CONSTITUTIONAL LAW—SEARCH AND SEIZURE—ILLINOIS STATE RACING BOARD RULE WHICH PROVIDES FOR WARRANTLESS SEARCHES OF RACING LICENSEES IS CONSTITUTIONAL AS APPLIED TO THE SEARCH OF A JOCKEY'S AUTOMOBILE—*LeRoy v. Illinois Racing Board*, 39 F.3d 711 (7th Cir. 1994).

I. INTRODUCTION

Organized horse racing has existed for thousands of years.[1] The first organized horse races were held in ancient Babylonia, Egypt, and Syria.[2] Complete with chariots, these events soon became very popular in ancient Greece and Rome.[3] As civilizations advanced, the popularity of horse racing grew.[4] In 1665, more than a millennium after the first recorded races, the "sport of kings" premiered in the "New World."[5]

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1. H. HORENSTEIN, RACING DAYS 37 (1987). The earliest racing manual was composed in 1500 BC by a Hittite figureman. *Id.*

2. *Id.* Evidence of those races was found in the hieroglyphics of the eighteenth Egyptian Dynasty. *Id.*

3. HORENSTEIN, *supra* note 1. Horse racing was a popular sport in ancient Greece. *Id.* In 680 BC, chariot races were first introduced to the Olympics. *Id.* In the Olympics of 642 BC, the races were held without chariots, as the contestants rode on horseback. *Id.* Their love of horse racing was reflected in Greek literature. *Id.* In *The Clouds* (author unknown), the character of Pheidippides bankrupts his father with unlucky racing tips. *Id.*

In ancient Rome, emperor Tarquinus Prisius held chariot races annually in the Circus Maximus. *Id.* In addition, emperors Nero and Domitian held hundreds of races during their reigns. *Id.*

4. Patrick Cunningham, *The Genetics of Thoroughbred Horses*, SCIENTIFIC AMERICAN, May 1991, at 92. Thoroughbred horses were originally the property of a very limited royal coterie. *Id.* These royal circles imported thoroughbred stallions from North Africa and the Middle East into England in the early 1600's. *Id.* at 93. During the patron age of King Charles II, horse racing was fueled with a breath of great interest and the sport continued to develop throughout the 18th Century. *Id.*

5. HORENSTEIN, *supra* note 1. In February of 1665, Richard Nicolls, New York's royal governor under Charles II, organized the first formal horse race in America. *Id.* This landmark event took place on Hempstead Plains (now Long Island, New York). *Id.* Soon after, horse racing spread to New Jersey, Pennsylvania, and many of the southern colonies. *Id.* By 1680, there were five horse racing tracks in Virginia alone. *Id.* The first American track constructed specifically for thoroughbreds was the Union Course, built in 1821 on Long Island. *Id.*

Originally, horse races were run on tracks that measured four miles in length. *Id.* at 39. Eventually, the tracks were shortened to three miles during the reign of Richard II

Today, the sport that was once exclusively the sport of the upper echelons is very much the sport of the ordinary citizen.[6] The contemporary horse racing industry has evolved into a multi-billion dollar enterprise that has become very much a part of American leisure and recreation.[7] The sport has become so popular in the United States that nearly one-hundred race tracks are in operation which host over fifty million annual patrons who wager billions of dollars per year.[8]

Like any other revenue generating industry, horse racing is replete with litigation.[9] Fundamental constitutional guarantees clashed head on with the Illinois horse racing industry in *LeRoy v. Illinois Racing Board.*[10] The Illinois Racing Board suspended and fined jockey Steven LeRoy for possession of a syringe capable of injecting chemical substances into a horse, a violation of Rule 9.10, in his automobile and for using abusive language.[11] LeRoy's suspension was based primarily on Illinois Racing Board Rule 25.19 which authorizes warrantless, suspicionless searches of individuals licensed by the Illinois Racing Board.[12] In addition, LeRoy was also suspended pursu-

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(1189-1199). *Id.* Today, the average length of a U.S. horse track is between one and one and one-half miles. FUNK & WAGNALLS NEW ENCYCLOPEDIA 624 (1990).

6. *Id.* Horse racing has consistently been the number one attendance drawing sport in the United States, surpassed only by baseball in 1984. Thomas Meeker, *Thoroughbred Racing-Getting Back on Track.* 78 KY. L. J. 436 (1990).

7. *See* Cunningham, *supra* note 4, at 92.

8. *Id.* In 1984, thirty-three billion dollars in recorded bets were paid out. *Id.* In 1988, the state of California was host to $2,647,309,192 in betting. 18 CHRB ANN. REP. 2 (1988).

In California alone there are 14 horse racing facilities located in and around Fresno, Los Angeles, and San Diego. Elizabeth Bartlett, *Medication Regulations of the California Horse Racing Industry: Are Changes Needed to Prevent the Use of Illegal Drugs?*, 27 SAN DIEGO L. REV. 743 (1990). In New Jersey there are five horse racing tracks: Monmouth Park, The Meadowlands, Atlantic City, Freehold, and Garden State. *See* Luke Ioving and John Keefe, *Horse Drugging - The New Jersey Trainer Absolute Insurer Rule: Burning Down the House to Roast the Pig,* 1 SETON HALL J. SPORT L. 61, 62 (1990).

9. *See* Shoemaker v. Handel, 795 F.2d 1136 (3rd Cir. 1986) (which applied the administrative search exception to the warrant requirement in order to permit warrantless drug testing of jockeys); Graham v. Illinois Racing Bd., 394 N.E.2d 1148 (Ill. 1979) (which upheld the "Failure to Guard" provision of the Illinois Horse Racing Act); Kline v. Illinois Racing Bd., 469 N.E.2d 667 (Ill. App. Ct. 1984) (which upheld the blood testing provision of the Illinois Horse Racing Act).

10. 39 F.3d 711 (7th Cir. 1994).

11. *Id.* at 712.

12. *See* ILL. ADMIN. CODE tit. 11, §1325.19 (1995); *see infra* note 91 for text of Rule 25.19.

ant to Rule 20.10 which prohibits the use of improper language toward Illinois Racing Board employees.[13] LeRoy was finally suspended pursuant to Illinois Racing Board Rule 22.30 which imposes additional suspension time upon previously suspended individuals who are caught on the property of any Illinois Racetrack.[14] However, LeRoy challenged his suspensions by arguing that Rule 25.19, 20.10, and 22.30 were unconstitutional and in violation of the First, Fourth, and Fourteenth Amendments.[15]

This note will first briefly explore some of the problems inherent in the sport of horse racing. Second, it will examine some of the existing regulations that govern the industry. Third, it will briefly analyze prior challenges to Illinois racing rules. Finally, this note will examine in depth *LeRoy v. Illinois Racing Board* in an attempt to determine whether horse race regulations are unduly trotting on fundamental constitutional rights.

II. The Tainted Industry And The Need For Regulation.

Whether it is disputes over salary caps[16] or anabolic steroid abuse, just about every sport is plagued with legal and moral problems. Although somewhat different problems are present in sports where animals are participants, their existence cannot be denied.[17] Since horse racing attracts many billions of

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13. *See* ILL. ADMIN. CODE tit. 11, §1320.10 (1995), *see infra* note 93 for text of Rule 20.10.

14. *See* ILL. ADMIN. CODE tit. 11, §1322.10 (1995), *see infra* note 107 for text of Rule 22.30.

15. *LeRoy*, 39 F.3d at 711-712.

16. *See* Bridgeman v. National Basketball Ass'n, 838 F. Supp. 172, 177 (D.N.J. 1993) (court defined a salary cap as a limit on the compensation professional sports teams can provide players in exchange for their services).

17. Bill Richards, *Charges of Brutality May Place Future of Iditarod on Ice*, Wall St. J., Mar. 2, 1995, at A1. The Iditarod is a 1,100 mile dog sled race from Anchorage to Nome, Alaska. *Id.* Recently, animal rights groups have waged an attack contending that the race has gotten so competitive that the drivers push their dogs to exhaustion and death. *Id.* Eight of the Iditarod's canine entrants have died in the past two races. *Id.* Critics further charge that drivers clubbed and beat their dogs with chains. *Id.* This onslaught of criticism has prompted Timberland Co., the events main sponsor, to withdraw. *Id.* at A6.

Like horse racing, dog racing attracts many billions of dollars in wagers per year. Peter Michelmore, *Hidden Shame of an American Sport*. READERS DIGEST, Aug. 1992, at 103. In January 1992, while clearing a lemon grove in Chandler Heights, Arizona, the bodies of 124 greyhounds were found. *Id.* It is suspected that the two to three year old

dollars[18] through parimutuel wagering[19] each year, the threat of corrupt practices such as the use of performance enhancing drugs and insurance fraud is great.[20] The individual states which raise revenue by taxing the sport[21] are injured by these corrupt practices via negative publicity in the news media which, in turn, deteriorates the image of racing.[22] Combating this negative image is one of the paramount issues facing state and federal regulators.[23]

Since many millions of dollars are at stake for the race tracks, owners, and trainers, some horsemen try to gain an advantage over the competition by administering prohibited performance enhancing drugs to their horses.[24] The most commonly administered performance enhancing drugs are classified into four categories. The first class is stimulants,[25]

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dogs were each shot in the head because their trainers believed that they were not fast enough to win purse money. *Id.*

18. *See supra* note 8.

