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1983]

GAMING—NEW JERSEY'S CASINO CONTROL ACT AND A CASINO  
PATRON'S RIGHT OF REASONABLE ACCESS PREVENT CASINOS  
FROM EXCLUDING CARD COUNTERS

*Uston v. Resorts International Hotel, Inc.* (N.J. 1982)

In January, 1979, the New Jersey Casino Control Commission (Commission)<sup>1</sup> promulgated a regulation<sup>2</sup> that effectively increased the recognized advantage of blackjack players who employ the technique known as card counting.<sup>3</sup> On January 30, 1979, Resorts International Hotel, Inc., (Resorts) excluded Kenneth Uston from the game of blackjack in the Resorts casino because he employed the card counting strategy.<sup>4</sup> Uston protested his exclu-

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1. *Uston v. Resorts Int'l Hotel, Inc.*, 89 N.J. 163, 445 A.2d 370 (1982). The Commission is the administrative body that regulates casino gambling in New Jersey and is charged by the legislature with general responsibility for implementing the Casino Control Act. See N.J. STAT. ANN. §§ 5:12-1 to -152 (West Supp. 1982). For a discussion of the power and duties of the Commission, see notes 15-17 *infra*.

2. N.J. ADMIN. CODE tit. 19, § 47-2.5 (1980). This regulation restricted the frequency with which the cards could be shuffled at the blackjack tables. 89 N.J. at 166-67, 445 A.2d at 371. The regulation was promulgated by the Commission pursuant to N.J. STAT. ANN. § 5:12-70 (West Supp. 1982). For the relevant text of § 5:12-70, see note 16 *infra*. This regulation remained in effect until September 15, 1982, when the Commission promulgated new regulations in response to the decision in *Uston*. See 14 N.J. Admin. Reg. 559 (proposing new blackjack regulations); *id.* at 841 (adopting new blackjack regulations). For a discussion of the new regulations, see notes 99-103 and accompanying text *infra*.

3. 89 N.J. at 167, 445 A.2d at 371. The card counter keeps a running tally of the cards as they are dealt and adjusts betting strategies according to the relative number of high and low cards remaining in the deck. *Id.* at 166, 445 A.2d at 371. As the cards are dealt, the odds fluctuate and sometimes heavily favor the player; restricting reshuffling allows the odds to fluctuate more dramatically. *Uston v. Resorts Int'l Hotel, Inc.*, No. 79-2, Final Order at 23 (Casino Control Comm'n Dec. 31, 1979), *rev'd*, 179 N.J. Super. 223, 431 A.2d 173 (App. Div. 1981), *aff'd*, 89 N.J. 163, 445 A.2d 370 (1982).

The card counting strategy was developed through statistical and computer analysis of the probabilities involved in the game. See Baldwin, Cantey, Maisel & McDermott, *The Optimum Strategy in Blackjack*, 51 J. AM. STATISTICAL A. 429 (1956). An independent study of the game of blackjack by a private research firm concluded that an aggressive card counter could achieve a 2.5% advantage over the casino. Supplemental Brief of Respondent/Petitioner at 46a, *Uston v. Resorts Int'l Hotel, Inc.*, 89 N.J. 163, 445 A.2d 370 (1982). This compares with a 0.5-1.5% advantage of the casino over the average player. *Id.* Kenneth Uston had concluded that blackjack offered the best advantage of any New Jersey casino game. See generally K. USTON, MILLION DOLLAR BLACKJACK (1981). Normally, all commercial gambling is premised on odds favoring the proprietor. King, *Public Gaming and Public Trust*, 12 CONN. L. REV. 740, 749 (1980).

4. 89 N.J. at 167, 445 A.2d at 372. Resorts began excluding all suspected card counters after an inquiry to the Commission chairman elicited the response that no statute or regulation prevented a casino from excluding card counters. *Id.* at 167, 445 A.2d at 372. Uston is a well-known teacher and player of blackjack. *Id.* Former Vice-President of the Pacific Stock Exchange and a graduate of the Harvard Gradu-

sion to the Commission, which upheld Resorts' action.<sup>5</sup> On appeal, the New Jersey Superior Court, Appellate Division, reversed the Commission's decision.<sup>6</sup>

The Supreme Court of New Jersey affirmed the decision of the Superior Court,<sup>7</sup> holding that the Casino Control Act vests exclusive authority in the Commission, not the casinos, to exclude patrons based upon their strategy of play, and that Resorts' common law right to exclude Uston for other reasons was outweighed by Uston's competing right of reasonable access to the casino. *Uston v. Resorts International Hotel, Inc.*, 89 N.J. 163, 445 A.2d 370 (1982).

Regulation of gambling in the United States ranges from legalization of certain games in some states<sup>8</sup> to a total prohibition in others.<sup>9</sup> The trend is toward increased legalization of gambling,<sup>10</sup> in part because state govern-

ate School of Business, Uston now makes his living as a professional gambler and author. See generally K. USTON, *supra* note 3.

5. 89 N.J. at 167, 445 A.2d at 372. The Commission held that Resorts, as an amusement operator, had an absolute common law right to exclude patrons for any reason so long as the state and federal civil rights laws were not violated. *Id.* For a discussion of the common law right to exclude, see notes 27-51 and accompanying text *infra*.

6. *Uston v. Resorts Int'l Hotel, Inc.*, 179 N.J. Super. 223, 431 A.2d 173 (App. Div. 1981), *aff'd*, 89 N.J. 163, 445 A.2d 370 (1982). In reversing the Commission, the Appellate Division relied on § 5:12-71 of the Casino Control Act (Act), which directs the Commission to compile a list of persons to be excluded from the casinos. *Id.* at 226-27, 431 A.2d at 175. For the pertinent text of § 5:12-71, see note 19 *infra*. For a discussion of § 5:12-71, see notes 19-22 and accompanying text *infra*. The Appellate Division held that this section of the Act vested exclusive authority in the Commission to designate persons to be excluded, and considered "dubious" the assumption that an earlier New Jersey decision espoused a common law right in a casino to exclude for any reason. 179 N.J. Super. at 227, 431 A.2d at 175 (citing *Garifine v. Monmouth Park Jockey Club*, 29 N.J. 47, 148 A.2d 1 (1959)). The Appellate Division believed that the holding of *Garifine* posited only a right of racetrack owners to exclude suspected undesirables. *Id.* For a discussion of *Garifine*, see notes 34-39 and accompanying text *infra*. For a discussion of the common law right to exclude, see notes 27-51 and accompanying text *infra*.

7. Justice Pashman delivered the opinion of the court, and was joined by Justices Clifford, Schreiber, Handler, and O'Hern. Chief Justice Wilentz did not participate.

8. O'Donnell, *A Chief Executive's Views on the Necessity for Comprehensive State Control and Regulation in the United States Gaming Industry*, 12 CONN. L. REV. 727, 728 (1980). As of 1980, 45 states had some form of legalized gambling. *Id.* A table showing the status of legalized gambling in American jurisdictions as of October, 1977, shows that bingo, horseracing, and lotteries are most common. Rose, *The Legalization and Control of Casino Gambling*, 8 FORDHAM URB. L.J. 245, 265-66 n.99 (1980) (quoting THE COUNCIL OF STATE GOVERNMENTS, RESEARCH BRIEF, LEGALIZED GAMBLING 6 (1978) [hereinafter cited as RESEARCH BRIEF]).

9. Rose, *supra* note 8, at 265-66 n.99 (quoting RESEARCH BRIEF, *supra* note 8, at 6). Hawaii, Mississippi, Missouri, Utah, and Texas had no form of legalized gambling at the time of the study. *Id.*

10. COMMISSION ON THE REVIEW OF THE NATIONAL POLICY TOWARD GAMBLING, GAMBLING IN AMERICA, FINAL REPORT 1 (1976) [hereinafter cited as GAMBLING IN AMERICA]. This report of a congressional commission concludes simply that "[g]ambling is inevitable." *Id.* The report is the result of a three-year study; it also concludes that 80% of the Americans surveyed favored some form of legalized

ments have begun to view legalized gambling as a source of revenue.<sup>11</sup> As states have legalized various forms of gambling, careful regulation has been an important concern.<sup>12</sup> Nowhere is this more apparent than in casino gam-

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gambling. *Id.* at 3. However, this conclusion has been challenged as a "gross-overstatement." Snyder, *Regulation of Legalized Gambling: An Inside View*, 12 CONN. L. REV. 665, 669 (1980). A study funded by the United States Department of Justice similarly concludes that the legalization of certain forms of gambling is the apparent trend. Blakey, *Preface* to NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, *THE DEVELOPMENT OF THE LAW OF GAMBLING: 1776-1976 xx* (1976) (study presenting a thorough analysis of the history of gambling); *see also* Symposium, *Legal Aspects of Public Gaming*, 12 CONN. L. REV. 661-947 (1980) [hereinafter cited as Symposium *Public Gaming*]. Two states, Nevada and New Jersey, and Puerto Rico currently have legalized casino gambling. GAMBLING IN AMERICA, *supra* at 78; O'Donnell, *supra* note 8, at 728-29. Several other states have considered legalization of casino gambling, and the commentators agree that legalization in other states is inevitable. Hawkins, *Casinos and Land Use: Law and Public Policy*, 12 CONN. L. REV. 785, 785 n.2 (1980) (listing Connecticut, Delaware, Iowa, Minnesota, Montana, New Hampshire, South Dakota, and Wyoming as having actively considered legalizing casinos); Hicks, *No Longer the Only Game in Town: A Comparison of the Nevada and New Jersey Regulatory Systems of Gaming Control*, 12 SW. U.L. REV. 583, 626 (1981); O'Donnell, *supra* note 8, at 729; Rose, *supra* note 8, at 248, 299.

