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Horse Racing and the Law: A Legislative Proposal to Harness Race-Fixing

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HORSE RACING AND THE LAW: A LEGISLATIVE PROPOSAL TO HARNESS RACE-FIXING

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I. Introduction

Recent investigations of race-fixing schemes in thoroughbred racing have focused public attention on the sport historically referred to as the "Sport of Kings."[1] These investigations, however, have done little to enhance racing's integrity. In fact, there are indications that the nation's leading spectator sport for more than a quarter of a century is now on the decline.[2] The significance of de-

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1. Some historians consider the best account of the first horse races to have been recorded in 1171 during the reign of King Henry II by William Fitzstephen, Monk of Canterbury. The account was later translated and quoted by Sir John Stow in SURVEY OF LONDON (1528):

> When a race is to be run [at Smithfield Market among hackneys and charging steeds] by this sort of horses, and perhaps by others which, in their kind, are also strong and fleet, a shout is imediately raised and the common horses are ordered to withdraw out of the way. Three jockeys, or sometimes only two, as the match is made, prepare themselves for the contest. . . . The horses on their part are not without emulation; they tremble and are impatient, and are continually in motion. At last, the signal once given, they start, devour the course, and hurry along with unremitting swiftness. The jockeys, inspired with the thought of applause and the hope of victory, clap spurs to their willing horses, brandish their whips, and cheer them with their cries.

R. LONGRIGG, THE HISTORY OF HORSE RACING 23 (1972). Although interrupted briefly by King Henry VIII and Oliver Cromwell in 1654, the sport was encouraged and perpetuated by succeeding English monarchs which eventually led to its being dubbed the "Sport of Kings." M. DRAGER, THE MOST GLORIOUS CROWN 7 (1975).

2. Attendance, the true barometer of the sport's health, declined for the second consecutive year in 1979. The 1979 attendance figures were less than the 1978 figures, THE AMERICAN RACING MANUAL 216 (1980), the latter having been 0.6% lower than the attendance figures in 1977. *Id.* at 214 (1979). Both thoroughbred and harness racing in 1979 attracted nearly 74 million fans who wagered more than $10.5 billion. *Id.* at 1038 (1980). This attendance figure represents a sharp decrease from 1976 when over 80 million fans bet more than $8 billion nationally. *Id.* at 1023, 1024 (1977). New York State has also shown a significant drop in attendance during the past year; over one half million fewer spectators appeared at New York racetracks in 1979 than in 1978. NEW YORK STATE RACING AND WAGERING BOARD - 1979 ANNUAL REPORT 15. *See also* Klein, *Backstretch Blues - Race-Track Operators Worry About Scandals, Lack of Young Patrons*, Wall St. J., June 12, 1980, at 1, col. 1; Barnes and Florio, *Integrity of Racing*, Wash. Post, June 25, 1980, at D5, col. 3 [here-

clining race track attendance and pari-mutuel handle[3] is reflected in tax revenue losses[4] to states which conduct pari-mutuel wagering on horse racing.[5] In addition, the economic impact of decreased

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inafter cited as *Integrity of Racing*]. It appears that the racing industry is not attracting new, younger fans to replace the average middle-age patron who has been the mainstay of racing for years. Joseph Kellman of the Illinois Racing Commission recently commented that "Young people who might be interested in racing read the papers and they read about drugs and fixed races. Do you think this encourages them to come out to the track? It's bad enough to lose your money legitimately. The public is just tired of being screwed." *Integrity of Racing, supra*, at col. 5.

3. The term "handle" in pari-mutuel parlance refers to the total amount of money wagered on a particular race, daily card (an afternoon's program of racing), or during a race meeting, season or year. "Pari-mutuel" wagering was originated by a Frenchman, Pierre Oller, and literally means to wager "among ourselves." In this type of wagering, winning bettors receive all the money wagered by the losers, after a percentage is deducted by the "house" (racetrack/racing association) for acting as agent or "stake-holder" for all the bets. The percentage deducted is referred to as commission or "take out" and is fixed by state law. This percentage varies from state to state and in New York is 17% at both thoroughbred and harness tracks. It is divided at thoroughbred tracks as follows: the state-5%, the racing association-8.6%, purses-3%, and the breeders fund-.4%. N.Y. UNCONSOL. LAWS § 7959 (McKinney Supp. 1979). *See generally* T. AINSLIE, AINSLIE'S COMPLETE GUIDE TO THOROUGHBRED RACING 54-62 (1968).

4. Tax revenue to states includes pari-mutuel taxes, track license fees, occupational license fees, admission taxes, franchise fees and breakage. "Breakage" is the difference between true mutuel odds and the lesser, rounded amounts given to winning players after computations have been made deducting state, track and purse percentages from pari-mutuel pools. THE AMERICAN RACING MANUAL 1039 (1980).

An indication of the dependence of pari-mutuel revenues upon the public's perception of racing as an honest sport is reflected by the legislative declaration accompanying an amendment to the pari-mutuel revenue law, Ch. 267, § 1, [1977] N.Y. Laws 343:

> The legislature further declares that the revenue the state has received from pari-mutuel betting since its inception has been and is a basic necessity to the support of the state and local governments, and that the large amount of real estate and school tax monies paid by the tracks and horse breeding farms is significantly important to taxpayers in local communities; that the large number of persons employed in the horse breeding farms' industry, when added to the thousands of people employed in the many fields of endeavor that provide the horses for tracks and breeding farms, and by their supportive suppliers, can jointly constitute an intrinsic segment of the state's economy.

5. Twenty-eight states conduct on-track, pari-mutuel betting on thoroughbred and/or harness racing and derive revenue there from. These states are: Arizona, Arkansas, California, Colorado, Delaware, Florida, Idaho, Illinois, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont, Washington and West Virginia. In addition, New York and Connecticut conduct legalized off-track betting ("OTB") on races run primarily at New York racetracks. THE AMERICAN RACING MANUAL 1039 (1980). In 1979, New York State realized $30,904,081 in tax revenues from these OTB operations. NEW YORK STATE RACING & WAGERING BOARD 1979 ANNUAL REPORT 5.

attendance and handle is felt by racetrack employees.[6] Perhaps the most significant impact of these declines is upon the quality of the sport. When pari-mutuel handles are down, racing associations[7] cannot offer substantial purses[8] as inducements to horsemen to

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Total pari-mutuel tax revenue to New York State in 1979 amounted to $85,753,409 as compared to $100,918,276 in 1978, reflecting a 15% decrease. In 1977, the total amounted to $108, 564,328, reflecting a 7% decrease from 1977 to 1978. THE AMERICAN RACING MANUAL 1040, 1044 (1979). These figures do not include New York State OTB revenues. Although based upon races run primarily at New York tracks, OTB revenues are not helpful for comparison purposes because they do not reflect monies derived from attendance at New York racetracks.

Most likely to be adversely affected by these declines are the major metropolitan centers like New York, Chicago and Los Angeles where horseracing is very popular. In Los Angeles, two major tracks, Hollywood and Santa Anita Parks, generate daily average attendances of approximately 25,000 with daily average handles of approximately $4 million. Chicago's two major tracks, Arlington and Sportsman's Parks, account for a daily average attendance of roughly 11,000 with an average handle of $1.5 million daily. New York's Belmont Park and Aqueduct race track averaged 17,500 fans daily with an average daily handle of $3.2 million in 1979. THE AMERICAN RACING MANUAL 224-28 (1980).

6. Trainers, jockeys, stablehands, exercise riders, valets, racing officials, attendants, ushers, food service and maintenance employees, security guards, pari-mutuel tellers and countless others depend upon racing to earn a living. In March 1973, the Delafield Commission (the "Commission") *see* note 15 *infra*, summarized its findings on horseracing in a report issued to the legislature on behalf of New York State Governor Rockefeller. The Commission concluded that "[h]orseracing is a valuable economic and recreational asset to the State of New York. The industry directly employs 20,000, generates $200 million in revenue to government annually, provides entertainment to more patrons than all other professional sporting events in New York combined and is a vital economic base to many of the State's communities." REPORT OF GOVERNOR'S COMMISSION ON THE FUTURE OF HORSE RACING IN NEW YORK STATE 117 (1973) [hereinafter cited as the DELAFIELD COMMISSION REPORT]. In making its various recommendations, the Commission was cognizant of these facts and concluded that "[t]he future of horseracing as a sport, employer, and source of government revenue depends upon the maintenance of high levels of attendance at the tracks." *Id.* at 124. At present, thoroughbred racing, for example, provides more than 10,000 jobs and contributes approximately $1 billion annually to New York State's economy. THE NEW YORK RACING ASSOCIATION MEDIA GUIDE 6 (1980).