19. *Id.* "In parimutuel betting, all the bets for a race are pooled and paid out on that race based on the horses' finishing positions, absent the state's percentage and the track's percentage." 9 CAL. REG. L. REP. 120 (1989).

20. H. HORENSTEIN, RACING DAYS 37 (1987).

21. Elizabeth Bartlett, *Medication Regulations of the California Horse Racing Industry: Are Changes Needed to Prevent the Use of Illegal Drugs?*, 27 SAN DIEGO L. REV. 743 (1990). In 1990, nearly $145 million in state revenue was raised through taxes on the horse racing industry in California. *Id.* In 1988, the exact figure amounted to $144,124,926. *Id.* Illinois derives tens of millions of dollars in tax revenue annually from parimutuel betting. Pelling v. Illinois Racing Bd., 574 N.E.2d (Ill. App. Ct. 1990).

22. Kline v. Illinois Racing Bd., 469 N.E.2d 667, 671 (Ill. App. Ct. 1984). "It is a truism to say that the horse racing industry depends upon public confidence in the sport and upon integrity and professional efficiency in its operation." *Id.*

A San Diego newspaper ran the following story after the close of the 1990 Del Mar Race Meet:

> It (Del Mar) was one of the worst meets because of the entire racing industry's continued reluctance and consequent inability to deal effectively with the issue of drugs, in men as well as animals, and the excessive use of legal performance enhancing substances, such as Lasix, Butazolidin, cortizone, and anabolic steroids. This cloud, growing ominously bigger and darker each day, hangs over the sport and contributes heavily to the paranoia that afflicts the betting public, which always suspects the worst.

SAN DIEGO READER, Sept. 20, 1990, at 24.

23. *Id.*

24. William Nack and Lester Munson, *Blood Money*, SPORTS ILLUSTRATED, Nov. 16, 1992, at 18. D. Wayne Lukas, a renowned horse trainer, is just one example of the money that not only owners can earn, but also trainers. *Id.* at 19. By receiving his standard 10% commission of the purse, he earned $17.8 million in 1988. *Id.* In 1991, he managed to earn $9.8 million. *Id.*

25. BERTRAM KATZUNG, PHARMACOLOGY 169 (1990). Stimulants are a chemically heterogeneous class of drugs. *Id.* Cocaine is a bitter, crystalline alkaloid obtained from

such as amphetamines, cocaine, and narcotics, which are given to horses to increase their speed.[26] The second type is depressants, which are given to decrease a horse's speed.[27] The third class is local anesthetics which are generally injected to deaden pain felt at the site of injection.[28] The fourth category is anti-bleeding medications such as Furosemide, or Lasix as it is commonly known.[29]

The Illinois Racing Board prohibits stimulants, depressants, and anesthetics, but in certain circumstances allows the administration of anti-bleeding medications.[30] Aside from performance enhancement, a major concern with anesthetics and anti-bleeding drugs is that they are often used to return injured horses to competition sooner than is medically advisable.[31]

Even though the abuse of performance enhancing drugs is such a major concern as to require widespread regulation, less than two percent of all horses ultimately become stakes winners.[32] Therefore, the purchase of a racehorse for investment purposes involves a significant financial risk.[33] After learning

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the leaves of the coca plant. *Id.* Its principal physiological effects are stimulation of the nervous system, which constricts the blood vessels and may result in exhilaration and possibly convulsions. *Id.* Amphetamines or "speed" are another type of stimulant which may, like cocaine, be given orally or via injection. *Id.* at 170. Some forms of amphetamines such as methylene dioxymethamphetamine have been reported to be neurotoxic to serotonergic neurons in the brains of animals. *Id.* at 170.

26. T. TOBIN, DRUGS AND THE PERFORMANCE HORSE, 261-75 (1981).

27. *Id.* at 85-109. This is practiced by persons who have an interest in seeing their horse lose. *Id.*

28. BERTRAM KATZUNG, PHARMACOLOGY 175 (1990).

29. T. TOBIN, DRUGS AND THE PERFORMANCE HORSE, 111 (1981). Lasix is used to treat a condition in race horses known as exercise-induced pulmonary hemorrhage. *Id.* Horses with this condition bleed from the lungs after physical exertion. *Id.*

30. *See* Illinois Racing Board Rule C9.9. The rule prohibits any horse from racing with any "foreign substance" in its body. *Id.* A "foreign substance" is defined as all substances except those which exist naturally in the horse or are contained in equine feed or supplements. *Id.* The rule also provides that a foreign substance of therapeutic value may be given by a veterinarian, but only after being approved by the Board. *Id.*

31. Elizabeth Bartlett, *Medication Regulations of the California Horse Racing Industry: Are Changes Needed to Prevent the Use of Illegal Drugs?*, 27 SAN DIEGO L. REV. 743, 746. It has been claimed by some veterinarians that some classes of steroids, such as corticosteroids, may attack the cartilage growth in young horses, thereby weakening the legs and making them more susceptible to breakage. Lester Munson, *Deciphering a Death*, SPORTS ILLUSTRATED, Nov 1, 1993, at 82.

32. John J. Kropp, *Horse Sense and the UCC: The Purchase of Racehorses.* 1 MARQ. SPORT L. J. 171 (1989).

33. *See* William Nack and Lester Munson, *Blood Money*, SPORTS ILLUSTRATED, Nov. 16 1992, at 18. Unlike famous paintings or baseball cards, horses experience wild, un-

from their trainers that the $500,000 yearling they just purchased cannot run as well as expected, the humane horseman will take the loss. All to often, however, owners insure their horses and subsequently have them destroyed to collect on lucrative life insurance policies.[34] FBI investigators claim that this is a nationwide practice at all levels of the horse racing industry.[35]

Although such horse slaughtering is dealt with by insurance fraud regulations, it reinforces the fact that the sport of horse racing is tainted with corruption and improper practices.[36] So, whether it is insurance fraud or blood-doping, the horse racing industry cannot go totally unchecked. The question remains, however: how much regulation is adequate?[37]

III. Examples of Existing State Regulations.

The horse racing industry is no stranger to regulations instituted to combat the use of performance enhancing drugs.[38] Medication regulations have existed in most major racing ju-

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foreseen fluctuations in value. *Id.* Yearlings purchased for $500,000 all to often end up not being able to run as well as a $10,000 maiden claimer. *Id.* at 22.

34. *Id.* For over a decade beginning in 1982, Tommy (the Sandman) Burns made a living as a hitman hired to destroy expensive horses with large insurance policies. *Id.* He asserts that during that time he would kill, via electrocution, as many as three horses per week. *Id.* The Sandman continued to explain that he would simply separate the end of an average extension cord, exposing the bare wire ends, attach alligator clips to the exposed ends of the wire and to the horse's ear and rectum, then plug the cord into a standard socket. *Id.* at 20. Burns continued by stating that even the most experienced pathologist would blame the horses death on colic. *Id.* Burns explained that the horses would die instantly by the electrocution method. *Id.* On one particular occasion, however, the target horse was only insured against broken legs, so Burns took a crowbar and shattered the hind leg of the thoroughbred. *Id.* The horse suffered for over an hour until a veterinarian ultimately executed the horse via lethal injection. Christopher Dauer, *Horse Fraud Ring Exposed in Florida*, National Underwriter Property & Casualty-Risk & Benefit Management, Feb. 1991, at 4.

35. Nack & Munson, *supra* note 33, at 22.

36. *See supra* note 34 and accompanying text.

37. *See* San Diego Reader, Sept. 20, 1990, at 24. Some states have taken the position that more pervasive regulations are appropriate, and have, therefore, passed strict liability trainer responsibility rules. *See* Ill. Admin. Code tit. 11, § 509.200 (1995). *Id.* Other states take the opposite approach and reduce unnecessary regulations in order to attract more horseman. *See* Ky. Rev. Stat. Ann. § 138.510 (1988).

38. Mahoney v. Byers, 48 A.2d 600 (Md. 1946). In the case of *Mahoney v. Byers*, the issue presented to the Maryland Court of Appeals was the constitutionality of rule 146 of the Maryland Racing Commission. *Id.* The rule stated, in part, that if there is "competent evidence, that any drug has been administered to the horse within forty-eight hours before the race, the trainer shall be subject to the penalties prescribed in sub-section (e) hereof, whether or not he administered the drug." *Id.* at 602.

risdictions since the 1970's.[39] Most of these jurisdictions prohibit all drugs except non-performance enhancing medications, such as Lasix,[40] which maintain and protect the health of horses.[41]

Horse racing regulations have their foundations in enabling legislation that establishes racing boards and delegates to them the power to promulgate rules governing the sport.[42] These boards are independent regulatory bodies made up of members who are appointed for a term of years.[43] Some of the broad regulatory powers these boards possess are in the areas of licensing, suspensions, and ejections.[44]

A primary responsibility of these boards is implementing and enforcing rules and regulations dealing with the use of foreign substances in race horses.[45] Horse racing boards typically concentrate on procedures for testing the blood or urine of the animals for the presence of foreign substances.[46] Some states have gone so far as to institute "trainer responsibility" rules which subject a trainer to strict liability if his horse tests positive.[47] Some states have also instituted extensive regulations

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39. T. TOBIN, DRUGS AND THE PERFORMANCE HORSE 112 (1981).

