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Analysis of the Term Willful in Federal Criminal Statutes

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AN ANALYSIS OF THE TERM "WILLFUL" IN FEDERAL CRIMINAL STATUTES

I. Introduction

The term "willful" in federal criminal statutes has defied any consistent interpretation by the courts, while legislatures have similarly neglected to clearly define its meaning. The term's prevalence in federal criminal statutes and regulations has raised significant problems for prosecutors and defense attorneys who must prove the presence or absence of "willful" conduct, as well as for potential defendants who have no clear barometer on whether their conduct is prohibited.[1] The ramifications of determining the meaning of willful vary with the character of the statute considered; but clearly, the failure to find willfulness, where it is required, is grounds for dismissal.[2] Under some statutes, a willful violation may be a criminal offense while a nonwillful violation may incur only a civil penalty.[3] Moreover, in some cases, the presence of "willful" intent may raise the offense from a misdemeanor to a felony.[4]

The judicial response to the varying uses of willful in federal statutes has been chaotic. Different definitions apply to different offenses, and there is little consensus as to what constitutes a finding of willfulness. Instructions to the jury regarding proof of a "willful" violation vary greatly, some standing in stark contradiction to one another.[5] The interpretations already applied to the term indicate that some approaches are more appropriate than others in terms of their fairness and logical consistency.

No effort will be made here to definitively analyze all that has been said with regard to the interpretation of "willful" in federal criminal statutes;[6] most attempts at an encompassing definition have been confusing at best.[7] Still it is possible to accomplish at least two objectives. The first aim is to categorize the varying interpretations that "willful" has received, in order to delineate some points of reference for concerned practitioners. Having reported on those developments, it is instructive to analyze and critique the reasoning behind the varying categories.

"Willful" has received four fairly broad but interrelated interpretations. The first and strictest of these interpretations indicates that an act is "willful" if done with a "bad purpose" or "evil motive." The bad purpose to deliberately

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1 *See, e.g.*, Inland Freight Lines v. United States, 191 F.2d 313 (10th Cir. 1951).

2 Marteney v. United States, 218 F.2d 292, 294-95 (9th Cir. 1958).

3 *See, e.g.*, Revenue Act of 1936, ch. 690, §§ 145 (a) and (b), 49 Stat. 1648, 1703.

4 *See* United States v. Pipefitters Local Union No. 562, 434 F.2d 1116, 1127 (8th Cir. 1970), *cf.* Spies v. United States, 317 U.S. 492 (1943).

5 *E.g.*, United States v. Martilla, 434 F.2d 834, 836 (8th Cir. 1969).

6 *See* 45 WORDS AND PHRASES *Willful; Willfully* 274-372 (1970), in which approximately 100 pages are devoted to the citation of cases dealing with "willful" and "willfully."

7 As Justice Frankfurter said in referring to the state of the law covering another issue: "The history of this problem is spread over hundreds of volumes of our reports. To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future." Freeman v. Hewitt, 329 U.S. 249, 252 (1946).

violate the law is sufficient to satisfy the requirement.[8] The second, less strict, interpretation considers conduct to be "willful" if it is done with an intent to commit the act and with a knowledge that the act is in violation of the law. It does not demand, however, that the defendant subjectively possess the sinister motivation or bad purpose that is characteristically present in the first category.[9] The third interpretation requires only that the act be committed voluntarily and intentionally as opposed to one that is committed through inadvertence, accident, or ordinary negligence. As long as there is an intent to commit the act, there can be a finding of willfulness even though the actor was consciously attempting to comply with the law and was acting with the good faith belief that the action was lawful. In effect, it requires an objective intent to commit the act but not necessarily a knowledge that the act will bring about the illegal result.[10] Finally, some courts have found an act to be "willful" even though it only involves some form of inadvertence, oversight, or negligence.[11] Under this last interpretation, a judge can find an act to be "willful" even though it was not committed intentionally. It is the broadest of the interpretations, and it is applied most often in judging acts of a corporation which has allegedly violated a regulatory statute.

The broader interpretations seem to be an outgrowth of the traditional treatment of "willful" under the civil law of torts. This is especially true of the tendency to allow less than intentional conduct to satisfy the requirement of "willful." Yet there are some problems with that development. Prosser categorizes "willful" as synonymous with "wanton and reckless" conduct. Under this conceptualization a willful act is somewhere between negligent and intentional conduct.[12] That conceptualization of the meaning of "willful" is distinctly different from the interpretation it has historically received in the criminal law.[13] The guideline instructions for the criminal law in *Federal Jury Practice and Instruc-*

8 It is akin to the requirement of specific intent. Morrisette v. United States, 342 U.S. 246 (1952).

9 United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969).

10 United States v. Williams, 421 F.2d 600 (10th Cir. 1970); *cf.* Ellis v. United States, 206 U.S. 246 (1906) (Holmes, J.).

11 Steere Tank Lines, Inc. v. United States, 330 F.2d 719 (5th Cir. 1964).

12 *See* W. Prosser, The Law of Torts § 34 (4th ed. 1971). For example, a driver might inadvertently take his eyes off the road to look at the passing scenery and as a result strike and kill a pedestrian crossing the street in front of his automobile. Under traditional tort law concepts, his conduct would be considered negligent. However, if the driver was drunk and driving far in excess of the speed limit on an icy evening, in addition to inadvertently letting his attention drift from the road, his conduct under such circumstances according to Prosser could aptly be described as willful, wanton, and reckless. Finally, compare the case in which the driver, with his mind about him, knowingly and deliberately hits the crossing pedestrian; this of course would be an intentional tort. So it is possible, then, to see how "willful" can indicate conduct that is more blameworthy than negligence but less so than intentional conduct. However one can easily see how, although the driver might have been drunk and exceeding the speed limit, it is entirely likely that he had no intent to strike the pedestrian. It is even more improbable that he voluntarily and with specific intent or with a bad purpose intended to strike the pedestrian. Nevertheless, under the civil conceptualization, it was permissible to find him "willful" because of the application of a different and less demanding standard. Yet, if one were to substitute the criminal concept of willful one could not find the reckless driver's conduct to be intentionally committed with the bad purpose to strike and kill the pedestrain. Therefore one could not come to the conclusion that such conduct was committed "willfully."

