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The Adequacy of Criminal Intent Standards in Federal Prosecution

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Chairman Grassley, Ranking Member Leahy, and members of the Committee: Thank you for providing me this opportunity to discuss the importance of criminal intent standards in federal law and the need to ensure that such standards adequately protect individuals against unjust prosecution. My testimony will proceed in four parts. First, I will explain why criminal intent, or *mens rea*, requirements are important and why this issue deserves Congress's attention. Second, I will discuss how the proliferation of criminal laws without adequate intent requirements harms individuals and society. Third, I will offer my perspective on recent proposals to shore up *mens rea* requirements, including Senator Hatch's bill, the *Mens Rea Reform Act of 2015*, which is currently before the Committee. I will also respond to criticisms that have been leveled against these proposals and explain why these criticisms are wrong. Fourth, I will explain why meaningful *mens rea* reform must be included as part of the current criminal justice reform effort in Congress.

I. The Importance of Criminal Intent Requirements

From its earliest days, our criminal law has contained both a moral and a practical element. For an act to be a crime, the law has traditionally required both that the act cause (or threaten) some kind of harm and that the individual who committed the act do so with malicious intent. The requirement of a guilty mind, also called *mens rea*, helps to separate conduct that may be harmful but that is not morally culpable from conduct truly deserving of criminal penalties.

In this way, criminal intent requirement protect individuals who accidentally commit wrongful acts or who act without knowledge that what they are doing is wrong. A person who trips while walking down the sidewalk and knocks over another person does not commit assault, because the person did not intend to harm the other individual. Similarly, a person who

mistakenly takes an article of clothing that doesn't belong to him does not become a thief merely because he took something that wasn't his. Only if the person knew that the item wasn't his has he committed a criminal act, because only then has he acted with criminal intent.

Mens rea requirements have become increasingly important in recent years as our criminal code has expanded from traditional *malum in se* (Latin for “wrong in itself”) offenses like murder, theft, or assault—offenses that everyone knows are wrong—to include so-called *malum prohibitum* (Latin for “wrong because prohibited”) offenses that are wrong only because Congress has proscribed them. Examples of *malum prohibitum* offenses abound. One federal statute criminalizes the transportation of water hyacinths.¹ Another makes it a crime to use the 4-H Club logo without authorization.² And then there are the thousands upon thousands of crimes created by regulation, not statute. No one knows for sure how many criminal regulatory offenses there are. One estimate placed the number at over 300,000.³ But one thing we can be sure of is that the vast majority of these regulations criminalize conduct that is not inherently wrongful, but rather that the agency merely wishes to limit. Such is the nature of regulation.

Unlike with a traditional crime like assault or kidnapping, only a person who knows about a *malum prohibitum* offense knows that conduct in violation of the offense is criminal. For this reason, robust *mens rea* requirements are particularly vital for such crimes. As *malum prohibitum* offenses increasingly fill our criminal code, it therefore becomes increasingly important for Congress to ensure that the crimes it creates—and the crimes agencies create—have adequate *mens rea* protections.

II. How Inadequate Criminal Intent Requirements Harm Individuals and Society

¹ 18 U.S.C. § 46.

² 18 U.S.C. § 707.

³ See John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 216 (1991).

Unfortunately, the available evidence indicates that Congress has not been doing a good job of ensuring that crimes have adequate criminal intent standards. A 2010 study by the Heritage Foundation and the National Association of Criminal Defense Lawyers found that 57 percent of nonviolent offenses proposed in the House or Senate during the 109th Congress had inadequate *mens rea* requirements.⁴ Twenty-five percent had no *mens rea* requirement at all.⁵ Nonviolent offenses are the type of offense for which criminal intent standards are perhaps most important, because such offenses often deal with conduct that is not inherently wrongful. Yet in more than half of cases, nonviolent offenses proposed during the 109th Congress contained either weak *mens rea* requirements or no *mens rea* requirement at all.

The absence of meaningful criminal intent standards in much of our criminal law is not some abstract problem. It has real consequences for real people. Just ask Bobby Unser, the famed race car driver who was criminally prosecuted for wandering into federal land on a snowmobile during a blizzard that nearly took his life. Or ask Wade Martin, an Alaskan fisherman who was charged with violating the Marine Mammal Protection Act for selling ten sea otters to a buyer he thought was a Native Alaskan but who turned out not to be. Under the Act, selling sea otters is perfectly legal if the buyer is a Native Alaskan. Mr. Martin's mistake was believing the buyer was who he claimed to be.

Neither Mr. Unser's nor Mr. Martin's actions were inherently wrongful. There is nothing inherently bad about riding a snowmobile on federal property, just as there is nothing intrinsically evil about selling sea otters. But federal law forbade both acts, without any requirement of criminal intent as to the relevant conduct. And so Mr. Unser and Mr. Martin both pled guilty.

⁴ Brian W. Walsh and Tiffany Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, Heritage Foundation Special Report No. 77 at 12 (May 5, 2010).