11. *See* Symposium *Public Gaming*, *supra* note 10, at 661. With a reported \$17 billion wagered by Americans in 1974, more states have become interested in this revenue source. GAMBLING IN AMERICA, *supra* note 10, at 77. In Nevada, gambling is the single largest industry in the state, employing nearly one-third of the work force and providing nearly half of Nevada's budget as of 1978. Skolnick & Dombrink, *The Limits of Gaming Control*, 12 CONN. L. REV. 762, 772-73 (1980) (citing NEVADA GAMING ABSTRACT (1977)). New York has considered casino gambling as a solution to its financial problems. *Id.* at 770 (citing Interim and Final Reports of the Casino Gambling Study Panel, State of New York (April 16, 1979, and Aug., 1979)). It has been stated that legalized gambling is now a significant part of the American leisure market with a virtually unlimited growth potential. O'Donnell, *supra* note 8, at 729. On the other hand, legal gambling is viewed by one study as a regressive form of taxation with the poor paying a larger proportion of their income. GAMBLING IN AMERICA, *supra* note 10, at 1. The same study also concludes that not all states should expect casino gambling revenues to significantly ease their financial burdens, since these revenues are not capable of supporting a heavily urbanized state. *Id.* at 101. Further, it has been argued that if a state is financially interested in promoting the gambling industry then the controls on gambling will be eroded in response to perceived economic interest. Skolnick & Dombrink, *supra*, at 784. For a discussion of the need for strict regulation of casino gambling, *see* note 12 *infra*.

12. Rose, *supra* note 8, at 299. Strict regulation is considered necessary to prevent corrupt influences and organized crime from infiltrating legalized gambling. *Id.* Virtually all commentators urge strict regulation by individual state governments. *See, e.g.*, King, *supra* note 3, at 761. ("If a state decides to allow . . . [legalized gambling,] it should implement a hard nosed, efficient, and honest system of regulation."); O'Donnell, *supra* note 8, at 731 ("Full and reasonable control by the state . . . is necessary and desirable . . ."); GAMBLING IN AMERICA, *supra* note 10, at 102 (recommending scrupulous control). *See also* Snyder, *supra* note 10, at 724-25 (urging that Congress impanel a new commission to reconsider federal gambling policy). A considerable body of federal gambling regulation exists, although historically the federal government has merely attempted to balance the policies of all jurisdictions. Blakey & Kurland, *The Development of the Federal Law of Gambling*, 63 CORNELL L. REV. 923, 1021 (1978). Strict regulation is also considered necessary for player protection. *See* GAMBLING IN AMERICA, *supra* note 10, at 103 (state should bear responsi-

bling, and New Jersey's Casino Control Act (Act)<sup>13</sup> evidences this concern by expressly declaring it to be public policy that casino gambling be strictly regulated and controlled.<sup>14</sup>

The Act delegates the authority to regulate casino gambling to the Casino Control Commission,<sup>15</sup> which is required to promulgate rules for all

bility for protecting the interests of those whose gambling it promotes); Hicks, *supra* note 10, at 616 (basic rules of operation should be set to protect players).

Some commentators, however, point out that over-regulation can stifle the casino enterprise. See Hicks, *supra* note 10, at 595, 625 (New Jersey's extreme caution in legalization of gambling may stifle the industry and result in a competitive disadvantage); O'Donnell, *supra* note 8, at 739 (over-regulation may discourage innovation, prevent profitable operation, and discourage potential entrants to the industry). In any event, Skolnick and Dombrink argue that control of casino gambling is of limited effectiveness because the revenue-raising motive for legalization of gambling necessarily erodes the control; these authors conclude that promises of strict regulation are often merely a political prerequisite to legalization. Skolnick & Dombrink, *supra* note 11, at 784. For a discussion of New Jersey's regulation of casino gambling, see notes 13-22 and accompanying text *infra*.

13. N.J. STAT. ANN. §§ 5:12-1 to -152 (West Supp. 1982). New Jersey totally suppressed gambling for many years. Note, *The Casino Act: Gambling's Past and the Casino Act's Future*, 10 RUT.-CAM. L. REV. 279, 281 (1979). Although New Jersey's constitution originally did not address the gambling issue, it was amended in 1844 to deny the legislature the power to authorize lotteries. *Id.* at 283-85. A state constitutional convention in 1947 adopted a provision depriving the legislature of the power to authorize gambling but provided for a referendum vote by the citizens on specific gambling proposals. *Id.* at 287-88. This constitutional provision provided the foundation of New Jersey gambling law. *Id.* at 288. See N.J. CONST. art. IV, § 7, ¶ 2. Casino gambling in New Jersey was first proposed on a state-wide basis but was overwhelmingly defeated. Note, *supra*, at 289. In 1976, the state's voters ratified a constitutional amendment authorizing casino gambling solely within Atlantic City. Note, *supra*, at 289. See N.J. CONST. art. IV, § 7, ¶2D (1976) (amended 1981). The constitutionality of this amendment was upheld by the New Jersey Superior Court. *Young v. Byrne*, 144 N.J. Super. 10, 364 A.2d 47 (Law Div. 1976). For a discussion of the resulting legislation, see notes 14-22 and accompanying text *infra*.

14. N.J. STAT. ANN. § 5:12-1(b)(13) (West Supp. 1982). The Act declares that only a system of strict regulation and control can maintain integrity, public confidence, and trust in legalized casino gambling. *Id.* § 5:12-1(b)(7). New Jersey carries out this statutory policy by employing a licensing system, with thorough investigation of license applicants prior to licensing. *Id.* § 5:12-1(b)(8). See generally Hicks, *supra* note 10, at 604-14 (discussing various licensing requirements). The Act declares that legalized casino gambling in Atlantic City is a unique tool for urban redevelopment, and will facilitate the improvement of blighted areas and the expansion of convention and tourist facilities. N.J. STAT. ANN. § 5:12-1(b)(4) (West Supp. 1982). It has been stated that the Act "cover(s) virtually every facet of casino gambling and its potential impact on the public." *Knight v. Margate*, 86 N.J. 374, 381, 431 A.2d 833, 836 (1981). For a discussion of the history of New Jersey's attitude towards gambling, see note 13 *supra*. For a thorough comparison of New Jersey's system of regulation to the Nevada system, see Hicks, *supra* note 10.

15. N.J. STAT. ANN. § 5:12-63(c) (West Supp. 1982). The Commission is granted authority to adopt any regulations it deems necessary or desirable to carry out the provisions of the Act. *Id.* § 5:12-69(a). Further, the Commission is given power to issue subpoenas, to administer oaths, to conduct investigative hearings, and to collect fees, penalties and taxes. *Id.* §§ 5:12-65, -66, -68. The Commission is required to maintain agents in all licensed casinos during operating hours. *Id.* § 5:12-63(f). The Commission is authorized to hear contested cases, including complaints

legislatively authorized games.<sup>16</sup> The Commission may also promulgate any regulations it deems necessary to assure the vitality of casino operations and to assure fair odds to the players.<sup>17</sup> Although neither the Act nor the regulations refer to card counters or card counting,<sup>18</sup> section 5:12-71 of the Act requires the exclusion of certain persons from casino premises.<sup>19</sup> This section

against casino licensees, and to make and issue decisions. *Id.* §§ 5:12-107 to -108. The legislature has provided for limited judicial review of Commission decisions. *Id.* § 5:12-110. A reviewing court may affirm, remand, or reverse, if the Commission's decision is unconstitutional, beyond statutory authority, or arbitrary, capricious or otherwise not in accordance with law. *See id.* § 5:12-110(c)(1)-(3). For a view that additional checks are needed on the broad authority of the Commission, see Note, *supra* note 13, at 302.

16. N.J. STAT. ANN. § 5:12-70(f) (West Supp. 1982). The statute provides in pertinent part as follows:

The commission shall . . . include within its regulations the following specific provisions in accordance with the provisions of this act:

Defining and limiting the areas of operation, the rules of authorized games, odds, and devices permitted, and the method of operation of such games and devices . . . .

*Id.*

17. *Id.* § 5:12-100(e). The statute provides in pertinent part as follows:

All gaming shall be conducted according to rules promulgated by the commission. All wagers and pay-offs of winning wagers at table games shall be made according to rules promulgated by the commission, *which shall establish* such minimum wagers and *other limitations as may be necessary to assure the vitality of casino operations and fair odds to and maximum participation by casino patrons*; provided, however, that a licensee may establish a higher minimum wager with the prior approval of the commission.

*Id.* (emphasis added).

