Volume 74
Issue 2 *Dickinson Law Review - Volume 74, 1969-1970*

1-1-1970

Brennan v. Illinois Racing Board: The Validity of Statutes Making a Horse Trainer the Absolute Insurer for the Condition of His Horse

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Notes

BRENNAN v. ILLINOIS RACING BOARD: THE VALIDITY OF STATUTES MAKING A HORSE TRAINER THE ABSOLUTE INSURER FOR THE CONDITION OF HIS HORSE

In *Brennan v. Illinois Racing Board*,[1] the Illinois Supreme Court declared unconstitutional a statute[2] making a horse trainer the absolute insurer of, and responsible for, the condition of his horse if the horse is found to have any drugs, narcotics or stimulants in his system on the day the horse races. This decision focuses attention on the conflict which exists among the states as to the validity of these "trainer insurer" rules.[3] This Note will

1. Brennan v. Illinois Racing Bd., 42 Ill. 2d 352, 247 N.E.2d 881 (1969).
2. ILL. ANN. STAT. ch. 8, § 37c-3 (1966):
> The trainer shall be the absolute insurer of and be responsible for the condition of horses entered by him in a race regardless of the acts of a third party. Should chemical or other analysis of saliva or urine samples, or other tests, show the presence of any drug of any kind or description, the Board may in its discretion suspend or revoke the license of the trainer, the stable foreman in charge of the horse, the groom, or any other person shown to have had the care or attendance of the horse.
3. A similar statute was held to be unconstitutional by the Florida Supreme Court in State *ex rel.* Paoli v. Baldwin, 159 Fla. 165, 31 So. 2d 627 (1947).

Trainer insurer rules have been held valid in California, Sandstrom v. California Horse Racing Bd., 31 Cal. 2d 401, 189 P.2d 17 (1948); New Mexico, Sanderson v. New Mexico State Racing Comm'n., 80 N.M. 200, 453 P.2d 370 (1969); and West Virginia, State *ex rel.* Morris v. West Virginia Racing Comm'n., 133 W. Va. 179, 55 S.E. 2d 263 (1949).

Ohio has a "trainer insurer" rule, but the Supreme Court of Ohio, Battles v. Ohio State Racing Comm'n, 12 Ohio App. 2d 52, 230 N.E.2d 662 (1967), while holding that the insurer rule was not unconstitutional in its general application, stated that it could be ruled invalid as to a particular set of circumstances, so that in effect, the court rejected the absolute liability interpretation.

analyze the decision of the *Brennan* case in light of contrary decisions in other jurisdictions as to the validity of the "trainer insurer" rules and in relation to other areas of absolute liability.

Jean Brennan was the trainer of a horse which, having won a race, was subjected to a urinalysis pursuant to the racing regulations. A stimulant, prohibited by the Illinois Racing Board's Rules of Racing, was found in the urine sample. The Racing Board revoked Brennan's trainer's license for a violation of the rules.

Brennan appealed the revocation, and was successful in having the revocation order set aside by the Circuit Court of Cook County on the grounds that the rule under which his license was revoked was arbitrary, unreasonable and deprived him of due process of the law.

On appeal by the State Racing Board, the Illinois Supreme Court affirmed, holding that the "trainer insurer" rule was arbitrary, unreasonable and an illegitimate exercise of police power. The court stated that the rule prevented the horse trainer from making a defense to the charge against him by substituting an irrebuttable presumption which unjustly destroyed his right to offer evidence to establish his innocence.[4]

Background

Millions of dollars are involved in the legalized gambling which is attendant upon horse racing.[5] The states receive a portion of this amount in tax revenues.[6] In addition, an untold amount of money is involved in illegal, off-track gambling. The wagering public has a substantial interest in horse racing. They are betting money on the outcome of the races under the assumption that the races are being conducted fairly and honestly. If the public has doubts about the fairness and honesty with which the races are conducted, their willingness to risk money will decrease. Of more importance, those persons who had wagered on the horse which is eventually declared the winner as a result of the disqualification of the drugged horse will not be able to obtain either a refund of the money they wagered or the money they would have won had not the original "winner" been drugged. The state also has a substantial interest in horse racing, for if the amount of wagering decreases because of the public's lack of confidence in the manner in which the races are conducted, the tax revenues received by the state will decrease proportionately. For these reasons, close regulatory supervision of horse racing is necessary and appropriate.

Those charged with the supervision of the races must not only

4. Brennan v. Illinois Racing Bd., 42 Ill. 2d 352, 355, 247 N.E.2d 881, 884 (1969).

5. The pari-mutuel turnover for 1966 was $4,685,000,000. U.S. Bureau of Census, Statistical Abstract of the United States: 1967, at 213 (88th ed. 1967).

