



Testimony of

STEPHEN A. SALTZBURG

on behalf of the

AMERICAN BAR ASSOCIATION

for the hearing on

**THE ADEQUACY OF CRIMINAL INTENT
STANDARDS IN FEDERAL PROSECUTIONS**

before the

COMMITTEE ON THE JUDICIARY

of the

UNITED STATES SENATE

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Chairman Grassley, Ranking Member Leahy, and Members of the Judiciary Committee:

Personal Background

Good morning. My name is Stephen Saltzburg. I am the Wallace and Beverley Woodbury University Professor at The George Washington University Law School. I serve on the Council of the American Bar Association's Criminal Justice Section (CJS), which has over 20,000 members including prosecutors, private defense counsel, appellate and trial judges, law professors, correctional and law enforcement personnel, law students, public defenders, and other criminal justice professionals. I am a Past Chair of CJS, have served on its governing Council since 2001 and currently serve as its elected representative the ABA House of Delegates, our organization's policy-setting body.

The American Bar Association

The American Bar Association is the world's largest voluntary professional organization, with a membership of over 400,000 members worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world. I appear today at the request of ABA President Paulette Brown to share the views of the ABA.

Importance of this Hearing

We commend the Committee for holding this hearing on erosion in federal lawmaking regarding *mens rea* requirements in criminal cases. The requirement that the state must prove both a wrongful act and a wrongful intent in committing that act has served historically as a fundamental principle of Anglo-American law and necessary precondition when government seeks to deprive an individual of his or her liberty. In the 1952 case *Morrisette v. United States*, Justice Jackson emphatically stated “[t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.”¹

***Mens Rea* and the Breadth of Federal Criminal Law**

In 1998, the American Bar Association (ABA) Task Force on the Federalization of Criminal Law, chaired by former Attorney General Edwin Meese, issued a report entitled “The Federalization of Criminal Law.” The Task Force's research revealed a startling fact about the explosive growth of federal criminal law: More than 40% of the federal provisions enacted after the Civil War had been enacted since 1970.²

Other observers have reported that the pace of new federal criminal law enactment since the 1998 report has continued unabated and it is estimated that there are over 4,450 federal statutory

¹ *Morrisette v. United States*, 342 U.S. 246, 250 (1952) (Jackson, J.).

² Task Force on Federalization of Criminal Law, ABA Criminal Justice Section, *The Federalization of Criminal Law* 7 (1998), available at http://www.americanbar.org/content/dam/aba/publications/criminaljustice/Federalization_of_Criminal_Law.authcheckdam.pdf.

crimes and tens (maybe hundreds) of thousands more in federal regulations.³ State legislatures nationwide, both full-time and part-time, have likewise seen the need to significantly expand their state criminal codes in significant fashion over the last several decades. While well-meaning and responsive to individual bad acts, it is not clear that multiplying criminal laws results in safer communities, especially when the reality is that there is no additional funding to support new investigation and prosecution of these new crimes.⁴ In one critical respect, multiplying, expanding and broadening the reach of criminal law can place individuals at risk because they might well not know the actual reach of the statutory scheme.

Neither criminal law professors nor lawyers who specialize in criminal law can know all of the conduct that is criminalized, and it is a practical impossibility for a lay person to understand what is criminal and what is not.⁵ At the ABA Criminal Justice Section 2012 Fall Conference, former Attorney General Edwin Meese noted that the immense number of laws are traps to the unwary and threaten people who would never consider breaking the law.⁶ In a criminal justice system in which criminal statutes reach every imaginable type of conduct, *mens rea* takes on special importance because it provides some assurance that only individuals who can be shown to have a culpable state of mind face punishment.

Criminal Laws Once Enacted Remain Even as New Laws are Enacted

Every change in human behavior affords an opportunity for new legislation. As we moved into a computerized world, the call for “computer crimes” was irresistible. Each innovation – whether it be the Internet, GPS devices, or something else new – often results in a legislative judgment that criminal laws must be added, broadened, or multiplied to assure that they are current and encompass newer as well as older means of violating the law. Rarely is there a call to eliminate criminal provisions; the momentum is toward expansion with little interest in contraction. The reality is that legislation is passed with the well-motivated goal of assuring that criminal statutes are not obsolete and that law enforcement and prosecutors can deal with new forms of criminal behavior. But, in the course of multiplying, expanding, and adding to criminal statutes, legislators frequently cannot predict how broadly their enactments will be construed and how far they might reach beyond the immediate concerns that gave rise to them.⁷

Sometimes the very legislators who sponsored new criminal statutes are surprised by how they are used. Their surprise might be attributable to creative use by prosecutors or expansive judicial interpretations. But, sometimes their surprise is attributable to the fact that in the haste to add to

³ See Brian W. Walsh & Tiffany M. Joslyn, Heritage Found. & Nat'l Ass'n of Criminal Def. Lawyers, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law* at 4 (2010) [hereinafter Heritage Found., *Without Intent*], available at <http://www.heritage.org/research/reports/2010/05/without-intent>; John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation L. Memo. No. 26, June 16, 2008, at 1 (finding that from 2000 through 2007 Congress enacted an average of 56.5 crimes a year).

