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Congress Doesn't Know Its Own Mind—And That Makes You a Criminal

Paul Rosenzweig

Abstract

All too often, America's legislature writes laws that are silent on the question of intent. Whether by mistake, through laziness, or due to purposeful ambiguity, Congress often writes laws without a "guilty mind" (mens rea) *requirement and leaves it to the courts to decide whether that law has an intent requirement in it, what that requirement is, and the actions to which it applies. As a result, innocent persons are facing unjust conviction for violating federal criminal offenses. Congress should stop creating laws that do not have* mens rea *requirements, but simple solutions can be difficult to implement. America therefore needs a systemic solution: a statute that, by its terms, sets a default rule for* mens rea *requirements.*

Imagine a criminal law that stated simply "do not use drugs." Such a law would be absurdly vague and impossible to enforce. What about, for example, drugs taken by accident (because an individual did not know that his or her bourbon contained Rohypnol); or drugs that were not illegal (like aspirin); or drugs that an individual thought were legal but, contrary to his or her understanding, were in fact illegal (if, hypothetically, you took aspirin in North Dakota but did not know that aspirin had been outlawed by the state); or substances taken by an individual who did not know that he or she was consuming "drugs" (like caffeine in coffee or chocolate), or even that they were considered "drugs" under the law.

Under such a vague law as "do not use drugs," all of the above-noted scenarios would be problematic, both as a matter of law and as a matter of moral authority and justice. The key to fixing such a

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The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

Key Points

- All too often, America's legislature writes laws that are silent on the question of intent. Whether by mistake, through laziness, or due to purposeful ambiguity, Congress often writes laws without a "guilty mind" requirement and leaves it to the courts to decide whether that law has an intent requirement in it, what that requirement is, and the actions to which it applies.
- As a result, innocent persons are facing unjust conviction for violating federal criminal offenses. It is time for a solution.
- The answer to this problem is simple to state: Congress should stop creating laws that do not have *mens rea* requirements.
- But simple solutions, while often easy to state, can be difficult to implement. Therefore, America needs a systemic solution: a statute that, by its terms, sets a default rule for *mens rea* requirements.

broadly stated law lies in the traditional concept of criminal law that goes by the Latin phrase *mens rea*, or the idea of a guilty mind. If an individual knows that he or she is taking a drug and if he or she knows that the drug is illegal, then it is fair to say that the individual in question has committed a crime. If the individual does not know those things, then he or she may be mistaken, negligent, a klutz, or an ignorant boob; that individual is *not*, however, a criminal.

To solve this problem, the hypothetical statute would need to be rewritten to read "do not *knowingly* use illegal drugs." In this instance, the word "knowingly" serves the important purpose of establishing a *mens rea* requirement—that is, a requirement that the government must prove a guilty mind before imposing punishment.[1]

This focus on intent is not a quixotic piece of arcane legalism. Rather, it reflects the reality of everyday life. As Oliver Wendell Holmes Jr. once said, "even a dog distinguishes between being stumbled over and being kicked."[2] Individuals know instinctively that state of mind matters and that intent often makes all the difference between a mistake, a tragic accident, and a heinous crime.

That is why it is troubling and deeply problematic that Congress increasingly has taken to writing laws that do not consider state of mind. Indeed, new laws often lack language about *mens rea* (also sometimes called the element of *scienter*). All too often, America's legislature writes laws that are silent on the question of intent. Whether by mistake, through laziness, or due to purposeful ambiguity, Congress often writes laws along the lines of "do not use drugs" and leaves it to the courts to decide whether the law has an intent requirement in it, what that requirement is, and the actions to which it applies (e.g., does one have to "know" that he or she ingested a substance, or must one also "know" that the substance was illegal?). Unfortunately, the courts often say something like "If Congress had wanted to have an intent requirement, it could have," and so make these statutes into broad criminal provisions that can be violated by mistake.

Even though it is (regrettably) constitutional for Congress to create a criminal statute without intent,[3] it is exceedingly unwise for it to do so. It is even more foolish for Congress to fail to do so through neglect or purposeful ambiguity. If Congress wants to create a criminal statute without a *mens rea* requirement, it should do so only explicitly—and, given the possibility of inadvertence and the need to protect against encroachment on liberty, mere silence on the subject should not be taken as an affirmative intent to create a strict liability offense.

The easy answer to this problem would be for Congress to do a better job every time it writes a new criminal law, but nothing is ever easy with Congress; all too often, the criminal provision is a mere adjunct to a much larger bill and is often an afterthought.

This nation therefore needs another answer—a safety net answer—for when Congress misses the boat. Hence this proposal: Congress should act one time only and pass a law that makes it clear that when it is silent, there is a default *mens rea* rule. In other words, all criminal laws should, by statute, be assumed to have a criminal intent requirement *unless* Congress explicitly says otherwise. Of course, Congress would be free to say otherwise if it wished, but such a background rule would mean that the unintentional expansion of the criminal law would end.