13 *Compare* Potter v. United States, 155 U.S. 438 (1894), *and* Evans v. United States, 153 U.S. 584. (1893), *with* Monday v. United States, 421 F.2d 1210 (7th Cir. 1970).

tion treat "willful" in the following manner: "An act is done 'willfully' if it is done voluntarily and intentionally . . . with the bad purpose to disobey or disregard the law."[14] This approach suggests that specific intent with bad purpose or evil motive is essential to a finding of willfulness.

This distinction between the meaning of willful under the criminal and the civil law has become blurred in the last few decades, and has resulted in judges expanding the interpretation of "willful" in the criminal law to the point indicated above, i.e., encompassing almost every possible form of conduct without any consistent interpretation emerging. These broader interpretations involve a cutting back on the more strict standard, described in *Federal Jury Practice and Instruction,*[15] that was traditionally applied in criminal prosecutions. The adoption of these less demanding standards has been of more recent origin, and the frequency with which a court will define "willful" in these broader terms today depends to a large extent on the offense charged. The more regulatory or administrative the statute appears the more likely a court will resort to a less strict standard. This is in contrast to the tendency to impose a stricter requirement when a statute proscribes a more traditional common law offense.

It is important to analyze these developments in the interpretation of "willful" through both historical and conceptual frameworks to determine the extent of the conflict and confusion that rages over the term's meaning. Clearly, "willful" in the early stages of interpretation was defined strictly. For a variety of reasons some interpretations have departed from this strict standard; the objective here is to discern whether these departures are proper in terms of their reasoning and their results. The expansion of the meaning of "willful" has evolved by a snowballing process that has gradually rendered the term useless as a tool for describing or prohibiting any particular conduct. The reasoning of the cases in this process is often faulty and the judicial branch is rendering a large number of federal criminal statutes onerous in their potential scope by failing to give the language of the statutes any consistent interpretation. Hopefully, this examination will contribute to an understanding of the dimensions of the problem and a recognition that the word is overused in statutory construction and too little understood or consistently treated by the judiciary.

II. Early Interpretations Requiring "Willful" to Include a Bad Purpose

A. *The Strict Interpretation Is Established*

Early interpretations of "willful" in federal criminal statutes indicated that it means an act committed not only voluntarily but also with a bad purpose. "It is frequently understood," says Bishop, "as signifying an evil intent without justifiable excuse."[16] The tendency in the early stages of interpretation was to require a deliberate intention to evade or disregard the provisions of the law as

14 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 16.13 (2d ed. 1970).
15 *Id.*
16 1 J. BISHOP, CRIMINAL LAW § 428 (1923).

a prerequisite to the imposition of punishment.

The Supreme Court first addressed the issue in *Felton v. United States*,[17] a regulatory case. Defendant was charged under an Act of 1868 imposing taxes on distilled spirits.[18] Section 16 provided that certain regulations were to be followed in the distilling process, and § 96 provided that if any distiller should "knowingly and willfully omit, neglect, or refuse to comport with the guidelines,"[19] he would suffer a penalty of $1,000 and forfeit to the United States government any remaining interests that he had in spirits. The defendants in *Felton* had inadvertently failed to furnish a wine cistern of the prescribed capacity. They requested a good faith instruction and it was denied. The jury returned a guilty verdict together with a finding that there was only a technical violation of the law and that there was clearly no intention to defraud the government or evade the provisions of the law. The Supreme Court reversed on appeal. In discussing the question of whether the voluntary conduct of the defendants was willful, the Supreme Court said that the technical violation of the statute was not sufficient since there was an absence of the bad purpose which would render the neglect "willful" and therefore actionable. "Doing or omitting to do a thing knowingly and willfully implies not only a knowledge of the thing but a determination with bad intent to do it or omit doing it."[20] The *Felton* case established the widely followed principle that the gravamen of any offense which requires a showing of willfulness is the bad purpose with which the act is committed.[21]

St. Louis & S.F.R.R. Co. v. United States[22] expanded this concept: mere failure, even if the failure was intentional, to perform the duty prescribed by a regulatory statute would not be sufficient to satisfy the requirement of willfulness. Judge Van Devanter considered an action against the defendants to recover a penalty for alleged failure to comply with an Act of 1906 which prohibited the confinement of cattle in a railroad car without unloading for rest, water, or food beyond the statutory limit of 28 hours.[23] The judge emphasized the distinction between a simple failure to perform the duties created by the statute and a "willful" failure to perform those duties. Judge Van Devanter considered it improper to ignore the qualifying word "willful" because it described an essential element of the offense; that element required that the attitude of a carrier having a free will reflect an obstinate disregard or plain indifference to the requirements of the law. A voluntary and intentional act without this added purposefulness would not be sufficient to meet the test of willfulness.[24]

17 Felton v. United States, 96 U.S. 699 (1878).
18 The Act of July 20, 1868, ch. 186, 15 Stat. 125.
19 96 U.S. at 699.
20 *Id.* at 702.
21 *See, e.g.*, note 13 *supra*.
22 169 F. 69 (8th Cir. 1909).
23 Act of June 29, 1906, ch. 3594, 34 Stat. 607.
24 169 F. at 71-73.

