Journal of Criminal Law and Criminology

Volume 52
Issue 4 *November-December*

Article 5

Winter 1961

Public Welfare Offenses: A New Approach

Glen V. Borre

PUBLIC WELFARE OFFENSES: A NEW APPROACH

In recent years, there has been a proliferation of "public welfare" statutes. In most instances, these statutes impose criminal penalties without the traditional requirement of specific intent, or mens rea. Do these statutes, or some of them, violate due process? How are the courts to determine whether the public interest warrants the imposition of strict liability? If the court decides that strict liability should not be imposed as a matter of law, how should it instruct the jury on the matter of the defendant's responsibility? This article considers these questions and others, offering a uniform approach to the various forms of public welfare statutes.—EDITOR.

Recent years have seen a rash of "public welfare statutes" establishing crimes which require no criminal intent, or *mens rea*.[1] Courts have been plagued with the problem of reconciling these statutes with the requirements of due process.

A lack of criminal intent may arise in two distinct contexts, that is, through ignorance either of the law or of relevant facts.[2]

Today, the plea of ignorance or mistake of law is rarely encountered in prosecutions for serious crimes.[3] No sane defendant pleads ignorance of the law when accused of homicide, for the obvious reason that murder represents a basic violation of the moral principles of society. Recognition of mistake of law as a valid defense in such a situation would contradict those values. Yet, many plead ignorance of the law when accused of an act not generally known to be criminal. A corollary of ignorance of the law is ignorance of a relevant fact. Thus, though the defendant may be aware of the substance of the law, he may be unaware of a particular fact which renders his conduct unlawful.[4] The cases involving ignorance of the law and of the facts will be treated separately for purposes of analysis.

[1] The term "public welfare offense" is used to denote a group of police offenses and criminal nuisances punishable irrespective of the actor's state of mind. Sayre, *Public Welfare Offenses*, 33 COL. L. REV. 55 (1933).

[2] The term "ignorance of the law" is used to denote absence of knowledge that a relevant legal proposition exists. The law is expressed in distinctive legal propositions. Facts, on the other hand, are qualities or events occurring at definite places and times. HALL, CRIMINAL LAW 376 (2d ed. 1960).

[3] The ancient legal maxim "ignorance of the law will not excuse," is still a maxim of our law. See *e.g.*, United States v. Balint, 258 U.S. 250 (1922); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1910).

[4] For example, a person may be unaware of an open bottle of liquor in a car he has borrowed. See ILL. REV. STAT. ch. 43, §140 (1959).

MISTAKE OF FACT

In *United States v. Balint*[5] the Supreme Court held an individual could be convicted of selling an opium derivative without using the form required by statute,[6] even though the indictment had failed to charge that he had sold the drugs knowing them to be such. The court looked to the legislative intent of the act and concluded that its manifest purpose was to require every person dealing in drugs to ascertain at his peril whether what he sells comes within the statute. Here the Court's analysis ends, without inquiry into the requirements of due process. However, Congress apparently felt that the danger from negligent sale of narcotics was so repugnant to the public welfare that it required strict criminal liability; the requirements of *due process* may justifibly be qualified in such cases. The duty of the individual is greater in these circumstances because of the inherently dangerous activity involved.[7] However, such a test is of little value when considering problems of conduct involving less danger to the public welfare, where the public interest may not be so compelling as to require a limitation of fourteenth amendment rights. In these situations, it is submitted, the courts should weigh the individual rights against the benefits of public welfare.

In cases where the courts determine that the public interest does not warrant a limitation upon

[5] 258 U.S. 250 (1922). In a companion case, United States v. Behrman, 258 U.S. 280 (1922), the Court handed down a similar ruling with reference to the prescription of drugs.

[6] Narcotic Act of Dec. 17, 1914, 38 Stat. 785 (1914).

[7] Mr. Justice Holmes' illustration balancing an individual's first amendment rights with the public interest presents an analogous situation. "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." Schenck v. United States, 249 U.S. 47, 50 (1919).

due process, a useful standard of due process is required. In such cases a fair approach would be to ask: Has the defendant's conduct exhibited an unreasonable disregard for apprising himself of the true facts involved?

