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Constitutional Dilemma**

by

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Exclusion of Patrons and Horsemen From Racetracks: A Legal, Practical and Constitutional Dilemma

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INTRODUCTION

Racetracks frequently confront a problem that has produced heated legal controversies for well over one hundred years: the need to exclude or eject individual patrons and horsemen¹ from racetrack premises.² The underlying theme is frequently that the racetrack³ or the state regulatory body responsible for the su-

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¹ For purposes of this Article, the term horsemen means persons who are horse owners, trainers, jockeys or racing commission licensees.

² The first reported decision in Anglo-American jurisprudence focusing on the exclusion or ejection of a racetrack patron appears to be *Wood v. Leadbitter*, 153 Eng. Rep. 351 (Ex. 1845). See notes 19-27 *infra* and accompanying text.

³ Racetracks throughout the United States are generally privately owned and operated under a state-granted license or permit. For a discussion of the private character of race courses, see notes 56 and 72 *infra*. Depending upon the vocabulary adopted by the state regulatory authority, the racetrack may be known as a "racetrack," a "racing association," or by other terms. See, e.g., PENNSYLVANIA RULES OF RACING § 163.310 (1985) ("race track"); SOUTH DAKOTA RULES AND REGULATIONS GOVERNING HORSE RACING AND HORSE RACING MEETINGS, R. 20.04:19 (1985) ("racing associations"). Generally, these differences in terminology are of no substantive significance, and this Article considers all such terms interchangeable.

pervision of horse racing⁴ attempts to exclude persons whose presence at the track is not in the best interests of the sport of racing.⁵ Some of the activities giving rise to exclusion or ejection of an individual, such as intoxication or violent conduct, are not directly related to the sport.⁶ Others, such as bookmaking, race fixing or the illegal drugging of horses to improve their performance,⁷ are the perennial scourges of the horse racing industry.

In response to these and other problems, the courts developed the racetrack's common law right of exclusion, permitting track management to exclude patrons or horsemen from the premises for just cause or for no reason at all.⁸ Subsequently, legislatures and racing commissions of many states approved statutes and regulations⁹ that permit the racetrack, the racing

⁴ In most states, the supervision of thoroughbred horse racing is vested by state law in an administrative body designated as a racing commission or a racing board. *See, e.g.,* ILL. ANN. STAT. ch. 8, § 37-2 (Smith-Hurd 1985) (creating the Illinois Racing Board); KY. REV. STAT. ANN. § 230.220 (Bobbs-Merrill 1982) [hereinafter cited as KRS] (creating the Kentucky State Racing Commission). In several states, there are separate commissions or boards for types of racing other than thoroughbred racing. *See, e.g.,* KRS § 230.413 (1982) (creating the Kentucky Quarter Horse and Appaloosa Commission); KRS § 230.620 (1982) (creating the Kentucky Harness Racing Commission). This Article uses the terms board and commission interchangeably. Unless otherwise specified, the terms refer to the state administrative entity with authority to supervise thoroughbred horse racing within the jurisdiction.

⁵ See notes 97-107, 129-43, and 154-62 *infra* and accompanying text for a general discussion of the standards applicable to racetracks and racing commissions in the exclusion of patrons and horsemen from racetrack premises.

⁶ See notes 158-60 *infra* and accompanying text.

⁷ See notes 154-62 *infra* and accompanying text.

⁸ *See, e.g.,* *Marrone v. Washington Jockey Club*, 227 U.S. 633, 636 (1913) ("the rule commonly accepted in this country from the English cases"); 153 Eng. Rep. 351 (English law).

⁹ A review of the complete panorama of state statutory and regulatory restrictions on the horse racing industry is beyond the scope of this Article. Suffice it to say that the state-imposed requirements on racing and pari-mutuel wagering, even within a single jurisdiction, are indeed extensive. *See, e.g.,* KRS §§ 230.070-.090 (general provisions); KRS §§ 230.210-.360 (racing); KRS §§ 230.361-.374 (pari-mutuel wagering); KRS §§ 230.385-.398 (pari-mutuel wagering for harness racing); KRS § 230.400 (Thoroughbred Development Fund); KRS §§ 230.410-.447 (quarter horse and appaloosa racing); KRS §§ 230.510-.520 (Kentucky Horse Council); KRS §§ 230.610-.770 (trotting and harness racing); Kentucky Rules of Racing, 810 KY. ADMIN. REGS. § 1:001-.021 (1985) [hereinafter cited as K.A.R.].

The rules of racing in many states are codified along with the other administrative regulations promulgated by state agencies. *See, e.g.,* 810 K.A.R. § 1:001 *et seq.* In some

commission, or both to exclude or eject individual patrons and horsemen from the premises.¹⁰ In several states, including Kentucky,¹¹ the common law right of exclusion and a statutory or regulatory authorization¹² or mandate¹³ to exclude certain individuals coexist,¹⁴ so that at least two independent sources for the track's authority to exclude or eject may be relevant to any given situation. Increasingly, however, both the common law right and the statutory and regulatory provisions relating to exclusion have been subjected to legal and constitutional challenges.

This Article examines the sources of the common law right of exclusion¹⁵ and surveys the statutory and regulatory provisions adopted by many states. Various challenges to the application of these rights of exclusion are scrutinized,¹⁶ and the rights of

jurisdictions, however, the rules of racing are not so codified. The racing commission of the various states, including those with codified rules of racing, publish separate pamphlet editions of the regulations containing the codified and, if applicable, uncodified material. See, e.g., KENTUCKY RULES OF RACING (1984). Frequently, the numbering system in these unofficial compilations differs from the official codification. Compare *id.* (regulations I - XX) with 810 K.A.R. § 1:001-.021. As a practical matter, most attorneys practicing in the area of equine racing law refer to the rules and regulations by using the state racing commission's numbering system rather than the codified citation. Therefore, for ease of reference, throughout this Article citations to the state rules and regulations governing racing will give the name of the state, the number of the rule or regulation from that state's unofficial pamphlet edition of its racing regulations, and the pamphlet edition year of publication. E.g., "KENTUCKY RULES OF RACING, R. I (1984)."

¹⁰ See notes 96-113, 144-76 *infra* and accompanying text.

¹¹ See *James v. Churchill Downs, Inc.*, 620 S.W.2d 323 (Ky. Ct. App. 1981).

¹² Some statutes and regulations permissively *authorize* the racetrack or the racing commission to exclude certain persons from the track, without *requiring* the track to exclude anyone. See, e.g., KENTUCKY RULES OF RACING, R. VI, § 23(1) (1984) ("Associations may eject or exclude any persons, licensed or unlicensed, from association grounds or a part thereof solely of its own volition and without any reason or excuse given therefor . . .").

¹³ Some regulations *require* the track to exclude or expel certain described categories of persons from its premises. See, e.g., KENTUCKY RULES OF RACING, R. VI, § 23(2) (1984) ("Association shall eject or exclude from association grounds all persons believed to be engaged in a bookmaking activity or solicitation [sic] of bets or touting . . ."). Cf. KENTUCKY RULES OF RACING, R. VI, § 23(1) (1984).

¹⁴ See, e.g., *Tropical Park, Inc. v. Jock*, 374 So. 2d 639 (Fla. Dist. Ct. App. 1979) (statute preempts common law right to exclude only in the areas designated by statute); *James v. Churchill Downs, Inc.*, 620 S.W.2d 323 (for the statute to abrogate the common law, the intention to do so must be clear).

¹⁵ See notes 19-42, 47-95, 129-42 *infra* and accompanying text.

¹⁶ See notes 96-113, 144-77 *infra* and accompanying text.

the racetrack are examined both in terms of the need for such powers of exclusion and their ability to withstand legal and constitutional attack.¹⁷ This analysis leads to the conclusion that many of the statutory and regulatory provisions currently in force need updating so that racetracks may exclude certain individuals without fear of legal or constitutional challenge.¹⁸

I. SOURCES OF AUTHORITY FOR THE RIGHT TO EXCLUDE

A. *The Common Law Right of Exclusion*

In 1845, an English court for the first time examined the right of a racetrack to exclude a patron. In *Wood v. Leadbitter*,¹⁹ an action for assault and false imprisonment, the plaintiff purchased a ticket to sit in the grandstand at the Doncaster races, and subsequently was asked to leave the premises by a servant of Lord Eglintoun, the steward of those races.²⁰ After refusing to leave, the plaintiff was taken by the arm and forced to leave without the use of "unnecessary violence."²¹ The case reporter noted that Lord Eglintoun wanted the plaintiff to leave "in consequence of some alleged malpractices of his on a former

¹⁷ See notes 86-95 *infra* and accompanying text.

¹⁸ See text accompanying note 219 *infra*.

¹⁹ 153 Eng. Rep. 351 (Ex. 1845).

²⁰ *Id.* at 351. "[T]ickets of admission to the Grand Stand were issued . . . and sold for a guinea each, entitling the holders to come into the stand, and the inclosure round it, during the races." *Id.*

²¹ *Id.* at 352. "It must be assumed that the plaintiff had in no respect misconducted himself, and that, if he had not been required to depart, his coming upon and remaining in the inclosure would have been an act justified by his purchase of the ticket." *Id.* at 353.

Many cases recite that the exclusion or expulsion at issue was accomplished without unnecessary violence and that the person ejected was, but for the racetrack's right of exclusion, properly within—or seeking to enter—the racetrack. Thus, the reader may assume in this Article, like the court in *Wood*, that unless the contrary is stated, in each instance the person ejected was otherwise properly on the racetrack premises and that the ejection did not involve the use of undue violence. For a discussion of the limits of force that may generally be used in ejecting a trespasser, see 87 C.J.S. *Trespass* § 45b (1954).

For purposes of this Article, one may assume also that, unless otherwise stated, the ejected person's conduct would not otherwise have subjected him to arrest. The expulsion of a patron or a horseman from racetrack premises that is merely incidental to a lawful arrest is beyond the scope of this Article.

occasion, connected with the turf,"²² but neither the reporter's notes nor the judge's decision gives any hint as to the nature of the "alleged malpractices."²³ The guinea that the plaintiff had paid to get into the races was not returned.²⁴

The legal analysis paved the way for a century of decisions: the court considered the situation a real estate case. In the judge's view, the plaintiff had purchased a license to go on the racing grounds. Classifying the ticket as a license rather than a grant under real estate principles, the court concluded that the ticket was revocable. According to the court, the ticket did not constitute a grant, because the ticket was not "under seal," as legally required at that time for any transfer of an incorporeal right affecting land.²⁵ Although the court noted in dicta that the plaintiff might have a right of action against the seller of the ticket, "any such action would be founded on a breach of contract, and would not be the result of his having acquired by the ticket a right of going upon the stand, in spite of the owner of the soil."²⁶ The plaintiff's claim to get his guinea back might be valid, but the "owner of the soil" had the right to expel the plaintiff as a matter of real estate law. According to the learned judge, "the ancient landmarks of the common law"²⁷ compelled such an analysis.

Although American courts would cling to *Wood* as an important precedent, English courts ironically did not hold it in such high esteem. Seventy years later, in *Hurst v. Picture Theatres, Ltd.*,²⁸ the King's Bench Division of the High Court of Justice concluded that *Wood* was no longer good law.²⁹ *Hurst*

²² 153 Eng. Rep. at 352.

²³ See *id.* at 351-59. See notes 144-76 *infra* and accompanying text for a discussion of the grounds for exclusion of horsemen under modern statutes and regulations, many of which relate to former "turf" offenses.

²⁴ *Id.* at 353.

²⁵ *Id.* at 358-59. See *Hurst v. Picture Theatres, Ltd.*, [1914-15] All E.R. 836, 838-39 (explaining the holding in *Wood*).

²⁶ 153 Eng. Rep. at 359.

²⁷ *Id.* at 358-59.

²⁸ [1914-15] All E.R. 836.

²⁹ *Id.* at 838-40 (opinion of Buckley, L.J.); *id.* at 842-43 (opinion of Kennedy, L.J.). *Hurst* has been cited to courts in the United States to show that *Wood*, the foundation of the common law right, is unsound. See, e.g., *Greenfeld v. Maryland Jockey Club*, 57 A.2d 335, 336-37 (Md. 1948). Such arguments have been rejected. See, e.g., *id.* at 337.

involved a movie theatre patron whom management ejected in the mistaken belief that the customer had not paid for his seat.³⁰ The *Hurst* court noted that, even if *Wood v. Leadbitter* were still good law, the patron should prevail because the patron was not buying a revocable interest in a portion of the theatre, but a right to see the movie:

What is the grant [in this case]? What the plaintiff in the present action paid his money for was to enjoy the sight of a particular spectacle. He was anxious to go into a picture theatre to see a series of moving pictures during an hour or a couple of hours. . . . That which was granted to him . . . was the right . . . to attend a performance from its beginning to its end. That which was called the licence, the right to go upon the premises, was only something granted to him for the purpose of enabling him to enjoy that which had been granted him—namely, the right to see. He could not see the performance unless he went into the building. . . . So that here . . . there was a licence coupled with a grant . . . [and a] licence coupled with a grant is not revocable.³¹

The *Hurst* court's interpretation of the realities of the situation seems accurate, for, when he buys his ticket, the patron of any type of entertainment—be it an opera, a movie or a horse race—is almost certainly thinking of the amusement itself rather than his right to occupy a few square feet of the premises.

Hurst also suggests an alternate way to defeat the *Wood* analysis. After the merging of equity and law in the English court system,³² the *Wood* rationale was no longer valid because a "modern" court could find that, even if the license to enter

³⁰ [1914-15] All E.R. at 837.

³¹ *Id.* at 839.

³² The court stated:

According to *Wood v. Leadbitter* . . . the plaintiff would have been dismissed from a court of law; he would have no case. He comes into a court of equity, and he obtains relief in equity.

. . . .

. . . . The position of matters now is that the Court is bound under the Judicature Act to give effect to equitable doctrines.

