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CONSTITUTIONAL LAW-DUE PROCESS-PUNISHMENT FOR ACTS DONE WITHOUT CONSCIOUSNESS OF WRONGDOING

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COMMENTS

CONSTITUTIONAL LAW—DUE PROCESS—PUNISHMENT FOR ACTS DONE WITHOUT CONSCIOUSNESS OF WRONGDOING — In the recent case of *United States v. Dotterweich*[1] the United States Supreme Court (four justices dissenting) held the president of a drug jobbing company personally liable for violation of the Federal Food, Drug and Cosmetic Act[2] on informations charging misbranding and adulteration of products. There was no evidence of any personal guilt on the defendant's part, nor was there any proof or claim that he ever knew of the introduction into commerce of the adulterated drugs in question.[3] The disagreement among the members of the court was essentially one

[1] 320 U.S. 277, 64 S. Ct. 134 (1943).

[2] 52 Stat. L. 1040 (1938).

[3] See Justice Murphy's dissenting opinion in United States v. Dotterweich, 320 U.S. 277 at 285 (1943).

of statutory interpretation,[4] but in view of the fact that defendant's liability is vicarious in nature and is without knowledge or consciousness of any wrongdoing, we properly might give some consideration to the propriety and constitutional justification for the imposition of such liability.

In the Fifth and Fourteenth Amendments to the Federal Constitution it is provided that no person shall be deprived "of life, liberty, or property without due process of law"; these restrictions are respectively on the Federal Government and on the state governments. Attempts to formulate a precise definition of the concept of "due process of law" have been unsuccessful, but it is generally accepted that the phrase means a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.[5] And yet it must be understood that the clause does not apply only to the *enforcement* of laws—it applies equally to the *making* of laws, so that in the creation of new statutes the legislative body must give consideration to all private and individual rights and property interests to be affected thereby.[6] This means that in testing the constitutionality of an act the courts will examine the legislative competency both as to jurisdiction to act and as to the reasonableness and propriety of the particular regulation of human activity then under consideration—all as measured by an application of the "due process of law" concept.

It would be impossible within the short space of a few pages to discuss, even summarily, the manifold applications of the due process clause to legislative enactments. Therefore, our only consideration here is the application of the due process clause to the creation of criminal liability for acts theretofore treated as innocent,[7] and the further application thereof to legislative alterations of requisite operative facts of criminal liability, such as the elimination of the elements of intent, consciousness of wrongdoing, and wilfulness.

The authority of legislative bodies, either state or federal, to create new crimes and to alter the essential elements of old crimes is derived from police power bestowed by the Federal Constitution. The police

[4] The court split upon the proper interpretation of the words "any person" as used in § 303(a) of the statute. The majority concluded that Congress did not intend thereby to impose liability solely upon a corporation [which is defined as a "person" in § 201(e)] violating the statute, but intended to extend liability to the officers and agents of such corporation.

[5] Endicott Johnson Corp. v. Encyclopedia Press, 266 U.S. 285 at 288, 45 S. Ct. 61 (1924); Pennoyer v. Neff, 95 U.S. 714 at 733 (1877).

[6] State v. Henry, 37 N. M. 536, 25 P. (2d) (1933).

[7] People v. West, 106 N.Y. 293 at 296, 12 N.E. 610 (1887). "The power of the legislature to define and declare public offenses is unlimited except insofar as it is restrained by constitutional limitations."

power of the states is considered to be a plenary power to legislate for the general welfare of its citizens,[8] whereas the police power exercisable by the Federal Government, being a government of limited powers, is confined to those fields which have been specifically delegated to it by the Federal Constitution. Within the areas specially delegated, however, the Congress has full power to legislate for the public welfare—but there must be a "peg" on which to hang the exercise of such power.[9] Whether or not the particular exercise of the police power in question is by the state or Federal Government, the due process clauses of the Constitution stand as limitations thereon, and it must appear to the satisfaction of the courts that any restriction upon individual liberty, or any deprivation of property, is justified by public needs, serves the general public welfare, and is not exercised arbitrarily or unreasonably.[10] The constitutional provisions of due process thus establish limitations upon the police power of legislatures in the creation of crimes and the imposition of punishments.

It has been stated that the due process clause was intended to guarantee to the individual those rights which he had at common law at the time of the adoption of the Constitution,[11] but this does not mean that the due process clause prohibits the Congress or the legislatures from forbidding a person to do things simply because he might have done them at common law. Where public interest demands it, the legislature may impose such prohibitions as it deems necessary to achieve the desired end.[12]

[8] Noble State Bank v. Haskell, 219 U.S. 104 at 111, 31 S. Ct. 186 (1910).