18. While the current blackjack rules do not mention card counting or card counters, a regulation banning card counters was proposed shortly before the *Uston* decision. 14 N.J. Admin. Reg. 467 (1982). At the time of this writing, action on this proposal is still pending. *Id.* at 841 (b). Further, in response to the decision in *Uston*, substantial changes were made in the rules of blackjack to decrease the card counter's advantage. For a discussion of the new rules, see notes 99-103 and accompanying text *supra*.

19. N.J. STAT. ANN. § 5:12-71 (West Supp. 1982). The statute provides in pertinent part as follows:

a. The commission shall, by regulation, provide for the establishment of a list of persons who are to be excluded or ejected from any licensed casino establishment. Such provisions shall define the standards for exclusion and shall include standards relating to persons:

- (1) Who are career or professional offenders as defined by regulation of the commission;
- (2) Who have been convicted of a criminal offense . . . which is punishable by more than 6 months in prison, or any crime or offense involving moral turpitude; or
- (3) Whose presence in a licensed casino would . . . be inimical to the interest of the State of New Jersey or of licensed gaming therein, or both.

The commission shall promulgate definitions establishing those categories of persons who shall be excluded pursuant to this section including cheats and persons whose privileges for licensure or registration have been revoked.

*Id.* The statute also requires giving notice to an individual before placing his name

had not been construed by a New Jersey appellate court prior to *Uston*,<sup>20</sup> but a virtually identical Nevada statute<sup>21</sup> was held to have no bearing on whether card counters could be excluded from a casino.<sup>22</sup>

In the absence of a legislative determination of who may patronize a gambling establishment, the common law is controlling.<sup>23</sup> A proprietor's

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on the exclusion list and provides him an opportunity to demand a hearing with the Commission. *Id.* §§ 5:12-71(e) to -71(i). The regulations promulgated pursuant to this statute define the statute's terms and provide particular details for listing persons to be excluded. *See* N.J. ADMIN. CODE tit. 19, §§ 48-1.1 to -1.8 (1979). For an argument that § 5:12-71 is unconstitutional as a bill of attainder, see Note, *State Regulation of Casino Gambling: Constitutional Limitations and Federal Labor Law Preemption*, 49 FORDHAM L. REV. 1038 (1981).

Card counters are *not* mentioned in these regulations, and the legislative history of § 5:12-71 does not indicate an intent that it be applied to exclude card counters. *See Governor's Staff Policy Group on Casino Gambling, Second Interim Report*, 31-33a (February 17, 1977) [hereinafter cited as *Policy Group Report*]; *State Government Federal and Interstate Relations Committee, Public Hearings on Assembly Bill 2366 (Casino Control Act)* (December 15, 1976) [hereinafter cited as *Casino Act Hearings*]. The *Policy Group Report* recognizes the existence of a common law doctrine allowing racetrack operators to exclude or eject patrons and suggests codification of that doctrine for the benefit of casino operators. *Policy Group Report* at 32. For a discussion of this common law doctrine, see notes 27-39 and accompanying text *infra*. Addressing the area of exclusion of certain undesirable persons, the report asserts that the state's interest is in barring persons with criminal backgrounds and associations from Atlantic City casinos. *Policy Group Report* at 32.

Further, the text of the Casino Act Hearings demonstrates that the legislature used Nevada's regulatory structure for guidance. *Casino Act Hearings* at 61 (Statement of Senator McGann). The *Policy Group Report* specifically notes that § 5:12-71 was adopted from a similar Nevada statute then in effect, which was later construed not to exclude card counters. *Policy Group Report* at 32-33. *Compare* Act of April 15, ch. 376, § 38, 1967 Nev. Stat. 1027, 1041 (current version at NEV. REV. STAT. § 463.151 (1981) with N.J. STAT. ANN. § 5:12-71 (West Supp. 1982). For a discussion of a case interpreting the Nevada statute as not requiring the exclusion of card counters, see note 22 and accompanying text *infra*.

20. For a discussion of the *Uston* court's treatment of § 5:12-71, see note 64 *infra*.

21. *See* Act of April 15, ch. 376, § 38, 1967 Nev. Stat. 1027, 1041 (current version at NEV. REV. STAT. § 463.151 (1981)).

22. *Uston v. Hilton Hotels Corp.*, 448 F. Supp. 116 (D. Nev. 1978). In *Uston v. Hilton Hotels*, *Uston* brought an action against a Nevada casino for its refusal to allow him to play blackjack. *Id.* at 118. The court concluded that Nevada's statutory exclusion scheme did not require the exclusion of card counters. *See* Act of April 15, 1967, ch. 376, § 38, 1967 Nev. Stat. 1027, 1041 (current version at NEV. REV. STAT. § 463.151 (1981)). Finding that the state of Nevada had not significantly participated in the exclusion of card counters, the court concluded that *Uston's* exclusion was not a result of state action, and therefore would not support a claim under § 1983 of Title 42 of the United States Code. 448 F. Supp. at 119-20. *See* 42 U.S.C. § 1983 (1976).

23. The Act states that any provision of law inconsistent with, in conflict with, or contrary to the Act is amended, superseded, or repealed to the extent of the conflict. N.J. STAT. ANN. § 5:12-133(b) (West Supp. 1982). In New Jersey, statutes in derogation of the common law are to be strictly construed. *See Blackman v. Iles*, 4 N.J. 82, 89, 71 A.2d 633, 636 (1950). *See generally* 3 J. SUTHERLAND, STATUTORY CONSTRUCTION §§ 61.01-.05 (C. Sands, 4th ed. 1972).

right to exclude<sup>24</sup> may be limited both by state and federal laws protecting the civil rights of a patron<sup>25</sup> and by a patron's competing right to reasonable access.<sup>26</sup> At common law, an amusement owner had the right to exclude anyone from his premises for any reason.<sup>27</sup> In the landmark English case,

24. For a discussion of a proprietor's common law right to exclude, see notes 27-51 and accompanying text *infra*.

25. Various federal and state civil rights laws, enacted after the adoption of the fourteenth amendment, prohibit discriminatory treatment (i.e., exclusion or segregation) of amusement patrons. See U.S. CONST., amend. XIV. See also N.J. CONST. art. I, ¶5 (no person shall be denied the enjoyment of any civil right). The federal Civil Rights Act of 1964 prohibits discrimination in place of public accommodation, but only when the discrimination is based on race, color, religion, or national origin. 42 U.S.C. § 2000a(a) (1976). A place of public entertainment is a "public accommodation" if its operations affect commerce, or if its discriminatory conduct is supported by state action. *Id.* § 2000a(b)(3). See generally Annot., 7 A.L.R. FED. 415 (1971) (construction and application of this section of the Civil Rights Act of 1964). Additionally, New Jersey has enacted a law which prohibits exclusion from places of public accommodation or amusement based on race, creed, color, national origin, ancestry, marital status, or sex. See N.J. STAT. ANN. § 10:1-3 (West 1976). This statute has been construed by the New Jersey Supreme Court as having no effect on a proprietor's right to exclude for reasons other than those proscribed in the statute. See, e.g., *Garifine v. Monmouth Park Jockey Club*, 29 N.J. 47, 148 A.2d 1 (1959). For a discussion of *Garifine*, see notes 34-39 and accompanying text *infra*.

Some states have enacted statutes which expressly prohibit all unreasonable exclusions from places of public amusement. For a discussion of these statutes, see note 32 and accompanying text *infra*.

26. For a discussion of cases granting a right of reasonable access to property, see notes 40-51 and accompanying text *infra*.

27. See, e.g., *Nation v. Apache Greyhound Park, Inc.*, 119 Ariz. 76, 579 P.2d 580 (Ariz. Ct. App. 1978) (at common law, operators of most businesses have the right to exclude anyone without having to show cause); *Greenfeld v. Maryland Jockey Club*, 190 Md. 96, 57 A.2d 335 (1948) (at common law, one could choose his customers; a patron had no right to attend); *Tamelleo v. New Hampshire Jockey Club, Inc.*, 102 N.H. 547, 163 A.2d 10 (1960) (common law proprietors of private enterprises could admit or exclude whomever they choose); *Madden v. Queens County Jockey Club, Inc.*, 296 N.Y. 249, 72 N.E.2d 697, cert. denied, 332 U.S. 761 (1947) (common law proprietors of private enterprises enjoyed an absolute power to serve whomever they pleased). See also Annot., 1 A.L.R.2d 1165 (1948) (stating the common law rule and collecting cases); 4 AM. JUR. 2d *Amusements and Exhibitions* § 10 (1962); 86 C.J.S. *Theaters & Shows* § 31 (1954). But see *Ferguson v. Gies*, 82 Mich. 358, 365, 46 N.W. 718, 720 (1890) (state's common law provided a remedy for any unjust discrimination in all "public places"); *Donnell v. State*, 48 Miss. 661, 683 (1873) (state's common law provided that all who applied for admission to public shows and amusements were entitled to be admitted). Innkeepers, common carriers, and others engaged in "common callings" did not enjoy this right to exclude; they had a duty to serve everyone without discrimination. See, e.g., W. PROSSER, *HANDBOOK ON THE LAW OF TORTS* 615 (4th ed. 1971); Annot., 1 A.L.R.2d 1165 (1948). However, the operator of a common calling is not under a duty to serve persons whose conduct is disorderly, riotous, or annoying or dangerous to other persons. *Atwater v. Delaware, L. & W. R.R.*, 48 N.J.L. 55, 61, 2 A. 803, 807 (1886). See *Holly v. Meyers Hotel and Tavern, Inc.*, 9 N.J. 493, 89 A.2d 6 (1952) (hotel had a duty to take reasonable steps to prevent its guests from harming other persons). The importance of the business to the public, based upon economic conditions at the time, determined the extent of the duty to serve. *Arterburn, The Origin and First Test of Public Callings*, 75 U. PA. L. REV. 411, 420 (1927); *Wyman, The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156 (1904). A United States Court of Appeals has held that even



*Wood v. Leadbitter*,<sup>28</sup> the Court of Exchequer upheld a landowner's right to exclude, reasoning that, absent a grant by deed of a property interest, a right to enter the land of another is at most a revocable license.<sup>29</sup> Although the decision in *Wood* was questioned in a subsequent English case,<sup>30</sup> a number of American jurisdictions still recognize *Wood's* rule and allow an absolute right to exclude.<sup>31</sup> However, several American jurisdictions have restricted this

though a casino operator may be an innkeeper in the common law sense, the operator is not acting in that capacity in its dealings with a gambling patron and thus has no duty to serve him. *Uston v. Airport Casino, Inc.*, 564 F.2d 1216, 1217 (9th Cir. 1977).

