the study clearly qualifies that although steroids might enhance the ability of an individual horse to train more than otherwise possible, "anabolic steroids also have harmful side-effects [and] these results emphasize the need for an adequate work [to] rest ratio in the training program to maintain a positive anabolic hormonal balance . . . ."<sup>120</sup>

Trainers who use steroids to enhance the performance of a horse during a race argue that the increase in appetite and size of the animal can increase its speed.<sup>121</sup> It is further argued that one effect of steroids is the ability to emphasize the "flight" aspect of the "fight or flight" instinct at the beginning of a race.<sup>122</sup> The triggering of the flight instinct in a horse leads to a release of adrenaline followed by an increase in heart rate and "dumping" of additional red blood cells from the spleen, transporting more oxygen to the horse's muscles.<sup>123</sup> In other words, the increase in appetite, size, and volume of red blood cells that provide clinically proven medical benefits to horses in need of the drug supposedly enhance a healthy racehorse's performance.

Nevertheless, all peer-reviewed research and publications disclaim any performance enhancement that is arguably provided by the use of steroids. The same paper that concludes that post-exercise application of nandrolone may help muscle recovery also states that "no controlled studies on horses yet exist to show whether anabolic steroids improve *physical performance* in comparison with that of similarly trained control horses."<sup>124</sup> In fact, three studies demonstrate that

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<sup>116</sup> *Id.*

<sup>117</sup> Soma et al., *supra* n. 111, at 101.

<sup>118</sup> Sepo Hyypä, *Effects of Nandrolone Treatment on Recovery in Horses After Strenuous Physical Exercise*, 48 J. Veterinary Med. 343, 345 (2001).

<sup>119</sup> *Id.* at 350.

<sup>120</sup> *Id.* (internal citation omitted).

<sup>121</sup> Finley, *In Horse Racing, Test of Beefed-Up Champions*, *supra* n. 105.

<sup>122</sup> Leigh Nichol, *Anabolic Steroids in Horse Racing*, Indiana Horsemen's Coalition 2-3, <http://www.indianaharness.com/Announcement/IHRC/Anabolic%20Steroids%20in%20Horse%20Racing.pdf> (last accessed Nov. 21, 2009).

<sup>123</sup> *Id.*

<sup>124</sup> Hyypä, *Effects of Nandrolone Treatment*, *supra* n. 118, at 343 (emphasis added).



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anabolic steroids offer *no beneficial effect* on exercise performance.<sup>125</sup> Thus, the usefulness of steroids in the improvement of physical exercise “is largely dependent on subjective opinions” of trainers and veterinarians.<sup>126</sup>

### C. Harms of Steroid Use in Horses

The detrimental effects of the use of steroids for prolonged periods have been documented. As mentioned *supra*, steroids change the behavioral habits of horses.<sup>127</sup> In male horses, an increase in testosterone, or a synthetic alternative, creates dangerous behavior such as aggressiveness and “stallion-like” activity in an otherwise sexually inactive horse.<sup>128</sup> One commenter describes the behavioral swing resulting from ending the use of steroids on a horse as a “disaster.”<sup>129</sup> In addition, the drastic increase in the volume of blood resulting from steroids requires a horse’s heart to process 65% more volume than normal when resting.<sup>130</sup>

Perhaps the most controversial detrimental effect regards track-related deaths of horses. Horses’ organs, unlike most other mammals, function poorly when a horse is not able to stand.<sup>131</sup> As such, when a horse breaks a bone in its leg, often the only option is to immediately euthanize the animal.<sup>132</sup> Leg breaks during races have often been attributed to the use of synthetic tracks or the use of the now highly regulated and controversial non-steroidal anti-inflammatory drugs (NSAIDs).<sup>133</sup> The fact that increased regulation of other controversial drugs and track conditions has not greatly decreased the number of fatal breakdowns on tracks, along with the increased attention to ster-

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<sup>125</sup> See Sepo Hyypä et al., *Exercise Performance Indices in Normal and Anabolic Steroid Treated Trotters*, 18 *Equine Veterinary J.* 443–47 (1995); D.H. Snow et al., *Effects of Nandrolone Phenylpropionate in the Horse: General Effects in Animals Undergoing Training*, 12 *Equine Veterinary J.* 224, 224–28 (1982); J.R. Thornton et al., *Influence of Anabolic Steroids on the Response to Training of 2 Year Old Horses*, 3 *Equine Exercise Physiology* 503, 503–08 (ICEEP Publications 1991).

<sup>126</sup> Soma et al., *supra* n. 111, at 101.

<sup>127</sup> *Id.* at 105–06.

<sup>128</sup> *Id.*

<sup>129</sup> Dave Zirin, *The Lessons of Big Brown*, *The Progressive* 16–17 (Aug. 2008) (“Cycling off a ‘roid can be disaster . . . couple cycling off of steroids with the severe dehydrating effect of [an anti-bleeding medication] and you have the recipe for a Belmont bomb.”).

<sup>130</sup> Nichol, *supra* n. 122, at 2–3.

<sup>131</sup> George H. Waring, *Horse Behavior* 117 (2d ed., William Andrew Publg. 2003); Cherry Hill, *How to Think Like a Horse: The Essential Handbook for Understanding Why Horses Do What They Do* 71 (Storey Publg. 2006).