7. The New York Racing Association ("NYRA"), for example, was created by the New York state legislature in 1955 as a non-profit, non-dividend paying corporation chartered to conduct thoroughbred racing at Aqueduct, Belmont Park and Saratoga racetracks. It is governed by a 23 member Board of Trustees who serve without compensation. Board members are the sole stockholders of NYRA and may sell their shares only to successor trustees at the original sale price. The state charter also grants NYRA a 25 year franchise on thoroughbred racing which has been extended through the 1985 racing season. NYRA pays the state a franchise fee of not less than $30,000 per racing day for the right to conduct races and offer pari-mutuel wagering. In addition, NYRA must adhere to the rules and regulations of the New York State Racing and Wagering Board. *See* Ch. 812, § 1-a, [1955] N.Y. Laws 1211; N.Y. UNCONSOL. LAWS § 7902 (McKinney 1979).

8. "Purses" are the prize monies awarded to the first four finishers in each race. At New

race at their tracks, thus threatening the future of quality horse racing.

The United States Supreme Court recently examined an approach by the states towards stricter regulation of horse racing and thereby rescue the sport from its decline. However, the Court in *Barry v. Barchi*[9] upheld the constitutionality of a New York statute[10] governing, *inter alia*, administrative hearing procedures for

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York thoroughbred tracks, the winner receives 60% of the total purse, the second place finisher 22%, the third 12% and the fourth 6%. Despite decreasing attendance, purses have been increasing due to OTB's contribution to New York tracks for their purses. Purse distribution in the United States set a record in 1979 with a gross of $415,414,224. In New York, where total purse money is the highest in the country, NYRA offered $52,278,250 in purses during the 1979 racing season. This amount exceeded California's three major tracks' total purse monies which amounted to $36,611,514. THE AMERICAN RACING MANUAL 218-23 (1980).

Horse owners receive their horse's respective share of the purse distribution. A trainer generally receives 10% of the horse's distributive share as does the jockey; 10% of a jockey's winnings is given to his agent for arranging the mount or ride.

9. 443 U.S. 55 (1979).

10. N.Y. UNCONSOL. LAWS § 8022 (McKinney 1979) provides:

> If the state harness racing commission shall refuse to grant a license applied for under this act, or shall revoke or suspend such a license granted by it, or shall impose a monetary fine upon a participant in harness racing the applicant or licensee or party fined many demand, within ten days after notice of the said act of the commission, a hearing before the commission and the commission shall give prompt notice of a time and place for such hearing at which the commission will hear such applicant or licensee or party fined in reference thereto. *Pending such hearing and final determination thereon, the action of the commission in refusing to grant or in revoking or suspending a license or in imposing a monetary fine shall remain in full force and effect.* The commission may continue such hearing from time to time for the convenience of any of the parties. Any of the parties affected by such hearing may be represented by counsel, and the commission may be represented by the attorney-general, a deputy attorney-general or its counsel. In the conduct of such hearing the commission shall not be bound by technical rules of evidence, but all evidence offered before the commission shall be reduced to writing, and such evidence together with the exhibits, if any, and the findings of the commission, shall be permanently preserved and shall constitute the record of the commission in such case. In connection with such hearing, each member of the commission shall have the power to administer oaths and examine witnesses, and may issue subpoenas to compel attendance of witnesses, and the production of all material and relevant reports, books, papers, documents, correspondence and other evidence. The commission may, if occasion shall require, by order, refer to one or more of its members or officers, the duty of taking testimony in such matter, and to report thereon to the commission, but no determination shall be made therein except by the commission. Within thirty days after the conclusion of such hearing, the commission shall make a final order in writing, setting forth the reasons for the action taken by it and a copy thereof shall be served on such applicant or licensee or party fined, as the case may be. The action of the commission in refusing to grant a license or in revoking or suspending a license or in imposing a

suspended harness licensees. In so holding, the Court failed to consider the recent wave of corruption that has swept the thoroughbred racing industry, a fact which would certainly have mandated a different result. This Article will first examine the relevant court decisions involving license suspensions in horse racing. An evaluation of the corruption present in both the harness and thoroughbred racing industries will be set forth in Part III. Finally, this Article will propose legislative amendments to the relevant statutory provisions which should serve to stem the tide of thoroughbred corruption and help restore the public's confidence in the sport.

II. Relevant Court Decisions

A. *Hubel v. West Virginia Racing Commission*

In *Hubel v. West Virginia Racing Commission,*[11] an owner/trainer of a thoroughbred racehorse had his license suspended for a period of forty-seven days following a test which revealed that his horse had been drugged prior to winning the third race at a West Virginia track. The owner filed suit in district court challenging a rule of the West Virginia Racing Commission which prohibits a stay of any suspension of an owner's or a trainer's license to engage in horse racing pending a hearing and formal determination of those responsible for the drugging of a racehorse. Although it was not disputed that the owner's license as an owner/trainer was a property right entitled to due process protection, the district court found that the owner's usual right to notice and hearing before disciplinary sanctions are applied, was outweighed by important state interests. Therefore, notice and hearing were permitted to follow temporary suspension. In affirming the district court's decision, the Fourth Circuit enunciated the rationale that was to be used later by state racing commissions across the country as justification for the suspension of licenses before a final administrative adjudication had been made:

> The state has at least two substantial interests to be served. It has a hu-

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monetary fine shall be reviewable in the supreme court in the manner provided by the provisions of article seventy-eight of the civil practice law and rules. (footnote omitted).

11. 513 F.2d 240 (4th Cir. 1975).

manitarian interest in protecting the health of the horse, and it has a broader and more weighty interest in protecting the purity of the sport, both from the standpoint of protecting its own substantial revenues derived from taxes on legalized pari-mutuel betting and protecting patrons of the sport from being defrauded. Collectively, these interests, we think, justify the severe penalty of disqualifying a horse that has been drugged, its trainer and perhaps its owner, from further participation in legalized racing until the matter can be heard and determined and an appropriate final sanction formulated. . . . [I]mmediate suspension without the possibility of stay, deters tampering and promotes care.[12]

B. *Barchi v. Sarafan*

A similar situation as that in *Hubel* was presented in *Barchi v. Sarafan*.[13] Barchi, a harness trainer, was accused of having improperly treated his horse with a drug in violation of the rules[14] of the New York State Racing and Wagering Board ("Racing Board").[15] Relying upon those presumptions of the Racing Board which place responsibility upon the trainer in such circumstances,[16] the Racing Board suspended Barchi's license[17] for fifteen

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12. *Id.* at 243.

13. 436 F. Supp. 775 (S.D.N.Y. 1977), *aff'd in part, rev'd in part sub nom.* Barry v. Barchi, 443 U.S. 55 (1979).

14. [1974] 9 N.Y.C.R.R. § 4120.4 provides in part:

No person shall, or attempt to, or shall conspire with another or other to:

(a) Stimulate or depress a horse through the administration of any drug, medication, stimulant, depressant, hypnotic or narcotic. . . .

(d) Administer any drug, medicant, stimulant, depressant, narcotic or hypnotic to a horse within 48 hours of its race.

