

# Criminal Law - Mistake of Law - a Valid Defense - United States v. Crosby, 294 F.2d 928 (2d Cir. 1961)

DePaul College of Law

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

## Recommended Citation

DePaul College of Law, *Criminal Law - Mistake of Law - a Valid Defense - United States v. Crosby, 294 F.2d 928 (2d Cir. 1961)*, 11 DePaul L. Rev. 329 (1962)

Available at: <https://via.library.depaul.edu/law-review/vol11/iss2/8>

This Case Notes is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact [wsulliv6@depaul.edu](mailto:wsulliv6@depaul.edu), [c.mcclure@depaul.edu](mailto:c.mcclure@depaul.edu).

## CASE NOTES

### CRIMINAL LAW—MISTAKE OF LAW—A VALID DEFENSE

In a prosecution under the Securities Act of 1933, three brokers and a brokerage corporation were charged in a seventeen count indictment with wilfully and knowingly using the mails to sell stock which was not registered with the Securities and Exchange Commission.<sup>1</sup> The brokers in selling the unregistered stock were acting on the representation of counsel that such shares or transactions were exempt from the registration requirement. The United States Court of Appeals, in reversing the conviction, stated that a basic element of such an offense was criminal intent and guilty knowledge, and that the defendants' mistake as to the law negated such an intent. While the legal advice was probably erroneous, the court continued, it could not say that the advice was so patently erroneous as to permit the question of the defendants' good faith belief to go to the jury. *United States v. Crosby*, 294 F.2d 928 (2d Cir. 1961).

The *Crosby* case makes criminal intent a necessary element for the violation of a statute regulating security transactions. As to such offenses, the Court equates criminal intent with the intent to commit an act, knowing such conduct to be prohibited by law. The effect of this decision is that a reasonable mistake of law will constitute a valid defense to culpability for such an offense.

The Court's holding that a mistake of law acts as a valid defense to criminal culpability conflicts with the almost universal tendency of the courts to reject such a defense. The scope and significance of such a holding can only be properly understood by carefully examining the different classes of criminal offenses and the intent required in such offenses.

Traditionally, criminal actions have been considered by courts and legal writers as falling into one of two classes. Those actions to which wrong is imputed only because lawmaking bodies have placed them in a for-

<sup>1</sup> 15 U.S.C. § 77e(a) (1958): "(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale. 15 U.S.C. § 77X (1958): Any person who wilfully violates any of the provisions of this subchapter . . . shall upon conviction be fined not more than \$5,000 or imprisoned not more than five years, or both."

bidden category are spoken of as *mala prohibita*, while acts that are inherently wrong are said to be *mala in se*.<sup>2</sup>

*Mala in se* offenses, although traditionally defined as actions which are intrinsically<sup>3</sup> or inherently<sup>4</sup> wrong, are probably more correctly defined as those acts which are considered objectively wrong, *i.e.*, acts which are offensive to the "conscience of society."<sup>5</sup> These offenses include such acts as murder, arson, assault and theft; actions which contract no additional turpitude from being declared unlawful by a legislature.<sup>6</sup> Criminal culpability for such offenses attaches only when there is a concurrence of act and intent.<sup>7</sup> The contention that wrongful intent is necessary to constitute a crime is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.<sup>8</sup> The intent necessary is not the intent to violate a known law, but the intent to do an act which is objectively wrong.<sup>9</sup> The conduct must be the result of a vicious will,<sup>10</sup> *i.e.*, the act must be committed voluntarily by a person who understands the nature of the act. The actor need not know that such conduct is against the law, it is sufficient if the conduct is objectively wrong. Therefore, to constitute a crime *malum in se*, there must be a vicious will and an unlawful act consequent upon such vicious will.<sup>11</sup>

As all acts which constitute offenses *mala in se* are objectively wrong, ignorance of the law can never be a defense, for knowledge of the law is not necessary for a criminal intent as to these offenses. The intent necessary is not the intent to violate the law, but merely the intention to do the wrongful act.<sup>12</sup>

Likewise, mistake of law is not a defense<sup>13</sup> if the intention is to do the wrongful act. To allow a person to plead that he had interpreted the law erroneously would be to deny the objectivity of criminal law. The rule

<sup>2</sup> Hildreth v. State, 215 Ark. 808, 223 S.W.2d 757 (1949).

<sup>3</sup> Regina v. Prince (1875) L.R. 2 C.C.R. 154.

<sup>4</sup> State v. Barker, 113 Utah 514, 196 P.2d 723 (1948).

