

## SAVING SILENT SUFFERERS

### THE CASE FOR FEDERAL REGULATION OF DRUG USE IN HORSERACING

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## INTRODUCTION

“But only one horse was euthanized that day.”

— Paul Campo<sup>1</sup>

In March 2009, the front leg of racehorse Private Details snapped in half during a race at Aqueduct Racetrack in New York, as part of a five-horse pile up.<sup>2</sup> This injury, in effect, ended his life, as authorities decided to euthanize him that day.

Campo’s statement, while correct, failed to address the larger and quite troubling trend. Between November 14, 2008, and March 19, 2009, injuries at the same racetrack resulted in the euthanizing of *twelve horses*.<sup>3</sup>

And Private Details was not the last. Another racehorse, Sigh You, suffered the same fate a day later after he broke his left front leg.<sup>4</sup>

Indeed, minimizing one horse’s death to suggest that it is an isolated incident ignores a growing problem—the use of anabolic steroids or their counterparts in horses, and the relationship of such use to the rising number of fatal injuries.

The horseracing industry’s recent reform efforts have not solved the problem. Many trainers give drugs to horses to enable them to race, even when such drugs may compromise the health of the horse. As Dr. Rick Arthur explained, “[t]he reforms have not addressed the practice of giving racehorses legal drugs that allow horses to run when, in a different era, they would not have been allowed to.”<sup>5</sup>

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<sup>1</sup> William C. Rhoden, *Horse Racing Begins Reform, but Legal Drugs Are Still an Issue*, THE NEW YORK TIMES (March 19, 2009), available at <http://www.nytimes.com/2009/03/20/sports/othersports/20rhoden.html>. Paul Campo is the Vice President and Director of the New York Racing Association (“NYRA”), and made the above statement in response to a question about the tragic death of racehorse Private Details.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* Another died of heart failure *during* a race. *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* Equine Medical Director, Dr. Rick Arthur, of the California Horse Racing Board.

The result of this drug usage is often what the industry refers to as “breakdowns.”<sup>6</sup> Breakdown is another term for a horse’s death.<sup>7</sup> Part of the problem is the inability of humans to understand the side effects for horses using anabolic steroids and other drugs. As one doctor explained, “[o]bviously, the patients can’t talk to us, so if some medication is hiding or is masking some problem, it’s difficult to determine.”<sup>8</sup>

The recent increase in breakdowns extends beyond the Aqueduct Racetrack in New York. In 2009, Nancy Heitzeg, a professor at St. Catherine’s University in Minnesota, calculated that “there had been approximately *three breakdowns a day* nationwide since [the] Kentucky Derby [in 2008].”<sup>9</sup> From 2003 to 2008, *three thousand racehorses* died on American racetracks.<sup>10</sup>

What is most surprising about this growing epidemic is the lack of public awareness regarding the increase in deaths of racehorses.<sup>11</sup> Even with the highly publicized death of Barbaro, a Kentucky Derby winner, public outcry concerning the deaths of racehorses has been minimal.<sup>12</sup> This may be, in part, because the public views these breakdowns in the same way boxing fans and pro football fans look at catastrophic injuries: as an unfortunate, but inevitable consequence of playing the game. The difference is that boxers and football players choose to participate, while horses do not.<sup>13</sup>

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<sup>6</sup> Gregg Doyel, *Horse Racing Will Eventually Break Down—and not a Day Too Soon*, CBSSPORTS.COM (April 30, 2009), <http://www.cbssports.com/columns/story/11696235/rss>; Cynthia F. Hodges, *That’s the Breaks: Trainer Responsibility for Racehorse Breakdowns in New York*, THE ANIMAL LEGAL AND HISTORICAL CENTER (2008), [http://www.animallaw.info/articles/ddusracehorsetrainer.htm#\\_ftnref50](http://www.animallaw.info/articles/ddusracehorsetrainer.htm#_ftnref50).

<sup>7</sup> *Id.* Doyel explained, “[h]orse racing people prefer other words to describe the death of a horse, like ‘breakdown,’ as if the horse is a car. There’s always another car, right? Always another horse, too. But the word ‘breakdown’ offends me, because it confuses the story instead of telling it: That a . . . horse, . . . had to be injected with a fatal amount of poison to put it out of its misery.” *Id.*

<sup>8</sup> Rhoden, *supra* note 1.

<sup>9</sup> *Id.*

<sup>10</sup> Doyel, *supra* note 6.

<sup>11</sup> *Id.*

<sup>12</sup> Bradley S. Friedman, *Oats, Water, Hay, and Everything Else: The Regulation of Anabolic Steroids in Thoroughbred Horse Racing*, 16 ANIMAL L. J. 123, 125 (2009). Barbaro died as a result of an on-track injury during the next Triple Crown race, the Preakness Stakes.

<sup>13</sup> Rhoden, *supra* note 1.

Historically, the federal government deferred to the states and their agencies in the regulation of horseracing. This deference, though, is not only hurting and killing horses, but it is also damaging the future viability of the horseracing industry itself.

Early in 2011, Representative Ed Whitfield from Kentucky introduced H.R. 1733, Interstate Horse Improvement Act (“Improvement Act”), a bill seeking to amend the Interstate Horseracing Act of 1978, by, among other things, banning the use of performance enhancing drugs (“PEDs”) in horseracing.<sup>14</sup> A similar bill also exists in the Senate, but both have not advanced beyond committee at the time of this writing.<sup>15</sup>

In light of the current crisis in horseracing, this article argues for the adoption of federal regulation of the use of PEDs in horseracing, whether by the proposed amendment or by a new statute. Further, this article asserts that the federal government should create a commission to regulate horseracing and supervise the implementation of these proposed reforms.

Part I of this article describes the brief history of federal regulation of drug use in thoroughbred racing. Part II explains why the current status quo is inadequate, arguing for increased uniformity in standards and highlighting the absence of much-needed industry leadership. Part III then makes the case for the adoption of a federal standard regulating drug use in horseracing and a commission to oversee its implementation. Finally, Part IV proposes the creation of a federal commission to address the current problems.

