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The 'Inherently Wrongful' Doctrine in Federal Law

Can a person be convicted of a federal crime for committing an act if he did not believe he was engaged in any wrongdoing? As deeply counterintuitive as it may seem, the answer, with increasing frequency, is "yes." If the government can demonstrate that certain prohibited conduct is "inherently wrongful," the government need not prove at trial that the defendant committed the act with any consciousness of the act's wrongfulness or illegality. While this is a relatively familiar concept when applied to classic malum in se offenses, such as murder, there has been a gradual expansion of the notion to apply to more ambiguous conduct. In a recent case, United States v. Autumn Jackson, the Second Circuit had occasion to apply the inherently wrongful principle to the extortion efforts of a woman claiming to be Bill Cosby's daughter, and the case illustrates the difficulty our criminal justice system confronts in trying to implement the principle. As I suggest, the idea of inherent wrongfulness is rooted in an old and confused debate in criminal law, may be impossible to apply, and will lead to uncertainty about our definition of a criminal.

Forty-eight years ago, in Morissette v. United States, Justice Jackson described the purpose of criminal law as follows:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of laws as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. [FN1]

The Court found the source of this principle in "Biblical, Greek, Roman, Continental and Anglo-American law." [FN2] The case is often cited to support the conclusion that federal criminal statutes should be construed to require proof of conscious wrongdoing, that is, acting with knowledge that one is either breaking the law or behaving immorally. Many scholars believe that consciousness of wrongdoing is a basic requirement in criminal law, [FN3] and the Supreme Court has affirmed that that requirement is the "background assumption" of criminal law. [FN4] The cases requiring proof that the defendant knew he was breaking a specific law, such as tax code, food stamp and securities regulations, are the clearest illustrations of what I will refer to as the wrongfulness requirement. [FN5]

There is, however, another common law maxim that has competed over time with the wrongfulness requirement, and that is the doctrine that ignorance of the law is no defense. This doctrine has supported enforcement of criminal statutes on virtually a strict liability basis: the government need only prove the defendant knew what he was doing, not that he understood he was breaking the law or doing anything wrong. The so-called public welfare cases and prosecutions of environmental law violations are the clearest examples. [FN6] Sounding more in tort law than criminal, the ignorance of law doctrine applies presumptions about the defendant's state of mind, for "the common law presumed that every person knew the law." [FN7]

Two scholars, Professors Sharon Davies and John Wiley, have recently written informative law review articles on the current state of the law on mens rea issues. The tension between the wrongfulness and the ignorance of law doctrines is best demonstrated by the sharply contrasting perspectives of these two works, with Davies forcefully arguing that the Supreme Court has improperly strayed from the ignorance of law doctrine by imposing a wrongfulness requirement, [FN8] and Wiley just as forcefully arguing that the Court should continue the trend toward abandoning the ignorance of law doctrine in favor of the wrongfulness requirement. [FN9]

While there is nothing unusual about scholars disagreeing over any point of law, what is most interesting here is that, on this issue bearing on fundamental justice, the Supreme Court has not offered any controlling guidance that supports one scholar over the other. Of course, since the Court attempts to interpret the mens rea requirement set forth in the statute at issue, debate would be ended if Congress accurately and consistently indicated what actus reus, accompanied by what mens rea, it wished to criminalize. However, Congress has been inconsistent in its statutory language. For example, the "word 'wilfully' is sometimes said to be a 'word of many meanings' whose construction is often dependent on the context in which it appears." [FN10] Similarly, the "definition of 'knowingly' varies according to the particular statute." [FN11] Thus, judicial opinions about the mens rea intended by Congress are legion, with even single cases spawning sharply divergent views among the Supreme Court justices who see congressional intent very differently.

