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THE DEVELOPMENT OF CRIMES REQUIRING NO CRIMINAL INTENT

Under the common law, during its later development, criminal intent was a necessary element of every crime.¹ "Scienter," or guilty knowledge, had to be proved in every criminal case before a conviction could be secured. But prior to the twelfth century, English criminal law records do not reveal that the courts considered criminal intent necessary to a crime.² In the *Leges Henrici Primi*, compiled in 1188, which is an early attempt to state the existing law, the rule is often repeated that "he who commits evil unknowingly must pay for it knowingly."³ Records show that the death penalty could be, and was sometimes, exacted from persons who negligently caused the death of another. But this was not the general practice. Though the early law did not set forth criminal intent as a necessary element of criminality, an examination of the common law crimes will show that it would be impossible to commit most of them without an evil intent. Robbery or rape could not be committed without an evil design; and it would be difficult to unknowingly engage in housebreaking. The intent to burn was always essential to common-law arson.⁴

After the twelfth century, as the interest in Roman law increased in England, and as the power of the Chancellors grew, principles of Roman and canon law were engrafted into the common-law. Criminal intent was necessary to crime under the Roman law, and under the canon law the intent, and not the act, was the important requirement. Gradually, the necessity of evil intent came to be recognized as essential to the common-law crime, so that when Blackstone wrote his treatise he was able to state, "To make a complete crime, coznizable by human laws, there must be both a will and an act. . . . As a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that to constitute a crime against human laws there must be, first, a vicious will, and, secondly, an unlawful act consequent upon such vicious will."⁵ Criminal intent has remained a necessary element of the common-law crime until the present day.⁶

Most statutory crimes also require criminal intent. But because of the complicated nature of modern society, the legislatures of the states

¹ *La Russa v. State*, 142 Fla. 504, 196 So. 302 (1940).

² Sayre, *Mens Rea*, 45 HARV. L. REV. 977.

³ 2, POLLOCK AND MATTLAND, HISTORY OF ENGLISH LAW (2d. 1923) 99.

⁴ Sayre, *Mens Rea*, op. cit.

⁵ 4 BLACKSTONE'S COMMENTARIES 21.

⁶ *Olson v. State*, 143 Wis. 413, 127 N.W. 975 (1910); *Welch v. State*, 145 Wis. 86, 129 N.W. 656 (1911); *People v. Boxer*, 24 N.Y.S. (2d) 628 (1940); *McKnight v. State*, 171 Tenn. 574, 106 S.W. (2d) 556 (1937); *Borderland Const. Co. v. State*, 49 Ariz. 523, 68 P. (2d) 207 (1937).

have found it necessary, in order to protect the public safety and welfare, to pass laws which make the mere performance of certain prohibited acts, or the failure to perform other commanded acts, unlawful, regardless of the actor's intention. These laws, variously defined as "police offenses" and as "public welfare offenses," are justified as a proper exercise of the police power.⁷ They are concerned with such things as the law of the road, general safety regulation, pure food laws, criminal nuisances, employment regulation, narcotics and gambling suppression, licensing, and employment regulation, and other offenses. Violations in any of these fields are usually not major offenses, but the violations are apt to be numerous. Because of the nature of these offenses, it would be almost impossible to secure conviction if the state were required to prove the criminal intent of persons who violated the law.⁸ And yet, in order to protect the public health and safety, it is necessary that violations of these regulations be kept at a minimum. So the states, in the exercise of their police power, have declared certain things unlawful regardless of the actor's interest.⁹ The acts defined as public welfare offenses are usually not *malum in se*, but are wrong merely because they are prohibited by statute. "The rule that a wrongful act and a wrongful intent must concur to constitute a crime does not deny to the state the power to create and define as a crime the mere doing of an act which but for the statute would not be an offense."¹⁰

Whether or not criminal intent is an element of a particular crime is a matter of statutory construction.¹¹ Statutes are ordinarily construed by the courts in the light of the common law, and unless an intention to the contrary is expressed, criminal intent ordinarily is required.¹² The Legislature's intention to dispense with intent in statutory crime must be clearly expressed.¹³ "The appearance or non-appearance of the word 'knowingly' or its equivalent in a statute is not conclusive on the question whether the statute requires criminal intent to establish the offense, but that question is to be determined by considering the subject-matter of the statute, the language, the evil sought

⁷ 1 WHARTON CRIMINAL LAW 44; Sayre, *Public Welfare Offenses*, 33 COLUMBIA L. REV. 56; State ex rel Conlin v. Wausaw, 137 Wis. 311, 118 N.W. 810 (1908).