Id. at 840 (discussing *Frogley v. Earl of Lovelace*, [1859] 70 E.R. 450, 453). For a discussion of the effect of civil rights legislation on the common law right of exclusion in the United States, see notes 86-95 *infra* and accompanying text.

the premises were revocable *at law* because it was not under seal, in *equity* the plaintiff would be entitled to an injunction restraining the owner of the premises from breaching his contract with the patron by revoking the license.³³ A court could also find that the license to allow the patron to enter and see the entertainment is coupled with an implied contract not to revoke the license until the end of the performance.³⁴

Thus, in the country where it was rendered, *Wood* is no longer entitled to deference, and its views on the racetrack/patron relationship have been refuted. In the United States, however, *Wood* and its progeny maintain a remarkable vitality.

Wood has attained wide acceptance in the United States, due in large part to its citation by Justice Oliver Wendell Holmes in the United States Supreme Court decision *Marrone v. Washington Jockey Club*.³⁵ Marrone purchased a ticket of admission to Bennings Race Track in Washington, D.C., but was not permitted to enter the track, apparently because the track management believed that he had “‘doped’ or drugged a horse entered by him for a race a few days before.”³⁶ Marrone brought a trespass action based upon the management’s forcible prevention of his

³³ [1914-15] All E.R. at 840-41. In *Hurst*, an injunction was not actually granted; the plaintiff was allowed to recover damages. *Id.* at 841. As a practical matter, obtaining an injunction before the exclusion in most instances would be virtually impossible. The *Hurst* court did not so much suggest that the plaintiff actually should get an injunction, but used the premise that the theatre owner’s conduct would be *enjoinable* to reach the conclusion that the patron’s license was irrevocable.

Nevertheless, the *Hurst* rationale that the plaintiff could or should be entitled to an injunction restraining the proprietors from breaching the contract by revoking the license may apply with greater force in the context of horse racing than in the *Hurst* movie theatre situation. Presumably, the movie would be shown again at other times and on other days, making it difficult for the patron to demonstrate irreparable harm. See, e.g., FED. R. CIV. P. 65(b). But in the horse racing context, if the patron or horseman wanted to see or to participate in a given race and were prevented from doing so by his exclusion from the track, he would never again be able personally to witness or to participate in that race, suggesting a truly “irreparable injury” that could justify equitable relief. See, e.g., *Bier v. Fleming*, 538 F. Supp. 437, 441 (N.D. Ohio 1981), *revd. on other grounds*, 717 F.2d 308 (6th Cir. 1983) (citing earlier proceeding in which the plaintiff harness driver/trainer was granted a temporary restraining order permitting him to drive harness horses at Northfield Park).

³⁴ See [1914-15] All E.R. at 841.

³⁵ 227 U.S. 633 (1913).

³⁶ *Id.* at 636.

entry into the racetrack, and alleged that the Washington Jockey Club had conspired to destroy his reputation.³⁷

Justice Holmes noted that there was no evidence of any conspiracy and that the track management had used no more force than necessary to keep the plaintiff from entering the racetrack.³⁸ As to the propriety of excluding Marrone, Justice Holmes's analysis paralleled that used by the English court in *Wood*:

[The plaintiff's] argument hardly went beyond an attempt to overthrow the rule commonly accepted in this country from the English cases, and adopted below, that such tickets do not create a right *in rem*. . . .

We see no reason for declining to follow the commonly accepted rule. The fact that the purchase of the ticket made a contract is not enough. A contract binds the person of the maker but does not create an interest in the property that it may concern, unless it also operates as a conveyance. The ticket was not a conveyance of an interest in the race track, not only because it was not under seal but because by common understanding it did not purport to have that effect. There would be obvious inconveniences if it were construed otherwise. . . . [T]he holder had no right to enforce specific performance by self-help. His only right was to sue upon the contract for the breach. It is true that if the contract were incidental to a right of property either in the land or in goods upon the land, there might be an irrevocable right of entry, but when the contract stands by itself it must either be a conveyance or a license subject to be revoked.³⁹

The wording varies slightly from that used by the *Wood* court, but the analysis from a real estate perspective, characterizing the ticket as a revocable license, is virtually identical.⁴⁰

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 636-37 (citing *Johnson v. Wilkinson*, 29 N.E. 62 (Mass. 1885); *McCrea v. Marsh*, 12 Gray 211 (Mass. 1857); *Meisher v. Detroit B.I. & W. Ferry Co.*, 118 N.W. 14 (Mich. 1908); *Schubert v. Nixon*, 83 A. 369 (N.J. 1912); *People ex. rel. Burnham v. Flynn*, 82 N.E. 167 (N.Y. 1907); *Taylor v. Cohn*, 84 P. 388 (Or. 1906); *Horney v. Nixon*, 61 A. 1088 (Pa. 1905); *N.W.V. Co. v. Black*, 75 S.E. 82, 85 (Va. 1912); 153 Eng. Rep. 351).

⁴⁰ See 153 Eng. Rep. 351. Two years after the United States Supreme Court's decision in *Marrone*, *Wood* was overruled by *Hurst*. See notes 28-34 *supra* and accompanying text for a discussion of *Hurst*.

The principles set forth in *Wood* and *Marrone* have become the majority rule in the United States.⁴¹ Although both decisions dealt with racetrack situations, courts have applied the same reasoning to other situations, such as theatres and other places of public amusement.⁴²

B. *Statutes and Regulations*

Adding to or modifying the common law right of exclusion, many jurisdictions have enacted statutes⁴³ or promulgated rules and regulations⁴⁴ pertaining to the exclusion of individual pa-

⁴¹ See, e.g., *Watkins v. Oaklawn Jockey Club*, 86 F. Supp. 1006, 1016 (W.D. Ark. 1949), *aff'd*, 183 F.2d 440 (8th Cir. 1950); *Flores v. Los Angeles Turf Club, Inc.*, 361 P.2d 921, 924 (Cal. 1961); *Silbert v. Ramsey*, 482 A.2d 147, 150 (Md. 1984); 57 A.2d 335 at 336 (Md. 1948); *Garifine v. Monmouth Park Jockey Club*, 148 A.2d 1, 5-6 (N.J. 1959); *Madden v. Queens County Jockey Club*, 72 N.E.2d 697, 698 (N.Y.), *cert. denied*, 332 U.S. 761 (1947). See also *Tropical Park, Inc. v. Jock*, 374 So. 2d 639, 640 (Fla. 1979) (citing *Madden*); *James v. Churchill Downs, Inc.*, 620 S.W.2d 323 (Ky. Ct. App. 1981) (citing *Rodic v. Thistledown*, 615 F.2d 736 (6th Cir.), *cert. denied*, 449 U.S. 996 (1980)).

⁴² See, e.g., *Capital Theatre Co. v. Compton*, 54 S.W.2d 620, 621 (Ky. 1932); *Shubert v. Nixon Amusement Co.*, 83 A. 369, 371 (N.J. 1912). As recently as 1984, the Maryland Court of Appeals followed *Wood* and *Marrone* in *Silbert v. Ramsey*, 482 A.2d 147 (Md. 1984), recognizing that the license granting access to the racetrack's premises is revocable. Although the court did not explicitly say so, one may infer from the language of the *Silbert* decision that the proprietor has a right to exclude a patron at his whim. See *id.* at 150.

⁴³ See, e.g., KRS §§ 230.070-.990 (1982); OHIO REV. CODE ANN. §§ 3769.01-.99 (Baldwin 1985).

⁴⁴ See, e.g., ARIZONA HORSE RACING RULES AND REGULATIONS, R. 4-27-121(E)(3)(f) (1983); RULES AND REGULATIONS GOVERNING HORSE RACING IN ARKANSAS, Regulations 1247-50 (1985); CALIFORNIA HORSE RACING BOARD RULES AND REGULATIONS, R. 1528 (1984); COLORADO GENERAL RULES OF RACING FOR GREYHOUND AND HORSE RACE MEETS, R. 3.01-.02 (1982); DELAWARE STATE HARNESS RACING COMM'N RULES AND REGULATIONS R. 5 § 21(k) (1978); FLORIDA HARNESS RACING RULES & REGULATIONS R. 7E-4.01(12), R. 7E-4.09, R. 7E-4.28 (1984); IDAHO RULES AND REGULATIONS FOR HORSE RACING AND HORSE RACING MEETINGS R. 343 (1984); ILLINOIS RACING BOARD RULES AND REGULATIONS OF HARNESS RACING R. 3.02 (1985); IOWA STATE RACING COMM'N RULES OF HARNESS RACING R. 693-9.165 (99D) (1984); KENTUCKY RULES OF RACING R. VI § 23. & R. XI § § 1 & 2 (1984); LOUISIANA STATE RACING COMM'N RULES OF RACING R. 1.16 (1984); RULES AND REGULATIONS OF MAINE STATE HARNESS RACING COMM'N Ch. 22(4) (1981); MARYLAND RACING COMM'N THOROUGHBRED RULES R. 10.01.45(x) (1984); MASSACHUSETTS STATE RACING COMM'N RULES OF HORSE RACING R. 4.44(12) (1985); MICHIGAN DEPARTMENT OF AGRICULTURE RACING COMM'N GENERAL RULES OF RACING R. 431.1005(b), .1130 (1985); MINNESOTA RACING RULES R. 7897.0120(2) (1985); MONTANA BOARD OF HORSE RACING LAW AND RULES R. 23-4-202(2) (1985); NEBRASKA RULES OF RACING Ch.

trons, horsemen, or both from racetrack premises. The statutes and regulations differ widely among jurisdictions⁴⁵ and, in light of the pre-existing common law right, the effects that they have on the right of exclusion are not altogether clear. The common law right and the statutory and regulatory provisions governing exclusion within a given jurisdiction tend to become intertwined when applied. Furthermore, the analysis of the rules of exclusion must consider the distinction between a patron and a horseman,⁴⁶ adding still further complexity.

II. EXCLUSION OF PATRONS

Under common law, anyone engaged in a public calling, such as an innkeeper or a common carrier, had a duty to the general public and was required to serve without discrimination all who sought service.⁴⁷ In contrast, the proprietors of private enterprises, including places of amusement such as theatres and racetracks, were under no such restriction and could generally

6.003 (1984); NEVADA RACING COMM'N REGULATIONS GOVERNING HORSE RACING R. 466.010(15) (1980); NEW JERSEY RACING COMM'N RULES AND REGULATIONS OF HARNESS RACING R. 13:71-3.2, -5.3 (1982); RULES GOVERNING HORSE RACING IN NEW MEXICO R. 41.01 (1981); NEW YORK RACING AND WAGERING BOARD DIVISION OF RACING RULES AND REGULATIONS R. 4119.8 (1983); OHIO RULES AND REGULATIONS R. 3769-4-28 (1985); OKLAHOMA HORSE RACING COMM'N RULES OF RACING R. 104 (1985); OREGON RACING COMM'N RULES OF HORSE RACING R. 462-37-005(4) (1985); OREGON PARI-MUTUEL RULES AND REGULATIONS R. 462.080 (1985); PENNSYLVANIA STATE HORSE RACING COMM'N RULES OF RACING § 163.340(g) (1984); SOUTH DAKOTA RULES AND REGULATIONS GOVERNING HORSE RACING AND HORSE RACING MEETINGS R. 20:04:17:06 (1983); WASHINGTON HORSE RACING COMM'N RULES OF RACING R. 260-84-060 (1984); WEST VIRGINIA RULES OF RACING R. 362 (1985); WYOMING RULES OF RACING AND PARI-MUTUEL EVENTS § 3(s) (1983).

⁴⁵ Compare CALIFORNIA HORSE RACING BOARD RULES AND REGULATIONS § 1982 (1984) (requiring that all persons ejected or excluded be notified of the reason for the ejection or exclusion and be notified of appeal procedures) with IDAHO RULES AND REGULATIONS FOR HORSE RACING AND HORSE RACING MEETINGS (1984) (making no provision whatsoever that ejected persons be notified of the reason for their ejection or be notified of appeal procedures).

⁴⁶ See notes 47-128 *infra* and accompanying text for a discussion of the exclusion of racetrack patrons. See notes 129-76 *infra* and accompanying text for a discussion of the exclusion of licensed horseman.

⁴⁷ *Madden v. Queens County Jockey Club, Inc.*, 72 N.E.2d 697, 698 (N.Y.), *cert. denied*, 332 U.S. 761 (1947). See *Lombard v. Louisiana*, 373 U.S. 267, 275-79 (1963) (Douglas, J., concurring); *Greenfeld v. Maryland Jockey Club*, 57 A.2d 335, 337 (Md. 1948).

exclude anyone at their sole discretion,⁴⁸ even if the patron had gained admittance to the facility and was later ejected.⁴⁹

A. *The Common Law Right*

Because a racetrack is not a public enterprise, the right under common law to eject or exclude a patron without cause is well established.⁵⁰ In often-cited *Madden v. Queens County Jockey Club*,⁵¹ the plaintiff "Coley" Madden, a "patron of the races," was mistaken for Owney Madden, a bookmaker. Believing he was the bookmaker, Aqueduct Race Track management erroneously excluded Coley. The plaintiff obtained an injunction compelling the racetrack to allow him on its premises. The trial court found that because the plaintiff was a citizen of good repute and willing to pay the required admission price, he should be admitted to the racetrack's grounds.⁵²

⁴⁸ *Nation v. Apache Greyhound Park*, 579 P.2d 580, 581 (Ariz. Ct. App. 1978); *Tamelleo v. New Hampshire Jockey Club, Inc.*, 163 A.2d 10, 11-12 (N.H. 1960); 72 N.E.2d at 698 (N.Y. 1947). See *Salmore v. Empire City Racing Ass'n*, 123 N.Y.S.2d 688, 692 (N.Y. Sup. Ct. 1953) ("The operation of a race track does not constitute the performance of a public function."); *Woollcott v. Shubert*, 111 N.E. 829, 830 (N.Y. 1916) ("At the common law a theatre . . . is in no sense public property or a public enterprise.").