<sup>132</sup> See *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) (last accessed Nov. 21, 2009) (“She didn’t have a front leg to stand on to be splinted and hauled off in the ambulance, so she was immediately euthanized.”).

<sup>133</sup> Jack Shinar, *Blood Horse, Racing Fatalities Decline in California*, [http://www.calracing.com/press\\_releases.php?f=RacingFatalitiesDeclinein.html](http://www.calracing.com/press_releases.php?f=RacingFatalitiesDeclinein.html) (Mar. 3, 2009) (last accessed Nov. 21, 2009).

oid use, has led some to argue that steroids might be to blame.<sup>134</sup> Some argue that a horse's skeletal frame cannot handle the increase in muscle mass that is purported to result from steroid use.<sup>135</sup> However, just like many issues surrounding the use of steroids in racehorses, there is no scientific or clinical data that proves this line of reasoning.<sup>136</sup> Nevertheless, steroids are believed to increase muscle mass, adding stress to a horse's already delicate skeletal frame.<sup>137</sup>

*D. The Emergence of Steroids as an Issue in Professional Thoroughbred Horse Racing*

Steroid use emerged as a press-worthy issue only during the past several years. Three events contributed to the rise of steroids as an issue in horse racing: (1) the general attention paid to steroid use in baseball and other professional sports; (2) the injuries of Barbaro in 2006 and Eight Belles in 2008; and (3) the admission of the use of pre-race steroids by the trainer of Big Brown, winner of the Kentucky Derby and the Preakness in 2008. The rise of the steroids issue led to the passing of model rules regarding anabolic steroids by the Racing Medication and Testing Consortium (RMTTC), an organization founded in 2000 by the twenty-three major representative organizations of the industry.<sup>138</sup>

During the past decade, both the press and the government have paid considerable attention to the use of steroids by prominent professional athletes in the United States.<sup>139</sup> In 2007, the attention reached a pinnacle when Major League Baseball released an investigation by former Senator George Mitchell, revealing the use of steroids by baseball superstars such as Roger Clemens.<sup>140</sup> The report was further glamorized by a series of congressional hearings on the subject.<sup>141</sup> As a result, the health effects of steroid use became widely reported.

In May 2006, more than a year before the Mitchell Report was issued and Congress began holding hearings on steroid use in profes-

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<sup>134</sup> See Anne Saker, *The Olympian, Horse Racing Fatal Breakdowns Higher in Oregon* (Feb. 16, 2009) (available at <http://www.theolympian.com/sports/topstories/story/757282.html> (Feb. 16, 2009) (last accessed Nov. 21, 2009)).

<sup>135</sup> See e.g. Rhoden, *supra* n. 87 (noting that it is unlikely that "any reform can remove the perils inherent in a sport in which 1,200-pound animals run full throttle in traffic on spindly legs.").

<sup>136</sup> Soma et al., *supra* n. 111, at 101.

<sup>137</sup> *Id.*

<sup>138</sup> Racing Medication & Testing Consortium, *History*, [http://www.rmtcnet.com/content\\_history.asp](http://www.rmtcnet.com/content_history.asp) (last accessed Nov. 23, 2009).

<sup>139</sup> See Rebecca Shore, *How We Got Here: A Time Line of Performance-Enhancing Drugs in Sports*, *Sports Illustrated*, <http://sportsillustrated.cnn.com/2008/magazine/03/11/steroid.timeline/index.html> (Mar. 11, 2008) (last accessed Nov. 21, 2009).

<sup>140</sup> *Id.*; George J. Mitchell, *Report to the Commissioner of Baseball of an Independent Investigation into the Illegal Use of Steroids and Other Performance Enhancing Substances by Players in Major League Baseball*, <http://files.mlb.com/mitchrpt.pdf> (Dec. 13, 2007) (last accessed Nov. 21, 2009).

<sup>141</sup> Shore, *supra* n. 139.

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sional sports, a Thoroughbred named Barbaro won the Kentucky Derby with such apparent ease that he was deemed a “superhorse.”<sup>142</sup> The buzz surrounding Barbaro during the weeks leading up to the Preakness brought horse racing more attention than it had received in years. However, in front of record crowds, the presumably unbeatable Barbaro shattered a hind ankle, ending his career.<sup>143</sup> The injury at the Preakness, coupled with the fact that his owners insisted on keeping him alive after the injury, made him a national icon up until his death in 2007 and brought the issues of steroid use and injury reporting to the table, although his trainers were not accused of using steroids.<sup>144</sup>

In May 2008, just days after plans for a Barbaro memorial at Churchill Downs were unveiled,<sup>145</sup> Eight Belles finished in second place at the Kentucky Derby, barely losing to another apparent “superhorse” named Big Brown.<sup>146</sup> The nearly 200,000 fans in the crowd, along with millions of television viewers throughout the world, watched Eight Belles collapse from two broken ankles just past the finish line.<sup>147</sup> Perhaps most significant was that she was euthanized on the track during the national broadcast. Then, just days after the Kentucky Derby, the renowned trainer of Big Brown, Rick Dutrow, casually admitted that not only was Big Brown treated with Winstrol before the Derby but that he would continue to treat Big Brown and his other horses with steroids to enhance their performance before every race.<sup>148</sup>