15. The New York State Racing and Wagering Board ("Racing Board") was created by the legislature, Ch. 346, § 1, [1973] N.Y. Laws 480, in response to recommendations made in the Delafield Commission Report. *See* note 6 *supra*. Historically referred to as the Delafield Commission because of its appointed chairman Charles B. Delafield, the Commission recommended the creation of "a single agency . . . consolidating and reorganizing the State Racing (Thoroughbred), Harness Racing, Quarter Horse Racing and Pari-Mutuel Off-Track Betting Commissions." DELAFIELD COMMISSION REPORT *supra* note 6, at 126. Originally recommended as the "New York State Racing Board," the legislature expanded the Racing Board's jurisdiction to include all legalized gambling such as off-track betting, games of chance and bingo. The Racing Board presently oversees all thoroughbred and harness racing and had regulated quarter-horse racing until 1978. Its responsibilities include, *inter alia*: the approving of New York harness and thoroughbred racing dates; the sanctioning of hunt and steeplechase meetings in New York; the granting, suspending and revoking of all licenses issued as well as the conducting of all disciplinary proceedings held in connection with any rule violations by any licensees. The Racing Board consists of three members appointed by New York's governor. Each member serves for a six-year appointment.

16. *Presumptions.* Whenever the test or tests prescribed in section 4120.1 hereof disclose the presence in any horse of any drug, stimulant, depressant or sedative, in any

days.[18] Notice to Barchi of his suspension was given sixteen days after the race and after he had undergone two lie-detector tests, both of which supported his lack of knowledge of the drugging.[19] After having been suspended without a hearing Barchi had the option of filing a notice of appeal with the Racing Board within ten days of the date of the notice of suspension.[20] Had Barchi chosen to file such notice, however, the original fifteen-day suspension would have lapsed by the time an administrative hearing could

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amount whatsoever, it shall be presumed: (a) that the same was administered by a person or persons having the control and/or care and/or custody of such horse with the intent thereby to affect the speed or condition of such horse and the result of the race in which it participated; (b) that it was administered within the period prohibited by subdivision (d) of section 4120.4 of this Part; and (c) that a sufficient quantity was administered to affect the speed or condition of such animal. [1974] 9 N.Y.C.R.R. § 4120.5.

Trainers' responsibility. A trainer shall be responsible at all times for the condition of all horses trained by him. No trainer shall start a horse or permit a horse in his custody to be started if he knows, of if [*sic*] by the exercise of reasonable care he might have known or have cause to believe, that the horse has received any drug, stimulant, sedative, depressant, medicine, or other substance that could result in a positive test. Every trainer must guard or cause to be guarded each horse trained by him in such manner and for such period of time prior to racing the horse so as to prevent any person not employed by or connected with the owner or trainer from administering any drug, stimulant, sedative, depressant, or other substance resulting in a positive test. *Id.* § 4120.6.

Trainers' responsibility. A trainer is responsible for the condition, fitness, equipment, and soundness of each horse at the time it is declared to race and thereafter when it starts in a race. *Id.* § 4116.11.

17. Barchi's "trainer-driver" license issued by the Racing Board is peculiar to harness racing. In thoroughbred racing, two separate and distinct licenses are issued for jockeys and trainers because a jockey generally does not train the horses he rides. Harness trainers, however, are often the drivers of their horses. To avoid licensing processing complications, the Racing Board issues one dual license.

18. N.Y. UNCONSOL. LAWS § 8010(2) (McKinney 1979) provides in part:

The commission may suspend or revoke a license issued pursuant to this section if it shall determine that (a) the applicant or licensee (1) has been convicted of a crime involving moral turpitude; (2) has engaged in bookmaking or other form of illegal gambling; (3) has been found guilty of any fraud in connection with racing or breeding; (4) has been guilty of any violation or attempt to violate any law, rule or regulation of any racing jurisdiction for which suspension from racing might be imposed in such jurisdiction; (5) or who has violated any rule, regulation or order of the commission, or (b) that the experience, character or general fitness of any applicant or licensee is such the participation of such person in harness racing or related activities would be inconsistent with the public interest, convenience or necessity or with the best interests of racing generally.

19. 436 F. Supp. at 777.

20. *See* note 10 *supra*.

have been scheduled. Instead, Barchi commenced an action in the United States District Court for the Southern District of New York[21] to enjoin the enforcement of the suspension. Barchi challenged section 8022 of the Unconsolidated Laws of New York ("section 8022")[22] on both due process and equal protection grounds. With respect to the former, he contended that section 8022 permitted the Racing Board to suspend him without granting him either a pre-suspension or a prompt post-suspension hearing. The suspension, Barchi argued, can and often does result in the loss by a trainer of his clientele of owners. During this period of suspension, owners must hire new trainers because there can be no hiatus in the care of a racehorse. Owners frequently retain these newly-acquired trainers after the suspension period has lapsed.[23] The monetary damage suffered by a trainer in these circumstances is significant.[24] Therefore, Barchi argued that there was no remedy at law to recoup this loss of income and clientele, should it be found at a later administrative hearing that his suspension was improperly imposed.[25]

The Racing Board countered Barchi's arguments for provisional relief with the traditional rebuttal employed by state racing commissions throughout the country in license suspension situations.[26] Immediate suspension was necessary, the Racing Board argued, in order to protect the integrity and reputation of the sport and to insure public safety:

> Historically both the tracks and the State authorities have found it imperative that harness racing be conducted fairly both in fact and in appearance.

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21. No. 76-3070 (S.D.N.Y. July 13, 1976). The action was commenced pursuant to 42 U.S.C. § 1983 (1976) which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

22. *See* note 10 *supra*.

23. Brief for Appellee at 9, Barry v. Barchi, 443 U.S. 55 (1979).

24. In addition to a daily fee received by a trainer for his services in caring for and training horses, a trainer earns a percentage of the purse his horses win in races. *Id.* *See* note 8 *supra*.

25. Brief for Appellee at 9, Barry v. Barchi, 443 U.S. 55 (1979).

26. *See* text accompanying note 12 *supra*.

> In the past, even the appearance of impropriety has resulted in disorders at the track and jeopardy to the safety of members of the public and the industry.[27]

Barchi's claim that he would suffer irreparable injury unless granted provisional relief was sufficient on its face to convince the district court to issue a temporary restraining order enjoining the Racing Board from further execution of its suspension decision.[28] By staying the enforcement of a Racing Board license suspension, Barchi had accomplished what few other harness trainers had been able to do.[29]

A three-judge panel in analyzing Barchi's claims began with an evaluation of whether the nature of a trainer's license entitles the holder to due process protection.[30] Because the Racing Board's decision to suspend or revoke a license is based upon a determination of licensee fault or misconduct, the court found that a licensee's interest warrants such constitutional protection.[31] The next consideration in a due process analysis involves the balancing of, *inter alia*, the private and governmental interests involved.[32] Barchi's in-

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27. Brief for Appellee at 11, Barry v. Barchi, 443 U.S. 55 (1979) (quoting Affidavit of John M. Dailey, counsel to the New York State Racing and Wagering Board (Aug. 26, 1976)).

28. *See* Barchi v. Sarafan, 436 F. Supp. at 777.

29. Six months elapsed by the time the Racing Board's motion for dismissal of Barchi's complaint for lack of subject matter jurisdiction was denied and a three-judge court was convened. The Racing Board urged the three-judge court to abstain from exercising its jurisdiction pending an "authoritative" state interpretation of section 8022. *Id.* at 778. The district court, while acknowledging the doctrine of absention, felt that the constitutionality of the harness statute was not an open question of state law. In citing Tappis v. New York State Racing and Wagering Bd., Harness Racing Div., 36 N.Y.2d 862, 331 N.E.2d 697, 370 N.Y.S.2d 922 (1975), the district court determined that the New York Court of Appeals' decision that the statute sufficiently complied with the requirements of due process was a conclusive finding of constitutionality. 436 F. Supp. at 779.

30. 436 F. Supp. at 780. *See* Goss v. Lopez, 419 U.S. 565 (1975); Board of Regents v. Roth, 408 U.S. 564 (1972).

31. 436 F. Supp. at 780. *See* Connell v. Higginbotham, 403 U.S. 207 (1971); Bell v. Burson, 402 U.S. 535 (1971).