B. *The* Murdock *Dicta: Seeds of Expansion*

In 1933, the Supreme Court in *Murdock v. United States*[25] continued to apply a strict standard of interpretation to the term willful, but in the process the Court indulged itself in some wide-ranging dicta that went beyond the scope of the immediate case. This dicta[26] considered willful in very loose terms, implying that it was a word of many acceptable meanings and interpretations. That implication was seized upon by later courts to introduce broader interpretations of the type of conduct that could constitute "willfulness" under the criminal law. *Murdock* was one of the original sources of the erosion of the distinction that long existed between "willful" as a civil law tort term, and "willful" as a specific element of intent in the criminal law.

In *Murdock,* the defendant was charged with willfully refusing to testify and supply information concerning deductions in his income tax returns under 26 U.S.C. §§ 1265 and 2146(b); and §§ 256 and 1114(b) of the Revenue Act of 1926.[27] The issue was whether or not the defendant's intentional refusal to answer was necessarily a "willful" refusal. The lower court found that the defendant's reticence was clearly a voluntary and an intentional refusal substantiating his guilt beyond a reasonable doubt. The Supreme Court reversed the conviction, refusing to agree that willful meant no more than voluntary and intentional. The Court held that the defendant was entitled to have the jury consider the question of an absence of evil motive in his refusal to answer questions. "The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent which the statute makes an essential element of the offense."[28]

Murdock, then, was entirely consistent with the prior decisions in that it had upheld the strict interpretation of "willful." But in the course of its opinion, the Court stated: "The word often denotes an act which is intentional, knowing, or voluntary as distinguished from accidental. But when used in a criminal statute it generally means an act done with bad purpose."[29] Some courts have interpreted this language as suggesting that "willful" is equivalent to intentional, voluntary, or knowing. These cases refused to recognize that *Murdock* in defining willful was attempting to establish that any act which was willful must at least have been committed intentionally and never only accidentally or inadvertently. The Court also clearly indicated that simply because an act was committed intentionally does not dictate that it was committed willfully; an analysis confirmed by the Court's specific approval of the *Felton* case. It indicated that a definition of "willful" had to include something beyond intent, *i.e.,* a bad purpose or evil motive aspect.[30] Moreover, this approach was adhered to in the

25 290 U.S. 389 (1933).
26 *Id.* at 394.
27 Revenue Act of 1926, ch. 23, 44 Stat. 723 (amended by INT. REV. CODE OF 1954 §§ 7201-7212).
28 290 U.S. 389, 397-98 (1933).
29 *Id.* at 394.
30 *Id.* at 395-96.

early stage of interpretation even when analyzing an administrative or regulatory statute.[31] *Murdock*, however, added another dimension to these early decisions even though in agreement with them both in reasoning and result. *Murdock* became the source of a broader and less rigorous interpretation of "willful."[32]

III. *Illinois Central:* A Civil Case Uses *Murdock* to Expand the Definition of Willful

A. *The Case*

In 1938, the Supreme Court decided *United States v. Illinois Cent. R. R. Co.*[33] Plaintiff brought an action to recover a civil penalty from a railroad company for its knowing and willful failure to unload cattle which were confined during transit in railroad cars for 37 hours,[34] thus exceeding the statutory limitation of 28 hours. The railroad, however, had obtained an eight-hour extension and therefore was only one hour over the limit. When the company had learned that the car would arrive in the stockyards very near the deadline, it arranged for an extra engine and crew to handle the shipment immediately upon arrival.[35] The yardmaster, however, negligently failed to notify the other employees of the arrival of the cattle, causing the cattle to remain unlawfully confined beyond the time allowed. The district court found for the railroad, indicating that although the regulations were not complied with in every respect, the defendant had not "willfully" failed to comply with the requirements of the act. The court of appeals affirmed, but the Supreme Court reversed on appeal.

Illinois Central, while a civil action, had a significant impact on the interpretation of willful in federal criminal statutes. It was the first case to depart from the traditionally strict interpretation applied in earlier Supreme Court decisions. The decision went further than any other case toward establishing willful as a word of many meanings depending upon its context. It became a ready source of precedent for an ever expanding and increasingly ambiguous definition of willful. It has been suggested that these expansive definitions make the use of the word meaningless and can easily lead to vague and overbroad statutes.[36] The case, however, is questionable in several respects, and it is at least arguable that the court misinterpreted the existing precedent in order to sustain its broad interpretation of willful.

B. *Criticism*

1. Improper Reliance on *Murdock*'s Dicta

Illinois Central relied on *Murdock* for its assertion that "willful" means "an intentional, knowing, or voluntary as opposed to an accidental, inadvertent,

31 *See* text accompanying notes 20-21 *supra*.
32 *See, e.g.*, Haner v. United States, 315 F.2d 792 (5th Cir. 1963).
33 303 U.S. 239 (1939).
34 *Id.* at 240.
35 *Id.* at 241.
36 *See* Grayned v. City of Rockford, 408 U.S. 104 (1972).

or negligent act."[37] However, the *Illinois Central* court failed to consider the context of that quote. The *Murdock* court was merely listing various ways in which "willful" has been defined in different areas of the law attempting to determine the proper meaning of willful in federal criminal statutes. *Murdock* made no conclusion as to the propriety of the various definitions, and it failed to distinguish between those definitions. Nor did *Murdock* indicate the extent to which it was referring to "willful" as it is used under the civil law of tort as an alternative description of wanton or reckless conduct. *Murdock* suggested that a "willful" act had to be at least intentional, knowing, and voluntary. However, the Court did not say that if an act is committed intentionally, voluntarily, or knowingly that it must also have been committed willfully. The statement merely indicates that an act which only rises to the level of inadvertent, accidental, or negligent conduct is without question not a willful act. In fact, the Court went on to hold that willful when used in criminal statutes generally means an act "prompted by bad faith."[38] A willful act, then, according to *Murdock*, must not only be an intentional, knowing, and voluntary act, it must also be an act done with some evil motive or bad purpose aspect.

