



Volume 3, Number 2

Summer 2012

Contents

ARTICLES

Past Bad Speakers, Performance Bonds & Unfree Speech: Lawfully Incentivizing “Good” Speech or Unlawfully Intruding on the First Amendment? <i>Clay Calvert</i>	245
The Future of Social Media Policy in the NCAA <i>Vicki Blohm</i>	277
And They’re Off: Eliminating Drug Use in Thoroughbred Racing <i>Amy L. Kluesner</i>	297

Harvard Journal of Sports & Entertainment Law
Student Journals Office, Harvard Law School
1541 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-3146; jsel@law.harvard.edu
www.harvardjsel.com
U.S. ISSN 2153-1323

The *Harvard Journal of Sports & Entertainment Law* is published semiannually by Harvard Law School students.

Copyright © 2011 by the President and Fellows of Harvard College.

Submissions: The *Harvard Journal of Sports and Entertainment Law* welcomes articles from professors, practitioners, and students of the sports and entertainment industries, as well as other related disciplines. Submissions should not exceed 25,000 words, including footnotes. All manuscripts should be submitted in English with both text and footnotes typed and double-spaced. Footnotes must conform with *The Bluebook: A Uniform System of Citation* (18th ed.), and authors should be prepared to supply any cited sources upon request. All manuscripts submitted become the property of the JSEL and will not be returned to the author. The JSEL strongly prefers electronic submissions through the ExpressO online submission system at <http://www.law.bepress.com/expresso>. Submissions may also be sent via email to jselsubmissions@gmail.com or in hard copy to the address above. In addition to the manuscript, authors must include an abstract of not more than 250 words, as well as a cover letter and resume or CV. Authors also must ensure that their submissions include a direct e-mail address and phone number at which they can be reached throughout the review period.

Permission to Copy: The articles in this issue may be reproduced and distributed, in whole or in part, by nonprofit institutions for educational purposes including distribution to students, provided that the copies are distributed at or below cost and identify the author, the *Harvard Journal of Sports & Entertainment Law*, the volume, the number of the first page, and the year of the article's publication.



Volume 3, Number 2
Summer 2012

EDITORIAL BOARD

Editor in Chief
Dave Zucker

Executive Editor
Trisha Ananiades

Executive Editor
Jeffrey M. Monhait

Executive Editor
Miles C. Wiley

Online Editors
Timothy Lamoureux
Austin Stack

Technical Chairs
Cynthia Chen
Brandon Hammer

Symposium Chair
Katie Weiss

Cynthia Chen
Erica Esposito
Hunter Landerholm

Submissions Committee
Adam Derry
Meredith Karp
Rachael Vera Moss

Mitchell Drucker
Judy Lai
McClain Thompson

Jenna Hayes

Article Editors
Eugene Karlik

Hunter Landerholm

Adam Derry
Erica Esposito
Alex Rosen

Line Editors
Abraham Funk
Meredith Karp
Daniel Sinnreich
McClain Thompson

Kelly Donnelly
Michael McCauley
Paul J. Sullivan

John Avila
Christopher Davis
John Geise
Tyler Keyser
Susanna Lichter
Clint Morrison
Michael Waks

Editors
Peter Byrne
Ty Davis
Brad Hinshelwood
DK Kim
Rebecca Matte
Rachael Vera Moss
Daniel Waldman

Dasom Chung
Mitchell Drucker
Daniel Kanter
Meg Lenahan
Patrick McKeown
Liat Rome
Christian Yost

Faculty Advisor's Introduction

Peter Carfagna

I would like to take this opportunity to welcome our readers to this Second Edition of the Third Volume of Harvard Law School's Journal on Sports and Entertainment Law. It has been my great pleasure to serve as the Faculty Advisor to the Journal since inception, and I am especially proud of the major steps forward that the previous Journal Editors and Staff Members have been able to make during that period of time—especially during this past year, when the Board and Staff were most successfully headed up by Editor in Chief, Dave Zucker, with able assistance from his Senior Editorial Board Members Trisha Ananiades (one of this year's recipients of the Professor Emeritus Paul J. Weiler Sports Law Scholarship), Jeff Monhait, and Miles Wiley.

In particular, I would like to congratulate Dave and his 2011-12 Board and Staff Members on expanding both the breadth and depth of the articles that JSEL has published this year. Starting with the Third Volume, First Issue, which recently became available through the JSEL Website, Dave and the JSEL Board/Staff were able to publish important scholarly contributions in a wide variety of sports and entertainment law areas that were in great need of further explication by the JSEL-published "experts" in the field.

For example, long-time colleague Boston College Professor Warren Zola was able to tease out many of the intricacies of the labyrinthian NCAA-related rules and regulations regarding NCAA Basketball amateur eligibility issues, while also offering some provocative Proposals which JSEL hopes and trusts will be taken to heart by NCAA Members who should acknowledge that adopting at least some parts of Professor Zola's proposals is long overdue. Similarly, Professor Marc Edelman who, like Professor Zola, has regularly participated in our Annual HLS Sports Law Symposium, has provided a much-needed roadmap to the land-mines that have been created by the growing legal tsunami surrounding the entire "fantasy sports law" realm. Thanks to Marc, for providing such a landmark article, that bears re-reading as that entire area of legal regulation continues to evolve.

The other Articles in the First Edition also deserve careful reading and further study in such diverse areas as Copyright Law (co-authored by one of my former HLS Sports Law students, Ken Basin) and the Digital Millennium Copyright Act, as well as updating readers on the current state of Title IX Legislation's impact on various sub-groups of women. I commend you to enjoy the exciting publications relating to these important (and ever-expanding) areas of legal study. After doing so, please feel free to engage with the authors via on-line comments back to JSEL's Website, as you react to the Proposals contained in the Articles. Consistent with JSEL's mission, we are proud to publish such provocative thought-pieces that significantly contribute to the ever-expanding marketplace of ideas in the area of sports and entertainment law.

Finally, in the Second Edition, I hope that you will enjoy as much as I have the very thoughtful Articles that have traversed new research ground not previously covered by JSEL—Drug Use in Thoroughbred Horse Racing; "Performance Bonds and Unfree Speech;" and the NCAA's evolving Regulation of Social Media in the recruitment of high school athletes. This third article, written by HLS 3L Vicki Blohm, resulted in Ms. Blohm's being awarded the 2012 Professor Emeritus Paul J. Weiler Student Writing Prize in Sports and Entertainment Law. Again, your time will be rewarded if you pay particular attention to the Proposals for change that accompany each of these JSEL Articles. And again, we welcome your input via e-mail reply, so as to guide JSEL's publications in the future.

So, I welcome you to JSEL's annual celebration of legal scholarship in the "wonderful world of sports and entertainment law". In so doing, I congratulate Dave Zucker and his Board/Staff for their singular accomplishments this year. At the same time, I welcome aboard Editor-Elect Miles Wiley and the recently elected 2012-13 Senior Editorial Board who will, I am sure, make every effort to continue to advance the mission of JSEL next year in new and exciting ways that will build on the strong foundation established by JSEL's prior editorial Boards and Staffs with whom I have had the privilege to work.



Past Bad Speakers, Performance Bonds & Unfree Speech: Lawfully Incentivizing “Good” Speech or Unlawfully Intruding on the First Amendment?

Clay Calvert*

ABSTRACT

Using the recent legal woes of television pitchman Kevin Trudeau as an analytical springboard, this article examines the multiple First Amendment issues and red flags raised by the imposition of performance bonds on “past bad speakers” as conditions precedent for their future speech. Performance bonds, the article argues, blur the traditional line that separates prior restraints from subsequent punishments in First Amendment jurisprudence. They also represent a form of government intrusion in the marketplace of ideas — a form of interventionism, premised on financial incentivism — that ostensibly discourages dangerous or otherwise unlawful speech from re-entering the speech market. This article also addresses the proper standard of judicial scrutiny that should be used to evaluate the validity of performance bonds. Furthermore, it considers whether the scope of performance bonds is necessarily limited to scenarios involving the Federal Trade Commission or whether such bonds can also be imposed in other contempt proceedings and/or by other federal agencies, such as the Federal Communications Commission.

* Professor & Brechner Eminent Scholar in Mass Communication and Founding Director of the Marion B. Brechner First Amendment Project at the University of Florida, Gainesville, Fla. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. Member, State Bar of California. The author thanks Prof. Matthew D. Bunker of the University of Alabama for his ideas that enhanced the final version of this article.

TABLE OF CONTENTS

INTRODUCTION	246
I. FEDERAL TRADE COMMISSION v. TRUDEAU: SACRIFICING FIRST AMENDMENT CONCERNS TO PURIFY THE MARKETPLACE OF IDEAS?	254
II. SPEAKER EQUALITY, PRIOR RESTRAINTS & PERFORMANCE BONDS: THE CITIZENS UNITED PERSPECTIVE AND BEYOND ...	260
III. PERFORMANCE BONDS AND THE MARKETPLACE OF IDEAS: HOW TO DRIVE FALSEHOOD FROM THE FIELD?	263
IV. PERFORMANCE BONDS AND THE PARADE PERMIT ANALOGY: A DIFFERENCE WITHOUT IMPORTANCE?	267
V. ARE PERFORMANCE BONDS ON PAST BAD SPEAKERS VALID OUTSIDE THE REALM OF COMMERCIAL SPEECH?	270
VI. CONCLUSION	273

INTRODUCTION

In November 2011, the U.S. Court of Appeals for the Seventh Circuit upheld in *Federal Trade Commission v. Trudeau* the imposition of a judge-ordered, \$2 million performance bond¹ that television infomercialist² and

¹ Performance bonds are common in the construction industry when “a party known as a surety agrees to be responsible for the performance of a contractor on a project.” Cheryl S. Kniffen, *A Georgia Practitioner’s Guide to Construction Performance Bond Claims*, 60 MERCER L. REV. 509, 510 (2009) (discussing 40 U.S.C. § 3131(b)(2)). According to Kniffen,

the performance bond is essentially a guarantee that if the principal obligor (the contractor) fails or wrongfully refuses to perform the work governed by the construction contract, then the secondary obligor (the surety) will either perform in the principal’s place or pay damages to the obligee (the owner or general contractor) for the breach of its principal.

Id.

² An infomercial is “a longer than average advertisement that ranges in duration from 3 to 60 minutes” and that “may appear to the viewer initially as a program rather than a commercial.” Infomercials “usually consist of segments containing demonstrations, with testimonials by experts and satisfied users separated by two internal commercials.” Tom Agee & Brett A.S. Martin, *Planned or Impulse Purchases? How to Create Effective Infomercials*, J. ADVER. RESEARCH., Nov.–Dec. 2001, at 35, 35 (citing GEORGE. E. BELCH & MICHAEL. A. BELCH, *ADVERTISING AND PROMOTION: AN INTEGRATED MARKETING COMMUNICATIONS PERSPECTIVE* (1993)). See generally REMY STERN, *BUT WAIT . . . THERE’S MORE!: TIGHTEN YOUR ABS, MAKE MILLIONS, AND LEARN HOW THE \$100 BILLION INFOMERCIAL INDUSTRY SOLD US EVERYTHING BUT THE KITCHEN SINK* (2009) (providing an in-depth

“master huckster”³ Kevin Trudeau⁴ must post if he ever wants to broadcast infomercials again.⁵ The bond, which Trudeau unsuccessfully argued violated his First Amendment⁶ right of free speech,⁷ was imposed as a coercive civil-contempt measure⁸ — one designed to deter him from making deceptive infomercials in the future,⁹ given Trudeau’s track record of televised

and entertaining examination of the business of television infomercials). In the 1980s, “the infomercial quickly became a fixture on the American pop culture landscape.” *Id.* at x.

³ Christopher Dreher, *What Kevin Trudeau Doesn’t Want You to Know*, SALON (July 29, 2005, 12:48 PM), http://www.salon.com/2005/07/29/trudeau_4 (describing the “paranoid world of master huckster Kevin Trudeau”).

⁴ “Trudeau has sought to portray himself as a consumer advocate fighting the establishment. He’s also a convicted felon who spent two years in prison in the 1990s for credit-card fraud.” Stephanie Zimmermann, *The Weight of the Word*, CHI. SUN-TIMES, Sept. 18, 2007, at News 17. See generally Catherine Bryant Bell, Comment, *The Curious Case of Kevin Trudeau, King Catch Me If You Can*, 79 MISS. L.J. 1043, 1044–74 (providing an excellent biography of Trudeau and tracing his legal woes).

⁵ *FTC v. Trudeau*, 662 F.3d 947, 953–54 (7th Cir. 2011).

⁶ The First Amendment to the United States Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated nearly ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

⁷ *Trudeau*, 662 F.3d at 949 (noting Trudeau argued that “the bond requirement violates the First Amendment”).

⁸ See *Turner v. Rogers*, 131 S. Ct. 2507, 2516 (2011) (explaining that “[c]ivil contempt differs from criminal contempt in that it seeks only to ‘coerc[e] the defendant to do’ what a court had previously ordered him to do”) (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 442 (1911)); see generally Daxton R. “Chip” Stewart & Anthony L. Fargo, *Challenging Civil Contempt: The Limits of Judicial Power in Cases Involving Journalists*, 16 COMM. L. & POL’Y 425, 431 (2011) (observing that “[i]n American law, civil contempt is intended to provide a way for courts to coerce people to comply with their orders; civil contempt is distinguished from criminal contempt, which is for punitive purposes”).

⁹ See *Trudeau*, 662 F.3d at 953 (asserting that a performance bond “makes it less likely that there will be future violations because Trudeau will face a considerable financial loss if he is involved in a deceptive infomercial”).

deception that caused “such tremendous consumer harm in the past”¹⁰ and in light of his violation of at least one previous court order.¹¹

Trudeau, in fact, has been on the radar screen of the Federal Trade Commission (“FTC”) for more than a decade. A January 1998 *Federal Register* posting, for example, notes the FTC charging that a company called Tru-Vantage International, acting “in concert with Howard S. Berg and Kevin Trudeau, made a false and unsubstantiated claim that Howard Berg’s Mega Reading is successful in teaching anyone, including adults, children and disabled individuals, to significantly increase their reading speed while substantially comprehending and retaining the material.”¹² FTC Chair Deborah Platt Majoras, during a 2007 speech at the University of North Carolina, Chapel Hill, noted the FTC has charged Trudeau “with making false or deceptive claims in infomercials for various products or systems purported to cause significant weight loss, reverse hair loss, achieve a photographic memory, and cure addictions to food, alcohol, tobacco, or narcotics.”¹³

¹⁰ *Id.* at 953. As for Trudeau’s history of deception, the Seventh Circuit highlighted his 32,000-plus broadcasts of deceptive infomercials for a book called *The Weight Loss Cure ‘They’ Don’t Want You to Know About*. *Id.* at 949.

¹¹ See Order, FTC v. Trudeau, No. 03 C 3904 (N.D. Ill. June 29, 2004), available at <http://www.ftc.gov/os/caselist/0323064/040629contempt0323064.pdf> (finding Trudeau in contempt of court for violating part of a preliminary injunction relating to the marketing of a coral calcium supplement).

¹² Tru-Vantage Internat’l, L.L.C.; Analysis to Aid Public Comment, 63 Fed. Reg. 3131 (Jan. 21, 1998), available at <http://www.ftc.gov/os/fedreg/1998/january/980121truvantage.pdf>.

¹³ Deborah Platt Majoras, Chair, FTC, Roy H. Park Lecture at the University of North Carolina School of Journalism and Mass Communication: The Vital Role of Truthful Information in the Marketplace 10 (Oct. 11, 2007), available at http://www.ftc.gov/speeches/majoras/071011UNCspeech_DK.pdf. Majoras went on during the same speech to note other instances where the FTC disputed the veracity of Trudeau’s infomercials:

Trudeau claimed in subsequent infomercials that Coral Calcium Supreme, a dietary supplement purportedly made from marine coral, cured terminally ill cancer patients and enabled multiple sclerosis patients to get up out of their wheel chairs. In another infomercial, he claimed that Biotape, an adhesive strip, afforded permanent relief from severe pain. In 2003, Commission attorneys returned to court, filing a contempt action against Trudeau. In final settlement of that proceeding, Trudeau paid \$2,000,000 and agreed to another stipulated permanent injunction, this time banning him from appearing in, producing, or disseminating infomercials that advertise any product, service, or program.

Id. at 11.

Given this history of alleged deception, the logic of mandating a performance bond as an incentive for promoting truthful speech seems obvious — Trudeau only forfeits the \$2 million sum if he makes a deceptive infomercial, so he has a hefty monetary motivation not to produce misleading ones in the future.¹⁴ The constitutionality, however, of imposing such bonds on what this article dubs *past bad speakers*¹⁵ is far less apparent. The fact that the issue was given only cursory analysis by the three-judge panel of the Seventh Circuit in *Trudeau* is even more troubling.¹⁶ Furthermore, it has never been addressed by the U.S. Supreme Court, despite the fact that the FTC frequently requires performance bonds as conditions precedent for speech on repeat offenders of its rules.¹⁷ In fact, in a May 2010 statement before the U.S. Senate Special Committee on Aging, the FTC openly acknowledged it seeks performance bonds in cases involving repeated violations of its rules.¹⁸

¹⁴ *Trudeau*, 662 F.3d at 951 (noting that “[t]his sanction is purgeable because Trudeau’s bond is not forfeited to the FTC unless he makes a deceptive infomercial”).

¹⁵ Kevin Trudeau, of course, would not consider himself to be a member of this category. On his website, in fact, he describes himself as “fast becoming the world’s foremost consumer and natural cures advocate. A fearless whistleblower, Trudeau is the voice for the voiceless when it comes to exposing corruption and hypocrisy in the medical and corporate worlds.” About, KT Radio Network, <http://www.ktradio.com/about> (last visited Apr. 9, 2012).

¹⁶ See *infra* Part I.

¹⁷ See, e.g., Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief, *FTC v. Neiswonger*, No. 4:96 CV 02225 SNL (E.D. Mo. Feb. 28, 1997), available at <http://www.ftc.gov/os/caselist/9623134/970228neiswongerstipfnl.pdf> (providing, in relevant part, that the defendants are “hereby permanently restrained and enjoined from engaging, whether directly, in concert with others, or through any business entity, in the advertising, marketing, offering for sale or sale of any program *unless such defendant first obtains a performance bond in the principal sum of \$100,000*”) (emphasis added); Press Release, Fed. Trade Comm’n, Two Floridians Banned from Selling Business Opportunities; Two Others Must Post Performance Bonds (Jan. 27, 1999), available at <http://www.ftc.gov/opa/1999/01/hart2.shtm> (involving a fraudulent Internet kiosk business opportunity scheme, and requiring one individual to “post a \$1 million performance bond before engaging in telemarketing or business opportunity sales” and another individual “to post a \$500,000 performance bond before selling business opportunities”).

¹⁸ Prepared Statement of the Federal Trade Commission on Deceptive Marketing of Dietary Supplements FTC Enforcement Activities 7, Before U.S. Senate Special Committee on Aging (May 26, 2010), available at <http://www.ftc.gov/os/testimony/100526dietarysupplementstatement.pdf>.

The imposition of performance bonds on past bad speakers as conditions precedent for future expression raises a host of important queries with constitutional implications:

- Are performance bonds *de facto* prior restraints on expression¹⁹ that should be considered presumptively unconstitutional²⁰ or are they more akin to subsequent punishments²¹ for past bad speech that, like an award of punitive damages, are designed in part to deter such bad speech in the future?²²
- If performance bonds function as a *quasi* form of punitive damages, at least to the extent they are designed to deter future bad speech,²³ then what is the proper framework for determining when they become so grossly excessive in amount as to violate a past bad speaker's constitutional rights?²⁴
- Should the permissibility of performance bonds be evaluated under the strict scrutiny²⁵ standard of review that typically applies to content-based regulations of speech²⁶ or, as in the case of *Trudeau*, where the

¹⁹ See *Alexander v. United States*, 509 U.S. 544, 550, 553–54 (1993) (observing that “[t]emporary restraining orders and permanent injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints,” and that “our decisions have steadfastly preserved the distinction between prior restraints and subsequent punishments”).

²⁰ See *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976) (observing that “prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights”).

²¹ See *Alexander*, 509 U.S. at 550 (observing “the distinction, solidly grounded in our cases, between prior restraints and subsequent punishments”).

²² See *BMW of N. America, Inc. v. Gore*, 517 U.S. 559, 568 (1996) (observing that “[p]unitive damages may properly be imposed to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition”).

²³ See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492–93 (2008) (remarking that “the consensus today is that punitives are aimed not at compensation but principally at retribution and *detering harmful conduct*” and that retribution and deterrence are generally accepted today as the “twin goals of punitive awards”) (emphasis added).

²⁴ See *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (observing that “this Court has found that the Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as ‘grossly excessive’”).

²⁵ See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011) (observing that to pass muster under strict scrutiny, a government entity must prove that the law in question “is justified by a compelling government interest and is narrowly drawn to serve that interest”).

²⁶ See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (observing that “[o]ur precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content”).

goal was to prevent fraudulent commercial speech, should they be measured by a more relaxed standard, such as intermediate scrutiny?²⁷

- What does the use of performance bonds, as a government-imposed financial incentive for encouraging truthful and otherwise non-harmful expression, reveal about the functioning or failure of the marketplace of ideas?²⁸
- Is the use of performance bonds confined only to situations involving FTC actions against those who repeatedly engage in a pattern of deceptive speech or, alternatively, can and should they be deployed more widely in other scenarios involving speakers who previously have engaged in unlawful forms of expression, such as obscenity and libel?²⁹

All of these questions, remarkably, have been neither addressed nor resolved by the judiciary. This article's purpose is not to provide answers to them, but rather to problematize the difficulties surrounding the nexus between performance bonds and the First Amendment and, in turn, to highlight the constitutional red flags performance bonds raise.

Using *Trudeau* as an analytic springboard, this article examines the constitutionality of performance bonds imposed on past bad speakers as a condition precedent for engaging in future speech. Cases like that involving Kevin Trudeau implicate First Amendment concerns because, as the Seventh Circuit observed, "Trudeau is required to post a bond before he participates in an infomercial *regardless of whether it contains a misleading statement*. His bond will not be forfeited unless he makes a misrepresentation in violation of the court order, but that does not eliminate the need for First Amendment scrutiny."³⁰

The consequences of imposing performance bonds as a condition precedent on past bad speakers, of course, stretch far beyond the narrow realm of infomercials, which were once completely banned by the Federal Communications Commission ("FCC").³¹ Imagine, for instance, a court ordering the

²⁷ See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1339 (2010) (noting that the Supreme Court has held "that restrictions on nonmisleading commercial speech regarding lawful activity must withstand intermediate scrutiny"). See generally Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298 (1998) (providing a comprehensive examination of the concept of intermediate scrutiny).

