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Notes

NOTES

CRIMINAL LAW—IGNORANCE OF LAW HELD EXCUSE TO FELON REGISTRATION ORDINANCE.—In a landmark case, the Supreme Court of the United States has recently decided[1] that a California felon registration ordinance, carrying criminal penalties,[2] was unconstitutional as applied to a defendant who had no knowledge of her duty to register. In a five to four decision, Justice Douglas, writing for the majority upheld defendant's ignorance of the law as a valid defense to this action. Therefore, the case of *Lambert* v. *California*[3] has seemingly overruled the basic doctrine that ignorance of the law will not excuse.[4]

In the *Lambert* case,[5] the defendant was a resident of California for seven years. She had been convicted of forgery in Los Angeles, which California regards as a felony. The defendant was then arrested on suspicion of another offense, when it was discovered that she had failed to register as a felon after her forgery conviction. The People, being unable to prosecute under the suspected offense, then tried petitioner for violation of the municipal ordinances.[6] At the trial, it was contended by defendant that Section 52.39,[7] denies *due process*[8] and other rights unnecessary to enumerate. The defendant was found guilty after a jury trial and fined $250.00, with three years probation. Petitioner then renewed her constitutional objection[9] and moved for a new trial. The motion was denied and the conviction upheld on appeal. At the trial, defendant offered proof of no knowledge on her part, but this defense was refused. The Supreme Court stated the issue to be, "whether a registration act of this character violates due process, where it is applied to a person who has no actual knowledge of his duty to register and where no showing is made of the probability of such knowledge."[10] In holding the affirmative of the issue, the majority then reasoned that, "*actual knowledge* and *subsequent failure* to *comply* are necessary before a conviction under the ordinance can stand."[11]

Before discussing the full impact of *Lambert* v. *California*,[12] it is necessary to view these felon registration statutes,[13] and their position today. A felon registration ordinance is designed to provide the law enforcement agency with a list of those people with a previous felony record for the purpose of preventing recidivistic behavior. These ordinances are susceptible, by selective enforcement, to be used as a means of harassment or detention of the undesirable felons. But, by not prosecuting every infraction of these ordinances, the law enforcement agency may lull convicted persons into believing the law is a dead letter. Therefore, when the particular law enforcement

[1] Lambert v. People of the State of California, 355 U. S. 325, 78 S. Ct. 240, — L. Ed. 2d — (1957).

[2] L. A. MUN. CODE ANN. §§ 52.38 (a), 52.39, 52.43 (b) (1933).

[3] See note 1, *supra*.

[4] Shevlin-Carpenter Co. v. State of Minnesota, 218 U. S. 57, 30 S. Ct. 663, 54 L. Ed. 930 (1910).

[5] See note 1, *supra*.

[6] See note 2, *supra*.

[7] See note 2, *supra* (a convicted felon must register if in Los Angeles five days—unlawful if failure).

[8] U. S. CONST., AMEND. XIV.

[9] *Ibid.*

[10] Note 1, *supra*, at 327, 78 S. Ct. at 242, — L. Ed. 2d at —.

[11] *Id.* at 328, 78 S. Ct. at 243, — L. Ed. 2d at —.

[12] See note 1, *supra*.

[13] For survey of local registration ordinances, see: Note, Criminal Registration Ordinances: Police Control over Potential Recidivists, 103 U. PA. L. REV. 60 (1954).

agency feels it is necessary, the ordinance in question may be enforced to its full extent against ex-convicts who are thought to be undesirable.[14] The chief draftsman of the Los Angeles ordinance[15] concerned here, thought that these ordinances would gain their strength from the failure of ex-convicts to register, thus giving the police an opportunity to prosecute ex-convicts suspected of other crimes, where proof of the other crimes was inadequate.[16] It was believed that the felon registration ordinances would result in a mass exodus from the cities by the convicted felons and ex-convicts.[17]

The Los Angeles Ordinance[18] was the first of its kind. Since then, similar legislation has become quite common throughout various parts of the United States.[19] Also, five states are known to have criminal registration statutes.[20] Several constitutional objections have been raised against these ordinances, aside from *due process,* the most often being that the states cannot, in exercise in their police power, unduly impinge upon individual liberties.[21] However, the Supreme Court has held that the states may restrict protected rights when the public is endangered,[22] and the states may act whether this danger is actual, present, or impending.[23]

At the Common Law, "for a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defense."[24] The famous maxim of the Civil Law of Rome, ignorantia juris, quod quisque tenetur scire, neminem excusat (ignorance of the law will never excuse), is a maxim of our own law as well.[25] However, ignorance or mistake of fact is different from ignorance of law, because, if a man intends to kill a housebreaker or a thief, in his own house, and by mistake kills one of his own family, this is no criminal action.[26] But, if a man thinks he has a right to kill a person who has been excommunicated or outlawed wherever he meets him, and he does so, this is wilful murder.[27] The defences of ignorance or mistake of law are aimed at demonstrating the lack of the criminal intent, or *mens rea,* which is a requirement of a crime. Generally, persons charged with a crime plead as a defense their ignorance of the law that the act perpetrated was a crime, and therefore, based on this ignorance, they lacked the guilty intent necessary to make their acts criminal. Under the general rule, this is not a defense.[28] The reason that ignorance of the law will not excuse, while ignorance of