40. *Id.*

41. *But see* N.Y. COMP. CODES R. & REGS. tit. 9 § 4120.2 (1989) (prohibiting the administration of medications within 48 hours of the start of the race). In Illinois, drugs of therapeutic value may be given by veterinarians upon being approved by the board. T. TOBIN, DRUGS AND THE PERFORMANCE HORSE 112 (1981).

42. *See* CAL. BUS. & PROF. CODE § 19400 (1989); *see also* N.J. STAT. ANN. § 5:5-22 (1988). After establishing the Illinois Racing Board, the Illinois law states that "the Board is vested with jurisdiction and supervision over all race meetings in this state." ILL. ANN. STAT. CH. 230 para. 5/9(a) (Smith-Hurd 1975).

43. ILL. ANN. STAT. Ch. 230 para. 5/9 (Smith-Hurd 1975).

44. *Id.*

45. *Id.*

46. *See.* CAL. CODE REGS. tit. 4 §1858 (1989). A typical testing regulation states in part:

> blood and urine samples shall be taken from the winner of every race, from horses finishing second in every race with exacta or quinella wagering, second or third in any stake race with a gross purse of $20,000 or more, beaten favorites, seven competing horses selected at random, and from such other horses as may be selected or designated by the stewards or the official veterinarian.

Id.

47. Luke Ioving and John Keefe, *Horse Drugging - The New Jersey Trainer Absolute Insurer Rule: Burning Down the House to Roast the Pig,* 1 SETON HALL J. SPORT L. 61, 62 (1990). Trainer responsibility rules are more commonly known as absolute insurer, failure to guard, or rebuttable presumption rules. *Id.*

A typical absolute insurer provision will read in part: "[t]he trainer shall be the absolute insurer of and responsible for, the condition of the horses entered in a race, regardless of the acts of third parties." Ohio Rules of Racing, Rule 259.01 (1969).

which provide for searches of the jockey, trainer, and groomer's stables and personal areas.[48]

The state of Illinois is a jurisdiction where the horse racing industry is subject to strict regulation.[49] The Illinois Horse Racing Act of 1975 ("the Act") authorizes the Illinois Racing Board to institute and enforce any and all regulations that are necessary to promote and protect the integrity of the Illinois horse racing industry.[50] This broad spectrum of regulatory authorization includes drug testing, searches, licensing, disciplining improper conduct, suspensions, and a host of other related areas.[51] The legality of these provisions have been challenged repeatedly in the federal courts and the Illinois state court system.[52]

A typical failure to guard provision may read in part: "[e]very trainer has a duty to guard or cause to be guarded each horse trained by him/her in such a manner as to prevent any person, including his/her veterinarian, from administering to such horse any foreign substance in violation of these rules." ILL. ADMIN. CODE tit. 11, § 509.200 (1995).

In *Brennan v. Illinois Racing Bd.*, the Supreme Court of Illinois deemed the original trainer responsibility rule unconstitutional on the grounds that it was arbitrary and unreasonable. Brennan v. Illinois Racing Bd., 247 N.E.2d 881, 882 (Ill. 1969). The absolute liability rule held the trainer liable regardless of whether he was responsible for the presence of the foreign substance, no matter what level of care the trainer used to ensure the horse remained "clean." *Id.* In *Brennan*, the Illinois Supreme Court held that "there is still no assurance that the rule in its operation offers any more protection than does one based upon fault, or that it has a real and substantial relation to the protection of racetrack patrons." *Id.*

After a small amendment, the present Illinois trainer responsibility rule was upheld in *Graham v. Illinois Racing Bd.* by the same court. Graham v. Illinois Racing Bd., 394 N.E.2d 1148 (Ill. 1979). The present Illinois "Failure to Guard" provision only makes a trainer liable if the trainer fails to guard his horse from being administered a prohibited substance. ILL. ADMIN. CODE tit. 11, §509.200. It is a retreat from the strict liability of "absolute insurer" and is now more of a negligence standard. *Id.*

48. *See* N.J. ADMIN. CODE § 13:70-14A.5 (expressly provides that after a horse tests positive for prohibited drugs, the stewards "shall notify the State Police and authorize a search of the premises occupied by the stable involved.") See also ILL. ADMIN. CODE tit. 11, § 1325.190 (1995) (authorizing searches even absent a showing that a horse has tested positive for a foreign substance). *Id.*

49. ILL. ANN. STAT. ch. 230, para. 5/9 (Smith-Hurd 1975). *See also* Kline v. Illinois Racing Bd., 469 N.E.2d 667, 671 (Ill. App. Ct. 1984) (court stated that "[i]t is well established that the state is granted vast authority in regulating the horse racing business in Illinois.").

50. ILL. ANN. STAT. ch. 230, para. 5/9 (Smith-Hurd 1975). "The Board is vested with jurisdiction and supervision over all race meetings in this State. . . . [T]he Board is vested with the full power to promulgate reasonable rules . . . regulations and conditions under which all horse race meetings in the State shall be held and conducted." *Id.*

51. *Id.*

52. *See* Kline v. Illinois Racing Bd., 469 N.E.2d 667 (Ill. App. Ct. 1984). In *Kline v. Illinois Racing Bd.*, the Illinois Appellate Court upheld the constitutionality of the blood testing provision of the Illinois Horse Racing Act by holding that it was not overbroad.

IV. Prior Litigation of Illinois State Racing Board Regulations

In *Serpas v. Schmidt*,[53] backstretchers[54] brought a § 1983 civil rights claim against the Illinois Racing Board seeking declaratory and injunctive relief from certain investigative practices conducted pursuant to Rule 25.19, including warrantless searches of their on-track dormitory rooms and pat-down searches of their persons within the racetrack enclosure.[55] In *Serpas*, the United States Court of Appeals for the Seventh Circuit ultimately held that Rule 25.19 was unconstitutional as it applied to searches of dormitories and personal pat-downs.[56]

The Board initially argued that warrantless searches had generally been upheld in heavily regulated industries.[57] However, the *Serpas* court distinguished the Illinois regulation because Rule 25.19 did not expressly provide for searches of living quarters[58] and, therefore, did not offer any guidance or

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Kline, 469 N.E.2d at 667. Specifically, an owner challenged Illinois Racing Board Rule C9.9 which prohibits "any foreign substance" to be introduced into the body of the horse. *Id.* The challenge came on the grounds that the term "any foreign substance" was substantially overbroad in that it prohibited the use of non-performance enhancing drugs such as Lasix, which do not pose a threat to the integrity of horse racing. *Id.* at 708. However, the *Kline* court held that since Rule C9.9 provided for amendment to allow the use of therapeutic drugs, the rule was not overbroad. *Id. See also* Graham v. Illinois Racing Bd., 394 N.E.2d 1148 (Ill. 1979) (court upheld the present Illinois trainer responsibility rule); Brennan v. Illinois Racing Bd., 247 N.E.2d 881 (Ill. 1969) (held the original Illinois trainer responsibility rule unconstitutional on the grounds that it was arbitrary and unreasonable); People v. Strauss, 502 N.E.2d 1287 (Ill. App. Ct. 1986) (which held that Rule 25.19, as applied to warrantless pat-down searches of a jockey's body, was constitutionally permissible under the administrative search exception to the Fourth Amendment).

53. 621 F. Supp. 734 (N.D. Ill. 1985), *aff'd*, 827 F.2d 23 (7th Cir. 1987).

54. Backstretchers work at race tracks, grooming feeding and exercising race horses. *Serpas*, 827 F.2d at 25. Most backstretchers are employed by the horses' trainers and are licensed by the Illinois Racing Board under the Horse Racing Act of 1975. *Id.* Most of the backstretchers live in rent-free dormitories located in the backstretch, which is where the horses are stabled. *Id.*

55. *Id.*

56. *Serpas*, 827 F.2d at 24.

57. *Id.* The Board relied on *United States v. Biswell*, where the United States Supreme Court upheld warrantless searches in the firearms industry. *Id.* (discussing United States v. Biswell, 406 U.S. 311 (1972)).

58. *Id.* at 28. Rule 25.19 specifically lists a series of places subject to search, including "other places of business." *Id.* The court noted that this last phrase classified the earlier listed areas as places of business as well. *Id.* Therefore, the court concluded that the statute did not provide for searches of residences. *Id.*

Furthermore, in rejecting the Board's argument that the dormitories were not

limitations on the discretion of the officials conducting the search.[59] The court stated that even in closely regulated industries, the search provisions must be narrowly tailored to the state's legitimate objectives in order to minimize the inherent dangers of unbridled discretion.[60] In effect, the rule did not assure the backstretchers' reasonable expectation of privacy.[61]

Next, the Board asserted that the regulatory scheme as a whole provided sufficient certainty of application to act as a warrant substitute.[62] The *Serpas* court disagreed, however, and stated that to satisfy the "certainty and regularity" requirement, the inspection program must provide for clear limitations on the discretion of the searcher.[63] The court concluded by noting Rule 25.19 provided no such limitations.[64] Without elaborate discussion, the court concluded that the personal pat-down searches failed for the same reasons as the dormitory search.[65]

Conversely, in *People v. Strauss*,[66] the Illinois Appellate

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residences since they were only temporary lodging and were accessible by a master key, the court looked to *United States v. United States District Court*, which stated that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Id.* (discussing United States v. United States District Court, 407 U.S. 297, 313 (1972)).