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<sup>14</sup> H.R. 1733, 112th Cong. (2011); *H.R. 1733: Interstate Horseracing Improvement Act of 2011*, GOVTRACK.US, available at <http://www.govtrack.us/congress/bills/112/hr1733>.

<sup>15</sup> S. 886, 112th Cong. (2011); Paulick Report Staff, *Congressmen Introduce Racing Drug Bill*, PAULICKREPORT.COM (May 4, 2011), <http://www.paulickreport.com/news/the-biz/congressman-introduce-racing-drug-bill/>.

## I. FEDERAL REGULATION IN HORSERACING

## A. Origin

As a sport, horseracing dates back to the Greek Olympics in 666 B.C.<sup>16</sup> Thoroughbred racing and the thoroughbred horse breed began in England during the seventeenth and eighteenth centuries.<sup>17</sup> This development in England also carried over to the British colonies on North America's Atlantic Coast.<sup>18</sup> Eventually, New York implemented the first horse racetrack in 1665.<sup>19</sup> The sport of thoroughbred horseracing purportedly started in America in 1745 in Annapolis, Maryland.<sup>20</sup> This triggered thoroughbred races with jockeys racing on tracks ranging from nearly a mile to two full miles.<sup>21</sup>

Both the Civil War and Reconstruction periods led to four advances in American Thoroughbred Racing: (1) the transfer of dominance in the sport from the South to the North; (2) the emergence of New York as the social, legal, and financial center of all racing; (3) the end of the emphasis on endurance; and (4) the domination by Lexington's progeny on race courses across the country.<sup>22</sup> In addition, the Industrial Revolution contributed to the rise in gambling in thoroughbred racing.<sup>23</sup> The rise in gambling on thoroughbred horses increased the sport's popularity.<sup>24</sup>

Soon after, in 1908, "pari-mutuel betting" on the Kentucky Derby became legal.<sup>25</sup> Eventually, the increase in gambling on

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<sup>16</sup> JOAN S. HOWLAND, ROGER F. NOREEN, & MICHAEL J. HANNON, A LEGAL RESEARCH GUIDE TO AMERICAN THOROUGHBRED RACING LAW FOR SCHOLARS, PRACTITIONERS, AND PARTICIPANTS, 1, Vol. 31, William S. Hein & Co., Inc., NY. (1998) [hereinafter American Thoroughbred Racing Law] (citing ROGER LONGRIGG, THE HISTORY OF HORSE RACING, 10 (1972)).

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

<sup>18</sup> *Id.* By the middle of the seventeenth century, "horse racing was an accepted colonial recreation." Unprompted competitions became the norm on the main roads of numerous colonial cities, such as Philadelphia.

<sup>19</sup> *Id.* at 2.

<sup>20</sup> Luke P. Breslin, *Reclaiming the Glory in the "Sport of Kings" – Uniformity is the Answer*, 20 SETON HALL J. SPORTS & ENT. L. 297, 301 (2010).

<sup>21</sup> *Id.*, at 301.

<sup>22</sup> American Thoroughbred Racing Law, *supra* note 16, at 5.

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

<sup>24</sup> *Id.*

<sup>25</sup> Breslin, *supra* note 20, at 301-02. This event encouraged other states to do the same. "Pari-mutuel wagering" gives the racetrack an allotted,

horseracing led Congress to implement the Interstate Horseracing Act of 1978 (“Interstate Horseracing Act”).<sup>26</sup> In doing so, Congress concluded it needed to “protect identifiable national interests and regulate interstate commerce with respect to wagering on horse racing . . . to further the horse racing and legal off-track betting industries in the United States.”<sup>27</sup>

Interestingly, the horseracing industry eagerly accepted the Interstate Horseracing Act because the federal government prevented the “interference by one state with horseracing gambling policies of another state.”<sup>28</sup> The horseracing industry approved of the enacted legislation because it seemingly helped maintain the industry’s stability.<sup>29</sup> But two years later, the sport’s industry reacted negatively to the idea “of federal intervention” on drug use in horses.<sup>30</sup>

### *B. The Initial Attempt to Regulate Drug Use*

From the sport’s beginning in the United States, all decisions, regulations, and commentary possess one common theme—to preserve the sport’s integrity.<sup>31</sup> This theme remains at the heart of the present debate and discussion concerning drug use for the sport’s racehorses.

Serious third party campaigns against drug use in horseracing began in 1979 when activists from the Humane

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Percentage of the total amount wagered . . . to cover expenses, such as operating costs, racing purses, and state and local taxes. Once these expenses are subtracted from the total amount, the balance is returned to a pool and shared among [sic] all winning bets. *Id.*

<sup>26</sup> 15 U.S.C. § 3001 (West 2012).

<sup>27</sup> Edward S. Bonnie, *Corrupt Horse Racing Practices Act of 1980: A Threat to State Control of Horse Racing*, 70 KY. L.J. 1159, 1168 (1982), reprinted in University of Arkansas School of Law, The National Agricultural Law Center, available at <http://www.NationalAgLawCenter.org>; H.R. 7254, 96th Cong.

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

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> American Thoroughbred Racing Law, *supra* note 16, at 17. *Carrol v. California Horse Racing Board* “is the first reported case involving a drugged race horse, and it has been referred to as the ‘genesis’ of what would later be called the ‘absolute insurer rule’ in racing commission regulations.” The California appellate court found the trainer responsible for a horse’s condition. *Id.* at 17-18. (citing Ray H. Garrison and Jewel N. Klein, *Brennan Revisited: Trainer’s Responsibility for Race Horse Drugging*, 70 K.Y. L.J. 1103, 1112 (1981).