[14] *Id.* at 91-93.
[15] See note 2, *supra.*
[16] See note 13, *supra,* at 63.
[17] New York Times, July 4, 1935, P. 16, Col. 2.
[18] See note 2, *supra* (1933).
[19] California: Southgate, Sept. 26, 1933; Florida: Miami Beach, Nov. 17, 1933; California: Arcadia, Dec. 5, 1933; Florida: Coral Gables, Dec. 19, 1933; see note 13, *supra,* for complete list.
[20] Arizona: ARIZ. CODE ANN. §§ 13-1271 to 74 (1939).
California: CAL. PEN. CODE ANN. § 290 (1951).
Florida: LAWS OF FLA. C. 28470 (1953).
Illinois: ILL. STAT. ANN. C. 38, §§ 192.29 to .32 (1949).
New Jersey: N. J. STAT. ANN. §§ 2a: 169 A-I to 10 (1952).
[21] See note 4, *supra;* United States v. Balint, 258 U. S. 250, 42 S. Ct. 301, 66 L. Ed. 604 (1922).
[22] Bryant v. Zimmerman, 278 U. S. 63, 49 S. Ct. 61, 73 L. Ed. 184 (1928).
[23] City of Manchester v. Leiby, 117 F. 2d 661 (1st Cir. 1941); United States v. Harriss, 347 U. S. 612, 74 S. Ct. 808, 98 L. Ed. 989 (1954); Hines v. Davidowitz, 312 U. S. 52, 61 S. Ct. 399, 85 L. Ed. 81 (1941).
[24] 4 CHASE'S BLACKSTONE 868 (1938).
[25] See note 21, *supra.*
[26] See note 24, *supra.*
[27] See note 24, *supra.*
[28] See note 4, *supra.*

fact may excuse, is that the opportunity for fraud would be greater in the case of ignorance of law.[29]

Modern case and statutory law has further re-enacted the Common Law doctrines. The fact that everyone is presumed to know the law,[30] is true whether the offense charged is mala prohibitum,[31] or mala in se.[32] In a further extension, it has been held that a showing of "(a) good faith reliance on advise of council" will not bar the application of the general rule.[33] At Common Law, *scienter* was a necessary ingredient of every crime.[34] Today this Common Law requirement has been incorporated in many statutory crimes.[35] The situation is such that where statutes are silent as to requirement of knowledge, some courts have included the requirement in the statutory definition.[36] However, even though the Common Law rule as to knowledge is generally followed, the states have wide latitude in enacting police laws without making knowledge an essential element, and it has been held that this modification is consistent with the *due process* clause of the fourteenth amendment.[37] The various states dealing with cases on ignorance of the law have had similar results to the Common Law and Federal Rules. It has been held that no defense was available, where accused was honestly mistaken as to the meaning of the law,[38] or that he believed in good faith that the law he violated was unconstitutional.[39] The rule that ignorance of the law is no excuse has been applied to an act of a public officer,[40] as well as to one who is a foreigner and in whose country the act charged was not a crime.[41] However, where a specific intent is essential to constitute the crime charged, and ignorance of the law will negate the existence of that specific intent, the general rule does not apply.[42] Also, where the law on a certain point has not been specifically settled, is obscure, or is highly susceptible to more than one reasonable construction, the general rule was not applied.[43] The distinction between crimes malum prohibitum and malum in se is also of importance in noting the position of the states today, on ignorance of the law. When a legislature declares a certain act punishable, the crime becomes one malum prohibitum, as opposed to a crime malum in se, which is inherently wicked.[44] Therefore, it is important to keep in mind that mala prohibita offenses may consist of acts of omission as well as acts of commission,[45] and where a duty to act is made out, nonperformance

[29] CLARK & MARSHALL, CRIMES § 60 (1952).

[30] See note 4, *supra.*

[31] Blumenthal v. United States, 88 F. 2d 522 (8th Cir. 1937).

[32] United States v. Gunn, 97 F. Supp. 476 (W. D. Ark. 1950); United States v. Greenbaum, 138 F. 2d 437 (3rd Cir. 1943).

[33] Miller v. United States, 277 Fed. 21 (4th Cir. 1921).

[34] HOLMES, COMMON LAW 130 (1881).

[35] Morissett v. United States, 342 U. S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1951); United States v. Cramer, 352 U. S. 1, 77 S. Ct. 1, 1 L. Ed. 2d 1 (1945); Reynolds v. United States, 98 U. S. 145, 78 L. Ed. 381 (1878).

[36] United States v. Murdock, 290 U. S. 389, 54 S. Ct. 223, 78 L. Ed. 381 (1933).

[37] *Ibid;* Note 21, *supra,* United States v. Balint.