Prominent anti-medication proponents in horse racing seized upon the announcement by Big Brown’s trainer. In particular, Congressman Edward Whitfield from Kentucky threatened that unless steroids were banned from horse racing, Congress would repeal the Interstate Horse Racing Act<sup>149</sup> and thus cut off interstate pari-mutuel off-track betting, which accounts for more than 88% of all bets placed.<sup>150</sup> The threat led to a hearing on the issue by the House Subcommittee on Commerce, Trade, and Consumer Protection that highlighted the detrimental effects of using steroids in horses.<sup>151</sup>

Under the surveillance of Congress and the threat of federal regulation that would destroy the lucrative pari-mutuel betting operations, the racing industry was forced to deal with the perceived issue as

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<sup>142</sup> Drape, *Startling Injury at Preakness Ends Barbaro’s Quest*, *supra* n. 2.

<sup>143</sup> *Id.*

<sup>144</sup> A.J. Perez, *House Testimony Heartens Barbaro Owners*, [http://www.usatoday.com/sports/horses/2008-06-19-Hearing\\_N.htm](http://www.usatoday.com/sports/horses/2008-06-19-Hearing_N.htm) (June 20, 2008) (last accessed on Nov. 21, 2009).

<sup>145</sup> Esther Marr, *King Selected to Create Barbaro Statue*, <http://www.bloodhorse.com/horse-racing/articles/44984/king-selected-to-create-barbaro-statue?id=44984> (May 2, 2005) (last accessed Nov. 21, 2009).

<sup>146</sup> *Runner-up*, *supra* n. 132.

<sup>147</sup> *Id.*

<sup>148</sup> Finley, *In Horse Racing, Test of Beefed-Up Champions*, *supra* n. 105.

<sup>149</sup> 15 U.S.C. §§ 3001–3007 (2006).

<sup>150</sup> Finley, *In Horse Racing, Test of Beefed-Up Champions*, *supra* n. 105.

<sup>151</sup> Perez, *supra* n. 144.

quickly as possible.<sup>152</sup> Moreover, two days before the congressional hearing, the influential Jockey Club called for a sport-wide end to steroid use by December 31, 2008.<sup>153</sup> However, this announcement has been criticized as a tactic to preempt attacks during the hearing. Thus, most state commissions looked to the easiest solution: the adoption of the model rule promulgated by the RMTC, the industry-created and funded association. To date, all racing states have passed or are in the process of passing some form of the model rules through the state commissions' rulemaking powers.<sup>154</sup>

## V. CURRENT FORMS OF REGULATION OF STEROIDS IN PROFESSIONAL HORSE RACING

Although commissions often cite the adoption of the Racing Medication and Testing Consortium (RMTC) model rules when a steroid regulation is promulgated, the steroid regulations adopted by state racing commissions during the past year vary.<sup>155</sup> Nevertheless, the regulations that a state might adopt can be broken into three general categories. The first option is to not adopt any specific rules and default to the Food and Drug Administration (FDA) veterinary permissible-use regulations. The second option is to adopt the RMTC Model Rule for steroid regulation (Model Rule). The third option is to adopt parts of the Model Rule and combine them with recommendations by other organizations such as the Jockey Club, the state legislature, or the state commission. This Part first discusses the prevalent difficulties with steroid regulation in general and then analyzes each of the three regulatory options while highlighting the difficulties of each.

### A. *Difficulties with Regulating Steroids in Horses*

In analyzing the various forms of steroid regulations in horse racing it is necessary to discuss the three major difficulties or weaknesses that are currently inherent in the regulations: (1) distinguishing between therapeutic and illegal uses; (2) inadequacies of testing procedures; and (3) overall enforcement of the rules.

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<sup>152</sup> James M. Lewis, *Racing Industry Acting Quickly on Some Reforms*, <http://veterinarynews.dvm360.com/dvm/Veterinary+Equine/Racing-industry-acting-quickly-on-some-reforms/ArticleStandard/Article/detail/533189> (Aug. 1, 2008) (last accessed Nov. 21, 2009).

<sup>153</sup> *Id.* The Committee also called for a ban on friction-enhancing toe grabs and a series of whip-related reforms. *Id.*

<sup>154</sup> Racing Medication Testing Consortium, [http://www.rmtcnet.com/content\\_model\\_rules.asp#Rules](http://www.rmtcnet.com/content_model_rules.asp#Rules) (last accessed Nov. 21, 2009).

<sup>155</sup> Interview with James E. Robertson, Senior Legis. Asst. to U.S. Rep. Whitfield-Ky. (Apr. 3, 2009). Although the model rules are often used, states vary in the interrelated and correlating sections of the regulations.