⁴⁹ See 57 A.2d at 336. It is clear that pre-admittance exclusion is treated the same as an ejection from the racetrack grounds. See *id.* Thus, although an individual obtains a ticket and gains admittance, he does not have any greater right than the person who is refused the opportunity to purchase a ticket or fails to make it into the racetrack. See 579 P.2d at 580-81. Exclusion and ejection are therefore considered identical in theory for purposes of this Article.

⁵⁰ See, e.g., *Watkins v. Oaklawn Jockey Club*, 86 F. Supp. 1006, 1016 (W.D. Ark. 1949), *aff'd*, 183 F.2d 440 (8th Cir. 1950); *Flores v. Los Angeles Turf Club, Inc.*, 361 P.2d 921, 924 (Cal. 1961); *Tropical Park, Inc. v. Jock*, 374 So. 2d 639, 640 (Fla. Dist. Ct. App. 1979); *James v. Churchill Downs, Inc.*, 620 S.W.2d 323, 324-25 (Ky. Ct. App. 1981); *Silbert v. Ramsey*, 482 A.2d 147, 149 (Md. 1984); *Greenfeld v. Maryland Jockey Club*, 57 A.2d at 337; *Tamelleo v. New Hampshire Jockey Club, Inc.*, 163 A.2d at 11-12; *Marzocca v. Ferone*, 461 A.2d 1133, 1136-38 (N.J. 1983); *Garifine v. Monmouth Park Jockey Club*, 148 A.2d 1, 3-6 (N.J. 1959); *People v. Licata*, 320 N.Y.S.2d 53, 55 (N.Y. 1971); *Madden v. Queens Jockey Club*, 72 N.E.2d at 698; *Presti v. New York Racing Ass'n*, 363 N.Y.S.2d 24, 26-27 (N.Y. App. Div. 1975); *Vaintraub v. New York Racing Ass'n*, 280 N.Y.S.2d 758, 759 (N.Y. Sup. Ct. 1967); *Gottlieb v. Sullivan County Harness Racing Ass'n*, 269 N.Y.S.2d 314, 316 (N.Y. Sup. Ct. 1966). See *Rodic v. Thistledown*, 615 F.2d 736 (6th Cir.), *cert. denied*, 449 U.S. 996 (1980); *Nation v. Apache Greyhound Park, Inc.*, 579 P.2d at 581; *Capital Theatre Co. v. Compton*, 54 S.W.2d 620, 621 (Ky. 1932).

⁵¹ 72 N.E.2d 697 (N.Y. 1947).

⁵² *Id.* at 697-98.

The New York Court of Appeals ultimately reversed the decision,⁵³ in part on the basis that a racetrack proprietor is not obligated to the general public, and thus the common law right of exclusion prevails.⁵⁴ The court ruled for the racetrack even though the racetrack proprietors had clearly excluded a person who was “a citizen of good repute and standing.”⁵⁵ According to the court, a racetrack—like other places of amusement—enjoys “an *absolute* power to serve whom they please.”⁵⁶

The absolute right to exclude a patron from a racetrack is found in the majority of states that have addressed the question.⁵⁷ The New Jersey Supreme Court, in *Garifine v. Monmouth Park Jockey Club*,⁵⁸ initially followed the majority rule in denying the plaintiff's attack on the common law doctrine of the absolute right of exclusion.⁵⁹ The plaintiff in *Garifine* wanted the court to require the racetrack to produce evidence sufficient to establish “good cause” for his exclusion.⁶⁰ Although the

⁵³ *Id.* at 700. The appellate division reversed the trial court, and the court of appeals affirmed the appellate division. *Id.* at 698, 700.

⁵⁴ *Id.* at 698-99.

⁵⁵ *Id.* at 698.

⁵⁶ *Id.* (emphasis added). This “absolute” right is limited only by any constitutionally or statutorily imposed requirements that alter the common law. *See id.*

In *Madden*, for example, the court noted that, in New York, “a statute—explicitly covering ‘race courses’—limits the power by prohibiting discrimination on account of race, creed, color or national origin. . . . That, then, is the measure of the restriction.” *Id.* Many, if not all, jurisdictions have adopted some form of civil rights statute dealing with racial and religious discrimination based on the federal model. *See* 42 U.S.C. § 2000(a) (1982). Racial or religious discrimination may constitute a violation of such a civil rights provision, if the civil rights legislation is sufficiently broad in its coverage, without affecting the racetrack's general right to exclude individual patrons for any other reason. *But cf.* 57 A.2d at 337 (“except in cases of common carriers, innkeepers and similar *public callings*, one may choose his customers”) (emphasis added) with 482 A.2d at 150-51 (“*Greenfeld* is consistent with the majority of case law which has upheld the proprietor's right to exclude”; but “[a]ppellee concedes that a race-track is a place of *public accommodation*” as that term is used in the civil rights legislation) (emphasis added).

⁵⁷ *See, e.g.*, 86 F. Supp. at 1016; 361 P.2d at 924; 374 So. 2d at 640; 620 S.W.2d at 324-25; 57 A.2d at 337; 163 A.2d at 12; 148 A.2d at 6; 320 N.Y.S.2d at 55; 72 N.E.2d at 698; 363 N.Y.S.2d at 26-27; 280 N.Y.S.2d at 759; 269 N.Y.S.2d at 316. *See also* 615 F.2d 736; 579 P.2d at 581; 54 S.W.2d at 621. *But see* 461 A.2d at 1136-38. *See notes 64-72 infra* and accompanying text for a discussion of *Marzocca*.

⁵⁸ 148 A.2d at 5-6.

⁵⁹ *Id.* at 6.

⁶⁰ *Id.* “The burden of the plaintiff's present attack is on the common-law doctrine

racetrack had informed the plaintiff that he was "an undesirable, and that his general record and reputation warrant[ed] his exclusion,"⁶¹ the court explicitly stated that there was no reason to alter the common law doctrine granting the racetrack the absolute right to exclude a patron. The court observed in dicta, however, that the defendant did not challenge the racetrack's good faith or sound purposes, and that because there were not "any urgent considerations of justice or policy,"⁶² no reason existed to depart from the common law right of a racetrack to "exclude suspected undesirables."⁶³ This dicta has complicated the right of exclusion issue in subsequent decisions.

In *Marzocca v. Ferrone*,⁶⁴ the Superior Court of New Jersey departed from the absolute right of exclusion stated in *Garifine*. Rather than the exclusion of a patron, *Marzocca* involved the exclusion of a horse owned by the plaintiff, a licensed⁶⁵ owner, from racing at Freehold Raceway. The plaintiff had been racing his horses at the defendant's racetrack, but wanted to race his horse, Lord John C, at another racetrack.⁶⁶ The racetrack's racing secretary⁶⁷ did not want Lord John C to leave the racetrack because the horse was needed to complete a field of horses within a certain category.⁶⁸ The plaintiff, in spite of the racing

which he states should be altered to afford him a right of admission to the race track in the absence of affirmative legal proof by the defendant that there is good cause for his exclusion." *Id.*

⁶¹ *Id.* at 2.

⁶² *Id.* at 6.

⁶³ *Id.*

⁶⁴ 453 A.2d 228 (N.J. Super. Ct. 1982), *rev'd in part*, 461 A.2d 1133 (N.J. 1983).

⁶⁵ In all jurisdictions where racing is permitted, the state's racing commission has the authority to license those individuals who work on the track or own horses. After an application is approved, a license is issued that permits the individual to participate in that state's racing activity. See J. LOHMAN & A. KIRKPATRICK, *SUCCESSFUL THOROUGHBRED INVESTMENT IN A CHANGING MARKET* 73 (1984) [hereinafter referred to as LOHMAN & KIRKPATRICK]. See, e.g., KENTUCKY RULES OF RACING R. VII, § 1 (1984) (license required).

⁶⁶ 453 A.2d at 229.

⁶⁷ Every racetrack has a racing secretary whose job is to organize a complete racing program. LOHMAN & KIRKPATRICK, *supra* note 84, at 55. The racing secretary must therefore design a racing program that fits the horses that will run at his racetrack. *Id.*

⁶⁸ 453 A.2d at 230. At most racetracks, five categories of races are run; they include stakes races, handicap races, allowance races, maiden races and claiming races. See LOHMAN & KIRKPATRICK, *supra* note 65, at 43-45. The racing secretary apparently needed Lord John C for \$15,000 claiming races, because he "consistently had extreme difficulty filling races." 453 A.2d at 230.

secretary's warnings that if Lord John C left the racetrack, he would not be permitted to return, removed the horse and raced him at another course.⁶⁹ The racing secretary barred the plaintiff from entering Lord John C in any subsequent races at the racetrack, but permitted the plaintiff to stable and race other horses at the racetrack.⁷⁰

On appeal, the New Jersey Supreme Court, citing *Garifine*, recognized the racetrack's common law right of exclusion.⁷¹ The court indicated that the exclusion rule established in *Garifine* was controlling, but that the right should be limited by prohibiting exclusions that violated public policy. Finding no competing public policy issues, the court upheld the racetrack's exclusion of Lord John C from racing at Freehold Raceway.⁷²

The New Jersey decisions discuss the need to grant the public "reasonable access" to private property opened to the public,⁷³ and the dicta in *Marzocca* may undermine the common law right to exclude a patron.⁷⁴ Nevertheless, as recently as 1984, the Maryland Court of Appeals, in *Silbert v. Ramsey*,⁷⁵ examined the New Jersey decisions, but reaffirmed the common law right of a racetrack to exclude a patron without considering the supposed public right of reasonable access and without balancing

⁶⁹ 453 A.2d at 229.

⁷⁰ See 461 A.2d at 1135.

⁷¹ *Id.* at 1136 (citing 148 A.2d 1).

⁷² 461 A.2d at 1137-38. A close examination of the *Marzocca* decision sheds some light on its apparent conflict with the same court's dicta in *Uston v. Resorts Int'l Hotel, Inc.*, 445 A.2d 370 (N.J. 1982).

In dicta, the *Uston* court stated that the common law right of an amusement owner to exclude unwanted patrons had to be balanced against the competing interest of the patron in having reasonable access to private property once that property has been opened to the public. *Id.* at 375. Although *Marzocca* apparently does not ultimately decide the status of the right of exclusion in the patron context, it does intimate that—if asked to reach that issue—the New Jersey Supreme Court would limit the common law right of exclusion and require that the competing interests of the property owner and the patron be weighed. In contrast, an owner racing his horses at a New Jersey racetrack would be considered to be in a business relationship with the racetrack, and the court would not interfere with the racetrack's decision to exclude such a horseman unless the exclusion violated public policy.

⁷³ *Id.* See note 56 *supra* and accompanying text for a discussion of the status of racetracks as public accommodations under civil rights statutes.

⁷⁴ 461 A.2d at 1137.

⁷⁵ 482 A.2d 147 (Md. 1984).

the interests of the racetrack and the patron.⁷⁶ Although the court found that the racetrack had the common law right to exclude the patron, one should note that the patron had been previously convicted of violating lottery laws,⁷⁷ a fact that perhaps influenced the court's decision.⁷⁸

Often the patron in exclusion cases is an "undesirable" from the racetrack's perspective.⁷⁹ There are, however, decisions such as *Madden v. Queens County Jockey Club*⁸⁰ and *Greenfeld v. Maryland Jockey Club*⁸¹ in which the common law absolute right of exclusion permitted either ejection or exclusion of a patron from a racetrack, although there was no evidence that the patron possessed any "undesirable" characteristics.⁸² The New Jersey Supreme Court in *Garifine* explained the rationale for the racetrack's common law right to exclude *any* patron without cause:

[The track is] in the position to assert more than the traditional common-law right of the private entrepreneur to choose his patrons; its business admittedly tended to attract many undesirables who could freely roam about its premises, and it was well-advised to be on the lookout for them and to bar them whenever possible. It would seem rather unwise to deter its cautionary efforts by judicial rulings placing heavy evidential burdens upon it or imposing tortious responsibility if perchance

⁷⁶ *Id.* at 150.

⁷⁷ *Id.* at 149. "[Silbert had] a criminal record. In 1969, he was convicted of conspiring to, and of violating the Maryland lottery laws. . . . He was incarcerated from March 17, 1972 until [he was] paroled on June 5, 1975; he will remain on parole until sometime in 1984." *Id.*

⁷⁸ *See id.* at 151. The court, in discussing the limitation that the New Jersey Supreme Court placed upon *Garifine* (namely, that any exclusion must be consistent not only with the civil rights laws, but also with public policy), indicated that Silbert could not justify his challenge to the common law right of exclusion because the integrity of thoroughbred racing required the exclusion of those with prior criminal records.

⁷⁹ *See, e.g.*, 320 N.Y.S.2d at 54 n.1 (convicted of bookmaking); 363 N.Y.S.2d at 26 (aliases; entering horses in races with false ownership representations); 269 N.Y.S.2d at 316 (convicted of bookmaking). *See also* 620 S.W.2d 323 ("undesirable"); 148 A.2d at 2 (previously charged with but acquitted of bookmaking; "undesirable;" "general record and reputation warrants his exclusion").

⁸⁰ 72 N.E.2d 697 (N.Y.), *cert. denied*, 332 U.S. 761 (1947).

⁸¹ 57 A.2d 335 (Md. 1948).

⁸² Other cases in which the opinion does not reveal that the patron possessed any "undesirable characteristics" include: *Watkins v. Oaklawn Jockey Club*, 86 F. Supp. 1006 (N.D. Ark. 1949); *Nation v. Apache Greyhound Park, Inc.*, 579 P.2d 580 (Ariz. 1978).

it acted mistakenly; in this connection the substantial interests of the [racetrack] would appear to coincide with those of the public generally and to outweigh the comparatively slight interests of its patrons.⁸³

The better rule, as the Arizona Court of Appeals indicated in *Nation v. Apache Greyhound Park, Inc.*,⁸⁴ may be to allow the racetrack proprietor to have complete control over admission to his grounds without having to establish that every person excluded would, if left to his own devices, commit a crime or perform some other unlawful activity.⁸⁵

B. *Equal Protection and the Patron*

Due to the relative uniformity and strength of the common law right of the racetrack to exclude any given patron without justification, several patrons have asserted that the racetrack's conduct toward them was a violation of their constitutional rights. The challenger usually contends that the racetrack has failed to accord him equal protection and due process under the fourteenth amendment to the United States Constitution.⁸⁶

Patrons have most commonly argued that their right of entry is founded upon their right to equal protection of the laws.⁸⁷ The equal protection argument fails, however, unless some type of state action is involved.⁸⁸ Therefore, patrons have tried to establish state action by arguing first, that a racetrack, in ob-

⁸³ 148 A.2d at 5.