[38] People v. McCalla, 63 Cal. App. 783, 220 P. 431 (1923); People v. Faber, 29 Cal. App. 2d Supp. 751, 77 P. 2d 921 (1938).

[39] Hunter v. State, 158 Tenn. 63, 12 S. W. 2d 361 (1928).

[40] Skeen v. Craig, 31 Utah 20, 86 P. 487 (1906).

[41] Cambioso v. Moffett, 4 F. Cas. No. 2, 330 (D. C. Penn. 1807).

[42] United States v. One Buick Coach Automobile, 34 F. 2d 318, 320 (N. D. Ind. 1929); Townsend v. United States, 95 F. 2d 352 (D. D. C. 1938).

[43] Burns v. State, 123 Tex. Cr. 611, 61 S. W. 2d 512 (1933).

[44] Hildreth v. State, 215 Ark. 808, 223 S. W. 2d 757 (1949).

[45] Gerhart v. Dixon, 1 Pa. 224 (1845).

may be actionable, even though the failure is a mere omission.[46] Therefore, previous to *Lambert* v. *California,*[47] the law was definite and clear, even though its application had been criticized at times for its harshness. In *Pappas* v. *State,*[48] the defendant was Greek and spoke very little English. He bought personal property under a conditional sale arrangement, where the vendor retained title. He did not default in any payment, but was convicted of removing the property from the state without the vendor's consent, where the statute involved made such a removal a felony. Regardless of defendant's good faith in the transaction of the conditional sale, his complete ignorance of the law, and his partial knowledge of our language, he was imprisoned for this offense.[49]

Thus, following this overwhelming tide of precedence, we have *Lambert* v. *California,*[50] and its holding that defendant's ignorance of the law was sufficient to withstand a conviction. The majority recognized the rule that ignorance of the law will not excuse was deeply imbedded in our legal structure, and the principle that of all the powers of local government, the police power is one of the least limitable.[51] But, the majority reasoned, *due process* limits the exercise of the police power. Engrained in *due process,* they went on, is the requirement of notice, notice being essential, so that a citizen may defend against charges. Notice is required before the property interests of a citizen may be disturbed, before assessments may be made against a citizen, and before penalties may be assessed. The Supreme Court has ruled on these points in several recent cases that involved property interests in civil litigation,[52] and the principles discussed apply equally to wholly passive and unaware persons brought before the courts in criminal cases. It would appear from Justice Douglas' reasoning in arriving at his conclusion, that there is a difference between the defendant's *unknowing inaction* here, and the *unknowing but active* conduct, for example of a person engaged in the illegal transportation of contraband. In *Commonwealth* v. *Mixer,*[53] the defendant didn't know he was transporting contraband liquor but his conviction was upheld. Similarly, in *Feeley* v. *United States,*[54] where the sale of intoxicating liquor to Indians was prohibited, defendant was convicted even though he didn't know the purchaser was an Indian. Therefore, a distinction must be drawn between *unknowing acts of commission,* such as a sale,[55] transportation,[56] labeling,[57] or gam-

[46] United States v. Knowles, 26 Fed. Cas. 800, No. 15,540 (D. C. C. 1864); United States v. Warner, 28 Fed. Cas. 404, No. 16,643 (C. C. Ohio 1848); People v. Smith, 56 misc. 1, 105 N. Y. Supp. 1082 (Sup. Ct. 1907).

[47] See note 1, *supra.*

[48] 135 Tenn. 499, 188 S. W. 2d 52 (1916).

[49] *Ibid.*

[50] See note 1, *supra.*

[51] District of Columbia v. Brooke, 214 U. S. 138, 149, 29 S. Ct. 560, 563, 53 L. Ed. 941 (1909).

[52] Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950); Covey v. Town of Somers, 351 U. S. 141, 76 S. Ct. 724, 100 L. Ed. 1021 (1956); Walker v. City of Hutchinson, 352 U. S. 112, 77 S. Ct. 200, 16 L. Ed. 2d 178 (1956).

[53] 207 Mass. 141, 93 N. E. 249 (1910).

[54] 236 Fed. 903 (8th Cir. 1916).

[55] *Ibid;* State v. Thompson, 174 Iowa 119, 37 N. W. 104 (1889), where defendant, not knowing a buyer was a minor still was convicted of sale to minors, as the court held defendant was bound to know whether buyers were persons to whom he could lawfully sell.

[56] See note 53, *supra.*

[57] United States v. Thirty-Six Bottles of Gin, 210 Fed. 271 (3rd Cir. 1914), where the lack of an intent to deceive a purchaser was immaterial where the goods were misbranded.

bling,[58] and an *unknowing act of omission,* as the purely passive conduct of a person merely residing in Los Angeles.[59] In the *Lambert* case, the person (defendant) engaged in purely passive conduct, as merely residing in Los Angeles, would appear to have no such notice or reason to believe that his normally blameless conduct was a law violation. It further appears that Justice Douglas, writing for the majority, has seemingly made different *due process* requirements for an act of commission and an act of omission. One may therefore conclude from the majority holding, that when an act of omission is made punishable, an individual must have actual knowledge of its criminality, regardless of the fact that an intent is not necessarily an element of the crime, and that the police power of local government is one of the most freely exerciseable instruments of enforcement.