⁸ State v. Hartfiel, 24 Wis. 60 (1869); Clemens v. State, 176 Wis. 289, 185 N.W. 209, 21 A.L.R. 1490 (1921); Ludke v. Burek, 160 Wis. 440, 152 N.W. 190 (1915); Pinoza v. Northern Chair Co., 152 Wis. 473, 140 N.W. 84 (1913); Scott v. State, 171 Wis. 487, 177 N.W. 615 (1920); Skeen v. Craig, 31 Utah 20, 86 Pac. 487 (1906).

⁹ Landen v. United States, 299 Fed. 75, C.C.A. 6th (1924); State ex rel Ornstein v. Cary, 126 Wis. 135, 105 N.W. 792 (1905).

¹⁰ State v. Southern Express Co., 200 Ala. 31, 75 So. 343 (1917)

¹¹ United States v. Schultz, 28 F. Supp. 234, D.C. of Ky. (1939); Brown v. State, 137 Wis. 543, 119 N.W. 338 (1909).

¹² Knecht v. Kenyon, 179 Wis. 523, 192 N.W. 82 (1923).

¹³ State v. Great Atlantic & Pacific Tea Co of America, 111 W.Va. 148, 161 S.E. 5 (1931).

to be eradicated or prevented, and the consequences of the several constructions to which the statute may be susceptible; and if it clearly appears it was the Legislature's intention to make the act a crime regardless of intent, the courts will give effect to that intention."¹⁴

Since the statutes under which prosecutions for a criminal offense may arise irrespective of the intent of the defendant are police regulations designed to improve social and moral conditions and to protect the public health and safety, and since it is easy to secure convictions under statutes of this type, their number has rapidly increased during the past fifty years.¹⁵ If the Legislature prohibits under penalty the doing of a specific act, the doing of the prohibited act constitutes a crime, and the fact to be determined is whether or not the defendant did the act.¹⁶ It has been contended that laws which make a person who does a prohibited act guilty of a crime regardless of his intent, are unconstitutional, because they violate the fifth and fourteenth amendments to the United States Constitution which provide that no person shall be deprived of life, liberty, or property without due process of law, since the criminal intent is an essential element of crime. But the courts have held that these laws constitute a proper exercise of the police power, and that they violate no constitutional provision. "The Constitution does not require that scienter is a necessary element of any law where any offense is *malum prohibitum*, and one may violate the law without an intent to do so."¹⁷

In view of the fact that a state legislature has power under the Constitution to pass laws which make acts criminal regardless of whether the actor has criminal intent or not, or whether he is even conscious of the existence of the law, the Wisconsin Supreme Court has raised an interesting question. Under a statute which prohibits the willful doing of an act, could one be convicted who had no opportunity to avoid the act?¹⁸ The Oregon court has held that a law which would punish a man for the commission of an act which the utmost care on his part would not enable him to avoid probably would not be valid.¹⁹ In holding unconstitutional a law which deprived defendants of the defense of insanity, the Washington Supreme Court said, "The police power of the state, even if broad enough to authorize the Legislature to eliminate the element of intent in defining crime, is not without limitations; and a penal law would not be valid where it makes an act criminal which the utmost care and circumspection would not enable one to avoid."²⁰

¹⁴ *State v. Laundy*, 103 Ore. 443, 206 P. 290 (1922).

¹⁵ *Commonwealth v. Unkirch*, 142 Pa. Super. 591, 16 A. (2d) 737 (1941).

¹⁶ *Boyd v. State*, 217 Wis. 149, 258 N.W. 330 (1935).

¹⁷ *People v. Johnson*, 288 Ill. 422, 123 N.E. 543 (1919).

¹⁸ *State v. Welch*, 145 Wis. 86, 129 N.W. 656 (1911).

¹⁹ *State v. Laundy*, *supra*.

²⁰ *State v. Strasburg*, 60 Wash. 106, 110 Pac. 1020 (1910).

The trend of the criminal law during the past fifty years is summed up by Bishop when he says, "If a man intends to do what he is conscious the law, which everyone is conclusively presumed to know, forbids, there is no need of evil intent."²¹ How extensively Wisconsin has followed this modern trend of law is indicated by the succeeding list of statutes, none of which require criminal intent, and all of which provides for jail or prison sentences as penalties for their violation.

OFFENSES UNDER WISCONSIN STATUTES NOT REQUIRING CRIMINAL INTENT

(Prison or jail penalty provided)

1. CRIMINAL NUISANCES:

- 85.19 (5) Displaying a vehicle for sale by parking it on highway.
- 85.29 Throwing missiles at vehicles or placing circulars in them.
- 85.36 Operating automobile without muffler.
- 85.37 Operating automobile with cut-out.
- 85.38 Spilling loads from truck into highway.
- 85.57 Operating a truck without pneumatic tires.
- 85.59 Operating vehicle with cleats or lugs on wheels on highway.
- 95.25 (3) Interfering with work of state inspectors testing cattle for tuberculosis.
- 95.50 Throwing carcass of animal into lake or stream or depositing it on highway.
- 348.485 Displaying flag or emblem of organization advocating overthrow of United States government.
- 152.08 (1) Dentist employing "streeters" to solicit business.

