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LAMBERT V. CALIFORNIA
A DERELICT ON THE WATERS OF THE LAW?

A Los Angeles municipal ordinance makes it an offense for a person who has been convicted of a crime punishable in California as a felony to remain in the city for more than five days without registering with the Chief of Police.¹ Defendant in *Lambert v. California*² had previously been convicted of forgery—a felony in California. It was asserted at the trial that the defendant had no knowledge of the registration statute, and there was no evidence as to the probability of such knowledge. The defendant was found guilty, fined two hundred fifty dollars, placed on probation for three years.

The United States Supreme Court reversed the decision, five to four, finding that the ordinance was a violation of due process under the Fourteenth Amendment, in not requiring knowledge or probability of knowledge where the conduct of the defendant is "wholly passive—mere failure to register."³ The majority opinion delivered by Mr. Justice Douglas admits that ignorance of the law is no excuse⁴ and recognizes the wide latitude given to lawmakers to declare an offense and exclude elements of diligence and knowledge from its definition,⁵ but finds a violation of due process where the person is wholly passive and unaware of any wrongdoing. Mr. Justice Frankfurter, dissenting, criticized the majority's distinction between doing and not doing as a criteria.⁶ Frankfurter further stated that he was "confident that the present decision will turn out to be an isolated deviation from a strong current of precedents—a derelict on the waters of the law."⁷

Is the holding of the majority a derelict on the waters of the law? At first glance, it would appear so. The fact that the Court quoted from Holmes, *The Common Law*,⁸ coupled with the fact that there was no precedent cited would tend to indicate that the holding was an anomaly.

Of all the powers of local government the police power is "one of the least limitable. . . ."⁹ Due process places some limit on this exercise, however. In civil law there are innumerable situations in which notice is required and a penalty or forfeiture imposed for mere failure to act. Illustrating this point are several recent cases requiring notice before property interests can be disturbed.¹⁰

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1. Los Angeles Municipal Code § 52.39.
 2. 355 U.S. 225 (1957).
 3. *Id.* at 228.
 4. *Supra* note 2 at 228; *Shevlin Carpenter Co. v. Minnesota*, 218 U.S. 57 (1910).
 5. *Supra* note 2 at 228; *Chicago B. & Q. R. Co. v. United States*, 220 U.S. 559, 578 (1911).
 6. *Supra* note 2 at 230.
 7. *Supra* note 2 at 231.
 8. *Supra* note 2 at 229; "A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear." Holmes, *The Common Law* 50 (1946).
 9. *Supra* note 2 at 228; *Distric of Columbia v. Brook*, 214 U.S. 138 at 149 (1909).
 10. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1949); *Covey v. Town of Somers*, 351 U.S. 141 (1956); *Walker v. Hutchison City*, 352 U.S. 112 (1956).

Prior to the *Lambert* decision an awareness of some wrongdoing was an element only of crimes which by their very nature were wrongful and were crimes at common law—offenses *mala in se*. Crimes although innocent in themselves but prescribed by statute—offenses *mala prohibita*—were generally subject to strict enforcement regardless of any awareness of wrongdoing in the defendant. The constitutionality of a statute imposing strict liability was generally determined by the *mala in se—mala prohibita* test in the federal courts.¹¹ Several *mala prohibita* convictions were sustained by the United States Supreme Court over the due process objections even though the defendant was not aware of any wrongdoing.¹²

Although the Supreme Court upheld the conviction in *Balint v. United States*¹³ on the *mala prohibita* rule, it scrutinized the legislative intent of the statute prescribing the crime. The Court reasoned that, "Congress weighed the possible injustice . . . against the evil . . . and concluded that the latter was the result preferable to be avoided."¹⁴ Mr. Justice Frankfurter applied a similar test in upholding the conviction in *United States v. Dotterweich*¹⁵ wherein he stated that:

Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in a responsible relation to public danger.¹⁶