Society of the United States lobbied for the passage of the newly proposed “Drug Free Horse Racing Act” by Congress.<sup>32</sup> A report on *Sixty Minutes* that aired May 13, 1979, is arguably the event that “burst[ed] on the . . . scene” the issue of drug abuse in horseracing.<sup>33</sup> This media event ignited public concerns that the “control medication” standard in majority of horseracing states, “allow[ed] trainers, owners, and veterinarians to subject horses to inhumane treatment.”<sup>34</sup>

A year later, the introduction of the Corrupt Horse Racing Practices Act of 1980 (“The Corrupt Act”) further heightened the debate over the drug practices in horseracing.<sup>35</sup> The bill claimed that the use of drugs or “numbing” practices in a horse before a horserace

corrupts the integrity of the sport, promotes criminal fraud, misleads the wagering public and horse purchasers, poses and unreasonable risk of serious injury to riders, is cruel and inhumane to the horse, and that such acts adversely affect and burden interstate commerce.<sup>36</sup>

The Corrupt Act unfortunately failed after several executives and interested parties from the horseracing industry testified against the bill.<sup>37</sup> These industry representatives and other

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<sup>32</sup> Bonnie, *supra* note 27, at 1159. Also, Congress enacted the Horse Protection Act in 1970 (amended 1976), because the movement of “such horses [in horse shows] burdened” the economy. The Horse Protection Act “was directed at cruel and inhumane practices of ‘soring’ horses in horse shows or sales, which refers to a variety of methods and devices used to cause pain or inflammation in an effort to make the horse perform better.” *Id.* at 1166.

<sup>33</sup> *Id.* at 1159, n.4. The “segment . . . featured jockeys, racing commissioners, chemists and horsemen’s representatives and trainers. The segment show[ed] excerpts from patrol films which featured horses and jockeys falling during races and served to [present] the highly emotional medication issue.” *Id.*

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

<sup>35</sup> *Id.* at 1159.

<sup>36</sup> *Id.* at 1170.

<sup>37</sup> Andy Platter, *Changing of the Guard in Kentucky Puts a Hold on Equine Research*, THE HORSEMEN’S J. (2004), available at <http://www.hbpa.org/HorsemensJournal/Display.asp?section=3&key1=3851>. During the 1980s, “[Dr. Thomas] Tobin was invited to testify before numerous racing commissions, and finally Congress, in an effort to defeat the Corrupt Horse Racing Practices Act, a bill which might have crippled the sport. The bill died shortly after Tobin’s presentation before the congressional justice committee.” *Id.*

various parties fought and won to keep the regulation of drug use in horseracing under the purview of the states.

### *C. The Problem Resurfaces*

Twenty years later, the same concerns are starting to resurface. The introduction of the Interstate Horseracing Improvement Act of 2011 is one signal of the growing interest in this problem.<sup>38</sup> The problems at the Aqueduct Racetrack have not gone unnoticed. The *New York Times* has highlighted this issue recently, calling for reform in light of its two-year investigation of the sport. And Home Box Office (“HBO”) canceled its television show about horseracing, *Luck*, after several horses died during production.<sup>39</sup>

The growing interest in this problem makes this a particularly appropriate time to reconsider the need for increased regulation of horseracing. The next section explains in more detail the urgent need for reform.

## II. WHY THE STATUS QUO IS INADEQUATE

### *A. The Absence of Uniform (and Adequate) Standards*

Currently, states oversee their individual horserace “industries” via commissions.<sup>40</sup> Most commissions receive their power from the state’s racing statute(s); however, a few states

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<sup>38</sup> *H.R. 1733*, *supra* note at 14. Senator Tom Udall, in 2011, co-sponsored the Improvement Act, which would supervise integrity and safety in the horseracing industry, and “renewed his call in wake of a March 25 [2012] report in the *New York Times*.” On March 26, 2012, Senator Udall released a statement that described that the *New York Times* report “paints a very disturbing picture of the industry.” The *New York Times* report focuses on American quarter horseracing and thoroughbred horseracing. Tom LaMarra, “*Sen. Udall: ‘Corruption’ in Horse Racing Alarming*,” THE HORSE.COM (March 27, 2012), <http://www.thehorse.com/ViewArticle.aspx?ID=19789>.

<sup>39</sup> Sid Fernando, *Times expose notwithstanding, troubling figures at NYRA*, SIDFERNANDO.WORDPRESS.COM (March 29, 2012), <http://sidfernando.wordpress.com/2012/03/29/times-expose-notwithstanding-troubling-figures-at-nyra/>.

<sup>40</sup> Kimberli Gasparon, *The Dark Horse of Drug Abuse: Legal Issues of Administering Performance-Enhancing Drugs to Racehorses*, 16 VILL. SPORTS & ENT. L.J. 199, 202 -03 (2009).



allow their governors direct oversight over race agencies or commissions.<sup>41</sup>

With regard to illegal drugs, thirty-two out of thirty-eight states in the industry have such agencies that supervise steroid usage.<sup>42</sup> The Jockey Club, one of the “big four” associations, declared an “end to steroid use [in the sport’s industry] by December 31, 2008.”<sup>43</sup> The organization made the declaration in an attempt to avoid congressional oversight, including potential changes to the Interstate Horse Racing Act under consideration.<sup>44</sup>

In theory, achieving some uniformity among state commissions in drug regulation could be possible through: (1) adoption of the sport’s Racing Medication and Testing Consortium (“RMTC”) “model rules,” especially the RMTC rule for steroid drugs (“Model Rule”); or (2) choosing to defer to the Food and Drug Administration (“FDA”) standards.<sup>45</sup> The Model Rule resulted from strenuous efforts to eliminate racehorse fatalities because of “non-anabolic steroid drugs.”<sup>46</sup>

In practice, though, widespread adoption of these standards seems unlikely. Further, these options are themselves quite broad and unlikely to achieve any semblance of uniformity.

Indeed, there currently are no clear and defined standards for drug usage in the horseracing industry. Many states adopted the original model rules; however, only twenty-five states implemented the rules’ Uniform Penalties, which are an addendum to the rules.<sup>47</sup>

Unfortunately, the various state policies do not serve to prevent abuse. Instead, the current approaches to regulation provide numerous loopholes, along with ambiguity regarding what is permissible.