In *United States v. Dotterweich*,[8] the Supreme Court upheld a conviction of the president and general manager of a corporation for shipping an adulterated and misbranded drug in interstate commerce in violation of a federal statute[9] making any violator guilty of a misdemeanor. The district court allowed the jury to determine Dotterweich's individual responsibility for furthering a transaction forbidden by an act of Congress. The Supreme Court held that there was sufficient evidence to support such a finding of responsibility.[10]

Although both the instant case and *Balint* involved drug statutes, Dotterweich, unlike Balint, was not directly involved in the sale of drugs. Both statutes are said to impose strict criminal liability; yet, because Dotterweich was only indirectly involved, the court allowed the jury to consider his responsibility.

Allowing the issue of Dotterweich's responsibility for the shipment to go to the jury is similar to the proposed determination of the reasonableness of the defendant's conduct. The most notable difference would be in the phrasing of the jury instruction. "Responsibility" is a vague term, and the various implications of the agency relationship could confuse the jury. Whether the defendant's conduct exhibited an unreasonable disregard for apprising himself of the true facts involved is a more suitable and precise standard to use, once the initial decision of letting the jury consider the reasonableness issue is decided.

In *Morissette v. United States*[11] the defendant, while hunting on government property used as a practice bombing range, took and then sold about three tons of old metal bomb casings. When charged under a federal larceny statute,[12] he pleaded that he thought they were abandoned. The trial judge refused to allow evidence of the defendant's lack of knowledge. The Supreme Court reversed the defendant's conviction, holding that larceny and related common law crimes require *mens rea*.

Here, for the first time the Supreme Court came to grips with an attempted elimination of intent in common law fields. The Court required more than taking the property into possession, stating, "He must have knowledge of the facts, though not necessarily the law, that made the taking a conversion."[13] One may conclude that if an offense was a crime at common law, and there is a question of the defendant's ignorance of relevant facts, intent[14] must be proved, not merely presumed. The Court never spoke of the *due process* question; however, the Court's approach to the problem seems to be based, at least implicitly, upon the basic elements of *due process*. The question arises how far these requirements extend beyond common law crimes.

If an offense were not a crime at common law, proof of intent might still be required where the actor's conduct was brought under the protection of the due process clause of the fifth or fourteenth amendment.[15] That *due process* extends beyond common law crimes is borne out by later cases.[16]

The Dram Shop statutes[17] prohibit selling liquor to minors or to intoxicated persons and provide criminal penalties,[18] despite lack of knowledge on the seller's part that the person was a minor or that the individual was intoxicated. These cases may be categorized as mistake of fact situations. They are generally upheld without the proof of knowledge. It may be practically impossible to determine whether a customer is a minor or drunk, and it seems unjust to impose liability where any normal reasonable person would have made the same error.

The proposed test seems appropriate to this situation, and the question would be: Did the defendant make a reasonably conscientious attempt to ascertain the true facts? While not a precise test, it permits a determination to be made upon the facts in each case.[19]

[8] 320 U.S. 277 (1952).

[9] Federal Food, Drug and Cosmetic Act, 52 Stat. 1040 (1938), 21 U.S.C. §§301–92 (1959).

[10] "Responsibility" is used in the sense of an agent's responsibility for the liability of the corporation based upon the shared responsibility in the business process.

[11] 342 U.S. 246 (1952).

[12] 62 Stat. 725 (1948), 18 U.S.C. §641 (1959).

[13] Morissette v. United States, *supra* note 11 at 262.

[14] Morissette may have had the general intent to take the casings, but he did not have the specific intent to steal, since he lacked *mens rea*. He may even have had the necessary intent, but the jury was never allowed to determine this issue.

[15] See generally U.S. CONSTITUTION ANNOT. 751 (1952).

[16] See Lambert v. California, 355 U.S. 225 (1957).

[17] See 33 A.L.R. 415 (1924).

[18] ILL. REV. STAT. ch. 43, §131 (1959).

[19] Thus, an inebriate who is the exception and does

There are various other situations in which the individual is aware of his actions and conduct, but doesn't realize that what he is doing or not doing is unlawful. These situations may be catagorized as ignorance of the law problems.