²⁸ See generally Nima Darouian, *Accessing Truth: Marketplaces of Ideas in the Information Age*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 1, 4–5 (2010) (providing a brief overview of the marketplace of ideas theory).

²⁹ See *infra* notes 33–36 and accompanying text (posing hypotheticals involving such situations).

³⁰ *FTC v. Trudeau*, 662 F.3d 947, 953 (7th Cir. 2011) (emphasis added).

³¹ See Jan LeBlanc Wicks & Avery M. Abernethy, *Effective Consumer Protection or Benign Neglect? A Model of Television Infomercial Clearance*, 30 J. ADVER. 41, 42

owner of an adult bookstore who was once convicted of selling an obscene³² DVD to first post a \$1 million performance bond before he could re-open the same bookstore, *regardless* of the fact that the books and DVDs he now wants to sell have never been deemed obscene in court. Or consider a scenario in which the FCC mandates performance bonds on television stations that have violated indecency regulations³³ in the past in order for them to maintain their licenses. Under principles of civil libel law,³⁴ could a court order one individual who has repeatedly defamed — and been found liable for libel — another individual to post a performance bond before the repeat defamer could ever say anything else, *regardless of whether it contains a misleading statement*, about the defamed individual in the future?³⁵

Such performance bond possibilities are no longer merely hypothetical, in light of cases like *Trudeau*. Despite this, the U. S. Supreme Court has never squarely addressed the First Amendment constitutionality of imposing a performance bond as a condition precedent for future expression on those who have engaged in false, misleading or otherwise unlawful speech in the past.³⁶ In fact, the Seventh Circuit in *Trudeau* cited only one 1995 district

(2001) (noting that “[t]he FCC banned infomercials in 1973” and “lifted the infomercial ban in 1984”).

³² Obscene expression is not protected by the First Amendment’s guarantee of free speech. See *Roth v. United States*, 354 U.S. 476, 485 (1957) (holding that “obscenity is not within the area of constitutionally protected speech or press”); *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 124 (1989) (writing that “we have repeatedly held that the protection of the First Amendment does not extend to obscene speech”).

³³ See Guide: *Obscenity, Indecency, and Profanity Guide*, FEDERAL COMMUNICATIONS COMMISSION, <http://www.fcc.gov/guides/obscenity-indecency-and-profanity> (last visited Apr. 9, 2012) (setting forth the FCC’s definition of indecent broadcast content, as well as the FCC’s enforcement procedures and guidelines for filing complaints regarding allegedly indecent content).

³⁴ Libel involves “a false allegation of fact that is disseminated about a person and that tends to injure that person’s reputation.” JOHN D. ZELEDNY, *COMMUNICATIONS LAW: LIBERTIES, RESTRAINTS AND THE MODERN MEDIA* 131 (6th ed. 2011). The basic six elements of a libel suit that a plaintiff has the burden of proving are defamatory content, falsity, publication, identification, fault and harm. *Id.*

³⁵ This is a different scenario from that in which courts have upheld injunctions prohibiting the repetition of statements that have previously been adjudicated to be defamatory. See *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 353 (Cal. 2007) (holding that “a properly limited injunction prohibiting defendant from repeating statements about plaintiff that were determined at trial to be defamatory would not violate defendant’s right to free speech”).

³⁶ A divided high court has stated, in the context of upholding a post-obscenity-conviction seizure of constitutionally protected expressive material under the Rack-

court opinion, *United States v. Vlahos*,³⁷ which upheld a \$75,000 performance bond — a far cry from the \$2 million bond figure approved in *Trudeau*.

In *Vlahos*, a federal district court granted summary judgment in favor of the FTC, holding that certain radio and television commercials used by the defendants to advertise methods of purchasing confiscated and repossessed cars were unfair and deceptive.³⁸ The court ordered the *Vlahos* defendants to post a \$75,000 bond before they could again engage in advertising of any automobile auction or credit card information service.³⁹ In upholding the performance bond, U.S. District Judge George M. Marovich opined that the bond “represented a reasonable means of remedying and preventing . . . further unlawful practices.”⁴⁰ The decision was upheld by the Seventh Circuit in 1996.⁴¹

To address the constitutionality of performance bonds imposed on past bad speakers as a condition precedent for future speech, Part I of this article examines the Seventh Circuit’s analysis in *Trudeau* in greater depth.⁴² Part II questions whether the status of an individual as a past bad speaker should affect the degree of First Amendment protection he or she receives for future

eteer Influenced and Corrupt Organizations Act (“RICO”), that “the threat of forfeiture has no more of a chilling effect on free expression than the threat of a prison term or a large fine.” *Alexander v. United States*, 509 U.S. 544, 556 (1993). In *Alexander*, “the assets in question were ordered forfeited not because they were believed to be obscene, but because they were directly related to petitioner’s past racketeering violations. The RICO forfeiture statute calls for the forfeiture of assets because of the financial role they play in the operation of the racketeering enterprise.” *Id.* at 551. Ultimately, *Alexander* involves a very different scenario — the post-trial forfeiture provisions of RICO that sweep up protected expression as assets associated with a racketeering enterprise — than *Trudeau*.

The majority’s conclusion in *Alexander* drew a vehement dissent from Justice Anthony Kennedy, who wrote that “[t]he fundamental defect in the majority’s reasoning is a failure to recognize that the forfeiture here cannot be equated with traditional punishments such as fines and jail terms.” *Id.* at 561 (Kennedy, J., dissenting). See generally Sean M. Douglass & Tyler Layne, *Racketeer Influenced and Corrupt Organizations*, 48 AM. CRIM. L. REV. 1075 (2011) (providing a current overview of the federal RICO provisions).

³⁷ 884 F. Supp. 261 (N.D. Ill. 1995), *aff’d*, No. 95-1484, 1996 U.S. App. LEXIS 20525 (7th Cir. Aug. 9, 1996).

³⁸ *Id.* at 263.

³⁹ *Id.*

⁴⁰ *Id.* at 266.

⁴¹ *United States v. Vlahos*, No. 95-1484, 1996 U.S. App. LEXIS 20525 (7th Cir. Aug. 9, 1996).

⁴² See *infra* Part I.

expression,⁴³ especially in light of the U.S. Supreme Court's 2010 ruling in *Citizens United v. Federal Election Commission*.⁴⁴ Part II also considers whether performance bonds are more like prior restraints on expression than subsequent punishments. Part III examines the performance bond issue through the lens of the venerable marketplace of ideas theory of freedom of expression, exploring bonds as a form of government-mandated marketplace manipulation.⁴⁵ Part IV analyzes the similarities and differences between imposing performance bonds on past bad speakers and requiring groups to post money before they can obtain permits to engage in speech-related activities such as marching or parading.⁴⁶ Part V explores the possibility of imposing bonds on past bad speakers in contexts other than FTC actions targeting deceptive advertising.⁴⁷ Finally, Part VI calls on courts to provide more rigorous scrutiny of performance bonds, akin to that used to analyze gag orders — prior restraints — on the press.⁴⁸

I. FEDERAL TRADE COMMISSION v. TRUDEAU: SACRIFICING FIRST AMENDMENT CONCERNS TO PURIFY THE MARKETPLACE OF IDEAS?

The \$2 million performance bond imposed on Kevin Trudeau was initially fashioned by U.S. District Judge Robert W. Gettleman in April 2010.⁴⁹ Gettleman's earlier attempt to ban Trudeau from producing any infomercials for three years in a civil contempt proceeding had been struck down by the Seventh Circuit less than a year before.⁵⁰ The problem with the infomercial ban, according to the Seventh Circuit, was that:

It lasts for three years no matter what Trudeau does. Trudeau could take all the steps in the world to convince the FTC and the district court that he will be truthful in his next infomercial, but even if he offers to read his book word-for-word and say nothing else, he cannot free himself of the court's sanction.⁵¹

⁴³ See *infra* Part II.

⁴⁴ 130 S. Ct. 876 (2010).

⁴⁵ See *infra* Part III.

⁴⁶ See *infra* Part IV.

⁴⁷ See *infra* Part V.

⁴⁸ See *infra* Part VI.

⁴⁹ *FTC v. Trudeau*, 708 F. Supp. 2d 711 (N.D. Ill. 2010).

⁵⁰ See *FTC v. Trudeau*, 579 F.3d 754, 779 (7th Cir. 2009) (holding that Judge Gettleman "cannot impose a non-purgeable, three-year penalty as a civil contempt sanction. Accordingly, we vacate the infomercial ban and remand").

⁵¹ *Id.* at 777.

What does this mean? Coercive civil contempt sanctions, as contrasted with compensatory civil contempt sanctions,⁵² must be purgeable, such that a contemnor like Kevin Trudeau has the opportunity, through some form of affirmative conduct, “to free himself of the sanction.”⁵³ The infomercial ban, however, was not purgeable because there was nothing Trudeau could do to relieve himself of the burden.⁵⁴

Rather than fashion its own coercive remedy for Trudeau, however, the Seventh Circuit remanded the case back to Judge Gettleman, reasoning that the “district court is in a better position to fashion an appropriate coercive remedy, should it choose to do so on remand. The court could also, of course, choose to impose a criminal sanction instead.”⁵⁵ The FTC raised the performance bond issue with Gettleman on remand, suggesting he require Trudeau to post a \$10 million bond for five years before Trudeau could engage in future infomercials involving books, newsletters or other informational publications touting the supposed benefits of products, programs or services.⁵⁶

Observing that “deceptive commercial speech is entitled to no constitutional protection”⁵⁷ and noting in his opinion the strong likelihood that Trudeau would repeat his deceptive conduct in marketing *The Weight Loss Cure ‘They’ Don’t Want You to Know About*,⁵⁸ Judge Gettleman concluded that

⁵² See *id.* (observing that “civil contempt sanctions come in two breeds, and two breeds only. They either *compensate* those harmed by the contemnor’s violative conduct or *coerce* the contemnor to cut it out”) (emphasis added).

⁵³ *Id.* See generally Linda S. Beres, *Civil Contempt and the Rational Contemnor*, 69 IND. L.J. 723, 726 (1994) (asserting that “[i]f the judge’s goal is to induce compliance, she must give the contemnor an incentive to obey the court order. Civil contempt, therefore, requires imposing an indeterminate or conditional sanction – one that ends if the contemnor complies”).

⁵⁴ See *Trudeau*, 579 F.3d at 777 (observing that “the infomercial ban is not purgeable and therefore not a proper coercive contempt sanction”).

⁵⁵ *Id.* at 779.

⁵⁶ *FTC v. Trudeau*, 708 F. Supp. 2d 711, 720 (N.D. Ill. 2010).

⁵⁷ *Id.* at 721.

⁵⁸ Judge Gettleman lambasted Trudeau on this point, opining:

The court has no faith in the notion that Trudeau has somehow been reformed by these proceedings or anything else that has happened since the publications of the offending infomercials in 2007. Indeed, Trudeau continues to deny that he did anything wrong, contends that his deceptive information is somehow protected by the Constitution, and pretends that he did not profit from the book or the infomercials and thus should not have to pay anything to the people he deceived.

Id.

“a performance bond in some amount does not violate Trudeau’s First Amendment rights and is part of an appropriate equitable remedy in this case.”⁵⁹ The judge pointed out that performance bonds were previously used in cases involving FTC actions against weight-loss product promoters⁶⁰ and a telemarketing college-scholarship search service.⁶¹ The only legal bone Gettleman threw to Kevin Trudeau was setting the bond at \$2 million instead of the \$10 million sum requested by the FTC.⁶² He added that the bond:

[S]hall be deemed continuous and remain in full force and effect so long as, and for at least five (5) years after: (a) Defendant Trudeau produces, disseminates, makes or assists others in making any such representation in an infomercial for any book, newsletter, or other informational publication; or (b) any infomercial containing any such representation is aired or played on any television or radio media (including but limited to network television, cable television, radio, and television or radio content that is disseminated on the Internet).⁶³

Kevin Trudeau, as noted earlier, argued to the Seventh Circuit that the imposition of the bond violated his First Amendment right of free speech.⁶⁴ The appellate court initially held that any First Amendment issues were decided under the test created by the U.S. Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*⁶⁵ for evaluating restrictions imposed on commercial speech.⁶⁶ *Central Hudson* established a multi-part test under which truthful advertising for lawful goods and activi-

⁵⁹ *Id.* at 720.

⁶⁰ See *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1277 (S.D. Fla. 1999) (requiring one defendant to “post a performance bond in the amount of \$5 million before engaging, directly or indirectly, in any business related to weight-loss products or services specifically, or in marketing of any product or services generally, anywhere in the United States,” and another defendant in the same case to “post a performance bond in the amount of \$1 million before engaging, directly or indirectly, in any business related to weight-loss products or services specifically, or in marketing of any product or services generally, anywhere in the United States”).

⁶¹ *FTC v. Career Assistance Planning, Inc.*, 1997 U.S. Dist. LEXIS 17191, at *18–19 (N.D. Ga. Sept. 19, 1997) (requiring the defendants to post performance bonds in the amount of \$6 million before they could engage in future telemarketing).

⁶² *FTC v. Trudeau*, 708 F. Supp. 2d 711, 724 (N.D. Ill. 2010).

⁶³ *Id.* at 724–25.

⁶⁴ See *supra* notes 7–8 and accompanying text.

⁶⁵ 447 U.S. 557 (1980).

⁶⁶ *FTC v. Trudeau*, 662 F.3d 947, 953 (7th Cir. 2011).

ties can only be regulated if the government proves it has a substantial interest that is directly advanced by a narrowly tailored regulation.⁶⁷ The high court in *Central Hudson* was explicit that speech relating to unlawful goods and activities or that is misleading receives no First Amendment protection.⁶⁸

This test, as Professor Michael Hoefges observes, “remains today as the means by which commercial speech regulations are tested for constitutionality under the First Amendment,”⁶⁹ despite the fact that it represents “a controversial form of intermediate scrutiny.”⁷⁰ Jennifer Pomeranz, director of legal initiatives at Yale University’s Rudd Center for Food Policy & Obesity, suggests that “the intermediate nature of the test reflects the subordinate position that commercial speech holds under the First Amendment.”⁷¹

The Seventh Circuit’s decision to use the *Central Hudson* test to measure the validity of the performance bond imposed on Kevin Trudeau is therefore crucial because it greatly enhanced the likelihood the decision would be upheld. Because Kevin Trudeau’s speech activity—namely, the production and broadcast of infomercials—amounts to advertising, it only receives a limited, intermediate level of protection under the First Amendment⁷² and can thus be regulated more easily under *Central Hudson*⁷³ than most content-based restrictions, which are subject to the more rigorous⁷⁴

⁶⁷ *Central Hudson*, 447 U.S. at 564–66.

⁶⁸ *Id.* at 566 (opining that “[a]t the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading”).

⁶⁹ R. Michael Hoefges, *Regulating Professional Services Advertising: Current Constitutional Parameters and Issues Under the First Amendment Commercial Speech Doctrine*, 24 CARDOZO ARTS & ENT. L.J. 953, 968 (2007).

⁷⁰ *Id.* at 956.

⁷¹ Jennifer L. Pomeranz, *Compelled Speech Under the Commercial Speech Doctrine: The Case of Menu Label Laws*, 12 J. HEALTH CARE L. & POL’Y 159, 170–71 (2009).

⁷² See Tamara R. Piety, *Against Freedom Of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2586 (2008) (observing that the commercial speech doctrine extends only “a limited, intermediate level of protection for commercial speech”).

⁷³ *Contra* David C. Vladeck, *Lessons from a Story Untold: Nike v. Kasky Reconsidered*, 54 CASE W. RES. 1049, 1059 (2004) (asserting that “[t]he *Central Hudson* test the Court now employs is a demanding one—a standard so rigorous that it results in the virtually automatic invalidation of laws restraining truthful commercial speech”).

⁷⁴ *Contra* Matthew D. Bunker et al., *Strict in Theory, But Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL’Y 349, 377

strict scrutiny standard of review.⁷⁵ Strict scrutiny requires the government to prove that it has a compelling interest—not merely a substantial one⁷⁶—to justify regulating speech⁷⁷ and that the means of regulation are the least restrictive way of serving that compelling interest.⁷⁸

Applying the *Central Hudson* test, the Seventh Circuit held—without any analysis and citing no precedent—that protection of consumers constitutes a substantial government interest, stating only that this prong of the test was “obviously met.”⁷⁹ The appellate court then concluded, within the space of the same paragraph, that this consumer-protection interest was directly and materially advanced by the performance bond in two ways, opining that “[i]t makes it more likely that consumers will be compensated for future violations and, more importantly, it makes it less likely that there will be future violations because Trudeau will face a considerable financial loss if he is involved in a deceptive infomercial.”⁸⁰ In other words, the ap-

(2011) (arguing that the strict scrutiny standard in First Amendment jurisprudence “is arguably a weaker judicial tool today for measuring the constitutionality of laws targeting speech than it was in the past. Although still strongly protective of expression, there is at least some evidence that the test lacks the rigor for which it once was noted”).

⁷⁵ Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 444 (1996) (observing that “in most contexts, a strict scrutiny standard applies to content-based action of all kinds”).

⁷⁶ See Matthew D. Bunker, *Adventures in the Copyright Zone: The Puzzling Absence of Independent First Amendment Defenses in Contemporary Copyright Disputes*, 14 COMM. L. & POL’Y 273, 293 (2009) (observing that “[i]n intermediate scrutiny, government need not demonstrate a compelling interest – only an ‘important’ or ‘substantial’ interest, which makes the government’s justification for its regulation significantly less taxing”).

⁷⁷ This step involves “a normative judgment about the ends: Is the interest important enough to justify a speech restriction?” Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2418 (1996).

⁷⁸ See Tom W. Bell, *Free Speech, Strict Scrutiny, and Self-Help: How Technology Upgrades Constitutional Jurisprudence*, 87 MINN. L. REV. 743, 745 (2003) (writing that “under the guise of strict scrutiny, the Supreme Court has interpreted the First Amendment to require that state actors imposing a content-based restriction on speech prove that the restriction (1) advances a compelling government interest, and (2) is narrowly tailored to achieve that end,” and adding that “[t]he Court includes under the latter prong an inquiry into whether the state action in question offers the least restrictive means of achieving the state’s allegedly compelling interest”).

⁷⁹ *FTC v. Trudeau*, 662 F.3d 947, 953 (7th Cir. 2011).

⁸⁰ *Id.*

pellate court recognized the financial incentivization that performance bonds carry for deterring “bad” speech and producing “good” speech.

The Seventh Circuit then turned to the final aspect of the *Central Hudson* test—the narrow tailoring prong.⁸¹ This was the only part of the test on which the appellate court lingered in its analysis before ultimately finding the bond was constitutional. It concluded as such for three reasons. First, the appellate court emphasized that the bond only applied to one narrow category of speech—infomercials—in which Trudeau might engage. It wrote that the bond:

[D]oes not limit Trudeau as an author; it does not curtail Trudeau’s attempt to pitch products in any print medium; it does not even apply if Trudeau makes a TV or radio ad under two minutes. Its application targets only the commercial conduct that has caused such tremendous consumer harm in the past—infomercials.⁸²

Put differently, there were ample alternative avenues and media of speech in which Trudeau could freely engage without needing to post a bond first.

Second, it found that the amount of the bond was reasonable. In particular, it noted that Judge Gettleman “took seriously Trudeau’s claim that it is beyond what he can afford by allowing him to file an audited financial statement and prove as much in a hearing.”⁸³

Third and finally, it determined the bond was “proportional to the amount of harm Trudeau caused by previous deceptive infomercials”⁸⁴ and, in fact, was actually low based upon the past damages to consumers Trudeau had caused.

The Seventh Circuit never considered the possibility that a performance bond imposed on a past bad speaker constitutes a presumptively unconstitutional prior restraint on expression,⁸⁵ a possibility explored later in this Article.⁸⁶ Furthermore, because it failed to apply strict scrutiny, the appellate court also never had to consider whether protecting consumers from the mere possibility—not a certainty—that Trudeau might produce false and misleading infomercials in the future constitutes a compelling interest.⁸⁷ In

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 953–54.

⁸⁴ *Id.* at 954.

⁸⁵ The phrase “prior restraint” is absent from the Seventh Circuit’s opinion. *FTC v. Trudeau*, 662 F.3d 947, 953 (7th Cir. 2011).

⁸⁶ See *infra* Part II and accompanying text.

⁸⁷ Speculation about the possible dangers or harms caused by speech that has yet to occur seems to be too tenuous of a relationship upon which to impose a monetary

addition, it did not examine whether a performance bond is the least restrictive method of serving this alleged interest or whether there are alternative, less restrictive ways of facilitating speech.

In the author's opinion, it comes as little surprise that the appellate court's analysis of Judge Gettleman's performance bond imposition as a coercive form of civil contempt was somewhat cursory. Attorney Lawrence N. Gray asserted in a 1998 law journal article that "[w]ith rare exception, appellate contempt law decisions are of extraordinarily poor quality. Bearing the marks of hurried carelessness and shockingly poor judgment, these decisions seem to mix and match truth with falsity and inaccurately cite or conveniently ignore precedent, resulting in a virtual jurisprudence by nomenclature."⁸⁸ While this characterization seems slightly over-the-top, it nonetheless indicates that perhaps appellate court jurists are disinclined to interfere extensively with the broad-based contempt power actions of their lower court brethren.⁸⁹

The bottom line is that the appellate court in *Trudeau* failed to explore the larger and more troubling First Amendment issues surrounding the imposition of performance bonds on past bad speakers. Part II of this article begins to undertake such an examination.

II. SPEAKER EQUALITY, PRIOR RESTRAINTS & PERFORMANCE BONDS: THE CITIZENS UNITED PERSPECTIVE AND BEYOND

In a 2003 law journal article examining the nexus between the First Amendment freedom of speech and the Fourteenth Amendment Equal Protection Clause, Professor Daniel P. Tokaji coined the term "First Amendment Equal Protection" to represent "the democratic ideal that all citizens should have an equal opportunity to participate in public discourse."⁹⁰ Per-

burden, especially because the performance bond is required on all future speech, whether it is lawful or not. *Cf.* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002) (observing that "the Government may not suppress lawful speech as the means to suppress unlawful speech" and stressing that the notion that "protected speech may be banned as a means to ban unprotected speech" is one that "turns the First Amendment upside down").

