

# Articles

## THE SUPREME COURT AND EXCLUSIONS BY RACETRACKS

BENNETT LIEBMAN\*

*"I say race horses are essentially gambling implements, as much as roulette tables."*<sup>1</sup>

### I. INTRODUCTION

Operating a horse racing track in the early twentieth century was a fairly simple task. Racetrack owners could basically do whatever they wished. For no reason in particular, track owners could exclude any and all patrons, as well as any owner, trainer, or jockey, directly participating in the day's events. This article will show why such practices were easy, and expound on the current legal state of racetrack exclusion. While this article generally refers to horse racing, the analysis in this article also applies to the other sports, such as greyhound racing and jai alai, in which legalized sports gambling is authorized.

Initially, racetrack owners found it fairly easy to exclude others because the United States Supreme Court made any resort to federal courts, by parties excluded from racetracks, an unthinkable action. The Supreme Court assisted in establishing this concept by holding that exclusions from racetracks under the common law were not actionable offenses. In 1913, the United States Supreme Court in *Marrone v. Washington Jockey Club*, through a decision authored by Justice Oliver Wendell Holmes, established this principal of total management discretion in racetrack exclusions.<sup>2</sup>

---

\* Bennett Liebman is the Executive Director of the Government Law Center of Albany Law School. He has served as the Coordinator of the Government Law Center's Program on Racing and Gaming Law since the program's inception in 2002. Mr. Liebman is a summa cum laude graduate of Union College and a cum laude graduate of New York University School of Law. The author wishes to acknowledge and thank Stanley Bergstein, the executive vice-president of Harness Tracks of America and Paul Estok, Esq., the counsel of Harness Tracks of America for allowing him to help develop the analysis and many of the materials used in this article.

1. See Oliver W. Holmes, *THE AUTOCRAT OF THE BREAKFAST TABLE* 84 (1858) (quoting opinion of horse racing).

2. See 227 U.S. 633, 636 (1913) (establishing discretion regarding racetrack exclusion and failed to change commonly accepted contract rule).

The decision in *Marrone* almost guaranteed that people excluded from racetracks would not have relief in the federal court system. It also provided a precedent that was followed in nearly every state court jurisdiction where there were no rules or legislation on the powers of a racetrack to exclude individuals. While a number of changes have been instituted over the nearly ten decades since *Marrone* was decided, much of the basic rule espoused by Justice Holmes remains unchanged. Where the common law is unchanged, management at a racetrack can, with certain exceptions, largely do whatever it wishes in determining whether a patron has access to the racetrack. Individuals who have horse racing licenses may have greater rights; however, in common law states, the rights of these licensees still remain circumscribed.

This article will review the factual background of *Marrone*, the pre-*Marrone* precedents involving racetrack exclusions, the decision in *Marrone*, and finally the decision's effects on the horse racing industry. In reviewing the effects of the *Marrone* decision, this article will begin by reviewing the holdings of federal courts issued in the first fifty years after *Marrone*. Next, the article will analyze how the federal courts treated the decision in the years after the civil rights revolution of the Warren Court. This article also provides separate reviews for exclusions of racetrack licensees and exclusions of racetrack patrons. The article concludes with a review of how state courts have treated the *Marrone* decision after it was first issued and how the legal precedents of these state courts have changed in the years since the Warren Court.<sup>3</sup>

## II. WHO WAS JOSEPH MARRONE?

The history of the *Marrone* case is a microcosm of the issues involved in excluding people from racetrack property. Primarily, this issue surrounds the question of whether the owners excluded an individual because he posed a threat to the propriety and the integrity of racing or rather removed an individual for strictly personal reasons.

---

3. One thing that has changed is the site of the exclusion that prompted the *Marrone* lawsuit. The site of the incident was the Bennings Racetrack, which operated until 1908 in the District of Columbia; Bennings was able to operate because it was outside the location subject to the ban on District of Columbia gambling. There has been no horse racing in the District of Columbia since Bennings ceased operations. See Ch. 497, 26 Stat. 824 (1981) (banning gambling in Washington, Georgetown, and areas in District of Columbia within one mile of two cities); see also 154 CONG. REC. H3922-24 (Mar. 25, 2008) (recalling remarks of Thetus Sims).

The foundation of the case began, on November 23, 1907, after Joseph Marrone entered his horse St. Joseph in the first race at the Washington D.C. racetrack, Bennings.<sup>4</sup> The horse ran in the name of Miss A. M. Marrone, Joseph Marrone's daughter. Mr. Marrone was acknowledged as the trainer of the horse.<sup>5</sup> In an era well before the advent of any scientific drug testing, stewards at the racetrack believed that the horse was acting strangely. The stewards exclaimed "St. Joseph's warm appearance and antics excited their suspicion."<sup>6</sup> They asked the track veterinarian for his thoughts on St. Joseph's condition and he told the stewards that the horse "appeared to have been doped."<sup>7</sup> The stewards did not remove/disqualify the horse from the race; rather, the horse ran and finished next-to-last in a twelve horse field. Following the race, Mr. Marrone was suspended from entering any future horses at Bennings, and his case was referred to the Jockey Club.<sup>8</sup> On the following racing day, Mr. Marrone purchased a ticket as a patron and was ejected from the track by security officials.<sup>9</sup> On the succeeding day, Mr. Marrone again returned to Bennings, purchased a ticket of admission, but was again denied entry into the racetrack.<sup>10</sup> The *Marrone* exclusion was termed the "sensation of the meeting."<sup>11</sup>

---

4. See *Hibiscus Purse Won By Anna Marrone II*, N.Y. TIMES, Jan. 16, 1927 at S1 (showing horses named after family members finished 1-2 in Hibiscus Purse in Hialeah with Anna Marrone II winning, followed by Joseph Marrone III).

5. See *Current Notes of the Turf*, DAILY RACING FORM, July 11, 1915 (noting he allegedly owned race horses since 1885). How Joseph Marrone was able to train horses while simultaneously conducting his regular business involving garbage cleaning in the New York City area has never been disclosed in newspaper articles.

6. See *Good Card Deserved Better at the Benning Races*, WASH. TIMES, Nov. 24, 1907 (noting suspicious behavior of horse); see also *Right Royal Wins*, N.Y. TRIB., Nov. 24, 1907 (describing races that day and not mentioning Joseph Marrone).

7. See *id.* (highlighting veterinarian opinion).

8. See *How Can You Pick Em If Owners Don't Know When to Back Entries*, WASH. TIMES, Nov. 25, 1907 (discussing suspension at Bennings). The Jockey Club was the private organization that established and enforced most of the rules governing thoroughbred racing. See generally *Fink v. Cole*, 97 N.E.2d 873 (1951) (stating purpose of Jockey Club). As horse racing in the United States became increasingly publically regulated, the role of the Jockey Club in the actual promulgation and enforcement of rules diminished. For example, in New York the role of the Jockey Club in licensing individuals for horse racing was formally terminated. See *id.* (eliminating grant of legislative power).

9. See *Bookies Weep and Wail*, WASH. TIMES, Nov. 26, 1907 ("Joe Marrone got the gate yesterday when he presented himself for admission to the track."); see also *Marrone Denied Admission*, WASH. POST, Nov. 26, 1907 (revealing admission denial).

10. See *Marrone v. Wash. Jockey Club*, No. 2019, 1910 WL 20767, at \*1 (D.C. 1910) ("The same officer who had been called on the former occasion led him away from the entrance into the street.").

11. See *Racing*, WASH. TIMES, Dec. 29, 1907 (describing exclusion).

At a time Marrone was ejected from the racetrack grounds, the courts were seldom used to resolve horse racing disputes. Nevertheless, Joseph Marrone wasted no time in suing the Washington Jockey Club, the owner of Bennings, and the stewards of the racetrack.<sup>12</sup> Marrone's principal argument was that, while he was known as a heavy bettor, he bet virtually nothing on St. Joseph on the day the horse was suspected of being doped. Additionally, St. Joseph often acted in the claimed suspicious manner on his way to the track.<sup>13</sup> Mr. Marrone stated that the charge of doping "disgraces him in the eyes of thousands of his friends, hurts his character, and affects his business standing."<sup>14</sup> He also declared:

I'll say what I have to say and won't stop until my name is cleared until I can resume racing until I choose or stop [and] nothing will stop me. All the Pinkertons, all the politicians, and all the judges in the world will not stop me. I will give my life to be set right.<sup>15</sup>

As the lawsuits progressed through the courts, Marrone was finally admitted to the track after paying his two dollar admission fee, at the tracks last race of the season, the spring Bennings meeting of 1908.<sup>16</sup> Marrone was also allowed to enter horses, including St. Joseph, at the spring race.<sup>17</sup> These positive actions, however, did not deter Marrone from pursuing his suit. He said, "I am going to fight for vindication and won't stop until I get it."<sup>18</sup> Marrone had his critics and the media was one of the loudest of all. The anti-Italian

12. See, e.g., *Marrone v. N.Y. Jockey Club*, 17 N.Y.S. 936 (N.Y. Gen. Term. 1892) (holding certain claims of Marrone relevant); and *Marrone v. N.Y. Jockey Club*, 14 N.Y.S. 199 (N.Y. Gen. Term. 1891) (determining "he fails to set out a cause of action against anybody" in contract claim).

13. See *Says St. Joseph Was Doped*, WASH. POST, Nov. 24, 2007 (detailing horses' actions); *Doped Horses Hard to Tell When Fixed to Race*, WASH. POST, Dec. 8, 2007 (portraying doped horses) For more on Marrone's wagering, see *Marrone the Star Benning Winner*, WASH. TIMES, Apr. 13, 1907; and "Gossip of the Track," WASH. HERALD, Apr. 13, 1907 (portraying scandal). Also, "Joe Marrone . . . is said to have cleaned up a small fortune on his horse's victory." See *L'Amour Medium of Coup*, WASH. POST, Apr. 13, 1907 (stating Marrone "had won \$30,000 but it is safe to say that the amount was not half that much" and brought in "best engineered and most successful coup of the meeting").

14. See *Marrone Threatens the Racing Game in this State*, N.Y. EVENING WORLD, Dec. 7, 1907 (describing effects of allegations).

15. See *id.* (declaring will to not give up action).

16. See *Bellweather Winner of Bennings Handicap, First Stake of Season*, N.Y. WORLD, Mar. 23, 1908 (noting track meeting).

17. See Vincent Treanor, *Eyes of Bennings on Racing Bill*, N.Y. WORLD, Mar. 31, 1908 (showing horses entered); and *Amateur Riders Have Day at Bennings*, DAILY RACING FORM, Apr. 9, 2008 (entering horses).

18. See *id.* (highlighting drive for vindication).

sentiment in the media's treatment of Marrone was not particularly subtle. Several media outlets recited: He "recites his wrongs in the broken English used by Italians."<sup>19</sup> He "has the dark, flashy eyes of his race."<sup>20</sup> "He doesn't talk English as well as some of his countrymen."<sup>21</sup> "Not much sympathy will be exerted over Marrone's troubles. He is a type of horsemen who plays the game with sharp tools and if his own fingers are cut, nobody will cry."<sup>22</sup>

In media also highlighted Marrone as possessing a vast fortune, which had possibly been obtained through illegal means.<sup>23</sup> Some believed he was the protégé to the Tammany boss "Big Tim" Sullivan and that he had through his contacts with Tammany, obtained his wealth by controlling the City's scow trimming contract.<sup>24</sup> Others believed that he obtained his fortune by running a majority of city contracts.<sup>25</sup> He was once described as "the owner of all the dump privileges of the city of New York."<sup>26</sup> Moreover, in 1906, public scrutiny about his wealth led to a major investigation how of how he obtained New York City's street cleaning contracts.<sup>27</sup> Despite all of these assumptions about his vast fortune, there were almost no funds in his estate and he officially died insolvent.<sup>28</sup>

---

19. See *Good Card Deserved Better*, *supra* note 6 (noting anti-Italian remarks).

20. See *id.* (regarding eyes, highlighting anti-Italian remarks).

21. See *id.* (concerning speech, noting anti-Italian remarks).

22. See *Bookies Weep*, *supra* note 9.

23. See *Marrone in Trouble Again*, WASH. HERALD, Mar. 22, 1910.

24. See *The Brooklyn Dumps*, N.Y. TRIB., Mar. 18, 1906. The laborers who were employed as scow-trimmers tended to be especially low-paid immigrants from Italy. See Thomas Reppetto, *AMERICAN MAFIA: A HISTORY OF ITS RISE TO POWER 19* (2004) (explaining national origin of scow-trimmers).

25. See *H.S. Brown left \$322,719*, N.Y. TIMES, Mar. 28, 1929. It was reported in 1932 that Marrone, by salvaging and reselling the paper delivered to the dumps, "died a millionaire," and "[e]ventually he was an authentic millionaire, not just a rich man." See Boyden Sparks, *Garbage*, POPULAR SCIENCE, Jan. 1932, at 126. Being a New York City contractor arguably placed Marrone in the same league as other New York City contractors such as the turf patrons, William Collins Whitney, August Belmont, Thomas Fortune Ryan, and Peter Widener; but, the latter individuals helped construct the subways while Marrone cleaned the streets. See *id.*

26. See *Grand Opera on the Bowery*, APPLETON'S MAG., Jan. 1907, at 28

27. See, e.g., *Ivins to Take Dodging Witness to Grand Jury*, N.Y. EVENING WORLD, Apr. 30, 1906; *This Is Awful! Marrone Won't Work for City!*, N.Y. EVENING WORLD, May 2, 1906; *Dump King' Forgets*, N.Y. TRIB., May 1, 1906; and *Ivins Couldn't Make Contractor Answer*, N.Y. TIMES, May 3, 1906.

28. See *H. S. Brown*, *supra* note 27.

## III. THE PRIOR PRECEDENTS

## A. Prior Supreme Court Precedent

Before the early twentieth century, it remained abnormal for the Supreme Court to rule on cases involving horse racing. Nevertheless the Court heard a case similar to Marrone's, just before the incident at Bennings. The Supreme Court, in *Western Turf Association v. Greenberg*, ruled in favor of an individual who was excluded from a racetrack.<sup>29</sup>

*Greenberg* involved a continual battle between an individual named Emanuel "Manny" Greenberg and the management of Tanforan Race Track.<sup>30</sup> Greenberg was a patron at Tanforan who produced a publication called the *Daily Racing Form*. Tanforan prohibited Greenberg from selling his publication at its track, because the track had an exclusive arrangement with a third party to sell only their racing guide.<sup>31</sup> Tanforan's Management feared that Greenberg's presence at the track would allow him to obtain the information necessary to produce a similar on-track racing guide and compete for sales in the open market.<sup>32</sup> Therefore, track management maintained his name in a black book, which it used to exclude undesirable individuals.<sup>33</sup> As a result, when Greenberg entered Tanforan, management would order him off the track.<sup>34</sup>

Greenberg brought suit against Tanforan claiming damages of \$10,000.<sup>35</sup> As the suit progressed, Tanforan claimed that it had the established precedent to dismiss anyone it desired from the grounds of the racetrack.<sup>36</sup> Tanforan argued that its rights "were as sacred as those of the citizen at his fireside."<sup>37</sup> Moreover, Tanforan's counsel argued that:

Greenberg had no more right to enter the track and carry away information to use for his own benefit than had the newspaper reporter to force his way into a private reception and against the wish of the host and hostess carry

29. See generally 204 U.S. 359 (1907).

30. See *id.* Tanforan was a racetrack in San Bruno, California which was utilized at various times as a racing facility from 1899 to 1964. See generally Darold Fredricks, *Tanforan's Race Track History*, DAILY J., July 6, 2009 (describing history and noting current shopping mall at location).

31. See *Corrigan Has a Blacklist for Enemies*, S.F. CALL, Mar. 21, 1900.

32. See *id.*

33. See *id.*

34. See *id.*

35. See *id.*

36. See *id.*

37. See *id.*

away the names of the guests and other matters for publication.<sup>38</sup>

Alternatively Greenberg's claims were largely based on a statute passed by the California legislature in 1893. That statute provided:

[T]hat it shall be unlawful to refuse admission to "any opera-house, theater, melodeon, museum, circus, caravan, race-course, fair, or other place of public amusement or entertainment, to any person over the age of twenty-one years who presents a ticket of admission acquired by purchase, and who demands admission to such place; provided, that any person under the influence of liquor, or who is guilty of boisterous conduct, or any person of lewd or immoral character, may be excluded from any such place of amusement."<sup>39</sup>

Because the racetrack was a place of public amusement, Greenberg's argument was that he could only be excluded if he was under the influence of liquor, boisterous, or a person of lewd or immoral character. At the time he was dismissed he fit none of these categories and therefore he argued that Tanforan could not legitimately exclude him.

Tanforan countered that the 1893 statute did not apply to its property. If it did apply, then Greenberg's continued efforts to obtain access to the track constituted boisterous conduct.<sup>40</sup> Additionally, Tanforan argued that the 1893 statute, if applicable, deprived the racetrack of its property rights under the Fourteenth Amendment and under the California Constitution.<sup>41</sup>

After laying out these arguments in the initial trial, the jury ruled for Greenberg and awarded \$3,000 in damages.<sup>42</sup> Subsequently, Tanforan appealed the judgment to the California Supreme Court.<sup>43</sup> The Supreme Court responded by upholding the

---

38. See *Jury Rebukes Corrigan and His Methods*, S.F. CALL, Mar. 23, 1900.

39. See *Greenberg v. W. Turf Ass'n*, 73 P. 1050, 1050 (Cal. 1903) (citing Cal. Stat. 1893, p. 220).

40. See *Jury Rebukes Corrigan*, *supra* note 38 (noting Greenberg's continuously active efforts to obtain access to racetrack).