59. *Id.*

60. *Id.* By requiring that statutory inspection programs be narrowly tailored, the courts seek to insure that the program serves as "a constitutionally adequate substitute for a warrant." *Id.* at 28.

61. *Serpas*, 827 F.2d at 28. The Fourth Amendment protects against "unreasonable" searches. *Id.* The reasonableness of a search depends on the expectations of privacy an individual has in the area searched. *Id.* The rationale for not requiring a warrant in situations in which the statute outlines the terms and conditions of the search is that such a statutory inspection program provides adequate protection of reasonable expectations of privacy. *Id.*

62. *Id.* at 29.

63. *Id.* The *Serpas* court noted that although horse racing requires extensive regulation to protect its integrity, the Fourth Amendment requires regularity of application and impartial assessments of reasonableness. *Id.* The court concluded that an "inspection program must define clearly what is to be searched, who can be searched, and the frequency of such searches." *Id.* (quoting Bionic Auto Parts v. Fahner, 721 F.2d 1072, 1078 (7th Cir. 1983)).

64. *Id.* The *Serpas* court concluded that the warrantless search scheme was not sufficient to qualify as a substitution for a warrant. *Id.* "This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search." *Id.* (quoting Camara v. Municipal Court, 387 U.S. 532, 533 (1984)).

65. *Id.*

66. 502 N.E.2d 1287 (Ill. App. Ct. 1986). In *Strauss*, a jockey was subjected to a pat-down search in the paddock area moments before post time. *Id.* at 1288. The search

Court declined to follow the Seventh Circuit's holding in *Serpas*, and found Rule 25.19 constitutional under the administrative search exception to the Fourth Amendment.[67] The court further held that the exception also applied to warrantless pat-down searches of the jockey's person.[68]

The *Strauss* court looked to the decision of the United States Court of Appeals for the Third Circuit in *Shoemaker v. Handel*[69] in applying the administrative search exception to Rule 25.19.[70] The *Strauss* court acknowledged that the Illinois horse racing industry had been highly regulated for many years.[71] Moreover, in applying the administrative search exception, the court also pointed to the fact that the state had a substantial interest in protecting the industry's integrity.[72] Finally, the *Strauss* court held that the pervasive regulation of the industry also reduced the plaintiff's expectation of privacy,

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uncovered an electronic stimulator that was prohibited under Illinois Horse Racing Act of 1975 ch. 8, para. 37(a)(3). *Id.* After being charged under the Act, Strauss moved to suppress the stimulator on the grounds that the search (and therefore Rule 25.19) was in violation of the Fourth Amendment. *Id.*

67. *Id.* at 1288. "We decline to follow the holding and reasoning of Serpas v. Schmidt . . . [W]e are more inclined to follow Shoemaker v. Handel." *Id.* (citing Shoemaker v. Handel, 795 F.2d 1136 (3rd Cir. 1986)).

68. *Id.*

69. 795 F.2d 1136 (3rd Cir. 1986). *Shoemaker* maintains that an exception to the search warrant requirement has been recognized for "pervasively regulated businesses . . . long subject to close supervision and regulation." *Id.* at 1139. The District Court in *Shoemaker* further declared that:

> certain industries have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise. Liquor and firearms are industries of this type: when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulations. The element that distinguishes these enterprises from ordinary businesses is a long tradition of close governmental supervision.

Shoemaker v. Handel, 608 F. Supp. 1151, 1156 (D.N.J. 1985).

The *Shoemaker* court also stated that "an individual engaged in a heavily regulated industry has no expectation of privacy because he is put on notice of unannounced nonconsensual warrantless inspections by both the history and degree of regulation." *Id.* (quoting Marshall v. Wait, 628 F.2d 1255, 1258 (9th Cir. 1980)).

70. *Strauss*, 502 N.E.2d at 1290. The administrative search exception to the search warrant requirement of the Fourth Amendment applies to closely regulated industries which have long been the subject of supervision. *Id.* The rationale for this exception is that certain industries have such an extensive history of regulation that no reasonable expectation of privacy could exist for the proprietor because he has voluntarily choose to subject himself to the full gamut of regulations. *Id.* Examples of such industries include the alcohol, tobacco, and firearm industries. *Id.*

71. *Id.*

72. *Id.*

thus validating the warrantless search of his person.[73]

Additionally, in *Dimeo v. Griffin*,[74] a class action was brought against the Illinois Racing Board on behalf of jockeys and others subject to a Board rule which required jockeys and other Illinois horse racing participants to submit to random suspicionless drug testing.[75] The United States Court of Appeals for the Seventh Circuit initially declared the rule a violation of the Fourth Amendment.[76] The full court rehearing en banc, however, ultimately held the rule constitutional under Fourth Amendment analysis.[77]

In upholding the rule, the court struck a balance between the degree of intrusiveness and the Board's reasons for the implementation of the rule.[78] The court maintained that the state had a substantial interest in promoting the safety of the participants[79] as well as protecting the financial revenue which it derived from the betting public's interest in a "clean" sport.[80] The court pointed out that since jockeys and other participants were subject to frequent medical examinations, they had a diminished expectation of privacy.[81] In upholding the rule, the

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73. *Id.* Again the *Strauss* court looked to *Shoemaker*, which stated that before the administrative search exception could extend to a search of one's person, the following two elements must be met: (1) a strong state interest in conducting the warrantless search must be present, and (2) the amount of industry regulations must reduce the justifiable privacy expectation of the individual being searched. *Id.* (citing *Shoemaker*, 795 F.2d at 1142).

74. 924 F.2d 664 (7th Cir. 1991), *reh'g granted*, 931 F.2d 1215 (7th Cir. 1991).

75. Dimeo v. Griffin, 943 F.2d 679, 682 (7th Cir. 1991) (en banc). The class asserted that the rule violated its Fourth Amendment right to be free from unreasonable searches. *Id.*

76. Dimeo v. Griffin, 924 F.2d 664 (7th Cir. 1991).

77. *Dimeo*, 943 F.2d at 680. The court reasoned that the state had important interests in the safety of participants as well as protecting the revenue it derived from the sport. *Id.* These interests outweighed the limited privacy interest which attach to urine testing in a regulated industry. *Id.*

78. *Id.* The *Dimeo* court noted that to determine "reasonableness" under the Fourth Amendment, it must undertake a balance-striking assessment. *Id.* The weaker the privacy interest asserted, the less showing of countervailing harms the government must make. *Id.* at 681. Since the plaintiff's privacy interest cannot be quantified, neither can the regulatory interest. *Id.*

79. *Id.* at 683. The court noted that horse racing is the second most dangerous of all sports, behind auto racing. *Id.* An average of two jockeys are killed every year and another 100 are injured seriously enough to be disabled for over a week. *Id.* The court emphasized that these dangers are enhanced when participants abuse drugs. *Id.*

80. *Id.* The court acknowledged that Illinois raises tens of millions of dollars annually by taxing parimutuel betting. *Id.* Such wagering might decline if the betting public suspected widespread use of drugs by the racing participants. *Id.*

81. *Id.* at 681.

court concluded that the state's interests outweighed the participants reduced privacy expectations.[82]

Finally, in *Hansen v. Illinois Racing Board*,[83] a licensed driver, trainer, and owner of race horses challenged his suspension for failing to consent to a search of his truck in violation of Illinois Racing Board Rule 25.19.[84] The Illinois Appellate Court declined to follow its 1986 decision of *People v. Strauss*,[85] and held that Rule 25.19, in every application, was in violation of the Fourth Amendment.[86] Specifically, the court acknowledged the applicability of the administrative exception to Rule 25.19, but nonetheless found the rule violative of the Fourth Amendment under the standard acknowledged by the United States Supreme Court in *New York v. Burger*.[87] The *Hansen* court reasoned that although there is a substantial governmental interest in regulating horse racing which could be furthered by authorizing warrantless inspections,[88] the rule failed to comply with the Fourth Amendment's requirement of reasonableness because it did not properly limit the discretion

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82. *Dimeo*, 943 F.2d at 682. The court discounted athletes' privacy expectations in this situation by reasoning that the more often an individual is subjected to a privacy invasion, the less intrusive it becomes. *Id.* Athletes are subject to many more medical examinations than average citizens, including procedures in which the athlete gives urine in the same manner as it would be extracted under the rule. *Id.*

83. 534 N.E.2d 658 (Ill. App. Ct. 1989).