Two dissents were written to this case. Justice Burton, for himself, merely stated that he doesn't believe the ordinances in question violated constitutional rights as applied to this appellant. Justice Frankfurter, writing also for Justices Harlan and Whittaker, does not distinguish between ignorance of the law as a defence to criminal acts of commission or omission. The main dissent also believes that if broadly adhered to, this decision would greatly impair and destroy much existing legislation. Justice Frankfurter concludes that the present case will only be an isolated example from the great weight of precedence.

Therefore, viewing the holding and reasoning of *Lambert* v. *California,*[60] with sufficient regard to a vigorous dissent and overwhelming contrary precedence, one must conclude that in the future, when an act of omission is made punishable, an individual must have actual knowledge of its criminality, regardless of the fact that intent is not a necessary element of the crime. A. C. M.

TAXES—FEDERAL INCOME TAX—ALLOWANCE OF ORDINARY AND NECESSARY EXPENSES AS DEDUCTION FROM INCOME WHERE ILLEGAL OR AGAINST THE PUBLIC POLICY OF THE STATE. —In three recent unanimous decisions,[1] the United States Supreme Court has elaborated its criteria for determining the relevance of *illegality* and *public policy* to computation of business profits under section 162 of the Internal Revenue Code,[2] which allows deduction of "all the ordinary and[3] necessary expenses paid or incurred during the taxable year in carrying on any trade or business. . . ."

Deductibility is generally so much an issue of fact that the Supreme Court has been reluctant[4] to review rulings or even define *ordinary and necessary.*[5] An often-

[58] Commonwealth v. Smith, 166 Mass. 370, 375, 44 N. E. 503, 504 (1896), where the defendant entered a gambling place, not knowing it was such, a conviction was upheld, as the "statute means that people enter such places at their peril."

[59] See note 1, *supra.*

[60] See note 1, *supra.*

[1] Commissioner v. Sullivan, 356 U. S. 27, 78 S. Ct. 512, 2 L. Ed. 2d 559 (1958); Tank Truck Rentals, Inc. v. Commissioner, 356 U. S. 30, 78 S. Ct. 507, 2 L. Ed. 2d 562; noted, 43 CORN. L. Q. 725. Hoover Motor Express Co. v. United States, 356 U. S. 38, 78 S. Ct. 511, 2 L. Ed. 2d 568 (1958).

[2] INT. REV. CODE OF 1954 § 162. Formerly INT. REV. CODE OF 1939 § 23 (a) (1) (A). 53 STAT. 12, *as amended by* 56 STAT. 819. 26 U. S. C. § 162.

[3] The terms are used conjunctively. Deputy v. DuPont, 308 U. S. 488, 60 S. Ct. 363, 84 L. Ed. 416 (1940). See MERTENS, LAW OF FEDERAL INCOME TAXATION, § 25.09 (Chicago, 1955-58).

[4] See dissenting opinion by Mr. Justice Roberts in Deputy v. DuPont, *supra,* note 3. 499, 60 S. Ct. at 369, 84 L. Ed. at 425; and Annot., 84 L. Ed. at 426.

[5] *Cf.* Dunn & McCarthy, Inc. v. Commissioner, 139 F.2d 242 (2d Cir. 1943).

quoted opinion by Mr. Justice Cardozo,[6] characterized the statutory standard as "not a rule of law . . . rather a way of life . . ." to be judged by ". . . the ways of conduct and the forms of speech which prevail in the business world. . . ." Subsequently Mr. Justice Douglas,[7] applied the time-honored principle that popular usage fixes public laws.[8] Ordinary expenses are thus referred to a type of business rather than a taxpayer's affairs:[9] a once-in-a-lifetime expense may be ordinary.[10] Nor need necessary expenses be indispensable; only beneficial and appropriate.[11] Almost any expenditure may qualify if it helps business and does not enhance capital assets.[12]

Whatever indulgence might flow from this liberal construction is, in practice, restricted by rulings that the burden of proof rests, item by item, upon the taxpayer.[13] Such rulings may stem from financial and administrative needs[14] but are almost always phrased in constitutional terms,[15] citing the sixteenth amendment. As Mr. Justice Van Devanter put it,[16] "The power to tax . . . extends to gross income. Whether, and to what extent, deductions shall be allowed depends on legislative grace; and only as there is clear provision therefor can any particular deduction be allowed. . . ." Although Congress has never taxed gross income, federal courts freely invoke the doctrine of legislative grace to justify denial of particular deductions.[17]

The Supreme Court has construed the same statute as expressing Congressional intent to tax unlawful business.[18] Mr. Justice Holmes's epigram,[19] "Of course Congress can tax what it also forbids," was always true of excise taxes.[20] But, after adoption of the sixteenth amendment in 1913, Congress levied income taxes on "lawful" business.[21] In 1927 the word, "lawful", was deleted.[22] And in 1927, when bootlegging had become

[6] Welch v. Helvering, 290 U.S. 111, 54 S. Ct. 8, 78 L. Ed. 212 (1933).