32. 436 F. Supp. at 780-81. The factors applicable to a due process determination were set forth in Matthews v. Eldridge, 424 U.S. 319, 335 (1976):

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: *first*, the private interest that will be affected by the official action; *second*, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and *finally*, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural

terest affected by the suspension of his license is the right to a livelihood.[33] On the other hand, New York wishes to ensure that sports be honestly conducted and that personal injury and property damage as a result of rioting after suspicious race results be avoided.[34] In addition, the state has a substantial financial interest at stake.[35] In balancing the relative weight of these interests, the court took notice of the time it presently takes the state to decide license suspension cases. It was clear that, in Barchi's case, a prompt hearing could have been conducted within the sixteen days the state required in imposing its sanctions. Moreover, expediting such hearings would not overburden the state because the statute already provides for review hearings.[36] Therefore, the court concluded that the "absence of either a pre-suspension hearing or a *prompt* post-suspension hearing denies plaintiff the meaningful review due process requires."[37]

Barchi also alleged that section 8022 denied him equal protection of the law because the statute prohibits stays of harness license suspensions pending administrative review, whereas the statutory counterpart for thoroughbred racing suspensions[38] does not contain a similar prohibition. The Racing Board argued that the disparity between the provisions of the two statutes was justifiable on the ground that harness racing was more susceptible to corruption than thoroughbred racing.[39]

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requirement would entail.

33. 436 F. Supp. at 781. *See* notes 23-24 *supra* and accompanying text.

34. 436 F. Supp. at 781.

35. *See* notes 4-6 *supra* and accompanying text.

36. 436 F. Supp. at 781. *See* note 10 *supra*.

37. 436 F. Supp. at 782 (emphasis in original).

38. N.Y. UNCONSOL. LAWS § 7915(3) (McKinney 1979) provides in part:

> No license shall be revoked unless such revocation is at a meeting of the state racing commission on notice to the licensee, who shall be entitled to a hearing in respect of such revocation. In the conduct of such hearing the commission shall not be bound by technical rules of evidence but all evidence offered before the commission shall be reduced to writing, and such evidence together with the exhibits, if any, and the findings of the commission, shall be permanently preserved and shall constitute the record of the commission in such case. The action of the commission in refusing, suspending or in revoking a license shall be reviewable in the supreme court in the manner provided by the provisions of article seventy-eight of the civil practice law and rules. . . .

39. 436 F. Supp. at 783. The Racing Board also contended that, in practice, there is no difference in treatment between thoroughbred and harness racing because the Racing Board

In applying the "traditional" equal protection test,[40] the court sought a rational state interest which could justify classifying the harness racing sector separately from the thoroughbred racing sector.[41] In addition to noting the Racing Board's failure to present evidence supporting its claim that harness racing was more prone to corruption or fraudulent manipulation,[42] the district court found the special legislative classification to bear little relation to the state's purpose: "The grant or denial of a stay is an individual determination. Even if a factually unsupported assertion of greater corruption in the harness industry is accepted by the Court, there is no relationship between a stay's availability and such probabilities of corruption."[43] Therefore, the court found the statute to violate the equal protection clause of the fourteenth amendment.[44]

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can grant stays in the harness industry as a matter of administrative grace. *Id.* at 782. This argument was dismissed by the court as being inconsistent with the defendant's previous due process argument that swift enforcement is essential in regulating harness racing. *Id.*

40. *Id.* at 783. This type of equal protection test was applied because § 8022 creates no suspect classification and involves no fundamental interests. *See* Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

41. 436 F. Supp. at 783.

42. Reliance was placed upon Carey v. Population Servs. Int'l, 431 U.S. 678 (1977), to justify placing this burden upon the state. 436 F. Supp. at 783. The burden was shifted to Barchi by the Supreme Court. *See* note 57 *infra* and accompanying text.

43. 436 F. Supp. at 783.

44. A third point raised by Barchi was the constitutionality of the Racing Board's trainers' responsibility rules. *See* note 16 *supra*. These rules provide that when a post-race test of a horse reveals the presence of any drug, it is to be presumed, subject to rebuttal, that the drug was either administered by the trainer or resulted from his negligence in failing to safeguard against its occurrence. Barchi claimed that the rules violated due process by reason of the lack of a rational connection between the absolute responsibility imposed upon a trainer and the misconduct to be inferred from the drugging of a horse. The district court concluded that the rules were not unconstitutional, relying upon the evidentiary presumption's rebuttable nature. The court found a rational connection between the trainer's duty to oversee his horses and the occurrence of tampering. 436 F. Supp. at 784.

The weight of authority in other states has upheld the constitutionality of rules creating an irrebuttable presumption of absolute trainer responsibility. *See, e.g.*, Hubel v. West Virginia Racing Comm'n, 513 F.2d 240 (4th Cir. 1975); Sandstrom v. California Horse Racing Bd., 31 Cal. 2d 401, 189 P.2d 17, *cert. denied*, 335 U.S. 814 (1948); Harbour v. Colorado State Racing Comm'n, 31 Colo. App. 471, 505 P.2d 22 (1973); Division of Pari-Mutuel Wagering v. Caple, 362 So. 2d 1350 (Fla. 1978) (overruling State ex rel. Paoli v. Baldwin, 159 Fla. 165, 31 So. 2d 627 (1947), which had found the rule unconstitutional); Fioravanti v. State Racing Comm'n, 375 N.E.2d 722 (Mass. App. 1978); Dare v. State, 159 N.J. Super. 533, 388 A.2d 984 (Super. Ct. App. Div. 1978); Jamison v. State Racing Comm'n, 84 N.M. 679, 507 P.2d 426 (1973); O'Daniel v. Ohio State Racing Comm'n, 37 Ohio St. 2d 87, 307 N.E.2d 529 (1974); State ex rel. Morris v. West Virginia Racing Comm'n, 133 W. Va. 179, 55

State racing authorities throughout the country, having adhered to the *Hubel* rationale since 1975,[45] were now apprehensive that the *Barchi* court's ruling would encourage suspended licensees in other states to assert similar challenges.[46] Moreover, the court's holding with respect to New York's license suspension procedures would likely send repercussions throughout the entire racing administrative hearing process because racing suspensions and revocations are reciprocally honored by state racing commissions and racetracks throughout the country.[47] Therefore, the Racing Board filed an appeal to the United States Supreme Court[48] which, in March, 1978, noted probable jurisdiction.[49]

C. *Barry v. Barchi*

In *Barry v. Barchi*,[50] Barchi's due process challenge of section 8022 was two-pronged. First, he alleged that the statute was unconstitutional because it permitted his license to be suspended

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S.E.2d 263 (1949). *Contra*, Brennan v. Illinois Racing Bd., 42 Ill. 2d 352, 247 N.E.2d 881 (1969); Mahoney v. Byers, 187 Md. 81, 48 A.2d 600 (1946) (slightly modified strict liability rule approved in Maryland Racing Comm'n v. McGee, 212 Md. 69, 128 A.2d 419 (1957)). *See generally* Annot., 52 A.L.R.3d 206 (1973); Note, *Brennan v. Illinois Racing Board: The Validity of Statutes Making a Horse Trainer the Absolute Insurer for the Condition of his Horse*, 74 DICK. L. REV. 303 (1970).

A concurring opinion filed by Judge Griesa in *Barchi* suggested an amendment to § 8022 similar in some respects to that proposed in this Article. *See* notes 92-103 *infra* and accompanying text. The opinion stated that the statute would not be unconstitutional if the "prohibition of stays" provision was eliminated or

> replaced with a provision allowing the Board to have the discretion to grant a stay pending a hearing. This means that the statute would be constitutionally proper if it granted the Board the discretion to impose pre-hearing sanctions, if this were coupled with the discretion to stay such sanctions pending a hearing.

436 F. Supp. at 785 (Griesa, J., concurring).

45. *See* text accompanying notes 11-12 *supra*.

46. Many at the New York State Racing and Wagering Board, as well as those in the harness racing industry, felt that *Barchi* would cause a flood of hearing requests at the Racing Board. Interview with Joseph Faraldo, Plaintiff-Appellee's counsel in *Barchi*, in New York City (Sept. 15, 1980).