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<sup>41</sup> *Id.* Certain states allow commissions the authority to issue licenses, create rules, and decide civil punishments.

<sup>42</sup> Friedman, *supra* note 12, at 126.

<sup>43</sup> *Id.* at 142.

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

<sup>45</sup> *Id.* Many state agencies frequently reference the model rules, but as of 2010, the states lacked uniformity in rules they adopted. *Id.*

<sup>46</sup> *Id.* at 145. Essentially, the model rules ban the use of steroids that are not allowed under the FDA standards. *Id.* at 146.

<sup>47</sup> *Id.* This amount was calculated in 2009.

Further, these variances result in different punishments when the state commissions enforce prohibitions against drug abuse. To illustrate, State A may suspend one trainer for committing the same act that State B permits.<sup>48</sup> In addition, states often are slow to punish violators. One example of the disparity in punishment is Richard Dutrow, Jr., who received over sixty<sup>49</sup> violations regarding “race day” medications but continued to work with horses in the state of New York.<sup>50</sup> New York’s commission, the New York State Racing and Wagering Board, finally acted, and collectively voted on October 12, 2011, to repeal Dutrow’s license for 10 years because of his outstanding record of rule violations.<sup>51</sup> A driving force for the commission’s overdue action was the discovery of even more drug abuse. In September 2011, officials discovered syringes loaded with xyzaline, an illegal painkiller, in Dutrow’s stalls.<sup>52</sup>

Without uniformity, trainers often recklessly disregard states’ standards, not paying attention to the different rules in each jurisdiction. Furthermore, even if trainers lack malicious intent, they could easily confuse which standard the state uses. To illustrate, the Maryland Court of Special Appeals agreed that administering the drug Lasix to a racehorse might disqualify an individual, even though he is not the “insurer” of the horse’s safety.<sup>53</sup> The court emphasized that “the Commission must also protect the public, the horses, the other owners, and the jockeys.”<sup>54</sup> Therefore, those who do not care about drug abuse toward his or her horse may avoid Maryland’s stricter drug policies and remain in a state such as New York that has more lenient drug policies. Consequently, horses will suffer.

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<sup>48</sup> Gasparon, *supra* note 40, at 205.

<sup>49</sup> Bob Ehalt, *Dutrow's career is far from dead*, ESPN.COM (November 11, 2011), [http://espn.go.com/blog/new-york/horse-racing/post/\\_id/1175/dutrows-career-is-far-from-dead](http://espn.go.com/blog/new-york/horse-racing/post/_id/1175/dutrows-career-is-far-from-dead).

<sup>50</sup> David Grening, *Trainer Dutrow Granted Reprieve*, ESPN.COM (October 17, 2011), [http://espn.go.com/horse-racing/story/\\_id/7115626/richard-dutrow-jr-granted-30-day-stay-new-york-license-revocation](http://espn.go.com/horse-racing/story/_id/7115626/richard-dutrow-jr-granted-30-day-stay-new-york-license-revocation).

<sup>51</sup> *Id.* The New York State Supreme Court granted a thirty-day stay shortly after the commission’s decision to repeal Dutrow’s license.

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

<sup>53</sup> Maryland Racing Com’n v. Belotti, 130 Md.App. 23, 45 (Md. Ct. Spec. App. 1999).

<sup>54</sup> *Id.*

Currently, the horseracing industry provides alternatives to avoid stricter rules. For example, in 2008, Delaware adopted a stringent “zero-tolerance policy,” which automatically fines the owner five thousand dollars if his or her racehorse tests positive for steroids.<sup>55</sup> But in Louisiana, “the window of culpability is only twenty-four hours before a race.”<sup>56</sup>

As demonstrated below, congressional oversight will provide the uniform regulations necessary to prevent these inconsistent variations. In addition, congressional oversight will eliminate any “local” politics that could influence a commission’s decisions. The industry invites wealthy participants who often have personal relationships with a state’s racing commission. Therefore, a state’s racing commission may turn a blind eye in one setting, while having a heavy hand in another setting. Indeed, the present approach of state deference in the regulation of the industry creates an unfortunate gamble for the horse.

### *B. The Lack of Industry Leadership*

The lack of leadership in the racing industry allows for manipulation of its rules and regulations. The four largest and most powerful organizations<sup>57</sup> of the horse racing industry claim the industry is improved and that they will continue to regulate it.<sup>58</sup> Nonetheless, drug abuse is still prevalent in the industry, as evidenced by the number of horse deaths in recent years.

These four associations have no checks and balances on each other, further demonstrating the lack of leadership and centralization among the racing industry. Similarly, state commissions also suffer from a lack of clarity concerning their powers and limits. For example, in 2008, Kentucky’s governor, Steve Beshear, abolished the state’s Horse Racing Authority.<sup>59</sup> He replaced the racing authority with the Kentucky Horse Racing

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<sup>55</sup> Andrew Medeiros, *Headless Horsemen: A Tale of Chemical Colts, Subprime Sales Agents, and the Last Kentucky Derby on Steroids*, 21 MARQ. SPORTS L. REV. 445, 446 (2010).

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

<sup>57</sup> *Id.* 447. The four associations are the Breeders’ Cup; the National Thoroughbred Racing Association (“NTRA”); the Thoroughbred Owners and Breeders Association (“TOBA”); and the New York Racing Association (“NYRA”).

<sup>58</sup> Friedman, *supra* note 12, at 149.