6. The revenue to the states for 1966 was $388,000,000. *Id.*

concern themselves with the actions of the horse owners, trainers, jockeys and others involved in the racing, but they must also concern themselves with the actions of other persons who would desire to control the outcome of the races. It is to this end that the "trainer insurer" rules have been enacted.[7] Under the "trainer insurer" rules, the trainer is not only responsible for his own actions and the actions of his employees, but also for the actions of third persons.[8] It is this portion of the rules making the trainer liable for the acts of third parties which has been the subject of litigation.

The division between the jurisdictions which have dealt with the "trainer insurer" rules is marked by their disagreement as to whether the regulations impose absolute liability or provide for irrebuttable presumptions, and whether this exercise of the police power violates the due process clause of the fourteenth amendment of the Constitution.[9]

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7. State *ex rel.* Morris v. West Virginia Racing Comm'n., 133 W.Va. 179, 55 S.E.2d 263 (1949). The purpose of the rule was

> . . . to avoid, as far as possible, the use of medicine or drugs which might affect the normal ability of a horse to run in a race intended to be conducted under rules of honesty and fairness. In effecting such a result, in the peculiar circumstances under which horses are trained and prepared for racing, responsibility for the condition of a horse when he enters a race must, of necessity, be placed somewhere. To leave any doubt on that point would be to make ineffective all efforts at regulation, and all attempts to assure fairness in horse racing.

Id. at 182, 55 S.E.2d at 269.

8. Sandstrom v. California Horse Racing Bd., 31 Cal. 2d 401, 189 P.2d 17 (1948): "The closer the supervision to which the trainer is held, the more difficult it becomes for anyone to administer a drug to the horse." *Id.* at 405, 189 P.2d at 21.

9. The issue has also arisen as to whether the trainer's license is a property right, hence protected by the fourteenth amendment, or a privilege, not within the protection of the fourteenth amendment. Though briefly mentioned in several of the cases involving "trainer insurer" rules, the issue does not seem to be an important factor in determining the validity or invalidity of the rules.

While there is a division of authority on the matter, the tendency appears to be that licenses, particularly where they are necessary to the pursuit of a profession or occupation, are deemed either property rights or liberties, both of which are protected by the fourteenth amendment. Schware v. Board of Bar Examiners, 353 U.S. 232 (1956): "A State cannot exclude a person from the practice of law or any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Id.* at 239. The court added in a footnote:

> We need not enter into a discussion of whether the practice of law is a "right" or "privilege." Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing law except for valid reasons.

The courts which have held the "trainer insurer" rules to be valid have interpreted them as imposing absolute liability by looking at the language of the rules and applying the "plain meaning rule."[10] In *Sandstrom v. California Horse Racing Board*,[11] the court stated that: ". . . [t]he import of this rule is to impose strict liability upon the trainer for the condition of the horse. The language of the rule can admit of no other conclusion."[12] As absolute liability rules they would be rules of substantive law[13] and within the exercise of the state's police powers.

The courts which have held the "trainer insurer" rules to be invalid have interpreted them as providing for irrebuttable presumptions[14] by looking at the effect of the rules.[15]

Id.; Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964), *aff'd on rehearing*, 330 F.2d 55 (5th Cir. 1964):

> It is firmly established, of course, that the state has the right to regulate or prohibit traffic in intoxicating liquor in the valid exercise of its police power, but this is something quite different from a right to act arbitrarily and capriciously. Merely calling a liquor license a privilege does not free the municipal authorities from the due process requirements in licensing and allow them to exercise uncontrolled discretion.

Id. at 609; Lewis v. Grand Rapids, 222 F. Supp. 349 (W.D. Mich. 1963), *rev'd in part on other grounds*, 356 F.2d 276 (6th Cir. 1967): "Liberty includes the right to pursue a lawful occupation. To prevent this without due process is to violate the Fourteenth Amendment to the United States Constitution." *Id.* at 386.

10. Chung Fook v. White, 264 U.S. 443 (1924): The words of the statute being clear ". . . [the court's] duty is simply to enforce the law as it is written, unless clearly unconstitutional." *Id.* at 446.

11. 31 Cal. 2d 401, 189 P.2d 17 (1948).

12. *Id.* at 405, 189 P.2d 21. To leave no doubt in the mind of the reader, the court went on to state:

> Rule 313 may not be deemed to establish a conclusive presumption to the effect that evidence of the presence of a drug in a horse is proof that the trainer drugged the horse. By express language the rule imposes strict liability for the condition of the horse. Fault in the sense of actual administration of the drug or negligent care by the trainer is neither the basis nor an element of liability. It may not be inserted into the case by subtle hypothesis. Whether the trainer drugged the horse or knew that it was drugged, or was negligent in not properly seeing that the horse was not drugged are not elements of liability.

Id.