41. See *W. Turf Ass'n v. Greenberg*, 204 U.S. 359, 362 (1907) (arguing racetrack's rights deprived as result of statute).

42. See *Jury Rebukes Corrigan*, *supra* note 38 (describing trial history of *Greenberg*).

43. See *id.*; see also *Jury's Verdict for Greenberg*, S.F. CHRON., Mar. 23, 1900 (detailing initial appeal).

constitutionality of the 1893 statute.<sup>44</sup> The court found that the statute was a valid exercise of the State's police power because it held that:

The state has the power to speak in regulating such places of amusement, and that when it does so speak it is with absolute authority, and its express law supersedes the mere whim or pleasure of the proprietor, so that he may no longer exercise his right to revoke a personal license.<sup>45</sup>

Nevertheless, the California Supreme Court overruled the damage award against Tanforan.<sup>46</sup> The court determined that under the 1893 statute, the excluded person was entitled to one hundred dollars plus "his actual damages."<sup>47</sup> The court found that actual damages did not include damages to the plaintiff's business nor allegations of subsequent deprivations of a plaintiff's right to enter the place of public amusement.<sup>48</sup> Punitive damages, however, could be awarded to the successful plaintiff, and could be given "by way of example for the personal indignity and wrong which have been put upon him."<sup>49</sup> Additionally, the plaintiff was not foreclosed from introducing evidence of the defendant's wealth to help determine plaintiff's damages.<sup>50</sup>

The 1903 decision by the California Supreme Court did not stop Greenberg's litigation against Tanforan.<sup>51</sup> In 1905, after Greenberg won a judgment against Tanforan, the California Supreme Court was again on an appeal asked to reconsider the constitutionality of the 1893 statute and its 1903 decision.<sup>52</sup> The court reaffirmed the constitutionality of the statute, stating that the statute was supported due to the legislature's "fundamental right, when not acting in contravention to its Constitution or to the Constitu-

---

44. See *Greenberg*, 73 P. at 1050 (rejecting Tanforan's attack on constitutionality of 1893 statute which was titled "An act making it unlawful to refuse admission to places of amusement").

45. *Id.* at 1050-51 (discussing regulatory authority of state).

46. See *id.* (noting that while statute's constitutionality was upheld, California Supreme Court struck down damage award against Tanforan).

47. *Id.* at 1052 (addressing provisions of 1893 statute).

48. See *id.* at 1051 (describing type of damages not includable in plaintiff's award for violations of 1893 statute).

49. *Id.* at 1052 (explaining reason for allowing punitive damages).

50. See *id.* (discussing relevance of defendant's wealth in determining plaintiff's damages).

51. See *Greenberg v. W. Turf Ass'n*, 82 P. 684, 684 (Cal. 1905) (reconsidering 1903 decision).

52. See *id.* at 685 (reaffirming 1903 decision to uphold statute's constitutionality).

tion of the United States, to modify the common law."<sup>53</sup> The court further stated:

The state, in the exercise of its police power, has the unquestioned right to regulate these places of public amusement, and it is in the exercise of this power, and not at all as having to do with civil rights, that the act in question was upheld in 140 Cal. and 73 Pac., and its constitutionality is here again affirmed.<sup>54</sup>

Tanforan appealed this decision to the United States Supreme Court.<sup>55</sup> In a decision by Justice Harlan, a unanimous court quickly dismissed Tanforan's argument.<sup>56</sup> Using language similar to that of the California Supreme Court, Justice Harlan wrote:

The race course in question being held out as a place of public entertainment and amusement, is, by the act of the defendant, so far affected with a public interest that the State may, in the interest of good order and fair dealing, require defendant to perform its engagement to the public, and recognize its own tickets of admission in the hands of persons entitled to claim the benefits of the statute. That such a regulation violates any right of property secured by the Constitution of the United States cannot, for a moment, be admitted.<sup>57</sup>

As a result of this ruling and the year before Joseph Marrone was excluded from Billings, the Supreme Court had ruled that a racetrack was a place of public entertainment affected by the public interest and a statute that limited racetrack exclusion was not a violation of the United State Constitution.<sup>58</sup> Nevertheless, the Court left open the question of whether this right extended to an individual in the absence of a state statute. The answer to that question in

---

53. *Id.* at 685 (limiting state's legislative authority only if unconstitutional).

54. *Id.* (asserting state's power to regulate race tracks as public place of amusement).

55. *See* *W. Turf Ass'n v. Greenberg*, 204 U.S. 359 (1907) (appealing 1905 decision to uphold statute's constitutionality).

56. *See id.* at 363-64 (describing court's decision to dismiss case based on broad regulatory authority of state).

57. *Id.* at 364 (affirming California Supreme Court's decision).

58. *See id.* (asserting Court's approval on statutes limiting racetrack exclusion).

determining the right of a racetrack to exclude individuals would be left to *Marrone*.<sup>59</sup>

## B. State Precedent

The primary state case that dealt with exclusions from race-tracks, which was decided before the *Marrone* incident, involved a notorious gambler named Riley Grannan.<sup>60</sup> Grannan was perhaps most famous for betting over \$62,000 on the horse “Duke of Navarre” against the horse “Domino” in a match race held at the Gravesend track in Brooklyn in 1894.<sup>61</sup> Grannan allegedly stood to pay out \$105,070 had Domino won the race.<sup>62</sup> “It was the largest bet that Grannan or any other man in America ever made over a single race.”<sup>63</sup>

Later, in 1895, Riley Grannan offered two jockeys gifts of \$500 each.<sup>64</sup> Grannan claimed that these payments were not bribes, but

---

59. See 227 U.S. 633, 636 (1913) (reanalyzing constitutionality of statutes which limited racetrack exclusions).

60. See L.B. YATES, *THE AUTOBIOGRAPHY OF A RACE HORSE* 138 (1919) (discussing case involving exclusion of Riley Grannan from racetrack); see also JOHN DIZIKES, *YANKEE DOODLE DANDY: THE LIFE AND TIMES OF TOD SLOAN* 53 (2000) (addressing Riley Grannan’s exclusion from racetrack).

61. EDO McCULLOGH, *GOOD OLD CONEY ISLAND*, 137-38; Fordham U. Press (2000) (noting race finished in dead heat); *Heavy Bets at the Races*, N.Y. TIMES, Sept. 14, 1895. (discussing Grannan’s large bet in 1894 on “Duke of Navarre”). Grannan could not have been older than 25 at the time of this wager. See *id.* (“He looks like a boy, but is one of the shrewdest men on the turf.”); see also *Luck of a Player*, S.F. CHRON., Sept. 26, 1894 (describing gamblers, such as Grannan, winning big bets at racetracks).

62. See *Dead Heat, Said the Judges, No Result in the Domino-Henry of Navarre Match*, N.Y. TIMES, Sept. 16, 1894, available at <http://query.nytimes.com/gst/abstract.html?res=9507E5DC1131E033A25755C1A96F9C94659ED7CF> (asserting Grannan “backed Henry of Navarre with a volcanic frenzy of eagerness which was amazing”); *Domino’s Dead Heat*, N.Y. DAILY TRIB., Sept. 16, 1894 (marveling about Grannan’s large bet on Domino); *That Was One of the Most Extraordinary Things Ever Known in the History of the Turf in Our Country*, N.Y. DAILY TRIB., Sept. 23, 1894; *Grannan’s History is an Interesting One, and He is Probably Better Known the World Over as a Heavy Plunger on Turf Events Than Any Man Ever Before the Public*, N.Y. TIMES, Dec. 26, 1898 (asserting that his wager on Henry of Navarre was said to have reached \$150,000); *A Word in Eulogium of Riley Grannan*, BOURBON NEWS, Apr. 17, 1908 (detailing Grannan’s bets at racetrack).

63. *Dead Heat*, *supra* note 62. In terms of the Consumer Price Index, a bet of \$60,000 in 1894 would have been the equivalent of a bet of \$1.62 million in 2008. See M2 Money Supply and Consumer Price Index: 1867-2008, U.S. BUDGET AND ECON. DATA [http://home.att.net/~rdavis2/cpi\\_m2.html](http://home.att.net/~rdavis2/cpi_m2.html) (last visited Feb. 11, 2010) (suggesting that given wagering rules of time, Grannan actually made about \$10,000 on his wagers in match race).

64. See *Grannan v. Westchester Racing Ass’n*, 153 N.Y. 449, 464 (N.Y. 1897) (stating that plaintiff gave as present five hundred dollars to licensed jockeys).

were mere rewards, or tips, for their riding.<sup>65</sup> One jockey, Henry Griffin, refused the gift, while Fred Taral, the other jockey, accepted the \$500 gift.<sup>66</sup> In 1896, after learning about the gift to Taral, the stewards of the Westchester Racing Association, which conducted thoroughbred racing at Morris Park in the Bronx, reprimanded Taral and made him return the gift.<sup>67</sup> At the same time, the stewards refused to admit Grannan into Morris Park.<sup>68</sup> The formal reason for refusing to admit Grannan was that his gift to Taral was in violation of the rules of the New York Jockey Club, forbidding anyone other than the owners of the horses from giving jockeys money and ruling off anyone who did so.<sup>69</sup> Since New York law required a licensed racecourse to operate under the rules of the Jockey Club, Grannan was in violation of these rules.<sup>70</sup>

As a result, even though Grannan had bought a ticket to enter Morris Park he was prevented from entering.<sup>71</sup> Subsequently, he sued the track and obtained a temporary injunction allowing him

65. *See id.* (declaring it reasonable for stewards to conclude Grannan gave money as “indirect bribe”).

66. *See Riley Grannan Obtains a Temporary Injunction Against a Jockey Club*, N.Y. TIMES, Dec. 25, 1896, at 3, available at <http://query.nytimes.com/mem/archive-free/pdf?res=9F01EFDF113BEE33A25756C2A9649D94679ED7CF> (reporting jockey’s acceptance of gift). Taral was one of the twelve jockeys who were original members of the thoroughbred racing hall of fame. *See Sande in Hall of Fame*, N.Y. TIMES, Aug. 29, 1955, at 29 (discussing first hall of fame class); *Grannan Explains His Gift to Taral*, S.F. CHRON., Sept. 30, 1896 (declaring Grannan explained his gift as complimenting Taral “on his good work in the saddle”).

67. *See Grannan*, 153 N.Y. at 464-65 (noting Association’s disapproval of Grannan’s gift).

68. *See id.* (acknowledging Association refused to admit Grannan into race-track as result of his inappropriate gift to jockeys).

69. *See id.* at 463-64 (implying there were other reasons afoot).

Jockeys were expressly forbidden to receive presents from any person other than the owners of the horses they rode, and any person who aided or abetted in any breach of the orders of the stewards, or who gave, offered or promised, directly or indirectly, any bribe to a jockey might be ruled off.

*Id.*

70. *See* 1895 N.Y. Laws Ch. 570 §6 (outlining rules of racecourse regulations). “An act for the incorporation of associations for the improvement of the breed of horses, and to regulate the same, and to establish a State Racing Commission.” *Id.*

71. *See Grannan v. Westchester Racing Ass’n*, 44 N.Y.S. 790, 792 (App. Div. 1897) (declaring Grannan was denied entrance into racetrack); *see also Frank Clarke’s Rule Ends*, N.Y. TIMES, Oct. 18, 1896, at 7, available at <http://query.nytimes.com/mem/archive-free/pdf?res=9D03E4D9133BEE33A2575BC1A9669D94679ED7CF> (discussing gatekeepers refusing to admit Grannan to track).

to enter.<sup>72</sup> After a hearing, the trial court vacated the injunction.<sup>73</sup> Grannan then appealed to the Appellate Division, and in a lengthy decision, the unanimous court fully backed Grannan and reinstated the injunction against Morris Park.<sup>74</sup> The court found that licensed horse racing tracks in New York were clothed with a public interest “in the same category with bridge, ferry, transportation companies and others, in which the public has rights firmly secured which may not be denied either to it or to individuals composing it.”<sup>75</sup> Such businesses have no right to continue to deny admittance to individuals who no longer displayed any intention to violate the reasonable rules of the business.<sup>76</sup> Additionally, in 1895, New York State passed a civil rights statute which made it:

[T]he absolute right of any citizen who conducts himself properly, and who complies with the reasonable rules of the public corporation, to enjoy the benefits secured to him thereby. It is beyond the power of such an association to provide by any rule for the permanent exclusion of any citizen from such place or exclude him from participation in its benefits.<sup>77</sup>

---

72. See *Youngsters Run a Mile*, N.Y. TIMES, Oct. 28, 1896, at 2, available at <http://query.nytimes.com/mem/archive-free/pdf?res=980DEED7133BEE33A2575BC2A9669D94679ED7CF> (describing Grannan showing up at Morris Park track and being allowed in with injunction); *Grannan Saw the Races*, BROOK. DAILY EAGLE, Oct. 28, 1896, at 5, available at [http://eagle.brooklynpubliclibrary.org/Repository/getFiles.asp?Style=oliveXLib:LowLevelEntityToSaveGifMSIE\\_BEAGLE&Type=text/html&Locale=english-skin-custom&Path=BEG/1896/10/28&ChunkNum=1&ID=Ar00504](http://eagle.brooklynpubliclibrary.org/Repository/getFiles.asp?Style=oliveXLib:LowLevelEntityToSaveGifMSIE_BEAGLE&Type=text/html&Locale=english-skin-custom&Path=BEG/1896/10/28&ChunkNum=1&ID=Ar00504) (noting Grannan admitted to park with injunction).

73. See *Grannan*, 44 N.Y.S. at 790 (mentioning that Grannan appealed from order denying Grannan’s motion to continue an injunction).

74. See *id.* at 800 (reversing lower court and reinstating injunction). There had been a previous decision by a lower court in New York allowing a racing association not to take entries from an individual. See *Corrigan v. Coney Island Jockey Club*, 22 N.Y.S. 394, 397 (N.Y. Super. Ct. 1893).

It is alleged in the complaint that the defendant has granted to it by the state the right to make and register bets and sell pools on the result of its races, and it is argued that this right imposes upon the defendant the fulfillment of a public duty, and that the acceptance of an entry of a horse to a race is one of the public duties which the defendant is obliged to fulfill within reasonable limitations. There is no grant of state aid to the defendant.

*Id.*

75. *Grannan*, 44 N.Y.S. at 793-94 (comparing race tracks to common carriers).

76. See *id.* at 796 (“[Plaintiff] has the legal right to demand that the condition of his entrance be determined by [his willingness to now comply with the rules] and not upon an offense committed prior thereto except as the latter may fairly be considered as bearing upon his present attitude.”).

77. 1895 N.Y. Laws 1042 (entitling all persons within jurisdiction of New York State to full and equal privileges in places of public amusement). See *Editorial Article 1*, N.Y. TIMES, June 19, 1895, at 4, available at <http://query.nytimes.com/gst/>

Furthermore, the court also took a dim view of the reasonableness of Rule 150.<sup>78</sup> Because gambling was illegal under the law, how could a rule purport to regulate a practice that was against the law.<sup>79</sup> Therefore, the Jockey Club rule was “without force and . . . utterly void in this respect.”<sup>80</sup>

The Morris Park officials appealed the adverse decision to the New York Court of Appeals.<sup>81</sup> In a unanimous decision, the Court of Appeals reversed the Appellate Division and allowed the race-track to continue to exclude Grannan.<sup>82</sup> Because the questions as to whether Grannan had proper notice of the hearing before the Jockey Club or whether Grannan’s violation of the Jockey Club’s rules had been established by sufficient evidence, were not certified for review by the Appellate Division, the court first noted that it would not decide either issue.<sup>83</sup> Likewise, the court declined to rule on the legality of a racing association, such as Morris Park, arbi-

---

abstract.html?res=9F0DE3DD103DE433A2575AC1A9609C94649ED7CF&scp=1&sq=Mr.+Malby%92s+new+civil+rights+bill+should+have+been+entitled+&st=P (referring to law as Malby Law after George Malby, speaker of New York State Assembly who helped secure its passage). Its essence is now contained in §40 of the Civil Rights Law in New York. Equal Rights in Places of Public Accommodation, Resort or Amusement, N.Y. Civ. Rights Law §40 (McKinney 1945). *See id.* (declaring that upon law’s passage New York Times editorialized that “Mr. Malby’s new civil rights bill should have been entitled ‘An act to enable negroes to blackmail the keepers of restaurants and hotels.’”); *see also Negroes and the New Civil Rights Law*, BROOK. DAILY EAGLE, June 21, 1895, at 6, *available at* <http://eagle.brooklynpubliclibrary.org/Default/Skins/BEagle/Client.asp?Skin=BEagle> (stating penalty section of law opens wide door for blackmail).

78. *See Grannan*, 44 N.Y.S. at 799 (voiding rule because it regulates illegal offense).

79. *See id.* (“Its purpose is plain. It was intended to and had the effect of regulating an offense against the law, and if the means were provided, or were knowingly permitted by the association for such purpose, its officers would offend against the Penal Code.”).

80. *Id.*

81. *See Grannan*, 47 N.E. at 898 (appealing Court of Appeals decisions and requesting reversal of their decision).