[7] Deputy v. DuPont, *supra,* note 3.

[8] CHASE, BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 25 (4th ed. New York 1938); GROTIUS, DE JURE BELLI AC PACIS, Book II, Ch. xvi, § II (Universal Classics Library transl. A. C. Campbell, New York, London, 1901, p. 177); Maillard v. Lawrence, 57 U. S. 267, 14 L. Ed. 925 (1853).

[9] Welch v. Helvering, note 6 *supra;* Deputy v. DuPont, *supra,* note 3.

[10] Kornhauser v. United States, 276 U. S. 145, 48 S. Ct. 219, 72 L. Ed. 505 (1928); Helvering v. Community Bond & Mortgage Corp., 74 F. 2d 727 (2d Cir. 1935).

[11] Commissioner v. Pacific Mills, 207 F. 2d 177 (1st Cir. 1953); Bennett's Travel Bureau, Inc., 29 T. C. No. 38 (1957).

[12] Edward J. Miller, 37 B. T. A. 830 (1938); Williams & Waddell v. Pitts, 148 F. Supp. 778 (E. D. S. C. 1957).

[13] Welch v. Helvering, note 6, *supra,* at 115, 54 S. Ct. at 9, 78 L. Ed. at 212.

[14] "It is well-settled law that, if income is to be free from taxation, the taxpayer must bring himself within the exemption or deduction which the statute provides. This taxpayer did not, and so he can not recover the taxes paid. This result need not shock us . . . . If the deduction is not granted the money is not wasted. It goes to support the United States Government." Fidelity Trust Co. v. United States, 253 F. 2d 407, 409 (3rd Cir. 1958).

[15] *E.g.,* Helvering v. Independent Life Ins. Co., 292 U. S. 371, 54 S. Ct. 758, 78 L. Ed. 1311 (1934); Goodman v. Commissioner, 200 F. 2d 681 (2d Cir. 1953).

[16] New Colonial Ice Co. v. Helvering, 292 U. S. 435, 54 S. Ct. 788, 78 L. Ed. 1348 (1934).

[17] But see: Griswold, *An Argument Against The Doctrine That Deductions Should Be Narrowly Construed As A Matter of Legislative Grace,* 56 HARV L. REV. 1142 (1943).

[18] United States v. Sullivan, 274 U. S. 259, 41 S. Ct. 607, 71 L. Ed. 1037 (1926).

[19] United States v. Stafoff, 260 U. S. 477, 480, 43 S. Ct. 197, 200, 67 L. Ed. 358, 361 (1923).

[20] Harford v. United States, 12 U. S. 63, 3 L. Ed. 504 (1814); Locke v. United States, 11 U. S. 212, 3 L. Ed. 364 (1813).

[21] INCOME TAX ACT OF 1913, 38 STAT. 114 (Oct. 3, 1913).

[22] INCOME TAX ACT OF 1921, 42 STAT. 227, 250, 268, § 223 (a) (Nov. 23, 1921).

a notoriously profitable business, Mr. Justice Holmes stated, for a unanimous Court, that deletion of "lawful" left no reason why the fact that a business is unlawful should exempt it from paying the taxes that, if lawful, it would have to pay.[23]

At the same time the Court brushed aside the fifth amendment as a defense for failure to file tax returns on grounds of self-incrimination.[24] "It would be an extreme, if not an extravagant interpretation of the fifth amendment, . . ." Mr. Justice Holmes wrote,[25] ". . . to state that it authorized a man to refuse to state the amount of his income because it had been made in crime." Elimination of the line between lawful and unlawful business pushed the Court toward exclusion of *illegality* and *public policy* from its criteria for deductibility. Sheer logic, indeed, could dictate that, when lawful and unlawful business are taxed under one statute, no expenditure should be non-deductible merely for unlawfulness. Mr. Justice Holmes postponed that problem with a dictum: "It is urged that, if a return were made, defendant [a bootlegger] would be entitled to deduct illegal expenses such as bribery. This by no means follows. But it will be time enough to consider the question when a taxpayer has the temerity to raise it."[26]

To date no taxpayer has forced the precise question to a Supreme Court decision. Federal courts have disallowed deductions for bribes,[27] lobbying,[28] and unsuccessful defence of criminal prosecutions.[29] A United States Court of Appeals recently called it "too plain to receive comment" that whiskey purchases (against Oklahoma law), and payments for political influence (not necessarily against any law), were both properly disallowed.[30]

On the other hand the Supreme Court has allowed deduction of kick-backs by eye-glass vendors to doctors who wrote prescriptions[31]—a practice deplored by the American Medical Association[32] and forbidden by some state statutes[33]—where the

[23] Note 18, *supra.*

[24] *Ibid.*

[25] *Ibid.*

[26] *Id.* at 263, 47 S. Ct. at 609, 71 L. Ed. at 1039.

[27] *E.g.,* Rugel v. Commissioner, 127 F. 2d 393 (8th Cir. 1942).