### 1. *Distinguishing between Therapeutic and Illegal Uses*

The fact that there are medical uses for steroids in racehorses presents a primary challenge. 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. The imposition of absolute insurer liability may diminish the incentive for a trainer to use steroids as performance enhancers. However, a rule that creates anything other than a blanket prohibition of any detectable level of synthetic steroid will provide an opportunity for a trainer, or a prescribing veterinarian working with the trainer, to claim that the drug was being used therapeutically. As one critic argued, the difference between horses and humans is that a “human athlete who illegally takes steroids chooses to accept that risk,” but a horse is unable to distinguish the purpose of the drug being put into his body.<sup>156</sup>

### 2. *Inadequacies of Testing Procedures*

There are only two processes for testing horses for steroids: urinalysis and blood tests. These methods have not been fully developed, and neither has been clinically proven to have the accuracy required to enforce current rules.<sup>157</sup> There are two related issues that currently make both forms of testing inaccurate: (1) not enough is known about how quickly or completely steroids pass through a horse’s system,<sup>158</sup> and (2) not enough research has been done to accurately determine which steroid is present in a positive sample.<sup>159</sup>

The scientists and veterinarians performing research and developing testing methods have routinely highlighted these two issues. The most recent study addressing the issue of the time necessary for anabolic steroids to pass completely from a horse’s system looked at the three legal steroids.<sup>160</sup> The study concluded that the wide variance in the time and amount of steroid metabolized by each horse was a function of the particular brand of the product being used.<sup>161</sup> This result is another reason for a complete ban on steroids in horse racing.

Moreover, Dr. Scot Waterman, the executive director of the RMTTC, highlighted the problem in December 2008 in a panel discus-

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<sup>156</sup> Editorial, *Horse Racing and Steroids*, 157 N.Y. Times A22 (June 3, 2008) (available at <http://www.nytimes.com/2008/06/03/opinion/03tue3.html> (June 3, 2008) (last accessed Nov. 21, 2009)).

<sup>157</sup> Brown, *supra* n. 103.

<sup>158</sup> 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) (last accessed Nov. 21, 2009).

<sup>159</sup> Masayuki Yamada et al., *Detection of Urinary Metabolites Common to Structurally Related 17 $\alpha$ -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).

<sup>160</sup> Angst, *supra* n. 158.

<sup>161</sup> *Id.*

sion of medication in racing and performance horses at the American Association of Equine Practitioners annual convention.<sup>162</sup> Dr. Waterman explained that there were eighteen different labs in the United States with eighteen different drug-testing protocols.<sup>163</sup> He noted that even under a “zero tolerance” rule, “zero tolerance” could mean one thing in one lab and something else in a different lab.<sup>164</sup> In addition to a lack of uniform procedures, the RMTC director stated that research provides no solid answers regarding how long it takes a horse to reduce the levels of a drug in its body to the legal limit.<sup>165</sup> Thus, even the organization that promulgates the widely adopted Model Rule acknowledges the severity of the testing problem.

### 3. *Enforcement of Steroid Regulations*

As with any rule or regulation, the efficacy of the rules restricting the use of steroids in racehorses is limited by the ability of the racing commissions to enforce them. As discussed *supra*, the commissions generally have wide-ranging authority.<sup>166</sup> This authority includes the power of rulemaking and enforcement. Thus, it is possible that a commission that passes a regulation does not have the resources to either provide the means to carry out the necessary testing or oversee the necessary enforcement procedures. Representative Whitfield expressed concern during the 2008 subcommittee hearing that the lack of a central governing association or agency like those of other professional sports hinders enforcement of the regulations.<sup>167</sup>

#### B. *No Regulation Specifically Targeting Steroids*

One way to regulate steroid use in horse racing is to not specifically regulate the drugs at all. Currently, Utah seems to be the only major racing state with no rule or regulation addressing the use of steroids.<sup>168</sup> It is logical to assume that the only limitations on steroids in racehorses are those imposed by the Federal Food and Drug Administration and the standards of the veterinary profession.<sup>169</sup> Thus, the four forms of steroids that are legal for use in horses under the FDA

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<sup>162</sup> Christy West, *AAEP 2008: Medication in Racing and Performance Horses*, <http://www.thehorse.com/ViewArticle.aspx?ID=13614> (Feb. 15, 2009) (last accessed Nov. 21, 2009).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *See supra* Section III(A).

<sup>167</sup> Lewis, *supra* n. 152.

<sup>168</sup> Utah Admin. Code rr. 51–70 (Agriculture and Food).

<sup>169</sup> *See* Food and Drug Administration, *Genetically Engineered Animals*, <http://www.fda.gov/AnimalVeterinary/DevelopmentApprovalProcess/GeneticEngineering/GeneticallyEngineeredAnimals/default.htm> (last accessed Nov. 21, 2009); American Veterinary Medical Association, *Animal Health*, [http://www.avma.org/animal\\_health/default.asp](http://www.avma.org/animal_health/default.asp) (last accessed Nov. 21, 2009).

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standard, which are also legal under the Model Rule and in every other racing state, are legal for use in horse racing in Utah.