Inherently Wrongful

One of the many issues implicated in this bewildering mens rea debate is the notion of inherently wrongful conduct. Closely tied to the ignorance of law doctrine, certain statutes are deemed to punish conduct that is "malum in se," bad in and of itself. Murder and assault are obvious common law examples of inherently wrongful conduct, and, in federal law, kidnaping, terrorism, or fraud are some examples. Once an offense is deemed to be inherently or intrinsically wrongful, the government need only prove the defendant acted "knowingly," that is, not by accident or mistake. In another context, Justice Stevens explained in Bryan v. United States that it is not necessary to prove " 'an evil-meaning mind' directed the 'evil-doing hand' " because of the "background presumption that every citizen knows the law." [FN12] Generally speaking, we can safely assume that everyone knows killing another or lying to another to gain some personal benefit is inherently wrong.

We run into trouble, however, when the presumption is applied to conduct that is merely questionable and not classically malum in se. Indeed, in referring to the "background presumption" in Bryan v. United States, the Court was discussing a firearms statute that criminalizes possession of a firearm (even if licensed) if the defendant also happens to be an illegal immigrant. [FN13] "Wrong" is of course, a notoriously ambiguous concept, about which philosophers have struggled for millennia, without resolution. Yet, rather than requiring proof that the defendant knowingly chose to commit a crime (or a bad act that happens to be a crime), the inherently wrongful principle requires lawyers and judges to agree on whether the act was so wrong that no proof of subjective intent is necessary.

The difficulty of reaching such agreement was highlighted in Ratzlaf v. United States. [FN14] 31 U.S.C. Section 5324 criminalized the "wilful" structuring of cash transactions designed to cause a bank not to file a report for transactions involving over $10,000 in U.S. currency. Ratzlaf understood that the bank had an obligation to file a report for any cash transaction involving more than $10,000; thus, he broke down the deposits to keep each deposit under that amount. The issue was whether the defendant had to know he was breaking the law in doing so. [FN15]

The government argued that those who engage in structuring cash transactions, "by their very conduct exhibit a purpose to do wrong," [FN16] and thus no proof of intent to violate any law should be read into the statute. Virtually all the circuit courts, including the Second Circuit, had held that, indeed, no such proof of conscious wrongfulness was necessary. The Supreme Court, however, disagreed with the government's characterization of the conduct and found nothing "inherently 'bad' " or "inevitably nefarious" about structuring. [FN17] The Court concluded that, by requiring "wilful" violations of the structuring law, Congress must have intended the government to prove that the defendant knew it was unlawful to structure. Dissenting Justice Blackmun agreed with the government and sharply disagreed with the majority's

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moral judgment: "The anti-structuring provision targets those who knowingly act to deprive the Government of information to which it is entitled.... That is not so plainly innocent a purpose as to justify reading into the statute the additional element of knowledge of illegality." [FN18]

Congress apparently agreed with the government and Justice Blackmun, for it swiftly rejected the Supreme Court's interpretation of congressional intent and amended the structuring statute to modify the language that was construed as requiring heightened mens rea. [FN19] Congress apparently believes that the conduct is inherently wrong such that no further proof of intent is necessary to convict.

'U.S. v. Jackson'

These debates take on an oddly abstract quality, where, rather than focusing on the intent of the person who committed the act, we are forced to engage in moral or social philosophy about what conduct is so wrongful the law will presume the guilty intent. The enormous complexity of this problem was illustrated recently in the Second Circuit's two decisions in United States v. Autumn Jackson, et. al. construing an extortion statute. [FN20] The inherent wrongfulness principle is by no means new in the context of Hobbs Act extortion cases and has often been applied in those cases. But the difficulty the courts have repeatedly had with the principle in this context should tell us something.

The defendant Autumn Jackson, claiming to be Bill Cosby's daughter, demanded $40 million from Cosby and threatened to publish her paternity claim to the media if he did not pay. Jackson was charged with extortion, in violation of 18 U.S.C. Section 875(d). At trial, the defendant requested a jury instruction including a wrongfulness element that would have provided, inter alia, that the jury must conclude the defendant "knew he or she had no lawful claim or right to the money." [FN21] The defendant contended that she was in fact Cosby's daughter and, in support of her claim to $40 million, proffered the testimony of an expert on what Jackson's paternity claim rights may have been (which testimony was excluded). [FN22] She argued that one cannot be convicted of extortion unless the jury concludes she knew she was doing something wrong, i.e., demanding money to which she was not entitled.