⁸⁴ 579 P.2d 580 (Ariz. Ct. App. 1978).

⁸⁵ *Id.* at 582.

⁸⁶ *See, e.g.,* Greenfield v. Maryland Jockey Club, 57 A.2d at 336; Madden v. Queens County Jockey Club, Inc., 72 N.E.2d at 698. Challenges to the common law right of exclusion have also been advanced under the privileges and immunities clause. *See* 57 A.2d at 336.

⁸⁷ While a constitutional challenge to the racetrack's right to exclude *patrons* is generally an equal protection argument, the right to exclude *horsemen* is more often challenged under the due process clause. *See* notes 141-42 *infra* and accompanying text.

⁸⁸ In *Watkins*, the court addressed the issue of state action:

[T]here is no substantial evidence to support a finding that in ejecting plaintiff from the race track of the Jockey Club defendants . . . were acting under color of law. On the contrary, the undisputed evidence as well as the stipulation of the parties showed that they were acting as agents of the Jockey Club only.

Watkins v. Oaklawn Jockey Club, 183 F.2d 440, 443 (8th Cir. 1950).

taining its license to conduct pari-mutuel wagering, becomes an agent of the state, and second, that the license granted to the racetrack is tantamount to a franchise to perform a public purpose or calling.⁸⁹

Both arguments have failed.⁹⁰ The New York Court of Appeals in *Madden* reasoned that if granting a license to the racetrack made the racetrack the state's agent, then every "licensee, theatre manager, cab driver, barber, liquor dealer, dog owner—to mention a few—must be regarded as 'an administrative agency of the state.'" ⁹¹ Nor has the granting of the license to a racetrack been found to create a "franchise" for its owner. Because racing and wagering existed at common law, "the license, instead of granting a privilege, merely permits the exercise of [a privilege] restricted and regulated by statute."⁹²

The patron's equal protection argument also failed in *Watkins v. Oaklawn Jockey Club*,⁹³ in which a uniformed deputy sheriff—acting as an employee of the racetrack—ejected the plaintiff.⁹⁴ The plaintiff argued that the deputy's actions were performed under "color of law," thereby establishing state action.⁹⁵ Although the officer was a state employee, at the time of the ejection he was working for the racetrack wholly as its employee. Therefore, the court found that his actions were consistent with being an agent for the racetrack.

C. Statutes and Regulations Pertaining to Patrons

The common law is not the only authority for the racetrack to exclude or eject a patron. Numerous statutes, rules and regulations enacted across the country deal with the problem, and most purport to grant to the racetrack, or to the racing com-

⁸⁹ See 57 A.2d at 337; 72 N.E.2d at 698.

⁹⁰ See, e.g., 57 A.2d at 338; 72 N.E.2d at 699.

⁹¹ 72 N.E.2d at 698-99.

⁹² *Id.* at 699-700. The *Greenfeld* court agreed, observing that under Maryland law the issuance of a license regulating an activity permissible at common law does not create a privilege, but merely restricts that right. The *Greenfeld* decision noted that the patron's attempt to invoke equal protection of the laws "results from confusion" between the franchise and licensing concepts. 57 A.2d at 338.

⁹³ 183 F.2d 440 (8th Cir. 1950).

⁹⁴ *Id.* at 442.

⁹⁵ *Id.* The plaintiff was not arrested, but was merely escorted from the gate.

mission, authority to exclude patrons either arbitrarily or upon specified grounds.⁹⁶

Some of the statutes, rules and regulations mirror the common law rule,⁹⁷ giving the racetrack the unfettered discretion to eject or exclude any person for any reason⁹⁸ or for no reason at all.⁹⁹ There is a distinction between those statutes, rules and regulations that require some reason for the exclusion, and those that permit even arbitrary exclusions without any hint of justification. For example, rule 462-080(4) of the Oregon Parimutuel Rules and Regulations provides that "[a] race meet licensee may eject any person from the race course *for any reason* and in any

⁹⁶ See, e.g., KRS § 230.215 (Bobbs-Merrill 1982); ARIZONA HORSE RACING RULES AND REGULATIONS R. 4-27-121(E)(3)(f) (1983); RULES AND REGULATIONS GOVERNING HORSE RACING IN ARKANSAS R. 1250 (1985); CALIFORNIA HORSE RACING BOARD RULES AND REGULATIONS R. 1528 (1984); COLORADO GENERAL RULES OF RACING FOR GREYHOUND AND HORSE RACE MEETS R. 3.01 (1982); DELAWARE STATE HARNESS RACING COMM'N RULES AND REGULATIONS R. 5 § 21(K) (1978); FLORIDA HARNESS RACING RULES & REGULATIONS R. 7E-4.02 (11-17) (1984); IDAHO RULES AND REGULATIONS FOR HORSE RACING AND HORSE RACING MEETINGS R. 343 (1984); ILLINOIS RACING BOARD AND REGULATIONS OF HARNESS RACING R. 3.02D (1985); IOWA STATE RACING COMM'N RULES OF HARNESS RACING R. 9.177 (2)c (1984); KENTUCKY RULES OF RACING R. 4 § 23 (1984); LOUISIANA STATE RACING COMM'N RULES OF RACING R. 2.2 (1984); RULES AND REGULATIONS OF MAINE STATE HARNESS RACING COMM'N Ch. 224 (1977); MARYLAND RACING COMM'N THOROUGHBRED RULES R. .45(Y) (1984); MASSACHUSETTS STATE RACING COMM'N OF HORSE RACING, R. § 4.44(12) (1985); MICHIGAN DEPARTMENT OF AGRICULTURE RACING COMM'N GENERAL RULES R. 431.1130(1) (1985); MONTANA BOARD OF HORSE RACING R. 23-4-202(2) (1985); NEBRASKA RULES OF RACING Ch. 6.003 (1984); NEVADA RACING COMM'N REGULATIONS GOVERNING HORSE RACING R. 466.010 (15) (1980); NEW JERSEY RACING COMM'N RULES AND REGULATIONS OF HARNESS RACING R. 13:71-5.1(a) (1984); RULES GOVERNING HORSE RACING IN NEW MEXICO R. 41.01 (1983); NEW YORK RACING AND WAGERING BOARD-DIVISION OF HARNESS RACING RULES AND REGULATIONS R. 4119.8 (1983); OKLAHOMA HORSE RACING COMM'N RULES OF RACING R. 104 (1985); OREGON RACING COMM'N RULES OF HORSE RACING R. 462-37-005 (4) (1985); PENNSYLVANIA STATE HORSE RACING COMM'N RULES OF RACING § 163.6(b) (1980); SOUTH DAKOTA RULES AND REGULATIONS GOVERNING HORSE RACING AND HORSE RACING MEETINGS R. 20:04:17:06 (1985); WASHINGTON HORSE RACING COMM'N RULES OF RACING R. 67.16.060(3) (1984); WEST VIRGINIA RACING COMM'N RULES OF RACING R. 362 (1985); WYOMING RULES OF RACING AND PARI-MUTUEL EVENTS § 3(s) (1985).

⁹⁷ See notes 50-85 *supra* and accompanying text for a discussion of the racetrack's common law right to exclude a patron.

⁹⁸ See, e.g., IOWA STATE RACING COMM'N RULES OF RACING, R. 9.177(2)(c) (1984); OREGON RACING COMM'N PARI-MUTUEL RULES AND REGULATIONS, R. 462-080(4) (1985); PENNSYLVANIA STATE HORSE RACING COMM'N RULES OF RACING, § 163.340(g) (1980); WYOMING RULES OF RACING AND PARI-MUTUEL EVENTS, § 37(g) (1985).

⁹⁹ See KENTUCKY RULES OF RACING, R. VI, § 23 (1984).

manner that is not contrary to law."¹⁰⁰ Such a provision seems to provide an opportunity for the person excluded to contest the racetrack's authority to exclude him by challenging the existence of any "reason" for his exclusion.¹⁰¹ On the other hand, certain statutes and rules, like those in Kentucky, permit even the arbitrary exclusion of a patron. Kentucky Rules of Racing, regulation VI, section 23(1), states: "Associations may eject or exclude any persons, licensed or unlicensed, from association grounds or a part thereof solely of its own volition and *without any reason or excuse* given therefor."¹⁰² The Kentucky statute closely parallels the substance of the Kentucky racing rule quoted, but vests the power to exclude in the racing commission.¹⁰³ Such language seems to permit the racetrack or the racing commission to exclude any patron *arbitrarily*, so long as the exclusion is not based upon race, color, creed or national origin.

Although jurisdictions like Oregon and Kentucky may give the racetrack, the racing commission, or both sweeping powers of exclusion, the most common type of regulation enumerates, directly or by reference,¹⁰⁴ the grounds that authorize the racetrack or the commission properly to exclude or eject a patron.¹⁰⁵

¹⁰⁰ OREGON RACING COMM'N PARI-MUTUEL RULES AND REGULATIONS, R. 462-080(4) (1985) (emphasis added).

¹⁰¹ This provision requires a finding of fact, which arguably activates a patron's right to a due process hearing to determine if the requisite "cause" has been established.

¹⁰² KENTUCKY RULES OF RACING, R. VI, § 23 (1984) (emphasis added).

¹⁰³

[I]t is the intent hereby to vest in the commission the power to eject or exclude from association grounds or any part thereof, any person, licensed or unlicensed, whose conduct or reputation is such that his presence on association grounds may, in the opinion of the commission, reflect on the honesty and integrity of thoroughbred racing. . . .

KRS § 230.215(2).

¹⁰⁴ Many of the statutes and regulations do not enumerate punishable violations in the exclusion provision itself but allow exclusion if the patron violates specific rules. See, e.g., DELAWARE STATE HARNESS RACING COMM'N RULES AND REGULATIONS, R. 20, § 11 (1978) (stating in pertinent part: "Any person, whether a licensed participant or a patron in violation of any other provisions of Rule 20, may be expelled from the track."). The rules that a patron might violate include rules against: the use of improper language, *id.* at § 1; fraudulent or injurious conduct, *id.* at § 6; and association with bookmakers, *id.* at § 9.

¹⁰⁵ The following rules allow the *racing commission* to exclude patrons for reasons such as improper or fraudulent conduct and association with bookmakers: COLORADO GENERAL RULES OF RACING FOR GREYHOUND AND HORSE RACE MEETS, R. 3.01 (1982);

Rule 362 of the West Virginia Racing Commission Rules of Racing is typical: "Violators of any Rule shall be subject to ejection from the grounds and/or to fine, suspension or to be ruled off."¹⁰⁶ The rules of racing that might be violated are usually quite specific, but most of the rules are more susceptible to violation by horsemen than by patrons.¹⁰⁷

The procedural rights to which the various regulations entitle the patron are as important as the substantive grounds for exclusion. Most of the regulations require neither a hearing nor any specific procedure prior to or at the time of the racetrack's

MICHIGAN DEPARTMENT OF AGRICULTURE-RACING COMM'N GENERAL RULES, R. 431.1130 (1985); RULES GOVERNING HORSE RACING IN NEW MEXICO, R. 41.01 (1984); NEW YORK RACING AND WAGERING BOARD-DIVISION OF RULES AND REGULATIONS, R. 4119.8 (1983); WASHINGTON HORSE RACING COMM'N RULES OF RACING, R. 67.16.060(3) (1984).

Other rules divide the authority to exclude among the racetrack, the racing commission and the stewards. *See, e.g.*, ARIZONA HORSE RACING RULES AND REGULATIONS, R. 4-27-101 (1983); RULES AND REGULATIONS GOVERNING HORSE RACING IN ARKANSAS, R. 1253 (1985); CALIFORNIA RULES AND REGULATIONS OF HORSE RACING, § 1529 (1984); DELAWARE STATE HARNESS RACING COMM'N RULES AND REGULATIONS OF HARNESS RACING, R. 5, § 21(k) (1978); IDAHO RULES AND REGULATIONS FOR HORSE RACING AND HORSE RACING MEETINGS, R. 304 & R. 901 (1984); ILLINOIS RACING RULES AND REGULATIONS OF HARNESS RACING, R. 3.04 (1985); IOWA STATE RACING COMM'N RULES OF RACING, R. 693-4.8(99D) (1984); KENTUCKY RULES OF RACING, R. I, § 23 & R. XIX, §§ 1 & 2 (1984); LOUISIANA STATE RACING COMM'N RULES OF RACING, R. 1.16 (1984); MARYLAND RACING COMM'N THOROUGHBRED RULES, Rules .10, .45 Y (1984); MASSACHUSETTS STATE RACING COMM'N RULES OF HORSE RACING, R. 4.17(4) (1985); MONTANA BOARD OF HORSE RACING LAW AND RULES OF HORSE RACING, R. 23-4-202(2) (1985); NEBRASKA RULES OF RACING, Ch. 7001.01 (1984); NEVADA RACING COMM'N REGULATIONS GOVERNING HORSE RACING, R. 466-185 (1980); NEW JERSEY RACING COMM'N RULES AND REGULATIONS OF HARNESS RACING, R. 13:71-1.20 (1982); OKLAHOMA HORSE RACING COMM'N RULES OF RACING, R. 104 & R. 401 (1985); OREGON RACING COMM'N PARI-MUTUEL RULES AND REGULATIONS, R. 462.080 (1985); PENNSYLVANIA STATE HORSE RACING COMM'N RULES OF RACING, § 163.6 (1980); SOUTH DAKOTA RULES AND REGULATIONS GOVERNING HORSE RACING AND HORSE RACING MEETINGS, Rules 20:04:17:05, 20:04:17:06 (1985); WEST VIRGINIA RACING COMM'N RULES OF RACING, R. 698 (1985); WYOMING RULES OF RACING AND PARI-MUTUAL EVENTS, §§ 2(s) & 37(a) (1985).