82. *See id.* at 901 (reversing appellate division); *see also Riley Grannan Defeated*, N.Y. TIMES, Oct. 6, 1897, at 4, *available at* <http://query.nytimes.com/gst/abstract.html?res=9906E1DB1330E333A25755C0A9669D94669ED7CF> (detailing events leading to Court’s decision); *Riley Grannan Defeated*, BROOK. DAILY EAGLE, Oct. 6, 1897, at 6, *available at* <http://eagle.brooklynpubliclibrary.org/Default/Skins/BEagle/Client.asp?Skin=BEagle&AW=1266787485093&AppName=2&GZ=T> (noting Court reinstated injunction against Grannan).

83. *See Grannan*, 47 N.E. at 898 (“Whether the plaintiff had proper notice of the hearing before the jockey club, or whether his violation of its rules was established by sufficient or competent evidence, are not before this court, as neither of those questions was certified for its determination.”).

trarily and without reason excluding an individual from its grounds.<sup>84</sup>

This left the court with one question to consider: Could Morris Park exclude an individual who violated the rules of the Jockey Club even when such individual had noted his willingness to comply with such rules in the future?<sup>85</sup> The court found that Morris Park did have this power.<sup>86</sup> The law licensing racecourses required that it operate under the rules of the Jockey Club.<sup>87</sup> This gave the rules of the Jockey Club the effect of law, as well as distinguishing racecourses from institutions that were organized for a public purpose.<sup>88</sup> The rules of the Jockey Club were reasonable, and the fact that Grannan indicated that he would comply with the rules in the future was not a sufficient reason for voiding a permanent exclusion.<sup>89</sup> Finally, the court interpreted the 1895 civil rights law as not being comparable to an open access to public accommodations law, but as a law barring discrimination based on race, creed, or color.<sup>90</sup> Because Grannan's exclusion had nothing to do with race or creed,

84. *See id.* at 899 (reasoning that issue was vague and appellate decision had been decided on other grounds).

85. *See id.* at 899.

If correctly understood, its fair purport is whether, under the law, the decision of the jockey club ruling the plaintiff off the turf for his disobedience of its reasonable rules and regulations, justified the Westchester Racing Association in excluding him from its grounds when races open to the public generally were being held, although he at the time tendered compliance with, and expressed a willingness in the future to conform to, the rules and regulations of the association, including those of the jockey club.

*Id.*

86. *See id.* at 901 (holding that "the stewards of the club had authority to rule the plaintiff off the turf").

87. *See id.* at 899 ("As that statute expressly required every such license to contain a condition that all running races or running race meetings conducted thereunder should be subject to the reasonable rules and regulations of the jockey club. . . .").

88. *See id.* (noting that Jockey Club's rules drew their authority from civil rights law of 1895). "Manifestly, under the statute, the Westchester Racing Association and its patrons were as much subject to those rules as they would have been if incorporated into and actually made a part of the act." *Id.*

89. *See id.* at 900 (indicating that Grannan's prior knowledge of rules meant he should have been aware of possibility of being excluded from club).

90. *See id.* at 901 (comparing protections of 1895 civil rights law to those of American Civil Rights Act).

We think the purpose of the statute now under consideration was to declare that no person should be deprived of any of the advantages enumerated, upon the ground of race, creed or color, and that its prohibition was intended to apply to cases of that character, and to none other.

*Id.* It should be noted that the New York Court of Appeals gave L. 1895, Ch. 1042 a very narrow construction. The first section of the statute arguably reads broadly to state categorically that:

the civil rights statute gave him no additional rights, and therefore, Morris Park acted properly in excluding him.<sup>91</sup>

### C. The English Precedents

Nearly on point with the legal issues involved in *Marrone* was the case decided in England by the Court of Exchequer, *Wood v. Leadbitter*.<sup>92</sup> Like the facts in *Marrone*, *Wood* involved an individual who was refused admittance to a horse racing track after purchasing a valid ticket to the event.<sup>93</sup> The *Wood* court after hearing all the arguments essentially determined that a ticket to an amusement event gave the purchaser only a revocable license.<sup>94</sup>

The facts of the case presented James Wood as an early 19th century bookmaker. Wood paid one guinea for his admission to the track and his admission ticket was neither signed nor sealed.<sup>95</sup> The ticket enabled him to watch the races from the grandstand or the enclosure.<sup>96</sup> Previously the English Jockey Club had removed Wood from horse racing tracks, for poor behavior.<sup>97</sup> However, The

---

[A]ll persons within the jurisdiction of this State shall be entitled to the full and equal accommodations, advantages, facilities and privileges of inns, restaurants, hotels, eating-houses, . . . and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens.

1895 N.Y. Laws Ch. 1042 § 1. The second section then applied this provision specifically to race, creed and color. *See id.* at § 2. The Court of Appeals reading contrasts significantly with the much broader reading that the California Supreme Court gave the California civil right act in *Greenberg v. Western Turf Ass'n.*, 73 P. 1050, 1052 (Cal. 1903) (allowing plaintiff to recover damages for personal indignities). The New York Court of Appeals would continue to give civil rights laws narrow readings. *See, e.g.*, *People ex rel. Cisco v. Sch. Bd. of Queens*, 56 N.E. 81 (N.Y. 1900) (holding separate but equal schools to be constitutional); *Burks v. Bosso*, 73 N.E. 58 (N.Y. 1905) (holding bootblacking business was not to be interpreted as place of public accommodation); *Woollcott v. Shubert*, 111 N.E. 829 (N.Y. 1916) (allowing theatre owner to permanently ban theatre critic because ban was not based on race); *Gibbs v. Arras Bros., Inc.*, 118 N.E. 857 (N.Y. 1918) (holding saloon was not place of public accommodation).

91. *See Grannan*, 47 N.E. at 901 (holding that excluding Grannan was consistent with statute).

92. (1845) 153 Eng. Rep. 351 (Exch.).

93. *See id.* at 352-53 (discussing case background and indicating that Wood's ticket was for entry to horse racing track).

94. *See id.* at 353, 360 (upholding trial court decision that ticket was revocable license allowing defendant to come to track only for certain amount of time).

95. *See id.* 352-54 (indicating that Wood paid one guinea for his ticket which allowed him to enter track for specific amount of time).

96. *See id.* at 353 ("[I]t was understood that [the tickets] entitled the holders to come into the stand, and the inclosure surrounding it, during every day of the races, which lasted four days.").

97. *See id.* at 354 (mentioning 1843 removal of Wood when he was also not misbehaving).

English Jockey Club only controlled one track, Newmarket, and did not control Doncaster.<sup>98</sup> Lord Eglintoun, the steward at Doncaster, was determined to remove Wood, and had an employee, Leadbitter, an ex-policeman, try to remove Wood from the premises.<sup>99</sup> Wood initially refused to leave, so Leadbitter was forced to remove him.<sup>100</sup> Wood then sued Leadbitter for unlawful imprisonment and assault.<sup>101</sup>

At the trial, the judge instructed the jury that the admission ticket was a license that did not convey any in rem rights to Wood, and subsequently, the jury ruled for Leadbitter.<sup>102</sup> Wood appealed on the grounds that the judge's instructions were improper.<sup>103</sup> In an opinion by Baron Alderson, the Court of Exchequer affirmed the trial court's ruling by agreeing that an admission ticket to the racetrack was a mere license uncoupled with any other rights to the property.<sup>104</sup> The admission ticket was not sealed or signed, and as such, Wood's only right was to sue the racecourse for a breach of contract.<sup>105</sup>

The *Wood* holding experienced a somewhat checkered history in England. Judges over a period of many years tended to question it and to distinguish its holding.<sup>106</sup> By 1898, it could be said that:

---

98. A fascinating history of *Wood v. Leadbitter* can be found at Patrick Polden, *A Day at the Races: Wood v. Leadbitter in Context*, 14 J. LEGAL HIST. 28 (1993). The author notes that the Jockey Club could not itself enforce Wood's banishment from the race track in question, but instead would have to rely on the actual owners of the track to uphold the ban. *See id.* at 31.

99. *See Wood*, 153 Eng. Rep. at 354 (indicating that Lord Eglintoun had Leadbitter forcibly remove Wood from track after Wood refused to leave). Rule 10.9

100. *See id.* (noting that plaintiff Wood's recalcitrance to leave caused defendant Leadbitter to use force to remove Wood from racecourse).

101. *See id.* (stating that action was for false imprisonment and assault).

102. *See id.* (“[A]ssuming the ticket to have been sold to the plaintiff under the sanction of Lord Eglintoun, still it was lawful for Lord Eglintoun, without returning the guinea, and without assigning any reason for what he did, to order the plaintiff to quit the inclosure.”).

103. *See id.* (indicating that new trial was requested due to misdirection of jury).

104. *See id.* at 360 (holding according to precedent that ticket was merely license).

105. *See id.* (stating that any potential action would be based on breach of contract). Presumably, that would have entitled Wood to a return of his money because of the consideration given by him for his admission to the racetrack. *See id.*

106. *See, e.g.,* *Lowe v. Adams*, [1901] 2 Ch. 598, 600 (distinguishing *Wood* and stating that it was no longer applicable); *see also* SIR JOHN WILLIAM SALMOND, *THE LAW OF TORTS: A TREATISE ON THE ENGLISH LAW OF LIABILITY FOR CIVIL INJURIES* 234 (1907), available at [http://books.google.com/books?id=5AA0AAAAIAAJ&pg=PP7&dq=%22since+the+fusion+of+law+and+equity+it+may+be+assumed&source=gbs\\_selected\\_pages&cad=4#v=onepage&q=%22since%20the%20fusion%20of%20law](http://books.google.com/books?id=5AA0AAAAIAAJ&pg=PP7&dq=%22since+the+fusion+of+law+and+equity+it+may+be+assumed&source=gbs_selected_pages&cad=4#v=onepage&q=%22since%20the%20fusion%20of%20law)

The general tenor of remarks made on *Wood v. Leadbitter* in subsequent judgments is that the decision is not to be extended; and that the principle established by the case is to be so interpreted as to do justice where the person having a license has a substantial interest in property of his own to be preserved, or where there is something to be done by the other party for consideration received.<sup>107</sup>

Finally, in 1915, just two years after the Supreme Court decided *Marrone*, the holding in *Wood* was effectively discarded in *Hurst v. Picture Theatres*.<sup>108</sup> Hurst bought a ticket to see a movie, but the theatre's management forcibly removed him because they alleged that he had not paid.<sup>109</sup> The theater argued that, under *Wood*, it had the right to remove Hurst, who simply had a revocable license.<sup>110</sup> The trial court judge opined that *Wood* was no longer good law because "a visitor to a theatre who had paid for his seat had a right to retain his seat so long as the performance lasted, provided he [abided by management's rules]."<sup>111</sup> After the judge instructed the jury accordingly, Hurst recovered £150 in damages.<sup>112</sup> The Court of Appeal upheld the verdict, finding that a contrary conclusion would be "not only contrary to good sense, but contrary also to good law" and would "involve[ ] startling results."<sup>113</sup> The court stated that "[i]t is no longer good law to do such an act as the defendants have done here."<sup>114</sup> The court suggested that with the merger of law and equity under the Judicature Act of 1873, *Wood* had to give way to the equitable considerations in

---

%20and%20equity%20it%20may%20be%20assumed&f=false ("Since the fusion of law and equity it may be assumed that the rule in *Wood v. Leadbitter* no longer applies to licenses which are of such a nature that they are specifically enforceable and therefore constitute equitable servitudes over the servient land.").

107. ROBERT CAMPBELL, RULING CASES 76 (The University Press 1898), available at [http://books.google.com/books?id=omcyAAAIAAJ&printsec=frontcover&source=gbs\\_navlinks\\_s#v=onepage&q=&f=false](http://books.google.com/books?id=omcyAAAIAAJ&printsec=frontcover&source=gbs_navlinks_s#v=onepage&q=&f=false).

108. [1915] 1 K.B. 1 (A.C.).

109. See *id.* at 2 (explaining reason for removal of Hurst from theatre).

110. See *id.* at 2-3 (stating defendant theatre's reliance on *Wood* in treating ticket as revocable license).

111. *Id.* at 3.

112. See *id.* (indicating amount of Hurst's damages awarded by jury).

113. *Id.* at 4-5 (Buckley, L.J.).

114. *Id.* at 15 (Kennedy, L.J.).

the current case.<sup>115</sup> Thus, while *Wood* was not technically overruled, its holding had become an anachronism.<sup>116</sup>

Eventually, whatever remained of *Wood* would be formally terminated in 1948 by *Winter Garden Theatre (London) Ltd. v. Millennium Productions Ltd*<sup>117</sup> and in 1952 by *Errington v. Errington & Woods*.<sup>118</sup> Nevertheless, while *Wood* tended to be given a narrow construction in England, courts throughout America gave extraordinary deference to the case.<sup>119</sup>

#### IV. THE MARRONE DECISION

##### A. The Lower Courts in *Marrone*

The *Marrone* court, confronted the question left open by the New York Court of Appeals in *Grannan*, as no state statute conferred a right of access.<sup>120</sup> In looking for precedent *Wood*, appeared to involve a similar dispute, but *Wood* at the time was hardly viewed as a robust decision in its home country.<sup>121</sup> It could be argued that following the reasoning in *Wood* a racetrack could only deny admission to individuals who had violated its rules.<sup>122</sup> A court

---

115. *See id.* at 9 (Buckley, L.J.) (“The position of matters now is that the Court is bound under the Judicature Act to give effect to equitable doctrines.”).

116. *See id.* (Buckley, L.J.) (finding that *Wood* rule does not apply when court must “give effect to equitable considerations”).

117. [1948] A.C. 173 (H.L.). “[S]ince the fusion of law and equity, . . . [*Wood*] . . . should no longer be regarded as an authority.” *Id.* at 191.

118. [1952] 1 K.B. 290 (Denning, L.J.) (C.A.). “Law and equity have been fused for nearly 80 years, and since 1948 it has been clear that, as a result of the fusion, a licensor will not be permitted to eject a licensee in breach of a contract to allow him to remain . . . nor in breach of a promise on which the licensee has acted, even though he gave no value for it.” *Id.* at 298-99.

119. *See* Gregory S. Alexander, *Reply: The Complex Core of Property*, 94 CORNELL L. REV. 1063, n.18 (2009) (“The common law rule permitting proprietors of businesses open to the public a broad right to exclude developed only later, when American courts began to adopt the English rule announced in *Wood v. Leadbitter*.”); *see also* *Shubert v. Nixon Amusement Co.*, 83 A. 369, 369 (N.J. 1912) (citing *Wood* as “[t]he leading case on [the] subject” of ticket license disputes involving ejection of ticket holder); *Revocability of Licenses—The Rule of Wood v. Leadbitter*, 13 MICH. L. REV. 401, 401 (1915) (“The rule of *Wood v. Leadbitter* has been almost uniformly followed by the American courts.”).

120. *See Grannan v. Westchester Racing Ass’n*, 153 N.Y. 449, 459 (N.Y. 1897) (declining to address “whether a racing association, organized under the law of 1895, can arbitrarily and capriciously, without reason or sufficient excuse, exclude a person from attending its races who offers to comply with the reasonable rules of the association”).

121. For a further discussion of the subsequent holdings that discounted *Wood*, *see supra* notes 106-119 and accompanying text.

122. *See Wood*, 153 Eng. Rep. at 360 (citing to instance of denial of admittance within racetrack); *see also Grannan*, 153 N.Y. at 463 (citing to second instance of denial of admittance).

might also reason that a racetrack like Bennings, which was given certain public duties and a near monopoly on racing in its area, might be required to be open to all individuals who were not disturbing the peace or did not pose a security threat.<sup>123</sup> In short, given the public regulation of horse racing, racetracks might be regarded as similar to inns and public carriers, which were required to admit the general public.<sup>124</sup> Perhaps a racetrack could be found to require a legitimate business reason to exclude a patron or someone who conducted business at the racetrack. Lingering was the question of whether a court would determine that a racetrack could exclude any individual for any reason, or for no reason at all.

When Marrone sued the Washington Jockey Club, the proprietor of Bennings racetrack, and the stewards at the racetrack for damages of \$50,000, he opened this question before the court.<sup>125</sup> He argued that the Jockey Club stewards had conspired to ruin his reputation, but failed to find favor with the trial court.<sup>126</sup> The trial judge, finding that there had been no conspiracy to damage Marrone, ordered a directed verdict for the defendants.<sup>127</sup> Marrone appealed from the trial court decision, but fared no better in the Court of Appeals of the District of Columbia ("D.C. Circuit").<sup>128</sup> The D.C. Circuit found that Marrone lacked evidence to prove that the stewards at Bennings racetrack had engaged in a conspiracy to ruin his reputation.<sup>129</sup> The D.C. Circuit ruled that Marrone failed to offer:

evidence of declarations and acts of the defendants showing, or at least tending to show, a malicious, concerted movement on their part to have plaintiff wrongfully charged with 'doping' his horse, in order that an opportu-

---

123. Under federal law at the turn of the 20th Century, a horse racing track in the District of Columbia was to pay a license fee of five dollars per day or twenty dollars per week. *See* Act of July 1, 1902, Pub. L. No. 57-218, 32 Stat. 590 (1902) (indicating required fee for horse tracks enacted in 1902).

124. *See generally* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. REV. 1283, 1439-43 (1996) (discussing race-tracks as related to public accommodation law).

125. *See Jockey Club Is Sued*, WASH. HERALD, Nov. 28, 2007.

126. *See Marrone v. Wash. Jockey Club*, 35 App. D.C. 82, 86 (D.C. Cir. 1910) (describing Marrone's allegation of conspiracy against racetrack).