While recognizing that, at common law, an operator of a private enterprise had an absolute right to exclude, commentators differ as to the justification for the rule. See Clark, *Licenses in Real Property Law*, 21 COLUM. L. REV. 757, 781 (1921) (privilege to enter the amusement premises is a revocable license); Conard, *The Privilege of Forcibly Ejecting an Amusement Patron*, 90 U. PA. L. REV. 809, 823 (1942) (requiring a proprietor to show cause to eject a patron would impede his duty to keep his premises safe); Turner & Kennedy, *Exclusion, Ejection, and Segregation of Theater Patrons*, 32 IOWA L. REV. 625, 645 (1947) (proprietor must be allowed room for judgment so that he is not unduly slow to eject persons disturbing his other patrons); Note, *Rights of Ticketholders to Places of Amusement*, 10 MD. L. REV. 169, 184 (1949) (proprietor should be allowed to eject anyone causing a disturbance or who might cause a disturbance). See generally 3 R. POWELL, REAL PROPERTY ¶428, at 34-293 to -300 (1949). For a discussion of the various American approaches to the common law right to exclude, see notes 31-32 and accompanying text *infra*.

28. 13 M. & W. 836, 153 Eng. Rep. 351 (Ex. 1845). In *Wood*, a racetrack ticketholder brought suit against the owner for ejecting him. *Id.* at 841, 153 Eng. Rep. at 353. The ticketholder was ejected for "some alleged malpractice of his on a former occasion." *Id.* at 838, 153 Eng. Rep. at 352.

29. A revocable license is a privilege in *A* to use the land *B*, so long as *B* does not cancel that privilege, and is revocable at any time. R. POWELL, *supra* note 27, ¶428, at 34-293. The court in *Wood* considered and rejected the argument that the purchase of a ticket might give him more than a revocable license, noting that an additional right might arise from a breach of contract, but not from a right to enter the land. 13 M. & W. 836, 855, 153 Eng. Rep. 351, 359 (Ex. 1845).

30. *Hurst v. Picture Theatres, Ltd.*, [1915] 1 K.B. 1 (1914). In *Hurst*, the purchaser of a ticket for a theater seat was ejected from the theater. *Id.* at 2. The theater owner relied on *Wood*, but the lower court in *Hurst*, believing that *Wood* was no longer good law, allowed recovery for the plaintiff. *Id.* at 3. On appeal, the court affirmed, with each judge of the three-judge panel delivering a separate opinion. *Id.* at 4, 11, 15. Lord Justice Buckley was of the opinion that *Wood* was no longer good law because it was decided purely on grounds of law and that an equity court would decide *Wood* differently. *Id.* at 6-9 (Buckley, L.J., concurring). Lord Justice Kennedy concluded that *Wood* was not determinative in the *Hurst* situation. *Id.* at 15 (Kennedy, L.J., concurring). However, he did conclude that the theater owner's act of excluding the patron without cause was no longer legal. *Id.* at 15 (Kennedy, L.J., concurring). Lord Justice Phillimore dissented, concluding that *Wood* was still good law. *Id.* at 20 (Phillimore, L.J., dissenting). For a discussion of the American courts' application of the *Wood* rule, see notes 31-32 and accompanying text *infra*. For a discussion of New Jersey's application of this rule, see notes 33-39 and accompanying text *infra*.

31. See Annot., 1 A.L.R.2d 1165 (1948). See, e.g., *Nation v. Apache Greyhound Park, Inc.*, 119 Ariz. 76, 579 P.2d 580 (Ariz. Ct. App. 1978) (racetrack proprietor must be able to control admission to facilities without risk of a lawsuit for each exclusion); *Griffin v. Southland Racing Corp.*, 236 Ark. 872, 370 S.W.2d 429 (1963) (proprietor of place of amusement is not under common carrier's duty to serve everyone and can exclude anyone he considers undesirable); *Greenfeld v. Maryland Jockey*

common law doctrine by statute.<sup>32</sup>

New Jersey formally adopted the common law doctrine of *Wood* in *Shubert v. Nixon Amusement Co.*<sup>33</sup> Subsequently, in *Garifine v. Monmouth Park Jockey Club*,<sup>34</sup> the New Jersey Supreme Court had another opportunity to consider

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Club, 190 Md. 96, 57 A.2d 335 (1948) (racetrack operator can exclude without reason or excuse); *People v. Licata*, 28 N.Y.2d 113, 268 N.E.2d 787, 320 N.Y.S.2d 53 (1971) (operator of racetrack can exclude so long as not based on race, creed, color, or national origin); *Mosher v. Cook United, Inc.*, 62 Ohio St. 2d 316, 405 N.E.2d 720 (1980) (business invitee did not possess an irrevocable license; licensor could revoke for any reason). In none of these cases did the court question the motives of the proprietors. While American courts following *Wood* frequently allude to the reason for the exclusion, they have not clarified why it is sufficient. *Turner & Kennedy*, *supra* note 27, at 643. *See also* *Garifine v. Monmouth Park Jockey Club*, 29 N.J. 47, 148 A.2d 1 (1959) (concluding that courts throughout the United States have generally adhered to *Wood*). However, some courts have evaluated the reasonableness of the exclusion. *See, e.g.*, *Tropical Park, Inc. v. Jock*, 374 So. 2d 639 (Fla. Dist. Ct. App. 1979), *cert. denied*, 383 So. 2d 1196 (Fla. 1980) (racetrack operator entitled to exclude person suspected to have "underworld" connections); *Toms v. Tiger Lanes, Inc.*, 313 So. 2d 852 (La. Ct. App.), *cert. denied*, 319 So. 2d 443 (La. 1975) (bowling alley proprietor could exclude patron who had threatened other patrons). Two commentators conclude that the rule recognizing an absolute right to exclude is more often stated than actually applied. *Turner & Kennedy*, *supra* note 27, at 642.

32. *See* Annot., 1 A.L.R.2d 1165, 1169 (1948). Civil rights statutes limit the common law right to exclude only with respect to exclusions based on race, color, creed, national origin, or ancestry. *Garifine v. Monmouth Park Jockey Club*, 29 N.J. 47, 59, 148 A.2d 1, 7 (1959). For a discussion of the impact of civil rights laws, see note 25 *supra*. Some states have placed further statutory limitations on this common law right. *See, e.g.*, *Orloff v. Los Angeles Turf Club*, 30 Cal. 2d 110, 180 P.2d 321 (1947) (upheld statute making exclusion from places of amusement unlawful unless patron is disorderly); *Rockwell v. Pennsylvania State Horse Racing Comm'n*, 15 Pa. Commw. 348, 327 A.2d 211 (1974) (common law doctrine abrogated by statute permitting patron's ejection only if his presence is inconsistent with orderly and proper conduct of racing); *Narragansett Racing Ass'n v. Mazzaro*, 116 R.I. 354, 357 A.2d 442 (1976) (statute interpreted to require that person be undesirable and that his presence be inconsistent with orderly and proper conduct of racing as precondition to exclusion). *But see* *Tamelleo v. New Hampshire Jockey Club, Inc.*, 102 N.H. 547, 163 A.2d 10 (1960) (statute providing for exclusion of persons whose presence, in racetrack operator's sole judgment, is inconsistent with orderly and proper conduct of racing is substantially declaratory of common law). *See generally* Annot., 90 A.L.R.3d 1361 (1979) (collecting cases on exclusion of patrons from racetracks).

