Mens Rea in the Criminal Law: Current Trends

By Marie Gryphon

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Traditionally, a violation of the criminal law must consist both in "an evildoing hand" and an "evil-meaning mind."[1] The latter requirement is known among lawyers by the Latin term, "mens rea" which literally means "guilty mind."[2] Generally, this requirement meant that a defendant would only be found guilty of a crime if he acted with the intent to do harm, or at least with knowledge that harm would naturally follow from his or her voluntary action. Mens rea was considered an important limitation on the reach of the criminal law because, unlike the civil law, the criminal law carried a heavy social stigma and the possibility of imprisonment. It was, therefore, an appropriate tool for punishing only those whose conduct marked them as having "violated the basic social contract."[3]

Until the middle of the 20th century, most state-level criminal offenses were a part of the common law rather than statutory law, and courts required prosecutors to establish that a defendant intended to commit the wrongful act charged as a matter of course. When state criminal codes were codified between the 1940s and 1960s, state legislatures included mens rea terms such as "purposely" or "knowingly" in their criminal statutes. Over the past 40 years, most states substantially reformed their criminal law based on the American Law Institute's Model Penal Code (MPC). Many of those states adopted the MPC's four mens rea categories and its system for strengthening mens rea requirements, including the MPC's instruction to courts to assume that a mens rea requirement was intended to be included in a criminal statute even when it is missing unless lawmakers have expressed a contrary intent.[4] As a result, relatively few state law crimes are strict liability offenses.[5]

Because federal criminal law has always been purely a creature of statute, it drifted much further from the traditional mens rea requirement as Congress increasingly chose to respond to economic and social problems with sweeping legislation to regulate business practices and the economy. Many of these "public welfare statutes" included no mens rea language at all, despite the fact that they did include criminal penalties for lawbreakers. The Federal Food Drug and Cosmetic Act, for example, provides at 21 U.S.C.S. §333(a), in part:

> (1) Any person who violates a provision of section 301 shall be imprisoned for not more than one year or fined not more than $1,000, or both.
>
> (2) Notwithstanding the provisions of paragraph (1) of this section, if any person commits such a violation after a conviction of him under this section has become final, or commits such a violation with the intent to defraud or mislead, such person shall be imprisoned for not more than three years or fined not more than $10,000 or both.[6]

Enhanced penalties are available under 21 U.S.C. §333(a)(2) in cases in which prosecutors prove "intent to defraud or mislead" in connection with a regulatory violation. But no mens rea language appears at all in 21 U.S.C. §333(a)(1), which prescribes up to a year in federal prison for single violations of this lengthy and complex statute.

The Supreme Court has adopted two different tests for determining how to interpret the absence of mens rea language in federal criminal laws. In the case of laws that proscribe *malum in se* conduct—the kind of intrinsically wrongful acts that are traditionally prohibited by the criminal law—the Court generally assumes that Congress meant to include a mens rea element when it codified the offense, even if it neglected to include specific language to that effect.

The Court has taken a strikingly different approach to interpreting the mens rea requirements of statutes that make individually innocuous behaviors criminal offenses in order to enforce a regulatory scheme

Marie Gryphon is a Senior Fellow with the Manhattan Institute's Center for Legal Policy. Her articles have appeared in The Investors Business Daily, Business Week, and National Review Online. She holds a J.D. from the University of Washington School of Law and is a Ph.D. candidate in public policy at Harvard University.

intended for general public benefit, such as the federal Food Drug and Cosmetic Act, the Clean Air Act, the Clean Water Act, and many others. These statutes, labeled "public welfare statutes," criminalize such behavior as discharging waste water without the correct permit[7] or shipping pharmaceuticals with inappropriate labeling.[8] The Court has declined to find implied mens rea elements in these statutes, with the result that many federal crimes are now effectively strict liability offenses.

Mens rea is also threatened by Congress's practice of enacting vaguely-defined offenses in order to make it easier for federal prosecutors to pursue the widest possible range of acts and actors that it deems objectionable. The Supreme Court stated in 1939, "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."[9] Since then, however, the Court has tolerated a proliferation of vague federal criminal statutes. For example, a federal law punishes "any scheme or artifice to deprive another of the intangible right to honest services."[10] No one, including the Supreme Court, knows what this language means, and Justice Antonin Scalia has warned that it is so vague that it could cover "a salaried employee's phoning in sick to go to a ball game."[11] Other federal fraud statutes, such as the traditional mail and wire fraud laws and the securities fraud laws, are troublingly elastic as well.

Finally, Congress has violated traditional mens rea principles by criminalizing the violations of vast swaths of the complex and ever-changing Code of Federal Regulations. Traditionally, so-called mistake-of-law defenses were considered invalid because good citizens were expected to know and understand their legal obligations,[12] but the old aphorism that "ignorance of the law is no excuse" has become a cruel joke for citizens who have been convicted and imprisoned for good-faith misinterpretations of highly-complex regulatory requirements.[13]

While the courts have done little to curb the rising tide of blameless regulatory crime at the federal level, the primary fault lies with Congress, which could honor the traditional mens rea principle by following some simple guidelines: 1) always include explicit mens rea language in criminal statutes, and specify that mens rea requirements should be applied to every element of a criminal offense; 2) avoid drafting vague and ambiguous crimes, even if that means Congress must err on the side of being cautious in its imposition of the criminal sanction and consign some types of enforcement to civil processes; 3) avoid criminalizing violations of regulatory law, or at least include an explicit defense for good-faith misinterpretations of ambiguous regulations.

The traditional mens rea requirement of the criminal law is an essential part of a liberal political system because it limits the legitimate reach of the criminal law, and thus the power of the state over its citizens. Because the criminal law, unlike the civil law, authorizes the state to incarcerate lawbreakers, the Constitution itself imposes numerous procedural safeguards, such as a high burden of proof and the right to testify in one's own defense, that are designed to prevent the incarceration of innocents. Limiting the scope of the criminal law to offenses committed with mens rea serves a parallel function. It prevents the state from incarcerating citizens who have inadvertently run afoul of the "discretionary and disputable judgment of the legislature" in the course of their productive, or at least intrinsically harmless, activities.

Endnotes

1 Morrisette v. United States, 342 U.S. 246, 251 (1952).

2 Oxford Dictionary of Law (Elizabeth A. Martin ed., 2003).

3 *See* Arthur Leavens, *Beyond Blame—Mens Rea and Regulatory Crime*, 46 U. Louisville L. Rev. 1, 12 (2007).

4 Model Penal Code § 2.02(3).

5 Strict liability crimes are those penalties for which the prosecution is not required to prove a defendant's mens rea; the guilty act is sufficient for conviction.

6 21 U.S.C. § 301 *et seq.*

7 33 U.S.C. § 1251 *et seq.*

8 United States v. Dotterweich, 320 U.S. 277 (1943).

9 Lanzatta v. New Jersey, 306 U.S. 451, 453 (1939).

10 18 U.S.C. § 1346.

11 Sorich v. United States, 129 S. Ct. 1308, 1309 (2009) (Scalia,

J., dissenting from denial of certiorari).

12 *See* Leavens, *supra* note 3, at 12.

13 United States v. White, 766 F. Supp. 873 (1991) (managers at a pesticide company convicted under the Resource Conservation and Recovery Act for a violation of federal regulations despite following, apparently in good faith, the advice of an expert consultant concerning the meaning of those regulations).

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