The district court disagreed with the defendant, agreed with the government, and denied the proposed jury instruction, holding that "threatening someone's reputation for money or a thing of value is inherently wrongful." [FN23] This view of the law was squarely supported by Second Circuit precedent. [FN24]

Nevertheless, the Second Circuit reversed, concluding that, in order for Jackson's threat to be inherently wrongful, the jury must find the defendant did not have actual or reasonable belief of entitlement to the $40 million. [FN25] "Issues of whether a defendant has a plausible claim of right and whether there is a nexus between the threat and the defendant's claim are questions of fact for the factfinder, and we conclude that the jury was not properly instructed." [FN26] While the Court opined that the defendant probably did not really believe she was entitled to $40 million, it reversed the conviction because the jury was not given a chance to deliberate on the issue.

In November of 1999, however, the Second Circuit reversed itself in the wake of the Supreme Court's decision in Neder v. United States, which essentially held that harmless error analysis applies to a trial court's improper instruction on an element of the offense. [FN27] The Second Circuit concluded the district court's jury instruction was harmless error given the weight of the evidence showing Jackson was not entitled to the $40 million. [FN28]In so ruling, the Second Circuit rejected Jackson's proffer of arguments supporting her demand for $40 million. Reviewing New York State family law, the Court noted the "utter implausibility that a court would order a child support payment in a sum even remotely approaching the [$40 million]." [FN29]

Significantly missing from the Court's analysis is what a 21-year old woman who is wholly unschooled in the law might have reasonably believed her rights to paternity were when her alleged father is a very famous, wealthy entertainer, when the media bombards us with stories of multi-millionaire celebrities and huge divorce settlements. It was apparently clear to the Second Circuit that "the jury would have found these defendants guilty if the court had properly instructed that the threat must be wrongful." [FN30] But too much of that conclusion rests on the fact that Jackson demanded $40 million first. Perhaps the jury would have found it significant that, in fact, she was negotiated down to $24 million. [FN31] Had Cosby's representative further worn her down to $10 million, might the jury have deemed her demand less implausible? And how are we to view the fact that in most legal negotiations, one bids high, at even implausible figures, expecting that a lower offer will follow? Is Jackson a criminal because she began her negotiation at $40 million, an implausibly high number, or is she a criminal because (as the district court found) she was threatening to ruin someone's reputation?

In short, when it comes to the notion of "wrongful," we wade into murky waters in attempting to apply objective reasonableness tests. Just as the Ratzlaf majority and the dissenters could not agree on whether structuring was wrong in and of itself, the Jackson appellate court did not agree with the district court and prior Second Circuit law as to what exactly it is about extortion that makes it wrong. Our criminal justice system does not usually rely on "The Answer" to such moral issues, and I suggest, it should not. It is traditionally the jury of one's peers that are trusted to judge the "guiltiness" of the defendant, and the job should be left to them.

Wrongfulness Element

Leaving the issue of wrongfulness to jurors is not simply a decision to avoid a notoriously difficult conceptual problem, it is a decision to focus on the guilt of the defendant before the court. The inherently wrongful principle vainly aspires to be an objective concept, and is not tied to the intent of the defendant, which is surely the issue we must address before concluding whether he is a criminal. In my experience, federal prosecutors will typically only target those defendants who the government believes consciously violated the law or otherwise engaged in knowingly wrongful conduct. Thus, the requirement of proof of that consciousness, uniformly applied, would rarely be an impediment to a sound prosecution. The proof usually consists of little more than a false exculpatory statement, an effort to conceal, or some secretive act, which tends to suggest the defendant was conscious of the wrongful nature of the act. Presented with such proof, jurors have little trouble satisfying themselves that the defendant knew he was doing wrong. Indeed, in both Ratzlaf and Jackson, there was evidence from which the jury could have concluded the defendants knew they were engaged in unlawful conduct, as the factual recitation of proof in those cases reveals. [FN32] The criminal justice system stands to lose little by requiring proof of the essential ingredient that prosecutors look for anyway when deciding whether to prosecute.