Some rules limit the exclusion period. *See, e.g.*, COLORADO GENERAL RULES OF RACING FOR GREYHOUND AND HORSE RACE MEETS, R. 302 (1982) (summary ejection by steward is for remainder of day).

¹⁰⁶ WEST VIRGINIA RACING COMM'N RULES OF RACING, R. 362 (1985).

¹⁰⁷ *See, e.g.*, ARKANSAS RULES AND REGULATIONS GOVERNING HORSE RACING IN ARKANSAS, R. 1205 (allowing the commission to rule off any person who bribes a racing official) & R. 1248 (allowing the stewards to rule off those who have violated the rules). *See also id.* at R. 1212 (tampering with horses as a violation); *id.* at R. 1204 (running an entry the person knows or believes is disqualified as a violation); *id.* at R. 1216 (administering drugs to a horse as a violation).

exclusion of a patron.¹⁰⁸ In the minority, Arizona grants the patron a right to a pre-exclusion hearing.¹⁰⁹ On the other hand, many of the regulations provide for some form of appeal procedure or postexclusion hearing.¹¹⁰ The racetrack is frequently

¹⁰⁸ See, e.g., RULES AND REGULATIONS GOVERNING HORSE RACING IN ARKANSAS (1985); COLORADO GENERAL RULES OF RACING FOR GREYHOUND AND HORSE RACE MEETS (1982); DELAWARE STATE HARNESS RACING COMM'N RULES AND REGULATIONS OF HARNESS RACING (1978); FLORIDA HARNESS RACING RULES AND REGULATIONS (1984); IDAHO RULES AND REGULATIONS FOR HORSE RACING AND HORSE RACING MEETINGS (1984); ILLINOIS RACING BOARD RULES AND REGULATIONS OF HARNESS RACING (1985); IOWA STATE RACING COMM'N RULES OF RACING (1984); MASSACHUSETTS STATE RACING COMM'N RULES OF HORSE RACING (1985); MINNESOTA RACING RULES (1985); MONTANA BOARD OF HORSE RACING LAW AND RULES OF HORSE RACING (1985); NEBRASKA RULES OF RACING (1984); NEVADA RACING COMM'N REGULATIONS GOVERNING HORSE RACING (1980); NEW JERSEY RACING COMM'N RULES AND REGULATIONS OF HARNESS RACING (1984); RULES GOVERNING HORSE RACING IN NEW MEXICO (1983); NEW YORK RACING AND WAGERING BOARD-DIVISION OF HARNESS RACING RULES AND REGULATIONS (1983); OKLAHOMA HORSE RACING COMM'N RULES OF RACING (1985); OREGON RACING COMM'N RULES OF HORSE RACING (1985); OREGON RACING COMM'N PARI-MUTUEL RULES AND REGULATIONS (1985); PENNSYLVANIA STATE HORSE RACING COMM'N RULES OF RACING (1985); WASHINGTON HORSE RACING COMM'N RULES OF RACING (1984); WEST VIRGINIA RACING COMM'N RULES OF RACING (1985); WYOMING RULES OF RACING AND PARI-MUTUAL EVENTS (1985). The authority of a racing commission to exclude a patron is discussed in notes 211-14 *infra* and accompanying text.

¹⁰⁹ ARIZONA HORSE RACING RULES AND REGULATIONS, § 121 (e)(6)(c) (1983), provides that when the stewards have reason to believe that a rule has been violated by any person, the procedure shall be as follows:

- a. The person shall be summoned to a hearing at which all stewards shall be present.
- b. Twenty-four hour's notice of said hearing shall be given to the person in writing. . . .
- c. No penalty shall be imposed until such hearing.

See also SOUTH DAKOTA RULES AND REGULATIONS GOVERNING HORSE RACING AND HORSE RACING MEETINGS, R. 20:04:01:13 (1985) (providing for an almost identical procedure).

¹¹⁰ See, e.g., ARIZONA HORSE RACING RULES AND REGULATIONS, R. 4-27-123 (1983); RULES AND REGULATIONS GOVERNING HORSE RACING IN ARKANSAS, R. 1257 (1985); CALIFORNIA HORSE RACING BOARD RULES AND REGULATIONS, § 1983 (1984); COLORADO GENERAL RULES OF RACING FOR GREYHOUND AND HORSE RACE MEETS, R. 4.01 (1982); IDAHO RULES AND REGULATIONS FOR HORSE RACING AND HORSE RACING MEETINGS, Rules 1001-06 (1984); LOUISIANA STATE RACING COMM'N RULES OF RACING, R. 52.1 (1984); HARNESS RACING RULES AND REGULATIONS OF THE MAINE STATE HARNESS RACING COMM'N, Ch. 237 (1977); MARYLAND RACING COMM'N THOROUGHBRED RULES, R. .10 (1984); MASSACHUSETTS STATE RACING COMM'N RULES OF HORSE RACING, R. 4.03 (1985); MICHIGAN DEPARTMENT OF AGRICULTURE RACING COMM'N GENERAL RULES, R. 431.1130 (1985); MONTANA BOARD OF HORSE RACING LAW AND RULES OF HORSE RACING, R. 8.22.302 (1985); NEBRASKA RULES OF RACING, Ch. 7 (1984); NEVADA RACING COMM'N REGULATIONS GOVERNING HORSE RACING, R. 466.185 (1980); NEW JERSEY RACING COMM'N RULES AND

under no obligation to disclose the existence of these rights;¹¹¹ therefore, the ordinary patron probably will not take advantage of his rights unless he somehow becomes aware of them through an independent source.

The scope of the exclusion also varies. While most statutes, rules and regulations permit the racetrack or racing commission to exclude the patron from the racetrack "premises,"¹¹² others provide that a patron excluded from a single racetrack may also be excluded from all others within the state.¹¹³

REGULATIONS OF HARNESS RACING, R. 13:71-3.1 (1984); RULES GOVERNING HORSE RACING IN NEW MEXICO, R. 42.02 (1983); NEW YORK RACING & WAGERING BOARD-DIVISION OF HARNESS RACING RULES AND REGULATIONS, § 4121.5 (1983); OKLAHOMA HORSE RACING COMM'N RULES OF RACING, R. 108 (1985); OREGON RACING COMM'N PARI-MUTUEL RULES AND REGULATIONS, R. 462.405 (1985); PENNSYLVANIA RULES OF RACING, R. 163.481 (1985); WASHINGTON RULES OF RACING, R. 260.88010 (1984); WEST VIRGINIA RULES OF RACING, R. 803 (1985); WYOMING RULES OF RACING, § 4 (1985).

Some other rules imply a right to appeal without expressly granting one. *See, e.g.,* KENTUCKY RACING RULES (1984).

¹¹¹ *See, e.g.,* DELAWARE STATE HARNESS RACING COMM'N RULES AND REGULATIONS OF HARNESS RACING (1978). The CALIFORNIA HORSE RACING BOARD RULES AND REGULATIONS, § 1982 (1984) requires the track to disclose the existence of these rights, an exception to the general practice.

¹¹² *See, e.g.,* RULES AND REGULATIONS GOVERNING HORSE RACING IN ARKANSAS, R. 1250 (1985); KENTUCKY RULES OF RACING, R. XIX, §§ 1 & 2 (1984); LOUISIANA RULES OF RACING, R. 1.16; RACING RULES AND REGULATIONS OF THE MAINE STATE HARNESS RACING COMM'N, Ch. 224 (1984); MASSACHUSETTS STATE RACING COMM'N RULES OF HORSE RACING, R. 4.02(9) (1984); MICHIGAN DEPARTMENT OF AGRICULTURE RACING COMM'N GENERAL RULES, R. 431.1005(f) (1985); NEBRASKA RULES OF RACING, Ch. 6.003 (1984); NEVADA RACING COMM'N REGULATIONS GOVERNING HORSE RACING, R. 466.010(15) (1985); NEW YORK RACING AND WAGERING BOARD-DIVISION OF HARNESS RACING RULES AND REGULATIONS, § 4100.1(13) (1983); NEW MEXICO RULES GOVERNING HORSE RACING, R. 41.12 (1983); WASHINGTON RULES OF RACING, R. 260.84.060 (1984); WEST VIRGINIA RULES OF RACING, R. 362 (1985); WYOMING RULES OF RACING AND PARI-MUTUAL EVENTS, § 3(f) (1985). In the foregoing rules and regulations, the terminology used to describe the premises varies, with some rules referring to the racetrack "premises," *see, e.g.,* RULES AND REGULATIONS GOVERNING HORSE RACING IN ARKANSAS, R. 1250 (1985), and some rules referring to the racetrack "grounds," *see, e.g.,* LOUISIANA STATE RACING COMM'N RULES OF RACING, R. 1.16 (1984). For purposes of this Article, the terms "premises" and "grounds" are synonymous. The distinctions do not seem significant.

¹¹³ *See, e.g.,* CALIFORNIA HORSE RACING BOARD RULES AND REGULATIONS, § 1528 (1984); COLORADO GENERAL RULES OF RACING FOR GREYHOUND AND HORSE RACE MEETS, R. 3.05 (1982); DELAWARE STATE HARNESS RACING COMM'N RULES AND REGULATIONS OF HARNESS RACING, R. 20, § 10 (1978); FLORIDA HARNESS RACING RULES & REGULATIONS, R. 7E-4.02(14) (1984); ILLINOIS RACING BOARD RULES AND REGULATIONS OF HARNESS RACING, R. 4.15 (1985); MONTANA BOARD OF HORSE RACING LAW AND RULES OF HORSE RACING, 23.4-202(2) (1985); OKLAHOMA HORSE RACING COMM'N RULES OF RACING, R. 104 (1985).

The statutes and regulations have one of two effects on the patron exclusion analysis: they either supplement the common law right of exclusion or abrogate that right.¹¹⁴ In *James v. Churchill Downs, Inc.*,¹¹⁵ the Kentucky Court of Appeals confronted the abrogation issue for the first time. In *James*, the plaintiffs argued that the Kentucky exclusion statute¹¹⁶ abrogated the previously recognized common law right of the racetrack to exclude a patron.¹¹⁷ Refusing to accept the plaintiffs' arguments, the court found that the Kentucky statute granting the Kentucky State Racing Commission the authority to exclude a patron had no effect on the racetrack's common law right to exclude the patron as well.¹¹⁸ According to the court, the legislative intent was "to expand the common law right of exclusion by vesting an additional entity, the Kentucky State Racing Commission, with authority to exercise the right" to exclude.¹¹⁹ The courts of

¹¹⁴ Compare *Gottlieb v. Sullivan County Harness Racing Ass'n*, 269 N.Y.S.2d at 316 (statutory right seems to supplement common law right) with *Burrillville Racing Ass'n v. Garabedian*, 318 A.2d 469, 472 (R.I. 1974) (statute abrogates the common law).

¹¹⁵ 620 S.W.2d 323 (Ky. Ct. App. 1981).

¹¹⁶ KRS § 230.215(2) provides, in pertinent part:

In addition to the general powers and duties vested in the commission by KRS 230.210 to 230.260, it is the intent hereby to vest in the commission the power to eject or exclude from association grounds or any part thereof any person, licensed or unlicensed, whose conduct or reputation is such that his presence on association grounds may, in the opinion of the commission, reflect on the honesty and integrity of thoroughbred racing or interfere with the orderly conduct of thoroughbred racing or Appaloosa racing.

KRS § 230.260 provides in pertinent part:

The commission is vested with jurisdiction and supervision over all thoroughbred race meetings in this Commonwealth and over all associations and all persons on association grounds and may eject or exclude therefrom or any part thereof, any person, licensed or unlicensed, whose conduct or reputation is such that his presence on association grounds may, in the opinion of the commission, reflect on the honesty and integrity of thoroughbred racing or Appaloosa racing or interfere with the orderly conduct of . . . racing . . . provided, however, no persons shall be excluded or ejected from association grounds solely on the ground of race, color, creed, national origin, ancestry, or sex.

¹¹⁷ 620 S.W.2d at 324.

¹¹⁸ *Id.* at 324-25 (quoting *Spirko v. Commonwealth*, 480 S.W.2d 169 (Ky. 1972), for the proposition under Kentucky law that "[t]he intention to abrogate the common law will not be presumed and the intention to repeal it by statute must be clearly apparent").

¹¹⁹ 620 S.W.2d at 325.

Florida, New Hampshire, and New York have reached similar conclusions.¹²⁰

Other courts, however, have determined that the specific statutes or regulations in their jurisdictions abrogate the racetrack's common law right to exclude a patron.¹²¹ In *Rockwell v. Pennsylvania State Horse Racing Comm'n*,¹²² the court found that the enactment of the Pennsylvania Thoroughbred Horse Race Meeting Corporation Act¹²³ abrogated the racetrack's common law right to exclude patrons. The court reasoned that, because the legislature had enacted a specific statute to deal with exclusion, the statute necessarily negated the common law.¹²⁴ Similarly, the Rhode Island Supreme Court, in *Burrillville Racing Ass'n v. Garabedian*,¹²⁵ reached the same conclusion in finding that a similar statute replaced the common law.¹²⁶ The court explained when a statutory enactment will override long-standing common law principles:

We have in the past often stated that it is always presumed that in enacting a statute, the Legislature did not intend to make any alteration in the common law unless the language used naturally and necessarily leads to that conclusion or unless the intent to alter [the common law] is clearly expressed.¹²⁷

The principles of statutory construction vary from state to state, making it impossible to generalize about the effect of a given statute upon the common law right of exclusion, but it appears that a court will not abrogate the common law without first determining that such was the legislative intent.¹²⁸

¹²⁰ See *Tropical Park, Inc. v. Jock*, 374 So. 2d at 640; *Tamelleo v. New Hampshire Jockey Club, Inc.*, 163 A.2d at 13; *People v. Licata*, 320 N.Y.S.2d at 55; *Presti v. New York Racing Ass'n, Inc.*, 363 N.Y.S.2d at 26; *Gottlieb v. Sullivan County Harness Racing Ass'n*, 269 N.Y.S.2d at 316.