127. *See id.* at 83 (stating that lower court verdict was directed by judge for defendants); *see also Fails to Prove Conspiracy*, WASH. HERALD, Dec. 22, 1908; *No Damages for 'Dope'*, WASH. TIMES, Dec. 22, 1908.

128. *See Marrone*, 35 App. D.C. at 89 (detailing court's decision to affirm lower court); *see also Jockey Club Wins Suit*, WASH. POST, Apr. 6, 1910.

129. *See Marrone*, 35 App. D.C. at 86 (explaining plaintiff's failure to meet burden of proof to establish case).

nity might be afforded to have him ruled off the track and prevented from coming upon the grounds.<sup>130</sup>

Likewise, Marrone could not recover from his false imprisonment claim because “no more force was used at the gates in preventing the plaintiff from entering the grounds than was necessary.”<sup>131</sup> That left the single issue of whether Bennings could exclude Marrone at all. There was no exact American precedent on this issue, but the court looked to the English precedent in *Wood* for persuasive precedent.<sup>132</sup> *Wood* made this a simple decision because it held that a ticket to an entertainment event was a revocable license.<sup>133</sup> This was the rule that the court elected to follow.<sup>134</sup>

The right given by the purchase of a ticket of admission to enter such places is a mere license that may be revoked at the will of the proprietor or his agents . . . . The law imposes no duty upon the proprietor as to whom he shall give or refuse admission. It presumes that his own interest will assure proper treatment to those whom he may invite, by advertisement or otherwise, to his place of entertainment or amusement, but there is no rule for his guidance except his own judgment and sense of propriety.<sup>135</sup>

Therefore, the D.C. Circuit determined that the racetrack was not a utility created for the benefit of the public, which was obliged to serve everyone, but, rather, it was a private entity similar to that of theaters, circuses, or private parks where owners were under no restriction as to whom they chose to admit.<sup>136</sup> The court ruled that the only remedy available to Marrone was a refund equal to his price for admission to Bennings.<sup>137</sup>

---

130. *Id.*

131. *Id.* at 87.

132. *See id.* (stating *Wood* has been “generally followed” in United States).

133. *See id.* (explaining holding in *Wood* that event tickets are revocable licenses and no damages can be collected for being ejected from events).

134. *See id.* (describing court’s decision to adopt *Wood*’s rule that event tickets are revocable licenses).

135. *Id.* at 88.

136. *See id.* at 87-88 (detailing court’s conclusion that racetrack is private entity and owner has control over who to admit, unlike public establishment).

137. *See id.* at 88 (explaining issue was breach of contract, entitling plaintiff to amount paid for ticket).

### B. The Supreme Court Decision in *Marrone*

The loss at the appellate level did not deter Marrone from appealing to the Supreme Court, and nearly three years after the appellate decision, (and five and a half years after Marrone's exclusion) the Supreme Court issued its own decision.<sup>138</sup> In a two paragraph decision authored by Justice Holmes, the Supreme Court unanimously affirmed the appellate court's decision and echoed the points made by the D.C. Court of Appeals.<sup>139</sup> There was no evidence of a conspiracy against Marrone introduced and no evidence of undue force used against Marrone in expelling him from the racetrack.<sup>140</sup> On the general right of exclusion, Justice Holmes cited *Wood* and wrote, "[w]e see no reason for declining to follow the commonly accepted rule."<sup>141</sup> He also stated that Marrone's admission ticket did not create any rights in rem.<sup>142</sup> Justice Holmes, said "[t]he 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."<sup>143</sup> Marrone's only remedy was to sue for breach of contract.<sup>144</sup> In short, under Justice Holmes' view and the common law, a racetrack has an unrestricted right to determine who can be admitted to its grounds.<sup>145</sup>

---

138. *See* *Marrone v. Wash. Jockey Club*, 227 U.S. 633, 636-37 (1913) (addressing grant of petition for writ of certiorari by Supreme Court after Marrone lost in appellate court).

139. *See id.* at 636 (detailing Supreme Court's affirmation of Appellate Court's decision). For the Court, Justice Holmes opined:

But as no evidence of a conspiracy was introduced, and as no more force was used than was necessary to prevent the plaintiff from entering upon the race track, the 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. . . . His only right was to sue upon the contract for the breach.

*Id.* (citations omitted).

140. *See id.* (explaining Court's notation that there was lack of evidence presented by plaintiff to overcome burden of proving conspiracy).

141. *Id.*

142. *See id.* (detailing rights given and not to admission tickets to racetracks).

143. *Id.*

144. *See id.* (describing decision of Supreme Court that only breach of contract claim could stand).

145. *See id.* (expressing Court's determination that "such tickets" do not create right in rem).

V. THE EFFECT OF *MARRONE*

By the time of the Supreme Court decision in *Marrone*, very few states had legal horse racing operations. As a result of legislation passed during the Progressive Era, horse racing had gone from one of the principal sporting events in the country to a fringe sport conducted basically in Kentucky and Maryland.<sup>146</sup> In 1913, one might have reasonably anticipated that the *Marrone* case would have had a modest impact on what little remained of the sport of horse racing and the authority of the case weakened by England's quick reversal of *Wood v. Leadbitter*.<sup>147</sup> Nevertheless, that was not the case. The Progressive Era waned and racing prospered as state governments adopted pari-mutuel racing as a revenue raising measure, allowing *Marrone* to become the basic law for one of the country's most prosperous sports.<sup>148</sup>

VI. THE FEDERAL COURTS AND *MARRONE*

## A. The First Fifty Years

One effect of the *Marrone* decision was that there was seemingly no ability for a party excluded from a racetrack to seek relief in the federal courts. With no horse racing in the District of Columbia since the closing of Bennings in 1908, no horse racing cases could emerge from a federal enclave, and further, the precedent in *Marrone* hardly made the federal courts an inviting setting. Before the 1970s, there were almost no occasions when a person who was excluded from a racetrack brought suit in federal court. Prior to 1970, there were only two decided cases (apart from *Marrone*) involving exclusions that originated in the federal court system. Thus, it is no great surprise that these three cases did not fare well for the plaintiffs who were seeking admission to the racetrack or seeking damages for being denied the ability to enter the racetrack.

---

146. See MCGRAW, T.K., HISTORICAL DICTIONARY OF THE PROGRESSIVE ERA, 1890-1920 382 (John D. Buenker & Edward D. Kantowicz eds., Greenwood Press 1988) (illustrating decline of horseracing as sport). In 1897, there were 314 racetracks in the United States; by 1908, that number had dropped to 25. See *id.* (describing racetracks in U.S. in 1897); see also WILLIAM H. P. ROBERTSON, THE HISTORY OF THOROUGHBRED RACING IN AMERICA 196 (Bonanza Books 1964) (outlining history of horseracing in America).

147. See *Hurst v. Picture Theatres Ltd.*, [1915] 1 K.B. 1 (1914) (overturning *Wood v. Leadbitter* in England).

148. See Stanley Levey, *Racing Now Virtual King of Sports, Topping Baseball in Gate Appeal*; HORSE RACING TOPS BASEBALL AT GATE, N.Y. TIMES, Apr. 30, 1953 (highlighting that case in which *Marrone* was premised on has been overruled).

The first of these cases was *Watkins v. Oaklawn Jockey Club*.<sup>149</sup> Watkins was a patron at Oaklawn Park, as well as the Captain of Detectives of the Hot Springs, Arkansas Police Department.<sup>150</sup> Based on his ejection from the racetrack, Mr. Watkins – in a manner similar to that of Anthony Marrone – argue that the “conduct of the defendants constituted a malicious and false arrest of the plaintiff, false and unlawful imprisonment of him and an unlawful deprivation of his liberty; that the said unlawful and tortuous conduct of the defendant has caused the plaintiff great embarrassment and mental anguish.”<sup>151</sup>

What made Mr. Watkins’s case somewhat different from the typical exclusion/ejection cases is that the actual ejection was made by the local county sheriff and the local county deputy sheriff who were working for and being paid by Oaklawn Park management.<sup>152</sup> While previous plaintiffs had argued the applicability of state civil right acts, Watkins was the first to argue that because the sheriffs’ officers had performed the ejection, he had been deprived of his due process rights under the Fourteenth Amendment.<sup>153</sup> As such, Mr. Watkins became an early advocate of applying the federal civil rights laws against the racetrack and its agents. The officers through their false imprisonment had violated his rights.

The trial court disagreed with Watkins arguments and directed a verdict for the defendants.<sup>154</sup> First, citing *Marrone*, it found that Oaklawn Park could “exclude from its premises any person with or without cause.”<sup>155</sup> The fact that Oaklawn held a license from the

149. See *Watkins v. Oaklawn Jockey Club*, 86 F. Supp. 1006 (W.D. Ark. 1949), *aff’d*, 183 F.2d 440 (8th Cir. 1950).

150. See *id.* at 1011 (describing Watkins’ position as Captain of Detectives and patron).

151. *Id.* at 1009 (listing allegations made by Watkins against Oaklawn, which were similar to *Marrone*).

152. See *id.* at 1008-09 (explaining Watkins was ejected by local law enforcement, which differentiates it from past cases).

153. See *Greenberg v. W. Turf Ass’n*, 73 P. 1050, 1050 (Cal. 1903) (arguing based on California Statute). In *Suttles v. Hollywood Turf Club*, black plaintiffs successfully sued for the right under the California Civil Rights Act to be admitted to the Hollywood Park clubhouse. *Suttles v. Hollywood Turf Club*, 45 Cal. App. 2d 283, 287 (Cal. App. 1941) (describing holding of case that plaintiffs were successful under California Civil Rights Act). Hollywood Park had argued that it could limit blacks to the grandstand or the general admission section of the racetrack. See *id.* at 284 (explaining central argument of defendant’s case).

154. See *Watkins*, 86 F. Supp. at 1009 (citing court’s decision to grant directed verdict for defendants).

155. *Id.* at 1016 (adopting reasoning from *Marrone* to determine outcome of case).

state of Arkansas did not make Arkansas a state actor.<sup>156</sup> Second, it determined that the officers, rather than working for the county, were simply agents for Oaklawn Park.<sup>157</sup> They were not operating under color of law, and accordingly, Watkins' constitutional rights had not been violated.<sup>158</sup> On appeal, the Eighth Circuit affirmed the decision of the district court, stating that the two officers from the sheriff's department "were paid for their services by the Jockey Club and not by the state. They were acting, therefore, only 'in the ambit of their personal pursuits.'"<sup>159</sup>

An excluded plaintiff was similarly unsuccessful in federal court in the case of *Martin v. Monmouth Park Jockey Club*.<sup>160</sup> Robert Martin was a jockey who resided outside the state of New Jersey where Monmouth Park was located.<sup>161</sup> While his license had been suspended by the State of Maryland for improprieties, his license had been reinstated in both Maryland and New Jersey.<sup>162</sup> He argued that under New Jersey law, Monmouth Park, as a quasi-public entity, could not arbitrarily exclude him and that as state licensee, he was entitled to use his license at Monmouth Park.<sup>163</sup> The district court made short shrift of these arguments, concluding that Monmouth Park was not a public corporation, and nothing in the rules and statutes of New Jersey contained an inkling of evidence that a licensee had a right to use that license at a specific track.<sup>164</sup> The court analogized jockey Martin's situation to that of a licensed physician in New Jersey who wished to practice at a particular hospital.<sup>165</sup> Thus, the applicable New Jersey case law did not support the broad claim of rights for which Martin had advocated, and the deci-

---

156. *See id.* (describing court's decision that license did not equate to state operation).

157. *See id.* at 1018 (expressing court's decision that defendants were not acting under color of law).

158. *See id.* at 1018 (holding no violation of Watkins' constitutional rights).

159. *Watkins v. Oaklawn Jockey Club*, 183 F.2d 440, 443 (8th Cir. 1950) (explaining what is needed to be found in order to determine individuals as state actors).

160. *Martin v. Monmouth Park Jockey Club*, 145 F. Supp. 439 (D.N.J. 1956), *aff'd*, 242 F.2d 344 (3d Cir. 1957).

161. *See id.* at 440 (describing plaintiff's occupation as jockey and residency outside of New Jersey).

162. *See id.* at 139 (detailing plaintiff's suspension of license to be jockey and later reinstatement).

163. *See id.* at 440 (explaining Martin's argument that he was entitled to exercise his license at Monmouth Park).

164. *See id.* at 441 (contending that nothing in statutes of New Jersey explicitly gave licensee right to use license at Monmouth Park).

165. *See id.* (explaining court's analogy to physician's license to practice).

sion was unanimously affirmed by the Circuit Court.<sup>166</sup> As a result, for the first fifty years after *Marrone*, no federal case had permitted a person, who was excluded from a racetrack, to regain admission to that racetrack.<sup>167</sup>

### B. The Warren Court, the Civil Rights Revolution, and Racing Licensees

The lack of success in bringing federal cases by plaintiffs excluded from racetracks might have continued for an even longer period of time, were it not for the confluence of a series of Supreme Court decisions expanding individual rights. These major decisions included *Monroe v. Pape*, which revitalized the Civil Rights Act of 1871 as a vehicle for individuals to vindicate Constitutional claims against State and local governments.<sup>168</sup> For horse racing, a crucial decision was *Barry v. Barchi*, finding that Barchi, a licensed horse trainer, had a protectable interest under the due process clause.<sup>169</sup> As Justice White made clear in his majority decision, “[a]s a threshold matter, therefore, it is clear that Barchi had a property interest in his license sufficient to invoke the protection of the Due Process Clause.”<sup>170</sup>

Finally, the Supreme Court, in a series of cases, expanded upon the notion of what actions by private entities would be treated as State actions. In *Burton v. Wilmington Parking Authority*, a private restaurant, which leased space in a government owned parking facility, refused to serve blacks.<sup>171</sup> The Warren Court found this to be state action under a symbiotic relationship test.<sup>172</sup> The state had “insinuated itself into a position of interdependence with Eagle [the restaurant] that it must be recognized as a joint participant in

---

166. *See id.* (describing court’s holding that there was no previous case law supporting plaintiff’s claim and unanimous decision by court).

167. *See id.* (permitting re-admittance to racetrack after exclusion for first time in fifty years).

168. *See Monroe v. Pape*, 365 U.S. 167 (1961) (describing role of Civil Rights Act as way to bring constitutional claims).

169. *See Barry v. Barchi*, 443 U.S. 55 (1979) (explaining court’s holding that plaintiff had constitutional claim).

170. *Id.* at 64. Justice Brennan’s concurring opinion similarly stated, “I agree that appellee’s trainer’s license clothes him with a constitutionally protected interest of which he cannot be deprived without procedural due process.” *Id.* at 69 (Brennan, J., concurring).

171. *See Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (adding that restaurant agreed with Delaware to follow any federal, state, and municipal laws, statutes, and ordinances).

172. *See id.* at 725-26 (determining outcome based off of particular facts and circumstances).

the challenged activity . . . .”<sup>173</sup> Additionally, in *Jackson v. Metropolitan Edison Co.*, where the court rejected the notion that actions by a regulated utility company constituted State action, the court formulated a “close nexus” test so that “the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself.”<sup>174</sup>

The outcome of these cases was that: (a) an individual licensed by a State to participate in horse racing now had a protectable interest under the due process clause; (b) these protectable interests gave a remedy, under 42 U.S.C. § 1983 against State action which infringed these rights; and (c) an argument could now be made that actions by licensed racetracks could now be considered State action. Thus, if a racetrack is a state actor, it would be depriving licensees of due process if they were excluded from the racetrack without sufficient procedural due process rights, such as notice and a hearing. These cases, however, did not afford any measure of protection to mere patrons of a racetrack. Patrons do not have state licenses and therefore do not have due process interests. But for horse racing licensees, who had been excluded by racetracks, the promise of possible relief under 42 U.S. §1983 has brought about numerous law suits, starting in the 1970’s.

Initially, a number of cases found that racetracks were state actors. Outcomes that racetracks that had summarily excluded licensees had also violated the civil rights of these licensees were a result of state licenses, regulations by States of racetracks, the presence of stewards who judged races based on their powers granted by the State, and the fact that many racetracks enjoyed near monopoly status in their areas.<sup>175</sup> These were the first federal cases to ever rule

---

173. *Id.* at 725.

174. *See* *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (applying test through detailed inquiry because State’s involvement may not be obvious).

175. *See* *Puntollillo v. N.H. Racing Comm’n*, 390 F. Supp. 231 (D.N.H. 1975) (claiming that state racing commission interfered with his employment opportunities by discriminating against him because of his national origin); *see also* *Catrone v. Mass. Racing Comm’n*, 404 F. Supp. 765 (D. Mass 1975) *vacated on other grounds*, 535 F.2d 669 (1st Cir. 1975) (instituting action for alleged violation of civil rights); *Fitzgerald v. Mountain Laurel Racing, Inc.*, 607 F.2d 589 (3d Cir. 1979) (holding that cancelling of stall privileges without hearing deprived plaintiff of due process); *Sims v. Jefferson Downs, Inc.*, 611 F.2d 609 (5th Cir. 1980) (alleging violation of constitutional rights in that plaintiff was ejected from state-licensed private racetrack); *Roberts v. Louisiana Downs, Inc.*, 742 F.2d 221 (5th Cir. 1984) (seeking damages and injunctive relief based on violation of Civil Rights Act of 1871). *But see* *Whetzler v. Krause*, 411 F. Supp. 523 (E.D. Pa. 1976), *aff’d*, 549 F.2d 797 (3d Cir. 1977) (contending that denial of access to certain race tracks deprived plaintiff of his constitutional rights); *Rahner v. Yonkers Racing Corp.* 1978 U.S. Dist. LEXIS

in support of individuals who had been excluded from a racetrack. These cases did not give additional substantive rights to licensees, but provided them with civil due process rights. They did not change the basis upon which racetracks could exclude licensees, but provided the licensees with procedural due process protections, such as notice and a hearing, before a licensee could be excluded from a racetrack.