33. 83 N.J.L. 101, 106, 83 A. 369, 371 (1912). In *Shubert*, plaintiff brought a tort action against defendant theater for wrongfully ejecting him. *Id.* The court noted that the majority of American cases follow *Wood*, and held that a theater patron has at most a license which may be revoked without reason at any time. *Id.* at 106, 83 A. at 371. The *Shubert* court noted that several earlier New Jersey decisions had relied on *Wood*. *Id.* at 105, 83 A. at 370-71 (citing *Hetfield v. Central R.R.*, 29 N.J.L. 571, 537 (1862) (relying on *Wood* to hold a parol license revocable at will); *Richman v. Baldwin*, 21 N.J.L. 395, 404 (1848) (relying on *Wood* as authority that license to go onto another's land, unless coupled with an interest, is revocable at will); *East Jersey Iron Co. v. Wright*, 32 N.J. Eq. 248, 253 (N.J. Ch. 1880) (license revocable at will)). Thus, the *Shubert* court chose to follow *Wood*. 83 N.J.L. at 106, 83 A. at 371. The *Shubert* court stated that it was following the *Wood* rule without regard to the justice of ejecting a theater patron without cause, since such a question was for the legislature. *Id.*

34. 29 N.J. 47, 148 A.2d 1 (1959).

the amusement owner's right to exclude.<sup>35</sup> Although affirming the lower court's holding that an amusement owner had an absolute right to exclude,<sup>36</sup> the court indicated its willingness to alter this common law right for compelling reasons of justice or policy.<sup>37</sup> Because the excluded plaintiff in *Garifine* did not demonstrate any strong reasons to alter the common law right,<sup>38</sup> the court upheld his exclusion.<sup>39</sup>

Since *Garifine*, the New Jersey courts have had further occasion to discuss the rights of property owners to exclude individuals from their premises.<sup>40</sup> In *State v. Shack*<sup>41</sup> and *State v. Schmid*,<sup>42</sup> both cases in which the property was partially open to the public, the New Jersey Supreme Court held that a private property owner's right to exclude was limited by competing rights of individuals who were on, or desired access to, the property.<sup>43</sup> In

35. *Id.* at 50, 148 A.2d at 2. In *Garifine*, defendant racetrack excluded plaintiff on the grounds "that he is not wanted, that he is an undesirable, and that his general record and reputation warrant his exclusion." *Id.* at 49, 148 A.2d at 2.

36. *Id.* at 60, 148 A.2d at 8. The Chancery Division had granted the defendant's motion to dismiss on the ground that it had an absolute right to exclude plaintiff. *Id.* at 49-50, 148 A.2d at 2.

37. *Id.* at 57, 148 A.2d at 6. The New Jersey Supreme Court noted that the defendant racetrack operator in *Garifine* was in a business that tended to attract undesirables, and that it would be unwise to deter the exclusion of undesirables by imposing tort liability for mistakes. *Id.* at 54-55, 140 A.2d at 5. The court also stated that the substantial interest of the defendant coincided with the general public's interest and outweighed the interest of the excluded patron. *Id.* For a further discussion of this balancing of interests, see notes 41-51 and accompanying text *infra*. The court stated further that this case did not present countervailing circumstances nor urgent considerations of justice or policy that would require departing from the traditional rule. 29 N.J. at 57, 148 A.2d at 6.

38. 29 N.J. at 57, 148 A.2d at 6. The court also noted that plaintiff did not question defendant's good faith nor the soundness of its purpose for the exclusion. *Id.*

39. *Id.* at 60, 148 A.2d at 8. The court also discussed the New Jersey Civil Rights Act and held that it applied only to exclusions based on race, color, creed, national origin, or ancestry. *Id.* at 57-60, 148 A.2d at 6-8 (construing N.J. REV. STAT. § 10:1-3 (version as of 1959)). Although the court affirmed the judgment of the Chancery Division "in all respects," it described the common law right as a "right of racetrack operators to exclude suspected undesirables." *Id.* at 57, 60, 148 A.2d at 6, 8 (emphasis added). The Chancery Division had granted defendant's motion to dismiss on the basis of an absolute right to exclude. *Id.* at 49-50, 148 A.2d at 2. The Appellate Division in *Uston* concluded that this language by the *Garifine* court is properly construed to limit the holding of *Garifine* to allow only the exclusion of undesirables. 179 N.J. Super. at 226, 421 A.2d at 175. For a discussion of the lower court's opinion in *Uston*, see note 6 *supra*.

40. See, e.g., *State v. Schmid*, 84 N.J. 535, 423 A.2d 615 (1980); *State v. Shack*, 58 N.J. 297, 277 A.2d 369 (1971).

41. 58 N.J. 297, 277 A.2d 369 (1971). For a discussion of *Shack*, see notes 44-47 and accompanying text *infra*.

42. 84 N.J. 535, 423 A.2d 615 (1980), *appeal dismissed sub nom.* Princeton University v. Schmid, 455 U.S. 100 (1982). For a discussion of *Schmid*, see notes 48-51 and accompanying text *infra*.

43. See *State v. Schmid*, 84 N.J. at 562, 523 A.2d at 629 ("[T]he 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 use that property . . .") (citations omitted); *State v. Shack*, 58 N.J. at 306, 277 A.2d at 373-74 (accommoda-

*Shack*, a farm owner who employed and housed migrant workers sought to exclude from his premises persons who attempted to provide government-sponsored medical and legal assistance to his employees.<sup>44</sup> Noting that property ownership rights are not absolute,<sup>45</sup> the New Jersey Supreme Court held that the denial of the migrant workers' rights to governmental assistance occasioned by the exclusion of persons who sought to bring the assistance to them was unjust.<sup>46</sup> Therefore, the court recognized, in the government workers, a right of access to the property, in derogation of the owner's right to exclude.<sup>47</sup> More recently, in *Schmid*,<sup>48</sup> the New Jersey Supreme Court held that a private university's right to exclude the public from its campus was limited by the state constitutional rights of expression and association of an individual desiring access to that property.<sup>49</sup> The

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tion must be made between "the right of the owner and the right of individuals who are parties with him in consensual transactions relating to the use of the property").

44. 58 N.J. at 299-301, 277 A.2d at 370-71. Several employees of legal and medical assistance programs were arrested and convicted for trespassing. *Id.* at 299, 277 A.2d at 370.

45. *Id.* at 305, 277 A.2d at 373. The court stated the common law maxim that a person should not use his property to injure the rights of another. *Id.* The court also observed that property rights serve human values, and that these rights not only exist for that purpose, but also are limited by it. *Id.* at 303, 277 A.2d at 372.

46. *Id.* at 307-08, 277 A.2d at 374. The court found that the migrant workers had a fundamental right to this government assistance. *Id.* at 308, 277 A.2d at 374. The court also stressed the disadvantaged nature of migrant farm workers and the government's response to their plight. *Id.* at 303-04, 277 A.2d at 372. The court concluded that the migrant workers also had a fundamental right to privacy and to live with dignity. *Id.* at 308, 277 A.2d at 374.

47. *Id.* at 307-08, 277 A.2d at 374. The court stated that the migrant workers' rights "are too fundamental to be denied on the basis of an interest in real property and too fragile to be left to the unequal bargaining strength of the parties." *Id.* at 308, 277 A.2d at 374-75. The court found it "unthinkable" that the farmer could assert a right that would isolate the migrant worker from these programs. *Id.* at 307, 277 A.2d at 374. Thus, the court concluded that representatives of government agencies and organizations providing these services could enter the farm to seek out the migrant worker. *Id.* Since the court found that the farm owner had no right to exclude the government workers, it reversed their trespass convictions. *Id.* at 308, 277 A.2d at 375.

48. In *Schmid*, the defendant was a non-student who wished to distribute political literature on the Princeton Campus. 84 N.J. at 538-39, 523 A.2d at 616-17. He was found guilty of trespassing on the campus. *Id.* Under University regulations, permission was required before off-campus organizations could distribute materials on campus; no such permission was required by a university organization or by students. *Id.* Members of Schmid's political party had previously sought permission unsuccessfully; however, no such permission was sought or received when Schmid was arrested. *Id.*

49. *Id.* at 568, 523 A.2d at 633. The court specifically protected defendant's state constitutional expressional and associational rights. *Id.* at 560, 523 A.2d at 628 (citing N.J. CONST. art. I, ¶¶ 6, 18). The court expressly reserved decision on whether the university had violated the defendant's federal constitutional first amendment rights. *Id.* at 553, 523 A.2d at 624. Justice Pashman criticized the majority for its extensive discussion of the federal Constitution and failure to reach a decision on that issue. *Id.* at 569, 523 A.2d at 633 (Pashman, J., concurring in part and dissenting in part).

*Schmid* court balanced the competing rights of the owner to exclude and the individual to free expression<sup>50</sup> and concluded that, to be upheld, an exclusion must be reasonable in relation to the property's normal use, the extent of the public invitation to use the property and the countervailing rights of the individual who seeks to enter or remain on the property.<sup>51</sup>

Against this background, Justice Pashman, writing for a unanimous New Jersey Supreme Court,<sup>52</sup> faced the issue of whether a casino could lawfully exclude a patron based upon his strategy of playing blackjack. The court held that the Casino Control Act<sup>53</sup> completely abrogated Resorts' common law right to exclude Uston for his game-playing strategies,<sup>54</sup> and that Resorts' right to exclude for other reasons was limited by Uston's competing right of reasonable access.<sup>55</sup> In explaining its holding, the court analyzed various provisions of the Act. It first observed that the Act declares a need for strict regulation of casino gambling<sup>56</sup> and specifically preempts the common law where it conflicts with the Act.<sup>57</sup> The court then turned to the provisions of the Act regulating casino games, which delegate substantial power to the Commission to promulgate regulations for the games.<sup>58</sup> Rely-

50. *Id.* at 562, 423 A.2d at 629. In seeking an "optimal balance" between protecting private property rights and protecting expressional freedoms, the court stated that the more private property is devoted to public use, the more it must accommodate individual rights. *Id.* (citations omitted).