⁴ See William Shepard, *A Country Overburdened by Too Many Laws*, CRIMINAL JUSTICE, Spring 2013, at 1.

⁵ Heritage Found., *Without Intent* at 4.

⁶ Edwin Meese III, The Heritage Found. Center for Legal & Judicial Studies Chairman, Speech at ABA Criminal Justice Section Fall Conference: Overcriminalization (Oct. 26, 2012), available at <http://www.americanbar.org/news/abanews/aba-news-archives/2013/08/overcriminalization.html>.

⁷ Paul J. Larkin, Jr., *Overcriminalization: The Legislative Side of the Problem*, Heritage Foundation Special Report No. 75 at 2-3 Dec. 13, 2011, available at <http://www.heritage.org/research/reports/2011/12/overcriminalization-the-legislative-side-of-the-problem>.

criminal law, they (1) failed to pay sufficient attention to *mens rea* requirements and either omit or mistakenly diminish them, and (2) failed to take sufficient care in their legislative drafting, leading prosecutors and courts to conclude that *mens rea* requirements were eliminated or reduced even though this was not the intent of the legislation.⁸ Both of these practices contribute to the problems of overbroad criminal liability and lack of the fair notice that the law is supposed to provide.⁹

The Importance of *Mens rea*

Conscientious legislators seek to respond to new forms of criminal activity as quickly as they can. But the desire to remain current accounts in large measure for the problems identified above regarding *mens rea*. There are too many short-term, goal-oriented federal and state criminal statutes that do not properly define the *mens rea* or guilty mind elements of the crime.¹⁰

The effect of a *mens rea* requirement or guilty mind element provides an offense with its normative appeal: the degree of liability and punishment will be proportionate to culpability and limited by it.¹¹ It is a fundamental principle of criminal law that, before criminal punishment can be imposed, the government must prove both a guilty act (*actus reus*) and a guilty mind (*mens rea*).¹² The erosion of the *mens rea* requirement threatens individuals with punishment for making honest mistakes or engaging in conduct that was not sufficiently wrongful to give notice of possible criminal responsibility.¹³ The common law followed the rule that a crime required the union of act and intent, and common law crimes were limited to morally blameworthy conduct. Today a person can be found guilty of violating a commercial, regulatory, or environmental law without proof that (1) the person had a purpose to break the law and (2) the person's conduct was clearly blameworthy. Both of these elements are critical to the ability of the law to limit criminal punishment to those who deserve it.¹⁴

To ensure that only blameworthy persons are convicted, governments must re-examine strict liability offenses to determine whether the absence of a *mens rea* element results in imposition of unwarranted punishment on defendants who lacked any culpable state of mind in performing acts that were not *malum in se*; to prescribe specific *mens rea* elements for all crimes other than strict liability offenses; and to assure that no strict liability crimes permit a convicted individual to be incarcerated. That is American Bar Association policy.¹⁵

⁸ See Heritage Found., *Without Intent* at 5-6.

⁹ See *id.*

¹⁰ See Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 Duke L.J. 285 (2012); *Principles for Revising the Criminal Code: Hearing before the Subcommittee on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. 1 (2011) [hereinafter *Principles for Revising the Criminal Code*] (statement of Edwin Meese III, The Heritage Foundation Center for Legal & Judicial Studies Chairman).

¹¹ Brown, *Criminal Law Reform* at 291.

¹² Heritage Found., *Without Intent* at 6-7.

¹³ *Id.*

¹⁴ *Principles for Revising the Criminal Code*, 112th Cong. 4 (2011) (statement of Edwin Meese III, The Heritage Foundation Center for Legal & Judicial Studies Chairman).

¹⁵ Am. Bar Ass'n, Resolution 113D (Aug. 2013), available at www.americanbar.org/content/dam/aba/uncategorized/GAO/2013_hod_annual_meeting_113D.pdf.