47. Hoffheimer, *Horse-Racing Tips for Lawyers*, 50 A.B.A. L.J. 250, 251 (1964). *See* Hubel v. West Virginia Racing Comm'n, 513 F.2d 240, 242 n.4 (4th Cir. 1975).

48. Jurisdiction of the Supreme Court to review the three-judge court's decision is conferred by 28 U.S.C. § 1253 (1976). *See* MTM, Inc. v. Baxley, 420 U.S. 799, 804 (1975).

49. 435 U.S. 921 (1978). Briefs of *amici curiae* urging affirmance were filed by the Harness Horsemen International, Inc., the Horsemen's Benevolent and Protective Association and the Jockeys' Guild, Inc. The *amicus* brief filed by NYRA urged either reversal or abstention until the statute was interpreted by the New York state courts.

50. 443 U.S. 55 (1979).

without granting him a prior hearing. Second, he claimed that his due process rights were violated because the statute prohibited stays of summary suspensions pending administrative review. As in the district court, the state predicated its argument on its interest in preserving the integrity of horse racing and in protecting the public from harm. The Supreme Court held that the due process clause did not require the holding of an evidentiary hearing prior to the effectuation of Barchi's suspension:

> [T]he State is entitled to impose an interim suspension, pending a prompt judicial or administrative hearing that would definitely determine the issues, whenever it has satisfactorily established probable cause to believe that a horse has been drugged and that a trainer has been at least negligent in connection with the drugging.[51]

However, the Court found that the statute was unconstitutionally applied to Barchi insofar as he did not receive a prompt post-suspension hearing:

> Once suspension has been imposed, the trainer's interest in a speedy resolution of the controversy becomes paramount. . . . [There is] little or no state interest . . . in an appreciable delay in going forward with a full hearing. On the contrary, it would seem as much in the State's interest as Barchi's to have an early and reliable determination with respect to the integrity of those participating in state-supervised horse racing.[52]

Barchi's second argument, that a statutory scheme that prohibits stays of revocations or suspensions for harness racing but not for thoroughbred racing licensees denies harness licensees equal protection of the law, was rejected by the Court.[53] The Court announced the standard to be applied in determining whether a statutory classification violates the equal protection clause of the fourteenth amendment: "[T]he varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational."[54] It was incumbent upon Barchi to demonstrate that the acute problems attending harness racing also

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51. *Id.* at 64. The trainers' responsibility rules, *see* note 16 *supra*, provided the probable cause that Barchi was at least negligent.

52. 443 U.S. at 66.

53. *Id.* at 68.

54. *Id.* at 67 (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)).

plague the thoroughbred racing industry[55] and that the two industries should be identically regulated in all respects.[56] The Court found that Barchi had failed to sustain this burden of proof.[57] Moreover, the Court's examination of the legislative history of section 8022 revealed that the disparate treatment was justifiable because harness racing is more susceptible to corruption.[58] The Court concluded that the statute's prohibition of stays was rationally related to the state's goal of mitigating the threats to the public interest arising in harness racing. Therefore, the Court reversed that part of the district court's decision which declared section 8022 unconstitutional under the equal protection clause.[59]

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55. *Id.* at 67 n.12.

56. *Id.*

57. In contrast to the district court, *see* note 42 *supra* and accompanying text, the Supreme Court placed the burden upon Barchi to show that " 'the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.' " 443 U.S. at 67-68 (quoting Vance v. Bradley, 440 U.S. 93, 111 (1979)).

58. *See* notes 60-68 *infra* and accompanying text.

59. The Court did not decide the issue whether "the procedures under § 8022, as that section may have been modified by . . . [N.Y. State Admin. Proc. Act § 401(3) (McKinney Supp. 1979)], satisfy the strictures of the Due Process Clause . . . [because §] 401(3) did not take effect until . . . two months after Barchi was suspended." 443 U.S. at 68-69 n.13. For a discussion of the effect of this legislation upon § 8022, *see* notes 81-91 *infra* and accompanying text.

The Court also did not address the district court's holding that the rebuttable presumption of trainer responsibility is constitutional. *See* note 44 *supra*. "[A]ppellee did not cross-appeal, and he is not to be heard upon the challenge to that holding made in his brief, since agreement with that challenge would result in greater relief than was awarded him by the District Court." 443 U.S. at 69 n.1 (Brennan, J., concurring in part).

Justice Brennan, joined by Justices Stewart, Marshall and Stevens, concurred in part with the judgment of the majority. Justice Brennan would not have reached the questions whether due process required a pre-suspension hearing and whether the difference between the procedures in harness and thoroughbred racing violates the equal protection clause. This position was based upon the "in the alternative" phrasing of the district court's judgment, *see* text accompanying note 37 *supra*, the absence of a cross-appeal by Barchi, and the "possibly significant changes in the procedures applicable to all future suspensions" by reason of N.Y. STATE ADMIN. PROC. ACT § 401(3) (McKinney Supp. 1979). 443 U.S. at 72, 74. Nevertheless, Justice Brennan remarked that "[t]he record in this case, in my view, raises serious doubts that the alleged state interests in this context are sufficient to justify postponing a trainer's hearing until after his suspension." 443 U.S. at 73 n.5. It is contended that public policy concerns dictate the necessity of summary suspensions in cases involving allegedly egregious conduct in horse racing. *See* text accompanying notes 98-103 *infra*.

III. Corruption in Horse Racing: A Reevaluation of the Equal Protection Analysis

The Supreme Court in *Barry* rejected Barchi's equal protection challenge to section 8022 based upon twenty-five year-old legislative findings that the harness racing industry was especially prone to corruption. An examination of those findings will be set forth, followed by a discussion of the recent developments in thoroughbred racing corruption.

A. The Moreland Commission

In 1953, Governor Thomas E. Dewey established a commission (the "Moreland Commission")[60] to investigate the pari-mutuel harness racing industry following the murder of the president of a harness employees union.[61] The Moreland Commission investigated the following areas: first, the printing and distribution of race track programs at Roosevelt Raceway on Long Island; second, the health and welfare fund of the harness employees union; and third, all aspects of pari-mutuel harness racing in New York State.[62] In its report to Governor Dewey, the Moreland Commission reached the following conclusions: 1) a judge of the County Court, Nassau County, had an interest in a concern which previously had printed the Roosevelt Raceway programs;[63] 2) there was

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60. Members were appointed to the commission under the provisions of N.Y. EXEC. LAW § 6 (McKinney 1972), also known as the Moreland Act:

> The governor is authorized at any time, either in person or by one or more persons appointed by him for the purpose, to examine and investigate the management and affairs of any department, board, bureau or commission of the state. The governor and the persons so appointed by him are empowered to subpoena and enforce the attendance of witnesses, to administer oaths and examine witnesses under oath and to require the production of any books or papers deemed relevant or material. Whenever any person so appointed shall not be regularly in the service of the state his compensation for such services shall be fixed by the governor and said compensation and all necessary expenses of such examinations and investigations shall be paid from the treasury out of any appropriations made for the purpose upon the order of the governor and the audit and warrant of the comptroller. . . .

Id.

61. Report of the New York State Commission to Study, Examine and Investigate State Agencies in Relation to Pari-Mutuel Harness Racing, *reprinted in* PUBLIC PAPERS OF THOMAS E. DEWEY 505 (1954).

62. *Id.* at 506-07.

63. *Id.* at 507-08.

"shocking" waste and mismanagement of the union local's fund;[64] and 3) "unless prompt steps were taken, pari-mutuel harness racing . . . might be jeopardized, with consequent loss of substantial revenue by the State."[65] The investigation disclosed that harness racing had become "a lush and attractive field for every kind of abuse."[66] As a result of these findings, section 8022 was amended[67] to prohibit the granting of a stay pending a hearing and final determination of a license suspension or revocation proceeding. Any appearance of impropriety would be avoided by such a provision. Strict regulation was necessary to prevent further abuses and "to meet a unique situation which does not exist anywhere else in government."[68]

B. Thoroughbred Corruption

It became evident during the 1970's that thoroughbred racing was not immune from corruption. Tony Ciulla, a so-called "mastermind" of race-fixing, was convicted in 1975 of fixing thoroughbred races and received a four to six year prison sentence.[69] In return for relocation, a new identity and immunity from further prosecution, Ciulla agreed to cooperate with the United States Department of Justice in its prosecution of other individuals involved in racing corruption. In the course of testifying at grand jury investigations and race-fixing trials, Ciulla admitted to having fixed literally hundreds of thoroughbred races at thirty-nine tracks throughout the country.[70]

The Justice Department's Organized Crime Task Force began its

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64. *Id.* at 509.