⁸⁸ Lawrence N. Gray, *Criminal and Civil Contempt: Some Sense of a Hodgepodge*, 72 ST. JOHN'S L. REV. 337, 337-38 (1998).

⁸⁹ This is the case because "an appellate court reviews contempt orders for an abuse of discretion. The competency of the trial court's underlying findings will be reviewed under the clearly erroneous standard." Joel M. Androphy & Keith A. Byers, *Federal Contempt of Court*, 61 TEX. B.J. 16, 27 (1998).

⁹⁰ Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2410 (2003).

formance bonds, however, treat speakers unequally based upon their previous speech and thus conflict with this notion. This inequality, as the Supreme Court recently observed in *Citizens United v. Federal Election Commission*, is problematic.

Speech restrictions based on the identity of the speaker are all too often simply a means to control content,” opined Justice Anthony M. Kennedy in 2010 for a majority of the Supreme Court in *Citizens United*.⁹¹ He added that “the Government may commit a constitutional wrong when by law it identifies certain preferred speakers,”⁹² even emphasizing that “[t]he First Amendment protects speech and speaker, and the ideas that flow from each.”⁹³

Such robust language regarding equality of speaker status seems to militate strongly against imposing performance bonds on individuals (or on corporate entities or unions, in light of *Citizens United*) based upon their negative status of having previously engaged in unlawful or punishable expression. Cases like *Trudeau* treat differently, in dichotomized fashion, past “bad speakers” from “good speakers” (those who have not been adjudicated to have engaged in unlawful or otherwise harmful speech in the past). Put differently, performance bonds deployed in cases like *Trudeau* apply only to speakers of prior deception, not to those who have yet to engage in illicit speech. The inequality with performance bonds thus may be expressed, formulaically, as: *Past Bad Speakers ? Past Good Speakers*.

Yet language in *Citizens United* suggests that equality of speaker status may only exist when the government treats speakers differently in the realm of political expression. As Justice Kennedy wrote, “[w]e find no basis for the proposition that, *in the context of political speech*, the Government may impose restrictions on certain disfavored speakers.”⁹⁴ Of course, as the Seventh Circuit observed, *Trudeau* did not engage in political speech but rather, in commercial speech.⁹⁵

The relevance of *Citizens United* on the issue of imposing performance bonds on past bad speakers, however, stretches beyond the question of speaker equality. In particular, *Citizens United* lays the groundwork for making the argument that performance bonds should be treated as prior restraints. In particular, Justice Kennedy expressed a willingness to interpret broadly the meaning of prior restraints in First Amendment jurispru-

⁹¹ *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* (emphasis added).

⁹⁵ *Supra* Part I.

dence. Although acknowledging that the Federal Election Commission's "regulatory scheme may not be a prior restraint on speech in the strict sense of that term,"⁹⁶ Justice Kennedy determined that the "onerous restrictions . . . function as the *equivalent of prior restraint* by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit."⁹⁷

In other words, even if one determines that performance bonds imposed on past bad speakers are not technically prior restraints on speech, they nonetheless may be tantamount to them and, in turn, treated as their equivalent by the judiciary. In fact, Justice Kennedy made it clear nearly twenty years ago in *Alexander v. United States*⁹⁸ that First Amendment jurisprudence should not be bound to a rigid, categorical approach between prior restraints and subsequent punishments. *Alexander* involved the forfeiture of the expressive-material assets (namely, sexually-themed magazines and movies) of an adult bookstore and theatre owner who was convicted of violating the Racketeer Influenced and Corrupt Organizations Act.⁹⁹ The forfeited assets "were found to be related to his previous racketeering violations,"¹⁰⁰ and the *Alexander* majority determined that their forfeiture:

imposes no legal impediment to—*no prior restraint* on—petitioner's ability to engage in any expressive activity he chooses. He is perfectly free to open an adult bookstore or otherwise engage in the production and distribution of erotic materials; he just cannot finance these enterprises with assets derived from his prior racketeering offenses.¹⁰¹

Dissenting from the view that the forfeiture of speech assets did not constitute a prior restraint, Justice Kennedy reasoned that although "[o]ur cases do recognize a distinction between prior restraints and subsequent punishments,"¹⁰² this "distinction is neither so rigid nor so precise that it can bear the weight the Court places upon it to sustain the destruction of a speech business and its inventory as a punishment for past expression."¹⁰³ Importantly, Kennedy added, "the term 'prior restraint' is not self-defining. One

⁹⁶ *Citizens United*, 130 S. Ct. at 895-96.

⁹⁷ *Id.* at 896 (emphasis added).

⁹⁸ 509 U.S. 544 (1993).

⁹⁹ *Id.* at 546 (setting forth the relevant facts of the case).

¹⁰⁰ *Id.* at 551.

¹⁰¹ *Id.* (emphasis added).

¹⁰² *Id.* at 566 (Kennedy, J., dissenting).

¹⁰³ *Id.*

problem, of course, is that “some governmental actions may have the characteristics both of punishment and prior restraint.”¹⁰⁴ He emphasized that they may be intertwined, opining that “a prior restraint and a subsequent punishment may occur together.”¹⁰⁵

This, arguably, is exactly the case with performance bonds when they are imposed on past bad speakers as a government-mandated condition precedent for engaging in future speech. First, they represent subsequent punishments to the extent they are imposed only on an individual subsequent to his or her prior engagement in bad speech. The FTC, for instance, would not impose a performance bond on a person who never previously has made an infomercial. It would only impose such a surety on those who have made misleading ones in the past.

On the other hand, performance bonds also constitute prior restraints because the government—a judge—requires a speaker first to post what is similar to a refundable user fee before he can speak.¹⁰⁶ An apt analogy here is to the security fees that public universities today impose on controversial speakers in order to cover the costs of heightened security.¹⁰⁷ Likewise, the performance bond is an attempt to secure a safe and secure marketplace of ideas—one less likely to include misleading information because the potential loss of the bond incentivizes the production of lawful expression. The next part of the article explores further the relationship between performance bonds and the marketplace of ideas.

III. PERFORMANCE BONDS AND THE MARKETPLACE OF IDEAS: HOW TO DRIVE FALSEHOOD FROM THE FIELD?

Dissenting nearly 100 years ago in *Abrams v. United States*,¹⁰⁸ Justice Oliver Wendell Holmes, Jr. famously reasoned that:

[T]he ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted

¹⁰⁴ *Id.* at 567 (emphasis added).

¹⁰⁵ *Id.*

¹⁰⁶ See generally Clayton P. Gillette & Thomas D. Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U. L. REV. 795 (1987) (providing an excellent overview of government-imposed user fees).

¹⁰⁷ See Erica Goldberg, *Must Universities “Subsidize” Controversial Ideas?: Allocating Security Fees When Student Groups Host Divisive Speakers*, 21 GEO. MASON U. C.R. L.J. 349 (2011) (providing a current and comprehensive examination of the constitutionality of security fees on college campuses).

¹⁰⁸ 250 U.S. 616 (1919).

in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.¹⁰⁹

Holmes' economic metaphor for a free trade in views and opinions today is known as the marketplace of ideas, and it is linked squarely with much of modern free speech theory in the United States.¹¹⁰ Two of the core tenets of the marketplace theory, as Harvard Berkman Center for Internet and Society fellow Derek Bambauer observes, are that government regulation "is unnecessary, and undesirable"¹¹¹ and that "governmental limits on communication are inherently suspect because they restrict the flow of competitive products into the marketplace and undercut valuable self-expression."¹¹²

What is perhaps most striking about the notion of a government entity – in this case, the federal judiciary – imposing a performance-bond requirement on speakers of prior falsehoods is that such a mandate constitutes a tacit admission that the marketplace of ideas metaphor is fundamentally flawed. In particular, the imposition of a performance bond to try to ensure that only truthful speech is uttered by a previously duplicitous communicator amounts to a recognition that: 1) truth will not always drive falsehood from the field; and 2) some consumers simply lack the intellectual capacity to rationally determine for themselves, after weighing competing claims by the likes of Kevin Trudeau and others promoting similar products, programs or services, which ideas are true and which ideas are false. Some people, in other words, will always fall for falsity.

Put more bluntly, the FTC wants to drive what it asserts are Kevin Trudeau's falsehoods from the field of infomercials. Why? Because, in the FTC's view, consumers keep falling for falsity and, therefore, a government-imposed incentive on speakers like Trudeau is necessary to purify the speech marketplace and to help consumers. Performance bonds thus smack of the

¹⁰⁹ *Id.* at 630 (Holmes, J., dissenting).

¹¹⁰ See Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 823–25 (2008) (observing that Justice Holmes' passage in *Abrams* "conceptualized the purpose of free speech so powerfully that he revolutionized not just First Amendment doctrine, but popular and academic understandings of free speech," and that "[n]ever before or since has a Justice conceived a metaphor that has done so much to change the way that courts, lawyers, and the public understand an entire area of constitutional law").

¹¹¹ Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 101, 106 (2006).

¹¹² *Id.*

brand of governmental paternalism¹¹³ that once justified so much of commercial speech regulation.¹¹⁴ Yet they are now being used in cases like *Trudeau* at a time when, as Furman University President Rodney Smolla observes, there is “growing hostility toward paternalism in commercial speech regulation.”¹¹⁵ It is a sentiment seconded by University of Florida Professor Lyrissa Lidsky, who observed in 2010 that “the modern trend, even in commercial speech cases, is to give more credit to the targets of commercial speech.”¹¹⁶

Perhaps an appropriate variable or concept here to help to understand this situation is *trust*. In particular, performance bonds are imposed on a speaker like Kevin Trudeau because:

- *Trudeau cannot be trusted* to produce truthful and non-misleading infomercials in the future;
- *consumers cannot be trusted* to see through, as it were, any false and misleading infomercials that Trudeau might indeed produce in the future; and
- *the marketplace of ideas cannot be trusted* to adequately drive false infomercials from the field of speech.

That some consumers are duped again and again is not surprising to Bambauer, who asserts that:

The weakness of the marketplace of ideas is the consumers who shop within it. Our perceptual filters, cognitive biases, and heuristics mean

¹¹³ Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 650 (2004) (defining paternalism in the free-speech context as “a restriction on otherwise protected speech justified by the government’s belief that speaking or receiving the information in the speech is not in citizens’ own best interests”). See generally Matthew D. Bunker & Clay Calvert, *Contrasting Concurrences of Clarence Thomas: Deploying Originalism and Paternalism in Commercial and Student Speech Cases*, 26 GA. ST. U. L. REV. 321, 335–41 (2010) (providing a brief overview of paternalism in First Amendment jurisprudence).

¹¹⁴ Professor Lyrissa Lidsky explains:

In the realm of commercial and other non-core speech . . . the Court sometimes (though not consistently) applies a credulous consumer model of the implied audience. This alternate model, which posits that many audience members are naive and easily misled, provides justification for paternalistic governmental intervention in the realm of commercial speech.

Lyrissa Barnett Lidsky, *Nobody’s Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 803–04 (2010).

¹¹⁵ Rodney A. Smolla, *Free the Fortune 500! The Debate Over Corporate Speech and the First Amendment*, 54 CASE W. RES. L. REV. 1277, 1292 (2004).

¹¹⁶ Lidsky, *supra* note 114, at 823.

that we do not consistently discover truth and discard false information. Therefore, we should discard the theory as an approach to communications regulation and adopt a more realistic approach that expressly considers why we value free discourse.¹¹⁷

Performance bonds, however, do not represent complete abandonment of the marketplace of ideas metaphor but, rather, constitute a limited measure of governmental interventionism in the speech marketplace. In particular, they affect and limit access to the marketplace of ideas: in order to gain entry to the marketplace of TV infomercials, Kevin Trudeau must pony up cash, in the form of a performance bond. There is, in other words, a financial barrier imposed on some speakers – namely, those who have been adjudicated to have engaged in some form of undesirable, unlawful speech in the past – but not on others.

Performance bonds thus seem somewhat counterintuitive to free speech principles, at least to the extent they promote *inequality of access* to the marketplace of ideas. The usual concern among academics and government entities is promoting equality of access to speech marketplaces, not hindering it.¹¹⁸ As the U.S. Supreme Court observed in *Red Lion Broadcasting Co. v. Federal Communications Commission*¹¹⁹ in upholding the Fairness Doctrine, “[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.”¹²⁰

But when it comes to performance bonds, the hindrance to access can be viewed both as a subsequent punishment for past bad behavior in the speech marketplace¹²¹ and as an incentive for providing better speech in the future. In line with *Red Lion's* fundamental premise in that “it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount,”¹²² performance bonds allow the speaker’s First Amendment rights – Kevin Trudeau’s rights – to be curtailed via a financial entry fee in order to supposedly benefit the audience’s right to receive truthful infomercials.

¹¹⁷ Bambauer, *supra* note 111, at 132–33.

¹¹⁸ See generally Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 49–71 (1984) (providing an overview of access reform notions in relationship to the marketplace of ideas).

¹¹⁹ 395 U.S. 367 (1969).

¹²⁰ *Id.* at 390.

¹²¹ See *supra* Part II (describing how performance bonds blur the distinction between prior restraints on speech and subsequent punishments for previous unlawful or otherwise undesirable expression).

¹²² *Red Lion*, 395 U.S. at 390.

IV. PERFORMANCE BONDS AND THE PARADE PERMIT ANALOGY: A DIFFERENCE WITHOUT IMPORTANCE?

Requiring a speaker to first post a performance bond before he or she can speak is, in some ways, analogous to permit schemes that mandate a group to first procure and pay for a government permit before it can engage in an activity such as a parade or a march. As Nathan Kellum, senior counsel for the Alliance Defense Fund, recently wrote, “[p]ermit schemes represent the most egregious, and perhaps the most popular, version of a prior restraint, whereby speakers are required to secure governmental permission in order to speak.”¹²³

Twenty years ago in *Forsyth County v. Nationalist Movement*,¹²⁴ the U.S. Supreme Court addressed the question of whether a parade ordinance in Forsyth County, Georgia that allowed local officials to vary the fee for assembling or parading to reflect the estimated cost of maintaining public order violated the First Amendment.¹²⁵ The Court initially made it clear that requiring a fee before one could speak constitutes a prior restraint on speech.¹²⁶ This observation solidifies the argument made in Part II that performance bonds on past bad speakers constitute prior restraints.¹²⁷

Such fees, however, may be permissible “in order to regulate competing uses of public forums”¹²⁸ if several requirements are satisfied. First, the regulation must limit the discretion of the government official charged with enforcing it by articulating narrowly drawn and definite standards.¹²⁹ Second, the amount of the fee cannot vary or shift based upon the content of the permit-seeker’s speech or message.¹³⁰ Third, if the regulation is content-neutral, then, in accord with intermediate scrutiny, it “must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication.”¹³¹

¹²³ Nathan W. Kellum, *Permit Schemes: Under Current Jurisprudence, What Permits are Permitted?*, 56 *DRAKE L. REV.* 381, 388 (2008).

¹²⁴ 505 U.S. 123 (1992).

¹²⁵ *Id.* at 124.

¹²⁶ *Id.* at 130.

¹²⁷ See *supra* notes 96–107 and accompanying text.

¹²⁸ *Forsyth County*, 505 U.S. at 130.

¹²⁹ *Id.* at 130–32.

¹³⁰ See *id.* at 130 (opining that “any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message”).

¹³¹ *Id.*

What does all of this mean? As encapsulated by the Alliance Defense Fund's Nathan Kellum:

The Supreme Court recognizes that regulatory fees may be assessed as part of a system of prior restraint, but only if the system is content-neutral and serves a legitimate state interest. Such interests may include the protection of public safety and the maintenance of order. However, as with any system of prior restraint, the assessment of fees must be directed by definite, objective, and narrow standards.¹³²

Applying these standards, the Supreme Court struck down Forsyth County's variable user fee system because: 1) it provided too much discretion to the government official administering it such that the "decision how much to charge for police protection or administrative time – or even whether to charge at all – is left to the whim of the administrator;"¹³³ and 2) it was a content-based system that allowed an audience's potentially hostile reaction to dictate the financial burden imposed on the speaker.¹³⁴ As this second reason intimates, the case represents what Professor Erica Goldberg dubs a classic example of a heckler's veto decision under which courts "require the government to protect unpopular speakers from would-be citizen censors."¹³⁵ *Forsyth County* thus stands, in part, for the principle that "the burden of protecting unpopular speakers must rest with the whole community; otherwise, hecklers could make it financially unfeasible for those with unpopular views to assemble and demonstrate."¹³⁶

At minimum, *Forsyth County* suggests by analogy that judges who impose performance bonds must follow clear, narrow and definite guidelines when determining the amount. Although the bond imposed in *Trudeau* was under a judge's civil contempt power, that power is not absolute and should, in the context of performance bonds as a condition precedent for future speech, be confined by clearly articulated principles and factors that a judge must weigh and balance.

¹³² Kellum, *supra* note 123, at 408–09.

¹³³ *Forsyth County*, 505 U.S. at 133.

¹³⁴ *Id.* at 134–35. See Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 948 (1994) (observing that "[t]he specific licensing scheme at issue was invalidated because it conferred too much discretion on administrators in fixing the amount of the fee, and it impermissibly allowed applicants expressing unpopular messages to be charged higher fees because of the added costs of maintaining order at their events").

¹³⁵ Goldberg, *supra* note 107, at 358.

¹³⁶ *Id.* at 361.

Of course, there is a fundamental difference between imposing strict control over the amount of *administrative discretion* in considering permit and user fees in *Forsyth County* and imposing strict control over the amount of *judicial discretion* a judge has during civil contempt proceedings in *Trudeau*. The problem is, as attorney Jennifer Fleischer writes, that “[c]ivil contempt gives judges almost unlimited discretion to impose severe sanctions but provides a contemnor seemingly inadequate safeguards.”¹³⁷ As Professor Elizabeth Patterson points out, for many centuries, “courts have claimed inherent authority to protect the integrity of their proceedings and ensure compliance with their lawful orders by holding offending parties in contempt of court.”¹³⁸ Professors Stewart and Fargo add that “the limits of judicial power in regard to contempt and other discretionary decisions are not clearly defined.”¹³⁹ Even in the face of First Amendment concerns, journalists have been jailed as a coercive form of civil contempt.¹⁴⁰

In addition to the distinction between administrative discretion in the parade permit scenario and the judicial contempt discretion in the performance bond situation, performance bonds imposed on past bad speakers are inherently content-based measures and thus should always be subject to strict scrutiny, rather than the intermediate scrutiny to which content-neutral parade permits are subjected. This is the case for several reasons.

First, in Kevin Trudeau’s situation, the subject matter regulated is infomercials for books, newsletters and other information touting products, programs and services.¹⁴¹ Second, performance bonds are content-based measures because their initial imposition is triggered only by a specific type

¹³⁷ Jennifer Fleischer, *In Defense of Civil Contempt Sanctions*, 36 COLUM. J.L. & SOC. PROBS. 35, 35 (2002).

¹³⁸ Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor’s Prison*, 18 CORNELL J. L. & PUB. POL’Y 95, 101 (2008).

¹³⁹ Stewart & Fargo, *supra* note 8, at 456.

¹⁴⁰ As recently encapsulated by attorney Robert Held:
Judith Miller . . . was jailed while employed by the *New York Times* for refusing to reveal information about a leak from Vice President Cheney’s Chief of Staff concerning CIA operative Valerie Plame. Ms. Miller had been found in civil contempt but “held the keys to the jail” because when she determined to comply with the subpoena (her source released her from her promise of confidentiality), she was freed. The Special Prosecutor had threatened criminal contempt (in addition to her civil confinement) in an effort to punish Ms. Miller for her refusal to comply with the subpoena. Robert Held, *The Court’s Highest Power: Contempt*, 24 CHI. BAR ASS’N REC. 36, 37 (2010).

¹⁴¹ See *supra* notes 63–64 and accompanying text.

of content that the speaker has engaged in during the past (in Trudeau's case, false and misleading infomercials).

Finally, a performance bond is inherently content-based precisely because it is intended to reward a speaker like Kevin Trudeau for engaging in particular type of content. Specifically, if Trudeau produces only truthful and non-misleading infomercials, he is rewarded over time because: 1) he does not forfeit the bond; and 2) the judge's order imposing the bond sunsets and he recoups the bond. Conversely, if Trudeau's future infomercial content is false or misleading, he is penalized and pays the already-established price of the bond. In brief, the price paid – or not paid – hinges on the future content that Trudeau transmits on the infomercial medium.

With this comparison between performance bonds imposed on past bad speakers and permit schemes in parade and march scenarios in mind, the next part of the article teases out the possibility of courts and government bodies mandating performance bonds in situations beyond those of FTC actions against serial deceivers.

V. ARE PERFORMANCE BONDS ON PAST BAD SPEAKERS VALID OUTSIDE THE REALM OF COMMERCIAL SPEECH?

If the Seventh Circuit gives its blessing to the Federal Trade Commission's request to impose performance bonds on individuals who repeatedly violate its rules on deceptive marketing, it is possible to imagine another federal administrative agency in the speech-regulation business—the Federal Communications Commission—mandating that the operators of television stations that repeatedly violate its rules on either indecency¹⁴² or children's educational content¹⁴³ post performance bonds to maintain their licenses. Currently, the FCC may revoke a station's license, impose a monetary forfeiture or issue a warning for indecency violations.¹⁴⁴ The maximum forfeiture today for the broadcast of obscenity, indecency or profanity is

¹⁴² See *supra* note 33 and accompanying text (addressing the FCC's regulation of indecency).

¹⁴³ See Guide: Children's Educational Television, Federal Communications Commission, <http://www.fcc.gov/guides/childrens-educational-television> (last visited Apr. 9, 2012) (setting forth the FCC's rules and guidelines, adopted pursuant to the Children's Television Act of 1990, regarding mandatory educational programming for children and limiting the amount of commercial time during such programming).

¹⁴⁴ See Indecency and Obscenity, Federal Communications Commission, <http://www.fcc.gov/topic/indecency-and-obscenity> (last visited Apr. 9, 2012) (providing that "[i]n response to a complaint, the FCC may revoke a station license, impose a

“\$325,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$3,000,000 for any single act or failure to act.”¹⁴⁵

The imposition of a purgeable performance bond on a TV station that had been fined in the past for indecency violations would provide it with a financial incentive not to do so again, and, instead, to better serve the public interest, convenience, or necessity. The bond could be set at the same \$325,000 figure as a maximum monetary forfeiture, for example, and last for a period of eight years (the length of time that a broadcast license is valid).¹⁴⁶

Such a bond, of course, would be subject to strict scrutiny in this scenario, regardless of whether it is considered a prior restraint or a subsequent punishment. Why? Because indecency constitutes a specific type of content that not only triggers the initial imposition of the performance bond, but also its potential forfeiture. Assuming that shielding minors from indecent broadcast content is a compelling interest, the government nonetheless would need to prove that coercing non-indecency content through the financial incentivization mechanism of a performance bond is the least restrictive means of serving that interest. Given the current turmoil surrounding the FCC’s current indecency enforcement regime,¹⁴⁷ is far from clear the government could clear this least-restrictive-means hurdle.