The no-specific-regulation model, however, does not entirely rely on ordinary veterinary practices and FDA standards. Utah does impose criminal punishment for tampering with horse racing. Specifically, the Utah Horse Regulation Act provides that “[a]ny person who uses or permits the use of any . . . drug of any kind, to stimulate . . . any animal in any race authorized by this [Act], except as prescribed by the commission, is guilty of a class A misdemeanor.”<sup>170</sup> Yet, this law cannot be considered as specifically regulating steroids for two reasons. First, it prohibits the use of any drug of any kind to stimulate any animal in a race.<sup>171</sup> Although it is arguable that steroids do have the stimulant effect of increasing a horse’s flight instinct, it is unclear whether a steroid is the type of drug targeted here.<sup>172</sup>

Second, as a result of not defining the specific drug targeted, or of using the general term “drug,” it is possible to include any substance that stimulates a horse under this statute. Thus, this criminal statute, as it pertains to stimulation, includes every drug with a stimulant effect. It is unclear whether a structure like Utah’s, which does not specifically reference or regulate the use of steroids, is any more effective than specific regulations because there is no research on the matter. However, the no-specific-regulation model gives no incentive to trainers racing exclusively in that state to use steroids any differently today than in the past.

### C. *The RMTC Model Rule*

#### 1. *Overview of the Model Rule*

The RMTC originally released a form of model rules (First Model Rules) in 2005.<sup>173</sup> The First Model Rules were the result of a concerted effort by the industry to combat racing track deaths related to the use of non-anabolic steroid drugs.<sup>174</sup> Shortly thereafter, the RMTC released a Uniform Penalties recommendation to supplement the First Model Rules.<sup>175</sup> As of December 2008, the First Model Rules were adopted by the racing commissions of thirty-four states, and as many as twenty-five states follow the Uniform Penalties in some form.<sup>176</sup>

An updated version of the First Model Rules was released in late 2007 on the heels of Barbaro’s death and at the height of the steroid saga in professional sports.<sup>177</sup> It is this updated version, which in-

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<sup>170</sup> Utah Code Ann. § 4-38-11 (Lexis 2009).

<sup>171</sup> *Id.*

<sup>172</sup> There are no cases in any jurisdiction enforcing this law or defining any of the terms as of Nov. 21, 2009.

<sup>173</sup> West, *supra* n. 162.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

cludes specific provisions that regulate the use of steroids in horse racing, that is called the “Model Rule” for steroid regulation. Chapter 11 of the updated First Model Rules contains a subsection entitled “Androgenic-Anabolic Steroids,” which provides that “[n]o [steroid] shall be permitted in test samples collected from racing horses except for residues of the major metabolites of stanozolol, nandrolone, and the naturally occurring substances boldenone and testosterone at concentrations less than the indicated thresholds.”<sup>178</sup> In other words, the Model Rule prohibits the use of steroids that are already illegal under the FDA rules. In addition, the Model Rule is specific in providing that the “residues of the major metabolite[s]” will be the focus of testing.<sup>179</sup> Subsection (2) provides the various threshold amounts, distinguishing different steroids’ permissible level in male and female horses.<sup>180</sup>

The Model Rule provides a requalification carve-out. Specifically, the Model Rule states that any horse treated with steroids to assist in the recovery from illness or injury may be placed on “the veterinarian’s list” in order to be monitored for concentrations of the drug in urine before the race.<sup>181</sup> Moreover, “[a]fter the concentration has fallen below the designated threshold for the administrated [steroid], the horse is eligible to be removed from the list.”<sup>182</sup> Finally, the Model Rule requires only the winning horse to be tested on the track, and the horses who test positive in a primary test can only be deemed in violation after a secondary, follow-up test.<sup>183</sup> Thus, a horse does not test “positive” for steroids unless “both tests are in agreement and the commission is notified of the result.”<sup>184</sup>

## 2. *Difficulties of the Model Rule*

The efficacy of the Model Rule critically suffers from each of the regulatory difficulties described *supra*. 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. Logically, the Model Rule creates an incentive to always place a horse on the veterinarian’s list. The reasoning is that even if a trainer is using steroids to enhance performance by increasing muscle mass or to improve post-workout muscle recovery, then the trainer is safe by

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<sup>178</sup> RMTC Model Rule Ch. 11, [http://www.rmtcnet.com/resources/Chapter\\_11\\_Model\\_Rules\\_1-09.PDF](http://www.rmtcnet.com/resources/Chapter_11_Model_Rules_1-09.PDF) at 16, (J)(1) (last accessed Nov. 21, 2009).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at (J)(2).

<sup>181</sup> *Id.* at (J)(5).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 17, (A)(1) (requiring testing of the official winning horse and any other horse the commissioner or stewards identify).

<sup>184</sup> RMTC Model Rule Ch. 11, *supra* n. 178, at 2, (C)(4) (“A timely and accurate filing of a Medication Report Form that is consistent with the analytical results of a positive test may be used as a mitigating factor in determining the nature and extent, if any, of a rules violation.”).



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placing the horse on the list since there is no way to find out the actual reason for using the drugs. Thus, a trainer can claim that the steroid was used to “recover from illness” when, in fact, the purpose was to enhance performance. The trainer will then be able to cycle the horse off steroids and ensure that legal levels are reached before the race.