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

Commission.<sup>60</sup> Governor Beshear explained the abolition was necessary to protect the state's racing industry.<sup>61</sup>

In addition, the lack of leadership and continuing drug abuse towards racehorses also relate to the various methods of corruption within the sport's industry. During the 1990s, thoroughbred breeder and Breeders' Cup founder, John R. Gaines, proposed the formations of the NTRA. His intentions included creation of a national organization "headed by a commissioner, mirroring the structure of the four major sports leagues in the United States."<sup>62</sup> An exclusive group of billionaires—known informally as the "Dinnies,"—blocked the project because it threatened their power over the industry.<sup>63</sup> In 2002, industry newcomer Gary Bizantz attempted to revive Gaines' idea; however, when Bizantz pushed for uniform drug regulations, the Dinnies opposed him, effectively killing the proposal.<sup>64</sup>

"Again, in 2003, newcomer Robert McNair, owner of the Houston Texans football franchise, attempted to effect change. [TOBA selected him] . . . to oversee a project with the working title of the "Thoroughbred Championship Tour."<sup>65</sup> The idea involved the creation of a "playoff-like format that would lead up to the Breeders' Cup. After two years of fundraising and planning, the final proposal went to the executive committee of the Breeders' Cup, led by two of the most powerful Dinnies."<sup>66</sup> They immediately refused the proposal.<sup>67</sup>

Regardless of the intentions of those overseeing the racing industry, it is clear that a lack of leadership continues to threaten the industry.

### *C. Silent Sufferers*

Another reason to address the issues with drug abuse in the horseracing industry is that horses are not able to resist the drugs

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

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

<sup>62</sup> Medeiros, *supra* note 55, at 447-48.

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

<sup>64</sup> *Id.*

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

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

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

unlike their human counterparts in other professional sports. Unlike baseball, horseracing has not received the same level of public opposition to the use of performance enhancing drugs. Additionally, unlike their human counterparts in professional sports, horses do not have the ability to choose whether to use drugs in the pursuit of victory. This decision remains with trainers and owners, who might not have the horse's best interests in mind.

Between the lack of public pressure to reform the industry and the inability of the horses to refuse the drugs, there is a true need for a set of federal regulations. As explained below, these regulations would force the entire industry to catch up with other professional sports in addressing drug abuse in the pursuit of enhancing performance. Furthermore, these regulations would serve to protect the only participants who have no voice—the horses.

### III. THE CASE FOR FEDERAL REGULATION

Although the horseracing industry claims a blanket standard for drug regulation exists in many states, the abuse continues. Many states enacted bans that regulate usage of anabolic steroids, but there is significant variation, with most states opting to limit the amount of the dosage in lieu of a complete ban. In addition, the penalties in many cases are insufficient to deter continued abuse.<sup>68</sup> Without change, the current culture and practices of the horseracing industry will continue to threaten both the horses and the integrity of the sport.

For example, New Mexico's lack of strong regulation and oversight unfortunately resulted in the death and disgusting treatment of horse, Teller All Gone, on September 3, 2011.<sup>69</sup> Teller All Gone's leg snapped during a race at the state's Ruidoso Downs

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<sup>68</sup> Walt Bogdanich, Joe Drape, Dara L. Miles, and Griffin Palmer, *Mangled Horses, Maimed Jockeys*, THE NEW YORK TIMES (March 24, 2012), <http://www.nytimes.com/2012/03/25/us/death-and-disarray-at-americas-racetracks.html?pagewanted=all>.

<sup>69</sup> *Id.* "Five of the seven tracks with the nation's highest rates of breakdown and injury are in *New Mexico*. Four tracks are unaccredited, and enforcement of drug violations is relatively lenient" (emphasis added).

Track. Like Private Details, officials euthanized him on the track.<sup>70</sup>

What was most troubling, though, is the complete disregard for the welfare of the horse, demonstrated by the officials' sickening decision to dump the horse's dead body in a junkyard near a commode.<sup>71</sup> This attitude—that horses are fungible commodities lacking any sort of dignity—underscores the need for increased oversight. Indeed, *The New York Times* recently completed two-year investigation “shows an industry still mired in a culture of drugs and lax regulation and a fatal breakdown rate that remains far worse than in most of the world.”<sup>72</sup>

#### *A. Budgetary Reasons*

Many states cannot afford the costs of elaborate drug testing machines and mechanics. The state's jockeys, horse owners, and the tracks themselves influence many state commissions.<sup>73</sup> Even though state horseracing commissions want to protect their “turf,”<sup>74</sup> commissions “are finding it increasingly difficult to count on the kind of budgets which they need to protect the industry and the public.”<sup>75</sup>

Drug testing and medication use is a prime example of where states struggle to support the demands of the sport's industry. The sport's national organizations too often significantly encourage state commissions to issue funds to analyze the “pharmacological” harms of medication on horses and to detect illegal medications in racehorses.<sup>76</sup> Yet, many state commission and legislatures struggle to find funds to implement these responsibilities.<sup>77</sup>

This is because states vary in demographics, population, and economic stability, which influence “the quality of racing.”<sup>78</sup> Higher state populations increase the likelihood of a higher

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

<sup>71</sup> *Id.*

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

<sup>73</sup> Bonnie, *supra* note 27, at 1164.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 1165.

<sup>77</sup> *Id.* These “exceptions . . . are New York, Kentucky, California, and Ohio.” *Id.* at n.28.

<sup>78</sup> *Id.*

number of placed bets at races, thus, funneling more money to a state's commission—the state's horseracing industry.<sup>79</sup> More money means a larger shield “of protection for the industry,” especially the state's horses.<sup>80</sup>

The lack of funds makes it difficult to garner support for sweeping changes within the industry. During difficult economic times, it is unlikely that Congress, or state legislatures, would pass legislation that provides additional expenses to the budget for the sole purpose of regulating horseracing. As a result, with no efficient manner for providing uniform regulation of horseracing, it is unlikely that states will be able to regulate the industry adequately.

### *B. Continued Drug Development*

The drug Clenbuterol is currently the new replacement for anabolic steroids.<sup>81</sup> Although, some states such as Oklahoma, have adopted standards to deal with use of this drug, many states have not done the same.<sup>82</sup> In enacting these new standards, the commission from Oklahoma provided for a monetary fine for violations and amended the language of the standards to make it easier for track veterinarians to test injured horses for illegal medication.<sup>83</sup> The commission thought the regulation was so important that it adopted it as an emergency rule, which would become permanent upon approval by the governor.<sup>84</sup> The enacting of the emergency rule shows how dangerous the drugs administered to the horses can be to their health. While some commissions have taken steps like this, often the steps do not address the most current threats, as it did in this situation.