Another potential scenario involving a disfavored form of expression in which a court could conceivably order a performance bond is defamation, in which a defendant has repeatedly defamed the same plaintiff over the course of several years, with the plaintiff winning libel lawsuits in each instance. Would a performance bond, imposed on the serial defamer as coercive measure to chill future libelous utterances against the plaintiff, pass constitutional muster?

monetary forfeiture or issue a warning if a station airs obscene, indecent or profane material”).

¹⁴⁵ 47 U.S.C.A. § 503 (2010).

¹⁴⁶ See 47 U.S.C. § 307(c)(1) (2011) (providing, in relevant part, that “[e]ach license granted for the operation of a broadcasting station shall be for a term of not to exceed 8 years” and that “a renewal of such license may be granted from time to time for a term of not to exceed 8 years from the date of expiration of the preceding license, if the Commission finds that public interest, convenience, and necessity would be served thereby”).

¹⁴⁷ The U.S. Supreme Court in January 2012 heard oral argument in the case of *FCC v. Fox Television Stations, Inc.*, 131 S. Ct. 3065 (2011). The case pivots on the issue of “[w]hether the Federal Communications Commission’s current indecency-enforcement regime violates the First or Fifth Amendment to the United States Constitution.” *Id.* at 3065–66.

The initial answer would appear to be no, especially if, as argued earlier,¹⁴⁸ performance bonds imposed by government entities — courts and/or administrative agencies — constitute prior restraints. De Paul University Professor Stephen A. Siegel observed in 2008 that “[a] half century ago enjoining defamatory speech was impermissible.”¹⁴⁹ That anti-injunction sentiment, however, is changing, with Professor Siegel noting that “[o]ver the past thirty years, several state courts of last resort have upheld injunctions restraining defamatory speech.”¹⁵⁰ Dean Erwin Chemerinsky concurs, observing in 2007 that while “the long-standing rule [is] that equity will not enjoin defamation and that such injunctions are prior restraints that inherently violate the First Amendment,”¹⁵¹ today “an increasing number of courts have imposed injunctions in defamation actions.”¹⁵²

In 2007, the Supreme Court of California upheld an injunction in a defamation case, but that injunction was limited to repeating speech that previously had been adjudicated as defamatory.¹⁵³ The California high courts held that “following a trial at which it is determined that the defendant defamed the plaintiff, the court may issue an injunction prohibiting the defendant from repeating the statements determined to be defamatory.”¹⁵⁴ A performance bond, however, would represent a more scatter-shot approach. Why? Because it could be imposed on a serial defamer to deter *any* future defamatory statements about the plaintiff — even statements that have not previously been adjudicated as defamatory. If performance bonds are akin to prior restraints, then the scope of the speech swept up by the performance bond would need to be much more narrow in order to possibly be constitutional.

Yet another scenario in which one could envision a court imposing a performance bond involves the operator of an adult bookstore who previously has been convicted of selling obscene material. In order to re-open his store, the operator might be forced by a court to post bond that he would relinquish were he to be convicted in the future of selling obscene materials. Certainly obscenity would seem to be equally objectionable to the allegedly

¹⁴⁸ *Supra* Part II.

¹⁴⁹ Stephen A. Siegel, *Injunctions for Defamation, Juries, and the Clarifying Lens of 1868*, 56 BUFF. L. REV. 655, 657 (2008).

¹⁵⁰ *Id.*

¹⁵¹ Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 SYRACUSE L. REV. 157, 173 (2007).

¹⁵² *Id.* at 157–58.

¹⁵³ *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339 (Cal. 2007).

¹⁵⁴ *Id.* at 349.

false and misleading commercial speech trafficked in by Kevin Trudeau. For instance, U.S. Senator Orrin Hatch (R. — Utah) sent a letter signed by forty-two senators to U.S. Attorney General Eric Holder in April 2011 urging “the Department of Justice vigorously to enforce federal obscenity laws against major commercial distributors of hardcore adult pornography.”¹⁵⁵ Hatch added that “we know more than ever how illegal adult obscenity contributes to violence against women, addiction, harm to children, and sex trafficking.”¹⁵⁶ Performance bonds would seem to represent one step in the type of vigorous enforcement efforts called for by Senator Hatch, as they arguably would chill the future dissemination of obscene adult content. The chilling effect would likely be overwhelming, given that an adult bookstore may sell hundreds or even thousands of DVDs. In turn, the possibility that any one of those titles standing alone would be adjudicated obscene and cause the loss of the performance bond might be a risk the owner would not want to take.

Each of the above three scenarios involving the relationship among indecency, defamation, obscenity and performance bonds is hypothetical. They are used here to illustrate the potential scope with which such bonds might be used and, in turn, why the courts must in the future apply analytic rigor when considering their constitutionality.

VI. CONCLUSION

For Kevin Trudeau, free speech today is no longer free. He must, instead, secure his right to speak, within the realm of televised infomercials, by first posting a monetary bond.

Performance bonds, this article has argued, blur the traditional line that separates prior restraints from subsequent punishments in First Amendment jurisprudence.¹⁵⁷ They also represent a form of government intrusion in the marketplace of ideas – a form of interventionism that ostensibly is designed to discourage and dissuade dangerous or otherwise unlawful speech from entering the speech market in the future. It is the threat of financial loss – the forfeiture of the performance bond – that supposedly incentivizes the production of what, in common parlance, might be thought of simply as “good” speech.

¹⁵⁵ Letter from U.S. Senator Orrin Hatch to U.S. Attorney General Eric Holder (Apr. 4, 2011), *available at* http://www.politico.com/static/PPM153_obsc.html.

¹⁵⁶ *Id.*

¹⁵⁷ *Supra* Part II.

The U.S. Supreme Court, however, has yet to consider the constitutionality of performance bonds as a condition precedent imposed on past bad speakers. Even if the bonds are reimbursable based upon good performance and, in turn, even if they do lapse or sunset after a fixed period of years, it now is time for the Court to consider: (1) whether; (2) how much; and (3) under what circumstances, a judge can financially charge a past bad speaker to re-enter an idea marketplace, such as that of infomercials, he previously has sullied and tarnished. In addition, the Court must address another question: how much repetitive and duplicative flouting of the limits of free speech is necessary for an individual to constitute or rise to the level of a past bad speaker upon whom a performance bond can be imposed?

Adding to the jurisprudential mess is the fact that broadcasting – the realm in which Kevin Trudeau’s infomercials traditionally have proliferated and in which the FTC targeted him – traditionally is regulated much more closely by the government than other forms of media.¹⁵⁸ Does this mean, in turn, that performance bonds might be imposed more easily on past bad speakers in the broadcast medium as compared to either the print medium or on the Internet?

Until the Supreme Court resolves all of these constitutional issues, the FTC should, at the very least, articulate and define the precise criteria under which it seeks performance bonds. Lower court judges, in turn, would be wise to consider such requests as prior restraints on speech, especially given pivotal swing Justice Anthony Kennedy’s willingness to expansively interpret that concept,¹⁵⁹ and subject them to a higher standard of review than intermediate scrutiny or the *Central Hudson* test deployed in *Trudeau*.

In particular, prior restraints on speech can only be justified by a government interest of the highest order.¹⁶⁰ It will be recalled that the Seventh Circuit in *Trudeau*, which never even considered whether a performance bond constitutes a prior restraint, only asked if there was a substantial gov-

¹⁵⁸ See generally *Reno v. ACLU*, 521 U.S. 844, 868 (1997) (remarking that “some of our cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers”); *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (observing that “of all forms of communication, it is broadcasting that has received the most limited First Amendment protection”).

¹⁵⁹ See *supra* notes 97–105 and accompanying text (describing Justice Kennedy’s views on prior restraints).

¹⁶⁰ See *People v. Bryant*, 94 P.3d 624, 628 (Colo. 2004) (observing that “to justify a prior restraint, the state must have an interest of the ‘highest order’ it seeks to protect”).

ernment interest.¹⁶¹ Furthermore, as a prior restraint, a performance bond should be narrowly tailored, both in terms of its amount and its duration,¹⁶² and courts must consider whether there are alternative, less speech-restrictive methods of trying to prevent the future “bad speech” than imposing a performance bond.

Another issue here that must be examined in the prior restraint context is the likelihood or certainty that someone like Kevin Trudeau really will engage in future speech that causes harm. In the context of prior restraints imposed on the press, the Supreme Court has noted that they “have imposed this ‘most extraordinary remed[y]’ only where the evil that would result from the reportage is both great and *certain* and cannot be mitigated by less intrusive measures.”¹⁶³ Just what does or should it take then, in terms of evidence and a factual record, for a court like the Seventh Circuit in *Trudeau* to convince itself that it is *certain* that Kevin Trudeau will engage in future deceptive and misleading infomercials unless a performance bond is imposed?

The bottom line is that, when it comes to his First Amendment speech rights, Kevin Trudeau amounts to a second-class citizen in the eyes of the FTC, the Seventh Circuit and District Judge Gettleman. Like a prison inmate who surrenders certain free speech rights that are possessed by the non-incarcerated because of the inmate’s past bad criminal acts,¹⁶⁴ Trudeau sacrifices the right to speak freely on infomercials without first posting a bond because of his past unlawful expression. Similarly, like a libel-proof plaintiff who has sacrificed his reputation by past bad acts of heinous magnitude,¹⁶⁵ Trudeau has lost his reputation – at least, in the eyes of the FTC and the

¹⁶¹ *Supra* note 76 (explaining that intermediate scrutiny requires a determination of whether there is a substantial interest).

¹⁶² *See Bryant*, 94 P.3d at 628 (observing that a prior restraint on speech “must be the narrowest available to protect that interest; and the restraint must be necessary to protect against an evil that is great and certain, would result from the reportage, and cannot be mitigated by less intrusive measures”).

¹⁶³ *CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (emphasis added).

¹⁶⁴ *See Overton v. Bazzetta*, 539 U.S. 126, 131 (2003) (observing that “[m]any of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration.”).

¹⁶⁵ A plaintiff is considered libel proof if his “reputation is already so badly tarnished that he cannot be further injured by allegedly false statements on that subject.” *Lufti v. Spears*, 2010 Cal. App. LEXIS 9310, at *16 (Cal. Ct. App. Nov. 23, 2010). *See, e.g., Carpenter v. King*, 792 F. Supp. 2d 29, 34, n.2 (D.D.C. 2011) (offering a concise and current review of the libel-proof plaintiff doctrine); *Stern v. Cosby*, 645 F. Supp. 2d 258, 270–71 (S.D.N.Y. 2009) (providing a recent review of

judiciary – as a truthful product pitchman and now must pay a price for his future speech that simply cannot be trusted for its veracity.

The Supreme Court, in turn, must now decide whether that price, borne as a performance bond, comports with the free speech guarantee of the First Amendment. If it answers that query in the affirmative, it then must define the circumstances when performance bonds are permissible and the constraints that can be imposed on them. If and when these questions are resolved, the legal system likely will have Kevin Trudeau to thank, after all, for forcing their assessment and evaluation.

the libel-proof plaintiff doctrine and the inapplicability of it to Howard K. Stern in his libel action against journalist-author Rita Cosby and her book publisher).

The Future of Social Media Policy in the NCAA

Vicki Blohm

TABLE OF CONTENTS

I. INTRODUCTION TO SOCIAL MEDIA AND NCAA REGULATIONS	277
II. CURRENT NCAA SOCIAL MEDIA RULES AND REGULATIONS	278
III. RECENT ENFORCEMENT OF NCAA SOCIAL MEDIA RULES	281
IV. SOCIAL MEDIA REGULATIONS AND THE FIRST AMENDMENT	283
V. CURRENT MONITORING OF SOCIAL MEDIA USE	284
VI. PROPOSALS FOR CHANGE IN THE NCAA	288
VII. FUTURE DIRECTIONS FOR NCAA REGULATIONS	292
A. <i>Streamline Recruiting Contact Rules</i>	293
B. <i>Treat All Communications the Same</i>	293
C. <i>Permit Social Media Use by Students</i>	294
D. <i>Do Not Regulate Speech by Unaffiliated Persons</i>	294
E. <i>Formalize Rules Regarding Boosters</i>	295
VIII. CONCLUDING THOUGHTS	295

I. INTRODUCTION TO SOCIAL MEDIA AND NCAA REGULATIONS

The surge in social media use in recent years has forever changed the way in which we communicate with friends, colleagues, and other members of society.¹ As it becomes increasingly easy to instantaneously spread messages amongst large groups of people, any monitoring of that speech is made more difficult. The National Collegiate Athletic Association (NCAA) has long regulated the way in which its member institutions communicate with prospective athletes.² The changes that social media have brought to such communication, however, pose challenges to the NCAA's rules and

¹ Today, Facebook is second only to Google as the most frequently visited website globally. Twitter is the tenth most frequently visited website globally. *See Top Sites: The Top 500 Sites on the Web*, ALEXA, <http://www.alexa.com/topsites> (last visited Mar. 8, 2012).

² The NCAA has been regulating recruiting since the 1950s. *See Taylor Room, The History of College Football Recruiting Cheating—Part 4*, BARKING CARNIVAL (June 9, 2008), <http://barkingcarnival.fantake.com/2008/06/09/the-history-of-college-football-recruiting-cheating-part-4/>.

regulations. The result is confusion amongst member institutions regarding what is expected of them, seemingly harsh or arbitrary punishments imposed by the NCAA, and general outrage by commentators denouncing the status quo.

In addition to the confusion surrounding what is and is not appropriate use of social media under NCAA regulations is the growing concern that such regulations infringe on the First Amendment rights of those choosing to use social media for speech relating to athletics. This concern increases as more people who are not formally associated with the member institutions' athletic departments express opinions on athletic issues. Furthermore, questions of responsibility are raised when a member institution is punished for the actions of a person unaffiliated with its athletic department.

This article will first outline current NCAA rules and regulations regarding social media and contact with prospective student-athletes. It will then discuss examples of recent enforcement of the rules by the NCAA, before turning to a discussion of why the current rules are generally thought to be inadequate. Finally, this article will outline proposals for changes to the rules and suggest a direction for future NCAA social media policy.

II. CURRENT NCAA SOCIAL MEDIA RULES AND REGULATIONS

NCAA rules on the use of social media are only directed at recruiting.³ Thus, no restrictions on social media are currently imposed on contacts between an athlete and an agent, as long as no agreement, oral or written, is made.⁴ Recruiting rules are aimed at limiting intrusion into the lives of high school student-athletes by college coaches.⁵ For example, texting between coaches and prospects was prohibited after student-athletes complained of the cost imposed on them and their families.⁶

The main NCAA rule regarding messages sent to prospective student-athletes through online vehicles falls under the all-encompassing heading, "Electronic Transmission." That rule states: "Electronically transmitted correspondence that may be sent to a prospective student-athlete (or the prospective student-athlete's parents or legal guardians) is limited to elec-

³ See NCAA, 2011-2012 DIVISION I MANUAL.

⁴ Darren Heitner, *NCAA Clarifies Social Networking Rules for Agents*, SPORTS AGENT BLOG (May 27, 2011), <http://www.sportsagentblog.com/2009/05/27/ncaa-clarifies-social-networking-rules-for-agents/>.

⁵ *Recruiting*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/Test/Issues/Recruiting+Overview> (last visited Mar. 8, 2012).

⁶ *Id.*

tronic mail and facsimiles. All other forms of electronically transmitted correspondence (e.g., Instant Messenger, text messaging) are prohibited.⁷ Exceptions allowing all forms of electronically transmitted correspondence are provided following the signing of a National Letter of Intent,⁸ after May 1 of the prospective student-athlete's senior year in high school, provided the institution has received a financial deposit.⁹ Exceptions are also provided for communications that relate solely to an institutional camp or logistical issue.¹⁰

In 2009 the NCAA clarified that "e-mail is not limited to a traditional e-mail service," making it permissible for a member of an institution's athletic staff to send a private message to a prospective student-athlete through Facebook or other social networking websites.¹¹ However, posting on a prospective student-athlete's "wall" is not permitted, and the institution may not publically comment on the prospective athlete's potential contributions to the team or his or her likelihood of enrolling in the institution.¹² The NCAA allows a prospective student-athlete to be a "friend" of an athletic department staff member, but only after the date on which electronic correspondence becomes permissible.¹³ Tweeting is allowed as long as coaches do not directly contact recruits and do not discuss specific recruits, as doing so would otherwise be unacceptable under NCAA rules.¹⁴

Different, more stringent rules currently apply to Division III schools. Unlike in Divisions I and II, the use of social networking sites by athletic staff of Division III schools to contact prospective student-athletes is strictly prohibited.¹⁵ In January 2012, Division III loosened communication rules regarding text messaging, deeming that form of communication now "the

⁷ NCAA, *supra* note 3, § 13.4.1.2

⁸ *Id.* § 13.4.1.2.1

⁹ *Id.*

¹⁰ *Id.* § 13.4.1.2.2

¹¹ *Recruiting—Electronic Transmissions—Social Networking Web Sites (I)*, NCAA EDUC. COLUMN, Oct. 9, 2009 (on file with the author).

¹² *Id.*

¹³ *Id.*

¹⁴ *Social media and recruiting*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/Test/Issues/Recruiting/Social+Media+and+Recruiting> (last visited Mar. 8, 2012).

¹⁵ *Hot Topic—Reminder About Using Social Networking Sites for Recruiting Within Division III (III)*, NCAA EDUC. COLUMN, Mar. 4, 2009 (on file with author).

norm.”¹⁶ In this same legislative session, however, a proposal to deregulate social media was withdrawn after receiving little support.¹⁷ Thus, a coach may not be “friends” with a prospective student-athlete on social media sites unless it can be shown that there is no athletic nexus for the friendship whatsoever.¹⁸ A limited exception to this strict social media policy allows Division III schools to publish general athletics information on social networking websites.¹⁹ The information must be general and not aimed at recruiting activities.²⁰ The information on the website may be posted by a coach, but the coach must not communicate with a prospective athlete through the website.²¹ Rather, the coach may make phone calls or use e-mail to correspond, provided it is within the permissible contact periods.²² Finally, Division III regulations provide for the possibility of a current student-athlete becoming “friends” with a prospective student-athlete, provided that a member of the athletic department has not directed interactions within that “friendship.”²³

The NCAA generally states that “technology can be used so long as it complies with the spirit and, where updated, the letter of already existing guidelines.”²⁴ With respect to Division III schools, however, the NCAA takes the position that, rather than anticipate new forms of communication, it will assume that use of all new technologies is prohibited until new legislation is enacted.²⁵ Moreover, recent enforcement actions raise doubts as to whether the NCAA will continue to comply with its stated position of generally allowing for the increased use and popularity of social media as a means of communication. While purporting to be receptive to such changes, the reality is that NCAA rules are unable to adequately address the

¹⁶ Gary Brown, *Text Messaging Adopted in Division III*, NCAA.ORG (Jan. 14, 2012), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2012/January/Text+messaging+adopted+in+Division+III>.

¹⁷ *Id.*

¹⁸ *See id.*

¹⁹ *Using Social Networking Sites within Division III (III)*, NCAA EDUC. COLUMN, Nov. 24, 2009 (on file with author).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Recruiting*, *supra* note 5.

²⁵ *Recruiting—Definitions and Applications—Electronic Transmissions (III)*, NCAA EDUCATIONAL COLUMN, Jan. 12, 2008 (on file with author).

current situations prospective student-athletes, coaches, and NCAA member institutions face.

III. RECENT ENFORCEMENT OF NCAA SOCIAL MEDIA RULES

Recently, the NCAA has stepped in to try to regulate the use of social media more actively. The University of North Carolina was recently sanctioned by the NCAA for a variety of infractions, including failure to “adequately and consistently monitor social networking activity that visibly illustrated potential amateurism violations.”²⁶ The NCAA defines a “failure-to-monitor” violation as less serious than a “lack-of-institutional-control violation,”²⁷ thereby resulting in less severe punishment for a “secondary” violation.²⁸ However, as discussed above, the NCAA doesn’t have any guidelines relating to social media outside the context of recruiting and says nothing about how a school should keep track of student-athlete use of social networking websites. The NCAA thus imposed sanctions for violating a non-existent rule.²⁹

North Carolina State University was warned of a recruitment rule violation when a freshman created a Facebook group called “John Wall PLEASE come to NC STATE!!!!”³⁰ The NCAA defines recruitment as “any solicitation of prospective student-athletes or their parents by an institutional staff member or by a representative of the institution’s athletic interests for the purpose of securing a prospective student-athlete’s enrollment and ultimate participation in the institution’s intercollegiate athletics program.”³¹ While it seems a stretch to consider a freshman student a “representative of the institution’s athletic interests,” the NCAA was willing to extend the definition due to the public nature of the plea. If such a broad interpretation is maintained, the effect on compliance could be far reaching.

²⁶ Tom Buchheim, *The NCAA Needs Social Media Guidelines*, FOURTH AND 140 (Sept. 22, 2011), <http://fourthand140.com/2011/09/22/the-ncaa-needs-social-media-guidelines/>.

²⁷ *Charging: Frequently Asked Questions*, NCAA.ORG (May 10, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Enforcement/Process/Charging>.

²⁸ *Penalties: Frequently Asked Questions*, NCAA.ORG (May 10, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Enforcement/Process/Penalties>.

²⁹ Buchheim, *supra* note 26.

³⁰ Mary Pilon, *Watch That Tweet! N.C.A.A., Colleges Wrestle with Social Media Recruiting Rules*, N.Y. TIMES COLLEGE SPORTS BLOG (Dec. 12, 2011, 7:00 AM), <http://thequad.blogs.nytimes.com/2011/12/12/watch-that-tweet-n-c-a-a-colleges-wrestle-with-social-media-recruiting-rules/>.

³¹ *Recruiting*, *supra* note 5.