Notwithstanding this, Justice Butler in *Illinois Central* ignored the context of the statement and seized upon those dicta to hold that willful meant intentional, knowing, and voluntary. *Illinois Central* further suggested that the language in *Murdock* made the definition of willful unclear, ignoring the ultimate determination of *Murdock*.

2. Improper Application of the Dicta

Even if the dicta in *Murdock* receive Justice Butler's interpretation, it is still not support for the result reached in *Illinois Central;* on the contrary, it dictates an opposite finding. As argued above, the *Murdock* Court, through those dicta,[39] established that an act could not satisfy the requirement of willfulness if it had been only negligently as opposed to intentionally committed. Even if it is assumed that the excerpt from *Murdock* equates an intentional act with a willful act, it clearly opposed allowing a negligent act to satisfy the requirement of willful.[40] The act which was found to be willful in *Illinois Central* was actually a negligent act, i.e., the negligent failure of the yardmaster, an Illinois Central employee, to notify the crew to unload the cattle before the statutory time limit expired.

3. Reliance on *St. Louis*

Justice Butler also relied on *St. Louis & S.F.R.R. Co.* to support his decision. In describing the conduct necessary for a finding of willfulness, Justice Butler quoted the following language from *St. Louis*: "[it is . . .] the attitude of a car-

37 303 U.S. at 242-43.
38 290 U.S. at 398.
39 *See* note 26 *supra.*
40 *See* note 37 *supra.*

rier who having a free will or choice either intentionally disregards the statute or is plainly indifferent to its requirements. . . ."[41] The quote was a correct representation of the definition applied in *St. Louis,* however, when this standard was applied to the facts of the *Illinois Central* case, an opposite result should have been reached.

The facts in the *St. Louis* case are remarkably similar to those of *Illinois Central.* Both defendants were *prosecuted* under the same statute for a civil penalty.[42] Both defendants had confined cattle that they were transporting in railroad cars beyond the statutory limit. Both defendants had failed to meet the deadline by a few hours because of unforeseen time delays. In *Illinois Central,* the cattle were confined only one hour beyond the limit. Although the time of confinement was not indicated in *St. Louis,* it is unlikely that it was shorter than one hour. In *St. Louis,* though, the Court had refused to find that the defendant had a choice to avoid committing the proscribed act and therefore although it had failed to unload the cattle within the period it had not done so willfully.[43] The *St. Louis* court said that the defendant manifested a disposition to respect the statute as nearly as it could rather than to disregard or be indifferent to it.[44]

The defendants in both cases had taken positive action in attempting to insure compliance with the statute. The Court in *St. Louis* stipulated that such attempts were made,[45] and in the *Illinois Central* case the defendant after learning of the unexpected delays dispatched an extra crew to insure unloading in time. Again, but for the unforeseen negligence in the yardmaster, compliance would have been insured. It is clear that *Illinois Central* did not evidence conscious disregard or indifference to the requirements of the statute, as the standard enunciated in the *St. Louis* case demands. And it is certainly clear that the *St. Louis* Court applying its own standards would not have found willfulness based on the facts of *Illinois Central.*

4. A Questionable Application of Respondeat Superior

An additional inconsistency exists in the application of the doctrine of respondeat superior. It is well settled that the negligence of the employee will be imputed to the employer if the wrong was committed within the scope of the employee's work. It is also clear that a corporation can be guilty of a knowing and willful violation of a regulatory statute through the doctrine of respondeat superior.[46] However, it is one thing to say that the knowledge of the employees and agents of a corporation who commit intentional acts is attributable to the corporation, but it is quite another to argue that the negligence of those employees and agents can constitute willfulness on the part of that corporation. This conclusion is untenable unless one admits that a negligent act by itself can

41 303 U.S. at 243.
42 The actions were brought under 45 U.S.C. §§ 71-74 (1970).
43 169 F. at 73.
44 *Id.*
45 *Id.* at 71-73.
46 There has been a vast amount written on this subject. *See, e.g.,* Seavey, *Speculation as to "Respondeat Superior,"* HARVARD LEGAL ESSAYS 433 (R. Pound ed. 1934); Douglas, *Vicarious Liability and the Administration of Risk,* 38 YALE L.J. 584, 720 (1929).

be a willful act, which would of course be contrary to the very language of the *Illinois Central* case itself. Nevertheless, the Court allowed a negligent act by the yardmaster to support a finding of "willful."

C. *The Significance of* Illinois Central

Illinois Central, then, is a crucial point in the expansion of the interpretation of "willful." After *Illinois Central,* it is possible to find "willfulness" on the basis of an intentional and even negligent act—a considerable departure from prior case law and traditional interpretation.

IV. Extending the Broader Interpretation into the Criminal Area

In the years since the *Illinois Central* decision, a division has developed in the federal courts over the interpretation of "willful" in federal criminal statutes. The split has been between an extension of the broader interpretation and an adherence to the stricter position taken in the earlier common law cases. Each of the lower federal court cases allowing a broader interpretation has relied on many false premises and misinterpretations of prior case law. Initially, it is important to note that although *Illinois Central* is a civil case, it has been relied on and followed in many criminal cases. While the decision is itself deficient, its persuasiveness as precedent in the criminal area is even more tenuous.