On the other hand, if the law continues to expand the reach of the inherently wrongful doctrine, we become increasingly confused about what proof is necessary to justify the deprivation of liberty. As firmly as prosecutors may believe in the "guiltiness" of a particular defendant, they can be seriously mistaken. We risk not only unfairness to an individual, but also growing public uncertainty about what a criminal is. Thus, where the morality of conduct is debatable, we should gladly leave to the jury the fundamental question whether a defendant acted with a consciousness of wrongdoing.

FN(1) Morissette v. United States, 342 U.S. 246, 250 (1952).

FN(2) Id. at n. 4 (citing Radin, Intent, Criminal, 8 Encyc. Soc. Sci. 126).

FN(3) See Kenneth Mann, "Punitive Sanctions: The Middleground Between Criminal and Civil Law," 101 Yale L.J. 1795 (1992) ("In paradigmatic criminal law, commission of a wrongful act must be accompanied by a mental element of wrongdoing.").

FN(4) Liparota v. United States, 471 U.S. 419, 426 (1985).

FN(5) Id. at 425 (to satisfy "knowing possession" requirement in food stamp statute, government must prove defendant knew his conduct violated law); Cheek v. United States, 498 U.S. 192, 201 (1991) (to satisfy "willfulness" requirement in tax law, government must prove defendant intentionally violated known legal duty); United States v. Chiarella, 588 F.2d 1358, 1370 (2d Cir. 1978) (to satisfy wilfulness requirement in securities law, government must prove defendant understood he was acting wrongfully).

FN(6) United States v. International Minerals & Chem. Corp., 402 U.S. 558, 563-4 (1971); United States v. Hopkins, 53 F.3d 533, 537 (2d Cir. 1995).

FN(7) Cheek v. United States, 498 U.S. at 199 (citing, inter alia, O. Holmes, The Common Law 47-48 (1881)); see also International Minerals, 402 U.S. at 565 (person dealing with dangerous materials "must be presumed to be aware of the regulations").

FN(8) Sharon L. Davies, "The Jurisprudence of Willfulness: an Evolving Theory of Excusable Ignorance," 48 Duke L.J. 341 (1998).

FN(9) John Shepard Wiley, Jr., "Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation," 85 Virginia Law Review 1021 (1999).

FN(10) Bryan v. United States, 524 U.S. 184, 191 (1998) (collecting cases).

FN(11) Sands, Siffert, Loughlin & Reiss, Modern Federal Jury Instructions, para 3A.01, p. 3A-3 (1999).

FN(12) Bryan v. United States, 524 U.S. at 193 (quoting Morissette v. United States, 342 U.S. at 251).

FN(13) 524 U.S. at 193.

FN(14) 510 U.S. 135 (1994).

FN(15) Id. at 137.

FN(16) Id. at 143.

FN(17) Id. at 144-45, 146.

FN(18) Id. at 155.

FN(19) 31 U.S.C. Section 5324(c) (as amended, Sept. 23, 1994).

FN(20) 180 F.3d 55 (2d Cir. 1999) (reversing conviction, and 196 F.3d 383 (2d Cir. 1999) (upon granting rehearing, affirming conviction).

FN(21) 180 F.3d at 65-66.

FN(22) 196 F.3d at 387.

FN(23) 180 F.3d at 65.

FN(24) United States v. Pignatelli, 125 F.2d 643, 646 (2d Cir.), cert. denied, 316 U.S. 680 (1942).

FN(25) 180 F.3d at 71.

FN(26) Id.

FN(27) 119 S.Ct. 1827 (1999).

FN(28) 196 F.3d at 388-9.

FN(29) Id. at 388.

FN(30) Id. at 389.

FN(31) 180 F.3d at 63.

FN(32) RATZLAF, 510 U.S. AT 150, 162 (DEFENDANT ENGAGED IN SYSTEMATIC STRUCTURING CONDUCT AT DIFFERENT BANKS AT DIFFE, 180 F.3D AT 61, 63 (DEFENDANT WARNED BY TWO SEPARATE INDIVIDUALS THAT HER CONDUCT WAS ILLEGAL).