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Edited Press Release, *Oklahoma Lowers Clenbuterol Limits for Racehorses*, THEHORSE.COM (April 3, 2012), <http://www.scoop.it/t/drug-testing-and-research/p/1553678951/the-horse-oklahoma-lowers-clenbuterol-limits-for-racehorses>.

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

<sup>83</sup> *Id.*

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

*C. Too Many Commissions*

The racing industry continues to “deal with” the problem by revising a commission’s regulations and/or implementing a new commission. The amounts of commissions are countless and cause incredible confusion. This consistent “band-aid” approach by the industry and commissions must end.

Mainly, the “big four” associations are not aggressive enough in ensuring that states adopt their proposals. For instance, on March 30, 2012, the Jockey Club issued Reform Racing Medication Rules (“the rules”).<sup>85</sup> Nevertheless, the rules’ success relies on vast acceptance by all horseracing states, and for its commissioners and officials to help enforce them.<sup>86</sup> But, the Jockey Club, later, stated it is “encouraging” all horseracing jurisdictions to accept the rules.<sup>87</sup>

Again, this isolated event is an example of the conduct that will continue to create inconsistency among horseracing states; some jurisdictions may swiftly adopt the rules, while others may accept portions of the rules, or refuse the rules in their entirety.

State legislatures and courts often vary concerning regulation of drugging issues. Minnesota, through its statute Section 240.23(j), has the authority to issue rules governing aspects of horseracing “which in its opinion affects the integrity of racing or the public health, welfare, or safety.”<sup>88</sup> Minnesota administrative rule 7890.0100 describes a medication as

a substance, compound, or element, or combination . . . which is or can be administered to a horse for the purpose of preventing, curing, or alleviating the effects of any disease, condition . . . or symptom . . . or for altering in any way the behavior, attitude, temperament, or performance of a horse, including athletic performance.<sup>89</sup>

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<sup>85</sup> Tom LaMarra, *Jockey Club Seeks Tougher Equine Medication Rules*, THEHORSE.COM (March 30, 2012), <http://www.thehorse.com/ViewArticle.aspx?ID=19809>. [hereinafter “Jockey Club”]

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> 2011 Minnesota Statutes, MINNESOTA OFFICE OF THE REVISOR OF STATUTES (April 17, 2012), available at <https://www.revisor.mn.gov/statutes/>.

<sup>89</sup> Subp.13, 2011 Minnesota Statutes, MINNESOTA OFFICE OF THE REVISOR OF STATUTES (April 17, 2012), available at <https://www.revisor.mn.gov/statutes/>.



In addition, “[t]he term medication includes all analgesics, anesthetics, depressants, narcotics, stimulants, tranquilizers, and other classifications of medications.”<sup>90</sup> The rule allows the use of certain NSAIDs such as Bute, Flunixin, Ketoprofen, and Furosemide, while prohibiting “milkshaking.”<sup>91</sup>

But, in some states, the use of milkshaking is not included in horserace regulations. For example, Louisiana prohibits “milkshaking,” but did not specifically enact a rule that explicitly banned the substance until after 2000.<sup>92</sup> Therefore, this allows for those “who know the system and horseracing industry” to find ways around states’ rules. Experienced trainers can just select which venues to race in to allow for the misuse of drugs and increasing the potential for injury to the horse.

#### *D. Horseracing Officials Recognize the Problem*

The current Jockey Club president, James Gagliano, stated, “[a]s we have said many times before, The Jockey Club believes the overuse of medication endangers our human and equine athletes, threatens the *integrity of our sport*, and erodes consumer confidence in our game.”<sup>93</sup> He also stated, “[h]orses should compete only when they are free from the influence of medication, and these reformed rules represent a *giant step* toward achieving that goal.”<sup>94</sup> Although, the Jockey Club recognizes the problem, its solution falls short. Reforming the Jockey Club’s rules is not a “giant step,” but instead a reoccurring step by one of the industry’s “big four” organizations.

Nevertheless, once again the racing industry sought only power and control by stating that it is “refining” and/or “improving” its standards. Gagliano reasoned “[w]e have been

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.* “Milkshaking” (to include bicarbonate loading) means the use of an alkalizing agent administered through a nasogastric tube or by any other means that changes the normal physiological state of a horse through elevation of plasma or serum TCO<sub>2</sub>.” *Id.*

<sup>92</sup> *Angelle v. Louisiana State Racing Com’n*, 828 So.2d 1153, 1159 (La. Ct. App. 2002). (where a rule for banning “milkshaking” was not in effect at the time of the violation).

<sup>93</sup> *See supra* note 85.

<sup>94</sup> *Id.*

refining this document since then and the result is a dramatically streamlined set of regulations that is on par with international standards . . . [i]t creates a new enforcement scheme with far stiffer penalties and deterrents for repeat offenders.”<sup>95</sup>

The proposal made by Gagliano only shows that horseracing officials in the industry only act or react when there is a public outcry or threat to take over the industry. These “refinements” are not in the best interests of the horses, but instead serve to increase officials’ power and control. The current economy enhances the greed and need for the racing industry to produce more races.

### *E. The Harmful Effects of Drugs*

#### 1. Therapeutic Drugs and PEDs

The purpose of steroid use is typically to enhance performance. Since the death of Eight Belles at the Kentucky Derby in May of 2008,<sup>96</sup> thirty-two out of the thirty-eight racing states adopted rules to regulate the use of steroids, specifically anabolic steroids, in horseracing.<sup>97</sup> With a million viewers watching, officials euthanized Eight Belles.<sup>98</sup> Eight Belles came very close to a victory, but her body could not defeat the drugged winner, Big Brown. As America mourned the lose of a helpless animal, Big Brown’s leading trainer nonchalantly declared that he administered anabolic steroids to Big Brown before the Derby.<sup>99</sup> He also admitted that he would continue to administer steroids “before every other race for the same reason.”<sup>100</sup> This event educated the public about the dangers and use of anabolic steroids in the sport.<sup>101</sup>

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

<sup>96</sup> Friedman, *supra* note 12, at 123. Eight Belles tragically collapsed at the Derby’s finish line with two broken legs. *Id.*

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

<sup>98</sup> *Id.* at 125.