84. *Id.* at 660. After receiving an anonymous tip, stewards of the Illinois Racing Board attempted to search the pick-up truck of the plaintiff, Warren Hansen, for two syringes believed to be inside. *Id.* at 660. After refusing to give consent, Hansen was suspended for violating Rule 25.19. *Id.* The circuit court of Cook County declared the rule unconstitutional on its face, and the defendants appealed. *Id.*

85. *Id.* at 663 (discussing People v. Strauss, 502 N.E.2d 1287 (Ill. App. Ct. 1986)). The *Hansen* court refused to follow *Strauss*, because, in that case, the court failed to apply the three standards enunciated by the United States Supreme Court in *New York v. Burger* for determining when a regulation authorizing warrantless searches was valid. *Id.* at 663; *see infra* note 87 for a discussion of *Burger*. In addition, the *Strauss* court relied on the Third Circuit decision of *Shoemaker*, but failed to fully follow the discretion requirements offered by the *Shoemaker* court. *Hansen*, 534 N.E.2d at 663.

86. *Id.*

87. 482 U.S. 691 (1987). The *Burger* Court recognized that privacy expectations are reduced in heavily regulated industries. *Id.* at 693. However, the Court formulated a three pronged test that must be satisfied before warrantless searches, in even a highly regulated industry, could be found reasonable. *Id* at 702. The three criteria are: (1) the regulation authorizing the inspection must be drawn pursuant to a substantial government interest; (2) the warrantless inspection must be necessary to further the regulatory scheme; and (3) the statute must provide for regular and certain application by limiting the discretion of the searching officers. *Id.* at 702-03.

88. *Hansen*, 534 N.E.2d at 662. The court stated that syringes are easily disposed of, and therefore allowing for immediate warrantless searches is a desired goal. *Id.*

of the inspecting officers.[89]

V. *LeRoy v. Illinois Racing Board*, 39 F.3d 711 (7th Cir. 1994).

In *LeRoy v. Illinois Racing Board*,[90] the United States Court of Appeals for the Seventh Circuit again considered whether Illinois Racing Board Rule 25.19,[91] which provides for warrantless searches of licensees of the State Racing Board, complied with the Fourth Amendment.[92] LeRoy also challenged 20.10,[93] which forbids "improper language" or conduct toward any official.[94] Writing for the majority, Circuit Judge Easterbrook held that rule 25.19 was not in violation of the Fourth Amendment as applied to a search of an automobile, and rule 20.10 was neither vague nor substantially overbroad.[95]

The Fourth Amendment to the United States Constitution provides basic protection to all citizens from unreasonable

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89. *Id.* The court elaborated by stating that Rule 25.19 fails to set forth the frequency or times of inspections, or provide the proper procedure for an officer to follow if a participant refuses to consent to the search. *Id.* The court stated: "[w]e believe that, in the interest of uniformity in application", the rule should set forth those procedures. *Id.*

90. 39 F.3d 711 (7th Cir. 1994).

91. Ill. Admin. Code tit. 11, § 1325.190 (1995). Rule 25.19 states in part:

> The Illinois Racing Board or the state steward investigating for violations of law or the Rules and Regulations of the Board, shall have the power to permit persons authorized by either of them to search the persons, or enter and search stables, rooms, vehicles, or other places within the track enclosure at which a meeting is held, or the tracks or places where horses eligible to race at said race meetings are kept, of all persons licensed by the Board, and of all employees and agents of any race track operator licensed by said board . . . in order to inspect and examine the personal effects or property on such persons or kept in such stables, rooms, vehicles, or other places as aforesaid. Each of such licensees, in accepting a license, does thereby irrevocably consent to such search as aforesaid and waive and release all claims or possible actions for damages that he may have by virtue of any action taken under this rule. Any person who refuses to be searched pursuant to this rule may have his license suspended or revoked.

Id.

92. *LeRoy*, 39 F.3d at 716.

93. Ill. Admin. Code tit. 11, § 1320.10 (1995). Rule 20.10 states:

> No owner, trainer, driver, attendant of a horse, or any other person shall use improper language to an official, or be guilty of any improper conduct toward such officers or judges or persons serving under their orders, such improper language or conduct having reference to the administration of the course, or of any race thereon.

Id.

94. *LeRoy*, 39 F.3d at 712.

95. *Id.*

searches and seizures instituted by government.[96] Substantive due process of the Fourteenth Amendment[97] dictates that any governmental regulation which infringes on a fundamental[98] liberty or property interest must pass strict scrutiny.[99] Finally, the First Amendment protects the right to express, non-obscene, non-defamatory speech.[100]

On April 27, 1987, agents of the Illinois Department of Law Enforcement searched a pickup truck on the grounds of the Maywood Park Racetrack which was driven, but not owned, by Steven LeRoy.[101] The search lacked probable cause,[102] but was conducted pursuant to Rule 25.19[103] which requires licensees of the Illinois Racing Board to consent to suspicionless

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96. U.S. CONST. amend. IV. The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

The Fourth Amendment was originally applicable only to actions of the federal government. *See* Wolf v. Colorado, 338 U.S. 25 (1949) (holding that the Due Process Clause of the Fourteenth Amendment did not itself require state courts to adopt the exclusionary rule with respect to evidence illegally seized by state agents). However, in *Mapp v. Ohio*, the Supreme Court held that the Fourth Amendment is incorporated into the Due Process Clause of the Fourteenth Amendment and, therefore, is applicable to actions taken by state agents. Mapp v. Ohio, 367 U.S. 643 (1961).

97. U.S. CONST. amend. XIV. The Fourteenth Amendment states, in part, that no state shall "deprive any person of life, liberty, or property, without due process of law." *Id.*

98. John C. Barker, *Constitutional Privacy Rights in the Private Workplace, Under the Federal and California Constitutions.* 19 HASTINGS CONST. L.Q. 1107. "The substantive areas covered by the right, such as sexual and marital choices, are narrowly circumscribed both by traditional cultural values and by an exacting standard of what is fundamentally private." *Id.* at 1110. Courts also tend to look at whether the right at issue is deeply rooted in history. *Id.*

99. *Id.* at 1108. To pass strict scrutiny, the government regulation must be narrowly tailored to further a compelling government interest. *Id.*

100. U.S. CONST. amend. I. The First Amendment states in part: "Congress shall make no law . . . abridging the freedom of speech." *Id.*

101. *Id.* Steven LeRoy was licensed in 1958 by the Illinois Racing Board, pursuant to the Illinois Horse Racing Act, as an owner, driver and trainer of standardbred race horses. *Id.* LeRoy agreed to comply with the rules established by the Illinois Racing Board. *Id.*

102. LeRoy v. Illinois Racing Bd., 1993 WL 114609, 1 (N.D. Ill. 1993). Probable cause is defined in terms of facts and circumstances sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense. Gerstein v. Pugh, 420 U.S. 103, 112 (1995).

103. ILL. ADMIN. CODE tit. 11, § 1325.190 (1995). *See supra* note 91 for text of Rule 25.19.

searches.[104] The search resulted in the discovery of a 60cc syringe and a clogged needle under the passenger seat.[105] Three stewards immediately excluded LeRoy from further racing pending an investigation.[106] On June 6, 1987, having found that the needle could have been cleaned and used to inject prohibited drugs into a horse, the Illinois Racing Board suspended LeRoy for ninety days for being in violation of Rule 9.10,[107] which prohibits licensees from possessing syringes on race grounds.[108]

Next, on July 30, 1987, LeRoy was suspended for an additional thirty days for being observed on the grounds of Sportsman's Park, in violation of Illinois Racing Board Rule 22.3, which prohibits suspended persons from being present on track property.[109] During the process of being ejected from the track, LeRoy swore at a steward in violation of Rule 20.10,[110] was fined $500, placed on probation through December 31, 1988, and suspended for the remainder of the 1987 season.[111]

Finally, on August 4, 1988, LeRoy was suspended a fourth

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104. *Id.*

105. LeRoy v. Illinois Racing Bd., 39 F.3d 711, 712.

106. *Id.*

107. ILL. ADMIN. CODE tit. 11, § 509.100 (1995). Rule 9.10 states in part:

a) No person, except a veterinarian, shall have in his possession within any race track enclosure, any hypodermic syringe, needle or any other instrument capable of being used for the injection of any chemical substance into any horse; except as provided herein.

b) Any person may possess, within any race track enclosure, any hypodermic syringe or needle for the purpose of administering to himself a chemical substance provided that a person has notified the state stewards in writing:

1) of the possession of such device,

2) of the size of such device, and

3) of the chemical substance to be administered by such device.

Id.

108. *LeRoy*, 39 F.3d at 712.

109. ILL. ADMIN. CODE tit. 11, § 1322.30 (1995). Rule 22.30 states:

Whenever the penalty of suspension is prescribed in these rules, it shall be construed to mean an unconditional exclusion and disqualification from the time of receipt of written notice of suspension privileges and uses of the course and grounds of a track during the progress of a race meeting, unless otherwise specifically limited when such suspension is imposed, such as a suspension from driving. A suspension or expulsion of either a husband or wife shall apply in each instance to both the husband and wife. The suspension becomes effective when notice is given unless otherwise specified.

Id.