Ignorance of the Law

The landmark case involving ignorance of the law as a defense to statutory crimes requiring no criminal intent is *Lambert v. California*.[20] Here the appellant had resided in Los Angeles for over seven years, during which period she was convicted of forgery. Upon her arrest on suspicion of another offense, the police discovered that she had failed to register as a felon after her forgery conviction, under an ordinance requiring every felon entering or residing in the city to register as such.[21] The state was unable to prosecute for the suspected offense, but prosecuted petitioner for violation of the municipal ordinances. The Court accepted the defendant's contention that the ordinances dispensed with the requirement of notice which is required where a penalty or forfeiture might be suffered for mere failure to act. The ordinances required no notice, and the defendant alleged that she had no knowledge of the law or probability of such knowledge. The Court held that the ordinances violated the due process clause of the fourteenth amendment, when applied to a person who had no actual knowledge of his duty to register and where no showing was made of the probability of such knowledge. The holding was based upon the fact that the conduct condemned by the ordinances was wholly passive and was unlike the commission of acts or failure to act under circumstances that would alert the doer to the consequences of his deed.[22]

The discussion in *Lambert* concerns active and passive conduct. The Court distinguishes between acts of commission, including failure to act under circumstances that should alert the doer to the consequences of his deed, and conduct which is wholly passive. Mrs. Lambert had lived in the city for seven years. If she had merely visited the city on more than five occasions during one month, she would have violated the ordinance;[23] but here Mrs. Lambert's conduct might have been active, *i.e.*, coming to the city. On the basis of the Court's reasoning, this would have been a properly prohibited activity. It might be argued however, that such conduct would be passive in that she was merely going about every day duties which took her into the city on the five occasions. The question arises as to the category into which the *Lambert* court would place such conduct. Distinguishable, perhaps, is the situation where the individual moves into the city and stays more than five days without registering, which is also a violation of the statute.[24] Here it could be argued that the actor should be put on notice (in light of his record) that such a movement might require registration. In both situations the conduct could be considered active, yet each is penalized for mere presence. In this respect the *Lambert* test seems unfair in that it is quite arbitrary.[25]

not appear drunk, and who has but one beer at a tavern, might not put a tavern keeper on notice that he is serving a "drunk person." On the other hand as the appearance and number of drinks consumed change, the conduct becomes blameworthy. In the case of a minor being served liquor, while the appearance of being over the prescribed age may not be adequate alone, such appearance, coupled with all the required identification, might justify a finding of not guilty for an unsuspecting tavernkeeper who has done all that could reasonably be expected in checking the minor's age.

[20] 355 U.S. 225 (1957).

[21] Los Angeles Municipal Code §52.38(a) (1933) defines "convicted person" as "any person who, subsequent to January 1, 1921, has been or hereafter is convicted of an offense punishable as a felony in the State of California, which offense, if committed in the State of California would have been punishable as a felony."

Section 52.39(a) makes it unlawful for any convicted person to be or remain in Los Angeles for more than five days without registering with the Chief of Police.

Section 52.39(b) requires convicted nonresidents of Los Angeles to register if they come within the city on five or more occasions during any thirty-day period.

[22] Of the *Lambert* minority of four, Justices Frankfurter, Harlan, and Wittaker felt the *Balint* case controlling, in that it emphasized social betterment. Mr. Justice Burton merely thought the offense did not violate the individual's constitutional rights.

[23] See *supra* note 23, §52.39(b).

[24] See *supra* note 23, §52.39(a).

[25] In Abbott v. Los Angeles, 53 Cal.2d 674, 349 P.2d 974 (1960), the California Supreme Court held that the state had preempted the field in which the Los Angeles ordinance operates. There is no state statute requirement for the registration of all felons. However, in the state penal code the legislature has provided a scheme for handling these matters. Also, the policy of the code's penal provision is to eliminate all penalties and disabilities arising from a conviction once the convicted person has successfully fulfilled the conditions of his parole. Furthermore, the state penal code does require the registration of sex offenders and requires careful records concerning the whereabouts of arsonists released after serving their sentences. Thus, the state legislature has determined that certain types of crimes require registration and others do not. On the same day the above case was decided, the same court held in Lambert v. Municipal Court of Los Angeles, 53 Cal.2d 690, 349 P.2d 984 (1960), that a new trial