[9] The "peg" on which the Federal Food, Drug and Cosmetic Act hangs is the power to regulate commerce.

For an excellent discussion of the power of the federal government to legislate for general welfare see Cushman, "The National Police Power," 3 MINN. L. REV. 289, 381, 452 (1919); 4 id., 247, 402 (1920).

[10] Nebbia v. New York, 291 U.S. 502, 54 S. Ct. 505 (1934); Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405, 55 S. Ct. 486 (1935).

Mr. Justice Holmes has said, in Noble State Bank v. Haskell, 219 U.S. 104 at 110, 31 S. Ct. 186 (1910), that a "comparatively insignificant taking" of liberty or property in aid of what is held by strong and preponderant public opinion to be greatly and immediately necessary to public welfare would not be denial of due process.

To the effect that a statute enacted in the exercise of police power is uncontrolled by the constitutional requirement of due process, see Durham Realty Co. v. La Fetra, 230 N.Y. 429 at 442, 130 N.E. 601 (1921); Rowland v. Morris, 152 Ga. 842 at 845, 111 S.E. 389 (1922).

[11] State v. Strasburg, 60 Wash. 106, 110 P. 1020 (1910) where a statute which removed the right to defense of insanity was held unconstitutional because the court found that such element was so inherently related to the guilt or innocence of persons at common law that it could not be taken away without violating constitutional guarantees.

[12] Noble State Bank v. Haskell, 219 U.S. 104, 31 S. Ct. 186 (1910).

The due process clause does not prohibit changes in the general body of law, common and statute. Bardwell v. Collins, 44 Minn. 97, 46 N.W. 315 (1890).

At common law it was an indictable offense to mix or sell adulterated or unwholesome foods for human consumption,[13] but, inasmuch as there are no common-law offenses against the United States, any federal liability in respect thereto must be dependent upon statute—and such liability is presently imposed by the Federal Food, Drug and Cosmetic Act of 1938. Likewise liability for this offense has been enacted into statutory form in the majority of states.

In the absence of express statutory provision to the effect that criminal liability for misbranding or adulteration of products is incurred only when "knowingly" done, it appears that the weight of authority favors an interpretation, both in the state statutes[14] and in the federal act,[15] imposing liability upon sellers even though the prohibited sale is made without knowledge of the wrongdoing and without intent to violate the statute. The sale of such products thus becomes an act to be performed at the peril of the seller, and cannot be made harmless by his good faith or his want of knowledge or wrongful intent.[16] The reason for the elimination of the operative fact of intent from the statutes imposing criminal liability for sale of adulterated or misbranded goods is apparent—to permit such a defense would be to allow every violator to avoid liability merely by pleading lack of knowledge and thus, practically, nullify the statute and defeat the purpose and intent of the legislature. The general public interest in obtaining wholesome foods properly branded is considered a sufficient justification for imposing such absolute liability upon the seller of adulterated and misbranded products, and it is therefore a proper exercise of the police power by state and federal governments within the limitations of the

[13] People v. Schwartz, 28 Cal. App. (2d Supp.) 775, 70 P. (2d) 1017 (1937); State v. Schlenker, 112 Iowa 642, 84 N.W. 698 (1900); but if defendant did not know of the unwholesomeness of the food and could not have ascertained by exercise of reasonable care, there was no criminal liability, Hunter v. States, 38 Tenn. 91 (1858).

[14] See annotation on duty of seller to ascertain at his peril that articles of food conform to food regulations in 28 A.L.R. 1385 (1924).

[15] United States v. 11¼ Dozen Packages, etc (D.C.N.Y. 1941) 40 F. Supp. 208; United States v. Buffalo Pharmacal Co., (C.C.A. 2d, 1942) 131 F. (2d) 500, which is the principal case in the lower court. Likewise in respect to the 1906 act, which the 1938 superseded, Von Bremen v. United States, (C.C.A., 2d, 1912) 192 F. 904; see annotation L.R.A. 1916D 170.

[16] The legislature may in the maintenance of a public policy regarding certain acts provide that "he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance." Shevlin-Carpenter Co. v. Minn., 218 U.S. 57 at 70, 30 S. Ct. 663 (1910).