13. Blood v. Gibson Circuit Court, 239 Ind. 394, 157 N.E.2d 475 (1959):

> As a general rule, laws which fix duties, establish rights and responsibilities among and for persons, natural or otherwise, are "substantive laws" in character, while those which merely prescribe the manner in which such rights and responsibilities may be exercised and enforced in a court are procedural laws.

Id. at 397, 157 N.E.2d at 478; *accord*, State v. Augustine, 197 Kan. 207, 210, 416 P.2d 281, 283-84 (1966).

14. Maryland Casualty Co. v. Williams, 377 F.2d 389 (5th Cir. 1967):

> A "conclusive presumption" of law is one which is final and irrebuttable, an inference which must be drawn from proof of given facts, and which no evidence, however strong, can overcome.

Id. at 394.

15. State *ex rel.* Paoli v. Baldwin, 159 Fla. 165, 31 So. 627 (1947). The court looked at Rule 117 which makes the trainer an absolute insurer, in

Wigmore,[16] in his treatise on evidence, is of the opinion that there cannot, in strictness, be such a thing as a conclusive presumption. The rule, which is purportedly a conclusive presumption, really provides that, where the first fact is shown to exist (*e.g.*, drugs in the horses system), the existence of the second fact (*e.g.*, that the trainer administered or negligently allowed to be administered a drug) is immaterial for the purpose of the proponent's case (*e.g.*, violation of the "trainer insurer" rule). The rule is not one apportioning the burden of persuasion nor is it one varying the duty of coming forward with the evidence. It is a rule of substantive law, and the legislature, in its control over the substantive law, is still limited by the due process clause of the fourteenth amendment.[17]

Therefore, whether the statute is interpreted as imposing absolute liability or as providing for an irrebuttable presumption, it is a rule of substantive law. Hence, the issue remains whether the "trainer insurer" rules are a violation of the due process clause of the fourteenth amendment.

THE POLICE POWER AND DUE PROCESS

The police power is the least limitable of the powers of government[18] and is the broadest in scope of any field of governmental activity.[19] An exact definition or limitation of the police power is impossible to give.[20] The Supreme Court of the United States has stated that the police power is "neither abstractly nor historically capable of definition."[21] Various attempts have been made at framing a definition of the police power[22] but these definitions

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pari-materia with Rule 109 which states:

> No person shall administer, or permit to be administered in any manner whatsoever, internally or externally, to any horse, entered or to be entered in a race, any stimulant, depressant, hypnotic nor narcotic drug, of any kind or description, prior to a race or workout.

Id. at 169, 31 So. 2d at 631. The court then concluded:

> In this regard Rule 117 in effect provides that proof of the fact that a horse entered in a race has been administered a drug shall constitute irrebuttable evidence that the trainer has violated Rule 109. This is why Rule 117 violates the due process clause of both our state and federal constitutions.

Id.

16. 9 J. WIGMORE, EVIDENCE (3d ed. 1940).
17. *Id.* § 2492 at 292, § 1354 at 718.
18. Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 83 (1946).
19. State v. McDonald, 160 Wis. 21, 59, 151 N.W. 331, 369 (1915).
20. Slaughter-House Cases, 83 U.S. 36, 62 (1873).
21. Berman v. Parker, 348 U.S. 26, 32 (1954).
22. Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962) ("time-tested

have been broad and difficult to apply. Because of the difficulties encountered in framing a definite rule which would be applicable in all cases, it would be much simpler to determine whether a particular case comes within the scope of the police power.[23]

The police power is not unlimited,[24] but its limitations have never been drawn with exactness.[25] The Supreme Court has generally refrained from announcing any specific criteria to be applied to a particular case except for substituting the standard of "reasonableness."[26] This requirement of reasonableness is a manifestation of the due process requirement.[27] The standard of reasonableness is of extreme importance[28] because the test of the regulation's constitutionality is not whether the regulation imposes any restrictions on constitutionally protected rights, but whether the restrictions imposed are reasonable.[29]

While there is no exact test to determine when a restriction is unreasonable,[30] the general rule is that in order for a police measure to be reasonable, "the means adopted must be reasonably necessary and appropriate for the accomplishment of the legitimate objects falling within the scope of the power."[31] A regulation is not necessarily unreasonable because it results in inconvenience or loss to an individual,[32] nor because some of the objects affected by it may be wholly innocent.[33] The test of reasonableness "involves consideration of the nature of the right asserted by the individual and the extent that it is necessary to restrict the assertion of the

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conceptional limit of public encroachment upon private interests"); Gilchrist Drug Co. v. Birmingham, 234 Ala. 204, 207, 174 So. 609, 612 (1937) ("the power to prevent, an anticipation of danger to come"); *Ex Parte* Ramirez, 193 Cal. 633, 640, 226 P. 914, 921 (1943) ("the power inherent in the state to prescribe, within limits of the state and federal constitutions, reasonable regulations to preserve the public order, health, safety and morals"); State v. Cromwell, 72 N.D. 565, 571, 9 N.W.2d 914, 919 (1943) ("the power to add to the general public convenience, prosperity and welfare").