65. *Id.* at 511.

66. N.Y. Legis. Doc. No. 86, 177th Sess., 3, 4 (1954).

67. Ch. 510, § 8, [1954] N.Y. Laws 650.

68. N.Y. Gov. Mess. on Harness Racing, *reprinted in* [1954] N.Y. Laws 1397 (McKinney).

69. SPORTS ILLUSTRATED, Nov. 6, 1978, at 29.

70. The payoffs received by Ciulla from fixing these races were enormous. On August 16, 1973, Ciulla collected $35,000 on one fixed race in Detroit. One month later he won $65,000, also on just one race. It appears that one of Ciulla's favorite schemes was to fix the favorite in the race and then bet all the possible combinations on the remaining horses in exacta or triple type of bets. *Integrity of Racing, supra* note 2, at 1 col. 3. In an exacta type of bet, one must pick the two horses in one race finishing first and second in exact order in order to win. In triple wagering, one must pick the horses that finish first, second, and third in exact order.

investigation of race-fixing schemes in 1973.[71] Because the investigations revealed that these schemes have been conducted on a grand scale, indictments and convictions have continued through today. In July 1979, twenty-one individuals, including jockeys, trainers and organized crime figures, were indicted for fixing races at New England tracks. The majority of them either pleaded guilty or were convicted.[72] In April 1980, fifteen racing figures were indicted for rigging races at Pocono Downs in Wilkes-Barre, Pennsylvania; six individuals were subsequently convicted.[73] As recently as October 1980, several individuals involved in Kentucky thoroughbred racing were indicted for conspiring to fix races at racetracks in Pennsylvania, Ohio, West Virginia, Illinois and Massachusetts.[74]

Information obtained in May 1980 during the trial of a former jockey, who was ultimately found guilty of bribing other jockeys,[75] suggested the extent of thoroughbred corruption in New York. Appearing as a government witness, José Amy, a well-known New York jockey, mentioned ten of the nation's leading jockeys[76] in connection with alleged race-fixing schemes. Three separate investigations of individuals alleged by Amy to have been involved in

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71. SPORTS ILLUSTRATED, Nov. 6, 1973, at 26.

72. Eight individuals pleaded guilty, one was found not guilty and four individuals remain fugitives. There was one dismissal. The seven who were convicted were: Howard T. Winter, Melvin Goldenberg, Elliot Paul Price, James DeMetri, Charles DeMetri, James Martorano and Sidney Tiltsley. No. 79-42MA (D. Mass., filed July 11, 1979). Six of the seven are appealing their convictions. Telephone interview with Judy Dobkin, Justice Department Organized Crime Task Force attorney, Chicago, Illinois (Oct. 27, 1980).

73. The convicted individuals were: Joseph Sciandra, Paul Whiteman, Ronald Scott, Lucien Parent, Vernon Ewalt and Guy Tumminello. No. 79-50 (M.D. Pa., filed Apr. 3, 1980). Four individuals pleaded guilty while three remain fugitives. In addition, there were two dismissals. Telephone interview with Judy Dobkin, Justice Department Organized Crime Task Force attorney, Chicago, Illinois (Oct. 27, 1980).

74. The individuals indicted were Charles Lee Wonder, William Morgan Combee, Burley Clouston II and Burley Clouston III. No. 80-0023O (W.D. Ky., filed Oct. 9, 1980). Telephone interview with Fred Partin, Assistant United States Attorney, Western District of Kentucky, Owensboro, Kentucky (Oct. 28, 1980).

75. Con Errico was found guilty by a New York jury of bribing jockeys in a scheme to fix nine races at Aqueduct and Saratoga in 1974 and 1975. He was fined $25,000 and sentenced to 10 years in prison. United States v. Con Errico, No. 80-137 (E.D.N.Y., filed May 19, 1980).

76. Amy revealed the names of several leading money-winning New York jockeys, including Jorge Velasquez, Jacinto Vasquez and Angel Cordero, Jr. *Integrity of Racing, supra* note 2, at col. 5.

these schemes are currently being conducted.[77]

The findings made by the Moreland Commission in 1954 in connection with corruption in harness racing[78] were only tangential to the actual conduct of the sport. In contrast, the indictments and convictions for thoroughbred race-fixing are directly related to the running of races and to pari-mutuel wagering. It appears now that, at a minimum, the "acute problems attending harness racing also plague the thoroughbred racing industry."[79] The fact that the number of fixed thoroughbred races is said to be in the hundreds[80] obviates the previous justification for disparate treatment of harness and thoroughbred licensees.

IV. A Legislative Analysis

In view of the recent evidence of corruption in the thoroughbred industry, Barchi's equal protection claim carries is more significant today than it was when first presented in *Barry*. More importantly, it has become imperative to impose some form of stricter regulation upon horse racing in order to rescue the sport from any further decline. In this section, the effect, if any, of the State Administrative Procedure Act upon section 8022 suspension procedures will be discussed. In addition, a series of legislative amendments will be proposed which should serve not only to rectify the equal protection problem posed by section 8022 but also to ameliorate the ailing horse racing industry.

A. The State Administrative Procedure Act

The State Administrative Procedure Act ("SAPA")[81] was enacted in 1975 "to provide uniform procedures for administrative

77. The United States Attorney's Office for the Eastern District of New York, the New York State Racing and Wagering Board and the New York Racing Association are interviewing jockeys, trainers, owners and other racing figures in order to establish whether any other information can be obtained for possible future indictments. Interview with Sal Curiale, Counsel to the New York Racing and Wagering Board, in New York City (Oct. 22, 1980).

78. *See* notes 60-68 *supra* and accompanying text.

79. Barry v. Barchi, 443 U.S. at 67.

80. Interview with Paul Coffey, deputy chief of the Justice Department Organized Crime Division, in New York City (Oct. 22, 1980). *See* Integrity of Racing, *supra* note 2, at D5, col. 3 ("Never has there been any series of prosecutions of this magnitude in the history of sports.").

81. Ch. 167, § 1, [1975] N.Y. Laws 226 (eff. Sept. 1, 1976).

rule-making, hearings and the issuance of licenses by State agencies."[82] Section 401(3) of SAPA provides the state with the authority to summarily suspend a license if the "public health, safety, or welfare imperatively requires emergency action. . . ."[83] The question whether this SAPA provision is applicable to the suspension provisions of section 7915 of the thoroughbred racing statute was apparently answered in *Gerard v. Barry*.[84] There, the Appellate Division of the New York Supreme Court nullified a Racing Board order summarily suspending a veterinarian's license to practice medicine at racetracks on the ground that the Racing Board had not made "any finding that the public health, safety, or welfare imperatively required such emergency action as a suspension prior to a hearing."[85] The Racing Board in *Barry* contended that the Appellate Division mistakenly applied the requirements of section 401(3) of SAPA to the *Gerard* case.[86] The provisions of Article Four of SAPA apply "when licensing is required by statute to be preceded by notice and opportunity for hearing."[87] Under the licensing provisions of section 7915,[88] there is no requirement of prior notice and hearing. Likewise, section 8010[89] of the harness

82. Memorandum of Gov., *reprinted in* [1975] N.Y. Laws 1742.

83. If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered, effective on the date specified in such order or upon service of a certified copy of such order on the licensee, whichever shall be later, pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

N.Y. STATE ADMIN. PROC. ACT § 401(3) (McKinney Supp. 1979).

84. 59 A.D.2d 901 (2d Dep't 1977), *appeal dismissed*, 44 N.Y.2d 729, 376 N.E.2d 932, 405 N.Y.S.2d 459 (1978).

85. 59 A.D.2d at 901.