Perhaps, a better approach to the problem would be to inquire into the actions of the individual in each case. Taking Mrs. Lambert, for example, it is reasonable to assume that the average citizen probably did not know of the felon registration law: likewise, Mrs. Lambert could not be expected to know of the law, absent special circumstances which would have put her on notice thereof. A reasonable test to resolve ignorance of the law questions would thus be "Was the defendant's conduct such as would reasonably put him on notice that an inquiry of the law should be made." This proposed test is similar to the *Lambert* test except that it emphasizes not the strict characterization of the act itself, but the reasonableness of the conduct.[26]

In this area also, the judge must first appraise the statute in light of legislative intent to determine whether or not strict liability for the public welfare would outweigh the individual's rights under *due process*. Here the implications of immorality prevalent in narcotics peddling are lacking. Although we are dealing with a previous law breaker, reasonable men could differ as to the extent of duty to make an inquiry into the law.

Reyes v. United States[27] illustrates the reasoning of some courts in upholding narcotics-registration statutes. The defendant, an addict or seller, violated the federal narcotics statute[28] by leaving the United States and returning without registering. The court held that he had violated the statute, and that there was no necessity of showing intent or knowledge of the statute. The court dismissed the *due process* question raised by *Lambert* because the act was:

1. no mere non-feasance—there was misfeasance: defendant crossed the border (ordinarily lawful) without registering (in an unlawful manner).
2. such that it should have put the defendant on notice. The failure to register was unrelated to the positive act of leaving the country "yet such failure plus the planned departure is under circumstances that should alert the doer to the consequences of his deed."[29]
3. not in violation of a statute deemed a convenient aid to police department bookkeeping.[30]

The act of moving across the border is certainly different than that of merely living in a city, with no definite activity on the part of the defendant. Nevertheless, the defendant might be justified in an ignorance of the law defense if he could prove he had no reason to be put on notice of the registration requirement. Here, the defendant's original crime of violating the narcotics law might be enough to put him on inquiry as to his duty in regard to movements in and out of the country.

Under the proposed test, once again the basic reasons for strict liability are weighed against the implications of *due process*. The court might conclude as a matter of law that such conduct justifies strict criminal liability and take the issue from the jury. This is not as strong a case as *Balint*, however, because the instant case involves a registration statute, the violation of which is not itself directly injurious to the public.

The Court of Appeals for the Second Circuit held in *United States v. Juziwiak*[31] that leaving the country without first registering as a narcotics law violator was a public welfare offense, and proof of criminal intent was not necessary to conviction. The court held that in any event, since notice of statutory requirements had been posted where the defendant had obtained employment and in various places he frequented, there was a sufficient showing of probability of knowledge of the registration requirement. The court also relied upon the "active" nature of the defendant's conduct in leaving the country. As we have seen, it is very

ordered by the municipal court for Mrs. Lambert after the United States Supreme Court's remand was precluded in light of the state court's determination that the ordinance was invalid.

[26] Because the registration ordinance was not declared unconstitutional as it applied to the particular facts in *Lambert*, such ordinances may well be applied in situations dissimilar to *Lambert* and be upheld. In the few states which have criminal registration statutes, [CAL. PEN. CODE ANN. §290 (1955), (Sex offenders); ARIZ. CODE ANN. §13-1271 to 74 (1956), (Sex offenders); FLA. STAT. ANN. §775.13 (1959 Supp.), (Registration of felons; applies to counties with population over 450,000); N.J. STAT. ANN. §2A 169A(1-10) (1953), (Narcotics law violators)], these statutes would tend to preempt city ordinances. In the majority of other jurisdictions which have no state statutes which preempt the various city ordinances (see Note, 103 U. PA. L. REV. 60 (1954), for a listing of these ordinances), these statutes would be constitutional on their face, depending of course, on the particular fact situation which might later bring about an unconstitutional determination.

[27] 258 F.2d 774 (9th Cir. 1958).

[28] 70 Stat. 574 (1956), 18 U.S.C. §1407 (1959).