51. *Id.* at 563, 423 A.2d at 630. In analyzing these factors, the court focused on the extent to which the campus was already open to the public. *Id.* at 564-65, 423 A.2d at 631. The court specifically noted that a public presence within the university was consonant with its expressed educational goals of free academic inquiry and free expression of ideas, that the university contemplated substantial public involvement and participation in the academic life of the university, and that the university's regulations dealt extensively with community use of university facilities. *Id.* at 564-65 & n.10, 423 A.2d at 631 & n.10. The court then noted that the regulations governing on-campus distribution of political literature contained no standards governing the grant or denial of permission. *Id.* at 567, 423 A.2d at 632. Finding these regulations unreasonable and thus invalid, the court concluded that Princeton's private property rights must yield to defendant's constitutional rights. *Id.* at 567-68, 423 A.2d at 632-33.

52. 89 N.J. at 175, 445 A.2d at 376.

53. N.J. STAT. ANN. §§ 5:12-1 to -152 (West Supp. 1982). For a discussion of the Act, see notes 13-22 and accompanying text *supra*.

54. 89 N.J. at 168-70, 445 A.2d at 373-74. For a discussion of the development and current status of the common law right to exclude, see notes 27-51 and accompanying text *supra*. For a discussion of limitations on the right to exclude, see notes 25, 31-32, & 40-51 and accompanying text *supra*.

55. 89 N.J. at 170-74, 445 A.2d at 373-75. For a discussion of this portion of the *Uston* decision, see notes 65-78 and accompanying text *infra*. For an analysis of this portion of the decision, see notes 89-98 and accompanying text *infra*.

56. 89 N.J. at 168, 445 A.2d at 372 (quoting N.J. STAT. ANN. § 5:12-1(13) (West Supp. 1982)). For a discussion of legalized gambling and the emphasis on strict regulation of casino gambling, see notes 8-14 and accompanying text *supra*. For a discussion of the policies underlying the Casino Control Act, see note 14 and accompanying text *supra*.

57. 89 N.J. at 168, 445 A.2d at 372 (citing N.J. STAT. ANN. § 5:12-133(b) (West Supp. 1982)). For a discussion of § 5:12-133(b), see note 23 *supra*.

58. 89 N.J. at 168, 445 A.2d at 372. The court stated that the "heart" of the Act

ing on the relevant provisions of the Act, sections 5:12-70<sup>59</sup> and 5:12-100(e),<sup>60</sup> the court inferred a legislative intent that the Commission have exclusive control over the conduct of the games.<sup>61</sup> The court concluded that allowing individual casino operators to determine how the games may be played would be inconsistent with this legislative intent.<sup>62</sup> Finding that Uston played the game within the rules as promulgated by the Commission,<sup>63</sup> the court determined that Resorts had no authority to exclude him based on his strategy of play.<sup>64</sup>

Although this determination was dispositive of the case,<sup>65</sup> the court rea-

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is its provisions for regulating legalized casino games. *Id.* See N.J. STAT. ANN. §§ 5:12-63 to -75 (West Supp. 1982). For a discussion of the Commission and its regulatory authority, see notes 15-17 and accompanying text *supra*.

59. N.J. STAT. ANN. § 5:12-70 (West Supp. 1982). For the text of § 5:12-70, see note 16 *supra*.

60. N.J. STAT. ANN. § 5:12-100(e) (West Supp. 1982). For the text of § 5:12-100(e), see note 17 *supra*.

61. 89 N.J. at 168-69, 445 A.2d at 372-73. The court noted that "the Commission's regulation of blackjack is more extensive than the entire administrative regulation of many industries." *Id.* at 169, 445 A.2d at 373. The court also stated that the rules of blackjack promulgated by the Commission cover every conceivable aspect of the game. *Id.* See N.J. ADMIN. CODE tit. 19, § 2.1-2.15 (1980). From the extensive statutes and regulations, the court inferred that the Commission's control over the rules and conduct of licensed casino games was intended to be comprehensive. 89 N.J. at 169, 445 A.2d at 373. For a discussion of the Commission's regulations prior to *Uston*, see notes 16-19 and accompanying text *supra*. For a discussion of the regulations promulgated in response to the decision in *Uston*, see notes 99-103 and accompanying text *infra*.

62. 89 N.J. at 169, 445 A.2d at 373. In light of the statutory policy requiring the Commission to ensure the credibility and integrity of casino operations, the court concluded that permitting casinos to determine game rules would subvert this policy by undermining the Commission's authority. *Id.* at 169, 445 A.2d at 373 (citing N.J. STAT. ANN. § 5:12-1(b) (West Supp. 1982)).

63. *Id.* The court observed that the Commission had promulgated the rules by which Uston gained his advantage, and that the Commission has sole authority to change those rules. *Id.* For a discussion of the rule change benefiting card counters, see note 2 *supra*. For a discussion of the rule changes made by the Commission in response to *Uston*, see notes 99-103 and accompanying text *infra*.

64. 89 N.J. at 169-70, 445 A.2d at 373. The court briefly discussed the statutory scheme for the exclusion of certain persons from casinos. *Id.* at 170 n.3, 445 A.2d at 373 n.3 (citing N.J. STAT. ANN. § 5:12-71 (West Supp. 1982)). Noting the Appellate Division's reliance on § 5:12-71 (statutory provision for excluding patrons), the court concluded that this section applies to persons with backgrounds that indicated criminal activity or actions hostile to the integrity of licensed casino gambling. *Id.* The court stated that it was not relying on this section of the statute, and declined to decide whether, pursuant to this section, the Commission had the authority to exclude card counters. *Id.* The *Uston* court also noted that the United States District Court for the District of Nevada had held a similar statute irrelevant to whether card counters can be excluded from casinos. *Id.* (citing *Uston v. Hilton Hotels Corp.*, 448 F. Supp. 116 (D. Nev. 1978)). For the text of § 5:12-71, see note 19 *supra*. For a further discussion of the district court's interpretation of the Nevada statute, see note 22 *supra*.

65. 89 N.J. at 170, 445 A.2d at 373. Since Uston was excluded because of his card counting strategy, a holding that this was impermissible could have ended the matter. However, for two reasons, the court felt constrained to refute any implica-

soned further that Resorts retained the right to exclude for reasons not within the scope of the Act.<sup>66</sup> While expressly reserving decision as to the precise extent of this right,<sup>67</sup> the court weighed the competing rights of the owner to exclude and the patron to access,<sup>68</sup> noting that “both have deep roots in the common law.”<sup>69</sup> The court then noted that the majority American rule is to disregard the patron’s right of reasonable access,<sup>70</sup> and that New Jersey had once subscribed to this rule.<sup>71</sup> Nevertheless, the court reasoned that more recent New Jersey decisions recognized that “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 use that property.”<sup>72</sup>

In analyzing cases that balanced private property rights against the rights of individuals,<sup>73</sup> the court concluded that property owners have no

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tion that, absent supervening statutes, owners of places open to the public have an absolute right to exclude. *Id.* at 168, 445 A.2d at 372. First the court concluded that the position of Resorts and the Commission—that there existed an absolute right to exclude under common law—was incorrect. *Id.* at 170, 445 A.2d at 373. Secondly, the Court concluded that the Act had not completely divested Resorts of its common law right to exclude. *Id.* For a discussion of the Commission’s position, see note 5 *supra*.

66. 89 N.J. at 170, 445 A.2d at 373. For a discussion of the court’s analysis of Resorts’ remaining right to exclude, see notes 67-78 and accompanying text *infra*.

67. 89 N.J. at 167-68, 445 A.2d at 372.

68. *Id.* at 170-74, 445 A.2d at 373-75.

69. *Id.* at 170, 445 A.2d at 373 (citing Arterburn, *supra* note 27; Wyman, *supra* note 27).

70. *Id.* at 170-71, 445 A.2d at 373-74 (citations omitted). The court stated that a right of reasonable access was part of the common law of some jurisdictions at the turn of the century and noted that the heart of the fourteenth amendment’s guarantee of equal protection was the assumption that a state was obligated to guarantee all citizens access to places of public accommodation. *Id.* (citing *Bell v. Maryland*, 378 U.S. 226, 296 (1964) (Goldberg, J., concurring); *Ferguson v. Gies*, 82 Mich. 358, 46 N.W. 718 (1890); *Donnell v. State*, 48 Miss. 661 (1873)). For a discussion of the impact of civil rights statutes on the proprietor’s right to exclude, see note 25 *supra*. For a discussion of the American rule with respect to the right of exclusion, see notes 31-32 and accompanying text *supra*. The *Uston* court then noted that the creation of the common law right to exclude followed the invalidation of segregation statutes, suggesting that the rule had “less than dignified origins.” 89 N.J. at 171 n.4, 445 A.2d at 373 n.4.