A. *The Process of Extension*

Although the reasoning in the cases that have applied the broader interpretation is at least questionable, they have caused a snowballing effect. Later decisions built upon the misinterpretations of prior cases without thoroughly examining their reasoning.[47] Today, courts often avoid making an extensive examination of the meaning of "willful." Instead, they summarily cite a case that supports their position and then terminate discussion. This superficial treatment has made it possible for the improper reasoning of the *Illinois Central* case and its progeny in the criminal area to gain a foothold without a clear examination of their basis.

B. *Spies* Dicta Aid the Expansion

Five years after *Illinois Central,* the Supreme Court again considered the term "willful" in a federal criminal statute in *Spies v. United States.*[48] The defendant had been convicted of attempting to defeat and evade income tax in violation of § 145(b) of the Revenue Act of 1936—a felony, and for failure to make a return or pay tax under § 145(a)—a misdemeanor.[49] Both offenses

47 *See, e.g.,* United States v. Maciel, 469 F.2d 718 (9th Cir. 1972); United States v. Couming, 445 F.2d 555 (1st Cir. 1971); and United States v. Williams, 421 F.2d 600 (10th Cir. 1970).

48 317 U.S. 492 (1943).

49 Revenue Act of 1936, 49 Stat. 1648, 1703 (1936) (now INT. REV. CODE OF 1954 §§ 7201-7207).

required that the conduct be "willful," and the petitioner claimed that the requirement of "willfulness" had not been met by the government. The government, in turn, contended that the knowing and intentional default in the payment of tax was, of itself, sufficient proof of "willfulness." The Supreme Court rejected the government's position arguing that "willful" "included some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer."[50] *Spies* clearly adhered to the stricter interpretation of "willful" that was developed in the early cases of *St. Louis, Felton, Evans,* and *Murdock.* It once again established that "willful" when used in federal criminal statutes demanded conduct that was not only intentional, voluntary, and knowing, but also conduct that was done with some evil motive or bad purpose to violate the law or be indifferent to it. However, many lower court cases[51] have relied on the dicta of *Spies* as support for an expansion of the traditional interpretation; a development similar to the misplaced reliance on *Murdock* dicta. The *Spies* Court stated that ". . . willful is a word of many meanings depending upon its context."[52] This is very similar to the statement in *Murdock* discussed above in that it recognizes that "willful" has become a term of extreme flexibility. Notwithstanding this use of the term in other areas, the *Spies* case unequivocally indicated that when it is used in federal criminal statutes the presence of the word indicates the requirement of "evil motive."[53]

C. *The First Example of the Expansion:* Zimberg v. United States

Several courts of appeals decisions have occurred since the *Spies* decision that have dealt with the word "willful" in a variety of federal criminal statutes. Most of these decisions have combined the dicta in *Murdock* and *Spies* with the holding of *Illinois Central* to apply a broader interpretation of "willful."[54] Infrequently, other courts have refused to do so.[55]

The first of the decisions to follow this pattern of extending the broader interpretation of "willful" into the criminal area was *Zimberg v. United States.*[56] The defendants were convicted of willful violation of price control legislation.[57] On appeal they contended that "willful" meant malevolently rather than merely knowingly and deliberately as the court below had held. The Ninth Circuit rejected this contention holding that although "willful" does have the meaning suggested by the defendants in some cases it did not have such a mean-

50 317 U.S. at 498.

51 *See, e.g.,* United States v. Ming, 466 F.2d 1000 (7th Cir. 1972), *cert. denied,* 409 U.S. 915 (1972); United States v. Matosky, 421 F.2d 410 (7th Cir. 1970), *cert. denied,* 398 U.S. 904 (1970); United States v. Fahey, 411 F.2d 1213 (9th Cir. 1969), *cert. denied,* 396 U.S. 957 (1969); United States v. Schipani, 362 F.2d 825 (2d Cir. 1966), *cert. denied,* 385 U.S. 934 (1966); and Martin v. United States, 317 F.2d 753 (9th Cir. 1963). *See also* Janko v. United States, 281 F.2d 156 (8th Cir. 1960).

52 317 U.S. at 497.

53 *Id.* at 498.

54 *See, e.g.,* United States v. Peltz, 433 F.2d 48 (2d Cir. 1970); and United States v. Cirillo, 251 F.2d 638 (3d Cir. 1957). *See* note 50 *supra. See also* note 63 *infra.*

55 *E.g.,* United States v. Patillo, 431 F.2d 293 (4th Cir. 1970); and Bloch v. United States, 221 F.2d 786 (9th Cir. 1955).

56 142 F.2d 132 (1st Cir. 1944).

57 Emergency Price Control Act of 1942 ch. 26, 56 Stat. 28.

ing in the present case.[58] *Zimberg* cited *Spies* for the proposition that "willful" is a word of many meanings "depending upon the context in which it is used."[59] The court then relied on the holding in *Illinois Central* quoting directly from that case: ". . . in statutes denouncing offenses involving moral turpitude 'willful' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong the word is often used without any such implication."[60] The *Zimberg* court insisted that this statute was generally administrative and therefore fell into the category of statutes "denouncing acts not in themselves wrong."[61]

The reasoning of the *Zimberg* case is suspect for two reasons. First, it adopted all the false premises of *Illinois Central.* Second, it ignored the fact that *Illinois Central* was an action to recover a civil penalty while *Zimberg* involved a criminal sanction. *Illinois Central* in relying on *Murdock* had quoted the clause in *Murdock* which indicated that "willful" when used in criminal statutes generally means with a bad purpose—the very principle established as early as 1878.[62] However, *Illinois Central* did not dispute or discuss the meaning of "willful" under criminal statutes; it simply avoided the issue presumably on the grounds that it was a civil action. It would seem, however, that the *Zimberg* court in dealing with a criminal statute would have felt compelled to discuss the language of *Murdock* and other cases which had established the stricter interpretation. *Zimberg* effectively disregarded the body of law represented by *Felton, St. Louis,* and *Murdock* in a manner that was tantamount to directly overruling them. *Zimberg* was making new law contrary to existing law without valid precedent to support this departure, and without successfully distinguishing the prior case law.