The NCAA suspended Lehigh's Ryan Spadola for "retweeting" an allegedly inappropriate racial slur.³² The NCAA chose to make an example of the student-athlete, despite his apology³³ and the fact that it has no formal policy on student-athlete's use of social media.³⁴ This incident leaves unclear what the consequences would be had the comment not been "racially insensitive" in nature. It raises the question of whether, had this not been an "unsportsmanlike" comment, but rather a thoughtless post like those made by countless college students every day, the NCAA would have taken similar action.

As a result of the emphasis placed on inappropriate comments made on social networking websites, colleges and universities have begun to shy away from recruiting high school students who have displayed poor judgment with respect to their online activities.³⁵ Yuri Wright, one of the best high school cornerbacks in the country, was recently expelled from his high school after sexual and racially offensive comments were made on his private Twitter account.³⁶ Despite being "private," this account had at least 1500 followers, all of whom could see the offending messages.³⁷ As a result of the postings and expulsion, the University of Michigan stopped its recruiting efforts, and there was a question as to whether Rutgers would choose to host him on campus as originally scheduled.³⁸ Wright ultimately did make a final recruiting visit to Rutgers, but signed his letter of intent with the University of Colorado at Boulder.³⁹ While this episode did not eliminate Wright's chances of being recruited, the hesitation displayed by NCAA institutions indicates how important maintaining a good reputation in all aspects of a player's behavior is for a school, its compliance obligations, and its

³² Bradley Shear, *Student-Athlete Suspended From NCAA FCS Playoffs For a Retweet*, SHEAR ON SOCIAL MEDIA LAW (Dec. 13, 2011), <http://www.shearsocialmedia.com/2011/12/student-athlete-suspended-from-ncaa-fcs.html>.

³³ See Michael LoRe, *NCAA suspends Lehigh University wide receiver Ryan Spadola one game*, LEHIGH VALLEY LIVE.COM (Dec. 8, 2011), http://www.lehighvalleylive.com/lehigh/index.ssf/2011/12/ncaa_suspends_lehigh_universit.html.

³⁴ Tom Buchheim, *NCAA Fails to Lead (Again) on Social Media Policy*, FOURTH AND 140 (Dec. 27, 2011), <http://fourthand140.com/2011/12/27/ncaa-fails-to-lead-again-on-social-media-policy/>.

³⁵ Dallas Jackson, *Offensive Tweets Lead to Expulsion of Star*, RIVALSHIGH (Jan. 20, 2012), <http://highschool.rivals.com/content.asp?CID=1321024>

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Lindsay H. Jones, *Prep Football Star Yuri Wright Bringing Baggage to CU Buffs*, DENVER POST (Feb. 1, 2012), http://www.denverpost.com/colleges/ci_19865056.

public relations. Given the uncertainty of social media policies, and the public nature of conduct on social media platforms, more schools are now unwilling to take on the risk of a recruit with a known history of online indiscretions.

IV. SOCIAL MEDIA REGULATIONS AND THE FIRST AMENDMENT

The recent enforcement examples discussed above demonstrate that NCAA rules on social media do not adequately addressing the issues that arise for student-athletes, coaches, and member institutions today. The NCAA must act quickly to pass more comprehensive regulations to avoid the dangerous precedent of punishing member institutions and athletes for rules that have not been formally approved and implemented. In so doing, however, the NCAA must tread carefully, as regulations restricting the use of social media risk infringing on the rights of free speech and expression protected under the First Amendment.

The Supreme Court held in *Brentwood II* that an amateur athletic association's recruiting rules did not violate the First Amendment.⁴⁰ In *Brentwood II*, a high school football coach sent letters to eighth graders, inviting them to attend spring practice sessions.⁴¹ The high school athletic league to which the school belonged found this act to be a violation of its recruiting rules, which prohibited the use of "undue influence" on middle school students, and sanctioned the school accordingly.⁴² The Court found that the school had voluntarily chosen to join the athletic league, thereby accepting the obligation to "prevent the exploitation of children, to ensure that high school athletics remain secondary to academics, and to promote fair competition among its members."⁴³ Finding a distinction between rules that prohibit speech to the public at large and those prohibiting "direct, personalized communication in a coercive setting," the Court found that these recruiting regulations struck "nowhere near the heart of" the First Amendment's protections.⁴⁴

While announced in the context of high school sports, the *Brentwood II* case suggests that restrictions on speech made by athletic staff directly to prospective college student-athletes do not violate the First Amendment.

⁴⁰ *Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad. (Brentwood II)*, 551 U.S. 291, 299 (2007).

⁴¹ *Id.* at 294.

⁴² *Id.* at 294–95.

⁴³ *Id.* at 296.

⁴⁴ *Id.*

Just as the high school had chosen to join the athletic league, the college or university has “chosen” to be part of the NCAA (despite the fact that it would be nearly impossible to participate in intercollegiate athletics without making the “choice” to join).⁴⁵ However, the opinion leaves open the possibility of finding a violation when the restrictions are less narrowly tailored. In *Brentwood II*, the Court addressed a coach directly contacting prospective players. By distinguishing this from “appeals to the public at large,”⁴⁶ the Court suggests the First Amendment would protect broad prohibitions on speech directed at a larger community. Furthermore, the focus on the “voluntary” nature of joining an athletic association⁴⁷ suggests that restrictions placed on those who are not voluntary members would also constitute a violation of the First Amendment.

V. CURRENT MONITORING OF SOCIAL MEDIA USE

Social media is changing so quickly that regulations are barely able to keep up. In 2006, Loyola University Chicago chose to completely ban student-athlete use of Facebook and MySpace.⁴⁸ John Planek, the Director of Athletics, announced that this “virgin” technology simply poses too many potential hazards to student-athletes.⁴⁹ Just six years later, however, these social websites are considered anything but “virgin” and their use has proven undeterred by the potential dangers they pose to member safety, privacy, and reputation. Commentators today argue that imposing such a complete ban on student-athletes is a violation of their First Amendment

⁴⁵ The NCAA is not the only collegiate athletic association. For example, the United States Collegiate Athletic Association (USCAA) aims to provide a level playing field for traditional and non-traditional institutions of higher education with enrollment between 500 and 2500 students. See USCAA, *MARKETING PACKET*, http://www.theuscaa.com/USCAA_Marketing_Packet_-_2011_Updated.pdf (last visited Mar. 5, 2012). Similarly, the National Association of Intercollegiate Athletics (NAIA) organizes athletic programs of smaller colleges and universities across the United States, as well as a few outside of the US. See *About the NAIA*, NAIA.ORG, http://www.naia.org/ViewArticle.dbml?DB_OEM_ID=27900&ATCLID=205323019 (last visited Mar. 5, 2012).

⁴⁶ *Brentwood II*, 551 U.S. at 296.

⁴⁷ *Id.* at 295.

⁴⁸ Matt Maher, *You've Got Messages: Modern Technology Recruiting through Text-Messaging and the Intrusiveness of Facebook*, 8 *TEX. REV. ENT. & SPORTS L.* 125, 139 (2007).

⁴⁹ *Id.*

rights.⁵⁰ Outrage resulted when rumors spread that Urban Meyer, the new coach of the Ohio State Buckeyes football team, would impose a complete ban on his players' use of Twitter.⁵¹ However, the rumor was later found to be untrue, with players "tweeting" that the reports were "hearsay."⁵²

While the ban by Meyer was only rumored, individual coaches have taken steps to regulate the use of social media by their athletes. For example, Mike Anderson, former University of Missouri men's basketball coach, effectively banned the use of Twitter while the team is in season.⁵³ Doing so, he argues, not only keeps the athletes' focus on the game, but also avoids any bad press for the team and athletic department.⁵⁴ Additionally, Villanova Men's Basketball,⁵⁵ South Carolina Football,⁵⁶ and Iowa Football,⁵⁷ are just three more examples of teams who have chosen to ban social media use while in season.⁵⁸ Many schools' athletic conduct policies now make clear that participating in athletics is a "privilege," not a "right," and that student-athletes may be disciplined for behavioral choices made in their "pri-

⁵⁰ See, e.g., Bradley Shear, *The NCAA, Social Media Monitoring, Censorship, the First Amendment, the Supreme Court, and Video Games*, SHEAR ON SOCIAL MEDIA LAW (June 28, 2011), <http://www.shearsocialmedia.com/2011/06/ncaa-social-media-monitoring-censorship.html>.

⁵¹ Michael Schottey, *Urban Meyer Shows Lack of Leadership by Banning Ohio State Players from Twitter*, BLEACHER REPORT (Jan. 3, 2012), <http://bleacherreport.com/articles/1008495-urban-meyer-shows-lack-of-leadership-by-banning-ohio-state-players-from-twitter>.

⁵² *New Head Coach Meyer's Twitter Ban for Buckeyes Untrue*, FOX NEWS.COM (Jan. 3, 2012), <http://www.foxnews.com/sports/2012/01/03/new-head-coach-meyer-bans-buckeyes-from-using-twitter/>.

⁵³ Alex Ruppenthal, *College Coaches Finding Ways to Monitor Athletes' Social Networking Activity*, COLUMBIA MISSOURIAN (May 13, 2010), <http://www.columbiamissourian.com/stories/2010/05/13/college-coaches-finding-ways-monitor-athletes-social-networking-activity/>.

⁵⁴ *Id.*

⁵⁵ Mike, *Villanova Basketball Players Apparently Banned from Twitter*, VU HOOPS (Sept. 26, 2010), <http://vuhoops.com/2010/09/26/twitter/>.

⁵⁶ *Steve Spurrier Bans His team from Using Twitter*, AOL SPORTING NEWS (Aug. 4, 2011), <http://aol.sportingnews.com/ncaa-football/story/2011-08-04/steve-spurrier-bans-south-carolina-gamecocks-from-using-twitter>.

⁵⁷ *Ferentz Keeps Social Media on Lockdown*, KCRG-TV9 (Aug. 9, 2011), <http://www.kcrg.com/sports/local/Ferentz-Keeps-Social-Media-on-Lockdown-127343833.html>.

⁵⁸ See Bradley Shear, *NCAA Student-Athlete Social Media Bans May Be Unconstitutional*, SHEAR ON SOCIAL MEDIA LAW (Aug. 11, 2011), <http://www.shearsocialmedia.com/2011/08/ncaa-student-athlete-social-media-bans.html>.

vate” lives.⁵⁹ These disciplinary policies can extend explicitly to use of the Internet and social networking websites.⁶⁰

Given the voluntary language contained within these conduct policies, a student-athlete will be hard-pressed to argue that the rules violate his or her First Amendment rights.⁶¹ The expectations are clearly outlined upon entering the athletic program, no outright ban is imposed on the use of social media, and the athlete, in choosing to use social networking websites, thus voluntarily agrees to abide by the conduct code.

Enforcing and monitoring these strict player conduct rules, however, remains difficult. Compliance offices, already understaffed and overwhelmed, are simply incapable of supervising what each and every student-athlete posts or tweets online. Some coaches are choosing to leave the policing efforts to their team captains.⁶² This hands-off approach has worked well for most schools, but may not be sufficient in the eyes of the NCAA should it seek to sanction a school for “failure to monitor.” In response, several companies have seized the business opportunity that active regulation of social media activity provides. These companies send direct solicitations to school compliance officers, offering monitoring of every student-

⁵⁹ ICE MILLER, LLP, “Welcome Back—Please Behave!” *Regulating the Off-Field Behavior of Student-Athletes*, ICE MILLER.COM, http://www.icemiller.com/enewsletter/LICA_Article_Student_Athlete_Off_Field.htm (last visited Mar. 5, 2012).

⁶⁰ See, e.g., THE MISSOURI STATE UNIVERSITY STUDENT-ATHLETE CODE OF CONDUCT, *available at* http://www.missouristate.edu/assets/policy/Op6.06_Student-Athlete_Policy.pdf; Ohio Athletics Student-Athlete Code of Conduct, *available at* <http://www.ohiobobcats.com/compliance/compl-student-ath-code-conduct.html>.

⁶¹ While students “do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 506 (1969), schools are permitted to implement reasonable policies for social media use and may ask students to agree to those policies upon entering. See, Bradley Shear, *NCAA Student-Athlete Social Media Bans May Be Unconstitutional*, SHEAR ON SOCIAL MEDIA LAW, (Aug. 11, 2011), <http://www.shearsocialmedia.com/2011/08/ncaa-student-athlete-social-media-bans.html>. When such a policy is signed voluntarily, it is likely that the student has willingly waived his or her right to claim infringement of First Amendment rights, just as schools that choose to join an athletic league voluntarily agree to its recruiting rules, even if speech is curtailed. See *Tenn. Secondary Sch. Athletic Ass’n v. Brentwood Acad. (Brentwood II)*, 551 U.S. 291, 299 (2007).

⁶² See Ruppenthal, *supra* note 54 (University of Missouri track coach Rick McGuire relies on his captains to talk to a teammate when an inappropriate internet post is made).

athlete for up to four cents per athlete, per day.⁶³ Even such small fees, however, can quickly add up for athletic programs.

For example, UDiligence advertises that it searches student social network profiles for profanity, racial slurs, sexual comments, or mention of drugs or alcohol.⁶⁴ It can also search for “keywords” to detect impermissible contact between student-athletes and agents, runners, or boosters.⁶⁵ A second company, Varsity Monitor, markets its service as a protection against actions that could negatively affect an athlete’s “Personal Brand” or endanger his or her future career.⁶⁶ The company Jump Forward released its Social Media Monitoring Solution at the 2012 NCAA Convention.⁶⁷ This platform claims to bring together all parts of the athletic department, including compliance, equipment, financial aid, and admissions, making it easier to monitor all athletic activity, not just social media use, through one streamlined account.⁶⁸ All three companies advertise the number of high profile institutions that have already chosen to subscribe to their services.⁶⁹

These companies argue they are not trying to play “big brother,” but rather are helping students maintain their reputations over the long term.⁷⁰ Nevertheless, such monitoring opens the schools up to free speech and privacy concerns, as well as Title IX liability, if all parties are not treated equally.⁷¹ Furthermore, critics worry that treating discrete groups of college

⁶³ Catherine Ho, *Companies Tracking College Athletes’ Tweets, Facebook Posts Go After Local Universities*, WASH. POST (Oct. 16, 2011), http://www.washingtonpost.com/business/capitalbusiness/companies-tracking-college-athletes-tweets-facebook-posts-go-after-local-universities/2011/10/10/gIQAyHZ9oL_story.html.

⁶⁴ *What We Find*, UDILIGENCE.COM, <http://www.udiligence.com/what-we-find.aspx> (last visited Mar. 8, 2012).

⁶⁵ *Id.*

⁶⁶ See VARSITYMONITOR.COM, <http://varsitymonitor.com/> (last visited Mar. 8, 2012); see also Patrick Thedinga, *Varsitymonitor.com—The Student Athletes Worst Enemy*, FLOTRACK (Jan. 20, 2012, 1:23 AM), <http://www.flotrack.org/blog/40903-varsitymonitorcom-the-student-athletes-worst-enemy>.

⁶⁷ *JumpForward Releases its Social Media Monitoring Solution at the 2012 NCAA Convention*, PRWEB.COM (Jan. 9, 2012), <http://www.prweb.com/releases/2012/1/prweb9087563.htm>.

⁶⁸ See JUMPFORWARD.COM, <http://jumpforward.com/> (last visited Mar. 8, 2012).

⁶⁹ See VARSITYMONITOR.COM, <http://varsitymonitor.com/> (last visited Mar. 8, 2012); JUMPFORWARD.COM, <http://jumpforward.com/> (last visited Mar. 8, 2012); UDILIGENCE.COM, <http://www.udiligence.com/> (last visited Mar. 8, 2012).

⁷⁰ See Ho, *supra* note 63.

⁷¹ *Id.*

students differently in ways that affect their privacy may set bad precedent for what is considered acceptable monitoring and regulation in the future.⁷²

Regulation of non student-athletes poses an entirely different set of problems. It is impossible to argue that these students have consented to increased regulations by choosing to attend their particular school. This is particularly true of public universities, which, as government entities, must safeguard their students' constitutional rights. Thus, regulating speech in the way that recent sanctions suggest the NCAA expects its member institutions to do may be impossible under First Amendment protections. Even if such regulations were permissible under the First Amendment, however, it is implausible to suggest that a school's compliance department would be capable of detecting all posts made by students that might concern athletics.

VI. PROPOSALS FOR CHANGE IN THE NCAA

A few formal proposals for change to current contact rules have been submitted to the NCAA. The first Division I proposal was submitted on June 30, 2011 and recommends streamlining the allowed communications with prospective student-athletes after a given date by eliminating the exceptions carved out for men's and women's basketball and football and eliminating the distinctions between before- and after-visit contacts.⁷³ The proposal states that current regulations regarding text messages and cell phone use are out-dated and impose huge monitoring burdens on coaches and compliance officers.⁷⁴ The NCAA Men's Basketball Issues Committee supported this proposal, Women's Basketball Issues and Football Issues committees took no position, and the Recruiting and Athletics Personnel Issues Cabinet opposed its adoption.⁷⁵ The proposal was under consideration, but tabled until the April 2012 meeting.⁷⁶

⁷² Bob Scalise, Nichols Family Director of Athletics, Harvard Univ., Remarks to Professor Carfagna's Sports and the Law: Representing the Professional Athlete class at Harvard Law School (Jan. 5, 2012).

⁷³ *Recruiting—Telephone Calls and Electronic Correspondence—No Limits on or After First Permissible Date*, NCAA LEGISLATIVE SERVICES DATABASE 2011-30 (proposed June 30, 2011).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

A second Division I proposal was recommended for adoption by the Recruiting and Athletes Personnel Issues Cabinet on September 14, 2011.⁷⁷ If adopted, the rule would create an exception to the prohibition on e-mail contact before a certain date for automated e-mails generated by, for example, accepting a Facebook friend request.⁷⁸ Coaches have argued that they need such an exception because a coach's failure to respond to a friend request might strain the potential relationship between a recruit and the coach. Additionally, there is no permissible method in which the coach may contact the prospect to explain the lack of response.⁷⁹

In Division II, sixteen legislative proposals were adopted in January 2012, three of which will serve to liberalize recruiting regulations.⁸⁰ Provisions 2012-11, 12, and 13 provide for a common start date – June 15 prior to the student's junior year – for all in-person, telephonic, and electronic forms of contact.⁸¹ There will be no limit on the number of contacts, except in cases where contact is prohibited by a Division II recruiting calendar.⁸² Supporters of the change praise the new rules for the increased opportunity for coaches and prospective student-athletes to communicate and for the reduced burden of oversight in compliance offices.⁸³

While these proposals reflect a step towards reducing the burdens of the current rules on communication, they by no means solve the problem posed by social media. In a post on the NCAA Bylaw Blog, John Infante states,

To fix the rules, we must first acknowledge a couple of things. We must acknowledge that trying to differentiate between different forms of text communication is no longer possible. We must acknowledge that these are the tools prospects want coaches to use to get in touch with them. And we must acknowledge that these tools put prospects in control of who con-

⁷⁷ *Recruiting—Recruiting Materials—Electronic Transmissions—Exception—Social Media Platforms—Automated Notifications*, NCAA LEGISLATIVE SERVICES DATABASE 2011-38 (proposed July 8, 2011).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *DII approves 16 legislative proposals*, NCAA.COM (Jan. 17, 2012), <http://www.ncaa.com/news/ncaa/article/2012-01-17/dii-approves-16-legislative-proposals>.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

tacts them through confirming friends, blocking users, and other privacy controls.⁸⁴

Infante argues that the NCAA must do away with the fiction that a Facebook message or Twitter direct message is equivalent to an e-mail. New technologies are mixing the various forms of communication. For example, Google Voice mixes phone calls and text messages with e-mail.⁸⁵ In this post, Infante suggests that the only viable option for regulating recruiting contact is controlling the time that the contact occurs.⁸⁶ He suggests allowing unrestricted communication after a given date, but admits that the idea has drawbacks, because it favors those families who are better prepared to deal with college coaches and earlier scholarship offers and commitments.⁸⁷

Others suggest that the NCAA look to the social media policies currently in place in other institutions to guide development of its own.⁸⁸ Tom Buchheim, a sports blogger who focuses on social media issues, is disappointed that the NCAA is choosing not to develop a firm policy on networking websites and is instead leaving that responsibility to its member institutions.⁸⁹ He suggests using the comprehensive policy in place in the NHL, or in many corporations, as a starting point.⁹⁰ The NHL imposes a “blackout period” on the use of social media, beginning two hours prior to face-off and ending when players have completed their post-game media obligations.⁹¹ The policy makes clear that players and personnel will be held responsible for their social communications, and that disciplinary actions may be taken for any statements that adversely affect the League, the club, or another member of a club.⁹² This policy of focusing on the timing

⁸⁴ John Infante, *Facebook Provides New Challenge to Recruiting Rules*, NCAA.ORG (Nov. 29, 2010), <http://www.ncaa.org/blog/2010/11/facebook-recruiting-rules/>.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Buchheim, *supra* note 34.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *NHL Institutes New Social Media Policy*, NHL.COM (Sept. 15, 2011), <http://www.nhl.com/ice/news.htm?id=588534>.

⁹² *Id.*

of social media use by players and personnel is substantially similar to those in place in both the NFL and NBA.⁹³

The NCAA believes that it must regulate social media in order to maintain a level playing field for recruiting consistent with current rules.⁹⁴ However, Ronnie Ramos, the managing director of communications at the NCAA, pushes back against those commentators who believe it must develop a comprehensive policy. He says that, as a membership organization rather than a league, the NCAA cannot unilaterally impose restrictions on social media.⁹⁵ Rather, the member institutions must develop the rules, and the NCAA may enforce them.⁹⁶ Ramos emphasizes that, given the public nature of social media comments, it is hard to do anything that will not be detected, so student-athletes have largely followed the rules.⁹⁷ The group that causes greater concern is boosters, because boosters are not directly affected if they break the rules.⁹⁸

But even the NCAA has recently come to recognize that its policies regarding electronic correspondence need to change.⁹⁹ The three Divisions are independently reaching similar conclusions on easing up on rules regarding electronic communications.¹⁰⁰ These changes largely center around the regulation of text messages, with proposals to treat them as equivalent to e-mail.¹⁰¹ While Division I and Division II member institutions are also considering making social-networking contacts equivalent to e-mail, Division III schools refuse to consider such an inclusion, based largely on privacy considerations for student-athletes.¹⁰²

⁹³ Maria Burns Ortiz, *Guide to Leagues' Social Media Policies*, ESPN.COM (Sept. 27, 2011), http://espn.go.com/espn/page2/story/_/id/7026246/examining-sports-leagues-social-media-policies-offenders.