<sup>5</sup> Starrs, *The Regulatory Offense in Historical Perspective*, ESSAYS IN CRIMINAL SCIENCE 235 (1961).

<sup>6</sup> 1 Bl. Comm. 54.

<sup>7</sup> Commonwealth v. Cali, 247 Mass. 20, 141 N.E. 510 (1923).

<sup>8</sup> Morissette v. United States, 342 U.S. 246 (1952).

<sup>9</sup> Rex v. Woodfall, 5 Burr. 2661, 98 Eng. Rep. 398 (1770).

<sup>10</sup> 4 Bl. Comm. 21.

<sup>11</sup> *Ibid.*

<sup>12</sup> Kennedy v. State, 46 Ga. App. 42, 166 S.E. 442 (1932).

<sup>13</sup> Long v. State, 44 Del. 262, 65 A.2d 489 (1949).

is the same as to a person who acts in good faith under the advice of counsel.<sup>14</sup> To hold otherwise would be to place the advice of counsel above the law itself.<sup>15</sup>

The last two hundred years, with its industrial revolution and the resultant increase in the complexity of society, have marked the growth of the *malum prohibitum* offense. An offense *malum prohibitum* is conduct which is not objectively wrong, but conduct which is wrong only in the sense that it is prohibited.<sup>16</sup> The conduct is of its nature indifferent, its whole criminality being based on the undoubted right of the state to make some things unlawful for the well-being and peace of the community.<sup>17</sup>

The purpose of *mala prohibita* regulations is the accomplishment of some social betterment rather than the punishment of crime,<sup>18</sup> and, therefore, the requisite of criminal intent is eliminated to insure the desired social result. The emphasis in such statutes is placed upon public and social as contrasted with individual interests, and, as a result, the courts look only for the injurious conduct of the defendant and are unconcerned with his individual guilt.

The necessity of a criminal intent having been eliminated, the offenders become strictly liable upon the commission of the act, and accordingly the defenses of ignorance of the law<sup>19</sup> and mistake of law<sup>20</sup> are invalid, as the purpose of these defenses is to show the absence of a criminal intent.

From the previous discussion it is evident then, that all prohibitions must either be *mala in se*, i.e., conduct which is objectively wrong, or *mala prohibita*, i.e., conduct which is not objectively wrong. And since it has been demonstrated that ignorance of the law is not a defense to either form of prohibition, in one case because all that is required is the intent to do the wrongful act, and in the other because no intent is necessary, it is clear that criminal acts as heretofore classified are not subject to the defense of ignorance of the law.

In the last century, with the continued growth of *mala prohibita* offenses, the judiciary has become increasingly aware that the right of the state to punish indifferent conduct is not an unrestricted right.<sup>21</sup> Al-

<sup>14</sup> *Miller v. United States*, 277 Fed. 721 (4th Cir. 1921).

<sup>15</sup> *Needham v. State*, 55 Okla. Crim. 430, 32 P.2d 92 (1934).

<sup>16</sup> *Commonwealth v. Adams*, 114 Mass. 323 (1873).

<sup>17</sup> 4 Bl. Comm. 42.

<sup>18</sup> *United States v. Balint*, 258 U.S. 250 (1922).

<sup>19</sup> *United States v. Behrman*, 258 U.S. 280 (1922).

<sup>20</sup> *Townsend v. United States*, 95 F.2d 352 (D.C. Cir. 1938).

<sup>21</sup> *Smith v. California*, 361 U.S. 147 (1959).

though a state may restrict a person's rights in order to promote the public good, the right to do so does not extend to the imposition of severe sanctions on indifferent conduct. In a case involving a labor law violation, Justice Cardozo pointed out that such violations, whether intentional or not, were punishable only by fine "moderate in amount," and added the limitation that, in sustaining the power to so fine unintended violations, "we are not to be understood as sustaining to a like length the power to imprison."<sup>22</sup> And recently the Supreme Court of the United States has recognized that the right to impose absolute criminal liability on *mala prohibita* offenses is restricted, even in cases where the statute does not require wilful conduct.<sup>23</sup> Legal writers have recognized for many years that the actor must have entertained a wrongful intent before he can be imprisoned for a *malum prohibitum* offense.<sup>24</sup>

Therefore, as a state should not imprison or otherwise severely punish a person who does not know that his indifferent conduct violates the law, the right of the state to punish severely such conduct should be based on the awareness of the accused that such conduct is violative of law. For if indifferent conduct does not make the actor strictly liable to such punishment, culpability can then attach only if the offender has a wrongful intent. As the act itself is indifferent, the intention of doing the act cannot be equated with a wrongful intent unless it can be shown that the offender knew that such action was prohibited by law. Therefore, ignorance or mistake of law will constitute a valid defense to those *mala prohibita* offenses in which wrongful intent is an essential element of the crime because of the severity of the punishment prescribed.