Strict Liability and the U.S. Supreme Court

Supreme Court jurisprudence has moved toward stronger culpability requirements. At the turn of the twentieth century and for several decades thereafter, the Court was willing to recognize strict liability as a concept that Congress intended to utilize in drafting criminal laws, especially for new regulatory statutes. These regulatory statutes were designed to make prosecution easier by not requiring proof of intent, thus enhancing their deterrent effect. Those goals were especially desirable and useful where the statutes address wrongs that would likely impact large numbers of persons, such as the regulation of food, drug, consumer and environmental safety violations. But, more recently the Court has returned to our common law heritage and insisted on interpreting federal felony statutes to require awareness of wrongdoing.¹⁶

In *Morissette v. United States*, Justice Jackson defined the increasing creation and utilization of strict liability crimes, stating:

“...[L]awmakers, whether wisely or not, have sought to make...regulations more effective by invoking criminal sanctions to be applied by the familiar technique of criminal prosecutions and convictions. This has confronted the courts with a multitude of prosecutions, based on statutes or administrative regulations, for what have been aptly called ‘public welfare offenses.’ These cases do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals...penalties commonly are relatively small, and conviction does not grave damage to an offender’s reputation. Under such considerations, courts have turned to construing statutes and regulations which make no mention of intent as dispensing with it and holding that the guilty act alone makes out the crime. This has not, however, been without expressions of misgiving.”¹⁷

Considered through the prisms of culpability *mens rea* and offense analysis, early twentieth century crimes described as imposing strict liability as analyzed by element makeup are not strict liability crimes at all because the offenses require some morally blameworthy state of mind.¹⁸ In contrast, the “new” strict liability offenses that arose in the latter half of the twentieth century did not, at least by their terms, require a criminal intent from even the offense analysis or culpability *mens rea* perspectives.¹⁹

It is important to recognize that the “new” strict liability approach toward crimes carries with it the dangerous potential of punishing people that are otherwise morally innocent. It is for this reason that the ABA is urging the re-examination of strict liability crimes.

Statutes with a weak or nonexistent *mens rea* requirement range from criminal

¹⁶ Stephen J. Schulhofer, *Criminal Justice, Local Democracy, and Constitutional Rights*, 111 Mich. L. Rev. 1045, 1062 (2013) (internal citations omitted).

¹⁷ *Morissette v. United States*, 342 U.S. 246, 254-56 (1952) (Jackson, J.).

¹⁸ Alan C. Michaels, *Constitutional Innocence*, 112 Harv. L. Rev. 828, 839 (1999).

¹⁹ *Id.* at 840.

violations of the Endangered Species Act²⁰ to the unauthorized use of a 4-H club logo.²¹ Federal criminal statutes with weak or nonexistent *mens rea* requirements undermine the rationale for criminalizing conduct. This in turn undermines the seriousness society attaches to a criminal conviction.

Legislation in the 114th Congress

The concerns regarding proliferation of federal criminal law and the erosion of *mens rea* have been a focus of attention for the House Judiciary Committee in the last several Congresses. On July 22, 2009, under the bipartisan leadership of Reps. Bobby Scott (D-VA) and Louie Gohmert (R-TX), the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held a hearing to learn about the trend of overcriminalizing conduct, erosion of *mens rea* and overfederalizing crime.²² On September 28, 2010, the Crime Subcommittee held a second hearing to examine the problems through the lens of the “Without Intent” report and explored the report’s recommendations.²³ At a House Judiciary Committee hearing held December 19, 2011, regarding legislation to overhaul the federal criminal code, three of four witnesses testifying included remarks addressing *mens rea* reform.²⁴

The House’s focus on *mens rea* continued in the last Congress as the House Judiciary Committee undertook an extraordinary review of the state of the federal criminal justice system under the auspices of the bipartisan Task Force on Over-Criminalization and Over-Federalization of Criminal Law. It held ten hearings over an 14-month period addressing issues including the proliferation of federal statutory and regulatory crimes, sentencing, and collateral consequences of conviction, among other subjects. Three of those hearings either entirely or substantially focused on *mens rea*: an overview hearing on June 14, 2013,²⁵ a hearing on *mens rea* reform on July 19, 2013,²⁶ and a November 14, 2013 hearing on regulatory crime.²⁷

Reform relating to *mens rea* was clearly a principal focus of the bipartisan House Judiciary Task Force hearings in the last Congress. At the outset of the current Congress, House Judiciary Chair Bob Goodlatte (R-VA) indicated that the Judiciary Committee would act on bipartisan legislation based on the Task Force proceedings including *mens rea* and sentencing reform. Representative James Sensenbrenner, Jr., developed draft legislation to provide for a “default *mens rea*” standard for federal criminal provisions that are silent as to any required criminal intent element

²⁰ 16 U.S.C. § 1531 et seq.