23. Booth v. Indiana, 237 U.S. 391, 395-96 (1915); Allgeyer v. Louisiana, 165 U.S. 578, 590 (1897).

24. Stepp v. State, 202 Miss. 725, 726, 32 So. 2d 447, 448 (1947); State v. Henry, 37 N.M. 536, 540, 25 P.2d 204, 208 (1933).

25. Euclid v. Amber Realty Co., 272 U.S. 365, 397 (1926).

26. Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962); Lawton v. Steele, 152 U.S. 133, 137 (1894).

27. Hoff v. State, 39 Del. 134, 140, 197 A. 75, 81 (1938).

28. McCoy v. York, 193 S.C. 390, 393, 8 S.E.2d 905, 907 (1940); Mehlos v. Milwaukee, 156 Wis. 591, 593, 146 N.W. 882, 884 (1914).

29. Baton Rouge v. Rebowe, 226 La. 186, 188, 75 So. 2d 239, 241 (1954).

30. Board of Zoning Appeals v. Decatur Co. of Jehovah's Witnesses, 233 Ind. 83, 86, 117 N.E.2d 115, 118 (1954).

31. Clason v. Indiana, 306 U.S. 439, 444 (1939). Nebbia v. New York, 291 U.S 502, 525 (1934); Miller v. Board of Public Works, 196 Cal. 477, 484, 234 P. 381, 388 (1925), *error dismissed*, 273 U.S. 781 (1925).

32. Henson v. Chicago, 451 Ill. 206, 210, 114 N.E.2d 778, 782 (1953); Chicago v. Washingtonian Home, 289 Ill. 206, 209, 124 N.E. 416, 419 (1919)

33. Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 83 (1946).

right in the interest of the public."[34]

REASONABLENESS

Absolute liability is imposed by the state under its police power and hence is subject to the reasonableness test. To determine whether the "trainer insurer" regulations are reasonable, it will be necessary to examine analogous cases to find what criteria the courts used in determining that the regulations were reasonable. Absolute liability has been imposed in the area of tort law and in the area of the law termed "public welfare regulations."[35] In the cases which have dealt with absolute liability statutes and regulations, four criteria from which the courts determined that the regulations were reasonable become apparent: *respondeat superior*,[36] control of activity causing the harm,[37] ability to bear the loss,[38] and the deterrent effect of the regulation.[39]

Respondeat Superior

Cases which uphold absolute liability statutes on the basis of *respondeat superior*[40] involve an employer-employee relationship

34. Jones v. Board of Control, 131 So. 2d 713, 717 (Fla. 1961).

35. F. SAYRE, *Public Welfare Offenses*, 33 COL. L. REV. 55, 73 (1933), roughly classifies the public welfare offenses as (1) illegal sales of intoxicating liquors, (2) sales of impure or adulterated foods, (3) sales of misbranded articles, (4) violations of anti-narcotics acts, (5) criminal nuisances, (6) violations of traffic regulations, (7) violations of motor vehicle laws, and (8) violations of general police regulations, passed for the safety, health or well being of the community.

36. United States v. Dotterweich, 320 U.S. 277 (1943); Van Oster v. Kansas, 272 U.S. 465 (1926); *Ex Parte* Marley, 29 Cal. 2d 525, 175 P.2d 832 (1946); Mantzoros v. Board of Equalization, 87 Cal. App. 140, 196 P.2d 657 (1948); Gibbons v. Cannaven, 393 Ill. 376, 66 N.E.2d 370 (1946); Anschutz v. Michigan Liquor Control Comm'n., 343 Mich. 630, 73 N.W.2d 533 (1955); Mazza v. Cavicchia, 28 N.J. Super. 280, 100 A.2d 550 (1954); Rufo v. Board of Liquor Control, 130 N.E.2d 374 (Ohio App. 1954), *rev'd on other grounds*, 164 Ohio St. 275, 131 N.E.2d 390 (1955); Commonwealth v. Koczwara, 397 Pa. 575, 155 A.2d 825 (1959); Scialo v. Smith, 210 A.2d 595 (R.I. 1965).

37. United States v. Dotterweich, 320 U.S. 277 (1943); Jones v. Brim, 165 U.S. 180 (1897); St. Louis & S.F. Ry. v. Matthews, 165 U.S. 1 (1896); United States v. Greenbaum, 138 F.2d 437 (3d Cir. 1943); Green v. General Petroleum Corp., 205 Cal. 328, 270 P. 952 (1928); Colton v. Onderdonk, 69 Cal. 155, 10 P. 395 (1886); Goldberg v. Rabuchin, 65 Cal. App. 2d 111, 149 P.2d 961 (1944); Wolfe v. Great Atlantic & Pacific Tea Co., 143 Ohio St. 643, 56 N.E.2d 230 (1944).