The only defense to a charge of adulteration or misbranding under the 1938 federal act, cited note 2 supra, is found in § 303(c) where immunity may be had by establishing a guaranty obtained from the vendor as to no adulteration or misbranding.

due process clauses to eliminate the element of intent.[17] It is the avowed purpose of these statutes which make the sale of food an act to be done only at the seller's peril that a greater degree of diligence should be required in the preparation and distribution of foods for human consumption. The possibility of harm to public health and life is so great in the distribution of unwholesome food that any person embarking on such business must take the risk of liability without any wrongful intent. The only constitutional limitation which is imposed upon such exercise of the police power is that the degree of diligence required in order to meet the standard set by the statute shall not be so high as to be beyond the reasonable possibility of human compliance.[18] The imposition of any higher standard would constitute a violation of the due process guarantee of the Constitution.[19]

Consideration should here be given to statutes which impose criminal liability upon employers for the wrongful acts of their employees, and also to the instances where corporate officers are held liable for the wrongs of subordinates. There would seem to be no difficulty in the former case in excusing the employer from liability where the wrongful act required intent or knowledge of wrongdoing and it did not appear that the employee's criminal act was done at the direction or with the express or implied consent of the employer—the requisite element that the act be knowingly done is not present in respect to the employer.[20] Of course if it appears from the facts of the particular case that the wrongful act was done upon the employer's authority, the imposition of liability would be proper, the employer being directly responsible for such wrongful acts of his employees. In most instances where the master is held to be responsible criminally for the wrongful conduct of his servants it is on the theory that the act complained of is positively forbidden (e.g., food adulteration statutes) and therefore knowledge or guilty intention is not essential to a conviction for the

[17] Chicago, B. & Q. Ry. v. United States, 220 U.S. 559 at 578, 31 S. Ct. 612 (1911). "The power of the legislature to declare an offense, and to exclude the element of knowledge and due diligence from any inquiry as to its commission, cannot, we think, be questioned." See also United States v. Balint, 258 U.S. 250, 42 S. Ct. 301 (1922).

[18] Grannis v. Ordean, 234 U.S. 385 at 395, 34 S. Ct. 779 (1913). "The 'due process of law' clause, however, does not impose an unattainable standard of accuracy." (Referring to misspelling of names in service of summons).

[19] Inasmuch as most of the pure food acts presently in force do not relieve from liability upon a showing of reasonable care in checking of food products, could it be contended that where it appeared necessary to examine each container to detect any adulteration that such would be requiring too high a standard of efficiency and would be violation of due process of law?

[20] State v. Muehler, 38 Minn. 497, 38 N.W. 691 (1888); Lathrope v. State, 51 Ind. 192 (1875).

offense.[21] If it is the policy of the law to positively prohibit certain acts because required by public interest, irrespective of what the motive or intent of the person violating the statute may be, no principle of justice or of due process of law is violated by holding the master liable for the wrongful acts of his servant on the same theory of vicarious liability by which the employer is held responsible civilly.[22] It would be inconceivable that by delegating to his employees the power to make sales of unwholesome foods or to do other prohibited acts, an employer might avoid liability in a business which he conducts at his own peril.

In the principal case the relationship is not one of master and servant, but, rather, that of corporate officer (Dotterweich was president and general manager) and subordinate. Presumably the violation was by a subordinate inasmuch as it is stated in Justice Murphy's dissenting opinion, "There is no evidence in this case of any personal guilt on the part of the respondent. There is no proof or claim that he ever knew of the introduction into commerce of the adulterated drugs in question, much less that he actively participated in their introduction."[23] But the imposition of criminal liability upon Dotterweich as president and general manager of the corporation is not without precedent: criminal liability of corporate officers has been based upon nothing more than the fact of their responsibility for the corporation's management.[24] It would seem that such is not an improper extension of the principle of vicarious liability, nor would the corporate officer have basis for complaint of want of due process when it appeared that such extension served the public welfare by requiring a higher degree of diligence and greater managerial supervision.

Somewhat analogous to our present problem are the statutes which make a crime of possession of an automobile from which identifying marks have been removed. Such statutes are upheld as being constitutional and not a denial of due process even though it would appear that not only are the elements of intent and knowledge made immaterial in determining guilt, but, in addition, the accused may be convicted for mere possession of such a vehicle when, as a matter of fact, there has been no affirmative act on his part in violation of the statute and the wrongful act may have been that of another for whom he is not re-

[21] People v. Possing, 137 Mich. 303, 100 N.W. 396 (1904).

[22] New York Central R.R. v. United States, 212 U.S. 481 at 494, 29 S. Ct. 304 (1908).