D. *The Progeny of* Zimberg

Other circuits quickly followed *Zimberg* in extending the doctrine of *Illinois Central* into the criminal area,[63] and the broader interpretation of "willful" became increasingly accepted. Each of these cases defined "willful" broadly, refusing to include the bad purpose concept. The first case decided cited only *Zimberg* for support.[64] Each case thereafter cited all the circuits that had to date followed *Zimberg.* The snowballing process extended into the district courts.[65] The net effect is that a large body of law has been ignored without having been confronted, distinguished, or even recognized. As a practical reality

58 142 F.2d at 137.
59 *Id.*
60 *Id.* at 137-38.
61 *Id.* at 138.
62 *See* note 17 *supra.*
63 *E.g.,* United States v. Fidanian, 465 F.2d 755 (5th Cir. 1972); Steere Tank Lines, Inc. v. United States, 330 F.2d 719 (5th Cir. 1964); Riss & Company v. United States, 262 F.2d 245 (8th Cir. 1958); Inland Freight Lines v. United States, 191 F.2d 313 (10th Cir. 1951); Nabob Oil Co. v. United States, 190 F.2d 478 (10th Cir. 1951); Kempe v. United States, 151 F.2d 680 (8th Cir. 1945).
64 151 F.2d at 688.
65 *E.g.,* United States v. Jannuzzio, 184 F. Supp. 460 (D. Del. 1960); United States v. E. Brooke Matlack, 149 F. Supp. 814 (D. Md. 1957).

the courts have been maintaining a position without examining its premises or effectively dealing with competing arguments.

V. The Propriety of Maintaining a Strict Interpretation

A. *Implementing Legislative Purpose*

In general, cases adopting a broader interpretation have based their decisions on the policy considerations advanced by the *Illinois Central* case, applying those considerations to the criminal area. These courts argue that a stricter interpretation would render the statute nugatory thereby frustrating legislative intent. Many of these courts admit that "willful" does have a bad purpose aspect to its meaning when it is used in statutes that condemn acts involving moral turpitude.[66] They maintain, however, that it possesses no similar meaning when used in statutes denouncing or prohibiting acts that are not in themselves wrong, i.e., statutes that are essentially administrative or regulatory in nature.[67] These courts generally note that when a safety act is involved, such a strict definition would frustrate the purpose of the statute making it "virtually impossible" to establish violations.[68] The language used to describe this distinction may vary slightly among courts, but it essentially represents the same theory. Some courts have spoken in terms of distinguishing common law offenses from new statutory requirements,[69] others have based the difference on malum in se versus malum prohibitum criteria.[70]

These courts also maintain that the implementation of the "humanitarian provisions of the statute"[71] is a justification for departing from the traditional definition.[72] They argue that the purpose of the statute would be frustrated, and its overall effectiveness hampered, if in every case the government had to prove "willfulness" as it was understood in the early decisions. They contend Congress did not intend that such a strict interpretation be given "willful"; a contention, however, that both assumes an understanding of legislative intent where none is expressed, and actually implements an intent that runs contrary to the plain meaning of the statutory language. In effect these courts are ignoring "willful" as surplusage.

Morisette v. United States,[73] however, represents the opposing principle that when Congress adopts legal terminology such as willful in a statute, it does so for a purpose, and thereby adopts the related body of law and interpretation given the term. In the absence of contrary expression, it must be assumed that the legislature is satisfied with the traditional position of the courts concerning

66 *E.g.*, 142 F.2d at 132.
67 190 F.2d at 480. *See also* United States v. Dye Construction Co., 510 F.2d 78 (10th Cir. 1975).
68 United States v. Consolidated Coal Co., 504 F.2d 1330, 1335 (6th Cir. 1974).
69 For a good discussion of this distinction *see* Morrisette v. United States, 342 U.S. 246, 250, 252, 264 (1952); Bloch v. United States, 221 F.2d 786 (9th Cir. 1955).
70 262 F.2d at 249.
71 303 U.S. at 242.
72 *Id.* at 244.
73 342 U.S. 246 (1952).

particular language and intends such a judicial approach to be continued.[74] Applying this policy to the interpretation of "willful" in federal criminal statutes dictates that "willful" be interpreted to require intentional conduct plus a bad purpose.

B. *Criticism of the* Murdock *Dicta*

Courts[75] rejecting this trend toward a broader interpretation have emphasized flaws in cases seeking to allow several forms of conduct to satisfy the requirement of "willfulness." *Forster v. United States,*[76] for example, in reversing a conviction, rejected a multidefinitional interpretation of "willful" in favor of establishing a requirement of bad purpose. The court dealt with the broader interpretation cases and their reading and application of *Murdock* as follows: "Apparently on the theory that the Supreme Court said it and . . . that is it . . . the instruction has been repeated time and again . . . but if one examines the disputed language,[77] Mr. Justice Roberts was compiling a list of various definitions and no more."[78] *Forster* further indicated that the compendium of definitions in *Murdock* was "harmless"[79] and then suggested that the list was not very helpful in clarifying the meaning of "willful." It then questioned the line of cases that cited the language of *Murdock* to support a flexible interpretation of "willful" in federal criminal statutes when *Murdock* itself had clearly required a bad purpose concept.