The Model Rule also presupposes that accurate, effective, and uniform testing is available. Specifically, the Model Rule sets precise threshold levels of steroid or residue from the steroids, called metabolites,<sup>185</sup> that are legal for a racehorse.<sup>186</sup> For example, for all horses, regardless of sex, concentrations greater than one nanogram of hydroxystanozolol—the metabolite of stanozolol—per milliliter of urine is illegal.<sup>187</sup> However, the Rule is expressly limited to urine tests that have not been confirmed to be accurate. In addition, there is no uniformity among labs or tests; therefore, a test by one lab might show greater metabolite levels than a test by another lab.<sup>188</sup> The same issues apply to the fact that the ability to metabolize steroids varies widely among individual horses and by the specific kind of steroid used. Thus, the Model Rule suffers from each of the difficulties of steroid regulation. This is why the Rule has been strongly criticized by anti-steroid advocates.<sup>189</sup>

#### D. *RMTC Model Rule with State Specific Changes*

##### 1. *Background on the Use of Other Factors in Rulemaking in Addition to the Model Rule*

The majority of states that currently regulate the use of steroids in horse racing have adopted the Model Rule either in its entirety or in a slightly altered form.<sup>190</sup> Some states have used the Model Rule as a baseline and either strengthened or loosened many of its regulations.<sup>191</sup> This might be attributed to four main factors. First, state commissions tend to be led by various people with ties either to private racing-industry entities or to animal-protection organizations. For example, the current executive director of the California Horse Racing

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<sup>185</sup> See Yamada et al., *supra* n. 159.

<sup>186</sup> RMTC Model Rule Ch. 11, *supra* n. 178, at 16, (J)(2).

<sup>187</sup> *Id.*

<sup>188</sup> West, *supra* n. 162.

<sup>189</sup> Interview with James E. Roberson, *supra* n. 155 (during the author’s conversation with Rep. Whitfield’s staff, it was suggested that the Model, along with the Jockey Club’s call to ban steroid use by 2009, was a concerted effort to preserve the status quo to the extent possible without being subject to possible federal regulation under the Interstate Horse Racing Act).

<sup>190</sup> 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).

<sup>191</sup> 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).

Board served both as an industry lobbyist and off-track betting operation supervisor before his appointment to the board.<sup>192</sup> The California board also includes international movie star and prominent animal protection advocate Bo Derek.<sup>193</sup> Such diverse leadership results in varied opinions on the efficacy of, and need for, regulation in a particular state. Second, some states had previously existing complex structures at the time that steroids became a prominent issue. Those structures might not have been conducive to adoption of the Model Rule without an all-encompassing and intensive change to an already fragile set of negotiated rules.<sup>194</sup>

Third, the Jockey Club rule recommends the adoption of the RMTTC Model Rule and amending it to allow for the four approved steroids to be administered to a horse more than thirty days before a race.<sup>195</sup> Specifically, the Jockey Club's rule conditions thirty-day pre-race steroid use on its administration by a licensed veterinarian, the filing of a report by the veterinarian, and a later testing for results below the threshold level.<sup>196</sup> These amendments seem to help fill the therapeutic-use loophole described *supra*.<sup>197</sup>

Fourth, as with any rule making by administrative agencies, there are various political factors that influence both the rule-making process and the final rule. Following a major conference about the issue in early 2008, when the Model Rule was first previewed, there were various dissenters in the industry.<sup>198</sup> The Executive Director of the Jockey Club commended the states that promised to adopt the Model Rule as soon as possible and publicly admonished those states that sought more time to analyze the Model Rule.<sup>199</sup> In particular, Kentucky and Maryland, both Triple Crown states, sought to take their time in adopting rules.<sup>200</sup>

Each of the four factors is epitomized by the events that took place in Kentucky just two months after the 2008 Kentucky Derby. Under

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<sup>192</sup> Press Release, Cal. Horse Racing Bd., *Board Names Kirk Breed Executive Director*, [http://www.chrb.ca.gov/press\\_releases/2008\\_02\\_25\\_press\\_release.pdf](http://www.chrb.ca.gov/press_releases/2008_02_25_press_release.pdf) (Feb. 25, 2008) (last accessed Nov. 21, 2009).

<sup>193</sup> Paul Fielder, *Bo Selection a BHA Pipedream*, *The Evening Standard* 58 (Jul. 16, 2008) (noting that Ms. Derek "has lobbied Congress for the past five years to ban the slaughter of the animals," a major animal-protection issue before Congress).

<sup>194</sup> *Compare* N.Y. St. Racing & Wagering Bd., <http://www.racing.state.ny.us/about/rls.home.htm>; *select* Chapter 1—Racing, *select* Subchapter A: State Racing Commission (Thoroughbred Rules) (last accessed Nov. 21, 2009) (currently under administrative review for amendment) *with* the Model Rule.

<sup>195</sup> The Jockey Club, *The Jockey Club Thoroughbred Society Safety Committee Recommendation*, <http://www.jockeyclub.com/mediaCenter.asp?story=338>; *select* Anabolic Steroids (June 17, 2008) (last accessed Nov. 21, 2009).

<sup>196</sup> *Id.*

<sup>197</sup> *Supra* Section V(A)(1).

<sup>198</sup> Tom LaMarra, *Regulator: Stop Steroid Use Now*, <http://www.bloodhorse.com/horse-racing/articles/43477/regulator-stop-steroid-use-now> (last updated Feb. 5, 2008) (last accessed on Nov. 21, 2009).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*; *Kentucky Governor Dissolves State's Horse Racing Authority*, *supra* n. 74.