[23] United States v. Dotterweich, 320 U.S. 277 at 285-286 (1943).

[24] State v. Burnham, 71 Wash. 199, 128 P. 218 (1912) where a manager of a milk concern was said to be liable under a statute making "every person" who sold milk below a fixed standard guilty of a misdemeanor.

See Lee, "Corporate Criminal Liability," 28 COL. L. REV. 1 at 16 et seq. (1928).

sponsible.[25] The only justification for holding such statutes to be constitutional is that the creation of such a crime is a proper exercise of the police power and that public necessity requires the imposition of such strict liability in order to avoid the interposition of the defense of want of knowledge or that the defacing had been done by a third party unknown to the accused which, in effect, might reduce the enforcement of the statute to a nullity.

Finally, we should consider briefly those statutes which attempt to deny to accused persons the right to the defense of insanity. In the only two cases which consider such statutes the courts have held them to be unconstitutional as a violation of due process of law.[26] In enacting these statutes it was undoubtedly the thought of the legislatures that such was a proper exercise of their police power; but when the Court considered this problem in the earlier of the two cases it determined that the statute was not a proper exercise of the police power.

> "It will be conceded that the legislature has a broad discretion in defining and prescribing punishment for crime, but broad and pervading as the police power is, it is not without constitutional limitations and restraints, and we can scarcely conceive of a valid penal law which would punish a man for the commission of an act which the utmost care and circumspection on his part would not enable him to avoid."[27]

The Court accepted without dispute the authority of legislatures to eliminate the element of intent from liability for criminal acts, but denied that there was any analogy between a man who may have sold adulterated food without knowledge of his wrongful act and the insane person who kills another; in the former, although he does not intend to sell the particular kind of food, he does intend to make a sale, while the insane person is incapable of intending any wilful act. The basis for refusing this analogy seems to be that inasmuch as at common law an insane person could not be legally punished for a crime committed by him the legislature is without authority to eliminate the ele-

[25] People v. Johnson, 288 Ill. 442, 123 N.E. 543 (1919) annotated in 4 A.L.R. 1535 at 1538 (1919). The court there recognized the possibility of some injustice under the act to the owner of a car the serial numbers of which had been altered by another, but it disposed thereof by saying at p. 446, "Laws cannot be held invalid merely because some innocent person may possibly suffer. The principle of police regulation is 'the greatest good to the greatest number'." See also annotation 42 A.L.R. 1149 (1926).

[26] Sinclair v. State, 161 Miss. 142, 132 So. 581 (1931), annotated 74 A.L.R. 241 at 265 (1931); State v. Strasburg, 69 Wash. 106, 110 P. 1020 (1910).

[27] Rudkin, C. J., in State v. Strasburg, 60 Wash. 106 at 128-129, 110 P. 1020 (1910).

ment of wilfulness from the punishable act; but how can this be reconciled with this same Court's acceptance of the legislature's power to eliminate the element of intent? [28] If it should appear that public necessity and general welfare required the exclusion of the element of wilfulness from crimes, why is it not a proper exercise of the police power to make that elimination just as in the case of exclusion of knowledge or intent, which is unanimously accepted as constitutionally proper? If the purpose and end of punishment and/or confinement for crime is the protection of society from similar occurrences in the future, then it would seem that there was equal necessity to protect society from danger in the case of the irresponsible as well as the responsible. "Moreover we must remember that always first comes the public welfare and public safety. Second comes the care for the innocent victim of the criminal act. Lastly should we deal with the accused party, but his interests ought not to be considered in preference to these other paramount securities of freedom." [29]

In summarizing the present state of the law as regards due process and its application to criminal statutes punishing acts done without consciousness of wrongdoing, it appears (a) that the operative facts of knowledge and intent may be eliminated without violation of the guarantee of due process of law, so long as there is a proper showing of public welfare and necessity requiring such elimination; but (b) that the courts have been unwilling to permit an elimination of the element of wilfulness from liability under criminal statutes, as demonstrated by their decisions holding unconstitutional those statutes which have attempted to withdraw the defense of insanity.

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[28] See Laylin and Tuttle, "Due Process and Punishment," 20 MICH. L. REV. 614 (1922); the authors support the position of the court in the Strasburg case.

[29] White, "Legal Insanity in Criminal Cases," 18 J. CRIM. L. AND CRIM. 174 (1927). See also dissenting opinion of Smith, C. J., in Sinclair v. State, 161 Miss. 142, 132 So. 581 (1931).