C. *Inconsistency and Unpredictability of the Broad Interpretation*

The lack of consensus concerning the interpretation of "willful" also presents significant problems of inconsistency and unpredictability which are traditional hallmarks of our legal system.[80] Today a federal court has wide discretion in defining "willful." There is precedent to support both a strict and broad interpretation. This exceptional flexibility destroys the law's ability to fulfill its responsibility to give adequate notice of what constitutes offensive conduct.[81] The situation as it stands now allows a judge to choose from available definitions of "willful" one that is consistent with his preconceived notions about the guilt or innocence of the defendants. He is then in a position to justify that definition by arguing that "willful is a word of many meanings depending upon its context."[82]

Typically, it is not appropriate to place a power to decide or define criminal conduct in the hands of the judiciary. This ability to define "willful" as broadly as the court sees fit runs contrary to the long-standing common law principle

74 *Id.* at 250.
75 *E.g.*, United States v. Vitiello, 363 F.2d 240 (3d Cir. 1966).
76 237 F.2d 617 (9th Cir. 1956).
77 *See* note 26 *supra* and accompanying text.
78 237 F.2d at 621.
79 *Id.*
80 *See generally* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).
81 *Id.* at 142-66.
82 317 U.S. at 497.

that penal statutes are to be strictly[83] interpreted; a theory holding that the power to define crime and assess punishment is vested in the legislature and not in the judiciary.[84] The argument is that if Congress wishes to define new forms of conduct as criminal it should do so expressly, and it is not within the province of the judiciary to punish this conduct without a clear mandate from Congress. This policy of interpretation, as Chief Justice Marshall said, ". . . is perhaps not much older than construction itself. It is founded on the tenderness of the law for the rights of individuals."[85] Yet the courts here, by giving "willful" such an expansive and open-ended reading, are actually legislating *ad hoc* offenses.

Similarly, the criminal law has always sought to exonerate those who did not possess a vicious will at the time that they committed the act.[86] *Actus Non Facit Reum, Nisi Mens Sit Reum,* or as in Blackstone's translation: "An unwarrantable act without a vicious will is no crime at all."[87] By requiring a vicious will together with the specific use of the word "willful" in light of its plain meaning[88] and its traditional interpretation, Congress intended to assess a penalty only if there was some additional blameworthiness in addition to negligent or intentional conduct. It is certainly within the power of Congress to establish liability for offenses without requiring "willful" conduct. It is an unfortunate distortion to allow the term "willful" to become so malleable that it conveys no real meaning. Such obscurity surrounding a word's meaning and therefore the content of a criminal law is not a commendable feature of any criminal justice system.[89] When Congress required a violation to be willful it seems to require more than a finding that a certain act was committed intentionally, or deliberately, or knowingly, or negligently, or accidentally, or inadvertently. It is unreasonable to assume that the legislature, although it used the term "willful," actually meant something else.[90]

VI. *United States v. Bishop* Indicates That the Broader Interpretation is Unacceptable

The Supreme Court has never explicitly held that "willful" whenever and wherever it is used in federal criminal statutes must include a bad purpose or evil motive aspect in accord with the traditional interpretation. However, in each individual case that has come before the Supreme Court involving an interpretation of "willful" in federal criminal statutes, the Court has held that in the instant case "willful" does require a bad purpose element.[91] Nevertheless, as has been demonstrated, a substantial number of courts of appeals and district courts have ignored this fact and applied on an individual basis the broader

83 United States v. A & P Trucking Co., 358 U.S. 121 (1958) (Douglas' dissent).
84 *Id.* at 127.
85 United States v. Wiltberger, 18 U.S. (5 Wheat.) 35 (1820).
86 342 U.S. at 252.
87 As quoted in S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESS, at 214 (1969).
88 AMERICAN HERITAGE DICTIONARY 1466 (W. Morris ed. 1969) defines "willful" as "unreasoningly obstinate."
89 *See generally* O. HOLMES, THE COMMON LAW, Ch. 2 (1923).
90 United States v. Palermo, 259 F.2d 872 (3d Cir. 1958).
91 *Potter, Felton, Murdock* and *Spies* are all good examples of this contention.

interpretation, denying the existence of any bad purpose requirement. As indicated, these courts rely on a number of factors to support their departures. One of these factors is that the Supreme Court has proceeded on a case-by-case, statute-by-statute analysis and has never absolutely held that "willful" is to be defined in every case with a bad purpose or evil motive element. This limited approach by the Supreme Court, although consistent with the judicial function to decide only the dispute before it,[92] has allowed lower courts to couple the rationale of *Illinois Central* with the broad dicta of other Supreme Court cases in the criminal area, like *Murdock,* in making the argument for the broader interpretation.

Yet in this case-by-case process the Supreme Court has emphasized the need to maintain a consistency by applying the traditional interpretation until Congress indicates otherwise. The last time that the Supreme Court was confronted with this question was in 1973, in *United States v. Bishop.*[93] Prior to the decision in *Bishop,* the circuits were split over the meaning of "willful" in federal tax statutes that imposed criminal sanctions. One line of cases best exemplified by *Abdul v. United States*[94] held that "willful" had a double meaning under federal tax statutes.[95] *Abdul* indicated that the use of "willful" in felony statutes required a finding of bad purpose in accord with the traditional interpretation; it insisted, however, that where the impending penalty was a misdemeanor, a lesser finding of "willfulness" could satisfy the requirement of the statute.[96] The *Abdul* court cited *Spies* to indicate the flexibility of the term "willful"[97] and then argued that "willful" could be defined in terms of careless disregard of the statute.[98]