71. 89 N.J. at 171, 445 A.2d at 374. The court concluded that the absolute right to exclude was adopted in New Jersey primarily out of deference to the English case of *Wood v. Leadbitter*. *Id.* (citing *Shubert v. Nixon Amusement Co.*, 83 N.J.L. 101, 83 A. 369 (1912)). The court then observed that a subsequent English case had disapproved of the *Wood* decision. *Id.* at 172, 445 A.2d at 374 (citing *Hurst v. Picture Theatres, Ltd.*, [1915] 1 K.B. 1 (1914)). The court also noted that New Jersey common law had evolved in the intervening years. *Id.* For a discussion of the common law right to exclude and the cases cited by the *Uston* court, see notes 27-39 and accompanying text *supra*.

72. 89 N.J. at 172, 445 A.2d at 374 (quoting *State v. Schmid*, 84 N.J. at 562, 423 A.2d at 629). For a discussion of *Schmid*, see notes 48-51 and accompanying text *supra*.

73. 89 N.J. at 172-74, 445 A.2d at 374-75 (discussing *State v. Schmid*, 84 N.J. 535, 423 A.2d 615 (1980); *State v. Shack*, 58 N.J. 297, 277 A.2d 369 (1970)). The

right under any circumstances to *unreasonably* exclude particular members of the public when the property is opened for public use.<sup>74</sup> In fact, the court observed that proprietors have a duty not to treat patrons in an arbitrary or discriminatory manner,<sup>75</sup> and that, in some instances, the proprietor has a duty to exclude disruptive persons.<sup>76</sup> Applying these standards to the facts of the case,<sup>77</sup> the court reasoned that, since Uston's presence was neither threatening nor disruptive, he retained his right of reasonable access to the casino.<sup>78</sup>

The court specifically reserved decision on whether the Commission had the authority to promulgate a regulation excluding card counters.<sup>79</sup> Recognizing that the Commission might have acted had it known that Resorts

court noted that the *Schmid* court had balanced individual rights against property ownership rights. *Id.* at 172, 445 A.2d at 374. Although it is not clear from the opinion, it appears that the *Uston* court analogized the *Schmid* balancing test to a balancing of an amusement patron's interests in remaining on the land with a proprietor's interests in excluding him. *Id.* The *Uston* court then addressed *Shack*, restating its holding that a farm owner's property ownership rights could not interfere with a migrant worker's "opportunity to live with dignity." *Id.* at 172-73, 445 A.2d at 375 (quoting *State v. Shack*, 84 N.J. at 308, 277 A.2d at 374). For a discussion of *Shack*, see notes 44-47 and accompanying text *supra*. For a discussion of *Schmid*, see notes 48-51 and accompanying text *supra*.

74. 89 N.J. at 173, 445 A.2d at 375. The court stated that this principle was implicit in the *Schmid* opinion. *Id.* Further, the court concluded that the determination of the reasonableness of an exclusion must be made on the facts of each case. *Id.* at 174, 445 A.2d at 375.

75. *Id.* The court concluded "[t]hat duty applies not only to common carriers . . . but to *all* property owners who open their premises to the public." *Id.* (emphasis added) (citations omitted). For a discussion of the duty not to act arbitrarily, which traditionally has been placed on innkeepers and common carriers, see note 27 *supra*.

76. 89 N.J. at 173, 445 A.2d at 375. The court noted that property owners may exclude persons who "disrupt the regular and essential operations of the [premises]." *Id.* (quoting *State v. Schmid*, 84 N.J. at 566, 423 A.2d at 631). Further, the court observed that a person who threatens the security of the premises and its occupants may be excluded. *Id.* (citing *State v. Shack*, 58 N.J. at 308, 277 A.2d at 374). Finally, the court noted that proprietors have a duty to remove dangerous or disorderly persons from the premises. *Id.* (citing *Holly v. Meyers Hotel and Tavern, Inc.*, 9 N.J. 493, 495, 89 A.2d 6, 7 (1952)).

77. 89 N.J. at 174, 445 A.2d at 375. The court noted that Uston did not threaten the security of any casino occupant, and that he did not disrupt casino operations. *Id.*

78. *Id.*

79. *Id.* The court stated that the Commission's authority had statutory and constitutional limits, without delineating those limits. *Id.* The court recognized that the policies of the Casino Control Act—to ensure fair odds to the players, casino vitality, and maximum participation—may conflict, and concluded that the Commission "must strike the appropriate balance." *Id.* (citing N.J. STAT. ANN. § 5:12-100(e) (West Supp. 1982)). The court warned that "[t]he Commission should consider the potentially broad ramifications of excluding card counters before it seeks to promulgate such a rule." *Id.* at 175, 445 A.2d at 376. The court noted that exclusion of players with winning strategies might diminish public confidence in the fairness of casino gambling, but also noted that the rules must allow a reasonable profit for the casinos. *Id.* The court concluded that "[f]airness and the integrity of casino gaming are the touchstones" by which the Commission must draft its rules. *Id.*



could not exclude card counters,<sup>80</sup> the court continued a temporary order banning card counters to allow time for the Commission to act.<sup>81</sup>

In analyzing the court's opinion, it is submitted that Justice Pashman properly concluded that Resorts had no authority to exclude card counters.<sup>82</sup> Investing a casino with broad authority to exclude players with a winning strategy would violate the legislative mandates of promoting public confidence in gambling and assuring maximum participation by patrons.<sup>83</sup> However, since card counters can have a statistical advantage in their favor,<sup>84</sup> it is also submitted that the economic viability of casino blackjack requires some control over card counting.<sup>85</sup> The *Uston* court seems to have correctly aimed for a middle ground, which would allow card counters to play under Commission regulations that minimize their advantages.<sup>86</sup> This judicial deference to the Commission's expertise was appropriate,<sup>87</sup> although the *Uston* court impliedly suggested that the Commission *not* adopt a regulation directly banning card counters.<sup>88</sup>

80. *Id.*

81. *Id.* The banning order, issued during the litigation, was originally extended for 90 days from the date of the decision (May 5, 1982). *Id.* The court later extended the order until September 15, 1982. *Uston v. Resorts Int'l Hotel, Inc.*, No. 18-595, Order of Court (July 14, 1982). The Commission promulgated new blackjack rules which became effective on the same date. For a discussion of the new rules, see notes 99-103 and accompanying text *infra*.

82. 89 N.J. at 168-69, 445 A.2d at 373.

83. Basic fairness and statutory policy seem to require that all persons be allowed to play, even those with winning strategies. See N.J. STAT. ANN. § 5:12-1(13) (West Supp. 1982) (statutory policy to maintain public confidence in casino gambling); *id.* § 5:12-100(3) (commission's regulations shall assure maximum participation by casino patrons). For the text of § 5:12-100(e), see note 17 *supra*.

84. For a discussion of card counting and its inherent statistical advantage, see note 3 *supra*.

85. Since casino gambling is both a state revenue source and a private enterprise, a reasonable profit is required or the game cannot be successfully operated. See N.J. STAT. ANN. § 5:12-100(e) (West Supp. 1982) (commission's regulations are required to ensure vitality of casino operations). For a discussion of gambling as a revenue source, see note 11 *supra*.

86. While the *Uston* court held that casinos could not exclude card counters, it deferred to the Commission to promulgate suitable regulations. 89 N.J. at 174, 445 A.2d at 375. See also *id.* at 167, 445 A.2d at 371-72 ("Resorts concedes that the Commission could promulgate blackjack rules that would virtually eliminate the advantage of card counting."). For a discussion of the new blackjack rules promulgated in response to *Uston*, see notes 99-103 and accompanying text *supra*.

87. As the agency charged with regulating the casino industry, the Commission has substantial experience in overseeing the game of blackjack. With its powers to propose regulations, receive public comment, and hold public hearings, the Commission is best suited to this task. For a discussion of the powers and duties of the Commission, see notes 15-17 and accompanying text *infra*.

88. 89 N.J. at 174-75, 445 A.2d at 375-76. The court implied that the Commission should not bar card counters by noting the "constitutional and statutory" limitations on the Commission's authority to do so, and by recommending that the Commission "consider the potentially broad ramifications of excluding card counters." *Id.* The court correctly noted that exclusion of winning players might diminish public confidence in the fairness of casino gambling. *Id.* at 175, 445 A.2d at 376.

Moreover, it is submitted that, although an entirely statutory analysis might have disposed of the case without resort to a consideration of the common law,<sup>89</sup> the *Uston* court correctly addressed the issue of the interplay of the competing rights of the proprietor to exclude and the patron to access.<sup>90</sup> Without such a determination, casino operators would have enjoyed their common law right to exclude for reasons not covered by the Act without regard to the reasonableness of the exclusion.<sup>91</sup> As the case was actually decided, unreasonable exclusions by casino and non-casino amusement operators will no longer be tolerated.<sup>92</sup> In fact, the *Uston* decision can be read as precluding all unreasonable exclusions from property that is opened to the public.<sup>93</sup>

In rejecting the common law right to exclude, the court relied on the principle inherent in *Shack* and *Schmid* of requiring an accommodation between an owner's right to exclude and an individual's rights.<sup>94</sup> The individual rights in both *Shack* and *Schmid* were quite compelling—migrant worker's rights to medical assistance, and state constitutional rights of free expression, respectively.<sup>95</sup> In *Uston*, however, the court restricted a property owner's right to exclude for the non-constitutional, less compelling, and arguably novel right of reasonable access of an amusement patron.<sup>96</sup>

Moreover, the *Uston* court did not expressly indicate how to accommodate both individual rights and property rights or how to determine which exclu-

It should be noted, however, that the court specifically reserved opinion on whether the Commission could lawfully exclude card counters. *Id.* at 166, 174, 445 A.2d at 371, 375.