²¹ 18 U.S.C. § 707.

²² *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. (2009).

²³ *Reining in Overcriminalization: Assessing the Problems, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. (2010).

²⁴ *H.R. 1823, the “Criminal Code Modernization and Simplification Act of 2011”: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. (2011).

²⁵ *Defining the Problem of Over-Criminalization and Over-Federalization: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113th Congress (2013).

²⁶ *Mens Rea: The Need for a Meaningful Intent Requirement in Federal Criminal Law: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113th Congress (2013).

²⁷ *Regulatory Crime: Solutions: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113th Congress (2013).

in the offense. It would provide that “knowing” is the required criminal intent for federal prosecutions based on statutes and regulations that are silent on intent.

The House default *mens rea* provision was included in a more comprehensive bill, H.R. 4002, the Criminal Code Improvement Act of 2015, introduced on November 16, 2015, by Reps. James Sensenbrenner, Jr. (R-WI), John Conyers, Jr. (R-MI), and four other members.

On November 18, the House Judiciary Committee approved H.R. 4002 by voice vote. At the same markup session the Committee approved a bipartisan sentencing reform bill, H.R. 3713, the Sentencing Reform Act of 2015, also by voice vote.

House Judiciary Chair Goodlatte has indicated consistently in public statements made since the Committee markup that he plans to combine the separate code revision and sentencing bills and likely add a prison reform bill in a package to be considered by the full House of Representatives as one bill.

Mens rea has not received comparable attention in the Senate. Negotiations that began in the last Congress relating to the proposed bipartisan sentencing reform legislation, the Smarter Sentencing Act, and the bipartisan “back-end” prison reform legislation, the CORRECTIONS Act, ended without a breakthrough in 2015. However, these negotiations were renewed in earnest under the leadership of Chairman Grassley and fellow Judiciary Committee members Durbin, Cornyn, Lee, Whitehouse, and Graham. This group of six, along with Ranking member Leahy and Booker, met over a period of months to explore and forge common ground on sentencing and corrections reforms, culminating in the introduction of the Senate criminal justice package bill, S. 2123, the Sentencing Reform and Corrections Act (SRCA) on October 1, 2015, and its approval in amended form by a 15-5 vote on October 26, 2015.

Senator Hatch has led the effort to bring forward a *mens rea* reform bill in the Senate and reportedly sought to include the subject in the bipartisan discussions that led to S. 2123, but there was not a sufficient consensus among the negotiators that common ground on *mens rea* could be reached in the negotiations. Notwithstanding, Senator Hatch expressed his view at the markup session for S. 2123 that *mens rea* reform would need to be part of any final Senate bill in order for it to enjoy broader support. His *mens rea* proposal, S. 2298, the Mens Rea Reform Act of 2015, was introduced on November 18, 2015 – the same day the House Judiciary Committee acted – by Senators Orrin Hatch (R-UT), Mike Lee (R-UT), Ted Cruz (R-TX), David Perdue (R-GA) and Rand Paul (R-KY).

The ABA Perspective

The ABA has shared the concerns many allied organizations have expressed with regard to the proliferation of criminal offenses at all levels of government that do not require proof of criminal intent. We closely followed the series of hearings in the House of Representatives and approved a policy resolution on strengthening *mens rea* requirements in August 2013. It urges federal, state and local governments to:

re-examine strict liability offenses to determine whether the absence of a *mens rea* element results in imposition of unwarranted punishment on defendants who lacked any culpable state of mind in performing acts that were not *malum in se*, to prescribe specific *mens rea* elements for all crimes other than strict liability offenses, and to assure that no strict liability crimes permit a convicted individual to be incarcerated.²⁸

Accordingly, the ABA believes that this Congress should act to strengthen the criminal intent requirements and enact a provision that would operate going forward to require, as both the House and Senate bills propose in principle, that new criminal statutes and regulations include provision(s) that indicate the criminal intent requirement for every offense or, if silent, be subject to a general default provision that would require a given standard of such intent for conviction.

However, for a number of reasons, we share the concerns of critics of the various *mens rea* reform proposals as regards the application of a new *mens rea* requirement to previously enacted laws. As reform proponents rightfully note, the growth in the past several decades in the number of federal criminal provisions is unprecedented and has been spread over most of 52 chapters in the federal code and in innumerable agency regulations in numbers that are highly speculative. No one knows all the laws in the universe of federal criminal provisions or can point to any source that can inform either a citizen or a legislative body of all specific federal criminal laws. For this reason, we do not know the impact that a new default intent requirement would have on existing law.