Was the *Lambert* decision a derelict from Frankfurter's reasoning in the *Dotterweich* case? Was Mrs. Lambert standing in a responsible relation to public danger? In effect, the California registration statute is merely "a law enforcement technique designed for the convenience of law enforcement agencies through which a list of names and addresses of felons then residing in a given community is compiled."¹⁷ Thus, could the legislature weigh the possibility of injustice against the evil that the statute was intended to prevent and conclude that the possible evil in failing to register outweighed the injustice of a conviction for such failure? In the *Lambert* case where the court found that the statute was a mere "enforcement technique,"¹⁸ was not the evil weighed against the injustice? Was this method of testing the validity of a statute a derelict from the decision in *Balint v. United States*?¹⁹

Douglas did not disregard previous decisions which upheld strict liability in *mala prohibita* offenses but distinguished the fact situations in the previous cases from those in the *Lambert* case. In the *Lambert* case

11. *Morrisette v. United States*, 342 U.S. 246 (1952).

12. *United States v. Dotterweich*, 320 U.S. 277 (1943); *United States v. Balint*, 258 U.S. 250 (1922); *United States v. Behrman*, 258 U.S. 280 (1922).

13. 258 U.S. 250 (1922).

14. *Id.* at 281.

15. 320 U.S. 277 (1943).

16. *Id.* at 281.

17. *Supra* note 2 at 229.

18. *Supra* note 2 at 229.

19. *Supra* note 13.

the violation was unaccompanied by any activity whatever and mere presence in the city was the test of liability. Coupled with defendant's mere nonfeasance was the lack of any circumstances which might move one to inquire into the necessity of acting.²⁰ Although there was no precedent to support the Court's decision, the majority opinion was not a deviation from a strong current of precedent, but it was a deviation from a strong current of fact situations previously considered by the Court.

The majority in the *Lambert* case found that the legislature had exercised its police power in an unreasonable and arbitrary manner and thus had deprived the defendant of due process of law. The distinctive feature of the *Lambert* case is the fact that it struck down the mala prohibita barrier previously protecting statutes excluding knowledge or probability of knowledge as an element of the crime. Whether or not the *Lambert* decision represents a departure from prior holdings will be determined by clarification of the decision in subsequent cases. In *United States v. Juzwiak*²¹ the United States Circuit Court of Appeals, Second Circuit, refused to extend the *Lambert* rule. In that case the defendant was a seaman who had previously been convicted of a narcotics violation. He subsequently left the United States without registering as required by a federal registration statute.²² Refusing defendant's evidence of lack of knowledge of the statute, the Court distinguished the case from the *Lambert* case on three grounds. 1) In the *Juzwiak* case there was an affirmative act, feissance—leaving the country. Whereas in the *Lambert* case there was a mere nonfeasance—failure to register. 2) The purpose of the federal narcotics registration statute was to control the amount of illegal narcotics crossing the border. Whereas the purpose of the Los Angeles ordinance was to conveniently aid the police department. 3) Leaving the country in the *Juzwiak* case was an uncommon event likely to put the defendant on notice; whereas, living in a city was a common event not likely to put the defendant on notice.

The Court of Appeals for the Ninth Circuit similarly refused to extend the *Lambert* doctrine in *Reyes v. United States*²³ and *Burks v. United States*.²⁴ The *Reyes*²⁵ case, involving violation of a narcotics registration law, was distinguished from the *Lambert* case on the basis of feissance compared to nonfeasance and the difference in the legislative intent of the two statutes. The *Burks* case, involving a conviction for conducting a wagering pool and willfully failing to register with the Internal Revenue District Office, was distinguished from the *Lambert* case on the basis of the type of crime. The Court said the *Lambert* rule "does not apply to crimes created by statute which involve public welfare."²⁶

20. Supra note 2 at 229.

21. 258 F.2d 844 (2d Cir. 1958).