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public scrutiny related to the death of Eight Belles, the media seemed to be looking at Kentucky as the de facto leader in regulation. When the Kentucky commission, then known as the Kentucky Horse Racing Authority, failed to adopt rules banning the use of steroids, Governor Steve Beshear took the radical step of dissolving the organization.<sup>201</sup> Governor Beshear claimed that the dissolution of the Kentucky Horse Racing Authority and the creation of its replacement, the Kentucky Horse Racing Commission, was a “necessary step to preserve [the] integrity” of Kentucky’s “signature industry.”<sup>202</sup>

In preserving the “integrity” of the industry, the Kentucky governor appointed nearly all of the members of the former organization. One of the few prior members not appointed to the new commission was the former vice chair of the old authority, Connie Whitfield, wife of Republican Congressman Ed Whitfield.<sup>203</sup> Just weeks before the dissolution, during a Congressional subcommittee hearing on the steroid issue, Representative Whitfield threatened to propose federal legislation that would end interstate horserace wagering if states did not completely ban the use of steroids.<sup>204</sup> Mrs. Whitfield apparently shared in her husband’s belief that steroids should be banned.<sup>205</sup> The new committee therefore was free from one of the more vocal proponents of an all-encompassing ban on steroids. Nevertheless, Kentucky serves as the epitome of how members of the state commissions, current complex rule structures, the influence of the Jockey Club, and political considerations have had major practical effects on the current form of steroid regulation.

## 2. *Kentucky as an Example of the Adoption of the Model Rule with Specific Changes*

In light of the eclectic mix of race commission members and the influence of the Jockey Club and the RMTTC, most states have restrictions on steroids that are similar in function but different in form. Yet, the Kentucky Horse Racing Commission’s steroid rule, effective as of September 5, 2008, includes elements of not only the Model Rule and the Jockey Club’s recommendation but also several other more progressive limitations.<sup>206</sup> The Kentucky Rule adopts the threshold levels for metabolites and trace amounts of the four legal steroids promulgated by the Model Rule. The Kentucky Rule, however, provides an explicit confirmation that steroids “shall be given for the sole purpose of treating an existing illness or injury” and that an “owner or trainer who is uncertain about whether a particular purpose is considered to

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<sup>201</sup> *Kentucky Governor Dissolves State’s Horse Racing Authority*, *supra* n. 74.

<sup>202</sup> *Id.* (While the dissolution of an administrative agency is radical, it was at least the third time that similar action had taken place in the state of Kentucky since 2004.).

<sup>203</sup> *Id.*

<sup>204</sup> LaMarra, *Regulator: Stop Steroid Use Now*, *supra* n. 198.

<sup>205</sup> *Id.*

<sup>206</sup> 810 Ky. Admin. Regs. 1:018(9).

be therapeutic shall consult with the commission prior to administration.”<sup>207</sup> This clause seems to have the effect of codifying the legality of the use of steroids and allowing trainers and veterinarians to confirm the use of steroids in their horses. It seemingly erases any argument that steroids have been banned from Thoroughbred racing in the home state of the Kentucky Derby.<sup>208</sup>

The Kentucky Rule does take the Jockey Club’s thirty-day limitation one step further by providing that “[a] minimum of sixty (60) days [must have] passed since the administration of the therapeutic [steroids] to the horse.”<sup>209</sup> In addition, the Kentucky Rule provides a list of procedures that must be followed when steroids are administered for therapeutic reasons. Those procedures include the explicit consideration of treatment alternatives and the documentation of those considerations and the specifics of the administration.<sup>210</sup> The Kentucky Rule also creates a database that is meant to track the administration of steroids to horses and which is updated by licensed veterinarians.<sup>211</sup>

### 3. *Difficulties with the Kentucky Rule*

Similar to the Model Rule, state-specific adaptations like Kentucky’s suffer from each of the major regulatory difficulties. However, the Kentucky Rule does make admirable efforts to ameliorate some of these difficulties. First, by increasing the number of days between when a horse can be treated with a steroid and when it may race from thirty days to sixty days, Kentucky might reduce the problems that occur due to the variations in the time it takes horses to metabolize steroids. Moreover, unlike the Model Rule, the Kentucky Rule provides that testing positive above the threshold level is a violation even if a subsequent test returns a negative result.<sup>212</sup> The state goes far and declares that “a negative finding in a *pre-race* sample does not provide a safe harbor for the owner, trainer, veterinarian or horse” and that “a positive finding in a *post-race* sample shall be treated as a violation of this administrative regulation even if there was a negative finding by the commission laboratory in a pre-race sample.”<sup>213</sup> This clause seems to eliminate any temptation to use steroids even if a horse was placed on the veterinarian’s list.

Yet the prevalent problem of the inability to accurately test for steroids coupled with the insufficiency of data on horses’ ability to metabolize certain steroids makes even the ambitious Kentucky Rule less than a true prohibition on steroids in horse racing. As some experts and trainers have suggested, no rule is sufficient unless it eliminates

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<sup>207</sup> *Id.* at (9)(3)(a).