¹²¹ See, e.g., *Rockwell v. Pennsylvania Horse Racing Comm'n*, 327 A.2d 211 (Pa. Commw. Ct. 1974); *Burrillville Racing Ass'n v. Parker*, 320 A.2d 334 (R.I. 1974); *Burrillville Racing Ass'n v. Garabedian*, 318 A.2d 469 (R.I. 1974); *Burrillville Racing Ass'n v. Mello*, 270 A.2d 513 (R.I. 1970).

¹²² 327 A.2d 211 (Pa. Commw. Ct. 1974).

¹²³ Act of Dec. 11, 1967, P.L. 707 (15 P.S. § 2651 et seq.).

¹²⁴ 327 A.2d at 214.

¹²⁵ 318 A.2d 469 (R.I. 1974).

¹²⁶ *Id.* at 472.

¹²⁷ *Id.* at 471.

¹²⁸ See, e.g., *id.*

Courts consistently recognize the racetrack's need to regulate patrons admitted to its premises, as well as the state racing commission's interest in controlling access to all racetracks within the state. Most courts have upheld the racetrack's absolute common law right to exclude a patron, even without cause. Over time, the rationale for the right to exclude a patron has evolved into a blend of real estate principles and public policy considerations. Significantly, many states have now enhanced the common law right by enacting statutes or rules authorizing—and in some cases even requiring—the racing commission, the individual racetrack, or both to exclude patrons whose presence at the racetrack is not in the best interests of racing. Thus, both the common law right and its statutory and regulatory counterparts exist today in almost every jurisdiction where racing is conducted, thereby giving the racetrack and the racing commission almost complete discretion to exclude the patron.

III. EXCLUSION OF HORSEMEN FROM THE RACETRACK

Racetracks often desire to exclude from their premises horsemen who assert a right to be at the racetrack to pursue their occupations as horse owners, trainers, jockeys or other racing commission licensees. The situation of the professional horseman, and his need to be at the racetrack to pursue his vocation, makes the analysis of the racetrack's right to exclude him different than that in the case of patrons.

A. *The Common Law Right as Applied to Horsemen*

The exclusion of a jockey provides a good example of the types of additional considerations that the courts find important in addressing the racetrack's right to exclude horsemen. In *Martin v. Monmouth Park Jockey Club*,¹²⁹ the plaintiff, a jockey, after exclusion from the racetrack, sought injunctive relief to compel the racetrack management to allow him to ride the mounts that he had secured. Martin had been previously suspended from riding in a neighboring state, but had been reinstated. Also, Martin had received his license as a jockey from

¹²⁹ 145 F. Supp. 439 (D. N.J. 1956).

the state of New Jersey, where Monmouth Park is located. The plaintiff attempted to gain admittance to the racetrack to perform his occupation by arguing to the court, first, that the racetrack was a quasi-public corporation that could not arbitrarily exclude him, and second, that the racetrack could not restrict his right to ride because the state had granted him a jockey license.¹³⁰

As in the patron cases,¹³¹ the court in *Martin* found that the racetrack was a private corporation with the right to admit or exclude anyone it pleased, absent some other legal restriction.¹³² Martin's license from the New Jersey Racing Commission did not insure that he would be able to ride at any specific racetrack. The plaintiff argued that his license gave him rights equivalent to that of a licensed physician to practice his profession in a given hospital. The court indicated that, although some decisions have dealt with the physician/hospital issue, these precedents did not go as far as the plaintiff would take them: "The most favorable conclusion that the plaintiff can draw from them is that *exclusion* may not be without justification."¹³³ The court found the exclusion justified and proper.¹³⁴ Although the decision still favored the racetrack, it modified the absolute common law right of exclusion when applied to a horseman, at least by requiring some justification for the exclusion.

In *Catrone v. State Racing Comm'n*,¹³⁵ the Massachusetts Appeals Court reiterated this position in deciding that a "racetrack at least may exclude licensed persons from participation in racing activity in the exercise of a reasonable business judgment."¹³⁶ In *Catrone*, the racetrack had excluded the plaintiff,

¹³⁰ *Id.*

¹³¹ See note 56 *supra* and accompanying text for a discussion of the racetrack's private status.

¹³² 145 F. Supp. at 440. The other types of legal restrictions might include exclusion of a licensee because of his race, creed, color, sex or national origin.

¹³³ *Id.* at 441. *Cf. Marzocca v. Ferone*, 461 A.2d 1133 (N.J. 1983). The *Marzocca* court announced that it would not interfere with the "business relationships" between the private racetrack and the individuals pursuing "their vocational activities" without finding some regulation permitting such interference. *See id.* at 1137.

¹³⁴ 145 F. Supp. at 441. The court's justification was that the excluded jockey had placed bets on horses racing against the one that he rode. *Id.*

¹³⁵ 459 N.E.2d 474 (Mass. App. Ct. 1984).

¹³⁶ *Id.* at 477.

Catrone, from entering his horses, and in addition, had refused him stall space on the racetrack's grounds. The Massachusetts racing commission's authority to promulgate rules and regulations covering the horse racing industry, including the right to license a racetrack, did not make that licensed racetrack a public utility. On the contrary, the racetrack remained a private corporation, "at liberty to deal (or reasonably to refrain from dealing) with licensed owners, trainers, and jockeys at least in accordance with sound business judgment."¹³⁷ The court concluded that, even though the horse racing industry is heavily regulated,¹³⁸ a private racetrack still had the authority to exclude any individual licensee from its grounds, within the bounds of "sound business judgment."¹³⁹ In addition, the court stated that, unless a specific legislative purpose to modify the common law right of a racetrack to determine which licensed individuals would be permitted on its grounds is present, the common law right would prevail.¹⁴⁰

Finally, Catrone claimed that state action was involved because the stewards at the racetrack and the racing commission itself ultimately became involved with his situation,¹⁴¹ implying that this entitled him to due process even upon the racetrack's exercise of its right of exclusion. The court rejected this argument. Although the stewards, one of whom was appointed by

¹³⁷ *Id.* at 476.

¹³⁸ See note 96 *supra* for citations to many of the states' racing rules.

¹³⁹ 459 N.E.2d at 477. See also *Saumell v. New York Racing Ass'n*, 460 N.Y.S.2d 763 (N.Y. Ct. App. 1983). Cf. *Jacobson v. New York Racing Ass'n*, 305 N.E.2d 765, 768 (N.Y. 1973). In *Jacobson*, the court found that a racetrack in New York did not have the right to exclude a licensed owner and trainer on an arbitrary basis. It is important, however, to note the difference between racing in the State of New York and in other jurisdictions. In New York, the New York Racing Association, the defendant in *Jacobson*, operates all but one of the thoroughbred racetracks found within the state. Therefore, the court relied heavily upon this "virtual monopoly power" and decided that the racetrack should not have "an absolute immunity from having to justify the exclusion of an owner and trainer whom the state has deemed fit to license." *Id.* *Evans v. Arkansas Racing Comm'n*, 606 S.W.2d 578 (Ark. 1980), contrasts with *Jacobson*. Even though the plaintiff in *Evans*, a properly licensed owner and trainer, was not permitted by the state's *only* racetrack to race his horses there, the court upheld the racing commission's decision banning *Evans* from entering his horses in races at the racetrack. *Id.* at 585.

¹⁴⁰ 459 N.E.2d at 476-77. See 461 A.2d at 1137.

¹⁴¹ 459 N.E.2d at 479.

the racing commission, failed to interfere with the racetrack's actions and the racing commission upheld the exclusion order, the exclusion did not involve state action.¹⁴²

In summary, when the common law right of exclusion is applied to a horseman, the courts will review the racetrack's exercise of discretion. The racetrack, however, need only show some justification or the exercise of sound business judgment that does not offend the court's sensibilities.

B. Statutes, Rules and Regulations Pertaining to the Exclusion of Horsemen

Many states have statutory or regulatory provisions that grant authority to the racetrack or the racing commission to exclude horsemen, either arbitrarily or on specified grounds, from the premises of the racetrack or from all racetracks within the state.¹⁴³ Because such statutes, rules and regulations are usually cumulative with the racetrack's pre-existing common law rights,¹⁴⁴ these statutory and regulatory provisions generally supplement any rights that the racetrack may already have to exclude an individual horseman.¹⁴⁵ Because the racing commission has no such authority at common law, however, the statutes and regulations pertaining to exclusion of horsemen constitute the limits of the racing commission's direct exclusionary authority in the matter, although in practice the racing commission's use of its licensing power may lead to similar results.¹⁴⁶

¹⁴² *Id.*

¹⁴³ See notes 112-13 *supra* and accompanying text.

¹⁴⁴ See notes 114-28 *supra* and accompanying text for a discussion of the effect of statutes and regulations authorizing exclusion based upon the racetrack's common law rights.

¹⁴⁵ See notes 129-42 *supra* for a discussion of a racetrack's common law right to exclude horsemen.

¹⁴⁶ Many jurisdictions' statutes, rules and regulations grant the racing commission authority over all aspects of racing, and also grant the racing commission authority to license all horsemen. See notes 163-76 *infra* and accompanying text. Several horsemen have argued that the racing commission's authority over licensing has preempted or abrogated the racetrack's right to exclude horsemen, but courts have either rejected or ignored this argument. See, e.g., *Martin v. Monmouth Park Jockey Club*, 145 F. Supp. 439; *Catrone v. State Racing Comm'n*, 459 N.E.2d 474; *Saumell v. New York Racing Ass'n*, 460 N.Y.S.2d 763. Others have contended that the racetrack's authority to exclude constitutes an improper delegation of the racing commission's authority. This contention

In many jurisdictions the regulation providing for exclusion refers to the exclusion of "any person" for a violation of the rules.¹⁴⁷ Thus, given its plain meaning, such a regulation could be applied to exclude horsemen, as well as patrons, from the racetrack. Some jurisdictions, however, expressly use the term licensee in their regulations pertaining to exclusion.¹⁴⁸ For example, the Ohio State Racing Commission Thoroughbred/Quarterhorse Rules and Regulations, Rule 3769-9-99(b), provides:

In addition to any other penalty provided, or in the event no penalty has been provided, the commission, may, upon finding a licensee has violated a rule of this chapter, fine the licensee an amount not in excess of the amount prescribed by law and/or deny, suspend or revoke any Ohio State Racing Commission license held by the licensee and/or rule off any such licensee from all Ohio race tracks.¹⁴⁹

This rule specifically provides for the ruling off¹⁵⁰ of licensed horsemen from all Ohio race-

has likewise been rejected. *See, e.g.*, *Tamelleo v. New Hampshire Jockey Club, Inc.*, 163 A.2d 10, 12-13 (N.H. 1960). *Cf.* *Fink v. Cole*, 97 N.E.2d 873 (N.Y. 1951) (legislative delegation of licensing power to private corporation is unconstitutional).

¹⁴⁷ *See, e.g.*, ARIZONA HORSE RACING RULES AND REGULATIONS, R. 4-27-121.6 (1983); RULES AND REGULATIONS GOVERNING HORSE RACING IN ARKANSAS, R. 1248 (1985); DELAWARE STATE HARNESS RACING COMM'N RULES AND REGULATIONS OF HARNESS RACING, R. 5 § 21(k) (1978); IDAHO RULES AND REGULATIONS FOR HORSE RACING AND HORSE RACING MEETINGS, R. 343 (1984); ILLINOIS RACING BOARD RULES AND REGULATIONS OF HARNESS RACING, R. 301 (1985); IOWA STATE RACING COMM'N RULES OF RACING, R. 693-9.177(99D)(2)(C) (1984); RULES AND REGULATIONS OF THE MAINE STATE HARNESS RACING COMM'N, Ch. 224 (1977); MARYLAND RACING COMM'N THOROUGHBRED RULES, R. 10 (1984); NEBRASKA RULES OF RACING, Ch. 6.003 (1984); RULES GOVERNING HORSE RACING IN NEW MEXICO, R. 41.01 (1983); OREGON RACING COMM'N RULES OF HORSE RACING, R. 462-37-005 (1985); PENNSYLVANIA STATE HORSE RACING COMM'N RULES OF RACING § 163.6(b) (1980); SOUTH DAKOTA RULES AND REGULATIONS GOVERNING HORSE RACING AND HORSE RACING MEETINGS, R. 20:04:17:16 (1985); WASHINGTON HORSE RACING COMM'N RULES OF RACING, R. 260-84-060 (1984); WYOMING RULES OF RACING AND PARIMUTUAL EVENTS, § 3(s) (1985).

¹⁴⁸ *See, e.g.*, CALIFORNIA HORSE RACING BOARD RULES AND REGULATIONS, R. 3.01 (1984); KENTUCKY RULES OF RACING, R. IV, § 3(3) (1984); MARYLAND RACING COMM'N THOROUGHBRED RULES, R. .45Y (1984); MICHIGAN DEPARTMENT OF AGRICULTURE-RACING COMM'R GENERAL RULES, R. 431.1130(1) (1985); NEW YORK RACING AND WAGERING BOARD-DIVISION OF HARNESS RACING RULES AND REGULATIONS, § 4119.8 (1983).

¹⁴⁹ OHIO STATE RACING COMM'N THOROUGHBRED/QUARTERHORSE OFFICIAL RULES AND REGULATIONS, R. 3769-9-99(b) (1985).