<sup>99</sup> *Id.* at 139. “Stallion-like’ activity” is behavior that occurs when a male horse is sexually active. The use of steroids can trigger this type of behavior when a male horse is not sexually active. *Id.*

<sup>100</sup> *Id.* at 124-25.

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

Currently, there are states without any form of steroid regulation for horses.<sup>102</sup> When given steroids, horses experience behavioral changes that can enhance the horse's performance, but often not without serious cost.<sup>103</sup> Steroids do this by raising the level of testosterone in male horses that causes sudden, dangerous aggression or 'stallion-like' activities.<sup>104</sup> In addition, steroids cause a horse's heart to pump an additional sixty-five percent in volume.<sup>105</sup> Nevertheless, steroids alone are not the only drugs that create problems in the industry or more importantly in horses.

The use of the drugs administered to horses can be a direct cause in catastrophic leg injuries to horses. For example, phenylbutazone is a commonly used drug in the training of horses because of its ability to allow a horse suffering from some soreness to train.<sup>106</sup> Some trainers, however, have exploited this drug to allow horses suffering from serious leg injuries to both train and compete for extended periods.<sup>107</sup> This use can inhibit the healing process and contribute to catastrophic leg injuries.<sup>108</sup> As a result, the misuse of these drugs can contribute to leg injuries of horses that can contribute to their deaths.

## 2. Legal Drugs

Legal drugs, often characterized as therapeutic drugs, are categorized in three forms: (1) Race-day medications, (2) Non-Steroidal, Anti-Inflammatory Drugs (NSAIDs) and (3) Steroidal, Anti-Inflammatory Drugs.<sup>109</sup> A common example of a race-day medication is Lasix, which trainers use to cure extreme "bleeding in its lungs."<sup>110</sup> The "bleeding" typically results from a "condition

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<sup>102</sup> *Id.* at 126. To illustrate, New York's rule, Section 4043.2 (e)(9) of its Compilation of Codes, Rules and Regulations states "[t]he following substances are permitted to be administered by any means until [forty-eight] hours before the scheduled post time of the race in which the horse is to compete . . . hormones and steroids (*e.g.*, testosterone, progesterone, estrogens, . . . anabolic steroids . . .) (West 2012).

<sup>103</sup> Friedman, *supra* note 12, at 139.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> L. R. Soma, C.E. Uboh, G.M. Maylin, *The use of phenylbutazone in the horse*, J. VET. PHARMACOLOGY AND THERAPEUTICS 35, 2 (February 2012).

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

<sup>108</sup> *Id.* at 3.

<sup>109</sup> *Id.*; Rhoden, *supra* note 1.

<sup>110</sup> Gasparon, *supra* note 40 at 206-07.

known as exercise-induced pulmonary hemorrhage.”<sup>111</sup> This condition arises when the horse’s internal organs are not in harmony with the remainder of his or her body.<sup>112</sup> When the horse is running, his or her intestines collide with the animal’s diaphragm and lungs.<sup>113</sup> This causes the horse’s lungs to bleed.<sup>114</sup>

Lasix prevents this method of bleeding; however, “Lasix is arguably a performance-enhancing drug.”<sup>115</sup> “To help counteract the argument that Lasix enhances performance, racing clubs tell bettors on the program whether a horse is on Lasix and how many races the horse has run on Lasix.”<sup>116</sup> The debate over Lasix also involves concerns that the drug operates “as a diuretic,” which “could be” administered to remove indication of supplementary “drugs in the horse’s system.”<sup>117</sup> Diuretic drugs dehydrate horses, and cause a slower post-race recovery. In 2010, every horse competing in the Triple Crown events used Lasix.<sup>118</sup> If this “use of Lasix was therapeutic, then all competing horses should have been suffering from an exercise-induced pulmonary hemorrhage.”<sup>119</sup>

In 2008, Lawrence R. Soma, veterinarian and professor at the University of Pennsylvania Veterinary School, testified about Lasix at a congressional subcommittee. She explained that Lasix could be both hard to discover in the horse’s system and has the characteristic of potentially serving as a PED.<sup>120</sup> She described the drug, by stating “[i]n summary, furosemide does not prevent bleeding, improves performance in some horses, can dilute urine to compromise detection of most drugs, and violates the rules of most States that there should be no medication on race day.”<sup>121</sup>

In addition, trainers give NSAIDs to racehorses for therapeutic reasons, but can abuse them in order to boost a

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

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

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

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

<sup>117</sup> *Id.*

<sup>118</sup> Rhoden, *supra* note 1.

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

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

horse's performance. Examples of this type of drug are "phenylbutazone, flunixin, and ketoprofen."<sup>122</sup> A majority of racing states permit the usage of one of these drugs for an approved time prior to the horse's competition.<sup>123</sup> Dr. Rick Arthur also explained in his interview with *The New York Times* that many veterinarians that check horses "for soundness before they race are concerned that the presence of [non-steroidal, anti-inflammatory drugs] compromises their ability to properly evaluate horses."<sup>124</sup> Further, broken leg injuries during races often result from the use of NSAIDs.<sup>125</sup> While states, on some level, "regulate" NSAIDs, the total deaths or "breakdowns" of horses has not significantly decreased.<sup>126</sup>

Finally, the third category, steroidal, anti-inflammatory drugs, is 'cortisone-type drugs,'<sup>127</sup> which are often administered to relieve or lower joint swelling.<sup>128</sup>

In reality, states do not appropriately regulate these three categories of drugs, particularly when one considers the interests of the horses. The current rules and regulations governing the therapeutic medication are not sufficient, and some even lack the ability to be truly enforced. In New York, the present rule, Section 4043.2 of the state's Compilation of Codes, Rules, and Regulations, governs the use of non-steroidal, anti-inflammatory drugs.<sup>129</sup> This rule allows trainers to administer only one of two non-steroidal, anti-inflammatory drugs, either flunixin or phenylbutazone to the horse through intravenous injection up to twenty-four hours prior to the post time for the horse's race.<sup>130</sup> Nevertheless, subsection (e) of the rule allows trainers to administer the substances to horses by any method up to 48 hours prior to the post time for the horse's

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<sup>122</sup> *Id.*

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

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

<sup>125</sup> Friedman, *supra* note 12, at 140; Rhoden, *supra* note 1.