⁹⁴ Meaghan Edelstein, *How the NCAA Stays on Top of the Social Media Game*, Interview with Ronnie Ramos, NCAA Managing Director of Communications, MASHABLE SOC. MEDIA (Jan. 9, 2011), <http://mashable.com/2011/01/09/ncaa-social-media-rules/>

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ See Gary Brown, *NCAA to Evaluate Text Regulations: Rules Regarding Texting Recruits Back on Table to Discuss*, NCAA.COM (Sept. 22, 2011), <http://www.ncaa.com/news/ncaa/article/2011-09-22/ncaa-evaluate-text-regulations>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

As these proposals indicate, commentators cannot agree on where reform is most needed. The NCAA continues to focus on traditional methods of contact and permissible contact periods and believes that it cannot create a comprehensive policy regarding the use of social networking websites. John Infante argues for more explicit sanctioning of social media during those contact periods.¹⁰³ Others look at the use of social media by student-athletes after matriculation.¹⁰⁴ No one, however, addresses regulation of students not affiliated with the athletic program. This omission likely reflects the belief that such regulation is simply implausible. In fact, prior to the sanctions imposed on UNC and those threatened against NC State, such wide-reaching regulation by the NCAA likely hadn't even been considered possible.

VII. FUTURE DIRECTIONS FOR NCAA REGULATIONS

NCAA rules continue to increase in complexity. Some athletic compliance offices no longer feel capable or competent to appropriately monitor and enforce all the rules and regulations expected of them.¹⁰⁵ As a result, schools are experimenting with restructured compliance departments.¹⁰⁶ Ohio State is considering moving its compliance office to a central group that also oversees research and medical compliance, pulling compliance out of the athletic department entirely.¹⁰⁷ Oregon is adding a new position to its compliance office that requires candidates to possess four years of law enforcement or investigative experience.¹⁰⁸ West Virginia has hired an employee with experience at the NCAA, law firms and the US government to work for the football team and serve as the liaison between the team and the compliance and admissions offices.¹⁰⁹ While these changes have the potential to enhance compliance, by formalizing compliance they might also deter self-reporting of potential violations or disrupt the relationships that exist

¹⁰³ See Infante, *supra* note 84.

¹⁰⁴ See *supra*, notes 88-93.

¹⁰⁵ Jake Trotter, *The NCAA and Social Media*, ESPN RECRUITING NATION (Jan. 30, 2012, 11:10 AM), http://espn.go.com/college-sports/recruiting/football/story/_/id/7510010/social-media-makes-mark-recruiting.

¹⁰⁶ John Infante, *Ohio State, Oregon, and West Virginia Plotting the Future of Compliance*, NCAA.ORG BYLAW BLOG (Jul. 10, 2011), <http://www.ncaa.org/blog/2011/07/ohio-state-oregon-and-west-virgina-plotting-the-future-of-compliance/>.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

between coaches, players, and the compliance staff. Furthermore, these changes do not address the underlying problem of overly complicated and burdensome rules and regulations, but are merely attempts by struggling compliance offices to cope with those burdens. The NCAA must act to simplify its rules.

A. *Streamline Recruiting Contact Rules*

The NCAA should adopt proposal number 2011-30, aimed at streamlining recruiting contact rules.¹¹⁰ While intended to reduce the intrusive impositions of college coaches on the lives of high school athletes, the strict contact periods cause more stress than they alleviate. Rather than enabling prospective student-athlete to talk to college coaches during times the student finds convenient, he or she is forced to wait for designated weeks of the year, during which the coach is likely overwhelmed with contacts, and therefore may be unable to dedicate the time and energy necessary to adequately address each student's questions or concerns. To reduce the confusion and stress caused to both athletic staff and recruits, prospective student-athletes should be permitted to correspond with college coaches freely after a given date. Following Division II's lead,¹¹¹ the date chosen could reasonably be during the summer before the prospective student-athlete begins his or her junior year of high school.

B. *Treat All Communications the Same*

It is simply no longer feasible to treat different forms of typed communication differently. NCAA rules should permit all forms of contact following the established contact date. Teenagers no longer view phone calls, fax, or even e-mail to be their primary forms of communication. Traditionalists oppose such changes, arguing that texting is an "unprofessional" method of "wooing" a prospective student-athlete.¹¹² Nevertheless, rather than forcing prospects to use methods of communication with which they are less comfortable, coaches should be permitted to contact prospective student-athletes in the ways the student-athlete considers most convenient. Should a coach feel that electronic communication is inappropriate for recruiting purposes, he or she can choose to use other methods of contact.

¹¹⁰ See *Recruiting*, *supra* note 77.

¹¹¹ See *supra*, notes 80-82.

¹¹² Brown, *supra* note 99.

C. Permit Social Media Use by Students

Once enrolled in a member institution, the NCAA should allow individual institutions to govern the use of social media by its students. Should a coach choose to impose a ban on social media leading up to a big game, doing so should be in his or her discretion, not dictated by the wishes of the NCAA. The effect that an NCAA-wide restriction would have on student-athlete speech would be disproportionate to the benefits gained for its goals of good sportsmanship or fair play. This hands-off approach by the NCAA also better reflects the world outside of college sports. It is important for students to learn that their actions do have consequences. Once out of school, there will be no strict rules regulating what a former student-athlete can and cannot do or say. He or she must be given an opportunity to learn that nothing done on the internet is private, and actions have real repercussions in the media, from future employers, or with graduate school admissions officers.

D. Do Not Regulate Speech by Unaffiliated Persons

Similarly, the NCAA should not attempt to regulate speech by students unaffiliated with the athletic program. While the NCAA argues that it must monitor all communications in order to maintain a level playing field for recruiting,¹¹³ the damage done to the First Amendment rights of students far exceeds the incremental benefit obtained for recruiting. Such regulation could be challenged under the Supreme Court's holding in *Brentwood II*, as being insufficiently tailored to athletic recruiting activities, and as infringing on "appeals to the public at large."¹¹⁴

¹¹³ The "NCAA Position" is:

"The recruiting process must balance the interests of prospective student-athletes and the Association's member institutions. The NCAA recruiting bylaw is designed to promote equity among member schools in the recruitment of prospective student-athletes and to shield the recruited individuals from undue pressures that may interfere with their scholastic or athletics interests." <http://www.ncaa.org/wps/wcm/connect/public/Test/Issues/Recruiting/> (last visited March 26, 2012).

¹¹⁴ *Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291, 296 (2007).

E. Formalize Rules Regarding Boosters

Boosters pose the most difficult problem, as they are more formally affiliated with the athletic program than the average student, but are not subject to direct discipline from the athletic department or sanctions from the NCAA.¹¹⁵ Boosters can, however, have an influence on a prospective student-athlete's choice of school, and thus should be subject to some limitations on the method and timing of their contact with students. The NCAA must articulate rules regarding when and how booster contact is appropriate, similar to the rules on permissible timing of contact suggested above for coaches and other athletics staff. Member institutions should be made explicitly responsible for educating boosters on these rules, what types of behavior are appropriate, and the potential consequences to the team or the athletic department should a booster fail to comply. If the NCAA feels that boosters from a particular school are not in compliance, the NCAA should issue a warning to the school, allowing it the opportunity to address the problem internally, before formal disciplinary action is taken by the NCAA. While such a policy may not deter all inappropriate influence by boosters and may not result in the articulation of bright-line rules, this policy would be far clearer to member institutions and boosters than the current situation. Implementing these basic guidelines may also help to expose where the true gaps in regulations lie, allowing for further development of rules and regulations in the future.

VIII. CONCLUDING THOUGHTS

The NCAA must address regulation of social media. It cannot allow the confusion that currently exists regarding what behavior will and will not be appropriate to continue. And it certainly cannot continue to sanction schools for violating rules it has not articulated.

Social networking websites are the preferred method of communication for today's high school athletes. To prevent undue intrusion into these high school student's lives, a stated goal of recruitment regulation by the NCAA,¹¹⁶ college coaches seeking to recruit these students must be permitted to use the form of communication that is most convenient for the prospects.

The NCAA must streamline and simplify its rules on contacting prospective student-athletes. All typed forms of communication must be

¹¹⁵ See Edelman, *supra* note 94.

¹¹⁶ *Recruiting*, *supra* note 5.

treated equivalently, and less emphasis should be placed on permissible contact periods. Such changes would reduce the burdens currently on compliance offices, allowing officers to spend their time addressing potentially more severe compliance violations.

The NCAA social media status quo is unsustainable. The NCAA and its member institutions must act to clarify and reform their social media policies. The sooner they do so, the better.

And They're Off: Eliminating Drug Use in Thoroughbred Racing

Amy L. (Williams) Kluesner¹

TABLE OF CONTENTS

I. INTRODUCTION	297
II. DRUG USE, CURRENT REGULATION, AND THE NEED FOR UNIFORMITY	300
A. <i>Inconsistent State Regulation</i>	302
B. <i>Improving Transparency and Uniform Disclosure</i>	303
III. WELFARE AND SAFETY OF THE RACEHORSE SUMMIT	306
IV. REGULATION OF NON-STEROIDAL ANTI-INFLAMMATORY DRUGS	309
A. <i>Phenylbutazone</i>	309
B. <i>Corticosteroids</i>	311
V. STRONGER REFORM AND HOPE FOR THE FUTURE	312
A. <i>The Debate on Anti-Bleeding Medication</i>	313
B. <i>In the Homestretch for Uniform Regulation</i>	316
C. <i>A Timely Victory</i>	318
VI. CONCLUSION	320

I. INTRODUCTION

The Triple Crown of thoroughbred racing is one of the rarest victories in sports. There are three jewels in the Triple Crown: the Kentucky Derby, popularly known as the “fastest two minutes in sports,”² held at Churchill

¹ Bachelor of Science, *cum laude*, Vanderbilt University (2002); Juris Doctor, Notre Dame Law School (2011). The author would like to thank Ed Edmonds, Associate Dean and Professor of Sports Law at Notre Dame Law School for his assistance with this article.

² See *Kentucky Derby Trivia*, KENTUCKY DERBY INFO, <http://www.kentuckyderby.info/kentuckyderby-trivia2.php> (last visited April 1, 2012). See generally PETER CHEW, *THE KENTUCKY DERBY: THE FIRST 100 YEARS* (1974); PAMELA K. BRODOWSKY & TOM PHILBIN, *TWO MINUTES TO GLORY: THE OFFICIAL HISTORY OF THE KENTUCKY DERBY* (2007); ANDY PLATTNER, *KENTUCKY DERBY VAULT: A HISTORY OF THE RUN FOR THE ROSES* (2008); KIMBERLY GATTO, *CHURCHILL DOWNS: AMERICA'S MOST HISTORIC RACETRACK* (2010).

Downs in Louisville, Kentucky; the Preakness Stakes, held at Pimlico Race Course in Baltimore, Maryland; and the Belmont Stakes, the longest of the races, held at Belmont Park in New York.³ Only eleven horses have won the Triple Crown — the first, Sir Barton, in 1919, and the last, Affirmed, in 1978.⁴ The agility, perseverance, and strength necessary to be a champion may at times seem impossible and cause some to resort to drugs or excessive medication. Athletes frequently fall victim to this temptation, and breeders, trainers and veterinarians who work with thoroughbred horses are no exception. Unfortunately, such measures may at times have tragic consequences.

Few can forget the tragic story of Eight Belles, the acclaimed filly who nearly won the 2008 Kentucky Derby, but collapsed during the race with two broken front ankles.⁵ She had to be euthanized by injection on the track.⁶ Fans were heartbroken over the incident. Eight Belles appeared to have the will of a champion and her death was reminiscent of Barbaro's unfortunate injury just two years earlier in the Preakness Stakes.⁷ After winning the Kentucky Derby in 2006 by the largest margin since 1946, Barbaro's chances of winning the Triple Crown looked promising.⁸ But he broke three bones in his right hind leg during the Preakness, developed laminitis in both front feet, and struggled for eight months through various treatments and surgeries.⁹ David Switzer, executive director of the Kentucky Thoroughbred Association, referred to Barbaro as a "hero," stating

³ See TRIPLE CROWN RACES, <http://www.triplecrownraces.com> (last visited April 1, 2012). See generally MARVIN DRAGER, *THE MOST GLORIOUS CROWN: THE STORY OF AMERICA'S TRIPLE CROWN THOROUGHBREDS FROM SIR BARTON TO AFFIRMED* (TRIUMPH BOOKS 2005) (1975); JOE DRAPE, *THE RACE FOR THE TRIPLE CROWN: HORSES, HIGH STAKES AND ETERNAL HOPE* (2001); *TO THE SWIFT: TRIPLE CROWN HORSES AND THEIR RACE FOR GLORY* (Joe Drape ed., 2008).

⁴ See TRIPLE CROWN RACES, *supra* note 3 (the eleven Triple Crown winners are: Sir Barton (1919); Gallant Fox (1930); Omaha (1935); War Admiral (1937); Whirl Away (1941); Count Fleet (1943); Assault (1946); Citation (1948); Secretariat (1973); Seattle Slew (1977); and Affirmed (1978)).

⁵ Associated Press, *Runner-up Eight Belles Breaks Front Ankles, Euthanized on Track*, ESPN (May 3, 2008) <http://sports.espn.go.com/sports/horse/triplecrown08/news/story?id=3380100>.

⁶ *Id.*

⁷ *Id.*

⁸ Associated Press, *Barbaro Euthanized After Lengthy Battle*, NBC SPORTS, Jan. 29, 2007, <http://nbcsports.msnbc.com/id/16846723>.

⁹ *Id.* Laminitis, an inflammation of the sensitive laminae of the hoof which leads to breakdown and degeneration, constitutes a medical emergency in its acute form. It can be caused by ingesting too many carbohydrates, excessive grazing, or over-

that “his owners went above and beyond the call of duty” to save him and made the right decision in putting him down.¹⁰

The good that came out of the deaths of Barbaro and Eight Belles was the realization that more uniform regulations regarding equine health standards and drug use should be a top priority for the sport of thoroughbred racing. It is difficult to explain exactly what caused the injuries to Eight Belles and Barbaro; some have suggested “genetics, track surface, training methods, [or] medications” may have contributed.¹¹ Both Eight Belles and Barbaro were descendants of Northern Dancer, a thoroughbred from the 1950’s who also had a shortened racing career due to leg injuries.¹² Big Brown, the horse who went on to win the Kentucky Derby following the collapse of Eight Belles, sparked controversy over the use of certain performance-enhancing drugs because a steroid, although legal, was found in his system.¹³ To examine the concerns about equine medication and prevent future injuries in racing, the Grayson-Jockey Club Research Foundation convened its first Welfare and Safety of the Racehorse Summit in 2006.¹⁴ In March 2008, the Summit promulgated a set of recommendations¹⁵ to improve the well-being of racehorses. The recommendations address issues such as improving track surfaces, measures to deal with catastrophic injuries, the use of racing medication and drug testing laboratories, the need for uniform regulation of medication, and the promotion of genetic diversity.¹⁶ The Summit last met in June 2010 to further the discussion on recommen-

exercise of an un-fit horse. See THE MERCK VETERINARY MANUAL, *Laminitis*, available at <http://www.merckvetmanual.com/mvm/index.jsp?cfile=htm/bc/90722.htm>.

¹⁰ *Id.* See generally EDGAR PRADO & JOHN EISENBERG, *MY GUY BARBARO: A JOCKEY’S JOURNEY THROUGH LOVE, TRIUMPH, AND HEARTBREAK WITH AMERICA’S FAVORITE HORSE* (2008) (jockey’s perspective on Barbaro’s death).

¹¹ Alison Rowe, *Potential Law Suit over Eight Belles?*, EQUINE LAW BLOG (May 7, 2008), <http://equinelaw.alisonrowe.com/2008/05/articles/equine-veterinary-medical-law/potential-law-suit-over-eight-belles/>.

¹² *Id.*

¹³ Jennifer M. Jabroski, Note, *Reining in the Horse Racing Industry: A Proposal for Federal Regulation of Steroid Use in Racehorses*, 1 KY. J. EQ. AG. & NAT’L. RES. L. 67, 68 (2009) (internal citations omitted).

¹⁴ See *Welfare and Safety of the Racehorse Summit*. GRAYSON-JOCKEY CLUB RESEARCH FOUNDATION, INC. (last visited Mar. 31, 2012), <http://grayson-jockeyclub.org/summitDisplay.asp>.

¹⁵ See *Welfare and Safety of the Racehorse Summit Recommendations*, GRAYSON-JOCKEY CLUB RESEARCH FOUNDATION, INC. (Mar. 18, 2008), <http://www.grayson-jockeyclub.org/resources/recommendations.pdf> [hereinafter *Welfare and Safety of the Racehorse Summit Recommendations*].

¹⁶ See Rowe, *supra* note 11.

dations, and racing medication and testing again played a central role.¹⁷ Most recently, the Association of Racing Commissioners International (RCI) called for a five-year phase-out of all medications used on race day.¹⁸ The debate on what medications should and should not be used in the training and racing of horses is far from being resolved, but it appears that major stakeholders in the industry such as veterinarians, owners, and trainers are making the safety and wellbeing of the horse a top priority.¹⁹

Part I of this paper will address current drug use in the industry, including anabolic steroids, corticosteroids, non-steroidal anti-inflammatory drugs (NSAIDs), and anti-bleeding medications. The inconsistencies of state regulation will also be examined in order to illustrate the need for greater transparency and uniformity in thoroughbred racing. Part II will discuss the objectives and resolutions of the Grayson-Jockey Club's Welfare and Safety of the Racehorse Summit. Part III will more closely examine current and future regulations of NSAIDs, particularly phenylbutazone and corticosteroids. Part IV discusses possibilities for stronger and more uniform regulation and recent recommendations for a phase-out of all race-day medications. This analysis suggests that the best way to restore the integrity of thoroughbred racing is for leaders and organizations within the industry to adopt a nationwide ban on all medications used in racing.

II. DRUG USE, CURRENT REGULATION, AND THE NEED FOR UNIFORMITY

The use of medication in American horseracing has been a controversial issue since the 1800s when doping rumors first circulated.²⁰ In the modern era, horses are given numerous medications as part of routine equine well-

¹⁷ See *Welfare and Safety of the Racehorse Summit Resource Page*, GRAYSON-JOCKEY CLUB RESEARCH FOUNDATION, INC. (last visited Mar. 31, 2012), <http://www.graysonjockeyclub.org/summitDisplay.asp?section=41>.

¹⁸ Tom LaMarra, *RCI: Phase Out Use of Drugs in Five Years*, BLOODHORSE (Mar. 28, 2011), available at <http://www.bloodhorse.com/horse-racing/articles/62162/rci-phase-out-use-of-drugs-in-five-years#ixzz1HzYl15EH>.

¹⁹ See generally *Regulators to Discuss Raceday Medication*, BLOODHORSE (July 18, 2011), available at <http://www.bloodhorse.com/horse-racing/articles/64079/regulators-to-discuss-race-day-medication>; *National HBPA: Keep Salix, Drop Adjunct Drugs*, BLOODHORSE (July 25, 2011), available at <http://www.bloodhorse.com/horse-racing/articles/64182/national-hbpa-keep-salix-drop-adjunct-drugs>; *Model Rule on Salix Administration Adopted*, BLOODHORSE (December 13, 2011), available at <http://www.bloodhorse.com/horse-racing/articles/66583/model-rule-on-salix-administration-adopted>.

²⁰ Bradley S. Friedman, *Oats, Water, Hay, and Everything Else: The Regulation of Anabolic Steroids in Thoroughbred Horse Racing*, 16 ANIMAL L. 123, 125 (2009).

ness, with some used to “combat the severe physiological reactions to the physical strain of racing.”²¹

These types of drugs include NSAIDs, corticosteroids, diuretics, bronchodilators, and various anti-bleeding medications.²² Some medication is needed to preserve the health and safety of the horse, but drugs that are used merely to enhance performance affect the fairness of racing and negatively impact the integrity of breeding.²³

Anabolic steroids were banned from racing in 2008.²⁴ While the ban was a step in the right direction, inconsistent individual state regulations and inadequate testing procedures persist. Corticosteroids are legal, but there has been debate regarding their potential to mask other injuries. NSAIDs like phenylbutazone, used for treating lameness in horses,²⁵ can also lead to long-term negative health effects. Recently there has been much controversy regarding the use of furosemide, more commonly known by its brand-name, Lasix, which is used to prevent stress-induced pulmonary bleeding in racehorses.²⁶ Lasix and phenylbutazone “have become staples of North American racehorse training and competition,” but their use may have led to a “steady decline in the durability of American thoroughbreds.”²⁷ In fact, “[t]he average number of lifetime starts has dropped from 44 in 1950 to 13 in 2007, accompanied by a dramatic increase in fatal breakdowns and career-ending injuries.”²⁸ Many trainers believe that Lasix is “good for the horse” and necessary to prevent bleeding, while others in the industry believe it to be “detrimental to the horse’s well being.”²⁹

²¹ *Id.* at 126.

²² *Id.*

²³ *Id.*

²⁴ See *Thoroughbred Safety Committee Recommendations*, GRAYSON-JOCKEY CLUB RESEARCH FOUND. (June 17, 2008), http://www.jockeyclub.com/resources/3_steroids.pdf [hereinafter *Thoroughbred Safety Committee Recommendations*]

²⁵ *Phenylbutazone (Bute) Use in Horses*, ONTARIO MINISTRY OF AGRIC., FOOD AND RURAL AFFAIRS, http://www.omafra.gov.on.ca/english/livestock/horses/facts/info_pheny.htm (last modified Apr. 7, 2011).

²⁶ *Furosemide (Lasix) Banned: Horse Bleeding Drug Not Allowed by American Graded Stakes Committee*, HUFFINGTON POST (Aug. 13, 2011), http://www.huffingtonpost.com/2011/08/13/furosemide-banned-horse_n_926184.html.

²⁷ Jim Squires, *Drugs in Racing: Déjà vu All Over Again*, THE RAIL: THE N.Y. TIMES HORSE RACING BLOG (May 7, 2011), <http://therail.blogs.nytimes.com/2011/05/07/drugs-in-racing-deja-vu-all-over-again/>.