United States v. Vitiello[99] represents the line of cases contrary to *Abdul. Vitiello* rejected an instruction that proof of "willfulness" could be satisfied if it was shown that there was "careless disregard of whether one had a right to act."[100] Stating that carelessness was insufficient to satisfy the statute, the court disapproved of *Abdul,* indicating that it had drawn an improper conclusion from a dictum in *Spies.*[101] It rejected the contention that "willful" as used in a misdemeanor tax statute means something less than it does when used in a felony tax statute.[102]

Bishop settled this dispute between the *Abdul* and the *Vitiello* positions by directly disapproving of the double standard of interpretation represented by *Abdul.*[103] The decision pointed out that the *Spies* Court had indulged in a great deal of speculation that did not reflect the reality of the law. *Bishop* emphasized that *Spies* had argued only that Congress could have theoretically included a

92 Marbury v. Madison, 5 U.S. (1 Cranch) 85 (1803).
93 412 U.S. 346 (1973).
94 254 F.2d 292 (9th Cir. 1958).
95 *Id.* at 294.
96 *Id.* at 293.
97 *Id.* at 294.
98 *Id.*
99 363 F.2d 240 (3d Cir. 1966).
100 *Id.* at 241-42.
101 *Id.* at 243.
102 *Id.*
103 412 U.S. at 353-56.

lesser requirement of "willfulness" in misdemeanor violations but that it had not.[104] *Bishop* held that until Congress legislates otherwise, the courts should continue to adhere to the traditional requirement in tax statutes, i.e., that "willful" must include a bad purpose element regardless of whether the offense is a misdemeanor or a felony. The Court also rejected the contention that tax laws were administrative rather than punitive and as such would demand a broader interpretation[105] of "willful" to achieve the desired goal of the statute.

There are three important aspects of the *Bishop* case that warrant attention. First, in settling the dispute over the meaning of "willful" in federal tax statutes the Court held that "willful" has a uniform meaning that is in accord with the traditional interpretation. It rejected outright the idea that careless or negligent conduct could satisfy the requirement of "willful." Second, the Court once again indicated its attitude toward the use of the word in all federal criminal statutes, expressing a strong reluctance to depart from traditional interpretations until Congress acts. The opinion reflected unfavorably on the judicial branch substituting its intent for the intent of the legislature. Finally, the Court refused to accept the invitation to hold that "willful" could mean something different when it is used in a regulatory statute.

Given the positions expressed in *Bishop,* it seems that lower courts would be well advised not to depart from the traditional interpretation. However, it is unlikely that lower federal courts will feel bound by the *Bishop* case in any area beyond the tax statutes. This suspicion has already been confirmed in *United States v. Dye Construction Co.*[106] *Dye* involved a willful violation of the Occupational Safety and Health Act in the construction of a building.[107] Although the case was decided after *Bishop,* it took no cognizance of the language in *Bishop* and took the position that "willful" is a word of many meanings, applying a broad and less strict standard. *Dye's* refusal to recognize *Bishop,* is presumably based on the theory that the holding of *Bishop* was limited to the tax statute in question. *Dye* argued that the object of OSHA[108] was one of regulation and prevention, and therefore Congress could not have intended that "willful" demand too difficult a level of proof. The court did this despite the language of *Bishop* which indicated that courts should not substitute a reading of legislative intent that contradicts traditional judicial interpretation unless Congress has explicitly indicated a change in attitude. *Dye* cited the usual cases in support: *Illinois Central, Murdock,* and *Spies.* It never discussed the possibility of requiring a bad purpose.

VII. Conclusion

It is probably safe to assert that the type of offense charged still tends to dictate how the court will define the term "willful." If the statute deals with a crime involving turpitude then "willful" will generally be defined to mean with

104 *Id.*
105 *Id.*
106 510 F.2d 78 (10th Cir. 1975).
107 The Occupational Safety and Health Act of 1970, *as amended* 29 U.S.C. §§ 651-66(e).
108 OSHA is an acronym for Occupational Safety and Health Act.

a "bad purpose" or "evil motive." A regulatory offense, despite a strong early tradition to the contrary, will probably yield a definition that is no more than an intentional or voluntary standard, and may be broad enough to include negligent conduct.[109]

One of the basic tenets of the law is to treat like conduct in a like manner.[110] Yet the lack of a definition here leads to inconsistent results, unpredictable standards, and a general lack of adequate notice to the defendant as to what types of conduct will be held to be "willful." There ought to be some effort to deal consistently with the body of law surrounding the use of "willful." There is a clear need for a definition which adequately explains "willful" and serves to distinguish it from "intentional," "knowing," "voluntary," "inadvertent," "accidental," or "negligent" conduct.

The Supreme Court cases decided in this area indicate that the interpretation of willful should include the requirement of a bad purpose to violate the statute. The word itself suggests that there ought to be at least a finding of some specific mental attitude that represents a conscious disregard of the statute or blatant indifference to its requirements.[111] The cases which refuse to apply such a standard argue that their departures from the strict interpretations are consistent with congressional intent[112] and are necessary for the effective operation of the statute. The argument is that the application of too strict a standard in regulatory statutes would make it "virtually impossible"[113] to establish violations. If this is true, and there is considerable merit to that contention, then the legislature should either make their intent clearer or reconsider the presence of the word in certain statutes with an eye toward being more selective and consistent in its use. Lacking that, lower federal courts should apply restraint, as exemplified by the Supreme Court, when interpreting the term "willful."

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109 *See* note 68 *supra.*
110 *See generally* K. LLEWELLYN, THE BRAMBLE BUSH (1951).
111 *See* note 17 *supra.*
112 *See* text accompanying notes 66-74.
113 504 F.2d at 1335.