To understand the rationale of such a dichotomy within *mala prohibita* offenses necessitates an analysis of the rights of the state and of the citizen in respect to such offenses.

The function of the state to promote the public good by maintaining order gives the state the right to restrict the rights of citizens in order to bring about this public good. As a result, the state may prohibit conduct committed without a wrongful intent if such conduct is detrimental to the public interest. The right to prohibit certain conduct of necessity is accompanied by the right to impose a sanction for the violation of such

<sup>22</sup> *People ex rel. Price v. Sheffield Farms Co.*, 225 N.Y. 25, 32-33, 121 N.E. 474, 477 (1918).

<sup>23</sup> *Lambert v. California*, 355 U.S. 225 (1957). Lambert was convicted under a Los Angeles municipal ordinance for failing to register as a felon. On appeal, the United States Supreme Court in a 5-4 decision, held that such an ordinance, when applied to a person who has no actual knowledge of his duty to register, violates the Due Process Clause of the Fourteenth Amendment.

<sup>24</sup> Hall, *Ignorance and Mistake in Criminal Law*, 33 IND. L. J. 1 (1957); Sayre, *Public Welfare Offenses*, 33 COL. L. REV. 55 (1933).

prohibitions. But as the sanction can attach to indifferent conduct, justice would require that the penalty be light, preferably no more than a light monetary fine. For although the state has the right to restrict a citizen's rights, it should not be permitted to imprison him for blameless conduct. To subject a citizen to possible imprisonment for conduct which is indifferent in nature would be to violate his constitutional right to due process of law.<sup>25</sup>

Therefore, the state may only eliminate the intent requirement in such *mala prohibita* statutes where regulation is necessary to achieve a social good, and where the sanction prescribed is regulatory and not punitive in nature.

Although the requirement of wrongful intent has been recognized in theory as necessary where offenses *mala prohibita* carry severe penalties, most courts have been reluctant to require such wrongful intent, even in cases where the statute prescribes that only wilful conduct is punishable. Almost without exception the courts have held that where wrongful intent has not been made an essential element of a regulatory offense, such intent need not be proved to sustain a conviction.<sup>26</sup> The courts have negated the need for criminal intent in cases concerning failure to register,<sup>27</sup> shipping of adulterated food<sup>28</sup> or unlabeled liquor,<sup>29</sup> and the shipping of goods at a rate below the statutory rate.<sup>30</sup> All of these prosecutions carried a possible penalty of one or more years of imprisonment. Although the great bulk of cases have discarded the need for criminal intent for such violations, the United States Supreme Court, in *Lambert v. California*,<sup>31</sup> held the enforcement of a municipal ordinance, in which intent was construed as unnecessary, to be an unconstitutional deprivation of due process. The defendant, ignorant as to the ordinance, was convicted for not registering as a felon as required by the ordinance. She was fined \$250 and placed on probation for three years. To date this decision has remained "a derelict on the waters of the law"<sup>32</sup> as was predicted by Justice Frankfurter in his dissent. Since the *Lambert* case, no federal court has held criminal intent to be an essential element in a

<sup>25</sup> *Lambert v. California*, 355 U.S. 225 (1957).

<sup>26</sup> *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57 (1910).

<sup>27</sup> *United States v. Juzwiak*, 258 F.2d 844 (2nd Cir. 1958); *Reyes v. United States*, 258 F.2d 774 (9th Cir. 1958).

<sup>28</sup> *United States v. Dotterweich*, 320 U.S. 277 (1943).

<sup>29</sup> *Blumenthal v. United States*, 88 F.2d 522 (8th Cir. 1937).

<sup>30</sup> *Armour Packing Co. v. United States*, 209 U.S. 56 (1908).

<sup>31</sup> 355 U.S. 225 (1957).

<sup>32</sup> *Id.* at 232.

*malum prohibitum* offense where the statute itself was silent on the subject.<sup>33</sup>

In cases concerning a statute which required a "wilful" violation, the courts have been slow to interpret this as requiring the defendant to be aware that such conduct is prohibited. Until recently the courts have interpreted the word "wilfully" to mean only that the actor intended to do the prohibited act, knowledge of the law being unnecessary.<sup>34</sup> The words of Justice Holmes, in *Ellis v. United States*, characterize this early thinking:

If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent.<sup>35</sup>

The obvious error in such thinking was to require the same objective manifestation of intent in both *mala prohibita* and *mala in se* offenses, *i.e.*, the doing of the prohibited act, without recognizing that the type of wrongfulness required in each class is different. It is obvious that the intent to do an act which is objectively wrong is the result of a wrongful intent. It is just as obvious that the intent to do an act which is indifferent in nature can only be the result of a wrongful intent when the actor is aware that such conduct is prohibited.

