



**Policy Brief**  
**May 2016**

## **Accidental ‘Criminals’**

### **Why New Mexico Needs *Mens Rea* Reform**

**By D. Dowd Muska**

#### **Introduction**

Liberals, conservatives, and libertarians agree: America has an overcriminalization problem.

Defined by legal scholar Vikrant P. Reddy as the prosecution of “actions that historically would not have been considered crimes,”<sup>1</sup> overcriminalization has profound impacts on the nation’s fiscal policy, social conditions, and labor force. Across the ideological spectrum, a consensus has emerged behind the need to “use the limited resources in both the law enforcement and corrections systems to maximize further reductions in the crime rate for every taxpayer dollar spent.”<sup>2</sup>

One tool that promises to combat overcriminalization is the codification of default rules for intent within criminal law. Enacted by legislatures in Ohio and Michigan, under consideration in other states, and moving forward at the federal level, the reform would make an important contribution to fighting overcriminalization in New Mexico.

#### **A Common Understanding**

Under the common law, which migrated across the Atlantic from the United Kingdom during the colonial era, a crime takes place when a *mens rea* (guilty mind) commits an *actus reus* (guilty act). As described by Roscoe Pound, the dean of Harvard Law School from 1916 to 1936: “Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong.”<sup>3</sup>

University of New Mexico School of Law Professor Leo M. Romero concurs, writing that “moral blameworthiness is a deeply rooted precondition to the imposition of penal sanctions.”<sup>4</sup>

According to The Heritage Foundation’s Paul Rosenzweig:

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.<sup>5</sup>

As late as 1952, the U.S. Supreme Court ruled, in *Morrisette v. United States*, that a man who had been successfully prosecuted for salvaging abandoned bomb casings from an Air Force range “could not be held liable unless the jury was afforded an opportunity to evaluate his intent.”<sup>4</sup> Writing for the majority, Justice Robert Jackson averred that

the 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.<sup>6</sup>

Addressing the specifics of the case, Jackson declared that the government

asks us by a feat of construction radically to change the weights and balances in the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution’s path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative.<sup>7</sup>

### **The Shift to Strict Liability**

The majority of crimes are classified as having either general or specific intent. The former is a desire “to perform some act, but without a wish for the consequences that result from that act.” The latter is “[a]ctual intent to perform some act, along with a wish for the consequences that result from that act.”<sup>8</sup> Murder is an example of general intent, and burglary, with the intent to rob a home or business, is an example of specific intent.

But in the late 19<sup>th</sup> century, industrialization prompted the creation of regulatory authorities at the federal, state, and local levels. Over the decades, and continuing today, a myriad of rules came to govern “the environment around us, the food we eat, the drugs we take, health, transportation, and housing, among many others.”<sup>9</sup>

Broadly speaking,

laws imposing sanctions that enforce and support administrative schemes are referred to as “regulatory crimes.” These laws are typically dispersed throughout codes instead of being grouped into the titles dealing with criminal law, and they often supplement civil remedies without giving guidance as to when civil or criminal enforcement would be appropriate.<sup>10</sup>

The shift in the “character of of criminal offenses” raises a key concern:

For centuries, *malum in se* conduct -- actions that are inherently wrong -- comprised the majority of criminal offenses. Crimes such as murder, rape, burglary, arson, and theft fall into this category. An individual who commits such a crime cannot reasonably claim ignorance of the law as a defense because everyone knows these actions are wrong.

On the other hand, behavior that is illegal only because a statute makes it so -- *malum prohibitum* conduct -- is becoming an increasing percentage of all criminal offenses. Paperwork violations, jaywalking, and modifying a building without a license are examples of this type of conduct. The abundance and growth of *malum prohibitum* offenses has destroyed the link between which actions constitute a crime and which are inherently wrong.<sup>11</sup>

Regulatory crimes, said to be made against “public welfare,” are categorized as strict-liability offenses, in which “a person who commits a prohibited act can be held criminally liable simply for committing that act even if the person did not mean to break any laws or was aware a law was being broken.”<sup>12</sup>

