

## Did Maximum Security Win the Kentucky Derby? Law and Economics Says... Maybe

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By now, Americans are familiar with the controversial ending to the Kentucky Derby this weekend that resulted in 65-to-1 longshot Country House being crowned the surprise winner. After leading the race wire-to-wire, Maximum Security was disqualified after a 20-minute review by the track stewards concluded that he had improperly switched tracks in the final turn, thereby impeding the horses behind him.

The decision has met with widespread confusion and condemnation, including from the nation's Chief Race Steward. So which horse should have won the race?

Law and economics can help clear the post-race fog. Law and economics' seemingly simple, but profound, insight is that legal sanctions (such as awarding civil damages or imposing criminal punishment) create incentives to promote or deter certain behavior. Thus, if reckless drivers are held liable for the accidents they cause, then they will take more care and cause fewer accidents.

Consider the traditional distinction in tort law between strict liability and negligence. Under a strict liability regime, when A is determined to have "caused" an accident to B, then B has a right to compensation, regardless of whether A did the act intentionally or unintentionally. Under a negligence regime, by contrast, not only must A be shown to have caused the accident, B must also show that A was driving in a negligent (i.e., careless) fashion at the time, such as by driving too fast on a rainy road. Thus, even if a driver causes an accident, he is liable only if he was acting in a negligent fashion at the time.

Because the implicit goal of the common law is to deter careless and intentional behavior, negligence is the normal standard. Strict liability traditionally was relegated to unusual situations, such as abnormally dangerous activities (such as blasting) or ownership of dangerous wild animals. No matter how careful you are about trying to prevent escape by your pet tiger, you will still be liable if he mauls your neighbor. All that matters is the end *effect*, not your intent or whether you were negligent in forgetting to lock his cage.

So can law and economics tell us which horse should wear the Derby crown? Maybe.

Kentucky's horse racing rules provide for a foul where a horse swerves in such a manner as to "interfere with, intimidate, or impede any other horse or jockey," but only if "in the opinion of stewards," the foul "alters the finish of the race."

Equine experts offer two different rationales for the rule: the impact of the swerve on the results of the race and the safety of the horses and jockeys. Television commentator Simon Bray articulated the latter explanation, stating: “Do we need to have horses hit the deck to have a DQ? War of Will was close to that happening.”

Post-race coverage treated these two rationales as interchangeable. Under principles of law and economics, however, they are not.

According to Luis Saez, Maximum Security’s jockey, the young horse was startled by the unexpected roar of 150,000 spectators as the horse rounded the final turn, almost tripping up War of Will, who was close on Maximum Security’s heels. Saez righted the horse almost immediately, but it was too late to prevent the \$3 million swerve (and an additional \$40 million that was wagered on Maximum Security).

If the purpose of the rule is to punish any action that impacts the result of the race regardless of the explanation, then Maximum Security’s excuse for swerving and Saez’s game efforts to minimize its effect are irrelevant. This objective points to a regime of strict liability, where all that matters is the effects of the action, not the intent or carelessness of the jockey.

If, by contrast, the purpose of the rule is to deter horses and jockeys from endangering other mounts, then both the unintentional nature of the swerve and Saez’s swift and responsible efforts to control the horse matter. Given the innocent intent and reasonable care taken by Saez, not to mention his self-interest in avoiding accident, imposing a foul is simply punitive and unlikely to provide incentives for different behavior in the future.

Regardless of the rationale, the rules still require the steward to conclude that it altered the finish of the race. Notwithstanding the judges ruling, anyone watching Maximum Security’s glorious ride knows which horse was going to win that race. But the inscrutable unpredictability of decisions by judges and juries is the subject of next week’s class.

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