2. VIOLATIONS OF GAMBLING LAWS

- 348.01 Promoting a lottery.
- 348.07 Keeping gaming devices.
- 348.08 Betting upon games.
- 348.172 Engaging in pool selling.
- 348.174 Frequenting place where pools are sold.

3. VIOLATIONS OF ANTI-NARCOTICS LAWS

- 161.02 Possessing drugs without license.
- 161.275 Possessing and using marijuana.

4. VIOLATIONS OF WEIGHTS AND MEASURES REGULATIONS

- 98.16 (10) Selling berries in containers not conforming to state specifications.
- 98.20 Manufacturing or offering for sale cotton duck or canvas without marking thereon the weight by ounces per yard.

²¹ 1 BISHOP, CRIMINAL LAW 300.

- 98.21 Offering for sale loaves of bread of other than statutory weights.
- 98.23 Selling more than 50 pounds of cheese without weighing each package and selling it according to weight.

5. VIOLATIONS OF LICENSE LAWS

- 95.01 Using unlicensed stallion.
- 95.61 Practicing veterinary medicine without license.
- 97.04 Distributing dairy products without license.
- 97.42 Selling oleomargarine without license.
- 100.01(2)(a) Acting as commission merchant without license.
- 100.13 Operating public warehouse without license.
- 114.16 Piloting aircraft without license.
- 125.09 Practicing watchmaking without certificate.
- 145.12 Acting as plumber without license.
- 150.01 Practicing midwifery without certificate.
- 152.02 Practicing dentistry without license.
- 153.07 Practicing optometry without certificate.
- 154.06 Practicing chiropody without certificate.
- 158.15 Practicing barbering without license.
- 159.15 Practicing cosmetic art without license.
- 162.06 Acting as well-driller without license.
- 175.07 Acting as private detective without license.
- 176.04 Selling liquor without license.
- 176.051 Manufacturing liquor without permit (A felony).
- 189.03 Selling securities without license.
- 201.73 Offering motor club services without license.
- 217.01 Engaging in business of transmitting money without certificate from state.
- 224.03 Conducting banking business without charter.

6. VIOLATIONS OF PURE FOOD LAWS—UNWHOLESOME FOOD

- 97.17 Handling food in unclean manner, or by a person wearing filthy clothes, or by a person afflicted with a loathsome disease or using ingredients that have become contaminated, in any bakery or confectionary.
- 97.31 Feeding dairy cows unwholesome food or keeping them in unclean stables, or using unclean milking utensils.
- 97.25 Selling adulterated food.
- 97.26 Selling food prepared under unsanitary conditions.
- 97.27 Selling food containing unhealthful preservatives.
- 97.37 Selling insanitary or adulterated milk or cream.
- 97.53 Sale of adulterated meats.
- 99.09 Keeping food other than "cold storage products" in cold storage more than 40 days.
- 99.10 Returning food to cold storage after it has once been released upon the market.

7. VIOLATIONS OF GENERAL FOOD REGULATIONS

- 95.29 Imitating state mark used to indicate milk products are from tuberculin tested cows.
- 97.43 Possess with intent to sell any imitation cheese or

- butter (except oleomargarine by licensed dealers) or any cheese or butter to which a foreign substance has been added.
- 97.44 Offering oleomargarine to a restaurant patron without notifying him of what it is.
- 97.62 Selling bread other than wheat or rye bread to which coloring is added, or which is sold without the kinds and amounts of ingredients printed on the wrapper.
- 97.025 Offering for sale imitation ice cream or ices not of statutory standard.
- 97.29 Selling preserves or jellies where ingredients not printed on label.
- 97.305 Selling macaroni, spaghetti and noodles which do not meet statutory standard.
- 97.46 Using words "butter," "cream," "creamery," or the name or picture of any brand of cattle in advertising a butter substitute.
- 97.49 Selling cheese with more than statutory moisture content.
- 97.52 Using "Wisconsin cheese" label on cheese that is not up to statutory requirements.
- 97.56 Selling as Kosher meat, meat not prepared according to Jewish ritual.
- 98.13 Failing to comply with statutory standards in using Babcock test for determining butter-fat content of milk.
- 98.14 Using or selling Babcock pipettes that do not comply with statutory standards.