¹⁵⁰ "Ruled off" means "denied access to any permit holder's premises during racing

tracks.¹⁵¹ The Arizona Horse Racing Rules and Regulations also specifically provide for the "ruling off" of licensees, stating:

In addition, the stewards may suspend, after a hearing for a period of time up to sixty (60) days, any person violating any of these Rules, and may rule off licensees violating any of these Rules. Nothing in these Rules shall prevent the stewards from imposing both a civil penalty and suspension for the same violation.¹⁵²

This statute distinguishes "any person" from a "licensee" by making licensees subject to different penalties,¹⁵³ and thus, arguably, horsemen in states such as Arizona might not fall within the "any person" category.¹⁵⁴

The standard for exclusion from the racetrack is often the breach of one of the jurisdiction's rules of racing. In many cases, these statutes or regulations prohibit certain conduct by horsemen licensed by the racing commission, but not necessarily conduct by the patrons. The Illinois Rules and Regulations of Harness Racing, for example, have a number of separate rules specifically directed toward horsemen, including the following rather typical provisions:

Rule 20.5 Betting on Starters

meetings conducted by the permit holder and forbidden to participate in any way whatsoever in the racing conducted during such racing meetings." *Id.* at R. 3769-1-10.

¹⁵¹ *Id.* at R. 3769-9-99(b).

¹⁵² ARIZONA HORSE RACING RULES AND REGULATIONS, R. 121 E.3f (1983). See also LOUISIANA RULES OF RACING, R. 2.2 (1984); MICHIGAN DEPARTMENT OF AGRICULTURE RACING COMM'N GENERAL RULES, R. 431.1130(1) (1985); NEBRASKA RULES OF RACING, Ch. 18.001 (1984); OHIO STATE RACING COMM'N THOROUGHBRED/QUARTERHORSE OFFICIAL RULES AND REGULATIONS, R. 3769-4-99(e) (1985); OREGON RULES OF HORSE RACING, R. 462-35-005(3) (1985); PENNSYLVANIA RULES OF RACING, § 163.471(a) (1985); WEST VIRGINIA RULES OF RACING, R. 698 (1985); WYOMING RULES OF RACING AND PARI-MUTUAL EVENTS, § 10(a) (1985).

¹⁵³ ARIZONA HORSE RACING RULES AND REGULATIONS, R. 121 E.3f (1983).

¹⁵⁴ Compare CALIFORNIA HORSE RACING BOARD RULES AND REGULATIONS, § 1405 (1985) (The "Board may independently punish any misconduct of any person connected with racing," perhaps indicating that horsemen may be subject to different, if not additional, disciplinary measures than patrons) with NEBRASKA RULES OF RACING, Ch. 6.003 (1984) ("[v]iolators of any rules shall be subject to ejection from the grounds and/or suspension or to be ruled off," suggesting that patrons as well as horsemen may be ejected or ruled off).

No owner, trainer, driver, agent, employee or attendant shall bet or cause any other person to bet on his behalf on any horse in any race in which a horse owned, trained or driven by him or in which he in any way represents or handles is a starter.

Rule 20.6 Fraudulent Proposals

If any person under the jurisdiction or control of the board is approached with any offer or promise of a bribe . . . it shall be the duty of such person to report immediately such matters to the judges and the board. Persons violating this section will be suspended for a period of not less than 30 days to a lifetime suspension.¹⁵⁵

The prohibitions directed toward licensees are not always specific, as the following rather broad Illinois provisions attest:

Rule 20.7 Acts Injurious to Racing

Any misconduct on the part of a race track operator or participant, fraudulent in its nature or injurious to the character of the turf, although not specified in these rules, is forbidden. Any person or persons who individually or in concert with one another, shall fraudulently and corruptly, by any means, affect the outcome of any race or affect a false registration or commit any other act injurious to the sport, shall be guilty of a violation.

Rule 20.10 Association With Undesirables

No owner, driver, trainer, groom attendant or any other person having charge of or access to any horse shall at any time associate with, consort with or in any manner communicate with any known bookmaker, tout or persons of similar pursuits either on or off the track. If the reputation of a gambler, bookmaker, tout or person of similar pursuit is notorious, the owner, driver, trainer, groom attendant or other persons having charge of, or access to any horse shall be presumed to have knowledge of the fact.¹⁵⁶

¹⁵⁵ ILLINOIS RULES AND REGULATIONS OF HARNESS RACING, R. 20.5 & R. 20.6 (1985).

¹⁵⁶ *Id.* at R. 20.7 & R. 20.10.

Violators of these rules, horsemen in most cases, may be subjected to ejection from the grounds, fine, suspension or being ruled off.¹⁵⁷

The Colorado General Rules of Racing for Greyhound and Horse Race Meets, on the other hand, contain a single prohibition that may result in the ejection either of patrons or horsemen.¹⁵⁸ Colorado's rule 3.01 states:

The Commission through the proper personnel may summarily eject from a racetrack any licensed or unlicensed person whose conduct while on the racetrack interferes with the orderly and proper conduct of a meet. Conduct considered to interfere with the conduct of a meet includes, but is not limited to: bookmaking or acting as a runner for a bookmaker; touting; pickpocketing; altering pari-mutuel tickets; offering to cash altered pari-mutuel tickets; entering or attempting to enter that portion of a racetrack open only to licensees or racing officials; entering or attempting to enter a racetrack without first purchasing a ticket to enter; being intoxicated by the use of alcohol or drugs; and possession of a narcotic or drug which violates state or federal laws. In addition, persons will be ejected from the racetrack for acting in a disorderly manner. Such conduct includes, but is not limited to: the use of words which tend to incite others to unlawful conduct; making unreasonable noises; fighting; striking or threatening to strike another person; discharging a firearm; and displaying a firearm. A licensee who engages in the above conduct will be subject to disciplinary action in addition to summary ejection.¹⁵⁹

As a practical matter, the prohibitions in the racing rules of a given state against pickpocketing, intoxication, disorderly conduct and fighting provide grounds for the ejection of either patrons or horsemen,¹⁶⁰ while the prohibitions against conduct such as fraudulently affecting the outcome of a race will be grounds for the ejection only of horsemen.¹⁶¹ These and other

¹⁵⁷ *Id.* at R. 3.02. See also note 147 *supra* for a listing of jurisdictions where violation of the rules may result in exclusion or ruling off from the racetrack.

¹⁵⁸ COLORADO GENERAL RULES OF RACING FOR GREYHOUND AND HORSE RACE MEETS, R. 3.01 (1982).

¹⁵⁹ *Id.*

¹⁶⁰ *See id.*

¹⁶¹ *See* ILLINOIS RULES AND REGULATIONS OF HARNESS RACING, R. 20.5-.7 & R. 20.10.

distinctions between the treatment of patrons and horsemen under the statutes and regulations indicate that the right of exclusion will vary depending upon the classification into which the party to be excluded falls.¹⁶²

The exclusion regulations of many jurisdictions permit the revocation or suspension of a horseman's license as well as his ejection from the racetrack.¹⁶³ Obviously, because horsemen are licensed by the state and the ordinary patron is not, the penalty of revocation or suspension of a license is applicable only to horsemen.¹⁶⁴

Most jurisdictions provide the horseman with some type of procedural protection if the *racetrack commission* or its agents threatens him with either exclusion from the racetrack or the loss of his license.¹⁶⁵ Although many jurisdictions authorize racetracks to exclude "any person,"¹⁶⁶ few, if any, have delegated authority directly to the racetrack if a license is involved.¹⁶⁷ Instead, jurisdictions generally vest the authority to revoke or

¹⁶² See text accompanying notes 163-77 *infra* for a discussion of other differences between the right to exclude patrons and the right to exclude horsemen.

¹⁶³ See, e.g., ARIZONA HORSE RACING RULES AND REGULATIONS, R. 121 6f (1983); CALIFORNIA HORSE RACING BOARD RULES AND REGULATIONS, § 1528 (1984); FLORIDA HARNES RACING RULES AND REGULATIONS, Ch. 7E-4.29(4) (1984); IDAHO RULES AND REGULATIONS FOR HORSE RACING AND HORSE RACING MEETINGS, R. 343 (1984); ILLINOIS RULES AND REGULATIONS OF HARNES RACING, R. 3.02 (1985); LOUISIANA RULES OF RACING, R. 57.2 (1984); MONTANA BOARD OF HORSE RACING, R. 8.22.150(24) (1985); RULES GOVERNING HORSE RACING IN NEW MEXICO, R. 41.01 (1984); OHIO STATE RACING COMM'N THOROUGHBRED/QUARTERHORSE OFFICIAL RULES AND REGULATIONS, R. 3769-4-99(E) (1985); OKLAHOMA RULES OF RACING, R. 104 (1985); OREGON RULES OF HORSE RACING, R. 462-35-005(3) (1985).

¹⁶⁴ One of the California rules is a good example of a provision imposing such a penalty:

Violation of any provision of this chapter, whether or not a penalty is fixed therein, is punishable in the discretion of the Board by revocation or suspension of any license, by fine, or by exclusion from all racing inclosures under the jurisdiction of the Board, or by any combination of these penalties.

CALIFORNIA HORSE RACING BOARD RULES AND REGULATIONS, § 1405 (1984).

¹⁶⁵ The same procedural protections may not be afforded if the *racetrack* excludes the horseman.

¹⁶⁶ See note 147 *supra* and accompanying text.

¹⁶⁷ None of the jurisdictions examined by the authors grants the racetrack the exclusive right to revoke or suspend a license.

suspend licenses with their respective racing commissions,¹⁶⁸ to suspend licenses with their stewards,¹⁶⁹ and to revoke or suspend licenses with a number of racetrack affiliates with a right of final appeal to the racing commission.¹⁷⁰ These distinctions are important to an understanding of the procedural rights of a horseman when his license is at stake, or he is subject to being "ruled off" the racetrack.

Iowa grants stewards the authority to suspend a horseman's license upon a finding of a rules violation.¹⁷¹ The stewards, however, may suspend the license for no more than thirty days after the ruling,¹⁷² and it is left to the racing commission to

¹⁶⁸ See, e.g., KENTUCKY RULES OF RACING, R. XIX, § 2 (1984); PENNSYLVANIA RULES OF RACING, § 163.6(d) (1985); WYOMING RULES OF RACING AND PARI-MUTUEL EVENTS, § 49(b) (1985).

¹⁶⁹ See, e.g., ARIZONA HORSE RACING RULES AND REGULATIONS, R. 121 6f (1983); RULES AND REGULATIONS GOVERNING HORSE RACING IN ARKANSAS, R. 1253 (1985); CALIFORNIA HORSE RACING BOARD RULES AND REGULATIONS, § 1528 (1984); IDAHO RULES AND REGULATIONS FOR HORSE RACING AND HORSE RACING MEETINGS, R. 901 (1984); ILLINOIS RULES AND REGULATIONS OF HARNESS RACING, R. 3.04 (1985); LOUISIANA RULES OF RACING, R. 57.2 (1984); MASSACHUSETTS RULES OF HORSE RACING, R. 4.16(l) (1985); NEW JERSEY RACING COMM'N RULES AND REGULATIONS, R. 13:71-1.20 (1982); OKLAHOMA RULES OF RACING, R. 408 (1985). "Stewards" are the "three individuals who uphold the rules of racing at a racetrack. They are answerable to the state racing commission and their decisions can be appealed to that body." LOHMAN & KIRKPATRICK, *supra* note 65, at 220.

¹⁷⁰ See, e.g., ARIZONA HORSE RACING RULES AND REGULATIONS, R. 101 E (1983); RULES AND REGULATIONS GOVERNING HORSE RACING IN ARKANSAS, R. 1256 (1985); CALIFORNIA HORSE RACING BOARD RULES AND REGULATIONS, § 1983 (1984); IDAHO RULES AND REGULATIONS FOR HORSE RACING AND HORSE RACING MEETINGS, R. 1001 (1984); ILLINOIS RULES AND REGULATIONS OF HARNESS RACING, R. 4.05 (1985); IOWA RULES OF RACING, R. 693-4.7(99D) (1984); KENTUCKY RULES OF RACING, R. XX, § 1(8) (1984); LOUISIANA RULES OF RACING, R. 57.2 (1984); RULES AND REGULATIONS OF THE MAINE STATE HARNESS RACING COMM'N, Ch. 23 (5) (1977); MARYLAND RACING COMM'N THOROUGHBRED RULES, R. 09.10.01.10(B) (1984); MICHIGAN DEPARTMENT OF AGRICULTURE-RACING COMM'N GENERAL RULES, R. 431-1130(3) (1985); MINNESOTA RULES OF RACING, R. 7897.0150 (3) (1985); NEBRASKA RULES OF RACING, Ch. 7.001 (1984); NEVADA RACING COMM'N REGULATIONS GOVERNING HORSE RACING, R. 466.185 (1980); NEW YORK HARNESS RACING RULES AND REGULATIONS, § 4121.5 (1983); OHIO STATE RACING COMM'N THOROUGHBRED/QUARTER-HORSE OFFICIAL RULES AND REGULATIONS, R. 3769-7-42 (1985); OKLAHOMA RULES OF RACING, R. 108 (1985); OREGON RULES OF HORSE RACING, R. 462-35-025 (1985); SOUTH DAKOTA RULES AND REGULATIONS GOVERNING HORSE RACING AND HORSE RACING MEETINGS, R. 20:04:01:12 (1985); WASHINGTON RULES OF RACING, R. 260-88-010 (1984); WEST VIRGINIA RULES OF RACING, R. 60 (1985); WYOMING RULES OF RACING AND PARI-MUTUEL EVENTS, R. 4(a) (1985).

¹⁷¹ IOWA RULES OF RACING, R. 693-9.177(99D)(l) (1984).

¹⁷² *Id.*

actually revoke the license.¹⁷³ Although the license holder may be subject to immediate limitations necessary to protect the public safety, the stewards must follow certain procedures before suspending the horseman's license.¹⁷⁴ If the stewards suspend the license, the license holder is entitled to contest the suspension before the racing commission.¹⁷⁵ Other jurisdictions provide similar protection to the licensee.¹⁷⁶

Thus, on the face of many of the rules, although a horseman may be ejected without procedural protection before or at the time of the ejection (just as a patron may be),¹⁷⁷ if the exclusion is permanent or involves a penalty directly affecting his license, the rules often accord him some procedural protection before the penalty becomes effective plus an appeal after the penalty becomes effective.