Nonetheless, the movement towards protection of racing licensees from exclusions under 42 U.S. C. § 1983 came to a quick end when the Supreme Court, in a series of decisions, made it difficult to find that an ostensibly private entity engaged in State action. The Supreme Court began to significantly narrow its definition of "State action" with *Rendell-Baker v. Kohn*, *Lugar v. Edmondson Oil Co.*, and *Blum v. Yaretsky* ("Blum Trilogy").<sup>176</sup> Under the *Blum* trilogy, mere state regulation and state funding of private institutions was not enough to make a business a state actor.<sup>177</sup> Instead, the state has to be responsible for compelling or influencing the Constitutional violation.<sup>178</sup> *Blum* in particular has established that an extensively regulated yet privately owned enterprise providing unique services does not fall within the scope of *Burton*.<sup>179</sup>

The Supreme Court's most recent major decision on State action came in the 2001 case, *Brentwood Academy v. Tennessee Secondary School Athletic Association*.<sup>180</sup> In *Brentwood*, the Court largely expanded and reformulated the *Burton* test for determining a State action.<sup>181</sup> The Court found that a high school interscholastic ath-

15850 (S.D.N.Y. 1978); *Gilmour v. N.Y. State Racing and Wagering Bd.*, 405 F. Supp. 458 (S.D.N.Y. 1975) (challenging termination by raceway).

176. See generally *Blum v. Yaretsky*, 457 U.S. 991 (1982) (exemplifying Supreme Court's narrowing view on what is considered state action); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (presenting situation where action by former teachers was not state action); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) (finding that petitioner was deprived of property through state action but did not present valid claims).

177. See *Blum*, 457 U.S. at 1004 ("The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment.").

178. See *id.* (explaining that State must be responsible for specific conduct of private actor).

179. See *id.* at 1011 ("As we have previously held, privately owned enterprises providing services that the State would not necessarily provide, even though they are extensively regulated, do not fall within the ambit of *Burton*.").

180. See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 290 (2001) ("[W]hether a statewide association incorporated to regulate interscholastic athletic competition among public and private secondary schools may be regarded as engaging in state action.").

181. See generally *id.* (expanding and reformulating test for State action).

letic association, eighty-four percent of whose members were public schools, was a state actor.<sup>182</sup> In its decision, the Court reviewed the factors it would consider in its State action analysis as follows:

[A] challenged activity may be state action when it results from the State's exercise of 'coercive power,' when the State provides 'significant encouragement, either overt or covert,' or when a private actor operates as a 'willful participant in joint activity with the State or its agents.' We have treated a nominally private entity as a state actor when it is controlled by an 'agency of the State,' when it has been delegated a public function by the State, when it is 'entwined with governmental policies' or when government is 'entwined in [its] management or control.'<sup>183</sup>

As a practical matter, the Supreme Court only expanded the notion of government entanglement by finding that a state athletic association, overwhelmingly dominated by public schools, was a state actor.<sup>184</sup> The other tests were not altered, and the years since *Brentwood* have not seen any expansion of the State action doctrine.

### C. Licensees and Racetracks as State Actors Under the New Supreme Court Formulation of State Action

Since the advent of the *Blum* trilogy, the only time courts have found a racetrack to be a state actor has been when a state agency was actually operating the racetrack.<sup>185</sup> For example, a New Jersey district court found the Meadowlands Racetrack to be a state actor because it was operated by a public benefit corporation.<sup>186</sup> Similarly, a federal court decided that the former New York Racing Association was a state actor because its entire financial bottom line went to the State.<sup>187</sup> Additionally, in *Sims v. Jefferson Downs Racing*

182. *See id.* (explaining that case's holding expanded applicable legal tests).

183. *Id.* at 296 (citations omitted) (showing that character of legal entities is determined not by its expressly private characterization in statutory law).

184. *See id.* at 291 ("We hold that the association's regulatory activity may and should be treated as state action owing to the pervasive entwinement of state school officials in the structure of the association, there being no offsetting reason to see the association's acts in any other way.").

185. *See Hedges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1322 (2d Cir. 1995) ("Because Meadowlands is run by a state agency, the New Jersey Sports & Exposition Authority (Sports Authority), there was no dispute as to whether the banning constituted state action.").

186. *See id.* (holding Meadowlands was acting under state by looking at specific facts of case).

187. *See Stevens v. New York Racing Ass'n*, 665 F. Supp. 164, 172 (E.D.N.Y. 1987) (finding state actor in Racing Association). The court stated, "In a real

*Association*, the court held that exclusion from a racetrack had to involve State action because a racetrack, acting by itself, had no power to exclude licensees.<sup>188</sup>

However, courts more frequently will hold that racetracks are not state actors. In *Murphy v. New York Racing Association*, a court employing the *Blum* standard found that NYRA was no longer a state actor.<sup>189</sup> Although the Third circuit once held that Dover Downs racetrack was a State actor, it has since found, under Supreme Court precedent, that a closely regulated racetrack/racing is not a state actor.<sup>190</sup> Therefore, in the absence of a specific fact situation where a racetrack working in cooperation with government authorities bars an individual from the racetrack, it is unlikely that a racetrack will be subject to a suit under 42 U.S.C. § 1983.<sup>191</sup> Courts have refused to find that the close regulation of horse racing by the state would create a close enough nexus to the government to rise to the level of State action. Other federal cases holding that race tracks are not state actors include *Hadges*, *Heflin*, *Murphy*, *Guzowski*, and *Crissman*.<sup>192</sup> Additionally, state courts in Iowa and Minnesota have determined that the racetracks in their states were not state actors.<sup>193</sup>

---

sense, defendant is merely a conduit through which money passes from the betting public to the state's coffers." *Id.*

188. See *Sims v. Jefferson Downs Racing Ass'n*, 778 F.2d 1068 (5th Cir. 1985) (holding racetrack had no power to exclude licensees and was therefore State actor); see also *Sims v. Jefferson Downs, Inc.*, 611 F.2d 609 (5th Cir. 1980) (claiming violation of constitutional rights in that plaintiff was ejected from state licensed private racetrack).

189. See *Murphy v. New York Racing Ass'n*, 76 F. Supp. 2d 489 (S.D.N.Y. 1999) (holding NYRA was not state actor).

190. See *Crissman v. Dover Downs Entm't*, 289 F.3d 231 (3d Cir. 2002), *cert. denied* 537 U.S. 886 (2002) (alleging that corporation's exclusion of trainers from facility violated trainers' due process rights). The Third Circuit once took the position that Dover Downs, a harness track in Delaware, was a State actor. See *id.* That decision was based in part on the fact that not only was the harness racetrack closely regulated, but also because that racetrack functioned as one of the three video lottery agents of the state of Delaware. See *id.*

191. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) (emphasizing that this would be akin to joint activity example given in *Brentwood* case).

192. See *Hadges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1322 (holding owner's exclusion of driver did not constitute state action for section 1983 purposes); see also *Heflin v. Ky. State Racing Comm'n*, 701 F.2d 599 (6th Cir. 1983) (holding that section 1983 action could not be maintained); *Murphy*, 76 F. Supp. 2d at 489 (analyzing case which held that association's regulatory enforcement action was state action for purposes of Fourteenth Amendment); *Guzowski v. Hartman*, 969 F.2d 211 (6th Cir. 1992), *cert. denied*, 506 U.S. 1053 (1993) (alleging antitrust violations); *Crissman*, 289 F.3d at 231 (alleging due process rights violations).

193. See *Green v. Racing Ass'n of Cent. Iowa*, 713 N.W. 2d 234 (Iowa 2006) (holding no state actor when racing association denied access to jockeys due to investigation); see also *In re Exclusion of Molnar from Canterbury Park*, 720 N.W.

Because racetracks are generally not considered state actors, the *Marrone* decision still stands tall.<sup>194</sup> While licensees may enjoy a property right that is protected from due process violations, it can only be protected from racetracks that are actually government agencies, and in only those instances where government officials jointly work with racetracks in engaging in an exclusion.<sup>195</sup> As a result, there really is no general federal right for horse racing licensees to be admitted to racetracks.

#### D. Federal Courts and Patrons at Racetracks

Patrons at racetracks are entitled to even fewer federally protected rights than racing licensees. Patrons do not hold a general federal right to entrance at public events and do not hold a protectable property or liberty interest under the Fourteenth Amendment.<sup>196</sup> Perhaps the most interesting of these patron exclusion cases is *Zizkis v. Kowalski*.<sup>197</sup> Zizkis was a frequent gambler and placed bets as a patron at a jai alai fronton in Connecticut.<sup>198</sup> He was then excluded from the fronton by the its owner and Zizkis brought suit against the fronton alleging a civil rights violation under 42 U.S.C. § 1983.<sup>199</sup> The court found that Zizkis had no federal constitutional rights including a First Amendment right to gamble, nor any rights that were protectable under Connecticut law.<sup>200</sup>

Even if a gambling facility is operated by a government agency, a patron still has no right to admission. In *Morris v. Off Track Betting*

2d 604 (Minn. Ct. App. 2006) (upholding decision of privately owned corporation, licensed to conduct live racing, to exclude him permanently from its card club).

194. For a further discussion of racetracks as State actors, see *supra* notes 178-86 and accompanying text.

195. For a further discussion on when due process may protect property rights see *supra* notes 178-86 and accompanying text.

196. See *Zizkis v. Kowalski*, 726 F. Supp. 902, 910 (D. Conn. 1989) ("Connecticut law creates no right of admission to jai-alai, no right not to be ejected, [and] no property right of which Zizkis was deprived . . ."). The court agreed with a similar Sixth Circuit case which held that a patron has no property interest in attending races, and that no federal law created a general right to attend. See *id.* (citing *Rodic v. Thistledown Racing Club, Inc.*, 615 F.2d 736 (6th Cir. 1980)).

197. See *generally id.* (finding that Zizkis was barred after cashing out winning ticket).

198. See *id.* (explaining facts of case leading up to plaintiff being barred).

199. See *id.* (describing plaintiff's claim for being barred permanently).

200. *Id.* at 911 (finding of court that First Amendment does not protect right to gamble). See *Allendale Leasing, Inc. v. Stone*, 614 F. Supp. 1440, 1454 (D.R.I. 1985) ("Indeed, in many states gambling is forbidden by the State Constitution."); See *generally* 54 C.J.S. 860, n.3 ("It has never been seriously contended that such state constitutional provisions impair federally protected First Amendment rights.").

*Corp.*, a patron at a state-run off-track betting facility sued to protest his exclusion from the gambling facility.<sup>201</sup> While it was conceded that an off-track betting corporation in New York was acting under color of state law in its exclusion, the patron simply had no constitutional rights that had been violated.<sup>202</sup>

In *Brooks v. Chicago Downs Association*, one of the more intriguing decisions on patron exclusion, the Seventh Circuit questioned the traditional rule on exclusions.<sup>203</sup> There the racetrack excluded out-of-state gamblers who wanted to place large wagers on the track's more exotic bets.<sup>204</sup> The court stated:

As a policy matter, it is arguably unfair to allow a place of amusement to exclude for any reason or no reason, and to be free of accountability, except in cases of obvious discrimination. In this case, the general public is not only invited but, through advertising, is encouraged to come to the race track and wager on the races' outcome. But the common law allows the racetrack to exclude patrons, no matter if they come from near or far, or in reasonable reliance on representations of accessibility.<sup>205</sup>

Nonetheless, the court was convinced that under the common law and the law of Illinois that there was no public right to enter a racetrack, claiming "the common law rule, relic though it may be, still controls."<sup>206</sup> Not only was there no general right of patron access but "proprietors of amusement facilities, whose very survival depends on bringing the public into their place of amusement, are reasonable people who usually do not exclude their customers unless they have a reason to do so."<sup>207</sup> As such, the court found no

---

201. See *Morris v. Off-Track Betting Corp.*, No. 92-CV-0320E(M), 1994 WL 721374, at \*1 (W.D.N.Y. 1994) (noting exclusion after patron threatened custodian for potentially causing his sneezing).

202. See *id.* at \*3-4 (rejecting argument that any constitutional right had been violated).

203. See *Brooks v. Chicago Downs Ass'n, Inc.*, 791 F.2d 512, 513 (7th Cir. 1986) (dealing with bet that was not allowed to be made by group after they won \$600,000).

204. See *id.* at 513-14 (explaining plaintiffs were attempting to place super bets, which one must select first two finishers of fifth and sixth races and first three finishers of seventh race).

205. *Id.* at 518.

206. *Id.* at 519.

207. *Id.* at 517.

broad policy reason to alter the common right of patron exclusion.<sup>208</sup>

Other federal cases have agreed with the traditional *Marrone* reasoning.<sup>209</sup> In short, “the cases generally recite the rule that innkeepers and common carriers have duties to serve the public and that other businesses have no such duties.”<sup>210</sup> Therefore, *Marrone* is certainly still thriving in the patron exclusion cases in the federal courts.

#### E. The State Courts And *MARRONE*: THE FIRST FIFTY YEARS

*Marrone* went unchallenged as state law in American racing until after World War II. In 1945, the management of Aqueduct Race-track in Queens, New York banned a man it believed was “Owney” Madden from entering the racetrack.<sup>211</sup> Owney Madden had allegedly been named as Frank Costello’s bookmaker, and Frank Costello was regarded as “the leading mobster in the city.”<sup>212</sup> “Owney” was one of the more infamous gangland figures of the 20th century.<sup>213</sup> Known generally as “The Killer,” Owney’s diversified criminal enterprises had by the early 1930’s garnered him a reputation as “the chief racketeer in New York City.”<sup>214</sup> To avoid much of this

---

208. *See id.* at 518 (reasoning that no policy urged alteration of common right of patron exclusion).

209. *See generally* Rodic v. Thistledown Racing Club, Inc., 615 F.2d 736 (6th Cir. 1980); Payne v. Fontenot, 925 F. Supp. 414 (M.D. La. 1995).

210. Joseph William Singer, *No Right To Exclude: Public Accommodations And Private Property*, 90 Nw. U. L. REV. 1283, 1439 (1996). *See generally* Perry Z. Binder, *Arbitrary Exclusions of “Undesirable” Racetrack and Casino Patrons: The Courts’ Illusory Perception of Common Law Public/Private Distinctions*, 32 BUFF. L. REV. 699 (1983) (noting public duty of entry only extends to innkeepers).

211. *See* Madden v. Queens County Jockey Club, Inc., 296 N.Y. 249, 253 (1947) (describing defendant prevented plaintiff from entering racetrack).

212. *See id.* (explaining Owney Madden was believed to be Frank Costello’s bookkeeper); *see also* Frank S. Adams, *Costello Boasts of Aiding Kennedy to Win Leadership*, N.Y. TIMES, Oct. 26, 1943 (stating that Costello mentioned “Coley” Madden in his testimony while Court of Appeals said that Costello had actually named “Owney” Madden). *See generally* Earl Johnson, Jr., *Organized Crime: Challenge to the American Legal System*, 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 399, 413 (1962) (defining Madden’s relationship with Costello as bookkeeper); LEONARD KATZ, *UNCLE FRANK, THE BIOGRAPHY OF FRANK COSTELLO*, Drake (1973); GEORGE WOLF AND JOSEPH DIMONA, *FRANK COSTELLO: PRIME MINISTER OF THE UNDERWORLD*, Hodder & Stoughton (1975). At a time when Aqueduct was barring individuals that had gambling contacts with Costello, the major New York harness track at the time, Roosevelt Raceway, actually hired Costello to limit bookmaking at its track. *See* James A. Hagerty, *Costello’s Power in Politics, Crime Shown at Hearing*, N.Y. TIMES, Mar. 13, 1951.

213. *See* VIRGIL W. PETERSON, *THE MOB 187* (Green Hill Publishers 1983) (describing Owney Madden’s reputation).

214. *See id.* (clarifying Madden’s reputation as chief racketeer).

notoriety and the accompanying legal scrutiny, Owney in 1935 “settled permanently in Hot Springs, Arkansas, where he became a powerful gambling boss who enjoyed solid political backing.”<sup>215</sup> His gaming business “was highly profitable and for decades served as a sanctuary for underworld leaders from all parts of the nation.”<sup>216</sup> Nonetheless, the man barred from entering Aqueduct was not, in fact, “Owney” but another Madden: Coleman “Coley” Madden.<sup>217</sup>

The court of appeals described “Coley” as “a self-styled ‘patron of the races.’”<sup>218</sup> The trial court in the case had found him to be “a citizen of good repute and standing.”<sup>219</sup> Yet, “Coley” Madden was not a mere racing fan enjoying a day at the races. In fact, “Coley” Madden was a prominent figure around the New York racetracks during the era in New York State where bookmaking, as long as it was conducted at the racetracks, was not a criminal offense.<sup>220</sup> Newsweek once called him “a young pricemaker about town.”<sup>221</sup> Madden was additionally described as “[h]aving taken every course in mathematics available at Columbia University, and sometimes lectured to the students on aspects of lightning calculation, Mr. Madden was invaluable to the whole bookmaking ring as a price fixer.”<sup>222</sup> “Coley” Madden was a very well known bookmaker at the New York tracks when bookmaking was considered more of a colorful profession than a crime.<sup>223</sup> It is hard to understand how anyone remotely connected with the racetrack could confuse “Owney” “The Killer” Madden with Columbia’s “Coley” Madden. Nonethe-

---

215. *See id.* (noting Madden’s move to Arkansas).

