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Injustice for All?
Why Congress Should Require Criminal Intent for Criminal Convictions

Rebekah Hildebrandt

The author is a Master of Public Policy student at the School of Public Policy, George Mason University, Arlington, VA. She can be reached at rhildeb2@masonlive.gmu.edu

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In a regrettable trend over the past forty years, Congress has been reducing and eliminating criminal intent requirements while simultaneously increasing the number of federal criminal laws and laws granting executive agencies the authority to create additional regulatory crimes. As a result, scores of ordinary citizens who did not know they had broken any law—and had no intention of doing so—have been convicted of criminal acts. This, despite the Supreme Court's recognition that requiring criminal intent to establish criminal responsibility "is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."[1]

As early as the 13th century, English courts began to require proof that an individual charged with a crime possessed a culpable state of mind or *mens rea*.[2] This longstanding tradition prevents the innocent from being unjustly convicted and punished as criminals for doing things they did not know were wrong, let alone illegal. However, Congress is rapidly eroding the distinction between law-abiding citizens and criminals by its failure to require the government to prove a defendant's *mens rea* or criminal intent in new laws it has passed regarding offenses that violate federal statutory regulations. Instead, whether intentionally or through inadvertence and neglect, Congress has been relying on strict liability theory, which means that committing the act—even accidentally—is sufficient for conviction, regardless of intent.

Criminal acts have always been strongly disapproved by society, and—accordingly—are sanctioned with legal disabilities (including the loss of voting rights, inability to own firearms, reduced access to employment), not to mention potential imprisonment, for those who are adjudged criminals. Given these severe consequences, it is not surprising that while strict liability theory is prominent in the civil justice system (especially in tort law), it has traditionally been the extraordinarily rare exception in the criminal justice system. Until recently, criminal

strict liability offenses were almost exclusively limited to statutory rape—a crime in which the evidentiary issues associated with demonstrating that the accused knew an individual's age, and society's interest in protecting the young, converged to create an outlier. As non-public-welfare strict liability offenses carry severe penalties and stigma, they have been few and "aberrant."[3]

A 2010 study jointly produced by the conservative Heritage Foundation and the progressive National Association of Criminal Defense Lawyers, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, found that 57% of non-violent and non-drug related offenses introduced in the 109th Congress had inadequate intent requirements.[4] Indeed, 25% of those offenses had no intent requirements whatsoever. While it was once widely accepted that ignorance of the law was no excuse, this maxim was accepted at a time when there were only a handful of crimes, and those crimes were of the sort (murder, rape, treason, theft, etc.) that people commonly knew to be wrong whether or not they had seen the statutes. Today, when many crimes concern detailed reporting requirements that cover arcane details that few know or understand—commonly referred to by prosecutors as "books and records" violations—the old rule of thumb is no longer fair to the accused. These laws create traps for the unwary, making full-fledged criminals out of citizens who make honest mistakes on paperwork. Examples abound of well-intentioned Americans who have faced criminal sanctions for offenses ranging from importing lobster in the wrong packaging to eating fries on the Metro, importing completely legal flowers without the proper paperwork to verify that they were greenhouse-grown and not wild, or wandering into a federal wilderness area on a snowmobile during a whiteout blizzard.

The *Without Intent* report states that, "For crimes involving inherently wrongful conduct—such as murder, arson, rape, theft, and robbery—the law properly allows the inference

of a guilty mind if the government proves that the conduct was committed voluntarily. With such crimes, the law properly assumes that inherent wrongfulness forecloses the possibility of punishing individuals who are not truly culpable."[5] This classification leaves thousands of other instances where the offense is not inherently wrongful, but could nonetheless result in an unwitting violation of one or more federal regulations or statutes. In these instances, violators are nonetheless being prosecuted criminally instead of civilly.

Former Attorney General Edwin Meese, not known for being soft on crime, has stated publicly, "Overcriminalization should concern everyone in America, both as citizens and as potential accused."[6] The website overcriminalized.com points out that "Criminal law is supposed to be used to redress only that conduct which society thinks deserving of the greatest punishment and moral sanction… But as a result of rampant overcriminalization, trivial conduct is now often punished as a crime."[7] In the foreword to the *Without Intent* report, Meese explains that Congress "has invoked this most awesome power of government—the power to prosecute and imprison—as a regulatory mechanism, something never contemplated by the nation's founders."[8]

Reasonable Americans believe that criminals should be caught, tried, and—if convicted—subjected to appropriate penalties for criminal actions because they rightly consider criminals to be blameworthy, menaces to society, and deserving of the resulting damage to their reputations. As a society, Americans have traditionally accepted that harming people or institutions deliberately is different in kind from inadvertently violating a statutory regulation. Our laws have reflected this distinction—until recently. Criminal laws are, in part, enacted to help citizens guide behavior. However, if ordinary citizens are not aware of what has been criminalized, they cannot act accordingly.

A detailed 2008 study estimated that there are approximately 4,500 criminal statutes on the books.[9] Yet, there is no central location where a citizen could look to find them. A single and publicly accessible Federal Criminal Code would be a good start to replacing thousands of scattered statutes throughout the United States Code and consolidating duplication. A unified Federal Criminal Code would provide consistency to criminal statutes, and the recodification process would be the perfect opportunity to revive the *mens rea* requirement in each instance where it has been omitted. In doing so, this reform would also begin to remedy the criminal laws Congress has passed that have turned far too many well-intentioned Americans into criminals.

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[1] *Dennis v. United States,* 341 U.S. 494, 500 (1951).

[2] Paul H. Robinson, "A Brief History of Distinctions in Criminal Culpability," *Hastings Law Journal* 31 (1980): 815.

[3] Joshua Dressler, Understanding Criminal Law (New York: Matthew Bender & Co., 2000), 127.

[4] Brian W. Walsh and Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law* (Washington: The Heritage Foundation and The National Association of Criminal Defense Lawyers, 2010), ix.

[5] Ibid., 1.

[6] Edwin Meese III, introduction to *One Nation Under Arrest*, edited by Paul Rosenzweig and Brian W. Walsh (Washington: The Heritage Foundation, 2010), x, xix.

[7] "About Overcriminalized.com," accessed May 9, 2011, http://overcriminalized.com.

[8] Walsh and Joslyn, *Without Intent,* vi.

[9] John Baker, "Revisiting the Explosive Growth of Federal Crimes," *Heritage Foundation Legal Memorandum* No. 26 (2008).