86. Brief for Appellant at 9, Barry v. Barchi, 443 U.S. 55 (1979).

87. N.Y. STATE ADMIN. PROC. ACT. § 401(1) (McKinney Supp. 1979).

88. If the state racing commission shall find that the financial responsibility, experience, character and general fitness of the applicant are such that the participation of such person will be consistent with the public interest, convenience or necessity and with the best interests of racing generally in conformity with the purposes of this act, it shall thereupon grant a license. If the commission shall find that the applicant fails to meet any of said conditions, it shall not grant such license and it shall notify the applicant of the denial.

N.Y. UNCONSOL. LAWS § 7915(2) (McKinney 1979).

89. N.Y. UNCONSOL. LAWS § 8010(2) (McKinney 1979) provides in part:

If the state harness racing commission shall find that the experience, character and general fitness of the applicant are such that the participation of such person in harness horse race meets will be consistent with the public interest, convenience and

statute does not require licensing to be preceded by notice and an opportunity for a hearing. Therefore, it would appear that SAPA does not apply to license suspensions in harness and thoroughbred racing.

The New York Court of Appeals has not yet specifically addressed the applicability of SAPA to suspensions in the thoroughbred industry. Nevertheless, the procedures under section 8022, even if modified by SAPA, would still result in an unconstitutional denial of equal protection of the laws and would fail to resolve adequately the problems plaguing horse racing for two reasons. First, a thoroughbred licensee could still procure a section 7915 administrative stay following a summary suspension under SAPA section 401(3) whereas a harness licensee could not. Second, SAPA requires the agency to make a "public welfare" finding in order to justify summary suspension of a license. Although the Racing Board would contend that the participation of a "drugged" horse in a race is anathema to honest horse racing, thereby reflecting a finding of public welfare,[90] there remain other instances suggesting corruption such as indictments for race-fixing which may not satisfy this "public welfare" standard.[91] These allegedly corrupt practices prove equally damaging to the sport's integrity. Reliance upon SAPA's effect, if any, upon the presently deficient statutory procedures would therefore be misplaced. Legislative amendments are needed to remedy the situation.

B. A Statutory Proposal

The Supreme Court in *Barry* implicitly suggested that any constitutional problems arguably presented by section 8022 could be addressed by the New York state legislature. The Court noted that section 8010(2) of the harness statute has "engendered a clear expectation of continued enjoyment of a license absent proof of cul-

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necessity and with the best interests of racing generally in conformity with the purposes of this act, it may thereupon grant a license.

Id. (footnote omitted).

90. Brief for Appellants at 19 n.*, Barry v. Barchi, 443 U.S. 55 (1979).

91. Although the Racing Board would make the argument that a race-fixing indictment would endanger the public safety so as to require emergency summary suspension, the "public welfare" standard places a substantial burden of proof on the state. Indeed, the Racing Board was unable to meet this burden in *Gerard*.

pable conduct. . . ."[92] In other words, a licensee's property interest in his license is derived from state law.[93] Relying upon the language of *Board of Regents v. Roth*,[94] the Court appeared to indicate that where a state statute by its terms creates rights[95] and circumscribes remedies,[96] the holder of such rights is entitled only to such due process as is granted thereunder.[97]

Therefore, it appears that the procedures in license suspension proceedings could be further circumscribed by legislative amendment in order to preserve the integrity of the sport. Both the har-

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92. 443 U.S. at 64 n.11.

93. For a similar discussion of Barchi's property interest, see *id.* at 70 n.2 (Brennan, J., concurring in part).

94. 408 U.S. 564 (1972). *Roth* defined the nature of property interests as follows:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by *existing rules or understandings* that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. at 577 (emphasis added).

95. *See* N.Y. UNCONSOL. LAWS §§ 7915(1), 7915(2), 8010 (McKinney 1979).

96. *See id.* §§ 7915(3), 8022.

97. *See* Leis v. Flynt, 439 U.S. 438, 441 (1979); Matthews v. Eldridge, 424 U.S. 319, 335 (1976); Perry v. Sindermann, 408 U.S. 593, 601-02 (1972); Pugliese v. Nelson, 617 F.2d 916, 922 (2d Cir. 1980) ("Considerable weight is given to whether the alleged liberty interest is in the nature of 'a bird in the hand' rather than one in the bush."); Thompson v. Bass, 616 F.2d 1259, 1264 (5th Cir. 1980); Devine v. Cleland, 616 F.2d 1080, 1086 (9th Cir. 1980); Metropolitan Hous. Dev. v. Village of Arlington Hts., 616 F.2d 1006, 1018 (7th Cir. 1980); Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 447 (2d Cir. 1980); McCarthy v. Cortland County Community Action Program, 487 F. Supp. 333, 343 (N.D.N.Y. 1980). Individuals who are discharged oftentimes argue that the reasons given for such action *stigmatize* the individual and damage his or her reputation in the community. When a governmental discharge imposes a stigma and restricts the individual's ability to seek and obtain employment, such action may be a deprivation within the meaning of the fourteenth amendment. The argument that a summary suspension upon indictment for a racing-related offense creates a "stigma plus," Paul v. Davis, 424 U.S. 693, 701-10 (1976); Webster v. Redmond, 599 F.2d 793, 799-801 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 712 (1980); Blank v. Swan, 487 F. Supp. 452, 455 (N.D. Ill. 1980); Scotto v. Waterfront Comm'n, ___ A.D.2d ___, ___, 425 N.Y.S.2d 832, 834 (1st Dep't 1980), thereby requiring procedural due process protections, Board of Regents v. Roth, 408 U.S. at 573; Wahba v. New York Univ., 492 F.2d 96 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974); Jones v. Kneller, 482 F. Supp. 204, 210 (E.D.N.Y. 1979), is without merit. The indictment, not the summary suspension, creates the stigma. As long as a mechanism is available whereby an individual has "an opportunity to refute the charge . . . [and] to provide the person an opportunity to clear his name," Board of Regents v. Roth, 408 U.S. at 573 n.12, a suspended individual's due process rights are satisfied. *See* Codd v. Velger, 429 U.S. 624, 627 (1977); Larry v. Lawler, 605 F.2d 954, 959-63 (7th Cir. 1978).

ness and thoroughbred sections[98] of the statute should be amended to provide that a licensee who is indicted[99] for a racing-related crime[100] could have his license summarily suspended by the Racing Board. By including a racing-related indictment as an additional ground for summary suspension or revocation of a license, the state would be furthering its "important interest in assuring the integrity of racing carried on under its auspices."[101] No equal protection problem would arise because the amendment would be applicable to both the harness and thoroughbred industries.

The "prohibition of stay" provision found in section 8022[102] seeks to avoid the appearance of impropriety in horse racing and should apply in instances where egregious conduct could threaten racing's integrity. These circumstances include convictions for crimes involving moral turpitude, fraudulent racing or breeding practices, bookmaking activities, as well as indictments for racing-related crimes. With respect to suspensions for racing-related indictments, the proposed amendment should additionally provide that the licensee could not be reinstated until the charges are disposed of or the licensee exculpates himself at a prompt post-suspension administrative hearing. In view of the corruption which exists in the entire racing industry, there is no longer any justification for disparate treatment of harness and thoroughbred licensees.

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98. N.Y. UNCONSOL. LAWS §§ 8010(2), 7915(2) (McKinney 1979).

99. An indictment, although only a formal charge, is nevertheless based upon some evidence. N.Y. CRIM. PROC. LAW § 190.65(1) (McKinney 1971). Similarly, the Supreme Court in *Barry* concluded that "[a]t the interim suspension stage, an expert's affirmance [of a positive drug finding], although untested and not beyond error, would appear sufficiently reliable to satisfy constitutional requirements." 443 U.S. at 65.

100. *See* N.Y. PENAL LAW § 180.50 (McKinney 1975) which provides:

> A person is guilty of tampering with a sports contest when, with intent to influence the outcome of a sports contest, he tampers with any sports participant, sports official or with any animal or equipment or other thing involved in the conduct or operation of a sports contest in a manner contrary to the rules and usages purporting to govern such a contest.
>
> Tampering with a sports contest is a class A misdemeanor.