[29] This is similar to the proposed test but does not attempt to correlate why the failure to register and the departure should have been blameworthy.

[30] See *supra* note 29, at 782.

[31] 258 F.2d 844 (2d Cir. 1958).

difficult to draw a distinction between active and passive conduct.

Again, using the proposed test for a mistake of law, Juzwiak's act would be viewed in light of whether it was reasonable to expect that he should have been on notice of the law, or at least that he should inquire into the law. Here, the court would have no problem in using such a test because of the various indications of probable knowledge.

In *State v. Birdsell*[32] the highest court of Louisiana held that a Louisiana statute[33] making it unlawful for any except persons of a specified class to possess hypodermic syringes or needles regardless of use was unreasonable; hence it was an improper exercise of the police power in violation of the due process clause of the fourteenth amendment. The court reasoned that the mere fact of possession does not warrant a presumption that the needle will be used by narcotic violators. This case illustrates an extreme attempt to exercise the police power of the state through a statute not requiring intent.

Similarly, in a Washington case[34] a Seattle ordinance[35] made it unlawful for anyone not "lawfully" authorized to be found in any place where narcotics were unlawfully kept. This had the effect of creating an irrebuttable presumption that the person found in proximity of unlawfully kept narcotics was guilty of participating in narcotics traffic. The court held that such an ordinance constituted an abuse of the police power of the city and a violation of due process. This case was given much the same treatment as *Birdsell*, where such a presumption was also unconstitutional.

Both the *Birdsell* and the Washington case illustrate somewhat different principles than *Lambert*, but are alike in that the fourteenth amendment provides a limitation upon the abuse of the police power by the states. The irrebuttable presumption made from the fact proved, *i.e.*, possession of the needle, is unreasonable in light of the legal, alternative uses to which the evidence might be put.[36]

[32] 235 La. 396, 104 S.2d 148 (1958).

[33] LA. STAT. ANN. ch. 40 §962 subd. (B) (1951).

[34] City of Seattle v. Ross, 54 Wash.2d 655, 344 P.2d 216 (1959).

[35] SEATTLE ORDINANCE No. 40149-9a as amend. 86061-1 (1957).

[36] These cases are analogous to situations where the actor has general intent to do a certain thing, such as keep a bag of tools in his trunk, but lacks the specific intent to use those tools to commit a burglary. See Benton v. United States, 232 F.2d 341 (D.C.Cir. 1956). Thus, under the proposed test in such cases, it would be unreasonable to consider that the conduct would put the actor on notice of an illegality where his conduct could easily be for a lawful purpose.

There are various criminal statutes within the public welfare area which have not been litigated since the *Lambert* decision, one of which is a Connecticut statute[37] prohibiting use of drugs or instruments as contraceptives. Assuming that an out-of-state traveler was accused of violating this statute and he pleaded lack of knowledge, what might be the result? The *Lambert* passivity test would not recognize his ignorance of the law plea, since his conduct was active. Therefore, the defendant might easily be found guilty. Under the proposed test, the question would be examined in light of whether the person's conduct would reasonably put him on notice. An out-of-state resident might well be treated differently than a person in-state who was more likely to know of the statute or be on notice to inquire, because he could not obtain contraceptives within the state.

CONCLUSION

We have seen that in certain situations the public welfare may warrant the imposition of strict criminal liability. In other instances the reasonableness of the actor's conduct should be considered. Generally, specific intent is required in all common law crimes and where the possession of objects or acts done may as readily be for a lawful purpose as an unlawful one. Moreover, the aftermath of *Lambert* has resulted in a realization that the fourteenth amendment can be used to protect the individual from disproportionate penalties. The major fallacy in any solution to the problems in this area lies in the attempted generalization on the complex principles underlying the doctrines. The proposed tests, however, provide a method of approach which is realistic and in keeping with the underlying doctrine upon which the criminal law is based, *mens rea*.

GLEN V. BORRE*

[37] CONN GEN. STAT. §53-32 (1958). Use of Drugs or Instruments to prevent conception. "Any person who used any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than $50. or imprisoned not less than 60 days nor more than 1 year or be fined and imprisoned."

* Student, Northwestern University School of Law.