



***MENS REA* REQUIREMENT: A CRITICAL CASUALTY OF OVERCRIMINALIZATION**

by
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Lawyers love Latin. Perhaps that is why they use the term *mens rea* to describe the simple concept that one should not be subject to punishment unless one has acted in a blameworthy way. Traditionally, the criminal law required a showing of *mens rea* (which is Latin for a guilty mind) for one to be convicted of an offense. One had to knowingly or at least recklessly act in a morally blameworthy way to be subject to criminal punishment.

If you ask a non-lawyer to identify a principle of law, he or she is likely to respond with “Ignorance of the law is no excuse.” For much of our history, this would have been a perfectly sensible response. Traditionally, the purpose of the criminal law was the punishment of those who wrongfully caused harm to others, not the regulation of interpersonal affairs. One does not need notice of what the law requires to know that one should not intentionally harm one’s fellow citizen. The *mens rea* requirement of the criminal law embodies the fundamental principle that punishment requires personal fault.

However, this principle also renders the criminal law a very poor mechanism for economic regulation. Regulation is not concerned with punishing wrongdoing, but with ordering human interaction so as to improve social welfare. To achieve this end, regulation must prohibit not merely conduct that is wrongful in itself (in lawyers’ Latin, *malum in se*), but any conduct that would thwart the overall regulatory scheme even when it is not wrongful in itself (*malum prohibitum*). When such regulatory offenses are embodied within the criminal law, the assumption that everyone is on notice of what the law requires—that ignorance of the law is no excuse—does not hold. Citizens may violate *malum prohibitum* laws without personal fault—without a guilty mind. To the extent that the *mens rea* requirement prohibits punishment in such cases, it undermines the efficacy of the regulatory scheme—something that suggests that regulation is best enforced administratively through civil sanctions.

Unfortunately, at an ever-accelerating rate over the course of the 20th and 21st centuries, federal and state governments have elected to employ the criminal law as a means of achieving regulatory ends. To do so, they have created a myriad of criminal offenses known as “public welfare offenses” that would be virtually unenforceable if the government had to prove that they were committed intentionally. As a result,

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Congress and the state legislatures did away with the *mens rea* requirement for such offenses, allowing citizens to be convicted of a crime even if their violation was merely inadvertent or was entirely innocent. Further, under what is called the “responsible corporate officer doctrine”, supervisors may be punished for the inadvertent or innocent violations of their subordinates. And, even in cases in which Congress and the state legislatures retained the requirement that the defendant act intentionally in committing a *malum prohibitum* regulatory offense, the principle that ignorance of the law is no excuse meant that criminal conviction required no showing that the defendant knew that his or her conduct was wrongful.

This means that citizens can be subjected to sometimes minor, but sometimes significant, punishment in the absence of any personal fault. Indeed, citizens have been imprisoned for conduct such as depositing landfill on their own property and importing lobsters in improper containers. It is telling that the Environmental Protection Agency has its own armed enforcement agents.

In addition to creating offenses that explicitly dispense with *mens rea*, Congress has further eroded the *mens rea* requirement through the creation of offenses, such as the federal fraud and money laundering offenses, that are so broad and vaguely-defined that citizens can never be sure when they have violated the law. For example, fraud traditionally required that one deprive another of his or her property by making a misrepresentation of material fact that the victim relied on in parting with the property. The federal fraud offenses, in contrast, criminalize not fraud, but the scheme or artifice to defraud – something that does not require an actual misrepresentation of fact or that the victim relied on the defendant’s statements or suffered any loss. These offenses criminalize virtually any conduct that involves deception or non-disclosure, and has been described by U.S. Court of Appeals for the Second Circuit as having a “virtually limitless” reach. Citizens have been prosecuted for claiming that the houses they were selling were good investments, for referring patients to perfectly adequate hospital facilities without revealing to the patients that they receive a referral fee for doing so, and, in Ken Lay’s case, for telling Enron employees that he was purchasing Enron stock, which was true, without revealing that he was also making forced sales of Enron stock in response to margin calls.

Although the charge against her was ultimately dismissed for lack of evidence, Martha Stewart was indicted and prosecuted for securities fraud. Her offense consisted of publicly declaring her innocence of insider trading, which in the opinion of prosecutors was a false statement designed to prop up the price of Martha Stewart Living Omnimedia stock. Regardless of what one thinks about Martha Stewart, how many people would know that doing an interview with Barbara Walters and asserting one’s innocence could constitute a federal offense?

By passing statutes that criminalize innocent or merely negligent behavior or that are so broadly defined that citizens cannot be sure when they are violating the law, the federal and state governments have significantly eroded the traditional *mens rea* requirement for criminal conviction. This is a development to be much regretted. There are many things a liberal government may do to improve social welfare. Government may properly ask individual citizens to make significant sacrifices for the common good. However, there are also many things a liberal government may not do. Visiting the opprobrium and stigma of criminal punishment on those who have not behaved in a blameworthy way is among them. Such official scapegoating is inconsistent with a liberal legal regime. A just legal system does not permit punishment without fault. Hence, justice demands the reinvigoration and preservation of the *mens rea* requirement for criminal punishment.