[28] The case most often cited to support denial of deductions for expenses of lobbying is Textile Mills Securities Corp. v. Commissioner, 314 U.S. 326, 62 S. Ct. 272, 86 L. Ed. 249 (1941), upholding Internal Revenue Regulation 111, § 29.23 (q)-1, which denied deductibility for "sums of money expended for lobbying, promotion or defeat of legislation, the exploitation of propaganda. . . ." See also: F. Strauss & Son, Inc., of Arkansas v. Commissioner, 251 F. 2d 724 (8th Cir. 1958) where the Court reasons that, by passively acquiescing for forty years, Congress conferred something in the nature of a prescriptive right upon the Commissioner of Internal Revenue to deny such deductions. See generally: Spiegel, *Deductibility of Lobbying, Initiative and Referendum Expenses: A Problem For Congressional Consideration,* 43 CALIF. L. REV. 1 (1957). *Compare:* Morgan v. Tate & Lyle, Lt., 35 Tax. Cas. 367 (H. L., 1955), where deductions of expenses of a propaganda campaign by British sugar refiners opposing nationalization of the industry were allowed as "wholly or exclusively laid out for purposes of business."

[29] *E.g.,* C. W. Thomas, 16 T. C. 1417 (1951).

[30] Finley v. Commissioner, 255 F. 2d 128 (10th Cir. 1958).

[31] Lilly v. Commissioner, 343 U. S. 90, 72 S. Ct. 497, 96 L. Ed. 769 (1952). See generally: Schwartz, *Business Expenses Contrary To Public Policy, An Evaluation Of The Lilly Case,* 8 TAX L. REV. 241 (1953).

[32] PRINCIPLES OF ETHICS OF AMERICAN MEDICAL ASSOCIATION, 1943, 1949. Editorials: 131 AMA J., 1128 (1946); 136 AMA J., 176 (1948); *Address of Chairman Albert C. Snell Before Section on Ophthalmology,* 117 AMA J., 497 (1941).

[33] Cal. Bus. & Prof. Code §§ 650, 652 (Deering, 1951); WASH. REV. STAT. § 10185-14 (Remington Supp. 1949).

kick-backs were paid in states which had not yet enacted prohibitory legislation.[34] The Court also allowed deduction of a mail-order dentist's legal[35] expenses incurred fighting a fraud order (later enforced) denying him use of the mails.[36] But deductions for fines or penalties are generally disallowed.[37] As a result, the cost of committing an offence may be deductible while a fine for the same offence is not.

If such diverse rulings share any rationale the courts have yet to expound it. Cases eluding the jaws of fact and legislative grace have been decided on a formidable assortment of grounds.[38] *Illegality* and *public policy* have been read into the ordinary-necessary requirement or considered separately,[39] if at all.[40] Where deductions for unethical expenditures have been upheld,[41] the courts have scanned the letter of legality. Where statutorily impeccable, but contractually unenforceable expenditures have been ruled non-deductible, as in some lobbying cases,[42] courts have looked to *public policy* implications of traditional contract law. In most cases enforcability of obligation has been held irrelevant.[43]

On deductibility of unlawful expenses of unlawful business, federal courts have inclined to pragmatic consideration of whether particular expenditures were, in cold fact, ordinary and necessary.[44] If this test seems to favor business where disreputable dealings are customary, the onus has been passed to Congress, as in Mr. Justice (then Judge) Minton's opinion in *Heininger* v. *Commissioner*: "If the . . . expenses [are] disallowed as a deduction, then no business expense is deductible, and such business would be taxable on its gross income. Congress has not said that that discrimination shall be made . . . If this change is to be made, and the policy altered, let Congress do it. Congress would only need to add the word, 'legal' . . ."[45]

In 1951 Senator Kefauver, on behalf of members of the former Senate Crime Investigating Committee, introduced an amendment to that year's tax bill, abolishing deductions for any expense paid or incurred as a result of illegal wagering, as an alternative to the proposed federal excise on wagering.[46] The excise on wagering was

[34] One state, North Carolina, enacted such a statute shortly afterward. N. C. LAWS c. 1089, §§ 21, 23 (1951).

[35] On deductibility of legal expenses, see generally: McDonald, *Deduction of Attorneys' Fees For Federal Income Tax Purposes,* 1030 U. OF P. L. REV. 168 (1954).

[36] Commissioner v. Heininger, 320 U. S. 467, 64 S. Ct. 249, 88 L. Ed. 171 (1943), *affirming* Heininger v. Commissioner, 133 F. 2d 567 (7th Cir. 1943).

[37] *E.g.,* Burroughs Bldg. Material Co. v. Commissioner, 47 F. 2d 178 (2d Cir. 1931); Boyle, Flagg & Seaman, Inc., 25 T. C. 43 (1955); Automatic Cigarette Sales Corp. v. Commissioner, 234 F. 2d 825 (4th Cir. 1956), *cert. denied,* 352 U. S. 951, 77 S. Ct. 326, 1 L. Ed. 242.