110. ILL. ADMIN. CODE tit. 11, § 1320.10. *See supra* note 93 for text of Rule 20.10.

111. *LeRoy*, 39 F.3d at 712.

and final time for the remainder of the 1988 racing season.[112] This suspension was the result of LeRoy again violating Rule 22.30 and in the process using more profane language in violation of Rule 20.10.[113]

LeRoy brought suit under 42 U.S.C. § 1983[114] in the United States District Court for the Northern District of Illinois, against the Illinois Racing Board, certain stewards, and individual members of the Board.[115] LeRoy's complaint alleged that all four suspensions were based upon evidence seized during an illegal warrantless search pursuant to Rule 25.19.[116] LeRoy argued that such searches conducted pursuant to Rule 25.19 had been held unconstitutional under the Fourth Amendment by the Court of Appeals for the Seventh Circuit.[117] LeRoy further argued that the Rule 25.19 search deprived him of equal protection and substantive due process.[118] LeRoy also argued that Rules 22.30 and 20.10, which excluded suspended individuals from all Illinois racing facilities and proscribed improper language respectively, deprived him of equal protection and substantive due process.[119] LeRoy finally alleged that Rule 20.10 was unconstitutionally overbroad and vague.[120] In a series of opinions, the district court ultimately dismissed LeRoy's claims via Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted.[121]

The district court's holdings were based on the defense of

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112. *Id.*

113. *Id.*

114. 42 U.S.C. § 1983. Section 1983 states in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

115. LeRoy v. Illinois Racing Bd., 1990 WL 7072 (N.D. Ill. 1990).

116. *Id.* at 2.

117. *See* Serpas v. Schmidt, 621 F. Supp. 734 (N.D. Ill. 1985), *aff'd*, 827 F.2d 23 (7th Cir. 1987). The Seventh Circuit held Rule 25.19 unconstitutional as it applied to searches of living quarters provided for race participants. *Id.*

118. *LeRoy*, 1990 WL 7072 at 2.

119. *Id.*

120. *Id.*

121. *See* LeRoy v. Illinois Racing Bd., 1993 WL 114609 (N.D. Ill. 1993); LeRoy v. Illi-

qualified immunity asserted by the individual defendants.[122] The court analyzed each allegation to determine if the Board had violated any "clearly established" right.[123]

In addressing LeRoy's Fourth Amendment claim, the district court granted the qualified immunity defense as applied to the search conducted pursuant to Rule 25.19.[124] The court pointed out that the defendants were entitled to qualified immunity because they convincingly demonstrated that LeRoy had given his consent for the search.[125] The court held that the existing case law on the constitutionality of Rule 25.19 was in conflict at the time.[126] LeRoy's rights, therefore, were not

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nois Racing Bd., 1992 WL 168528 (N.D. Ill. 1992); LeRoy v. Illinois Racing Bd., 1990 WL 251815 (N.D. Ill. 1990); LeRoy v. Illinois Racing Bd., 1990 WL 7072 (N.D. Ill. 1990).

In a motion to dismiss for failing to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6), the reviewing court must accept as true all well pled factual allegations and must draw all reasonable inferences in the non-movant's favor. Marmon Group, Inc. v. Rexnord, Inc., 822 F.2d 31, 34 (7th Cir. 1987).

122. LeRoy v. Illinois Racing Bd., 1990 WL 7072, 2 (N.D. Ill. 1990). In *Harlow v. Fitzgerald*, the United States Supreme Court explained the defense of qualified immunity. Harlow v. Fitzgerald, 457 U.S. 800 (1982). The Court stated that "government officials performing discretionary functions are generally shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Simply stated, public officials will be held liable for damages "only if the specific right violated was clearly established at the time they violated it." *Id.*

In order to prove that a right is clearly established, it must be shown that there is "a sufficient consensus based on all relevant case law indicating that the officials conduct was unlawful." Landstrom v. Illinois Dept. of Children & Family Services, 892 F.2d 670, 676 (7th Cir. 1990).

123. LeRoy v. Illinois Racing Bd., 1990 WL 7072 (N.D. Ill. 1990); *see also* LeRoy v. Illinois Racing Bd., 1993 WL 114609 (N.D. Ill. 1993); LeRoy v. Illinois Racing Bd., 1992 WL 168528 (N.D. Ill. 1992).

If a right is determined to be "clearly established" at the time which it is infringed, the public officials involved can no longer hide behind the defense of qualified immunity, and become susceptible to civil damages. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

124. *LeRoy*, 1990 WL 7072 at 4.

125. *LeRoy*, 1990 WL 7072 at 2. A copy of Illinois Racing Board Order of June 6, 1987, (which was attached to the complaint), states that police officers received LeRoy's consent before searching his truck. *Id.* The court relied on Fed.R.Civ.P. 10(c) which states, "when a disparity exists between the written instrument annexed to the pleadings and the allegations in the pleadings, the written instrument will control." *Id.* LeRoy implied that the search was made pursuant to the "Statutory Consent" required by rule 25.19. *Id.* It does not violate the Fourth Amendment to search a vehicle with the owner's consent. *Id.* Since the complaint did not sufficiently allege a Fourth Amendment violation, the Board was entitled to qualified immunity on this ground. *Id.*

126. *LeRoy*, 1992 WL 168528 at 6-7. In 1985, the Northern District of Illinois examined the constitutionality of Rule 25.19 in *Serpas v. Schmidt*, which was the foundation of LeRoy's argument. Serpas v. Schmidt, 621 F. Supp. 734 (N.D. Ill. 1985). The plaintiffs in Serpas challenged the authority of the Illinois Racing Board to conduct war-

"clearly established" and the qualified immunity defense remained valid.[127]

The court dismissed LeRoy's equal protection claims for failure to state a claim upon which relief could be granted.[128] LeRoy alleged that his punishment under Rule 22.30 was a violation of equal protection because he was disciplined more severely than others similarly situated.[129] The district court noted that although LeRoy satisfied the first prong of the equal protection test by demonstrating that persons punished under the rule have been treated differently, LeRoy failed to show that this differential treatment was on invidious grounds.[130]

Likewise, the district court held that LeRoy failed to state a claim upon which relief could be granted in challenging the First Amendment validity of Rule 20.10.[131] The court noted that LeRoy failed to assert facts sufficient to establish that the rule proscribed speech that touched upon a matter of public concern.[132] The court dismissed LeRoy's claims that Rule

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rantless searches of the plaintiff's residential quarters at the racetrack. *Id.* The *Serpas* court noted that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Id.* at 739. The court held Rule 25.19 unconstitutional as it applied to searches of living quarters. *Id.* The decision was upheld by the Seventh Circuit. Serpas v. Schmidt, 827 F.2d 23 (7th Cir. 1987).

Conversely, in *People v. Strauss*, the Illinois appellate court rejected the holding of the Seventh Circuit on the constitutionality of Rule 25.19. People v. Strauss, 502 N.E.2d 1287 (Ill. App. Ct. 1986). The *Strauss* court held that warrantless searches pursuant to the rule are constitutional under the administrative search exception to the fourth amendment. *Id.* Thus in April of 1987, when LeRoy's truck was searched, the courts were in conflict over the legality Rule 25.19 and, therefore, its constitutionality was not clearly established. LeRoy v. Illinois Racing Bd., 1992 WL 168528 (N.D. Ill. 1992). Due to the discrepancy of authority, the individual defendants were not put on notice that their search was violating a clearly established right, hence, the defense of qualified immunity remained valid. *Id.*

127. *Id.*

128. *LeRoy*, 1992 WL 168528 at 2-3.

129. *Id.*

130. *Id.* A successful selective persecution challenge requires the satisfaction of a two prong test. *Id.* (citing Vukadinovich v. Bartels, 853 F.2d 1387, 1392, (7th Cir. 1988)). The plaintiff must first demonstrate that persons similarly situated have not been prosecuted, and second, the decision was made on invidious grounds such as race, religion, or other arbitrary classifications. *Id.* "The mere failure of those who administer a law or regulation to treat all persons who have violated it with complete equality does not of itself infringe on the constitutional principal of equal protection." *Id.* (quoting D'Acquisto v. Washington, 640 F. Supp. 594, 625 (N.D. Ill. 1986)).

131. *Id.*

132. *Id.* at 3. LeRoy alleged that the Illinois Racing Board sought to prohibit his free speech by sanctioning him under Rule 20.10, by arguing that the rule proscribed conduct and speech which is acceptable under the First Amendment. *Id.* The court relied on

20.10 was overbroad and vague by concluding that LeRoy's pleadings did not allege facts to demonstrate that rule 20.10 was "substantially" overbroad or vague.[133]

The district court also dismissed LeRoy's substantive due process claims for failure to state a claim upon which relief could be granted.[134] Finally, the court found that the qualified immunity defense protected the defendants in their individual capacities from LeRoy's monetary claims.[135]

Finally, since LeRoy could not demonstrate a "continuing and adverse effect" on his rights or the rights of others, the

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Landstrom v. Illinois Dept. of Children & Family Services, where the Seventh Circuit held that to invoke the First Amendment in a § 1983 case, the plaintiff must "adequately allege statements which, among other things, touch upon a matter of public concern." *Id.* (quoting Landstrom v. Illinois Dept. of Children & Family Services, 892 F.2d 670, 678 (7th Cir. 1990)).