Therefore, it is evident that the legislature in providing that such offenses must be wilfully committed intends that the accused must be acting with a wrongful intent for criminal culpability to attach. To hold otherwise would be to construe the insertion of the word "wilfully" in the statute as a useless act, for all actions, other than those accidental or negligent, are wilful actions. And there appears no good reason why accidental and negligent conduct should be excused if the intent of the legislature is to punish innocent conduct regardless of intent. This writer suggests that any rational construction of such regulatory statutes requires that "wilfully" be equated with wrongful intent, *i.e.*, with knowledge that such action is prohibited by law.

The first cases to so interpret "wilfully" were the income tax cases in which defendant, ignorant as to his duty, failed to file returns.<sup>36</sup> In *Hargrove v. United States* the court held that "actual knowledge of the

<sup>33</sup> *Smith v. California*, 361 U.S. 147 (1959), an obscenity case in which First Amendment freedoms were in issue, is the only other case to hold that a state's ability to create strict liability statutes is limited.

<sup>34</sup> *United States v. Gris*, 247 F.2d 860 (2nd Cir. 1957).

<sup>35</sup> *Ellis v. United States*, 206 U.S. 246, 257 (1907).

<sup>36</sup> *Yarborough v. United States*, 230 F.2d 56 (4th Cir. 1956); *United States v. Murdock*, 290 U.S. 389 (1933); *Hargrove v. United States*, 67 F.2d 820 (5th Cir. 1933).

existence of the obligation and a wrongful intent to evade it, is of the essence."<sup>37</sup> Recently there has been a further judicial acceptance of the concept that a man is not criminally culpable unless he acts with a wrongful intent. With regard to *mala prohibita* offenses which require a wilful violation, the courts have required that the accused be aware that his conduct is wrongful.<sup>38</sup> In two recent cases<sup>39</sup> involving violations of the Management Relations Act,<sup>40</sup> the defendant union representatives were charged with accepting unlawful payments of money from the employers. In these cases, two different federal circuit courts held that the term "wilfully" requires that the defendants be aware of the restrictions of the statute.

And now the *Crosby* case adopts the rule that in order for there to be a "wilful" violation of a *malum prohibitum* offense, the defendant must have guilty knowledge and criminal intent, and that a reasonable mistake of law as to such offense will be a valid defense.

The majority of federal courts today still adhere to the concept that knowledge of the law is not necessary for the conviction of a *malum prohibitum* offense imposing punitive liability. The trend however is back to the imposition of severe punishment only for unlawful conduct motivated by a wrongful intent. As to prohibitory offenses which require a "wilful" violation, the establishment in the near future of wrongful intent as an essential element appears almost certain. Only a strong well-reasoned decision is needed to establish conclusively that knowledge of the prohibitory statute is necessary for criminal guilt. The next step would be to require "knowledge of the law" in those prohibitory offenses in which no "wilful" element is expressly required by statute, but which nevertheless incur a severe penalty. Conduct which is indifferent should not be subject to a severe penal sanction unless it is the consequence of a wrongful intent. Such intent should be necessary even though not expressly required by statute.

A most important caveat is now in order. Although indifferent conduct may be severely punished only when the actor is aware that it is prohibited, a careful examination should be made to determine if the conduct is in fact indifferent. For conduct which upon first blush appears to be indifferent may upon careful analysis be discovered to be *malum in se*. An example will help illustrate this point.

<sup>37</sup> 67 F.2d 820, 823 (5th Cir. 1933).

<sup>38</sup> *United States v. Klinghoffer*, 285 F.2d 487 (2nd Cir. 1960).

<sup>39</sup> *United States v. Inciso*, 292 F.2d 374 (7th Cir. 1961); *Korholz v. United States*, 269 F.2d 897 (10th Cir. 1959).

<sup>40</sup> 29 U.S.C. § 186(b) (1958) states: "It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, from the employer of such employees any money or other thing of value."

In *United States v. Inciso*<sup>41</sup> the defendant, a union representative, was convicted of accepting money from the employers of the employees whom he represented. At first glance, no evil imputes itself to the act of accepting money which is given voluntarily. But a closer analysis of the situation under which such conduct is prohibited seems to reveal that such conduct is in fact *malum in se*. It would seem that the act of accepting money from persons whose interests are antagonistic to those that the acceptor represents cannot be considered "indifferent" conduct. To argue that such conduct is blameless would be to appall the conscience of society.