See also 18 U.S.C. § 224(a) (1976) which provides:

> Whoever carries into effect, attempts to carry into effect, or conspires with any other person to carry into effect any scheme in commerce to influence, in any way, by bribery any sporting contest, with knowledge that the purpose of such scheme is to influence by bribery that contest, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

101. Barry v. Barchi, 443 U.S. at 64.

102. *See* note 10 *supra*.

Therefore, section 7915 of the thoroughbred statute should be amended to add a "prohibition of stay" provision so that it would be in harmony with its counterpart in harness racing.

Other infractions that occur in horse racing[103] do not have the same adverse effect upon the integrity of the sport as do the serious violations just enumerated. In suspension or revocation proceedings involving these relatively minor infractions, there is no need for a mandatory provision prohibiting stays. Rather, the amended sections should provide that the decision whether to grant or deny a stay should remain within the Racing Board's discretion.

V. Conclusion

Although the Supreme Court adequately addressed the due process issue presented in *Barry*, the Court's disposition of Barchi's equal protection claim is no longer viable. Since the Court's decision, information has surfaced indicating that corruption exists in the thoroughbred racing industry. That the twenty-six year-old

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103. *See, e.g.*, [1974] 19 N.Y.C.R.R. § 4035.2 which provides:

Foul riding penalized. (a) When clear, a horse may be taken to any part of the course provided that crossing or weaving in front of contenders may constitute interference or intimidation for which the offender may be disciplined.

(b) A horse crossing another so as actually to impede him is disqualified, unless the impeded horse was partly in fault or the crossing was wholly caused by the fault of some other horse or jockey.

(c) If a horse or jockey jostle another horse, the aggressor may be disqualified, unless the impeding horse or his jockey was partly in fault or the jostle was wholly caused by the fault of some other horse or jockey.

(d) If a jockey wilfully strike another horse or jockey or ride wilfully or carelessly so as to injure another horse, which is in no way in fault, or so as to cause other horses to do so, his horse is disqualifed.

(e) When a horse is disqualifed under this section every horse in the same race belonging wholly or partly to the same owner, in the discretion of the stewards, may be disqualifed.

(f) Complaints under this section can only be received from the owner, trainer or jockey of the horse alleged to be aggrieved and must be made to the clerk of the scales or to the stewards before or immediately after his jockey has passed the scales. But nothing in this section shall prevent the stewards taking cognizance of foul riding.

(g) Any jockey against whom a foul is claimed shall be given the opportunity to appear before the stewards before any decision is made by them.

(h) A jockey whose horse has been disqualified or who unnecessarily causes his horse to shorten his stride with a view to complaint, or an owner, trainer or jockey who complains frivolously that his horse was crossed or jostled, may be punished.

Moreland Commission findings should still mandate the statutory denial of an administrative stay *only* in harness racing in view of the recent disclosures of thoroughbred corruption would appear to affront any notions of equal protection.

Unless immediate remedial steps are taken by the state legislature, the "Sport of Kings" could become the "Sport of Thieves." Although the proposed legislative amendments would limit the ability of suspended racing licensees to continue their occupations at racetracks pending an administrative or judicial review, these amendments are the desperately needed initial step towards stricter regulation by the state.[104] With their passage, the racing

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104. The economic health of the racing industry and the tax revenues it generates depend on its acceptance by the public as a fair and honest sport. *See* Brief for Appellants at 16, Barry v. Barchi, 443 U.S. 55 (1979). *See also* note 4 *supra*. A number of states have enacted statutes designed to achieve this purpose, including provisions for summary suspensions in cases of suspected violations of law or racing rules. *See, e.g.*, COLO. REV. STAT. §§ 12-60-105 (3), 24-4-104(4) (1973); FLA. STAT. ANN. § 550.10(4)(b) (West Supp. 1980); ILL. ANN. STAT. ch. 8, § 37-16 (Smith-Hurd Supp. 1980) (includes "prohibition of stay" provision); KY. REV. STAT. §§ 230.320, 230.720 (1977) ("prohibition of stay" provisions in both thoroughbred and harness industries); PA. STAT. ANN. tit. 15, § 2618 (Purdon Supp. 1980) (includes "prohibition of stay" provision in harness industry). *But see* OHIO REV. CODE ANN. § 3769.091 (Page 1980) (appeal to commission shall stay suspension until further action by the commission); W. VA. CODE §§ 19-23-15 to 16 (1977) (demand for hearing operates automatically to stay or suspend execution of order suspending or revoking license).

There are bills currently pending in the United States House of Representatives and Senate which would prevent the use of any medication or therapeutic method of alleviating pain in horses participating in a race. The bill recommending passage of the Corrupt Horse Racing Practices Act of 1980 provides in part:

Sec. 3. The Congress finds that-

(1) the practice of drugging or numbing a race horse prior to a horse race-

(A) corrupts the integrity of the sport of horse racing and promotes criminal fraud in such sports,

(B) misleads the wagering public and those desiring to purchase such horse as to the condition and ability of such horse,

(C) poses an unreasonable risk of serious injury or death to the rider of such horse and to the riders of other horses competing in the same race, and

(D) is cruel and inhumane to the horse so drugged or numbed;

(2) the practice of drugging or numbing a race horse adversely affects and burdens interstate commerce; and

(3) criminal penalties and other sanctions are necessary in order to prevent and eliminate such practices.

Sec. 4. The following conduct is prohibited:

(1) the entering of a horse in a horse race by the trainer or owner of such horse if such trainer or owner knows of if [*sic*] by the exercise of reasonable care such trainer or owner should know that such horse is drugged or numbed;

(2) the drugging or numbing of a race horse with knowledge or with reason to be-

industry would be in a better position to ensure public confidence and regain the integrity the sport vitally needs to maintain its place as a valuable economic and recreational asset to the State of New York.

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lieve that such horse will compete in a horse race while so drugged or numbed; Provided, That the Administrator may by regulation establish permissible trace levels of substances foreign to the natural horse that he determines to be innocuous;

(3) the willful failure by the operator of a horse racing facility to disqualify a horse from competing in a horse race if such operator has, in accordance with section 6(a) of this Act, been notifed that such horse is drugged or numbed, or was not properly made available for tests or inspections as required under such section, and

(4) the willful failure by the operator of a horse racing facility to prohibit a horse from racing if such operator has, in accordance with section 5(f) of this Act, been notified that such horse has been suspended from racing. . . .

(b) Disqualification of Offenders.-(1) Except as provided in paragraph (2) of this subsection, any person who violates any provision of this Act, upon conviction thereof, by order of the Administrator, be disqualifed from entering a horse in a horse race, operating a horse racing facility, or performing for gain any service rendered in connection with horse racing, for a period not to exceed one year.

(2) Any person who violates any provision of this Act and who has been previously convicted for a violation of such Act shall, by order of the Administrator, be disqualifed from entering a horse in a horse race, operating a horse racing facility, or performing for gain any service rendered in connection with horse racing, for a period not to exceed five years. . . .

(d) Suspension of Horse from Racing.-(1) Any race horse found to have been drugged or numbed in violation of this Act shall, subject to paragraph (2) of this subsection, be suspended from competing in any horse race for a period of six months for the first infraction, and for a period of not less than twelve months for each subsequent infraction.

(2) No race horse shall be suspended under paragraph (1) of this subsection unless the owner of such horse is given notice and an opportunity for a hearing before the Administrator within two weeks after the date on which the infraction referred to in such paragraph is discovered. . . .

(e) Notification of Suspensions and Disqualifications.-Notification of all suspensions and disqualifications under this section shall be transmitted to the operator of each horse racing facility in accordance with such procedures as the Administrator shall by regulation prescribe. . . .

S.2636, 96th Cong., 2d Sess. (1980).

This bill was introduced in the 96th Congress and had twenty-two co-sponsors in the House of Representatives and five in the Senate. Telephone interview with Arnold Kirkpatrick, Executive Secretary of the Racing Advisory Committee, American Horse Council, Washington, D.C. (Oct. 30, 1980).