216. *Id.* at 203.

217. *See* Madden v. Queens County Jockey Club, Inc., 296 N.Y. 249, 254 (1947) (explaining Coley Madden was mistaken by defendants for Owney Madden).

218. *Id.* at 253.

219. *See id.* (finding Madden’s character allowed him cause of action and this court thereby entered that defendant be enjoined from keeping plaintiff off this race track).

220. *See* People ex rel. Shane v. Gittens, 78 Misc. 7 (N.Y. Sup. Ct. 1912), aff’d 155 A.D. 921 (N.Y. App. Div. 2d Dept. 1913) (noting legality of bookmaking in New York at time).

221. John Lardner, *Hail and Farewell*, NEWSWEEK, Nov. 20, 1939 at 41.

222. *Id.*

223. *See* Red Smith, *In the Bookies Hall of Fame*, N.Y. TIMES, Feb. 18, 1976 (describing bookmaking as profession); *see also* Red Smith, *Lunch In a Picture Gallery*, N.Y. TIMES, Feb. 29, 1976 (stating that columnist Ed Sullivan said Coley Madden won one of the largest racing bets in horse racing history). “Coley Madden, one of the most unusual characters at the major tracks, won \$120,000 on a horse named St. John at Empire City.” Ed Sullivan, *Looking at Hollywood*, CHI. TRIB., Feb. 24, 1938.

less, the court in the case assumed that the racetrack acted in error and barred "Coley" when it had intended to bar "Owney."<sup>224</sup>

Coley sued Aqueduct, and the trial court ruled for Coley and enjoined Aqueduct management from barring him from the racetrack.<sup>225</sup> The appellate court found that the common law rule still governed, explaining that "the common-law right of the racecourse proprietor to choose his patrons has not been nullified by implication merely because the State rigidly supervises his activities, requires licenses and taxes receipts from racing and from betting."<sup>226</sup>

On appeal, the court of appeals agreed with the Appellate Division and allowed Aqueduct to bar "Coley" Madden.<sup>227</sup> Judge Fuld, in a unanimous opinion, recognized that Madden compelled the court to decide the question left open in the *Grannan* case: whether a racetrack can ban a person from its facility for a bad reason or no reason at all.<sup>228</sup> The court found that the common law under *Marrone* still prevailed, and unless the common law had been altered by statutory enactment, Aqueduct had the right to bar "Coley" Madden.<sup>229</sup>

"Coley" Madden argued that the common law had been changed by the fact that pari-mutuel wagering had emerged in New York and that the taxes paid to the state from the pari-mutuels made the racetracks agents of the state.<sup>230</sup> The court outright rejected this argument because this would mean that every licensee

224. *See* *Madden v. Queens County Jockey Club, Inc.*, 296 N.Y. 249, 253 (1947) (noting court's assumption that racetrack intended to bar "Owney" from racetrack).

225. *See id.* at 250 (summarizing trial court's decision causing defendants to appeal the judgment).

226. *Madden v. Queens County Jockey Club, Inc.*, 269 A.D. 644, 645-46 (N.Y. App. Div. 2d Dept. 1945).

227. *See id.* at 646 (reversing lower court's injunction allowing Madden into racetrack).

228. *See* *Madden v. Queens County Jockey Club, Inc.*, 296 N.Y. 249, 253 (1947) (explaining how this question led court to find that operators of race tracks possess power to admit as spectators only those whom he may select, and to exclude, largely of his own volition, as long as exclusion is not based upon race, creed, color, or national origin).

229. *See id.* at 254 (explaining Aqueduct's right to bar Madden).

230. *See id.* (noting court's explanation that "Section 9 of the Pari-Mutuel Revenue Law provides in substance that the licensee shall retain 10 % of total deposits and pay there from 'to the state tax commission as a reasonable tax by the state for the privilege of conducting pari-mutuel betting,' an amount equal to a certain percentage of the total pool.").

would be regarded as an administrative agency of the state simply because he pays a tax or fee for his license.<sup>231</sup>

Madden also argued that the racetracks had been turned into franchisees of the state, and franchisees were required to serve all comers.<sup>232</sup> The court rejected this reasoning and found

[T]here is nothing inherent in the nature of horse racing – clearly a form of amusement- which makes operation of a race track the performance of a public function. If plaintiff's assumption were valid, it would follow that the mere fact of licensing makes the purpose a public one and the license in effect a franchise.<sup>233</sup>

Moreover, the court found that by authorizing Aqueduct to be a licensed racetrack, the state did not grant Aqueduct a right that it did not have under common law.<sup>234</sup> The ability to conduct horse racing for stakes did exist at common law, and the license, “instead of creating a privilege, merely permits the exercise of one restricted and regulated by statute.”<sup>235</sup>

Courts in other states echoed the *Marrone-Madden* rationale. In Maryland, a fan was ejected from Pimlico Racetrack with no reason given, and the fan brought suit against the racetrack.<sup>236</sup> Pimlico was basically in the same position as Aqueduct in Madden. The plaintiff argued that *Wood*, which had been the basis for the *Marrone* decision, had been overruled.<sup>237</sup> Accordingly, the plaintiff maintained that the “rule followed in the *Marrone* case (and subsequent American cases) is archaic and should be abandoned.”<sup>238</sup> The court disagreed with the plaintiff and found specifically that the rule was not archaic.<sup>239</sup>

---

231. *See id.* at 254 (emphasizing how court views racetrack owners no differently than licensees, theatre managers, cab drivers, liquor dealers, and dog owners).

232. *See id.* at 254-55 (explaining plaintiff's argument that racetracks were franchisees of state).

233. *Id.* at 255.

234. *See id.* (emphasizing that there is no public function in conducting racetracks).

235. *Id.* at 256.

236. *See Greenfield v. Maryland Jockey Club*, 190 Md. 96, 100 (1948) (maintaining defendant refused to give plaintiff any reason for ejecting him or denying him admission).

237. *See id.* at 101 (explaining plaintiff's position that *Wood* had been overruled).

238. *Id.* at 101.

239. *See id.* at 102 (“The rule that, except in cases of common carriers, innkeepers and similar public callings, one may choose his customers is not archaic.”).

The plaintiff also argued that pari-mutuel betting was only allowed in Maryland as a special public franchise.<sup>240</sup> According to the plaintiff, pari-mutuel betting had been illegal at common law, and since it was a franchise, the racetrack was required to serve and admit all prospective customers.<sup>241</sup> The Maryland Court of Appeals, found, again much like the New York Court of Appeals, that betting was not criminal under common law and instead, the licensing system of horse racing in Maryland had created “a minutely regulated, heavily taxed business in which private rights and responsibility have not been wholly extinguished.”<sup>242</sup> The licensing and regulation of horse racing did not turn racetracks from private carriers to public carriers, thereby allowing a racetrack the freedom to choose who could be admitted to its grounds.<sup>243</sup>

A very similar decision was issued by the Supreme Court of New Jersey in *Garifine v. Monmouth Park Jockey Club*.<sup>244</sup> The plaintiff was excluded from Monmouth Park based on the racetrack’s general assertion that “the defendant advised him that he is not wanted at the race track and that his general record and reputation warrant his exclusion.”<sup>245</sup> On one occasion after Mr. Garifine entered Monmouth Park, he was arrested and brought to trial, unsuccessfully, on the charge of being a disorderly person. He sued Monmouth Park “for malicious prosecution, false arrest, and deprivation of his right to attend the track.”<sup>246</sup>

Garifine argued that he had the right under the common law to be admitted to the race track and that New Jersey’s civil rights law also authorized his admission.<sup>247</sup> The court unanimously disagreed with Garifine’s argument, finding under *Marrone, Madden, Greenfield*, and theater admission cases that the common law al-

---

240. *See id.* (presenting plaintiff’s view that pari-mutuel betting allowed by Maryland created public franchise).

241. *See id.* (articulating plaintiff’s argument that pari-mutuel betting created public franchise and therefore facilities can be used by public).

242. *Id.* at 104.

243. *See id.* at 105 (expressing court’s holding that “Licensing, regulation and taxation of a private carrier do not make it a common carrier.”).

244. *See Garifine v. Monmouth Park Jockey Club*, 29 N.J. 47 (1959) (describing plaintiff’s request for relief against his exclusion and expulsion from Monmouth Park race track).

245. *Id.* at 57.

246. *Id.* at 49 (explaining all counts, other than malicious prosecution, were dismissed).

247. *See id.* at 50 (noting common law and civil rights claims of plaintiff). The plaintiff argued he had common law rights here despite the holding of the former New Jersey Supreme Court in *Shubert v. Nixon Amusement Co.*, 83 A. 369 (N.J. Sup. Ct. 1912).

lowed a proprietor to ban patrons without reasonable cause.<sup>248</sup> Horse racing was a place of public amusement, not a public calling requiring “the duty to serve the public without discrimination.”<sup>249</sup> The plaintiff offered no case law that supported authorization of his admission, and his assertion that Monmouth Park held a state monopoly was not sufficient to turn Monmouth Park into a public calling.<sup>250</sup> The court also found nothing in New Jersey’s civil rights law citing a general right of admission to places of public accommodation or amusement.<sup>251</sup>

The New Hampshire Supreme Court also found that the common law rule of *Marrone* governed a patron exclusion case.<sup>252</sup> In *Tamelleo v. New Hampshire Jockey Club*, Rockingham Park excluded a group of patrons because “their presence was inconsistent with the orderly and proper conduct of a race meeting.”<sup>253</sup> The plaintiffs argued that there is no common-law right in New Hampshire to operate a pari-mutuel race track, and, if there is, the state does not recognize the common-law rule of allowing a proprietor of a private enterprise to discriminate without cause among his patrons.<sup>254</sup>

The court agreed that there was no common law right to run a pari-mutuel race track, but that was not the decisive issue.<sup>255</sup> The track was still a private enterprise, and there was “no doubt that this state [adhered] to the general rule that the proprietors of a private

248. *See id.* at 50-51 (pointing out that precedent did not support plaintiff’s claim). “[O]perators of most businesses, including places of amusement such as race tracks, have never been placed under any such common-law obligation . . . .” *Id.* at 50.

249. *Id.* at 50. Precedent indicates that horse racing did not fall within the public calling category. *See id.*

250. *See id.* at 57 (“The burden of the plaintiff’s present attack is on the common-law doctrine which he states should be altered to afford to him a right of admission to the race track . . . We are satisfied that . . . there has been no showing made here for such alteration.”). Additionally, the New Jersey Racing Commission’s rules “say nothing about any individual patron’s right to admission [to race tracks], but they do provide that [its] Association conducting the race meeting shall police its grounds and shall eject ‘persons believed to be bookmakers’ along with other undesirables.” *Id.*

251. *See id.* at 57-60 (describing New Jersey Civil Rights Act). “Since the plaintiff does not suggest that his exclusion was based on race, creed, color, national origin or ancestry we find the Civil Rights Act to be inapplicable.” *Id.* at 60.

252. *See Tamelleo v. N.H. Jockey Club*, 102 N.H. 547, 549 (1960) (applying *Marrone* precedent instead of that cited by plaintiffs).

253. *Id.* at 547.

254. *See id.* at 548 (describing argument of plaintiffs). The defendant conceded there was no common-law right in New Hampshire “to operate a race track where pari-mutuel pools are sold.” *Id.*

255. *See id.* at 548 (“The business is still a private enterprise since it is affected by no such public interest as to make it a public calling as is a railroad for example.”).

calling possess the common-law right to admit or exclude whomsoever they choose.”<sup>256</sup> Thus, the track acted within its rights in excluding the plaintiffs.<sup>257</sup> All of these opinions show that even fifty years after Marrone had been decided, it remained good law in common law states.

#### F. Post Warren Court Licensee Exclusions in State Courts

The civil rights suits brought by racing licensees were most commonly brought in federal courts. Nonetheless, many states have sought to protect licensees in horse racing not by making findings of state action but by making changes in the statutes and rules governing the powers of race tracks.<sup>258</sup> A number of states have enacted statutes that require that race tracks have just cause to exclude a licensee from a race track.<sup>259</sup> Others allow excluded licensees an appeal to the state racing commission to contest the exclusion,<sup>260</sup> and some specify the grounds required for any exclusion.<sup>261</sup>

256. *Id.* at 549.

257. *See id.* at 550 (indicating holding of court consistent with precedent).

258. For more information on these statutory alterations, see *infra* notes 259-261 and accompanying text.

259. *See, e.g.*, 230 ILL. COMP. STAT. ANN. 5/9(e) (West 2000) (“The power to eject or exclude an occupation licensee or other individual may be exercised for just cause by the licensee or the Board, subject to subsequent hearing by the Board as to the propriety of said exclusion.”).

260. *See, e.g.*, CAL. BUS. & PROF. CODE § 19573 (West 2010) (describing procedure for appeal after exclusion from race track in California); LA. REV. STAT. ANN. § 4:192 (2009) (indicating right of hearing for any person excluded from race track in Louisiana); MASS. GEN. LAWS ANN. ch. 128A, § 10A (West 2010) (noting requirement for post-exclusion hearing in Massachusetts); MINN. STAT. ANN. § 240.27 (West 2010) (providing requirement of hearing in Minnesota); *see also* Evans v. Ark. Racing Comm’n, 606 S.W.2d 578, 583 (Ark. 1980) (implying plaintiff’s right to appeal).

261. *See, e.g.*, 230 ILL. COMP. STAT. ANN. 5/9(e) (West 2000) (explaining that “licensee or any other individual whose conduct or reputation is such that his presence may . . . call into question the honesty and integrity of horse racing or wagering or interfere with the orderly conduct of horse racing or wagering” may be excluded from tracks in Illinois); CAL. BUS. & PROF. CODE § 19572 (West 2008) (allowing exclusion of “known bookmaker[s]” or “any other person whose presence in the inclosure would . . . be inimical to the interests of the state or of legitimate horse racing” in California); LA. REV. STAT. ANN. § 4:193 (2009) (outlining categories of persons who may be excluded in Louisiana); MASS. GEN. LAWS ANN. ch. 128A, § 10A (West 2010) (permitting exclusion of “any person whose presence . . . is detrimental” may be excluded from race tracks in Massachusetts); MINN. STAT. ANN. § 240.27 (West 2010) (indicating who may be excluded from race tracks in Minnesota); 4 PA. CONS. STAT. ANN. § 325.215 (West 2010) (permitting exclusion of “any person whose presence there is . . . inconsistent with the orderly or proper conduct of a race meeting or whose presence or conduct is deemed detrimental to the best interest of horse racing” in Pennsylvania); R.I. GEN. LAWS § 41-3-17 (2009) (stating that “any person whose presence within the

Nonetheless, in those states where the common law still governs licensee exclusions, *Marrone*, as a general rule, is still the law.<sup>262</sup> A race track in these states can apparently exclude any licensee even without a reason.<sup>263</sup> While *Marrone* may still be the general rule in these states, excluded parties are starting to rely on tort theories, such as tortious interference with future economic opportunities, to limit the current effect of *Marrone*.

In one Ohio case, Beulah Park excluded a licensed jockey agent without giving a reason.<sup>264</sup> The agent brought suit against the track, and the exclusion was upheld by the Ohio Supreme Court.<sup>265</sup> Additionally, the Supreme Court found that the common law had not been changed in Ohio because the state licensing scheme was not intended to alter the common-law rights of a race track.<sup>266</sup> The court held that, “[t]he rules and statute cited by the appellee provide a right to exclude to the racing commission and racing stewards, who are not addressed by the common law. This does not mean that race track owners who possessed this right at common law have lost that right due to rules and statutes providing the same right to others.”<sup>267</sup>

---

enclosure is . . . undesirable” may be excluded in Rhode Island); *see also* *Evans v. Ark. Racing Comm’n*, 606 S.W.2d 578, 583 (Ark. 1980) (describing and upholding statute under which “any person who . . . has acted to the detriment of racing or violated the rules” may be excluded in Arkansas).

262. Because it was decided by the Supreme Court, *Marrone* is binding precedent on those states that have not statutorily altered the common law regarding licensee exclusions. *See Marrone v. Wash. Jockey Club of D.C.*, 227 U.S. 633 (1913).

263. *See id.* at 636-37 (indicating that ticket was license subject to revocation). *Marrone* does not specify whether any justification must be given for an exclusion, so it seems that states following the case need not justify removing someone from a race track. *See id.*

264. *See Bresnik v. Beulah Park Ltd. P’ship*, 617 N.E.2d 1096, 1097 (Ohio 1993) (holding horse racing park has common law right to exclude whomever it wants from its premises, despite lack of such language in statutory code). The facts simply indicated that “[o]n February 3, 1991, [plaintiff] was informed by a security officer that he was no longer permitted on the grounds of Beulah Park.” *Id.*

265. *See id.* at 1098 (reversing appellate court’s holding in favor of appellee jockey agent).

266. *See id.* (“Beulah Park possesses the common-law right to exclude whomever it pleases, provided the General Assembly has not abolished that right.”). The agent had argued that the overall licensing scheme in Ohio had changed the common law by giving the “State Racing Commission plenary power over the regulation of horse racing.” *Id.* at 1099 (Sweeney, J., dissenting).