The courts will often construe such a statute as *malum prohibitum*,<sup>42</sup> and hold that knowledge of the law is not necessary, as the intent to do the prohibited act is the only intent required. The conclusion that knowledge of the law is not necessary is correct. But the reason that knowledge of the law is not necessary is because the offense prohibited is in fact *malum in se*, and not because it is *malum prohibitum*. The court having erred in its analysis of the nature of the offense, and being convinced of the defendant's guilt, compounds its original error by declaring that knowledge of the law in *mala prohibita* offenses is unnecessary. So the court arrives at the correct conclusion by committing two errors which cancel each other out. But the harm done is stamped deep into the law. For the court reaffirms the erroneous conclusion, that knowledge of the law is unnecessary in *mala prohibita* offenses, despite the fact that such offenses provide for heavy penalties. Such an interpretation has been previously demonstrated as fundamentally unjust. To eliminate the necessity for such holdings requires only that the offenses be properly classified as to their nature in the first instance. Then the defenses of ignorance of the law and mistake of law would thereby be properly reserved only to conduct which of its nature is indifferent.

In conclusion it can be said that "knowledge of the law" as a requirement to criminal culpability should be restricted to those statutory offenses wherein (1) the conduct prohibited is indifferent, *i.e.*, it is not reprehensible to the conscience of society, and (2) the penalty for such violation is punitive in nature. It is necessary that such an exception exist to the rule that *ignorantia juris neminem excusat*. For although one must agree with Justice Holmes as to the desirability of this established rule,<sup>43</sup> such agreement must be limited to the case of the *malum in se* offense. The general good may make it more desirable to put an end to robbery and murder than to attempt to do absolute justice to every individual,

<sup>41</sup> 292 F.2d 374 (7th Cir. 1961).

<sup>42</sup> *United States v. Ryan*, 350 U.S. 299 (1956).

<sup>43</sup> HOLMES, *THE COMMON LAW* 47-48 (1881).

but the desirability of putting an end to the conduct involved in *mala prohibita* offenses is not so pressing as to disregard the individual's rights. The right of a society to restrict individual liberty can only be justified by a compelling social necessity. There exists no such social necessity which would require the imprisonment of individuals for conduct which is not deemed reprehensible and which is not known to be prohibited.

### ESCHEAT—POSSIBLE MULTIPLE LIABILITY OF ABANDONED INTANGIBLE PERSONAL PROPERTY

Appellant, Western Union Telegraph Company, is a New York corporation, having its principal office in that state. It also does business in all other states, the District of Columbia, and in many foreign countries. Besides its telegraphic message system, the company operates a telegraphic money order business. This latter service consists of accepting money for telegraphic transmission in the office nearest the sender to the office nearest the payee. The delivery of such money, given in the form of a negotiable draft, cannot always be made. It also happens that the sending office cannot, in every instance, make a refund to the sender. This money builds up in bank deposits all over the country. It is this specific property that the State of Pennsylvania seeks to escheat—in particular, the amount of money held by the company for money orders bought in that state.<sup>1</sup>

The courts of Pennsylvania declared the funds escheated, stating that since their decree was *naturally* subject to the full faith and credit clause of the United States Constitution, Western Union need not fear that the funds involved would be subject to double escheat in another state. They brushed aside all other contentions of the company.<sup>2</sup> In reversing the

<sup>1</sup> The pertinent portion of the Pennsylvania statute reads as follows:

“(b) Whenever the owner, beneficial owner of, or person entitled to any real or personal property within or subject to the control of the Commonwealth or the whereabouts of such owner, beneficial owner or person entitled has been or shall be and remain unknown for the period of seven successive years, such real or personal property, together with the rents, profits, accretions and interest thereof or thereon, shall escheat to the Commonwealth subject to all legal demands on the same.

“(c) Whenever any real or personal property within or subject to the control of this Commonwealth has been or shall be and remain unclaimed for the period of seven successive years, such real or personal property, together with the rents, profits, accretions and interest thereof or thereon, shall escheat to the Commonwealth, subject to all legal demands on the same.” PA. STAT. ANN. tit. 72, § 333 (1958).

<sup>2</sup> The company contended that such a judgment of escheat rendered in a Pennsylvania court would not protect it from the judgments of other states seeking to escheat the same funds. They further asserted that the senders of the money orders and holders