[38] See generally: Note, *Deductibility Of Illegal Expenses Under Section 162 Of The Internal Revenue Code: A Justification For Vagueness,* 66 YALE L. J. 603 (1957).

[39] Tank Truck Rentals, Inc. v. Commissioner, *supra,* note 1; Hoover Motor Express Co. v. United States, *supra,* note 1.

[40] Commissioner v. Sullivan, *supra,* note 1.

[41] Lilly v. Commissioner, *supra,* note 31.

[42] Textile Mills Securities Corp. v. Commissioner, *supra* note 28 at 339, 62 S. Ct. at 275, 86 L. Ed. at 251; Easton Tractor & Equipment Co., Inc., 35 B. T. A. 189 (1936).

[43] *E.g.,* Waring Products Corp. v. Commissioner, 27 T. C. 921 (1957), where the Tax Court said, at 929: "We know of no requirement that there must be an underlying legal obligation."

[44] *E.g.,* Commissioner v. Sullivan, *supra,* note 1. See generally: *Public Policy and Tax Deductions,* 51 COLUM. L. REV. 752 (1951); Keesling, *Illegal Transactions And The Income Tax,* 5 U. So. CAL. L. REV. 26 (1958).

[45] 133 F. 2d 567 (7th Cir. 1943), *aff'd,* Commissioner v. Heininger, note 36, *supra.*

[46] S. REP. No. 141, 82d Cong., 1st Ses. 31 (1951).

passed, and the Kefauver amendment defeated[47] after some Senators had pointed out that the Supreme Court had rejected, as unconstitutional, tax measures which appeared to impose penalties for violations of state laws.[48] Nevertheless, while the 1954 tax recodification was being drafted, the American Law Institute unsuccessfully recommended a ban on deduction of all unlawful expenses.[49] Meanwhile the Attorney General had announced an administrative program to the same purpose.[50] Any such program seems doomed by the Supreme Court's decision in the *Sullivan* case,[51] the first of the three recent unanimous decisions.

Apparently the Treasury sought certification of *Commissioner* v. *Sullivan*[52] to test several cases with similar facts.[53] The taxpayers, Chicago bookmakers, had deducted rent of their gambling halls and wages of their men. Illinois statutes made such expenditures not mere incidents of unlawful business, but crimes *per se*.[54] The Supreme Court unanimously allowed the deductions.

Mr. Justice Douglas, delivering the opinion, reasoned that, since Internal Revenue Regulations[55] make federal excises on wagers deductible for professional gamblers,[56] their rent and wages are equally ordinary and necessary in a recognized line of unlawful business.[57] The opinion cited the rule of *Commissioner* v. *Heininger* that

[47] 97 CONG. REC. 12230-12244 (1951).

[48] Child Labor Tax Case, 259 U. S. 20, 42 S. Ct. 449, 66 L. Ed. 817 (1920); Hill v. Wallace, 259 U. S. 44, 42 S. Ct. 453, 66 L. Ed. 822 (1922); United States v. Constantine, 296 U. S. 287, 56 S. Ct. 223, 80 L. Ed. 233 (1935); United States v. Kahriger, 345 U. S. 22, 73 S. Ct. 510, 97 L. Ed. 754 (1952) *rehearing denied,* 345 U. S. 931, 73 S. Ct. 778, 97 L. Ed. 1360. But see dissenting opinion by Mr. Justice Cardozo in United States v. Constantine, *ibid.,* advancing the view ". . . that an illegal or furtive business, irrespective of the wrongdoing of its proprietor, is a breeder of crimes and a refuge for criminals; and that, in any sound system of taxation, men engaged in such a calling will be made to contribute more heavily to the necessities of the Treasury than men engaged in a calling that is beneficent and lawful. Thus viewed, the statute was not adopted to supplement or sanction the police powers of the states or of their political subdivisions. It was adopted . . . as an appropriate instrument of the fiscal policy of the nation . . . . Classification by Congress according to the nature of the calling affected by a tax does not cease to be permissable because the line of division between callings to be favored and those to be reproved corresponds with a division between innocence and criminality in the statutes of a state . . . . By classifying in such a mode, Congress is not punishing for a crime against another government. It is not punishing at all. It is laying an excise upon a business conducted in a particular way with notice to the taxpayer that, if he embarks upon that business, he will be subject to a special burden. What he pays if he chooses to go on is a tax and not a penalty."

[49] A. L. I. FED. INCOME TAX STAT. § X165 (i) (1), (Feb., 1954 draft) (Philadelphia, American Law Institute, 1954).

[50] Attorney General Herbert Brownell, *Address To American Bar Association Annual Meeting, Aug. 27, 1953,* 78 A. B. A. REP. 334, 337-38 (1953).

[51] Commissioner v. Sullivan, *supra,* note 1.

[52] *Ibid.*

[53] Sam Mesi, 25 T. C. 513 (1955), *rev'd,* Mesi v. Commissioner, 242 F. 2d 558 (7th Cir. 1957); James and Anna Ross, Neil and Grace Sullivan, P-H 1956 T. C. Mem. Dec. ¶ 56005, *rev'd,* Sullivan v. Commissioner, 242 F. 2d 558 (7th Cir. 1957); Commissioner v. Doyle, 231 F. 2d 635 (7th Cir. 1956); Albert D. McGrath, 27 T. C. 13 (1956).