Some jurisdictions, such as Kentucky, have effectively codified the common law right of absolute exclusion, thereby permitting the racetrack to expel or exclude a licensee for any reason whatsoever, or for no reason at all.¹⁷⁸ Some states' exclusion statutes and regulations, however, limit the authority to expel a horseman granted to racetracks, requiring the racetrack to find that the horseman falls within an excludable category.¹⁷⁹

Daly v. Commonwealth Horse Racing Comm'n,¹⁸⁰ for example, involved a Pennsylvania exclusion statute that, among other things, allowed the racetrack to exclude a licensed person whose presence was "detrimental to the best interests of horse racing."¹⁸¹ Daly was a jockey whom a New Jersey grand jury had indicted on race fixing charges. On this basis, the Keystone

¹⁷³ *Id.* at R. 693-9.177(99D)(2).

¹⁷⁴ *Id.* at R. 693-4.3(99D)(2) (stewards must investigate the alleged misconduct); *id.* at R. 693-4.3(99D)(3) (stewards must give the license holder adequate notice of the steward's meeting).

¹⁷⁵ *Id.* at R. 693-4.7(99D)(3).

¹⁷⁶ *See, e.g.,* NEBRASKA RULES OF RACING, Ch. 7.00l (1984) (a licensee penalized or disciplined under these rules may request a hearing before the racing commission).

¹⁷⁷ *See* notes 108-13 *supra* and accompanying text.

¹⁷⁸ *See* KENTUCKY RULES OF RACING, R. VI, § 23 (1984). *See also* James v. Churchill Downs, Inc., 620 S.W.2d 323 (Ky. Ct. App. 1981).

¹⁷⁹ *See* notes 104-07 *supra* for the rules of various jurisdictions that set forth a standard for exclusion.

¹⁸⁰ 391 A.2d 1134 (Pa. Commw. Ct. 1978).

¹⁸¹ *Id.* at 1135.

Race Track—pursuant to the exclusion statute—excluded Daly from its grounds. The plaintiff argued that the statute was “impermissibly vague,” in violation of his constitutional rights.¹⁸² The court disagreed, finding that the exclusion statute reflected the legislature’s intent “to maintain public respect and confidence in the sport of horse racing” and that, therefore, it was sufficient that the conduct precipitating the exclusion “reflect[ed] negatively on the sport.”¹⁸³ According to the court, the statute was not vague because “a person of ordinary intelligence is capable of determining what conduct the statute encompasses.”¹⁸⁴

Arkansas has also upheld a state statute phrased in a similarly broad manner.¹⁸⁵ Certain statutes, in addition to providing a standard for permissive exclusion, also place an affirmative duty on the racetrack to exclude certain categories of licensees.¹⁸⁶

If the statute or regulation articulates a sufficiently definite standard, the licensee will still probably challenge the exclusion on due process grounds. To invoke the due process clause, however, the licensee must establish at least two threshold requirements: first, that the exclusion deprived him of a constitutionally protected interest, and second, that the exclusion constituted state action.¹⁸⁷

The horseman usually claims that his license constitutes a property interest protected by the fourteenth amendment. In *Phillips v. Graham*,¹⁸⁸ one of the most prominent cases in this area,¹⁸⁹ the Illinois Supreme Court concluded that there can be “no question that the license of the plaintiffs to pursue an occupation, as a trainer, owner and driver of harness horses, [was] a property interest given protection by the due process

¹⁸² *Id.* at 1136.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *See Evans v. Arkansas Racing Comm'n*, 606 S.W.2d 578 (Ark. 1980). *See also Mules v. Maryland Racing Comm'n*, 353 A.2d 664 (Md. App. 1976) (Maryland Racing Commission had right to deny a license to a veterinarian who had a previous criminal conviction).

¹⁸⁶ *See, e.g., Fiore v. Los Angeles Turf Club, Inc.*, 361 P.2d 921, 922 (Cal. 1961) (convicted bookmaker excluded from racetrack).

¹⁸⁷ *See, e.g., Phillips v. Graham*, 427 N.E.2d 550, 553-54 (Ill. 1981).

¹⁸⁸ 427 N.E.2d 550 (Ill. 1981).

¹⁸⁹ *Cf. Barry v. Barchi*, 443 U.S. 55 (1979).

clause."¹⁹⁰ The management of Fairmount Park Racetrack had excluded one of the plaintiffs, Phillips, after they learned that he had been indicted for conspiring to bribe a harness driver there. The Illinois Racing Board had subsequently affirmed the racetrack's action and extended the exclusion to all racetracks in Illinois. Phillips claimed that both actions deprived him of his property interest in his license. Accepting this contention, the court apparently found state action present, for it employed a due process analysis. The court, however, ultimately determined that Phillips had received all process to which he was entitled.¹⁹¹ The *Phillips* court relied on the United States Supreme Court decision in *Barry v. Barchi*,¹⁹² a licensing case that is at least arguably distinguishable.¹⁹³ Nevertheless, other courts¹⁹⁴ are in accord with *Phillips*, and consider the horseman's license a constitutionally protectible property interest.

Even if a property interest is present, the excluded licensee must still establish that the act of excluding him constituted state action.¹⁹⁵ In the context of an exclusion by racetrack management, state action frequently will not be present unless the racing commission has directly intervened. In *Evans v. Arkansas Racing Commission*,¹⁹⁶ the court did not find the requisite state action when the racetrack management of Oaklawn Jockey Club, Inc. refused to allow the plaintiff to run his horses. Because Oaklawn was a private corporation, its private acts with respect to the plaintiff were not the acts of the state, even though the rules and regulations of the racing commission authorized the exclusion and the commission reviewed and upheld the racetrack's decision.¹⁹⁷

If the horseman excluded by racetrack management is entitled to procedural due process, the only remaining issue is what

¹⁹⁰ 427 N.E.2d at 553.

¹⁹¹ *Id.* at 552-53, 555.

¹⁹² 443 U.S. 55 (1979).

¹⁹³ In *Phillips*, both the racetrack and the state racing commission had taken action to exclude the plaintiff; in *Barry*, only the racing commission took action.

¹⁹⁴ See, e.g., *O'Daniel v. Ohio State Racing Comm'n*, 307 N.E.2d 529 (Ohio 1974). *But see* *Bier v. Fleming*, 538 F. Supp. 437 (N.D. Ohio 1981) (liberty interest).

¹⁹⁵ See notes 86-95 *supra* and accompanying text for a discussion of state action in the equal protection context.

¹⁹⁶ 606 S.W.2d 578 (Ark. 1980), *cert. denied*, 451 U.S. 910 (1981).

¹⁹⁷ *Id.* at 579, 583. *But see* 538 F. Supp. at 446.

types of procedural safeguards are required. *Barry v. Barchi*,¹⁹⁸ the landmark Supreme Court case dealing with procedural due process and horsemen, involved the summary suspension of a trainer's license by the stewards at Monticello Raceway in New York. After one of the plaintiff's horses was found, through a postrace urinalysis, to have been drugged, the steward ultimately suspended the trainer's license without any presuspension hearing. The plaintiff contended that the suspension violated his due process rights.¹⁹⁹ Concluding that the plaintiff was entitled to due process, the Court focused upon the timing of the hearing to which the plaintiff was entitled.²⁰⁰ Though the plaintiff insisted that, for the hearing to be "at a meaningful time and in a meaningful manner,"²⁰¹ the hearing would have to be *before* the suspension, the Court disagreed:

Unquestionably, the magnitude of a trainer's interest in avoiding suspension is substantial; but the State also has an important interest in assuring the integrity of the racing carried on under its auspices. In these circumstances, it seems to us that the State is entitled to impose an interim suspension, pending a prompt judicial or administrative hearing that would definitely determine the issues, whenever it has satisfactorily established probable cause to believe that a horse has been drugged and that a trainer has been at least negligent in connection with the drugging.²⁰²

On the facts presented, the Court found it necessary that the plaintiff "be assured a prompt postsuspension hearing, one that would proceed and be concluded without appreciable delay."²⁰³ The Court's ruling, however, appeared to be limited by the following facts. First, the plaintiff's indictment by a grand jury demonstrated probable cause, which, in turn, provided "substantial assurance that the trainer's interest [was] not being base-

¹⁹⁸ 443 U.S. 55 (1979).

¹⁹⁹ *Id.* at 59, 61. For a discussion of trainer responsibility concerning race horse drugging, see generally Garrison & Klein, *Brennan Revisited: Trainer's Responsibility for Race Horse Drugging*, 70 Ky. L.J. 1103 (1981-82).

²⁰⁰ 443 U.S. at 63-64.

²⁰¹ *Id.* at 65 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

²⁰² 443 U.S. at 64.

²⁰³ *Id.* at 66.

lessly compromised.”²⁰⁴ Second, the presuspension opportunities that the plaintiff had to “present his side of the story to the State’s investigators . . . sufficed for the purposes of probable cause and *interim* suspension.”²⁰⁵

The *Barry* precedent was applied to the exclusion of a horseman in *Phillips v. Graham*.²⁰⁶ The *Phillips* court noted that when “only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for ultimate judicial determination is adequate.”²⁰⁷ Quoting *Barry* with approval, the court accepted the notion that no prehearing is necessary if, under the circumstances, the state’s interest in upholding the integrity of racing outweighs the licensee’s temporary interest, if there is “substantial assurance” that the interim action is proper, and if a prompt postsuspension hearing is afforded to finally resolve the issues.²⁰⁸ The *Phillips* court found that both the racetrack and the racing board had just cause to exclude the plaintiff, that “the procedure established by the Racing Board to determine promptly the propriety of an exclusion order issued by [a racetrack] significantly reduce[d] the ‘risk of erroneous deprivation,’ ” and that the licensee was entitled to a *de novo* hearing before the Board within seven to twelve days after his receipt of the exclusion order.²⁰⁹ The court, therefore, concluded that the plaintiff had received procedural due process and that his exclusion, both by the racetrack and by the state racing board, was proper.²¹⁰

Most statutory and regulatory exclusion rules, if implemented properly by the racetrack, can be applied in a constitutional manner so long as there is a rational justification for the exclusion that outweighs the licensee’s need to be at the racetrack. Moreover, it is noteworthy that in both *Phillips* and *Barry*, the state racing commission was actively involved, so that the presence of state action was clear. In the absence of such involve-

²⁰⁴ *Id.* at 65.

²⁰⁵ *Id.* at 65-66 (emphasis added).

²⁰⁶ 427 N.E.2d 550 (Ill. 1981).

²⁰⁷ *Id.* at 553 (quoting *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611 (1974)).

²⁰⁸ 427 N.E.2d at 556.

²⁰⁹ *Id.* at 555-56 (emphasis added).

²¹⁰ *Id.*

ment, the licensee will have great difficulty establishing state action, and the requirements imposed by the due process clause may not even be applicable.

If the state racing commission is involved in the exclusion, the substantive standards imposed by the commission rules must also pass constitutional muster. The standards governing commission action regarding exclusion are likely to be identical to those governing statutory and regulatory exclusion by the racetrack.²¹¹ As discussed above, those statutes and regulations that set forth specific criteria for exclusion, such as rule violations²¹² or other types of enumerated misconduct,²¹³ are much more likely to be upheld when applied to any given horseman.²¹⁴

On the procedural side of the analysis, *Barry* and *Phillips* suggest that, although a hearing *before* the racing commission excludes a horseman may not always be required, a prompt postexclusion hearing is a constitutional necessity.²¹⁵ If the racing commission seeks to revoke or suspend the horseman's license²¹⁶ in lieu of, or in addition to, excluding him from one or more racetracks pursuant to the exclusion provision,²¹⁷ then the required procedural safeguards must be applied *a fortiori*.²¹⁸ If, under state law, the racing commission has an opportunity to employ either an immediate exclusion or license suspension without a hearing,²¹⁹ or a more constitutionally acceptable prehearing or prompt posthearing,²²⁰ the racing commission would be well advised to employ one of the latter alternatives. Moreover, states

²¹¹ See, e.g., KRS § 230.215 (1982); KENTUCKY RULES OF RACING, R. VI, § 23 (1984).

²¹² See notes 147-57 *supra* and accompanying text for a discussion of exclusion rules that are triggered by rule violations.

²¹³ See notes 158-62 *supra* and accompanying text for a discussion of exclusion rules that are triggered by enumerated misconduct.

²¹⁴ See, e.g., *Daly v. Commonwealth Horse Racing Comm'n*, 391 A.2d 1134 (Pa. 1978).

²¹⁵ See 427 N.E.2d at 555-56.

²¹⁶ See, e.g., 443 U.S. at 59.

²¹⁷ See, e.g., 427 N.E.2d at 552.

²¹⁸ In the licensing context, both the state action and the deprivation of a property interest are clear. If the horseman is merely excluded from the premises, however, both arguments become more tenuous.

²¹⁹ See KRS §§ 230.215(2), KRS 230.260(1) (1982).

²²⁰ See *id.* § 230.320 (1982).

lacking the requisite standards and procedural safeguards for racing commission action involving both the exclusion and the license revocation scenarios would be well-advised to enact them.

CONCLUSION

The existence of a racetrack's common law right to exclude both patrons and horsemen is well established in American jurisprudence. The majority of the courts have concluded that a racetrack must have the right to choose its patrons and, with some limitation, the right to restrict those who desire to work on the racetrack's premises. In almost all situations constitutional challenges have failed because the courts have generally not found requisite state action. In most situations, the racetrack as a private enterprise has not been required to afford the litigant the sought-after constitutional rights.

Enhancing this common law right, statutes and regulations have specifically given the racetrack and the various racing commissions exclusionary authority. But it is through these statutes and regulations that the courts in some situations have found that procedural due process considerations are present and must be observed. This is especially true when the action complained of directly involves the applicable racing commission. Nevertheless, even if potential due process problems arise, available procedures will often make it possible for the racetrack, the racing commission, or both to implement the exclusion in a constitutionally permissible manner.