38. Chicago R.I. & Pac. Ry. v. Zernecke, 183 U.S. 582 (1901); Western Indemnity v. Pillsbury, 170 Cal. 686, 151 P. 398 (1915).

39. Chicago v. Sturges, 222 U.S. 313 (1911).

40. Greer Lines Co. v. Roberts, 216 Md. 69, 139 A.2d 235 (1958):
The rule of "respondeat superior" arises from a relation of principal

between the person charged and the person causing the harm. In the liquor control cases,[41] the criminal short-weight cases,[42] and the sales of misbranded drug cases,[43] the owner is penalized for the acts of his employees. The owner has hired the employees, is making a profit by virtue of their employment, and has an obligation to maintain an efficient and affirmative supervision of his business.[44] Hence, he should be and has been held responsible for their acts performed within the scope of their employment, and it is reasonable that he be so held.

It is submitted that this reasoning is not applicable to the "trainer insurer" rules. In the first place, the trainer, while possibly an employer of the jockeys, grooms and others who are necessary to the operation, is himself an employee of the owner of the horse. On this basis, it could be argued that the owner, not the trainer, should be held absolutely liable. The owner does forfeit his purse, but his right to have his horses entered in races is not vulnerable to suspension or revocation. Secondly, the trainer's liability is not limited to the acts or omissions of his employees, but is extended to include the criminal acts of third persons not subject to his control or supervision. None of the cases imposing absolute liability dealt with a situation where the harm was caused by the criminal act of a third party not related to the person charged in an employer-employee relationship. The court, in *Ex parte Marley*,[45] did indicate that such a situation could conceivably arise, but declined to comment as to the effect such a situation would have on the regulation.[46]

Control of Activity

The control of activity basis for determining the reasonableness of the regulations is found in the cases dealing with regulations concerning ultra-hazardous activities such as blasting,[47] oil

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and subordinate, and rests upon the powers of control and direction which the superior has over the subordinate, and applies when the relation of master and servant, employer and employee, or principal and agent is shown to exist between the wrongdoer and the person sought to be charged for the result of the wrong at the time and in respect to the very transaction out of which the injury arose.

Id. at 72, 139 P.2d at 238.

41. Van Oster v. Kansas, 272 U.S. 465 (1926); Gibbons v. Cannaven, 393 Ill. 376, 66 N.E.2d 370 (1946); Anschutz v. Michigan Liquor Control Comm'n., 343 Mich. 630, 73 N.W.2d 533 (1955); Mazza v. Cavicchia, 28 N.J. Super. 280, 100 A.2d 550 (1954); Rufo v. Board of Liquor Control, 120 N.E.2d 374 (Ohio App. 1954), *rev'd on other grounds*, 164 Ohio St. 275, 131 N.E.2d 390 (1955); Commonwealth v. Koczwara, 397 Pa. 575, 155 A.2d 825 (1959); Scialo v. Smith, 210 A.2d 595 (R.I. 1965).

42. *Ex Parte* Marley, 29 Cal. 2d 525, 175 P.2d 832 (1946).

43. United States v. Dotterweich, 320 U.S. 277 (1943).

44. Scialo v. Smith, 210 A.2d 595, 598 (R.I. 1965).

45. *Ex Parte* Marley, 29 Cal. 2d 525, 175 P.2d 832 (1946).

46. *Id.* at 529, 175 P.2d at 836.

47. Colton v. Onderdonk, 69 Cal. 155, 10 P. 395 (1886).

well drilling,[48] animals,[49] railroad fires,[50] and adulterated food and drugs.[51] In these situations, the person charged has control over the activity causing the harm,[52] and the potential dangers which might result from the activity itself are so great that the person is deemed to be "acting at his peril."[53] It could be argued that the trainer has control over the horse, but the horse is not causing the harm. The harm is the administering of the drug to the horse. The racing of the horse is not of itself an activity which has the potential for harm as is blasting, keeping or driving animals, and oil well drilling. However, neither is the sale of food an activity which has potential for harm, unless the food is adulterated, and these are activities upon which absolute liability has been imposed.

The courts that have passed on the food and drug regulations have limited their discussions to the lack of scienter—even though the defendant didn't and couldn't know that the food or drug was adulterated, he was still liable for prosecution. The "trainer insurer" rules could be read in the same way, that is, a trainer who enters a drugged horse in a race is liable, whether he knows the horse has been drugged or not. However, even if the "trainer insurer" rules were read in this manner, there are still obvious distinctions between them and the food and drug regulations. In the latter cases, the harm to the public is grave, with the possible results being serious injury or death; in the former, the harm to the public is merely pecuniary and the harm which results for the trainer is potentially disastrous. The public requires food for survival and drugs for healing. Except for a small portion of the population which raises and grows its own food, the public must rely on the food processors and distributors and the drug manufacturers. No such need is forced on the wagering public. To

48. Green v. General Petroleum Corp., 205 Cal. 328, 270 P. 952 (1928).

49. Jones v. Brim, 165 U.S. 180 (1897); Goldberg v. Rabuchin, 65 Cal. App. 2d 111, 149 P.2d 961 (1944).

50. St. Louis & S.F. Ry. v. Matthews, 165 U.S. 1 (1896).

51. United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Greenbaum, 138 F.2d 437 (3d Cir. 1943); Wolfe v. Great Atlantic & Pacific Tea Co., 143 Ohio St. 643, 56 N.E.2d 230 (1944).