8. VIOLATIONS OF TRAFFIC LAWS

- 85.063 Operating automobile not equipped with safety glass.
- 85.11 Not according equal rights to other users of the highway.
- 85.12 (2) Failure to comply with direction of traffic officer.
(3) Failure to obey traffic signal.
- 85.141 Failing to stop after an accident.
- 85.15 (1) Driving on wrong side of highway except when passing.
(2) Passing when highway not clear ahead for safe distance.
- 85.16 (1) Passing without sounding horn.
(2) Driving from one traffic lane to another without regard to vehicles approaching from rear.
(3) Crowding a vehicle while passing it.
(4) Refusing to give way to a vehicle attempting to pass.
(5) Passing on curves.
(6) Passing at railroad grade crossings and highway intersections.
(7) Passing street cars on left side on two-way highway.
(9) Failing to stop for street car unloading passengers.
(10) Passing vehicle stopped at intersection to permit pedestrian to cross.

- (11) Failing to stop on passing or meeting frightened animals.
 - 85.17 (1) Turning right from center lane of highway.
 - (2) Turning left from outside lane of the highway.
 - (4) Making 'U' turn at intersection having traffic officer or traffic signal.
 - (5) Turning in mid-block in business district or on a through traffic street.
 - 85.18 (4) Failing to yield right-of-way to through-traffic on arterial highway.
 - (5) Turning left at intersection without giving approaching traffic an opportunity to pass.
 - (6) Cutting through a funeral procession.
 - (7) Failing to yield right-of-way to authorized emergency vehicle sounding siren.
 - (8) Failing to yield right-of-way emerging from driveway or alley.
 - (10) Failing to yield to vehicles traveling on highway when leaving parking space.
 - 85.19 (1) Parking on highway.
 - (2) Parking on wrong side of the street.
 - (3) Stopping on hill or curve or in a crosswalk.
 - (4) Parking near a fire plug or in front of driveway or theater or church entrance.
 - (9) Parking or stopping on left side of highway.
 - 85.20 Failing to stop for authorized emergency vehicle sounding horn.
 - 85.21 Following an emergency vehicle.
 - 85.22 Driving over a safety zone.
 - 85.23 Driving along a sidewalk.
 - 85.24 Racing on the highway.
 - 85.28 Driving on track in front of streetcar.
 - 85.31 Backing into busy intersection for purpose of making turn.
 - 85.32 Following another car closely.
 - 85.33 Towing a truck without displaying red signal.
 - 85.40 Operating automobile without due regard to traffic, surface, width of highway, and other conditions.
 - 85.41 Speeding on a bridge or viaduct.
 - 85.44 Failing to yield right-of-way to pedestrian in crosswalk.
 - 85.45 Operating over-size or over-weight vehicle on highway.
 - 85.55 Operating trucks on streets restricted to automobile traffic.
 - 85.69 Failing to stop at an artery or through traffic.
9. VIOLATIONS OF GENERAL SAFETY REGULATIONS
- 85.13 Operation of vehicle by epileptic, drug addict, or habitual drunkard.
 - 85.135 Operation of vehicle by one subject to judgment for negligent operation of motor vehicle.

- 85.14 Defacing or removing traffic signal.
 85.26 Skating or coasting on the highway.
 85.27 Clinging to moving vehicles.
 85.30 Placing materials injurious to tires on highway.
 85.34 (1) Overloading vehicle so that it interferes with driving.
 (3) Driving with one arm.
 85.35 (1) Operating car with signs on windshield and windows.
 (2) Operating car not equipped with windshield wipers.
 85.39 (2) Riding on outside of vehicle.
 (3) Leading animals from a motor vehicle.
 85.56 Using unsafe trailer hitch.
 85.61 Operating tractor on highway without fenders.
 97.69 Selling medicine containing drug or poisonous substance without labeling it.
 97.70 Depositing deleterious drug on doorstep or giving it to a child.
 95.19 Failing to report animal afflicted with communicable disease.
10. VIOLATIONS OF EMPLOYMENT LAWS
- 103.65 Employing women or minors in dangerous or unhealthful employment.
 103.67 Employing minors under 14.
11. VIOLATIONS OF GENERAL TRADE REGULATIONS
- 100.15 Issuing trading stamps having cash value.
 100.16 Selling merchandise with the pretense of a prize.
 100.22 Unfairly discriminating between persons or communities in purchasing dairy products.
 115.07 Charging usurious rate of interest (over 10%).
 119.97 Mortgaging stored grain.
 139.03 Selling liquor without attached revenue stamps.
 125.15 Selling used watch without "Secondhand" tag attached.
 218.01 (7) Distributor inducing automobile dealer to transfer retail installment sales to finance company.
 221.49 Using name "bank" in business without state authority.
 223.08 Using name "trust" in business without state authority.
 348.36 Telegraph operator divulging message to unauthorized persons.

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