Mens Rea: A Primer

Criminal law is the expression of a heartfelt and well-justified human impulse. As long ago as Thomas Hobbes, humanity recognized that a life unprotected against random violence was one destined to be "nasty, mean, brutish and short."[4] The fear of violence and of unregulated retribution led to a fundamental insight: that human society collectively was better off if governments (of one form or another) had a monopoly on the lawful use of force

1. This is not an entirely hypothetical example. It is derived from a Florida statute criminalizing the possession of narcotics without any proof of intent. *See* Paul Rosenzweig & Daniel J. Dew, *Guilty Until Proven Innocent: Undermining the Criminal Intent Requirement*, Heritage Foundation Backgrounder No. 2782 (March 2013), http://www.heritage.org/research/reports/2013/03/guilty-until-proven-innocent-undermining-the-criminal-intent-requirement.
2. *The Common Law* 3 (1909).
3. The seminal case most frequently cited for that proposition is Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1910) (state may "eliminate the question of intent" without violating the Due Process Clause of the Fourteenth Amendment).
4. Thomas Hobbes, Leviathan Ch. 13, para. 9 (Edward Curley ed., Hackett Pub'g Co. 1994) (1651).

against the citizenry. From this grew criminal law—the authority for a government to lawfully imprison (or, in extreme cases, execute) an individual for antisocial acts.[5]

But this awesome power, this privilege of lawful force, was necessarily constrained by rules. Unconstrained government force quickly becomes tyranny, so modern criminal law, which traces its origins to feudal times, grew up limited by the rule of law—that is, by rules that restricted the types of cases in which criminal sanctions could be imposed.

From its inception, the criminal law expressed both a moral and a practical judgment about the societal consequences of certain activity: For an act to be a crime, the law required that an individual must either cause (or attempt to cause) a wrongful injury and do so with some form of malicious intent. In other words, the definition of a crime requires two things: an *actus reus* (a bad act) and *mens rea* (a guilty mind).[6] At its roots, the criminal law did not punish mere bad thoughts (intentions to act without any evil deed) or acts that achieved unwittingly wrongful ends but without the intent to do so. The former were for resolution by ecclesiastical authorities, and the latter were for amelioration in the civil tort system.

Thus, the concept of *mens rea* (*mens rea* is Latin for "guilty mind"; lawyers use it as a shorthand for the concept of intent) is a fundamental precept of criminal law. Historically, the law has required that before an individual is deemed a criminal, he must have acted with intent to do wrong. Accidents and mistakes are not considered crimes: "It is a fundamental principle of Anglo–Saxon jurisprudence that guilt...is not lightly to be imputed to a citizen who...has no evil intention or consciousness of wrongdoing."[7]

Courts attempting to define the degree of intent (also sometimes called *scienter*) that the government must prove for various criminal statutes have often written of the difficulty involved both in determining what intent requirement the legislature adopted and in defining the terms that the legislature used. There is "variety, disparity and confusion" in the many judicial definitions of the "requisite but elusive mental element" of many criminal offenses.[8]

In a clarifying effort, the Model Penal Code[9] has recognized four different states of mind from which a legislature might choose in defining a crime's *scienter* requirement: purpose, knowledge, recklessness, and negligence.[10] As used by the Model Penal Code:

- "Purpose" means the intent to do an act for the purpose of achieving a particular unlawful result.
- "Knowledge" indicates the intent to do an act, deliberately and not by mistake or accident, aware of the likeliness of the unlawful result.
- "Recklessness" means a callous and gross disregard for a risk created by an actor's conduct (what one might colloquially call "criminal negligence").
- By contrast, "negligence" denotes a failure to take the care expected of a reasonable person in a similar situation.

To these four, one may add a fifth possibility: strict liability (or the proof of a crime without the need to prove any intent).

Each of these intent requirements thus connotes a progressively less directed and intentional form of conduct, and the trend in criminal law has been to follow that progression. History tells the tale of diminished intent requirements for criminal laws.

Thus, the strongest conception of intent (or what the Model Penal Code would call "purpose")—that is, a conception necessitating proof that a defendant intended both to do the act that constituted the offense and to accomplish the particular harm

5. *See generally,* Theodore F.T. Plucknett, A Concise History of the Common Law (5th ed. 1956) (noting that as a matter of common law history, the Norman government took over the criminal justice system in order to give itself a monopoly over the use of force as a means of consolidating political power).
6. *See* 4 William Blackstone, Commentaries *358 (a crime consists of "a vicious will" and "an unlawful act consequent upon such vicious will.").
7. United States v. Dotterweich, 320 U.S. 277, 286 (1943) (Murphy, J. dissenting).
8. Morissette v. United States, 342 U.S. 246, 252 (1952).
9. The Model Penal Code (MPC) is a statutory text developed by the American Law Institute (ALI) in 1962. The Chief Reporter on the project was Herbert Wechsler. It was last updated in 1981. The intent, as its name suggests, was to provide a model for criminal law in the states.
10. American Law Institute, Model Penal Code, §2.02 (1962).