The *LeRoy* district court continued by asserting that since LeRoy was a licensed horseman, he could be categorized as a public employee. LeRoy v. Illinois Racing Bd., 1990 WL 7072, 2 (N.D. Ill. 1990). Therefore, the court stated "a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Id.* (quoting Connick v. Meyers, 461 U.S. 138, 147 (1983)).

133. *Id.* at 4. "The overbreadth doctrine requires that a statute be invalidated if it is fairly capable of being applied to punish people for constitutionally protected speech or conduct." BLACK'S LAW DICTIONARY 1103 (6th ed. 1990). "Where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well." *Id.* (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)).

The *LeRoy* district court also looked to decision of the United States Supreme Court in *Frisby v. Schultz*, which states that statutes with an excessive scope can be upheld if they are given limited constructions. *Id.* (discussing Frisby v. Schultz, 487 U.S. 474 (1988)). The *LeRoy* court continued by acknowledging that Rule 20.10 is limited to a discreet group of individuals and is only applicable to language and conduct directed towards officials of the Illinois Racing Board. *Id.*

Finally, the court declined to address the merits of LeRoy's vagueness challenge to Rule 20.10 because his pleadings did not describe his conduct. *Id.*

134. *Id.* at 1. LeRoy claimed that his racing license was a property interest. *Id.* However, the district court disagreed and stated that the standard for a substantive due process claim based on a state created property interest is that the plaintiff must show a violation of some substantive constitutional right or that state remedies are inadequate. *Id.* (citing Polenz v. Parrott, 883 F.2d 551, 558 (7th Cir. 1989)).

135. LeRoy v. Illinois Racing Bd., 1993 WL 114609, 3 (N.D. Ill. 1993). Furthermore, the district court relied on the Eleventh Amendment to dismiss the monetary suits against the Illinois Racing Board. *Id.* The Eleventh Amendment bars suits against a state by its citizens. *Id.*

The Eleventh Amendment states in part, "[t]he judicial power of the United States shall not be commenced or prosecuted against one of the United States." U.S. CONST. amend. XI. The *LeRoy* district court reasoned that the Illinois Racing Board is an agency of the state of Illinois and was, therefore, entitled to Eleventh Amendment protection. *LeRoy*, 1993 WL 114609 at 1.

court dismissed LeRoy's claims for injunctive relief.[136]

LeRoy appealed to the United States Court of Appeals for the Seventh Circuit which heard argument on September 7, 1994.[137] On October 27, 1994, Judge Easterbrook, writing for the majority, held that Rule 25.19 was constitutional as applied to searches of automobiles and Rule 20.10 was not substantially overbroad.[138]

Judge Easterbrook began the court's analysis by addressing LeRoy's claim that in Rule 25.19, the authorization of suspicionless warrantless searches was a violation of the Fourth Amendment.[139] The court began by distinguishing LeRoy's situation from the situation in *Serpas*.[140] The *LeRoy* court recognized that although privacy expectations in one's living quarters are high, LeRoy did not possess a similar expectation in the privacy of his truck.[141] The court continued by noting that these lower privacy expectations and inherent mobility have justified the search of automobiles upon a substantially lesser showing of cause.[142] Judge Easterbrook continued by emphasizing that in *Dimeo*, the court concluded that where drugs and horse racing participants are involved, individual privacy interests are not so great as to require a warrant when

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136. *Id.* at 3. LeRoy claimed that, unless enjoined, the Illinois Racing Board would continue to violate the rights of others. *Id.* However, LeRoy failed to allege "continuing and adverse effects" on his rights or the rights of others, which is a requirement of standing for a plaintiff seeking injunctive relief. *Id.* (citing O'Shea v. Littlefield, 414 U.S. 488, 495 (1974)).

137. LeRoy v. Illinois Racing Bd., 39 F.3d 711, 712 (7th Cir. 1994).

138. *Id.* at 711.

139. *Id.*

140. *Id.* As noted earlier, in *Serpas*, Rule 25.19 was declared a violation of the Fourth Amendment as it applied to warrantless searches of the living quarters of backstretchers in. *See supra* notes 54-65. The *Serpas* panel emphasized the heightened privacy expectations in one's living quarters, as well as the lack of statutory specificity which would serve to limit the discretion of the searching officers. *Id.*

141. *LeRoy*, 39 F.3d at 713.

142. *Id.* In articulating this assertion, the court looked to *California v. Acevedo*, in which the Supreme Court developed an exception to the warrant requirement for automobiles. California v. Acevedo, 500 U.S. 565 (1991). In *Acevedo*, the Court recognized:

> a necessary difference between a search of a store, dwelling, house, or other structure in respect of which a proper official warrant may readily be obtained, and a search of a ship, motor boat, wagon, or automobile . . . where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Id. at 570.

authorities wish to conduct a search.[143] The *LeRoy* court continued to reason that LeRoy was a licensed participant, and the search was used to enforce a drug prevention rule, therefore, the state's interest was high and LeRoy's privacy interests were low.[144]

Next, Judge Easterbrook addressed the applicability of the *Hansen* decision[145], which declared Rule 25.19 invalid on its face because it did not "limit the discretion of the inspecting officers."[146] The *LeRoy* court found that the rationale of the *Hansen* decision did not survive *Dimeo*, where the court permitted random suspicionless drug testing.[147] The court reasoned that discretion, as defined by *Burger*, merely required minimal limits on discretion so as to avoid arbitrary searches.[148] The court found this requirement satisfied because Rule 25.19 limited the searches to licensees on the premises of race tracks.[149] After balancing the state's significant interest in promoting "clean" horse racing with the individual's diminished privacy expectations in his automobile, the court stated, "[w]e do not think that the use of Rule 25.19 to authorize searches . . . is open to serious question."[150]

The *LeRoy* court continued by addressing the allegations that Rule 20.10 was vague and overbroad.[151] In affirming the district court's holding on this issue, Judge Easterbrook pointed out that the rule only applies to individuals licensed in Illinois and can be exercised only in connection to the adminis-

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143. *Id.*
144. *Id.*
145. 534 N.E.2d 658 (Ill. App. Ct. 1989).
146. *See supra* notes 83-89.
147. *LeRoy*, 39 F.3d at 714. *Dimeo* held that random, suspicionless drug testing did not violate the Fourth Amendment. *Id.* (discussing Dimeo v. Griffin, 943 F.2d 679 (7th Cir. 1991) (en banc)). In addition, conversely to the interpretation given *Burger* by the *Hansen* court, the *LeRoy* court stated that *Burger* did not require regulations to create search criteria and inspection schedules. *Id.* In *Burger*, the United States Supreme Court stated that proper discretion requirements are satisfied when the statute limited searches during business hours and informed all those subject to the search. *Id.* at 711-712 (citing *Burger*, 482 U.S. at 703). The *Burger* Court continued by stating that if search guidelines and announced schedules are required, the searches would be rendered ineffectual because guilty persons could make use of these limitations to avoid detection. *Id.* The *Burger* Court concluded by stating "surprise is crucial if the regulatory scheme . . . is to function at all." *Id.* (quoting *Burger*, 482 U.S. at 710).
148. *LeRoy*, 39 F.3d at 714.
149. *Id.*
150. *Id.*
151. *Id.* at 715.

tration of a race track or a race.[152] In concluding that Rule 20.10 was not "substantially overbroad" in the sense that it deters protected speech, Judge Easterbrook emphasized that the Rule was administered by an agency that could add supplementary details and explanations to the regulation, much like civil service law upheld by the United States Supreme Court in *Broadrick v. Oklahoma.*[153]

Finally, the court addressed LeRoy's claims that Rule 20.10 violated equal protection and procedural due process.[154] Judge Easterbrook quickly pointed out that the United States Constitution does not require similar penalties for similar wrongs,[155] and that LeRoy did not assert that race, religion or any other forbidden consideration accounted for the difference in his treatment.[156] In dismissing LeRoy's substantive due process challenge, Judge Easterbrook declared that no constitutional provision prevents states from suspending horseman who bring syringes onto racetrack property.[157]

Concurring in part and dissenting in part, Circuit Judge Wellford agreed with the majority's dismissal of LeRoy's substantive due process and equal protection claims.[158] Judge Wellford, however, vehemently disagreed with the majority's decision with regard to the Rule 25.19 search.[159] Judge Wellford declared that he would have found error on the part of the district court in granting a 12 (b)(6) motion to dismiss in favor of the Illinois Racing Board on the basis of qualified immunity.[160]

Judge Wellford offered a different interpretation of the applicable case law.[161] The judge pointed out that in *Serpas v.*

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152. *Id.*

153. LeRoy v. Illinois Racing Bd., 39 F.3d 711, 715 (7th Cir. 1994) (discussing Broadrick v. Oklahoma, 413 U.S. 601 (1973)).

154. *Id.*

155. *Id.* The *LeRoy* court referred to *Chapman v. United States*, where the Supreme Court explained that "a person who has been so convicted is eligible for, and the court may impose, whatever punishment is authorized by the statute, so long as that punishment is not cruel and unusual." *Id.* (citing Chapman v. United States, 500 U.S. 453, 465 (1991)).

156. *Id.*

157. *Id.*

158. LeRoy v. Illinois Racing Bd., 39 F.3d 711, 716 (7th Cir. 1994).

159. *Id.*

160. *Id.* at 718.