²⁸ *Id.*

²⁹ *Id.* See also Jennie Rees, *What Impact Would Lasix Ban Have on Field Size?*, THE COURIER-JOURNAL: HORSE RACING BLOG (July 21, 2011), <http://blogs.courier-jour->

A. *Inconsistent State Regulation*

Thoroughbred racing is primarily regulated by agencies within the states that are responsible for controlling the use of performance-enhancing drugs. Unfortunately, these horseracing agencies have a “reputation for lax enforcement.”³⁰ The penalties are inconsistent and often fail to “deter trainers, veterinarians and owners” from using drugs because of the intense desire to win and the enormous investment at stake.³¹ For example, in 2008, Delaware’s “zero-tolerance” steroid policy carried only a two-week suspension and a fine of \$5,000 for a positive test.³² Under the current regime of state regulation, the industry will depend on the cooperation of each state’s horseracing agency if it seeks to eliminate drug use altogether, and “[t]his dependency creates problems of cooperation, uniformity, enforcement and research.”³³

Even if uniform rules are eventually adopted by each state, they must be enforced. Congress recognized the need for uniform laws regarding equine medication and decided to act in order to preserve the integrity of horseracing. In 2008, Representative Ed Whitfield, a Republican from Kentucky, criticized the racing industry for falling behind other professional sports in its failure to ban steroids, asking “isn’t it time to clean up the sport of horse racing?”³⁴ The Jockey Club answered Rep. Whitfield’s request for uniformity by forming the Thoroughbred Safety Committee in 2008 to review equine health standards and formulate recommendations regarding the use of anabolic steroids.³⁵ Veterinarian Larry Bramlage, a member of the Committee, stated that steroids can be good for thoroughbreds

nal.com/racing/2011/07/21/what-impact-would-lasix-ban-have-on-field-size/. Rees argues that an absolute ban on drugs that prevent bleeding will harm the sport by decreasing the number of horses who are able to enter the field on race day.

³⁰ Kimberli Gasparon, Comment, *The Dark Horse of Drug Abuse: Legal Issues of Administering Performance-Enhancing Drugs to Racehorses*, 16 VILL. SPORTS & ENT. L.J. 199, 200 (2009).

³¹ *Id.*

³² JIM SQUIRES, HEADLESS HORSEMEN 154 (2009).

³³ *Id.*

³⁴ John Hay Rabb, *Congress Hears Testimony on Racehorse Drug Testing*, THOROUGHBRED TIMES (Feb. 27, 2008), available at <http://www.thoroughbredtimes.com/national-news/2008/february/27/waldrop-testifies-before-congress.aspx>.

³⁵ *Jockey Club Forms Thoroughbred Safety Committee*, THOROUGHBRED TIMES (May 8, 2008), available at <http://www.thoroughbredtimes.com/national-news/2008/may/08/jockey-club-forms-thoroughbred-safety-committee.aspx>.

because they “help them withstand the wear and tear of racing.”³⁶ However, some trainers abuse them, which can be detrimental to the health of the horse.³⁷ In June 2008, the Thoroughbred Safety Committee asked all North American racing authorities to eliminate the use “of all anabolic steroids in the race training and racing of Thoroughbreds.”³⁸ But while great progress was made in the nationwide elimination of anabolic steroids in thoroughbred racing, uniformity is still needed regarding the use of corticosteroids and anti-inflammatory drugs.³⁹

B. *Improving Transparency and Uniform Disclosure*

A lawsuit regarding the 2009 Kentucky Derby favorite, I Want Revenge, illustrates the importance of full disclosure regarding medication. I Want Revenge was scratched the morning of the Derby because of an injured ankle.⁴⁰ International Equine Acquisitions Holdings, Inc. (IEAH) owns a fifty percent interest in the horse and the other half belongs to David Lanzman, manager of racing activities.⁴¹ In the suit, IEAH claims that Lanzman failed to disclose the horse’s injuries, which Lanzman alleges were not known to him until the morning of the race.⁴² Two veterinarians, Dr. Foster Northrop and Dr. Larry Bramlage, testified that I Want Revenge was injected with synthetic joint fluid, corticosteroids, and antibiotics at the request of his trainer, Jeff Mullins.⁴³ Lanzman asserted that he was unaware

³⁶ Pat Forde, *Veterinarian: Horse Racing Will Ban Steroid Use*, ESPN.COM (June 6, 2008), <http://sports.espn.go.com/sports/horse/news/story?id=3429781>.

³⁷ *Id.*

³⁸ *Thoroughbred Safety Committee Recommendations*, *supra* note 24. Delaware, Maryland, New Jersey, New York, Pennsylvania, Virginia and West Virginia moved to eliminate anabolic steroid use in January 2008, several months before the Jockey Club’s recommendations were issued. *See, e.g.*, Press Release, Virginia Racing Commission, Mid-Atlantic States Move to Eliminate Steroid Use in Horse Racing (Jan. 25, 2008), <http://www.vrc.virginia.gov/document/Anabolic%20Steroid%20Release.pdf>.

³⁹ *See* GRAYSON-JOCKEY CLUB RESEARCH FOUND., INC., THOROUGHBRED SAFETY COMMITTEE RECOMMENDATION (Aug. 22, 2010), <http://www.jockeyclub.com/resources/nsaid.pdf>.

⁴⁰ Joe Drape, *Lawsuit Sheds Light on Use of Legal Medications in Horses*, N.Y. TIMES, (Oct. 5, 2009), http://www.nytimes.com/2009/10/06/sports/06horse.html?_r=2&em.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

of the treatment used by Mullins.⁴⁴ These veterinarians expressed concern that, while corticosteroids and anti-inflammatory drugs have therapeutic value to reduce soreness, they can also have detrimental long-term effects on the horse.⁴⁵ While I Want Revenge's treatments leading up to the derby were considered "minor and routine for a top-caliber racehorse," they are a "striking example of how the use, and overuse, of legal medications have placed America's thoroughbred population at ever greater risk of injury, and, in some cases, catastrophic breakdown."⁴⁶

This caution regarding drug use in horse racing must not be taken lightly because the United States has the highest thoroughbred mortality rate in the world.⁴⁷ According to Mary Scollay, equine medical director for the Kentucky Horse Racing Commission, "racehorse fatalities have occurred at the rate of 1.47 per 1,000 starts for synthetic surfaces, and 2.03 per 1,000 starts for dirt tracks."⁴⁸ This is notably higher than England, where the risk of fatality is between 0.8 and 0.9 per 1,000 starts, and Australia, where it is only 0.44 per 1,000 starts.⁴⁹ The number of injuries has led many in the racing industry, including Northrop, to push for more transparency with the public and improved disclosure between trainers, veterinarians, and owners.⁵⁰ In the weeks prior to the 2009 Kentucky Derby, writers from *The New York Times* asked the owner or trainer of each horse to share their veterinary records, but only three of the twenty agreed.⁵¹ Change will thus be a slow process. The ankle injury and subsequent surgery threatened to end the racing career of I Want Revenge, but he was able to return to racing in 2010, although he will never have another chance at the Kentucky Derby.⁵²

Foster Northrop along with Scott Palmer, who is chairman of the American Association of Equine Practitioners' Racing Committee, believe that "putting the horse first" when making decisions is the key to achieving

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Mike Farrell, *I Want Revenge Will Face Five in Iselin*, DAILY RACING FORM (Aug. 18, 2010), available at <http://www.drf.com/news/i-want-revenge-will-face-five-iselin>.

safety and integrity in racing.⁵³ “Best practices” for the veterinary care of racehorses should require that “[d]ecisions about medical treatment [be] based upon valid diagnostic indications, not the date of entry of the horse’s next race.”⁵⁴ Furthermore, “medications should be administered based upon scientific studies that demonstrate their ability to successfully treat illness or injury.”⁵⁵ Penalties should be enforced against veterinarians who do not follow these professional standards.⁵⁶ Northrop cites the scratching of *I Want Revenge* on the morning of the Derby as a proper decision that was made in the best interest of the horse which “most likely prevented a major injury.”⁵⁷ But deciding the proper medication for horses is a complex issue because therapeutic drugs may be needed for reasons specific to the illness or injury.⁵⁸ As Northrop and Palmer write:

Horses are treated with disease-modifying medicine, such as hyaluronic acid, to delay the onset of degenerative changes in the musculoskeletal system that are a natural result of any form of athletic activity. Medications may also be necessary for the prevention and treatment of respiratory and allergy-like conditions, while furosemide and/or adjunct bleeder medications are used to help prevent the occurrence of exercise-induced pulmonary hemorrhage (bleeding in the lungs). All of these medications are strictly regulated. No medication, therapeutic or otherwise, is allowed to be used [on the] day of the race in the United States except furosemide and adjunct medications for bleeding in some jurisdictions.⁵⁹

Typically, the decision to medicate a horse is made by the trainer, and not necessarily in consult with the veterinarian.⁶⁰ The trainer is well-equipped to handle day-to-day routine medical needs of the horse, whereas the veterinarian is consulted as the seriousness of the condition requires.⁶¹ But Northrop and Palmer write that it’s time for veterinarians to “be the voice

⁵³ Foster Northrop & Scott Palmer, *Making Good Decisions to Protect Horses*, NY TIMES, June 5, 2009, available at <http://therail.blogs.nytimes.com/2009/0605/making-good-decisions-to-protect-horses/?scp=1&sq=%22making%20good%20decisions%22&st=cse>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

for the horse” and to “lead the way” in making the right decisions about medication.”⁶² This need for more responsibility among equine professionals was a main reason for the Jockey Club’s institution of the Welfare and Safety of the Racehorse Summit.

III. WELFARE AND SAFETY OF THE RACEHORSE SUMMIT

The good that came out of the deaths of Barbaro and Eight Belles was the realization that more uniform regulations regarding equine drug use should be a top priority for thoroughbred racing. Shortly after Eight Belles was euthanized at the Kentucky Derby it became clear that “thoroughbred racing needs better oversight of equine health.”⁶³ Horseracing is unique among other sports in that there is very little accountability, and Porter supports adding procedures that would “ensure the soundness and durability of modern thoroughbreds.”⁶⁴ The injuries of Barbaro and Eight Belles brought to light “the gap between the physical characteristics a horse needs to win and those needed to lead a long life.”⁶⁵ This is precisely the danger of over-medicating thoroughbred horses. Certain drugs only offer a quick fix for the immediate needs of a particular race, but have detrimental long-term effects.

After Barbaro’s injury at the 2006 Preakness Stakes, those involved with breeding and training race horses took initiative. In October of that year the Keeneland Association held the inaugural Welfare and Safety of the Racehorse Summit to study the durability of horse breeds and bloodlines.⁶⁶ During recent years the number of starts for thoroughbreds has declined, and some suggest that their inability to compete is due to the owner’s and trainer’s fear of injury.⁶⁷ The Keeneland seminar brought together statisticians and breeding experts in an effort to create a comprehensive database of injuries and racing records “directed at improving safety.”⁶⁸ The hope was to be able to give owners and breeders a “durability score” that could pre-

⁶² *Id.*

⁶³ Jon Weinbach, *Better Racing Oversight Sought*, WALL ST. J. (May 6, 2008), <http://online.wsj.com/article/SB121003733327069541.html>.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* See also Grayson-Jockey Club Research Foundation, Inc., *Thoroughbred Safety Committee Recommendation for the Equine Injury Database*, August 17, 2008, available at <http://www.jockeyclub.com/resources/eid.pdf> (last visited Feb. 27, 2012).

dict the longevity of a horse's racing career.⁶⁹ The database, which is accessible via the Jockey Club's website, was launched in July 2008 and there are currently 87 racetracks providing relevant statistics.⁷⁰

As a follow-up to the Keeneland Association's 2006 seminar, the Grayson-Jockey Club Research Foundation held another Welfare and Safety of the Racehorse Summit in March 2008.⁷¹ Each of the Summit's seven working groups were charged with developing recommendations for the previously discussed issues.⁷² Participants agreed that "these recommendations should be provided to all aspects of the horseracing industry for review and consideration of implementation."⁷³ There were eight general recommendations that the working groups highlighted at the Summit: (1) improve track surfaces; (2) reduce catastrophic injuries; (3) improve drug testing and laboratory standards; (4) expand education; (5) establish uniform regulation; (6) coordinate implementation efforts; (7) encourage responsible thoroughbred ownership; and (8) promote genetic diversity among thoroughbreds.⁷⁴

Several of the Summit's recommendations have been successful in improving regulatory uniformity and tightening disclosure requirements. With regard to the second recommendation for catastrophic injuries, the primary objective is to reduce racing fatalities.⁷⁵ Summit participants discussed the development of a standardized on-track injury reporting program and ways to encourage more racetracks and commissions to participate.⁷⁶ To that end, the Jockey Club partnered with InCompass Solutions Inc., a company that offers pre-race veterinary exam software.⁷⁷ In an effort to encourage broad participation, InCompass announced in June 2010 that the on-track reporting software would be offered "free of charge to all racetracks that agree to share their respective examination data with association and regulatory veterinarians at other tracks that are also using the software."⁷⁸

⁶⁹ *Id.*

⁷⁰ See THE JOCKEY CLUB, <http://www.jockeyclub.com/initiatives.asp> (last visited Feb. 27, 2012).

⁷¹ *Welfare and Safety of the Racehorse Summit Recommendations*, *supra* note 15.

⁷² *Id.*

⁷³ *Id.* at 3.

⁷⁴ *Id.* at 3-9.

⁷⁵ *Id.* at 4.

⁷⁶ *Id.*

⁷⁷ See Bob Curran, *InCompass Pre-Race Vet Exam Software to be Offered Free to Racetracks*, THE JOCKEY CLUB (June 9, 2010), <http://www.jockeyclub.com/mediaCenter.asp?story=428>.

⁷⁸ *Id.*

The Summit's third recommendation concerns improvement of drug testing and laboratory standards. Participants recognized the need to establish more uniform standards and accreditation requirements along with a complete analysis of the most effective testing methods.⁷⁹ In developing recommendations for medication and drug testing laboratories, the following organizations were included: Association of Official Racing Chemists (AORC), Racing Medication and Testing Consortium (RMTC), Association of Racing Commissioners International (RCI) Drug Testing Standards Committee, the World Anti-Doping Agency, the Thoroughbred Owners and Breeders Association (TOBA) Sales Integrity Task Force, and the National Thoroughbred Racing Association (NTRA).⁸⁰ In 2010, the RMTC developed a "Drug Testing Initiative," which sought to reorganize and improve drug testing.⁸¹ The initiative seeks to develop a "code of standards for laboratory accreditation by the RMTC and consolidation of the current industry quality assurance programs into a single, independently monitored program."⁸² Believing this will result in "comprehensive reform and improvement to U.S. equine drug testing," the Jockey Club's Thoroughbred Safety Committee recommended "the adoption of the RMTC Equine Drug Testing Standards into the [RCI] Model Rule book and the participation and adoption of the standards by all United States racing authorities and their associated testing laboratories."⁸³ Laboratories in California, Kentucky, New York, and Pennsylvania signed letters of intent to complete the accreditation process no later than December 2011.⁸⁴

In order to establish uniform regulation of medication and coordinate implementation efforts (recommendations No. 5 and 6), Summit participants saw the need to create a national, non-federalized regulatory structure.⁸⁵ Specifically, participants sought to develop a consensus from all industry stakeholders and create a World Anti-Doping Agency member organization to set national drug policy and laboratory standards.⁸⁶ The main objective for implementation is to focus on the welfare and safety of

⁷⁹ *Welfare and Safety of the Racehorse Summit Recommendations*, *supra* note 15, at 3.

⁸⁰ *Id.* at 6.

⁸¹ Grayson-Jockey Club Research Found., Inc., *Thoroughbred Safety Committee Recommendation for Drug Testing and Laboratory Standards*, THE JOCKEY CLUB (Aug. 22, 2010), <http://www.jockeyclub.com/resources/lab.pdf>.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Welfare and Safety of the Racehorse Summit Recommendations*, *supra* note 15, at 7-8.

⁸⁶ *Id.*

racehorse as “the guiding principle in the decision-making process.”⁸⁷ To achieve this, steps were taken in October 2010 by the Association of Racing Commissioners International (RCI) to establish more uniform drug testing standards for the regulation of non-steroidal anti-inflammatory drugs such as phenylbutazone and corticosteroids.

IV. REGULATION OF NON-STEROIDAL ANTI-INFLAMMATORY DRUGS

A. *Phenylbutazone*

The RCI's Board of Directors lowered the threshold level for phenylbutazone, a NSAID also known as “Bute,” from 5 µg/ml of plasma or serum to 2 µg.⁸⁸ The RCI's Model Rules Committee suggested lowering the threshold for Bute based on recommendations from RCI's Regulatory Veterinarians Committee, the RCI Drug Testing Standards Committee, the Racing Medication and Testing Consortium (RMTC), The Jockey Club's Thoroughbred Safety Committee,⁸⁹ The Jockey's Guild, the Thoroughbred Owners and Breeders Association (TOBA) and the American Association of Equine Practitioners (AAEP).⁹⁰ The benefit of using an anti-inflammatory like Bute is that horses can be more comfortable while they run which can help avoid other compensatory injuries, but the downside is that some horses receiving phenylbutazone don't metabolize it well.⁹¹ Larry Soma, veterinarian and professor of anesthesia at University of Pennsylvania's New Bolton Center, says that the reduction will be better for horses and for racing:⁹²

⁸⁷ *Id.* at 8.

⁸⁸ Ed Kane, RCI Rules on Reducing Phenylbutazone Thresholds in Racehorses, *DVM NEWS MAGAZINE* (Dec. 1, 2010), available at <http://veterinarynews.dvm360.com/dvm/article/articleDetail.jsp?id=697064&pageID=1>.

⁸⁹ GRAYSON-JOCKEY CLUB RESEARCH FOUND., INC., *supra* note 39 “In light of concerns expressed by regulatory veterinarians. . .the Thoroughbred Safety Committee calls for the immediate adoption by the Association of Racing Commissioners International and all United States racing authorities of the Racing Medication and Testing Consortium recommendation revising the recommended threshold for the NSAID phenylbutazone from 5 micrograms per milliliter to 2 micrograms per milliliter of plasma or serum when administered not less than 24 hours prior to post time.” *Id.*

⁹⁰ See Kane, *supra* note 88.

⁹¹ *Id.*

⁹² *Id.*

The recommendation that you go from a threshold of 5 µg/ml to 2 µg/ml of serum is probably going to be beneficial in the long run . . . If it's going to cut back on some of the injuries we see in racehorses, that's positive, though there are many reasons why a horse becomes injured, and medication is just one possibility. We'll see over the next year or so if the overall catastrophic or non-catastrophic injury rate is reduced at some of the racetracks.⁹³

Other equine practitioners from various jurisdictions have echoed Soma's support of the lowered threshold. Kathleen Anderson is an equine veterinarian who works at racetracks in Maryland, Delaware, Pennsylvania, Virginia, West Virginia, New Jersey and New York.⁹⁴ She says that each jurisdiction where she practices has different Bute rules, so the action of the RCI Board of Directors offers welcome uniformity:⁹⁵

I don't feel this is a hardship at all for horsemen or for practitioners. In my experience, very few horses would be negatively impacted by a little less Bute — meaning I don't think the majority of horsemen rely on high levels to get horses to the races Once the ruling goes into effect, we'll find out quickly that higher levels of Bute are unnecessary. Like with the use of anabolic steroids, nobody could live without them until they had to. This is just one more step toward uniformity among medications between jurisdictions. And it's a good thing.⁹⁶

Bryan Young, an equine veterinarian who works at racetracks in Texas and Oklahoma, also supports the reduced level for Bute.⁹⁷ He is in favor of any steps that can be made to reduce the number of injuries.⁹⁸ Young stated that lowering the threshold could bring change in how the racing industry works and the way horses are trained on Bute:⁹⁹

Trainers won't be able to use Bute on a daily basis, especially leading up to a race, as they would with the previous threshold level [F]rom

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* The Virginia Racing Commission approved the lower phenylbutazone levels in March 2009. See Press Release, Virginia Racing Commission, Virginia Racing Commission Approves Stricter Controls on Use of Phenylbutazone (March 25, 2009), available at <http://www.vrc.virginia.gov/document/PBZ%20Press%20Release.pdf>.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

the standpoint of allowing the regulatory veterinarians an opportunity to look at these racehorses on race day, with a lower level of bute on board to give them a more accurate view, [is] a positive thing for racing.¹⁰⁰

Mary Scollay, Equine Medical Director for the Kentucky Horse Racing Commission, and a member of the RCI Regulatory Veterinarians Committee, is very supportive of the change because it will aid in performing more accurate pre-race exams.¹⁰¹ The pre-race exam is usually completed the morning of a race and the veterinarian is responsible for determining whether the horse is healthy enough to compete.¹⁰² Scollay stated that her colleagues have raised concerns regarding the ability to perform an accurate examination if the horse was under the influence of NSAIDs.¹⁰³ She noted, "If the things that we're looking for during a pre-race inspection in terms of heat, pain, swelling and inflammation were mitigated by the effects of medication, then we really couldn't assess the horse's condition."¹⁰⁴ Thus, reducing the threshold level of phenylbutazone in racehorses seems to be a step in the right direction for improving safety and uniformity.

B. *Corticosteroids*

Lowering the threshold levels for phenylbutazone could also have an effect on the use of corticosteroids in racing since both are anti-inflammatory in nature.¹⁰⁵ Corticosteroid use would likely increase if Kentucky lowers the threshold testing level for Bute.¹⁰⁶ Those who are actively involved with finding second careers for thoroughbreds after they retire from racing claim that horses "that have been regularly injected with corticosteroids have trouble rehabilitating."¹⁰⁷ Due to the concern expressed by veterinarians, the RMTC asserts that more research on the effects of corticosteroids is urgently needed, and researchers are currently investigating the use of several different corticosteroids in racehorses.¹⁰⁸

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Tom LaMarra, *Kentucky Equine Drug Research Council Targets Corticosteroids*, THE HORSE (Feb. 10, 2011), <http://www.thehorse.com/ViewArticle.aspx?ID=17780&src=RC>.