prohibited—did not long survive even in the common law. The English and American courts quickly recognized that, in most legal contexts, a criminal actor who intends to engage in an act is liable for whatever harm eventuates—even if it is different from that which was within his original contemplation.[11] In the words of the Model Penal Code, one can act "knowingly" or with the general intent to do the acts that constitute the offense without regard to any specific intent to do a wrongful act or violate a law.[12]

This concept of "knowing" intent has also taken hold in the context of regulatory offenses. Building on the time-honored maxim that "ignorance of the law is no excuse," courts now routinely conclude that one can be convicted of a crime for having acted knowingly (that is, purposefully doing an act) without the additional requirement that the government prove that the defendant had a conscious desire to achieve a particular end or to violate a known legal duty (typically, one found in the form of a statutory or regulatory prohibition). Thus, for example, violations of the Sherman Antitrust Act require only proof of deliberate business conduct without proof of intent to monopolize or intent to violate the law.[13]

The law also recognizes yet another culpable mental state with a further diminished aspect of purposefulness: One may be deemed guilty of a crime if one has acted with "criminal negligence." One common law definition of "criminal negligence" (that is, negligence of such a substantial kind and degree as to warrant punishment) suggests the nature of the historical definition: "aggravated, culpable, gross or reckless [conduct], that is, the conduct of the accused must be such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life."[14] Under this standard, for example, chiropractic doctors who have recommended fasting as a treatment for tuberculosis have been convicted of culpably negligent manslaughter.[15] Today, this type of "negligence" is more commonly called "recklessness"—that is, the awareness of a risk and disregard of the risk in circumstances that the law would consider unreasonable.[16]

This definition, limiting "criminal negligence" to, in effect, wanton recklessness, is no longer the rule. In many instances, the courts have allowed criminal convictions upon a showing of simple negligence—that is, a mere failure to exercise "reasonable care" that might normally give rise to civil tort liability. These cases, in contrast to those involving reckless conduct, concern situations in which the actor was actually unaware of the risk involved, though perhaps he ought to have been. Yet even here, there is some ground for the imposition of criminal sanctions. Even the negligent actor has acted wrongfully in some sense (though without a specific purpose to do so).

What is salient about this conception of intent and important for the discussion in this paper is the long-standing, broad consensus that there is no crime if there is no intent. In short, if there is no *mens rea* (of whatever degree is appropriate), then there is no just cause for the imposition of criminal penalties through the government's monopoly on the use of lawful force. Without a *scienter* element, criminal law becomes nothing more than the unwise imposition of punishment on those who have done no

11. *E.g.,* State v. Wickstrom, 405 N.W.2d 1 (Ct. App. Minn. 1987) (defendant hit victim causing abortion of pregnancy; guilty of criminal abortion despite lacking intent to injure fetus).
12. People v. Garland, 627 N.E.2d 377, 380–81 (Ill. App. 1993) ("Specific intent exists where from the circumstances the offender must have subjectively desired the prohibited result. General intent exists when the prohibited result may reasonably be expected to follow from the offender's voluntary act even without any specific intent by the offender.").
13. *E.g.,* United States v. United States Gypsum Co., 438 U.S. 422, 445–46 (1978). Notably, in this example, a corporate executive will at least know that his company's market share is increasing, alerting him to circumstances that might warrant inquiry. In complex health, safety, and environmental regulatory regimes, there is often nothing extrinsic that will alert the average business person to the proscribed nature of this conduct.
14. Walker v. Superior Court, 763 P.2d 852, 866 (Cal. 1988); *see also* State v. Gorman, 648 A.2d 967 (Me. 1994) (criminal negligence is gross deviation from standard of reasonable prudent person).
15. *See* Gian-Cursio v. State, 180 So.2d 396 (Fla. Ct. App. 1965).
16. Wayne R. LaFave, *Criminal Law*, 261–72 (5th ed. 2010).

wrong and whom justice does not require to be punished. One would think (and hope) that no criminal law would exist without a *scienter* element.

How Bad Is It?

Sadly, that is not the case. Worse yet, the absence of *scienter* elements from the criminal law is not a rarity—an outlier that can be explained by inattention or inadvertence. To the contrary, it is now a commonplace development.

It is impossible to measure the true extent of this problem. After all, the number of federal crimes on the books is so great that counting them is exceedingly difficult—and impossible for the average citizen.[17] The best estimate available puts the number of federal crimes at 4,500, but if these numbers are only an estimate, it is obviously impossible to answer the even more detailed question of how many of the crimes do not have a requirement.