52. Green v. General Petroleum Corp., 205 Cal. 328, 270 P. 952 (1928):

> Where an injury arises out of, or is caused directly and proximately by the contemplated act or thing in question, without the interposition of any external or independent agency which was not or could not be foreseen, there is an absolute liability for the consequential damages, regardless of any element of negligence either in doing the act or in the construction, use, or maintenance of that object or instrumentality that may have caused the injury.

Id. at 331, 270 P. at 955.

53. People v. Scott, 24 Cal. 2d 774, 782, 151 P.2d 517, 521 (1944).

them, it is generally recreation, and they are taking a gamble by wagering in the first place. The number of people who would intentionally adulterate food and drugs is practically nil, with the possible exception of an unscrupulous competitor, while the number of people who would intentionally drug a horse could be as many as there are persons wagering on the outcome of the race. None of the cases which based the reasonableness of the regulation on the control of the activity dealt with a situation in which the act which caused the harm was committed intentionally by a third person. The possibility of such an act, however, has arisen in a number of the "trainer insurer" cases.[54]

Ability to Bear Loss

The ability to bear the loss principle is peculiar to the tort field of absolute liability, such as a railroad's liability for injury to passengers[55] and workmen's compensation acts.[56] In *Chicago R.I. & Pac. Ry. v. Zernecke*,[57] the court upheld a statute creating absolute liability for the death or injury of a railroad passenger. The railroad's contention that the injuries resulted from a wreck caused by vandals who had torn up the track was to no avail.[58] The analogy of this statute with the "trainer insurer" statute appears on its face to be valid and undistinguishable since the court held the railroad liable for the acts of third parties not related to the railroad. This statute was designed, however, to give the injured party a remedy for the injury suffered—it is remedial, not penal.[59] The railroad is a large company carrying passengers for a profit. The individual passenger pays a fee for the service rendered by the railroad. The company cannot only bear the loss better than the passenger, but it can protect itself with insurance, and it can spread the loss among the users of the railroad by including in its ticket rates the cost of insurance. In the case of the trainer, the loss falls upon a large number of individuals, while the liability is imposed upon the trainer, and there is no way the trainer can insure against or spread his loss. In the railroad case, the loss to the individual is great, while the comparative loss to the railroad is minor. In the trainer's case, the loss to each member of the betting public is small in comparison to the loss of livelihood for the trainer.

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54. State *ex rel.* Paoli v. Baldwin, 159 Fla. 165, 31 So. 2d 627 (1947); Maryland Racing Comm'n. v. McGee, 212 Md. 69, 128 A.2d 419 (1957).
55. Chicago R.I. & Pac. Ry. v. Zernecke, 183 U.S. 582 (1901).
56. Western Indemnity v. Pillsbury, 170 Cal. 686, 151 P. 398 (1915).
57. Chicago R.I. & Pac. Ry. v. Zernecke, 183 U.S. 582 (1901).
58. *Id.* at 586.
59. Marter v. Repp, 80 N.J.L. 530, 77 A. 1030 (1910):
> A "penal" statute is one which enforces a forfeiture or penalty for transgressing its provisions or doing a thing prohibited. "Penal" is a much broader term than "criminal" and includes many statutory enforcements of police regulations the violations of which are in no sense crimes.

Id. at 531, 77 A. at 1031.

Finally, the purpose of the "trainer insurer" rules, unlike the statute imposing absolute liability on the railroad, is penal and not remedial. In most instances, the harm suffered by the wagerers is non-remedial because a determination that drugs are present in the horse's system is not usually possible until after the race has been run and the pari-mutuel winners paid off.[60] The purpose of the "trainer insurer" rules is to protect the interests of the wagering public by preventing the harm rather than compensating them after the injury has occurred.