¹⁰⁶ *See id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

In early 2011, the Kentucky Equine Drug Research Council received a letter from The Jockey Club asking Kentucky to lead the research and make recommendations to the state's Horse Racing Commission¹⁰⁹. Although many racing jurisdictions have drastically limited the use of medication on race day, corticosteroids are under scrutiny both because of their therapeutic and anti-inflammatory capabilities, and because they are not currently regulated.¹¹⁰ The research initiated by the RMTTC will aid in making recommendations to regulators for use in model rules on a national level.¹¹¹ Thus far, nine corticosteroids have been recognized for defining threshold testing levels, and these could be permitted for therapeutic use but banned on race days.¹¹² Injecting medication into a racehorse's joints is a common occurrence, but veterinarians are concerned that the injections may have long-lasting negative effects.¹¹³

V. STRONGER REFORM AND HOPE FOR THE FUTURE

At a March 2011 meeting of the Association of Racing Commissioners International (RCI), leaders called for a five-year phase-out of medication in horse racing.¹¹⁴ It was reasoned that a gradual phasing out would "give horsemen and owners sufficient time to adjust to the change" and the five-year time frame is "reasonable to bring North American racing policies in line with what is going on in other parts of the world like Europe and Hong Kong."¹¹⁵ In its release on equine medication the RCI stated that "[t]oday over 99% of Thoroughbred racehorses. . . have a needle stuck in them four hours before a race," which seems unnecessary to a majority of people "except horse trainers who think it necessary to win a race."¹¹⁶ Gradually allowing more equine drug use throughout the years has forced racing jurisdictions to "juggle threshold levels as horsemen become more desperate to win races," and this has led to a negative public perception of racing.¹¹⁷ The RCI did not mention the use of therapeutic medication for training purposes but, from the tone of the annual meeting, leadership

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ LaMarra, *supra* note 18.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

within RCI is seeking “a major overhaul of medication policies” with rules similar to those used in Australia, Dubai, Europe, Hong Kong, and Russia.¹¹⁸ If RCI moves toward a zero tolerance policy, however, it will mark a departure from the recommendations of the Racing Medication and Testing Consortium, which seeks to develop a consensus on drug use from a variety of professionals involved with racing.¹¹⁹ Some doubt that a zero tolerance policy for drug use is even possible given the amounts of medications used for training, but the RCI feels it has a duty to better serve the horses and the betting public.¹²⁰

A. *The Debate on Anti-Bleeding Medication*

The Association of Racing Commissioners International (RCI) wants to stop the use of the diuretic furosemide (commonly known as Lasix or Salix) which treats bleeding in the lungs of racehorses.¹²¹ In December 2011 RCI adopted a rule that prohibits private veterinarians from administering Lasix on race day, and this rule must be adopted by regulators in each racing jurisdiction.¹²² If furosemide is needed for therapeutic treatment on race day, it must be administered under “strictly regulated terms.”¹²³ RCI took action under recognition that racing medication policies in the United States are “‘not only out of step with an increasing number of the world’s racing nations, but out of step with other major league sports.’”¹²⁴ Furthermore, regulatory authorities, the general public, and entities closely involved with racing “are growing increasingly intolerant” of the use of such drugs.¹²⁵ Several organizations have joined RCI in support of its recommendations, including the “Kentucky Thoroughbred Association, the Thor-

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Matt Hegarty, *Jockey Club Outlines Support for Banning Raceday Furosemide*, DAILY RACE FORM (Apr. 28, 2011), <http://www.drf.com/news/jockey-club-outlines-support-banning-raceday-furosemide>.

¹²² *Model Rule on Salix Administration Adopted*, *supra* note 19.

¹²³ *Id.*

¹²⁴ Joe Drape, *Congress to Propose Stiffer Rules on Drugs*, N.Y. TIMES (Apr. 29, 2011), <http://www.nytimes.com/2011/04/30/sports/30racing.html>.

¹²⁵ Paul Moran, *Drug War of the Clueless*, ESPN.COM (May 1, 2011), http://sports.espn.go.com/sports/horse/triplecrown2011/columns/story?columnist=moran_paul&id=6461850. The fact that different states have had different policies regarding drug use in thoroughbreds would seem absurd in other sports like football or basketball. See Bill Heller, *Bettors Hurt by Secret Positives*, THOROUGHBRED TIMES (Nov.

oughbred Owners and Breeders Association, Keeneland Association, Breeders' Cup, Ltd., Thoroughbred Racing Associations of North America, and The Jockey Club."¹²⁶

For example, the Jockey Club issued a statement of support mentioning that race-day administration of Lasix "is no longer tolerated by the racing public" and that "U.S. policies that have allowed for [its] use have increasingly isolated the U.S. from the rest of the racing world."¹²⁷ While Lasix is effective in reducing the severity of bleeding that horses sometimes experience after a race, its usefulness "does not outweigh the harm to racing's reputation caused by the widespread use of the drug."¹²⁸

Many observers today believe that the Thoroughbred is not as sound and hardy as he once was, and the generations of horses racing on medication and then dominating the gene pool are suspected of causing or contributing to that decline. . . . If the rest of the world increasingly looks on the American Thoroughbred as a tainted product, the impact on the international market is easily predictable. . . . The Jockey Club stands convinced that the elimination of race-day medication is essential to achieving optimal stewardship of the horse, the sport, the public perception and confidence, and the business of Thoroughbred racing.¹²⁹

In contrast, the National Horsemen's Benevolent and Protective Association (HBPA) expressed skepticism about recommendations by the RCI to ban anti-bleeding medications on race day.¹³⁰ The HBPA raised concerns such as: how equine professionals can adequately address bleeding or exercise-induced pulmonary hemorrhage (EIPH) if Lasix or Salix cannot be used, whether there are alternative non-race-day treatments that can be used for

15, 2003), <http://www.thoroughbredtimes.com/commentary/2003/November/15/Bettors-hurt-by-secret-positives.aspx> (cited in Gasparon, *supra* note 30 at 199).

¹²⁶ *Id.* The Breeders' Cup board of directors plans to form a committee to develop a timetable for the elimination of anti-bleeding drugs commonly used on race-day. See *Ludt New BC Chair; Support for Medication Ban*, BLOODHORSE (Apr. 15, 2011), <http://www.bloodhorse.com/horse-racing/articles/62486/ludt-new-bc-chair-support-for-medication-ban>.

¹²⁷ Hegarty, *supra* note 120 (stating, "The United States is the only major racing jurisdiction where the drug is legal to use on raceday, and its ubiquitous use in the United States has consistently been the source of criticism by regulatory bodies in other countries.")

¹²⁸ *Id.*

¹²⁹ James L. Gagliano, *Statement from The Jockey Club*, (Apr. 28, 2011), available at <http://www.jockeyclub.com/mediaCenter.asp?story=489>.

¹³⁰ Ed DeRosa, *Horsemen Oppose Current Plan to Eliminate Race-Day Medication*, THOROUGHBRED TIMES (Apr. 18, 2011), <http://www.thoroughbredtimes.com/national-news/2011/04/18/hbpa-rci-raceday-medication.aspx>.

EIPH, what factors make U.S. racehorses more susceptible to EIPH than foreign horses, and how trainers in other countries compensate for EIPH.¹³¹ Following its convention in July 2011, the HBPA issued a statement supporting the elimination of all race-day medication except for the anti-bleeding drug Salix and only in particular circumstances.¹³² The HBPA supports the continued use of Salix “only if it is administered at least four hours before a race by a regulatory veterinarian in the horse’s stall.”¹³³ The decision was based on scientific evidence showing that “most racehorses will bleed sometime in their careers, and that Salix has been proven to reduce or prevent exercise-induced pulmonary hemorrhaging.”¹³⁴ The HBPA believes that Salix is “best for the welfare of horses and jockeys” and continues to support the enforcement of strict penalties for drug violations.¹³⁵

Anti-bleeding drugs are a source of controversy because of their increased use in thoroughbred racing over the years and the limited scientific research detailing the overall effects the drugs have on horses.¹³⁶ Furosemide, the diuretic known as Lasix “restricts excessive bleeding in a horse’s lungs due to exercise-induced pulmonary hemorrhage by directing the blood to the kidneys.”¹³⁷ In 1991 the number of horses that started a race on Lasix was about 45 percent and in 2010 the number is almost 95 percent.¹³⁸ The drug was developed as a treatment for swelling in the human body caused by heart or kidney failure and was first used in racehorses in the 1960’s¹³⁹ to reduce visible amounts of blood from the horse’s nostrils after racing.¹⁴⁰ At that time, horses could only be approved for Lasix use if they bled from the nostrils during competition, but the relaxing of restrictions over the years has led to severe overuse and abuse.¹⁴¹ Thoroughbred horses that run at speeds of over thirty miles per hour do have

¹³¹ *Id.*

¹³² *National HBPA: Keep Salix, Drop Adjunct Drugs*, *supra* note 19.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Squires, *Drugs in Racing*, *supra* note 27.

¹³⁷ *Id.*

¹³⁸ Moran, *supra* note 125.

¹³⁹ Veterinarian Alex Harthill administered the first dose of Lasix to the Kentucky Derby winner Northern Dancer in 1964 before anyone was aware the drug existed. The 1968 Derby winner, Dancer’s Image, was disqualified after testing positive for Lasix, which was illegal at that time. *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Moran, *supra* note 125.

varying degrees of bleeding in their lungs, but severe bleeding is uncommon.¹⁴² Not only is Lasix expensive (costing horse owners over \$100 million per year), but when it is used regularly in equine training, it can damage a horse's organs and interfere with bone remodeling by "disturbing the calcium phosphorus balance by releasing calcium stored in the bone."¹⁴³

B. *In the Homestretch for Uniform Regulation*

Because of these negative effects, it is obvious to both those inside the industry and those who enjoy thoroughbred racing as spectators that uniform regulation regarding drug use is an urgent need. There are thirty-eight racing jurisdictions in the United States, and each is governed by the state's individual racing commission which has authority to draft its own regulations.¹⁴⁴ The authority of each state to control racing in its jurisdiction and the lack of a centralized governing body leads to confusion and inconsistency.¹⁴⁵ There are three possibilities for creating a centralized governing body: (1) pass federal legislation; (2) develop a national governing body for thoroughbred racing similar to other sports; or (3) allow stakeholders within the industry to establish uniform rules and regulations for all thirty-eight racing jurisdictions.¹⁴⁶

Passing federal legislation seems to be the least viable of the options because owners, trainers, veterinarians, and breeders are reluctant to put the power of total regulation in the hands of Congress.¹⁴⁷ The racing industry "would only accept federal involvement as a last resort."¹⁴⁸ Currently the federal government's authority over horseracing is limited to the regulation of wagering and off-track betting through the Interstate Horseracing Act.¹⁴⁹ But stakeholders in the industry do not want to expand that authority to include all aspects of racing because "there are many competent and effective organizations within the racing community" capable of bringing about

¹⁴² Squires, *Drugs in Racing*, *supra* note 27.

¹⁴³ *Id.*

¹⁴⁴ Luke Breslin, Comment, *Reclaiming the Glory in the "Sport of Kings" – Uniformity is the Answer*, 20 SETON HALL J. SPORTS & ENT. L. 297, 313-14 (2010) (internal citations omitted).

¹⁴⁵ *Id.* at 314.

¹⁴⁶ *Id.* at 324.

¹⁴⁷ *Id.* at 314.

¹⁴⁸ *Id.*; citing John Scheinman, *Governing Body Urged for Racing Industry*, WASH. POST, June 20, 2008.

¹⁴⁹ *Id.* at 313 (internal citations omitted). See also Interstate Horseracing Act, 15 U.S.C. § 3001, et seq. (2007).

necessary changes with respect to drug use.¹⁵⁰ The week before the 2011 Kentucky Derby, Representative Edward Whitfield from Kentucky and Senator Tom Udall from New Mexico introduced a federal bill that would eliminate performance-enhancing drugs from thoroughbred racing.¹⁵¹ The bill establishes penalties, including a permanent ban, for trainers whose horses test positive for either illegal or therapeutic drugs.¹⁵² The language and purpose of the legislation is similar to the rules already proposed by RCI that will eliminate all drug use in thoroughbred racing over the next five years.¹⁵³ While it is laudable that legislators want to promote uniform regulation as a means of restoring the dignity of thoroughbred racing, federal involvement is not the most effective means. Owners, trainers, and veterinarians through organization such as RCI are better equipped to regulate the sport because they are the most closely connected and directly impacted by industry standards.

Some have argued that thoroughbred racing should be governed by a national governing body similar to the National Football League, National Basketball Association, or Major League Baseball.¹⁵⁴ While this may seem like a more effective and simplified approach, it is not likely to succeed for thoroughbred racing in the way it has with other sports because of the number of “conflicting organizations and interests in the [racing] industry.”¹⁵⁵ It is also unlikely that states that collect all the operational revenue and are able to enforce their own rules and interests would cede such power to a national racing league.¹⁵⁶

The third possibility, establishing uniform rules and regulations within the industry for all racing jurisdictions, is the most likely to succeed. A uniform consensus among leading thoroughbred organizations will ensure that “health and safety is not compromised, the integrity of American racing is upheld, and that all horses and racing jurisdictions are operating on an even playing field.”¹⁵⁷ Industry leaders should work to establish a zero-tolerance policy for the use of all drugs in racing and develop stricter penalties for those who violate the rules.¹⁵⁸ Medication may be used for rehabili-

¹⁵⁰ *Id.* at 324.

¹⁵¹ Moran, *supra* note 125.

¹⁵² *Id.*

¹⁵³ LaMarra, *supra* note 18.

¹⁵⁴ Breslin, *supra* note 144, at 325.

¹⁵⁵ *Id.* at 326.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 327.

¹⁵⁸ *Id.* at 328.

tation, but when a horse requires medication for a particular illness or injury, then that horse should not be permitted to race.¹⁵⁹ This is necessary to ensure the best equine health and wellness for racing across all jurisdictions.

If American racing becomes medication-free in a way that conforms to current international standards, it should come as a result of “industry-wide consensus, establishment of a central authority and unanimous regulatory effort”¹⁶⁰ among racing associations. The first steps in this process were taken in the summer of 2011 during the National Thoroughbred Racing Association, the American Association of Equine Practitioners, and the Racing Medication and Testing Consortium conferences regarding the use of race-day medication and its impact on equine health.¹⁶¹ Ideally these discussions will lead to the development of a model rule that all states can adopt. The surest way to return to a more pure form of racing is for the industry itself to adopt a nationwide ban on all medications.

C. *A Timely Victory*

The 2011 Kentucky Derby displayed many of the things that are great about thoroughbred racing. Despite the scratch of Derby-favorite, Uncle Mo, and Archarcharch’s leg injury during the race,¹⁶² there was a lot to celebrate in the victory of Animal Kingdom. Having never raced on dirt prior to the Derby, Animal Kingdom was not the most likely of candidates to win the roses.¹⁶³ Moreover, he is owned by a syndicate of twenty partners, Team Valor International, and “trained by an Englishman who has never been cited for violating a medication rule and believes a horse should

¹⁵⁹ *Id.*

¹⁶⁰ Moran, *supra* note 125.

¹⁶¹ Hegarty, *supra* note 121.

¹⁶² Uncle Mo was scratched the day before the Derby because of a gastrointestinal infection. The main goal for trainer, Todd Pletcher, was to keep the horse healthy so that he can continue racing. Archarcharch, however, will retire from racing. He suffered cartilage damage in his front left leg, which he injured during the race shortly after coming out of the gate. Joe Drape, *Uncle Mo Sent to Farm; Archarcharch is Retired*, N.Y. TIMES (May 9, 2011), <http://therail.blogs.nytimes.com/>.

¹⁶³ Joe Drape, *Animal Kingdom’s Win is Victory for the Sport*, NY TIMES (May 8, 2011), http://www.nytimes.com/2011/05/09/sports/09racing.html?_r=2&ref=sports.

be allowed to be a horse as much as possible.”¹⁶⁴ Trainer Graham Motion and Barry Irwin, CEO of Team Valor, “demonstrate how solid horsemanship rather than black bag veterinarian work can succeed at horse racing’s highest level.”¹⁶⁵ Animal Kingdom, who was born and raised in Kentucky, had a Brazilian-bred sire and a German-bred dam, which Irwin thinks played a part in his Derby win:

We have not done enough importing of horses and blood lines from other places where horses don’t run on drugs, and horses’ legs are not manipulated, and horses, basically, are bigger and tougher, stronger and sounder. In Germany, you are not allowed to breed a mare that has ever raced on drugs, Lasix, Bute, nothing. So when you buy some stock from there, you know you’re getting something good.¹⁶⁶

Motion adheres to “European principles of horsemanship” and trains his horses outside the racetrack.¹⁶⁷ After many years of using a lot of different trainers and tired of “the lack of truth telling in the profession,” Irwin was relieved when Motion agreed to train Animal Kingdom.¹⁶⁸

“How Animal Kingdom was bred by Irwin and how he was managed by Motion is nothing short of remarkable” given the prevalent use of performance-enhancing drugs in American racing.¹⁶⁹ Although Animal Kingdom did run on the anti-bleeding drug known as Lasix, which was legal the day of the Derby, Motion and Irwin stated that they would have “no trouble giving up drugs like Lasix” for future races.¹⁷⁰ Animal Kingdom’s victory

¹⁶⁴ *Id.*; see also Bill Finley, *The Fresh Face of Horse Racing*, ESPN (May 10, 2011), http://sports.espn.go.com/sports/horse/triplecrown2011/columns/story?columnist=finley_bill&id=6521407 (“Motion has never had a medication violation in a career that has spanned 19 years and includes more than 7,900 starters.”).

¹⁶⁵ Drape, *Animal Kingdom’s Win*, *supra* note 163.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* Irwin was passionate about finding a trainer who would not cheat to win. Motion had a reputation for always playing by the rules and Irwin could trust him. “Not only is Motion honest, he’s good. He’s won with 19 percent of his starters during his career, and with Animal Kingdom he pulled off the difficult feat of taking a horse that had never run on dirt and winning the toughest dirt race in the world.” Finley, *supra* note 163.

¹⁶⁹ *Id.*

¹⁷⁰ Jim Squires, *Derby Winner Sets Shining Example for Wayward Industry*, THE RAIL: THE N.Y. TIMES RACING BLOG (May 8, 2011), <http://therail.blogs.nytimes.com/2011/05/08/derby-winner-sets-shining-example-for-wayward-industry/#more-12781/>. “Although Team Valor has benefited by moving horses to the United States

at the Derby was arguably attained “with the best interest of the horse and the sport in mind,”¹⁷¹ and it could not have come at a more opportune time given the recent recommendation by the RCI to eliminate all race-day medication.¹⁷²

VI. CONCLUSION

There are several changes that can be made to improve the sport of thoroughbred racing. First, the safety and welfare of the horse must be the top priority. As exciting as it is, the thrill and financial gain of winning must not usurp the obligations of owners, trainers, and veterinarians to do what is best for the horse’s health. Second, transparency must be improved by developing a uniform tracking system for injuries. According to a 2010 report, the Jockey Club is working to develop “world-class equine drug testing laboratories capable of producing consistent results through uniform and standardized testing procedures,”¹⁷³ which is a major step toward improvement. Third, a central authority within the industry should make and enforce rules and regulations that bind all racing jurisdictions. The lack of a national uniform regulatory structure has not only harmed the image of horse racing in America, but “has led to a decline in the health and safety of the horse, as well as competitive disadvantages among racing jurisdictions.”¹⁷⁴ The best way to restore the integrity of thoroughbred racing is for leaders and organizations within the industry to adopt a nationwide ban on all medications used in racing.

In the debate over what medications should be allowed and under what conditions they should be used, we can lose sight of what is best about thoroughbred racing. Gambling has always played an influential role in the popularity of the sport, but the showcase of athletic power and endurance is what drives and sustains it.¹⁷⁵ Perhaps the most captivating win in racing

from non Lasix-tolerant racing jurisdictions, [Irwin] is one of the owners perfectly happy with a drug-free playing field. He believes he can breed a horse that can compete around the world without relying on race-day drugs.” *Id.*

¹⁷¹ Drape, *supra* note 163.

¹⁷² Moran, *supra* note 125.

¹⁷³ Tom LaMarra, *Officials Say Report Dispels Drug Criticism*, BLOODHORSE (Sept. 13, 2011), available at <http://www.bloodhorse.com/horse-racing/articles/65007/officials-say-report-dispels-drug-criticism#ixzz1qBuywOx6>.

¹⁷⁴ Breslin, *supra* note 144, at 315.

¹⁷⁵ See Maria Puente, *Hanging Onto a Horse’s Tale: Secretariat Still Astounds Us*, USA TODAY (Oct. 7, 2010), http://www.usatoday.com/life/movies/news/2010-10-07-secretariat07_CV_N.htm. “Racehorses are not out there for the money, they’re

history was that of Secretariat, winner of the 1973 Triple Crown.¹⁷⁶ Secretariat showed his strength and courage in each jewel of the Triple Crown. He set a record at the Kentucky Derby as the only horse in history to run it in under two minutes.¹⁷⁷ At the Preakness he was in last place at the first turn, but his jockey allowed the horse to make an early move to the outside and Secretariat went on to win by two and a half lengths.¹⁷⁸ After winning the Preakness, Secretariat's story began to capture the attention of America.¹⁷⁹ It had been twenty-five years since the last Triple Crown winner (Citation in 1948) and expectations were high.¹⁸⁰ But what happened at the Belmont Stakes on June 9, 1973, was more than anyone dreamed possible. Secretariat won by a "jaw-dropping 31 lengths," the largest margin in history, and his record-setting time still stands today.¹⁸¹ Secretariat set records while winning the Triple Crown and "he did it without steroids."¹⁸²

Secretariat's victory represents a purity and lack of compromise that must return to thoroughbred racing.¹⁸³ The responsibility of veterinarians, owners, and trainers is to ensure that horses can run based on their ability without artificial interferences. The Jockey Club "continues to believe that horses must compete only when they are free from the influence of medication."¹⁸⁴ This is why the movement to phase out all medications from thoroughbred racing is best for the integrity of the sport and the safety of the horse.

out there for the purest of intentions – they love to run, they love to win, and people just respond to that." *Id.*

¹⁷⁶ See Joe Drape, *To the Swift: Red Smith on Secretariat*, THE RAIL: NY TIMES HORSE RACING BLOG (June 6, 2008), <http://therail.blogs.nytimes.com/2008/06/06/to-the-swift-red-smith-on-secretariat/>.

¹⁷⁷ Secretariat's Triple Crown, ESPN Classic, Sports Century.

¹⁷⁸ *Id.*

¹⁷⁹ Secretariat's Triple Crown, ESPN Classic, Sports Century.

¹⁸⁰ *Id.*

¹⁸¹ Ron Flatter, *Secretariat remains No. 1 name in racing*, ESPN.COM, <http://espn.go.com/classic/biography/s/Secretariat.html> (last visited Apr. 2, 2013). For a comparison between Secretariat and the other Triple Crown winners, see Andrew Beyer, *Ranking the Triple Crown Winners*, THE WASHINGTON POST (June 6, 2008), <http://www.washingtonpost.com/wp-srv/sports/interactives/triplecrown08/>.

¹⁸² Puente, *supra* note 175.

¹⁸³ See *id.*

¹⁸⁴ LaMarra, *supra* note 173.