Critics of reform cite the potential impact that such a reform could have on public welfare laws protecting against environmental harm and food and drug safety laws that are now asserted to be largely reliant on strict liability. These laws, and an unknown number of similar laws, would be eviscerated, it is argued, by a newly imposed *mens rea* requirement, one that would render such laws toothless against wrongdoers. These are serious concerns and legitimate issues.

In addition, the application of a new *mens rea* requirement to an unknown body of existing law is likely to result in litigation to clarify or seek resolution of many if not most statutes and regulations changed by a new intent requirement. This prospect alone appears so significant that it suggests to us that this is not a constructive way forward, at least at this juncture.

For these reasons, we think the results of the Inventory of Federal Criminal Law authorized by section 9 of S. 2123, the Sentencing Reform and Corrections Act, ought to be sought first before retroactive application of a default *mens rea* standard. That section of the proposed Act would require the Attorney General to report back to the Senate and House Judiciary Committee within one year after enactment with an inventory of all federal criminal statutory and regulatory provisions, including the elements for each statutory offense, penalties, numbers of violations referred to DOJ, DOJ prosecutions per offense, convictions, information regarding the *mens rea* or lack thereof for each offense, and the number of prosecutions for criminal regulations and statutory offenses for which no *mens rea* element is required.

While the several hearings held by the House have clearly demonstrated that the proliferation of federal criminal provisions without a criminal intent requirement is a problem that Congress

²⁸ Am. Bar Ass'n, Resolution 113D (Aug. 2013), available at www.americanbar.org/content/dam/aba/uncategorized/GAO/2013_hod_annual_meeting_113D.pdf.

should address, the hearings did not undertake or examine specific federal laws or the body of specific federal criminal laws as contemplated by the inventory to be authorized by S. 2123. We think this examination should precede the application of a new *mens rea* requirement that would apply retroactively, for the reasons we have suggested.

Time is growing short for the full Senate to act on the much-needed compromise reforms addressing sentencing and prison programs/earned early release contained S. 2123. The reforms proposed in S. 2123 are modest steps forward, in our view, but are highly important as they responsibly address and will moderate policies that have resulted in extreme over-incarceration in the federal system. Those steps also represent the commendable bipartisan work of the leaders and members of this Committee to find common ground on difficult issues. The ABA would support a similar careful compromise on *mens rea*, if it can be found, but if not, would urge the Senate to pass S. 2123 soon.

If common ground can be found in the very near future on *mens rea*, perhaps it would be found in an agreement to take a modest step beyond the inventory provision in S. 2123 on *mens rea* to address prospective lawmaking. Such a step would provide that going forward, *mens rea* would be required be provided as a default criminal intent element for statutes that are silent on this matter. It would require each new individual criminal law as it is enacted to indicate affirmatively whenever no intent element is purposefully set forth and required and strict liability is to be imposed, or, if silent, be subject to a default criminal intent provision.

The default *mens rea* element in the federal code would therefore apply only when the enacting body ignores this requirement in a new law or regulation, one that is silent as to a *mens rea* requirement. Such a provision would not pose a significant barrier to Congress or an agency in choosing strict liability in any new law. Enactment of such a prospective *mens rea* requirement would, however, provide a new and salutary safeguard in the federal code against poor drafting and express a preference in federal polity that criminal intent is generally required and strict liability is the exception when imposing criminal penalties. This modest step would strengthen federal policy against the casual and overly-broad use of criminal sanctions.

Conclusion

The erosion of the *mens rea* element is a significant problem and directly affects the core principle of the American system of justice – that individuals should not be subjected to criminal prosecution and conviction unless they intentionally engage in inherently wrongful conduct or conduct that they know to be unlawful.

To protect individuals from punishment for making honest mistakes or engaging in conduct that was not sufficiently wrongful, the ABA urges Congress to re-examine strict liability offenses to determine whether the absence of a *mens rea* element results in imposition of unwarranted punishment on defendants who lacked any culpable state of mind in performing acts that were not *malum in se*; to prescribe specific *mens rea* elements for all crimes other than strict liability offenses; and to assure that no strict liability crimes permit a convicted individual to be incarcerated.

The purpose of the review of federal criminal provisions in our view should not be to bring about their elimination, but only to identify an appropriate mental element for such offenses. Identification of an appropriate mental element has the added benefit of drawing a bright line between acts that are appropriately punished as criminal and acts that need not be subject to criminal penalties.

Thank you for the opportunity to share the views of the ABA with the Committee. I would be pleased to answer any questions you may have.