Deterrent Effect

The reliance on the deterrent effect for finding the absolute liability regulations to be reasonable runs through all the cases, whether they be in the area of tort liability or public welfare regulations. In *Chicago v. Sturges*,[61] the court held valid a statute imposing absolute liability on a city for damages caused by riots, stating:

> The imposition of absolute liability upon the community when property is destroyed through the violence of a mob is not, therefore, an unusual police regulation. Neither is it arbitrary, as not resting upon reasonable grounds of policy. Such a regulation has a tendency to deter the lawless, since the sufferer must be compensated by a tax burden which will fall upon all property, including that of the evil-doers as members of the community.
>
> It is likewise calculated to stimulate the exertions of the indifferent and the law-abiding to avoid the falling of a burden which they must share with the lawless.[62]

The employer will tend to be deterred from not exercising due care in the employment and supervision of his employees; the animal owner will tend to be deterred from carelessness in the control of his animals; the oil well driller will tend to be deterred from carelessness in drilling his wells; the food and drug processors and manufacturers will tend to be deterred from slipshod practices. However, the deterrent theory has no application to that portion of the "trainer insurer" regulations which extend the liability of the trainer to the acts of third parties. Also, while it is true that the trainer will be deterred from himself administering drugs to his horse, from negligently and carelessly hiring and supervising employees, and from negligently and carelessly guarding his horse

60. Sandstrom v. California Horse Racing Bd., 31 Cal. 2d 401, 405, 189 P.2d 17, 21 (1948).
61. 222 U.S. 313 (1911).
62. *Id.* at 314.

to prevent others from administering drugs to it, this same deterrent effect could be obtained from a regulation based on fault. As the *Brennan* court stated,

> . . . 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 the track patrons against fraud or deceit. The thought of the "absolute insurer" provisions is presumably to induce the trainer to take precautions against a tampering with the horse. But this is no more than he would do anyway, under penalty provisions based on traditional principles of fairness, since the consequences of failing to take precautions would be the same. It would seem that the only applications of the rule which would not be equally covered by one based on fault would be to situations which the trainer could not have prevented anyway. We see little if any tendency in penalty-without-fault provisions to reduce the frequency of the crime.[63]

Necessity

Even though the absolute liability imposed by the "trainer-insurer" rules might be found to be reasonable on the basis of one or more of the preceding criteria, there remains the test of whether the regulation is necessary to attain the desired result. In 1911, the United States Supreme Court cautioned that ". . . the means devised to effect the purpose should not go beyond the necessities of the case."[64] In recent years, courts have turned this warning into a limitation on the police power, by stating that "the means cannot sweep unnecessarily broadly and thereby invade the area of protected freedom,"[65] ". . . means that broadly stifle fundamental personal liberties cannot be pursued when the end can be more narrowly achieved,"[66] and that ". . . the means must not interfere with private rights beyond the necessities of the situation."[67] As a result of this necessity limitation, courts have struck down statutes when an alternative, less drastic means was available to achieve the same end. In *Martin v. Struthers*,[68] the court held invalid an ordinance forbidding any person to summon to the door the occupants of any residence for the purpose of delivering hand-

63. Brennan v. Illinois Racing Bd., 42 Ill. 2d 352, 355, 247 N.E.2d 881, 884 (1969).

64. House v. Mayes, 219 U.S. 270, 282 (1911).

65. Zwickler v. Koota, 389 U.S. 241, 250 (1967); Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

66. NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 307 (1964); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293, 296 (1961); Kunz v. New York, 340 U.S. 290, 294-95 (1951); American Communications Assoc. v. Douds, 339 U.S. 382 (1950); Saia v. New York, 334 U.S. 558, 560 (1947); Lovell v. Griffin, 303 U.S. 444, 451 (1937).

67. Cantwell v. Connecticut, 310 U.S. 296, 304 (1940); Nolden v. East Cleveland City Comm'n., 12 Ohio Misc. 205, 209, 232 N.E.2d 421, 425 (1966).

68. 319 U.S. 141 (1943).

bills or circulars. This ordinance had as its purpose the protection of the householders from annoyance, including intrusion upon the hours of rest, and the prevention of crime. The court stated that there were ". . . other traditional legal methods of achieving the same end," and on that basis held the ordinance to be invalid.[69] In *Weaver v. Palmer Brothers*,[70] the court invalidated a statute regulating the manufacture of mattresses where a reasonable alternative method entailing less deprivation was available.[71] In *Talley v. California*,[72] the court held invalid an ordinance prohibiting the distribution of handbills because the breadth of its application went far beyond what was necessary to achieve a legitimate governmental purpose.[73]

While these regulations dealt with situations quite different from the horse trainer situation, the principle is the same. The "trainer insurer" rules go beyond what is necessary to protect the racing public, and alternative methods are available to achieve the same end. Regulations which would hold the trainer liable for guilt or negligence would be sufficient to protect the wagering public's interest, particularly when there are statutes which make it a felony to administer drugs to race horses with the intent to affect their performance in a race.[74] Not only is the public protected from fraud and deceit by the trainer and his employees, but it is also protected from fraud and deceit by any other person who attempts to control the outcome of the race.