89. Since Resorts sought to bar Uston because of his strategy of play, the court, after holding this was impermissible under the Act, could have refused to consider other reasons for exclusion. *See id.* at 169, 445 A.2d at 373. For a discussion of this portion of the *Uston* decision, see note 65 and accompanying text *supra*.

90. For a discussion of this portion of the *Uston* opinion, see notes 66-78 and accompanying text *supra*.

91. If the *Uston* court relied solely on the Act, any exclusions for reasons not covered by the Act would thus in theory be controlled by *Garifine*, which was thought to espouse an absolute right to exclude so long as civil rights statutes were not violated. For a discussion of *Garifine*, see notes 34-39 and accompanying text *supra*.

92. The court's holding on the common law right to exclude is not limited to casinos. *See* 89 N.J. at 170-74, 445 A.2d at 373-75. For a discussion of this portion of the *Uston* opinion, see notes 66-78 and accompanying text *supra*. It is submitted that a desire to clarify the common law with respect to all proprietors on this issue was a part of the court's motivation to reach beyond the Casino Control Act in formulating its decision. For a discussion of the probable impact of the *Uston* decision on the right to exclude, see notes 104-107 and accompanying text *supra*.

93. *See* 89 N.J. at 173, 445 A.2d at 375.

94. For a discussion of this principle, see notes 43-51 and accompanying text *supra*. For a discussion of the *Uston* court's recognition of this principal, see notes 72-78 and accompanying text *supra*.

95. For a discussion of *Shack* and *Schmid*, see notes 40-51 and accompanying text *supra*.

96. The *Uston* court has significantly expanded the class of individual rights which may restrict a property owner's right to exclude. The question remains as to what other individual rights will be sufficient to overcome property ownership rights.

sions are reasonable. By relying on *Schmid*, the court may have suggested that this accommodation be made considering the factors applied in *Schmid*—the property's normal use, the extent of the public invitation to use the property, and the countervailing rights of the individual.<sup>97</sup> Although the *Uston* court did not specifically address these factors, it did note certain circumstances when an exclusion is "reasonable"—where patrons disrupt operations, threaten other occupants, or are otherwise dangerous or disorderly.<sup>98</sup> Thus, it is suggested that, where an exclusion is not clearly "reasonable," courts should apply the *Schmid* factors in assessing the "reasonableness" of an exclusion.

The initial impact of the *Uston* decision has been the Commission's proposal<sup>99</sup> and adoption<sup>100</sup> of new rules for the game of blackjack. The new rules vest considerably more discretion in the casinos to determine the manner of playing the game with a concomitant lessening of the advantage enjoyed by card counters.<sup>101</sup> Since the New Jersey regulatory structure has

97. See *State v. Schmid*, 84 N.J. at 563, 423 A.2d at 630. For a discussion of *Schmid*, see notes 48-51 and accompanying text *supra*. For a recent case taking this approach, see note 107 and accompanying text *infra*.

98. See 89 N.J. at 173, 445 A.2d at 375.

99. 14 N.J. Admin. Reg. 559-69 (1982).

100. 14 N.J. Admin. Reg. 841(b) (1982). These rules became effective on Sept. 15, 1982, the day on which the *Uston* court's temporary card counter banning order ended. *Id.* For a discussion of the temporary banning order, see note 81 *supra*.

101. The new rules restructure the game of blackjack so as to minimize the statistical advantage of card counting. Most significantly, although the former rules substantially limited reshuffling of the deck, the new rules allow reshuffling at any time the dealer desires. Compare N.J. ADMIN. CODE tit. 19, § 47-2.5 (1980) (former rule) with 14 N.J. Admin. Reg. 841(b) (1982) (to be codified at N.J. ADMIN. CODE tit. 19, § 47-2.6(k)(l) (new rule). This is significant because the card counter adjusts his betting according to the relative number of high and low cards remaining in the deck; the casino can now shuffle when the "count" favors the player. For a discussion of card counting techniques, see note 3 *supra* and authorities cited therein. The new rules also restrict the maximum amount that a player can bet on one hand in certain situations, thus decreasing the player's ability to bet very heavily when the "count" tells him that the statistical odds are in his favor. 14 N.J. Admin. Reg. 841(b) (1982) (to be codified at N.J. ADMIN. CODE tit. 19, § 47-5.7) (proposed as Alternative No. A-1, 19:45-5.7 at 14 N.J. Admin. Reg. 563-64 (1982)). Other rule changes are similarly designed to limit the card counter's advantage. See generally 14 N.J. Admin. Reg. 841(b) (1982).

Given the *Uston* court's deference to the Commission to promulgate suitable rules to resolve the card counter problem, and the Commission's statutory authorization to promulgate rules for the games "as may be necessary to assure the vitality of casino operations," it is unlikely that these new rules would be declared invalid on their face as an overly broad delegation of authority. For a discussion of the *Uston* court's deference to the Commission to promulgate rules, see notes 79-81 and accompanying text *supra*. For a discussion of the Commission's statutory authority, see notes 15-17 *supra*. However, to the extent that a casino uses its discretion to engage in "arbitrary or discriminatory" treatment of card counters, the new rules would seem invalid as applied under *Uston*. See 89 N.J. at 173, 445 A.2d at 375. The extent to which a casino can legally use its reshuffling discretion to reduce the advantage of winning players is not yet clear.

been criticized as overly restrictive,<sup>102</sup> this added discretion given to casino operators should prove to be a worthwhile experiment.<sup>103</sup>

While the impact of the *Uston* decision on a non-casino amusement owner's right to exclude is unclear,<sup>104</sup> it appears that unreasonable exclusions will not be allowed.<sup>105</sup> The *Uston* court went to great length to avoid limiting its decision to statutory grounds.<sup>106</sup> It is suggested, therefore, that the decision will affect all property owners who open their property to the public, by disallowing unreasonable exclusions and arbitrary treatment of individuals. In fact, in a recent decision, the New Jersey Superior Court, Appellate Division, held that a racetrack operator's common law right to exclude was significantly restricted by *Uston*, remanding the case for trial to determine the reasonableness of the exclusion in light of the *Schmid* factors.<sup>107</sup> Finally, the inherent vagueness of a "reasonable" exclusion standard leaves the court substantial flexibility, though perhaps at the expense of predictability, in determining which exclusions are "reasonable."

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102. For a discussion of this criticism, see note 12 *supra*. It is not suggested that New Jersey is overly restrictive in its licensing procedures; this criticism extends only to the rules by which the casino games are operated.

103. The shuffle-at-will rule gives the dealer substantial flexibility to alter the progress of the game. The dealer could "count cards" himself and shuffle when the odds favor the player. It has been reported not only that this shuffle-at-will technique has almost completely discouraged card counters, but also that the average player is suffering as well. Ironically, the Commission was concerned throughout the litigation that, should card counters be allowed to play blackjack under modified rules lessening their advantage, the average player would be most detrimentally affected. Letter to author from Anthony J. Sposaro, Esq. (Feb. 10, 1983) (formerly senior assistant counsel to Commission in *Uston* litigation).

104. The *Uston* decision could be limited to its reliance on the Act, since arguably the court's discussion of the common law right was unnecessary to its decision and only an alternate ground for the decision. *Uston* at least shows that the current attitude of the New Jersey Supreme Court is to disfavor unreasonable or arbitrary treatment of amusement patrons. See 89 N.J. at 173, 445 A.2d at 375.

105. See *id.* Presumably, patrons who are unreasonably excluded may have redress against the property owner. In fact, exclusions of card counters by casinos have recently led to civil suits against the casinos for assault, battery or false imprisonment. See, e.g., *Bartolo v. Boardwalk Regency Hotel Casino, Inc.*, 185 N.J. Super. 540, 449 A.2d 1343 (Law Div. 1982) (judgement of \$54,000 awarded to four suspected card counters on grounds of false imprisonment); *Phila. Inquirer*, Aug. 29, 1982, at A1, col. 1 (reporting judgement against casino of \$105,000 in U.S. District Court for false imprisonment of a card counter).

106. The *Uston* court addressed the non-Casino Control Act issues primarily "to refute any implication . . . that, absent supervening statutes, the owners of places open to the public enjoy an absolute right to exclude patrons without good cause." *Id.* at 168, 445 A.2d at 372. For a discussion of this portion of the *Uston* opinion, see notes 65-78 and accompanying text *supra*.

107. *Marzocca v. Ferrone*, 186 N.J. Super. 483, 453 A.2d 228 (App. Div. 1982) (reasonableness of exclusion to be determined by balancing, in accordance with *Schmid* factors, private property rights against an individual's common law right to pursue his livelihood).