161. *Id.* at 716.

Schmidt,[162] the district court issued a broad injunction which, among other things, enjoined the Illinois Racing Board from "conditioning the issuance of occupational licenses upon applicants' forfeiture of their constitutional rights."[163] He continued by noting that not more than several months before the case at bar arose, the Seventh Circuit upheld the injunction instituted in *Serpas*.[164] To the best of his knowledge, Judge Wellford continued, the injunction was still in effect at the time of the search of LeRoy's automobile.[165]

Judge Wellford finalized his dissent by explaining that the Illinois Racing Board knew or should have known that the search clearly violated constitutional principals and, therefore, should not have been entitled to their immunity defense.[166] In reaching this conclusion, Judge Wellford reasoned that the defendants should have known of the injunction imposed against it by the district court, and affirmed by the Seventh Circuit in *Serpas*, as well as the *Hansen* decision in which the Illinois Appellate Court declared the rule unconstitutional on its face.[167] Judge Wellford concluded by stating that *Dimeo* should not have been applied retroactively and that in 1987, *Serpas* was authoritative.[168]

VI. Conclusion

The favorable treatment that the Seventh Circuit gave to gambling in *LeRoy* has not always been the attitude in America. In 1789 when the United States Constitution was drafted, non-lottery gambling was considered a sin.[169] Although many early Americans pursued card playing and

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162. 621 F. Supp. 734 (E.D. Ill. 1985).
163. *Id.* at 744.
164. *LeRoy*, 39 F.3d at 716 (citing Serpas v. Schmidt, 808 F.2d 601 (7th Cir. 1986)).
165. *Id.* at 717.
166. *LeRoy*, 39 F.3d at 717.
167. *Id.* at 718.
168. *Id.* The concurrence stated: "I do not agree that *Dimeo* (decided in 1991) may be retroactively applied in this case to consideration of a claim of qualified immunity to a 1987 episode." *Id.* Judge Wellford elaborated that "[w]hile *Serpas* may be deemed 'no longer authoritative' by the majority (as of 1991), for the reasons I have stated, I believe it was sufficiently authoritative (and its injunction binding) to preclude a Rule 12 (b)(6) motion in this case." *Id.*
169. Nelson Rose, *Gambling and the Law-1993 Update*, 15 Hastings Comm. & Ent. L.J. 93, 94 (1993). In Colonial America, non-lottery gambling could not be mentioned in polite society. *Id.* Gambling was viewed as something unholy, and the gambler was to be damned to hell. *Id.*

dice, the law has always treated gambling as a "vice" of society.[170] In his dissent, Judge Wellford attempted to uphold this view by vigorously attacking the majority decision on the basis that the law was clearly established at the time of the search.[171] He concluded that the qualified immunity defense should not have been upheld.[172]

Although Judge Wellford made an effort to prevent the further erosion of expressed Constitutional rights, his well reasoned opinion was not embraced by a majority of the Seventh Circuit. Even if the majority had declared the law "clearly established" to negate the defense of qualified immunity, the court declared Rule 25.19 Constitutionally permissible under the Fourth Amendment.[173]

In reaching its decision, the majority emphasized the fact that Rule 25.19 was enacted to safeguard a substantial state interest. The rationale was that since Illinois generates substantial revenue from taxing parimutuel wagering, the Rule is needed to promote public confidence in a drug free sport in order to keep attendance numbers high.[174] There is not doubt that wagering is a substantial and necessary source of tax income, however, that rationale alone does not justify warrantless searches.

Casino gambling is also a substantial source of tax revenue, however no state which allows it has any provisions which negate the requirements of the Fourth Amendment in order to protect this revenue.[175] In addition, courts which deal with warrantless searches in gambling casinos do not diminish or

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170. ALICE FLEMING, SOMETHING FOR NOTHING: A HISTORY OF GAMBLING 11 (1978). Three of the most notable colonial card players were George Washington, Thomas Jefferson, and Benjamin Franklin. *Id.* Card playing was one of the activities taxed by the Stamp Act of 1765. *Id.* In Massachusetts Bay Colony, the possession of cards and dice was illegal. *Id.*

See Rose, *supra* note 173. The view of gambling as a vice is still the majority view in American society. *Id.* Almost all jurisdictions in the United States have made gambling debts virtually unenforceable. *Id.* States have also limited the ability of gambling institutions to advertise. *Id.* In Nevada for example, the only legal businesses that cannot advertise are casinos and brothels. Id. In New Jersey, casino advertising is restricted to the casinos' restaurants, shows, and accommodations. *Id.*

171. LeRoy, 39 F.3d at 716.

172. *Id.*

173. *Id.* at 711.

174. *Id.* at 714.

175. RICHARD LEHNE, CASINO POLICY, 108 (1986). In 1937, shortly after the Nevada State Legislature legalized casino gambling within the state's boundaries, William Har-

overlook the requirements of the Fourth Amendment simply because the search was conducted in or around a casino.[176] The courts which dealt with these searches could have easily reasoned that warrantless searches are necessary to protect the tax revenues that casinos generate. Moreover, the legislatures of these "casino" states have taken less intrusive measures to protect the tax revenues generated by gambling within their borders.

Even if protection of tax revenues was a substantial state interest, the state of Illinois has alternative measures to combat the abuse of performance enhancing drugs without having to resort to warrantless search legislation. The Illinois Racing Commission subjects horses participating in races to drug screening as well as imposing liability on trainers for violating Illinois' trainer responsibility rule.[177]

In light of the fact that horse racing is continuing to lose market share of the growing gaming industry,[178] legislatures and track owners are taking measures to address this problem.

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rah opened the first gambling casino in Reno, Nevada. *Id.* Shortly thereafter, Benjamin "Bugsy" Siegel, erected the Flamingo casino hotel in Las Vegas, Nevada. *Id.*

New Jersey's original attempts to legalize casino gambling failed primarily because, unlike Nevada, New Jersey's original Constitution prohibited casino gambling. N.J. CONST. Art. IV, § 7 (1844). However, after six subsequent amendments, the Constitution of New Jersey was finally amended to allow the state legislature to enact legislation to allow casino gambling within the boundaries of the city of Atlantic City. N.J. CONST. Art. IV, § 2 (1976).

Like horse racing, gambling casinos are a substantial source of state revenue. Rose, *supra* note 173. In 1993, the twelve Atlantic City casinos had gross revenues of 3.7 billion dollars. Kristen Campion, *Riverboats: Floating Our Way to a Brighter Fiscal Future?*. 19 SETON HALL LEGIS. J. 573 (1995). The Casino Revenue Fund ("CFR") is a social program set up by N.J. STAT. ANN. § 5:12-145 (1976), which mandates that a percentage of casino revenues must be used for reducing property taxes, funding health services and aiding elderly and disabled individuals. *Id.* In 1993, these New Jersey casinos paid $294.6 million into the CFR fund. *Id.*

176. In *United States v. Welch*, the Ninth Circuit was faced with a warrantless search of a handbag and an automobile at a casino hotel in Las Vegas, Nevada. United States v. Welch, 4 F.3d 761 (9th Cir. 1993). In upholding the search, the court had to rely on the well established Fourth Amendment exception of consent and apparent authority. *Id.* at 762. *see also* Schultz v. Lamb, 504 F.2d 1009, 1010 (9th Cir. 1974) (which held that in spite of a high burglary rate in Las Vegas casinos, the requirements of the Fourth Amendment cannot be relaxed; United States v. Haddad, 558 F.2d 968 (9th Cir. 1977) (which declared that the Fourth Amendment remained an obstacle for a warrantless search of a hotel room in which the hotel guest was a convicted felon and was observed carrying a firearm).

177. ILL. ADMIN. CODE tit. 11, §509.200.

178. UNITED STATES DEP'T OF COMMERCE BUREAU OF ECONOMIC ANALYSIS, SURVEY OF CURRENT BUSINESS. v. 66-69 (1986-1989). Between the years of 1982 and 1989, wagering

In recent years, some legislatures have reduced taxes on race purses in order to allow the track owners to offer more prize money.[179] In addition, race track owners have increased race purse amounts to attract more competitive and well known horses in the hopes that this will increase attendance numbers. Illinois has taken the opposite approach by enacting more rules that may deter horseman from competing. Rule 25.19, by allowing warrantless, suspicionless searches will certainly not be as appealing to popular horse owners and drivers as increases in purse money.

There is no denying that the abuse of performance enhancing drugs is a serious problem that should not be approached lightly. It is also undisputed that tax revenue generated by parimutuel wagering is a state interest worth protecting. In spite of the fact that alternate measures exist in Illinois to combat drug abuse, the *LeRoy* court upheld the constitutionality of Rule 25.19 as it applies to the search of a jockey's automobile. Aside from the constitutional question of Rule 25.19, another question remains to be answered. Is Rule 25.19 really necessary? Or is it unduly trotting on fundamental Constitutional rights?

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in the United States grew 67%, however, parimutuel horse wagering increased only 14%. *Id.*

179. KY. REV. STAT. ANN. §138.510 (1988). In Kentucky, certain race parks have been successful in convincing the state legislature to reduce their purse tax from 4.75% to 1.5%. *Id.*