267. *Id.* at 1098. The dissent espoused the position that the statutory scheme had altered the common law and that the effect of the majority decision was to make the race track operator the “judge, jury and executioner to anyone who enters its grounds, regardless of whether such person is licensed to be there by the State Racing Commission.” *Id.* at 1100 (Sweeney, J., dissenting).

Such an opinion was echoed by the New Jersey courts in determining that patrons have broad rights to enter places of public amusement, but those rights do not apply to licensees.<sup>268</sup> In *Marzocca v. Ferone*, the New Jersey Supreme Court found that Freehold Raceway had the right to exclude a licensed owner's horse from its track.<sup>269</sup> The court found that the common law right to exclude governs in the case of people "who have a business relationship with the race tracks."<sup>270</sup>

Similarly, in New York State, the courts have generally found that a private race track retains its common law authority to exclude licensees.<sup>271</sup> *Arone v. Sullivan County Harness Racing Association* held that race tracks, apart from the New York Racing Association (NYRA), retained their right to exclude licensees.<sup>272</sup> In *Arone*, Monticello Raceway "had available to it the long-recognized prerogative of race track operators to exclude anyone from its track, without cause, provided the exclusion is not based on race, creed, color or national origin."<sup>273</sup> Courts in non-NYRA cases have continued to hold that the common law allows the race track to right to exclude licensees.<sup>274</sup>

---

268. See *Uston v. Resorts Int'l Hotel, Inc.*, 445 A.2d 370, 371 (N.J. 1982) (holding Casino Control Act precludes gambling resorts from excluding patron for card counting). But see *Marzocca v. Ferone*, 461 A.2d 1133, 1134 (N.J. 1983) (reversing appellate court and holding that race track had "an unfettered right to exclude").

269. See *Marzocca*, 461 A.2d at 1134-35 (considering common law right in context of exclusion of race horses from race tracks).

270. *Id.* at 1136. "[W]e hold that the racetrack's common law right to exclude exists in the context of this case, *i.e.*, where 'the relationship [is] between the track management and persons who wish to perform their vocational activities on the track premises.'" *Id.* at 1137 (citation omitted). See generally *Brennan v. N.J. Sports & Exposition Auth.*, No. A-4765-98T1, 1999 N.J. Super. LEXIS 168, at \*1 (N.J. Super. Ct. App. Div. May 6, 1999) (holding that race track run by public entity should have no broader authority than race track run by private entity to determine who may engage in horse racing at its track).

271. See *Arone v. Sullivan County Harness Racing Ass'n*, 457 N.Y.S.2d 958, 959 (N.Y. App. Div. 1982) (implying that plaintiff's rights were not violated because they were not denied entry to other tracks in New York).

272. See *id.* (indicating that race track could exclude patrons without cause due to lack of monopoly). NYRA had a virtual monopoly on thoroughbred racing. See *id.* Thus, because other tracks were not available to patrons who had been excluded, NYRA was barred from banning patrons without justification. See *Jacobson v. N.Y. Racing Ass'n*, 305 N.E.2d 765, 767 (N.Y. 1973).

273. *Arone*, 457 N.Y.S.2d at 959.

274. See *Ferraro v. Finger Lakes Racing Ass'n*, 583 N.Y.S.2d 66, 67 (N.Y. App. Div. 1992) (holding defendant's exclusion of plaintiffs from its race track was motivated by legitimate business interests and not for improper reasons); *Hendrickson v. Saratoga Harness Racing, Inc.*, 565 N.Y.S.2d 610, 611 (N.Y. App. Div. 1991) (concluding that plaintiff's merits claim against defendant private race track owner was unlikely to succeed, resulting in exclusion being upheld); *Wilsey v. Saratoga Harness Racing Inc.*, 528 N.Y.S.2d 688, 689-90 (N.Y. App. Div. 1988) (reiterating mes-

Florida has also allowed its race tracks to exclude licensees.<sup>275</sup> In *Calder Race Course, Inc. v. Gaitan*, the race track denied a trainer access to horse stalls.<sup>276</sup> The trainer pointed to a Florida racing commission regulation that stated that the track had to allocate horse stalls to trainers.<sup>277</sup> The court did not regard this regulation as depriving the race track of its exclusionary powers; instead, it found that “[u]ntil the Florida Legislature acts or private racing establishments disparage constitutionally guaranteed rights, they continue to have the right to choose those persons with whom they wish to do business.”<sup>278</sup>

Nevertheless, the common law is still subject to a number of limitations. One limitation exists where the racetrack has a de facto monopoly over horse racing. In *Jacobson v. New York Racing Ass’n*, the New York Court of Appeals placed a “justification” standard on licensee exclusions made by the NYRA.<sup>279</sup> NYRA was one of two licensed thoroughbred racing associations in New York, and it ran the dates in the New York metropolitan area and at the prestigious thoroughbred meet in Saratoga Springs.<sup>280</sup> The only other racing association, Finger Lakes, ran a far smaller meet than the NYRA.<sup>281</sup> Based on NYRA’s virtual monopoly over thoroughbred racing, the court found that “[e]xclusion from its tracks is tantamount to barring the plaintiff from virtually the only places in the State where he may ply his trade and, in practical effect, may infringe on the State’s power to license horsemen.”<sup>282</sup> As a result, the decision to exclude had to be a “reasonable discretionary business judgment.”<sup>283</sup> The burden would be on the excluded party to show that the decision to

---

sage of other two relevant holdings that plaintiff has heavy burden to overcome race track’s common law right to exclude).

275. *See Calder Race Course Inc. v. Gaitan*, 393 So. 2d 15, 16 (Fla. Dist. Ct. App. 1980) (finding private race track owners Florida can choose whom to exclude as long as not done for unconstitutional reasons).

276. *See id.* at 15 (detailing factual background of plaintiff’s lawsuit). The parties conceded that Gaitan had “no contractual right to the use of the horse stalls.” *Id.*

277. *See id.* at 16 (explaining legal basis for plaintiff trainer’s lawsuit against defendant race track).

278. *Id.*

279. *See Jacobson v. N.Y. Racing Ass’n*, 305 N.E.2d 765,767 (N.Y. 1973) (holding defendant racing association, having monopoly on thoroughbred horse racing in New York, did not have absolute right to exclude whomever it wanted).

280. *See id.* at 767 (explaining why court determined that NYRA was monopoly).

281. *See id.* at 768, n. \* (showing racing association with significantly less market power).

282. *Id.* at 768.

283. *Id.*

exclude was not based on “motives other than those relating to the best interests of racing generally.”<sup>284</sup>

The *Jacobson* reasoning was very similar to that of the California court of appeals’ reasoning in *Greenberg v. Hollywood Turf Club*.<sup>285</sup> A thoroughbred racetrack had excluded the plaintiff, who was a licensed trainer and stable agent.<sup>286</sup> The court found that the racetrack had a quasi-monopoly over racing and had to have a justification for its decision to exclude the plaintiff.<sup>287</sup> Similar reasoning was employed by the appellate court of Illinois in *Cox v. National Jockey Club*.<sup>288</sup> The court found that a racing association as a quasi-monopoly licensee of the state “cannot arbitrarily deny a licensed jockey permission to participate in its racing meet.”<sup>289</sup> Exclusion would be allowed where a “legitimate and reasonable justification for exclusion is articulated.”<sup>290</sup> Apart from “quasi-monopoly” the New Jersey Supreme Court in *Marzocca* added its own modification.<sup>291</sup> The court noted that any licensee justification could not violate public policy.<sup>292</sup> It simply stated a limit on “the common law doctrine by proscribing exclusions that violate public policy.”<sup>293</sup>

Further, there are restrictions on the common law right to exclude, which are derived from tort law principles.<sup>294</sup> One tort law limitation involves the tort of defamation.<sup>295</sup> A racetrack, even while acting within its rights to exclude an individual, could not

284. *See id.* (alleging what needs to be proved).

285. *See Greenberg v. Hollywood Turf Club*, 86 Cal. Rptr. 885 (Cal. Ct. App. 1970) (noting that race tracks do not need absolute immunity from providing reasons for excluding certain trainers from their grounds, even to protect legitimate business interests).

286. *See id.* at 887 (providing factual background for plaintiff trainer’s complaint against defendant race track).

287. *See id.* at 890-91 (holding quasi-monopoly prevented defendant race track from having absolute power to exclude people for any reason).

288. *See Cox v. Nat’l Jockey Club*, 323 N.E.2d 104 (Ill. App. Ct. 1st Dist. 1974) (comparing reasoning of case with *Greenburg* case).

289. *Id.* at 164.

290. *Id.* at 166 (explaining when exclusion would be fine under quasi monopolies). Illinois law on exclusion is now covered by statute. *See id.*

291. *See Marzocca v. Ferone*, 461 A.2d 1133 (N.J. 1983) (discussing requirements for licensee justification).

292. *See id.* at 517 (noting courts disdain with state law).

293. *Id.* In some ways this may have been akin to the language in *Martin*, which suggested that an “exclusion may not be without justification.” *Martin v. Monmouth Park Jockey Club*, 145 F. Supp. 439, 441 (D.N.J. 1956).

294. *See generally Wilsey v. Saratoga Harness Racing*, 140 A.D.2d 857 (N.Y. App. Div. 3d Dep’t 1988) (showing tort based case).

295. *See generally id.* (illustrating tort case of defamation).

defame that individual.<sup>296</sup> Nonetheless, there do not appear to be any successful defamation cases brought against racetrack that excluded an individual.<sup>297</sup>

In addition, tort law limits on common law licensee exclusions include the torts of interference with existing contracts, prima facie torts, and interference with a prospective economic advantage.<sup>298</sup> In *Greenberg v. Hollywood Turf Club*, the excluded licensee maintained that the racetrack had caused a breach in his existing contract and had intentionally interfered with his “prospective economic advantage by preventing his negotiations with other trainers and horse owners in the stable area . . . .”<sup>299</sup> The racetrack argued that its common law right to exclude governed the issue.<sup>300</sup> The court disagreed, however, finding that “the general principle that a party whose conduct causes legal injury should justify himself, applies here as well.”<sup>301</sup>

In *Ferraro*, two excluded trainers argued that their exclusion by the racetrack interfered with their existing contract and that their exclusions constituted a prima facie tort.<sup>302</sup> Since there was no proof that the racetrack knew about any existing contracts or procured their breach, they could not have been guilty of interference with any existing contracts.<sup>303</sup> On the prima facie tort issue, the court described the issue as one involving “1) the intentional infliction of harm, 2) which results in special damages, 3) without any excuse or justification, 4) by an act or series of acts which would otherwise be lawful.”<sup>304</sup> In *Ferraro*, there was justification since nothing in the record indicated that the racetrack had an improper or malicious motive to exclude the plaintiffs, and the plaintiffs had failed to show that there were any triable issues of fact on the question of motive.<sup>305</sup> While the excluded parties were unsuccessful in *Ferraro*, the case does seem to imply that a decision to exclude a

---

296. *See id.* (exemplifying unsuccessful defamation case).

297. *See* Wilsey v. Saratoga Harness Racing, 140 A.D.2d 857 (N.Y. App. Div. 3d Dep’t 1988); Ferraro v. Finger Lakes Facing Ass’n, 182 A.D.2d 1072 (N.Y. App. Div. 4th Dep’t 1992) (granting summary judgment against defamation claim).

298. *See generally* Greenberg v. Hollywood Turf Club, 7 Cal. App. 3d 968 (Cal. App. 2d Dist. 1970) (depicting tort law limits on licensee exclusions in common law).

299. *Id.* at 973.

300. *See id.* at 976 (presenting racetrack’s arguments).

301. *Id.* at 978.

302. *See Ferraro*, 182 A.D.2d at 1072.

303. *See id.* (discussing court’s view on racetrack’s argument).

304. *Id.*

305. *See id.* (declaring presence of proper justification).

licensed party made with malice or improper motive could face liability in New York for a prima facie tort.<sup>306</sup>

Perhaps the clearest example of an excluded party claiming tortious interference with future economic opportunities is the case involving Michael Gill and Delaware Park.<sup>307</sup> Thoroughbred owner Michael Gill was excluded by the thoroughbred racetrack Delaware Park.<sup>308</sup> He brought a wide variety of claims against the racetrack in federal court in Delaware including a claim that Delaware Park and two defendant trainers who regularly raced at Delaware Park had committed the tort of interference with an advantageous business relationship.<sup>309</sup> The court, applying Delaware law found that the tort had four elements including:

(1) the existence of a valid business relationship or expectancy; (2) knowledge of the relationship or expectancy on the part of the interferer; (3) intentional interference which induces or causes a breach or termination of the relationship or expectancy; and (4) resulting damages to the party whose relationship or expectancy has been disrupted.<sup>310</sup>

The plaintiff claimed that the actions of the racetrack in excluding him and the trainers from Delaware Park by recommending exclusion interfered with his ability to obtain future trainers for his horses and also made it impossible for him race there and to obtain stall space at other tracks in the Mideast.<sup>311</sup> The defendants argued that the racetracks had the right to exclude Gill under common law.<sup>312</sup> The court instead found,

The defendants miss the point. Plaintiff's argument is that the defendants interfered with his business expectancy in racing at Delaware Park, by improperly influencing Delaware Park's decision to not permit plaintiff to rent stalls or to race horses at the track. If true, that conduct is actionable under Delaware law and the existence of such a

---

306. *See id.* (demonstrating implied liability for improper motive or malice).

307. *See Gill v. Del. Park*, 294 F. Supp. 2d 638 (D. Del. 2003) (showing tortious interference with future economic opportunities).

308. *See id.* at 642.

309. *See id.* at 645.

310. *Id.* at 645 (citing *Lucent Info. Mgmt., Inc. v. Lucent Techs.*, 5 F. Supp. 2d 238, 243 (D. Del. 1998) (noting elements of advantageous business relationship).

311. *See id.* at 642 (setting forth Plaintiff's claims).

312. *See id.* at 645 (countering Plaintiff's claims with Defendant's arguments).

business expectancy is a question of fact not suitable for resolution at this time.<sup>313</sup>

The court further ruled that issue, of whether the actions taken by the defendants affected Gill's business expectancy at the non-Delaware tracks, was "a question of fact not suitable to resolution at this time."<sup>314</sup> In short, the common law ability to exclude a licensee did not by itself give a racetrack (or people conspiring with race-tracks) any immunity from the tort of interference with an advantageous business relationship.<sup>315</sup>

From these opinions it is apparent that while the common law rule, derived from *Marrone*, still has significant application to exclusion of licensees in horse racing, its prominence is beginning to fade. The emergence of tort theories of liability is now impinging on a racetrack's exclusionary rights, and even in common law states, it is likely that a racetrack now needs a reasonable justification before it can exclude any licensee.

### G. Post Warren Court Patron Exclusions in State Courts

Under common law, the significance of the *Marrone* decision may be waning in the area of licensee exclusions, but it remains virtually dominant in the realm of patron exclusions. As a general rule, except for those few states that have abrogated the common law, the rule of *Marrone* still prevails. There are only a few states where *Marrone* has been modified by strictly judicial action.<sup>316</sup> Only three states, California, Massachusetts, and Minnesota, have clearly modified the common law rule for patron exclusions.<sup>317</sup> For a time it had been ruled that the statute on exclusions in Rhode Island had altered the law on patron exclusions, but that statute was subsequently amended and restored the common law.<sup>318</sup>

---

313. *Id.* at 645-46.

314. *Id.* at 646.

315. *See generally id.* (portraying general law of case).

316. For further discussion see *infra* text accompanying notes 317-318.

317. *See* CAL. BUS. & PROF. CODE §§ 19572-19573 (portraying modification of common law rule for patron exclusions); 4 CCR §§ 1980 & 1989 (departing from common law rule for patron exclusions); MASS. GEN. LAWS ANN. Ch. 128A, § 10A (West 2009) (depicting adjustment of common law rule for patron exclusions); MINN. STAT. § 240.27 (showing alteration of common law rule for patron exclusions); *see also* *Catrone v. State Racing Comm'n*, 459 N.E.2d 474 (Mass. App. Ct. 1984), *appeal denied*, 462 N.E.2d 1374 (Mass. 1984) (demonstrating application of modified rule for patron exclusions).

318. *See* R.I. GEN. LAWS § 41-3-17 (establishing amended statute reflecting common law rule on patron exclusions); P.L. 1981 ch. 426 §1 (reflecting departure from common law rule); P.L. 1997 ch. 326 §146 (illustrating departure from common law rule).

Pennsylvania is similar to Rhode Island in that it once seemed the common law had been altered, but it now is in command. It had been held in *Rockwell v. Pennsylvania State Horse Racing Commission* that Pennsylvania had abrogated the common law rule as it affected patrons.<sup>319</sup> Nevertheless, in *Staino v. Commonwealth* the court ruled that Pennsylvania racetracks, pursuant to a statute amended after *Rockwell*, had an unlimited right to exclude patrons.<sup>320</sup> In *Staino*, the patron was ejected by Keystone Race Track.<sup>321</sup> The patron then appealed to the Racing Commission, which affirmed the ejection.<sup>322</sup> The patron claimed that tracks in Pennsylvania were required to provide patrons with due process before they could be denied their constitutional right to attend the track.<sup>323</sup> The court rejected all of the patron's arguments and found that the statute authorizing patron ejections was constitutional, that there was no state action in Keystone's actions and that patron had no cognizable constitutional rights.<sup>324</sup> Finally, the court ruled that the racing commission did not even have to hold a hearing in order to uphold Keystone's ejection of the patron.<sup>325</sup> The racing commission would only have to review the ejection if the patron had alleged that Keystone excluded him because of his membership in a protected class.<sup>326</sup> The court determined that a track "has carte blanche to eject a patron without cause except that it may not eject a patron because of the patron's race, color, creed, sex, national origin, or religion."<sup>327</sup> The court found "the statute is unambiguous in its affirmation of the licensed corporation's right to eject Mr. Staino, a patron, from Keystone Race Track without cause."<sup>328</sup>

While Pennsylvania law remains clear, the law in Louisiana still continues to be uncertain. Louisiana has a statute which on its face appears to apply to patrons and lists categories of persons who may

---

319. See *Rockwell v. Pa. State Horse Racing Comm'n*, 327 A.2d 211, 214 (Pa. Commw. Ct. 1974) (discussing holding of case).