<sup>208</sup> Tom LaMarra, *Ban on Steroids in KY Now in Effect*, <http://www.jockeyclub.com/tsc.asp?section=4#action13> (Sept. 6, 2008) (last accessed Nov. 21, 2009).

<sup>209</sup> 810 Ky. Register 1:018 § 9(3)(b) (2009).

<sup>210</sup> *Id.* at §9(e)(3)(e).

<sup>211</sup> *Id.* at § 9(4).

<sup>212</sup> *Id.* at §9 (6)(b).

<sup>213</sup> *Id.* at §9 (3)(c) (emphasis added).

all uses of all drugs except for treatment of medically diagnosed ailments.<sup>214</sup> Thus, while the Kentucky Rule is arguably a more comprehensive prohibition on steroids than other rules, it suffers from the same imperfections as other jurisdictions' rules.

## VI. PROPOSAL FOR A FEDERAL RULE

There is at least one possible rule that could effectively ban the use of steroids in professional horse racing even in the face of the difficulties addressed above. By taking advantage of a statute that Congress threatened to repeal in 2008,<sup>215</sup> the Interstate Horse Racing Act (Act),<sup>216</sup> it would be possible for the federal government to make elimination of the use of steroids, whether therapeutic or otherwise, a prerequisite for taking interstate wagers. The Act provides that while Congress believes that "the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders," wagers made across state borders must be regulated under federal law.<sup>217</sup> The Act effectively allows a state to take a percentage of wagers placed by out-of-state gamblers, so long as that fee is not greater than those applied to intrastate gamblers.<sup>218</sup> The Act is enforceable in federal district courts and imposes civil liability damages.<sup>219</sup>

An amendment to the Act that would make it illegal to take interstate bets on races that include horses treated with steroids within one year of the date of a race would be an extremely effective means of truly banning the use of steroids. The amendment should include a pre-race testing requirement for all horses participating in races with interstate wagering. Penalties for violation of the law should include the loss of racing licenses for one year by the owner and trainer of the horse. As it is unlikely that any existing federal agency could feasibly oversee the administration of the proposed amendments, the state commissions in charge of horse racing should be charged with the job of enforcing the law. Like the current regulations, this law will be limited in its effectiveness by the ability to accurately test for steroids in horses. As such, the federal government should adjust threshold levels annually to be in accordance with the most recent peer-reviewed literature on the subject.

The hope of this proposal is to not only deter the use of steroids in Thoroughbred racing, but to try to ameliorate the problems and loopholes within the Model Rule and other state regulations. Moreover, by

<sup>214</sup> Drape, *Many Derby Owners Silent on Drug Issue*, *supra* n. 9, at A4.

<sup>215</sup> Street & Smith's Sports Business Daily, *Congressional Hearing on Horse Racing Calls for Governing Body*, <http://www.sportsbusinessdaily.com/article/121775> (last accessed Nov. 21, 2009); Dick Jerrardi, *Consensus at Congressional Hearing: Governing Body Needed for Horse Racing*, Phila. Daily News (June 20, 2008).

<sup>216</sup> 15 U.S.C. §§ 3001–3007.

<sup>217</sup> 15 U.S.C. § 3001.

<sup>218</sup> *Id.* at § 3004.

<sup>219</sup> *Id.* at § 3005.

imposing a penalty on the owner and the trainer, the accountability and monetary loss of an entire year of racing will likely deter the use of steroids altogether. While this proposal is admittedly ambitious in its reach, it is realistic to the extent that it requires little or no federal financing and allows states to use their currently crafted enforcement regimes. Finally, the fact that the law would be uniform among the racing states would provide an incentive for states with smaller industries to create cooperatives with states with larger racing industries.

## VII. CONCLUSION

The use of steroids as a performance-enhancing drug is merely a sliver in the larger issue of medications used for non-medical purposes to improve a horse's chance of winning.<sup>220</sup> The recent emergence of the steroid issue provides a narrow case study into the difficulties of regulating the use of medication in Thoroughbred racing. Nearly all of the steroid rules and regulations adopted are slightly more than a year old. Thus, it will take some time before it is possible to adequately measure their individual effectiveness. Nevertheless, at this point it is clear that each regulation is limited by the inability to adequately measure the type and amount of steroid that may have been administered to a particular horse. Moreover, the fact that steroids are just one of a number of drugs that have interrelated physiological effects further complicates effective regulation.

As the history of the sport demonstrates, Thoroughbred horse racing is premised on the idea that all horses will be equal and that the human factor distinguishes a winning horse from the rest of the field. As the stakes have become larger, the drugs more powerful, and the sport more popular, the human element seems to all but replace the reality that these horses share only a common ancestry. These animals each share a bloodline flooded with chemicals that can easily be abused. Some enthusiasts believe that the only way to return to a more pure form of racing is to ban all medications from racing.<sup>221</sup> Without an encompassing, uniform regulation, Thoroughbred horses will continue to be raised on oats, water, hay, and everything else that might make them bigger and faster.

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<sup>220</sup> Drape, *Many Derby Owners Silent on Drug Issue*, *supra* n. 9, at A4.

<sup>221</sup> *Id.*