<sup>126</sup> Rhoden, *supra* note 1.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* Rhoden also reported the use of "steroidal" medications are disallowed "in international racing," but the United States has been more lenient.

<sup>129</sup> Friedman, *supra* note 12, at 134-35.

<sup>130</sup> *Id.*; N.Y. Comp. Codes R. & Regs., tit. 9, § 4043.2 (West 2012). According to proposed rulemaking issued on December 28, 2011, subdivision (d) of Section 4043.9 was amended to allow intravenous injection to be given twenty-four hours prior to the race's post-time; see, 2011 N.Y. Reg Text 279654 (NS) (West 2012).

race.<sup>131</sup> This creates an issue with enforceability since the current testing procedures do not provide enough information to determine the time or the method of drug administration.<sup>132</sup> As a result, there is no mechanism to prevent the trainer from claiming that he administered the drugs were administered in a permissible manner. This clearly creates an enforcement problem.

In general, the sport's history provides evidence of abuse, neglect, and strain with its racehorses. The dissent in *Dimeo v. Griffin*,<sup>133</sup> appropriately argued the majority needed to contemplate the contributing factors of horserace injuries and deaths.<sup>134</sup> Even at this time, states such as Illinois, dealt with the debate of "prerace drugs."<sup>135</sup> The dissent emphasized that trainers administered drugs, illegal and legal, to raise a horse's momentum, in addition to keeping a frail horse in a competition by shrinking or numbing his or her pain.<sup>136</sup>

The need for congressional oversight is evident through the review of the sport's history. Participants will continue to sacrifice of the health of the sport's horses in exchange for the lucrative incentives the sport offers. Without uniform rules, each state can provide for regulations that are neither sufficient nor enforceable as a practical matter.

#### IV. PROPOSED REFORMS

The creation of a federal commission is the most logical solution in solving the issues associated with horseracing. This commission would allow for the establishment of a common set of regulations, which would make it easier to enforce the regulations. Congress needs to pass legislation that would create this commission and give it authority to regulate the industry, but leave the regulating bodies of each state in charge and selecting the membership and enforcing the regulations.

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

<sup>132</sup> *Id.*

<sup>133</sup> 943 F.2d 679, 688 (7th Cir. 1991).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* (citing Barbra Sleeper, *Special Report for the Kings or Knaves*, ANIMALS, Mar. - Apr. 1991, 18).

This structure would allow for the establishment of uniform reforms of the industry, while also allowing input from those who stand to gain or lose from the regulations. This addresses the potential issues that state commissions have with possibly losing their influence.<sup>137</sup> Additionally, this structure provides for federal regulation without requiring large amounts of funding, avoiding the need for creating new taxes to find a revenue source to fund the operations of the commission. Essentially, the commission is nothing more than a rule making body. Furthermore, while the commission has no ability to enforce the rules it creates, these rules would be federal law, and punishable as such. As a result, the new consequences would serve as an additional deterrent to those considering breaking the rules without requiring the need for finding a funding method for enforcing the rules. This would address the fact that even though some states have attempted to provide for more uniform rules, they have failed to provide a punishment structure to encourage compliance with these rules.<sup>138</sup>

The commission would consist of one member from each state that regulates horseracing. The best format would be for the state bodies governing horseracing to choose their respective states commissioners. This allows each state to have a say in the regulation of horseracing, eliminating the potential for the interests of the industry in a single or small group of states to dominate the commission. This would reduce the possibility for corruption, along with ensuring that the rules are more balanced.

This commission would be responsible for creating and maintaining a set of rules to regulate the industry nationwide. Each state body regulating horseracing would be required to follow, and enforce, the rules. As a result, giving each state representation on the commission is imperative. Therefore, since the state's regulating body has a say in the rules, it is more likely to enforce them.

The uniform rules will allow trainers and those overseeing racing venues to comply with and enforce the rules. It will be easier to establish an industry-wide testing standard when every

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<sup>137</sup> Bonnie, *supra* note 27 at 1164.

<sup>138</sup> Gasparon, *supra* note 40, at 202.

state has to test for the same substances. Additionally, trainers and jockeys will only have to be concerned with one set of rules regardless of where the horse is racing, making it easier for them to ensure their compliance with the rules.

Congress' passing of legislation will give the commission the authority it needs to enact rules, along with giving the commission the authority to create punishments for these rules. Combining this power, with the ability of each state to influence the rules making process only encourages a more consistent set of rules. This commission would go a long way in establishing a set of rules that would serve to protect the health of the horses and protecting the integrity of the industry, without compromising the competitiveness of the industry.

#### CONCLUSION

The foremost problem with the horse racing industry today is drug abuse. This abuse serves as a brutal assault on the horses, which have no voice in their own cause. The lack of uniformity, the lack of leadership and the failure to regulate the sport in a similar fashion other professional sports have, has allowed for rampant abuse of the system. Federal legislation establishing a federal commission, with authority to create uniform regulations, or some other federal mandate is necessary to provide a solution to these problems. Either regulations passed by a federal agency, or a statute governing horseracing passed by Congress would provide a set of standard rules for everyone in the industry to follow. Additionally, the federal standard will make it easier to enforce penalties, bringing a true motivation for changes within the industry. Lastly, the integrity of horseracing is at stake. Continued inaction by the federal government's part will only perpetuate the slaughtering of horses on America's racetracks.