A regulation based on fault would also provide the horse trainer with certain constitutional rights deprived him by a statute imposing absolute liability. One of the requirements of due process is that the person charged be afforded a hearing.[75] The trainer

69. *Id.* at 146-49.
70. 270 U.S. 402 (1926).
71. *Id.* at 415; *accord*, Dean Milk Co. v. Madison, 340 U.S. 349 (1951).
72. 362 U.S. 60 (1960).
73. Id. at 62; *accord*, Shelton v. Tucker, 364 U.S. 479 (1960).
74. ILL. ANN. STAT. ch. 8, § 37(h)(1) (1966):
1. Whoever administers or conspires to administer to any horse a drug or stimulant or depressant internally, externally or by hypodermic method in a race or prior thereto, or
2. Whoever knowingly enters any horse in any race within a period of 24 hours after any hypnotic or narcotic or stimulant or depressant has been administered to such horse either internally or externally, or by hypodermic method, for the purpose of increasing or retarding the speed of such horse, is guilty of a felony and punishable by a fine of not more than five thousand dollars ($5000), or by imprisonment in a State prison or a county jail for not less than one nor more than two years or by both such fine and imprisonment.
75. Chicago v. Sturges, 322 U.S. 313 (1949); Morgan v. United States, 304 U.S. 1, 18-19 (1937).

may be afforded a hearing under the "trainer insurer" rules, but these hearings are, in effect, mere forms to reach a predetermined result. A regulation based on fault would still make the trainer liable for his own acts, whether they consisted of intentional or negligent administration of the drug, or intentional or negligent care of the horse which would allow another to administer the drug. However, at the same time it would give the trainer the benefit of an adversary hearing at which he could introduce evidence proving that the act was committed by a third party in spite of the care and diligence exercised by the trainer.

The proponents of the "trainer insurer" rules maintain that to make the trainer liable only for guilt or negligence would leave a wide area unprotected,[76] and they point out the difficulty of proving negligence or guilt.[77] The area is protected by those statutes making it a felony to administer a drug to a horse.[78] That a problem of proof exists, however, cannot be denied; but as Judge Carter points out in his dissent in *Sandstrom v. California Horse Racing Board*,[79] "this is a matter of weighing expediency against justice."[80] A similar argument regarding difficulty of proof was made in *Smith v. California*.[81] The court answered:

> We might observe that it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind. Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial.[82]

The problem of proof is burdensome, but under our system of justice, wherein a man is presumed innocent until proven guilty, it is necessarily cast upon the state. To deprive a man of his constitutional rights by legislatively dispensing with the requirement

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76. Sandstrom v. California Horse Racing Bd., 31 Cal. 2d 401, 189 P.2d 17 (1948):

> Should responsibility be imposed only for actual guilty participation or culpable negligence . . . there would exist a possible field of activity beyond the affirmative protection thereby afforded to the patrons of the pari-mutuel system.

Id. at 407, 189 P.2d at 23; Fogt v. Ohio State Racing Comm'n., 3 Ohio App. 2d 423, 426, 210 N.E.2d 730, 733 (1965).

77. Fogt v. Ohio State Racing Comm'n., 3 Ohio App. 2d 423, 210 N.E.2d 730 (1965):

> Manifestly, it would be almost impossible to prove guilty knowledge or intent in cases of this kind, and the futility of prosecutions under a rule requiring probative evidence or guilty knowledge and intent would eventually leave the public interest and welfare to the mercy of the unscrupulous.

Id. at 426, 210 N.E.2d at 733.

78. ILL. ANN. STAT. ch. 8, § 37(h)(1) (1966).

79. Sandstrom v. California Horse Racing Bd., 31 Cal. 2d 401, 189 P.2d 17 (1948).

80. *Id.* at 413, 189 P.2d at 29 (dissenting opinion).

81. 361 U.S. 147 (1959).

82. *Id.* at 154.

of proof of fault seems unconscionable. As the *Brennan* court points out, "[a]dministrative convenience is not a constitutional substitute for the rights of individuals."[83]

Conclusion

It is submitted that absolute insurer statutes and regulations, whether they be labeled as strict liability or irrebuttable presumption, violate the due process clause of the fourteenth amendment because they are arbitrary and unreasonable. They should be considered arbitrary and unreasonable because they go beyond what is necessary to protect the interests of the public and because alternative methods of attaining the desired end, methods which will not deprive the trainer of his rights, are available.

A regulation based on guilt or negligence is sufficient to afford the public the protection it needs. The only advantage the "trainer insurer" regulations have over regulations based on fault is the elimination of the proof requirement, and this advantage is not a sufficient basis to deprive the trainer of his rights.

It should be incumbent upon the state, as a beneficiary of the fruits of horse racing, to take a more active part in supervising and securing the activities at the racetrack, rather than pass to this burden to the individual trainer.

Thomas Costa

83. Brennan v. Illinois Racing Bd., 42 Ill. 2d 352, 355, 247 N.E.2d 881, 884 (1969).