22. 19 C.F.R. § 23.9a (Supp. 1958).

23. 258 F.2d 774 (9th Cir. 1958).

24. 287 F.2d 117 (9th Cir. 1961).

25. Supra note 23.

26. Supra note 24 at 125.

Both the *Juzwiak*²⁷ case and the *Reyes*²⁸ case give lip service to the mala in se-mala prohibita test which was abolished by the *Lambert*²⁹ case. This does not necessarily indicate, however, that the United States Circuit Court of Appeals for the Second and Ninth Circuits felt that the *Lambert* decision was a derelict on the waters of the law, as these courts clearly distinguished the fact situations and based their decisions on these distinctions.

Mr. Justice Frankfurter contends, in his dissent in *Lambert v. California*, that the distinction "between feissance and nonfeissance . . . is inadmissible as a line between constitutionality and unconstitutionality."³⁰ Frankfurter is apparently suggesting that the majority decision stands for the rule that all crimes of omission are unconstitutional unless the defendant has actual or probable knowledge of the offense. The majority decision does not stand for the proposition that all crimes of omission are unconstitutional. The rule applies only to cases in which the defendant is completely ignorant of the regulation, there is not sufficient means of notification, the regulation attempts to induce an act rather than to induce forbearance, the regulation is outside the normal type of welfare offenses, and the regulation gives no chance for the defendant to comply upon first notice. The decision was apparently based on the moral implications of imposing criminal guilt on a blameless person. "[T]he *Lambert* case disclosed so sharp a division in the Court that extension of its policy to new areas may well be thought unlikely."³¹ Although extension of the rule is unlikely, the majority decision leaves the door open for the courts to exonerate a defendant when conviction would be contrary to our notions of morals and justice. The majority decision in *Lambert v. California* is not "a derelict on the waters of the law"; it is a moral undercurrent affecting only a limited number of cases which comes within a narrow stream of fact situations.

Criminal registration statutes such as the one in the *Lambert* case have been enacted in over fifty major cities in over thirty different states.³² The stated objective of the criminal registration laws is to aid the police in preventing criminal activities and apprehending perpetrators thereof. Compulsory registration laws would appear to fall within the police powers of the states. The Supreme Court has upheld statutes imposing registration and identification requirements upon persons who were thought to present a particular danger to the community. The privileges and immunities, due process and equal protection clauses of the Fourteenth Amendment, however, limit the states' police power in that the protection of society by state action must not unduly infringe upon individual liber-

27. Supra note 21 at 847.

28. Supra note 23 at 782.

29. Supra note 2 at 229.

30. Supra note 2 at 231.

31. Supra note 21 at 848.

32. For a comprehensive view of registration statutes, see Note, 103 U. of Pa. L. Rev. 60 (1954).

ties. Consequently, it is difficult to make a general statement as to the constitutionality or unconstitutionality of criminal registration statutes.

Substantive due process requires that there be a relationship between the objective sought to be attained and the means employed to achieve that end. The relationship between the means and the end will depend upon whether registration and identification of convicted persons enables the community to protect itself from a genuine evil or danger. The most difficult and most significant factor in determining the social desirability and constitutionality of these laws is whether convicted persons present a sufficient danger to the community to warrant imposition of the registration requirements. In the registration statute upheld by the Supreme Court, the registration liability was imposed on individuals who were presently engaged in activity that could be considered dangerous. Since registration statutes cannot be labeled constitutional or unconstitutional per se, the validity of the statute can only be determined by applying it to each individual defendant.

The *Lambert* case "unmistakably points the right way in the right direction and will ultimately lead to a complete moral recovery of our penal law. . . . [T]he really important and encouraging matter is that the Supreme Court has told us that it detests the immoral use or misuse of the criminal sanction of a morally blameless defendant. . . . absolute criminal liability is beginning to end in America."³³

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33. 42 Minn. L. Rev. 1043 at 1104 (1958).