⁵ *Id.*

Laws with inadequate criminal intent requirements are particularly hazardous for individuals and small businesses, because ordinary citizens lack the time, money, and lawyers to stay on top of thousands—or hundreds of thousands—of constantly changing legal requirements. No person with a family to feed and a mortgage to pay has time to pore through the Code of Federal Regulations to ensure perfect compliance with 300,000 criminal regulations, just as no small business owner can afford to hire the army of lawyers necessary to understand the intricacies of the U.S. Code. Criminal intent requirements protect these individuals when they make honest mistakes or run afoul of obscure provisions that a more sophisticated company with an in-house compliance department might know about. Remove those requirements, and individuals and small business owners live in perpetual danger of prosecution.

Remember, too, that a criminal conviction carries a host of significant, sometimes irreversible consequences. A person convicted of a criminal offense may lose his ability to vote, to sit on a jury, to possess a firearm, and to practice his chosen profession, even if he serves no prison time. In addition, as my colleague John Malcolm has written, “[t]here is . . . a unique stigma that is associated with being branded a criminal. A person stands to lose not only his liberty and certain civil rights, but also his reputation—an intangible yet invaluable commodity . . . that once damaged can be nearly impossible to repair.”⁶ For businesses, even merely being charged with a crime can be enough to cause financial ruin.

Criminal laws with weak or inadequate intent requirements empower the government to rain down these devastating consequences in situations where a person didn’t know he was doing anything wrong or was powerless to stop the violation. This harms the individuals ensnared in these unjust prosecutions, as well as society at large. It breeds distrust of government and

⁶ John G. Malcolm, *The Pressing Need for Mens Rea Reform*, Heritage Foundation Legal Memorandum No. 160 at 4 (Sept. 1, 2015).

undermines the rule of law, which is predicated on the ability of individuals to understand the law and conform their conduct to it. More than anything else, it is deeply and fundamentally unfair. Before the government brands a person—or an organization—a criminal, it should have to prove that his conduct was morally culpable.

III. Proposed Legislation and Response to Criticisms

Legislation has recently been introduced in both the House and Senate to address the problem of unclear and inadequate criminal intent requirements in federal law. The House bill, H.R. 4002, *Criminal Code Improvement Act of 2015*, provides that if a federal criminal offense does not specify the state of mind required for conviction, then a default standard of knowledge applies. The bill also states that if an offense consists of conduct that a reasonable person in the same or similar circumstances would not know was unlawful, then the government must prove that the person knew, or had reason to believe, the conduct was unlawful. The House Judiciary Committee reported out H.R. 4002 by voice vote on November 18 of last year.

The Senate bill, S. 2298, *Mens Rea Reform Act of 2015*, was introduced by Senator Hatch the same day the House Judiciary Committee reported out H.R. 4002. S. 2298 sets a default intent standard of willfulness for any element of a federal criminal offense for which the text of the offense does not specify a state of mind. The bill further clarifies that if an offense specifies a state of mind but does not specify the elements of the offense to which the state of mind applies, the state of mind identified applies to all elements of the offense, unless a contrary purpose plainly appears. Exceptions in both cases apply where it is clear that Congress intended not to require any state of mind for a particular element or where an element concerns only venue or subject matter jurisdiction.

Both bills would make substantial improvements to our criminal laws, and I applaud both the House Judiciary Committee and Senator Hatch for their important work on this issue. Setting a default *mens rea* requirement would ensure that Congress and agencies do not through inattention or oversight create crimes with vague or unclear intent requirements or no criminal intent requirement at all.

Note that a default *mens rea* standard would not prevent Congress or agencies from creating strict liability crimes. What it would do, however, is require them to be *clear* about their intent to dispense with criminal intent requirements. A default *mens rea* standard would thus carry at least two crucial benefits. First, it would prevent the inadvertent or unintentional creation of crimes without criminal intent requirements. Second, it would encourage those who draft our criminal laws to pay closer attention to intent requirements and to be clearer about which elements have which intent standards. Any reform that would help to reduce sloppy or slapdash drafting of criminal laws deserves strong bipartisan support.

Unfortunately, there has been a great deal of misinformation spread about default *mens rea* in recent months. One publication called the House bill a “get out of jail free card.”⁷ Others have said that a default *mens rea* standard would “provide cover” for corporate wrongdoing⁸ and make it harder to prosecute terrorists and murderers,⁹ notwithstanding that neither terrorism nor murder is a strict liability crime. Still others claim that requiring proof of criminal intent will give businesses greater leave to pollute the environment and threaten the public welfare.

⁷ Mark Melin, *White Collar “Get out of Jail Free” Legislation Moves Forward*, VALUEWALK (Nov. 19, 2015), available at <http://www.valuewalk.com/2015/11/white-collar-fraud-congress>.

⁸ Carrie Johnson, *Obama Administration Says House Bill Would Give 'Cover' to White-Collar Defendants*, NPR (Nov. 25, 2015), available at <http://www.npr.org/2015/11/25/457369313/obama-administration-says-house-bill-would-give-cover-to-white-collar-defendants>.

⁹ Zach Carter, *White House Comes out Against Effort to Block White-Collar Crime Prosecutions*, HUFFINGTON POST (Nov. 19, 2015), available at http://www.huffingtonpost.com/entry/white-collar-crime-white-house-response_564dd06be4b00b7997f95240.