[54] ILL. ANN. STAT. §§ 326, 582 (Smith-Hurd 1934).

[55] 51 INT. REV. CUM. BUL. 1954-1.

[56] INT. REV. CODE OF 1954, §§ 3285 (d), 3290; 26 U. S. C. § 3285 (1952).

[57] On federal taxation of proceeds of unlawful acts other than unlawful business, *cf.,* Commissioner v. Wilcox, 327 U.S. 404, 66 S. Ct. 546, 90 L. Ed. 752 (1945); Rutkin v. United States, 343 U. S. 130, 72 S. Ct. 571, 96 L. Ed. 833 (1951).

the fact that an expenditure bears a remote relation to an illegal act does not make it non-deductible.[58] The opinion omitted to mention that the deductions allowed in the *Heininger* case were legal fees which defendant had a right to incur and a duty to discharge; whereas, in this case, defendant's payments constituted criminal acts. A plausible error in the advance sheet headnote, where the excise tax on wagers becomes a "tax on wages," typifies the prevailing confusion.[59]

The other two recent, unanimous Supreme Court decisions disallow deductions for fines imposed on trucking companies by state courts for infractions of maximum weight limits.[60] In 1942 the Commissioner of Internal Revenue issued a special ruling that such fines were deductible. In 1950 the ruling was rescinded on the ground that the fines had been considered tolls; on reconsideration they were found to be penalties.

In the *Hoover* case,[61] the trucking company called its violations of Kentucky and Tennessee statutes[62] inadvertent, and cited Emergency Price Control Act[63] cases[64] where federal courts distinguished between innocent and willful or negligent offenders. That distinction rested on the wording of the act, its legislative history, and the practice of fining innocent offenders only their overcharges, while willful or negligent offenders drew punitive fines.[65]

Mr. Justice Clark's opinion disallowing the deductions pointed out that the maximum load statutes made no distinction between innocent and willful or negligent infractions—hence allowance of deductions for inadvertence would frustrate a sharply defined state policy.[66]

In the *Tank Truck* case[67] the trucker advanced a converse argument[68]—that his violations of Pennsylvania maximum load statutes were willful and necessary because compliance would have been ruinous.[69] Conceding this, Mr. Justice Clark nevertheless stated, for a unanimous Court, that no finding of necessity was possible where deductibility would frustrate state policy sharply defined in a statute framed to protect the public.[70]

When three unanimous Supreme Court decisions on controversial and related issues are handed down concurrently some clarification might be expected. It will not be found here. Juxtaposition of these decisions in the reports only dramatizes the absence of coherent solution. In the *Hoover* and *Tank Truck* decisions, fines were ruled non-deductible because the statutes which had been violated were taken as expressions of

[58] Note 36, *supra.*

[59] SUMMARY, 2 L. Ed. 2d 559 (No. 9, 1958).

[60] Tank Truck Rentals, Inc. v. Commissioner, *supra,* note 1; Hoover Motor Express Co. v. United States, *supra,* note 1.

[61] Hoover Motor Express Co. v. United States, *supra,* note 1.

[62] KY. REV. STAT. 1953 § 189.222; TENN. CODE 1955 sec. 59-1104.

[63] EMERGENCY PRICE CONTROL ACT § 205 (e), 56 STAT. 34 (1942), 50 U. S. C. § 925 (e) (1952).

[64] *E.g.,* National Brass Works v. Commissioner, 182 F. 2d 526 (9th Cir. 1950); Farmers' Creamery Co., 14 T. C. 879 (1950).

[65] Jerry Rossman Corp. v. Commissioner, 175 F. 2d 711 (2d Cir. 1949).

[66] Followed in Keystone Mutual Co. v. Commissioner, 29 T. C. 1263 (1958) where penalty for innocent violation of municipal tax law was ruled non-deductible.

[67] Tank Truck Rentals, Inc. v. Commissioner, *supra,* note 1.

[68] For extracts from arguments of counsel and questions by Justices, see; 26 U. S. L. WEEK 3225 (1958).

[69] PA. P. L. 905, § 903, Stat. An. Tit. 75, § 453 (Purdon 1953, 1957). Pennsylvania later liberalized its maxim load statute. PA. ACT No. 70, June 30, 1955.

[70] So construed in Commonwealth v. Burall, 146 Pa. Super. 525, 22 A. 2d 619 (1941).

public policy. In the *Sullivan* decision, *public policy* was ignored, and expenditures in direct violation of state criminal statutes were held deductible. Are fines the controlling distinction? Or are illegal expenses deductible for unlawful business alone? If the truckers had paid prohibited wages, and the bookmakers had been fined for breaking highway regulations, would the decisions have been reversed? Such questions must multiply with successive cases until Congress and the Supreme Court construct some consistent relation between state law enforcement and federal taxation. S.L.W.