320. See *Staino v. Commonwealth*, 512 A.2d 75 (Pa. Commw. Ct. 1986) (stating holding of case); see also Race Horse Industry Reform Act (Act), 4 PA. CONS. STAT. §§ 325.101-325.402 (1981).

321. See *Staino*, at 75-76 (summarizing case facts).

322. See *id.* at 76 (outlining posture of case).

323. See *id.* (discussing patrons claims).

324. See *id.* at 78-79 (declaring constitutionality of patron ejection).

325. See *id.* at 79 (asserting no hearing is needed to uphold patron's ejection).

326. See *id.* at 78 (requiring review of ejection if exclusion caused by patron's membership within protected class).

327. *Id.* at 76.

328. *Id.* at 77.

be excluded from a racetrack.<sup>329</sup> The statute asserts that the racing commission shall promulgate rules creating the categories of persons who may be excluded from a racetrack.<sup>330</sup> The categories to be established by the racing commission must include, but are not limited to, five categories noted within the statute: underage persons, felons, career or professional offenders, people of notorious reputation, and people who have lost or been refused a racing license.<sup>331</sup> The racing commission has implemented the five mandatory categories and also added two additional categories.<sup>332</sup> These new classifications enable racetracks to exclude individuals who have behaved improperly or obnoxiously at a racetrack or whose action or inaction at a racetrack would interfere with the orderly business of the track.<sup>333</sup>

Louisiana courts have been unanimous in finding that the statutes took away the power of the tracks to exclude licensees suggesting this section would apply to patrons and limit the right of Louisiana tracks to exclude patrons according to the commission's

329. *See* La. R.S. ch. 4 §193 (detailing categories of persons subject to exclusions).

330. *See id.*

A. The commission shall adopt and promulgate rules and regulations establishing categories of persons who may be excluded or ejected from a track, race meeting, race, or licensed establishment. Such categories shall include, but shall not be limited to, categories of persons:

- (1) Who are not of age.
- (2) Who have been convicted of a felony under the laws of the United States, this state or any other state or country, or any crime or offense involving moral turpitude.
- (3) Who are career or professional offenders as defined by regulation of the commission.
- (4) Who are of notorious or unsavory reputation or whose presence, in the opinion of the commission, would be inimical to the state of Louisiana and its citizens or to the track, meeting, race, or licensed establishment, or to both.
- (5) Who have had a license or permit refused, suspended or withdrawn under R.S. 4:152.

B. No person may be excluded or ejected on account of race, color, creed, national origin, ancestry, disability, as defined in R.S. 51:2232(11), or gender.

C. No permittee in good standing shall be denied access to or racing privileges at any racing facility except in accordance with the rules of the Louisiana State Racing Commission.

*Id.*

331. *See id.* (establishing categories of individuals to be statutorily excluded from racetracks in Louisiana).

332. *See* LA. ADMIN. CODE tit. 35, § 1801 (2009) (stating rule adopted and meant to be applied pursuant to R.S. ch. 4§§ 192-193).

333. *See id.* (providing additional two categories for expulsion at racetracks).

established categories.<sup>334</sup> Nevertheless, in *Sims v. Jefferson Downs Racing Association* the Fifth Circuit stated in dicta that:

The proprietary rights of the racetrack are limited by this rule only with respect to permittees. The 1981 amendment preserved the proprietary rights of the racetrack with respect to others, because § 2 of Acts of 1981, No. 779, which amended Title 4, Chapter 4, provided: ‘Nothing contained in the provisions of this Act should in any way affect or be construed to limit or modify the proprietary rights of any owner of any establishment licensed to operate or conduct any exotic wagering or pari-mutuel wagering or pools.’<sup>335</sup>

The Louisiana Supreme Court in a subsequent case, which dealt with licensees and not patrons, declined to address the specific contention on patrons raised in the *Sims* case.<sup>336</sup> The court said, “Although *Sims* suggests that R.S. 4:193(C) limits the proprietary rights of racetracks only with respect to permittees and that the 1981 amendment, 1981 Acts, No. 779 § 2, preserved the proprietary rights of the racetrack with respect to others, we do not reach that question since it is beyond the scope of the issue before us.”<sup>337</sup>

Unlike Louisiana, common law states uphold the rule of total management discretion in patron exclusions, which remains the law.<sup>338</sup> One recent example is found in *Village of North Randall v. Offenburger* where a patron appealed a criminal trespassing conviction.<sup>339</sup> In the case, Thistledown security advised the patron, who had a betting dispute that if he did not return certain alleged overpayments, he would not be allowed on the track.<sup>340</sup> Additionally, management informed the patron that if he returned to the track

334. *But see* *Sims v. Jefferson Downs Racing Ass’n*, 778 F.2d 1068 (5th Cir. 1985) (acknowledging proprietary rights of racetrack are limited with respect to permittees).

335. *Id.* at 1076 n.5, (citing *Fox v. La. State Racing Comm’n*, 433 So. 2d 1123 (La. Ct. App. 1983)).

336. *See* *Wolf v. La. State Racing Comm’n*, 545 So. 2d 976 (La. 1989) (holding that conditioning race participation on execution of agreement violated jockeys’ rights as licensed permittees of La. State Racing Commission).

337. *Id.* at 979.

338. *See, e.g.*, *Vill. of N. Randall v. Offenburger*, 1994 Ohio App. LEXIS 1587, at \*1 (Ohio Ct. App. Apr. 14, 1994) (noting rule of total management discretion in patron exclusions as law).

339. *See id.* (recounting case facts).

340. *See id.* at \*2 (stating basis of patron’s exclusion from track).

without paying the money, he would be arrested.<sup>341</sup> The patron failed to follow these commands and on a return visit to the track he was arrested.<sup>342</sup> Disputing the arrest, the patron argued that the track was a place of public accommodation open to all, and that only the Ohio Racing Commission could eject patrons.<sup>343</sup> The court reviewed the Ohio precedents, ultimately finding that under the common law rule there was no general right to be admitted to a racetrack.<sup>344</sup>

Patron exclusions based on the *Marrone* common law theory have been upheld in Arizona, Arkansas, Florida, Kentucky, Maryland, and New York.<sup>345</sup> Accordingly, where the common law governs, there have only been two instances where courts have imposed restrictions on the common law right to exclude patrons.<sup>346</sup> One such instance was in *Tamelleo v. New Hampshire Jockey Club*.<sup>347</sup> In so holding the court asserted: "We interpret that part of the statute which allows the defendant licensee to exercise its 'sole judgment' to mean that the judgment cannot be exercised in a capricious, arbitrary or unreasonable manner."<sup>348</sup> The greater threat to the common law right to exclude patrons came in *Uston v. Resorts*

341. *See id.* (asserting patron received written notice "informing him that if he returned to the racetrack he would be arrested for trespassing).

342. *See id.* (detailing arrest of patron).

343. *See id.* at \*5 ("Authority to eject patrons from a race track rests solely with the Ohio Racing Commission . . . accordingly, [race track] did not have the authority to eject. . .").

344. *See id.* at \*7 (clarifying patron's privilege to be at racetrack was revoked therefore track was within its common law right to exclude patron from premises).

345. *See* *Silbert v. Ramsey*, 482 A.2d 147 (Md. 1984) (allowing racetrack to exclude patron from attending races); *James v. Churchill Downs, Inc.*, 620 S.W.2d 323 (Ky. Ct. App. 1981) (finding common law right to exclude patrons from racetrack); *Tropical Park, Inc. v. Jock*, 374 So. 2d 639 (Fla. Dist. Ct. App. 3d Dist. 1979) (upholding exclusions in racetracks found in common law); *Nation v. Apache Greyhound Park, Inc.*, 579 P.2d 580 (Ariz. Ct. App. 1978) (following common law exclusions); *People v. Licata*, 268 N.E.2d 787 (N.Y. 1971) (denying defendant from racetrack after being convicted of bookmaking); *Griffin v. Southland Racing Corp.*, 370 S.W.2d 429 (Ark. 1963) (permitting common law exclusions); *In re Saumell v. N.Y. Racing Ass'n*, 447 N.E.2d 706, 709 (N.Y. 1983) ("Nor is there anything . . . to suggest that the Legislature intended to pre-empt NYRA's common-law power of exclusion."); *In re Presti v. N.Y. Racing Ass'n*, 46 A.D.2d 387 (N.Y. App. Div. 2d Dep't 1975) (excluding racing broker from racetrack); *In re Vaintraub v. N.Y. Racing Ass'n*, 28 A.D.2d 660 (N.Y. App. Div. 1st Dep't 1967) (holding that race track may exclude people except for race, color or national origin).

346. *See* *Tamelleo v. N.H. Jockey Club, Inc.*, 163 A.2d 10 (N.H. 1960) (placing limits on licensee's right to exclude patrons); *Uston v. Resorts Int'l Hotel, Inc.*, 445 A.2d 370 (N.J. 1982) (restricting licensee's exclusion power).

347. *See* *Tamelleo*, 163 A.2d at 10 (holding bill in equity valid allowing proprietors of race tracks to admit or exclude anyone they choose and statute valid authorizing licensee of racetrack to exclude any person within sole judgment of licensee).

348. *Id.* at 13.

*International Hotel, Inc.*<sup>349</sup> In this case, Kenneth Uston, a blackjack player, who was renowned for his card counting abilities had been banned from Resorts International Hotel's blackjack tables.<sup>350</sup> The New Jersey Casino Control Commission who promulgated the blackjack rules, however, had no regulations on the exclusion of card counters.<sup>351</sup> Citing the common law exclusion cases, the Casino Control Commission confirmed the exclusion.<sup>352</sup> The New Jersey Supreme Court found for Uston because he had not violated any of the Commission's rules.<sup>353</sup> In addition, the court felt "constrained to refute any implication arising from the Commission's opinion that, absent supervening statutes, the owners of public accommodations enjoy an absolute right to exclude patrons without good cause."<sup>354</sup>

The court went on to find that both the views of the casino and the Commission were incorrect as these views pertained to the common law, forgetting common law's right of reasonable access to public places.<sup>355</sup> The court found that the absolute right of exclusion in New Jersey had been narrowed by several court decisions.<sup>356</sup> The effect of this narrowing of common law was:

[T]hat when property owners open their premises to the general public in the pursuit of their own property interests, they have no right to exclude people unreasonably. On the contrary, they have a duty not to act in an arbitrary or discriminatory manner toward persons who come on

---

349. *See Uston* 445 A.2d at 370 (noting threat to common law right to exclude patrons).

350. *See id.* at 371 (explaining strategy of card counting tilted odds in favor of patron under promulgated blackjack rules).

351. *See id.* at 373 (arguing exhaustive statutes made clear Casino Control Commission's control over rules and conduct of licensed casino was intended to be comprehensive therefore, Uston's gaming was "conducted according to rules promulgated by the Commission").

352. *See id.* at 372-73, (disagreeing with Casino Control Commission's choice upholding Resorts' exclusion decision under common law right to exclude).

353. *See id.* at 375 ("[A]bsent a valid [Casino Control] Commission regulation excluding card counters excluding card counters, respondent Uston will be free to employ his card counting strategy at Resorts' blackjack tables.").

354. *See id.* at 372 ("We hold that the common law right to exclude is substantially limited by a competing common law right of reasonable access to public places.").

355. *See id.* at 374 ("At one time an absolute right of exclusion prevailed" however, "common law has evolved" and "the more private property is devoted to public use, the more it must accommodate the rights which inhere in individual members of the general public who used that property.").

356. *See id.* at 374-75 (discussing precedent that narrowed right to exclude in public places).

their premises. That duty applies not only to common carriers. . . but to all property owners who open their premises to the public. Property owners have no legitimate interest in unreasonably excluding particular members of the public when they open their premises for public use.<sup>357</sup>

The court found that, under its concept of the common law, the casino did have some rights to exclude patrons.<sup>358</sup> It could exclude disorderly and disruptive people as well as people who threaten the security of the premises.<sup>359</sup> The court specifically noted that the casino would have the right to exclude “the disorderly, the intoxicated, and the repetitive petty offender.”<sup>360</sup> Therefore suggesting that the casino’s decision to exclude must be reasonable.<sup>361</sup> Because Uston was neither a security threat nor a disruptive influence, the casino had no common law right to exclude him.<sup>362</sup> Instead, Uston had a right of reasonable access to the casino.<sup>363</sup> A short time later, the New Jersey Supreme Court, in *Marzocca*, refused to apply the “reasonable access” theory to licensees.<sup>364</sup>

While the opinion in *Uston* has received a favorable academic reception, New Jersey remains the only state follow such a theory.<sup>365</sup> As a result, in all other states where the common law has not been abrogated by legislative enactments, the *Marrone* case continues to remain the law with respect to patrons at racetracks.<sup>366</sup> The law on patron exclusions in state courts remains largely what it was in

---

357. *Id.* at 375 (citation omitted).

358. *See id.* (noting casino’s right to exclude patrons).

359. *See id.* (allowing casinos to exclude patrons who were disorderly, disruptive, or threatened security).

360. *Id.* (articulating specific exclusions still allowed under common law in New Jersey).

361. *See id.* (“Property owners have no legitimate interest in unreasonably excluding particular members of the public when they open their premises for public use.”).

362. *See id.* (establishing reasonability of exclusion determined on case-by-case basis).

363. *See id.* (holding under circumstances and without valid contrary rules by Commission, Uston had right of reasonable access to Resorts International’s blackjack tables).

364. *See Marzocca v. Ferone*, 461 A.2d 1133, 1135-37 (N.J. 1983) (discussing right to reasonable access).

365. *Uston v. Resorts Int’l Hotel, Inc.*, 445 A.2d 370 (N.J. 1982) (suggesting limited application of holding in patron exclusion cases).

366. *See Marrone v. Wash. Jockey Club of D.C.*, 227 U.S. 633, 636 (1913) (upholding patron exclusion as good law).

1913.<sup>367</sup> Seemingly, the courts, like Justice Holmes, “see no reason for declining to follow the commonly accepted rule.”<sup>368</sup>

### VIII. CONCLUSION

Often when people think of Justice Oliver Wendell Holmes’ place in sports law they think of *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs* which provided an antitrust exemption for major league baseball.<sup>369</sup> Yet the importance of this decision has been diminished by collective bargaining agreements, judicial decisions governing the interpretation of those agreements, and legislative enactments.<sup>370</sup> On the other hand, the effect of the *Marrone* decision has certainly continued to be extremely significant to the horse racing industry.<sup>371</sup> The unlimited discretion that *Marrone* provided for racetracks in patron exclusion remained largely unchallenged for the first five decades of the twentieth century.<sup>372</sup> Even now, the decision influences the basic law in almost all cases involving the exclusion of patrons or individuals who hold licenses to engage in horse racing.<sup>373</sup> While it may be difficult to envision the “Yankee from Olympus” consorting with the likes of Joseph Marrone, Riley Grannan, Manny Greenberg, or even Coley Madden, Justice Holmes’ influence on the sport cannot be denied. Holmes decision in *Marrone* truly places him in the winners’ circle in terms of his influence on the sport of horse racing.<sup>374</sup>

---

367. *See id.* (suggesting law concerning patron exclusions remains unchanged since 1913).

368. *Id.* at 636.

369. *See* Fed. Baseball Club, Inc. v. Nat’l League of Prof’l Baseball Clubs, 259 U.S. 200 (1922) (discussing case dealing with baseball antitrust).

370. *See* Kan. City Royals Baseball Corp. v. Major League Baseball Players Ass’n, 532 F.2d 615 (8th Cir. 1976) (presenting dispute between players and owners over collective bargaining agreements). *See also* Mitchell Nathanson, *The Irrelevance of Baseball’s Antitrust Exemption: A Historical Review*, 58 RUTGERS L. REV. 1 (2005) (examining Major League Baseballs’ antitrust exemption); Martin M. Tomlinson, *The Commissioners New Clothes: The Myth of Major League Baseball’s Antitrust Exemption*, 20 ST. THOMAS L. REV. 255 (2008) (concentrating on antitrust exemption and split in interpretations); Curt Flood Act of 1998, 15 U.S.C. § 26b (2006) (reviewing application of antitrust laws to professional major league baseball); Nathaniel Grow, *Reevaluating the Curt Flood Act of 1998*, 87 NEB. L. REV. 747 (2009) (explaining labor relations between MLB and MLBPA).

371. *See Marrone*, 227 U.S. at 636 (serving as primary authority in horse racing).

372. *See id.* (providing legal basis for laws regarding patron exclusions at racetracks).

373. *See id.* (retaining influence within horse racing).

374. *See* CATHERINE DRINKER BOWEN, *YANKEE FROM OLYMPUS: JUSTICE HOLMES AND HIS FAMILY* (1944) (addressing life of Justice Holmes).