To begin with, these critics ignore that the default intent standard will apply *only* in situations where Congress or the agency has failed to specify any criminal intent whatsoever. Many of our most important environmental and public welfare statutes contain clear *mens rea* standards, meaning the bills would not apply to them at all.¹⁰ And even where Congress or the agency has failed to specify the intent required for conviction, nothing prevents Congress or the agency from going back to clarify whether it intended to create a strict liability crime.

Establishing a default *mens rea* standard would not remove any crimes from the books. Nor would it override existing *mens rea* standards, including existing strict liability standards set forth in statutes and regulations. It would not limit the authority of Congress or agencies to create new criminal offenses, including new strict liability offenses. It would have no impact on the Justice Department's ability to prosecute corporate executives for willful blindness—such conduct already has a willfulness requirement built in—and would have no impact on the Department's ability to prosecute executives for recklessness or negligence under statutes or regulations that criminalize reckless or negligent behavior. Finally, establishing a default *mens rea* standard would have no impact whatsoever on statutes or regulations that prescribe civil penalties. It would apply only to criminal prosecutions, where a person's liberty and standing in the community is at stake. Regulators would have precisely the same authority and power as before to impose civil fines and other non-criminal penalties for regulatory violations.

In sum, default *mens rea* is not a giveaway to the corporate class, and it does not deserve to be caricatured as such. It is a principled response to a growing problem—the increasing criminalization of conduct that an average person would not know is wrong.

IV. The Way Forward on *Mens Rea* Reform

¹⁰ See, e.g., 42 U.S.C. § 7413(c) (applying criminal penalties to knowing and negligent violations of the Clean Air Act).

I offer my strong endorsement of the default *mens rea* effort and I urge this Committee to take up Senator Hatch's bill and report it favorably to the full Senate. Before closing, I would like to comment briefly on the current political dynamics of criminal justice reform and the need to include a meaningful default *mens rea* requirement as part of any such reform effort.

For the past several years, a coalition of conservative and liberal groups and Members of Congress has been working together to address infirmities in our criminal justice system. There has been a great deal of bipartisanship on this issue—much more than we have typically seen in the past.

Last fall, this Committee reported out a lengthy sentencing and prison reform bill. The House Judiciary Committee has also reported out sentencing, prisoner reentry, and substantive criminal law reform legislation, in addition to the default *mens rea* bill I have discussed.

I have previously expressed concerns about the Senate sentencing bill.¹¹ In particular, I believe that the bill reduces too many mandatory minimums and unwisely provides for the early release of thousands of violent offenders.

Equally problematic, however, the bill contains no meaningful front-end reforms to address whether and when an individual should be prosecuted in the first place. You simply cannot have meaningful criminal justice reform without tackling both sides of the problem: the front-end question of whether an individual deserves punishment and the back-end question of what punishment the person should receive. In this regard, criminal justice reform without *mens rea* reform is incomplete.

I'm heartened by the House's action on default *mens rea* and hope that House leadership will make *mens rea* reform part of any criminal justice reform package that passes the House.

¹¹ See Ed Meese & Ron Hosko, *We Need Thoughtful, Not Expedient, Criminal Justice Reform*, THE HILL (Oct. 19, 2015), available at <http://thehill.com/blogs/congress-blog/judicial/257183-we-need-thoughtful-not-expedient-criminal-justice-reform>.

House Judiciary Committee Chairman Bob Goodlatte, for his part, recently said that any deal on criminal justice reform that does not include provisions to strengthen *mens rea* protections will not move forward in the House.¹² I would strongly urge the Senate similarly to make default *mens rea* part of any criminal justice bill that passes the Senate.

There are some who say that Congress should wait on *mens rea* reform, that Congress should pass sentencing reform and wait to address *mens rea* until a later date. If Congress adopts that strategy, *mens rea* reform will die.

Meaningful criminal justice reform comes around only so often. The current moment is the result of years of yeoman's work by think tanks and prescient legislators. If sentencing reform passes without a meaningful *mens rea* component, not only will Congress's "criminal justice reform" effort be woefully incomplete, but we will also lose the opportunity we have right now to correct the deficiencies that have crept into our criminal intent standards.

There is room for bipartisan agreement on default *mens rea*. The House bill, which was sponsored by former House Judiciary Committee Chairman James Sensenbrenner and cosponsored by Ranking Member John Conyers and Representative Sheila Jackson Lee—and which passed the House Judiciary Committee by voice vote—is proof of that. I urge the Members of this Committee, and the Senate as whole, to work together on this issue so that we can make a real difference in strengthening and improving crucially important criminal intent requirements.

Criminal justice reform must be more than sentencing reform and prison reform. It must include meaningful *mens rea* reform as well.

¹² Clare Foran, *A New Hurdle in the Push for Criminal-Justice Reform*, THE ATLANTIC (Jan. 12, 2016), available at <http://www.theatlantic.com/politics/archive/2016/01/criminal-justice-reform-obama/423789>.