Researchers from The Heritage Foundation and the National Association of Criminal Defense Lawyers, however, began to create an estimate of the extent to which a lack of *mens rea* requirements is infecting federal criminal law.[18] This study revealed that of the 446 criminal proposals advanced in Congress during the 109th Congress, 25 percent (113 bills) had no intent requirement. And that carried forward into enactment: Of the 36 new criminal statutes passed by the 109th Congress, nine (again, a full quarter) had no intent requirement at all. In short, Congress created nine new strict liability crimes where a "defendant's knowledge, intent, misperceptions, mistakes, or accidents are essentially irrelevant to his innocence or guilt."[19]

One example, selected at random, demonstrates the point far better than all statistics could. The Youth Worker Protection Act (H.R. 2870), had it been enacted, would have made it a crime "to employ a youth" in the sale of goods in a public place (in other words, you cannot use a child to "peddle"). No intent would have been required, so the government would not have had to prove either that an individual knew the person he or she employed was a youth or that he or she knew the sale of goods occurred in a public place. The government also would not have had to prove that an individual knew it was illegal to employ children to sell candy on the street. Had this law passed and had a man thereafter given his grandson five dollars to set up a lemonade stand on the corner, that man would have been a felon—without any need to prove criminal intent at all.

Curbing the exploitation of youth is a goal on which all right-thinking Americans can agree, but this nation should also agree that the inadvertent violation of an obscure criminal prohibition should not land the violator in jail. Absent proof of *scienter*, the actor simply is not morally culpable.

Toward a Solution

The answer to this problem is simple to state: Congress should stop creating laws that do not have *mens rea* requirements. But simple solutions, while often easy to state, can be difficult to implement. Given the multiplicity of criminal law proposals each year (446 in the above-cited sample, for example), it would be difficult to ensure that all of them are adequately drafted. Some will contain mistakes. Others will be drafted without intent requirements for inappropriate policy reasons, such as a general desire to appear "tough on crime."

To prevent that result from happening, America needs a systemic solution: a statute that, by its terms, sets a default rule for *mens rea* requirements. Such a law would state that "If there is no intent element in a criminal statute, the courts should understand that Congress, nonetheless, has adopted an intent requirement." Congress would need to specify what that default intent requirement was, and an appropriate balance would be to require both proof of "knowing" bad conduct for all crimes enacted before this new default *mens rea* statute that do not have an existing *scienter* requirement and proof of "willfulness" or "purpose" for all statutes adopted after enactment.

17. *See* John S. Baker Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation Legal Memorandum No. 26 (June 2008), http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes.
18. Brian Walsh & Tiffany M. Josslyn, Heritage Found. & Nat'l Ass'n of Criminal Def. Lawyers, Without Intent: How Congress Is Eroding the Criminal Intent Requirement in federal Law (2010).
19. *Id.* at 14. This, of course, leaves aside the far larger category (fully a third of all cases) where Congress provides for an intent requirement that is weak or inadequate. This addresses only the truly extreme case where no intent is required at all.

Thus, the statute would apply to both existing and future crimes where the *scienter* element is missing. It should, by its terms, apply to any cases that have yet to be indicted or brought to trial (it would be too disruptive to allow the passage of the statute to reopen cases where criminal proceedings have begun and jeopardy has attached).

Finally, the statute should make clear that the default *mens rea* requirement should apply to all elements of the offense—that is, both the acts that constitute the crime and knowledge of the criminality of the underlying conduct. The only exceptions here should be for elements that are necessary to establish jurisdiction or venue—basic procedural points where the proof of intent is generally not germane—and possibly for exceedingly dangerous conduct that a reasonable person should have known created a risk of death or serious bodily injury. Again, if it wishes, Congress could negate that presumption, but as a background rule, it would be the wisest one and the most protective of personal liberty.

Conclusion

This proposal would protect innocent persons from unjust conviction under federal criminal offenses that have inadequate *mens rea* requirements. Federal courts grant a criminal defendant the benefit of the doubt when Congress has failed to define the *mens rea* requirements for criminal offenses and penalties adequately.

Note that this proposal is simply a presumption to take care of circumstances where there has been a failure by Congress to make itself clear by not including *mens rea* terminology. Although it would almost always be unwise to do so, Congress would remain free to enact strict liability offenses even after this reform is implemented, but to do so, the legislature would have to make its purpose clear in the express language of the statute.

Enacting this new requirement would improve the *mens rea* protections throughout federal criminal law, provide needed clarity, force Congress to give careful consideration to *mens rea* requirements when adding or modifying criminal offenses, and help to ensure that fewer individuals are unjustly prosecuted and punished. It is well past the time for Congress to get its criminal law house in order, and this proposal would be a good (albeit modest) start.

—Paul Rosenzweig *is a Visiting Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation.*