Furthermore, the “principle of correspondence” holds that offenders must be culpable for *each* element of a crime. The concept

has been defended as essential to respect for autonomy; it ensures that one is punished only for choices one has made, not for events one did not will or anticipate. It reflects basic values of classical liberalism and rejects the state’s power to use individuals for public ends, even for a laudable goal like harm protection. State codes that fail to abide by the correspondence principle implicitly assert a different justification for criminal law, for state power over citizens’ liberty and individual autonomy.<sup>13</sup>

Many have come to believe that when *mens rea* is lacking for any or all elements of an offense, strict liability turns “otherwise good people who may have made a good faith mistake” into “convicted criminals.”<sup>14</sup>

One of the best examples of an egregious strict-liability prosecution at the federal level occurred in the Land of Enchantment. In 1996, Bobby Unser, a three-time winner of the

Indianapolis 500, went snowmobiling with a friend near Chama. A flash snowstorm blew in, and whiteout conditions caused Unser and his companion to become trapped. Severely ill and exhausted, after two days and two nights, the men found a barn with a phone, and called for help. But once Unser informed the U.S. Forest Service of the incident, and he was prosecuted for entering a “wilderness” area -- even though there was no proof that such a violation took place.<sup>15</sup> In 1997, he was convicted, and fined \$75 by U.S. District Judge Lewis Babcock.<sup>16</sup> The conviction was appealed, but ultimately Unser’s prosecution was left to stand after the U.S. Supreme Court refused to hear his case.

## The Reform Movement

Boston University School of Law Professor of Law and M.L. Sykes Scholar Kenneth W. Simmons expressed the worries of a broad spectrum of the legal community when he wrote that

increasing criminalization of conduct formerly governed only by private law and civil regulation has made it increasingly unfair to expect all persons to be aware of the criminal law, at their peril. A few courts have responded by rejecting strict criminal liability for mistake of law in at least some categories of cases. So it is time to seriously consider providing a more general excuse to all defendants who are faultlessly ignorant or mistaken with respect to the criminal law.<sup>17</sup>

Reformers at the state level have come to embrace a default *mens rea* provision as a tool to protect citizens from inappropriate strict-liability prosecution. In 2014, Ohio’s legislature passed, and Governor John Kasich signed, SB 361. The bill codified a significant clarification:

When the section language defining an element of an offense that is related to knowledge or intent or to which *mens rea* could fairly be applied neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense the element of the offense is established only if a person acts recklessly.<sup>18</sup>

SB 361 passed unanimously, and took effect on March 23, 2015.

More recently, both chamber of Michigan’s legislature unanimously passed House Bill 4713. The legislation

addresses criminal statutes that fail to require a culpable mental state for the conviction of the crime. The culpable state of mind ... is often indicated in statute as “intentionally,” “knowingly,” or “recklessly.” These are the mental states of the accused that the prosecution needs to demonstrate in order to convict.<sup>19</sup>

In both Ohio and Michigan, activists and lobbyists on the right and left supported *mens rea* reform. House Bill 4713 was endorsed by the National Federation of Independent Business, the

U.S. Justice Action Network, the ACLU of Michigan, the Criminal Defense Association of Michigan, and the Mackinac Center for Public Policy, a free-market think tank.<sup>20</sup>

### **The Need in New Mexico**

New Mexico has one of the worst violent-crime rates in the nation.<sup>21</sup> In the Albuquerque metro region, a “cadre of hard-core violent criminals has become a common theme,” with “brazen armed robberies to carjackings to the cold-blooded shooting of police officers.”<sup>22</sup>

It’s clear, particularly in an era of constrained budgets, that New Mexico needs to prioritize its law-enforcement resources. A default *mens rea* law, similar to the ones passed in Ohio and Michigan, is one tool to foster such prioritization.

In 2013, the state’s high court took a small step toward *mens rea* reform, as it relates to enforcement of temporary orders of protection issued under New Mexico’s Family Violence Protection Act. Aaron Ramos was prosecuted for being near his ex-girlfriend at a bar both would frequent “on Thursday nights to teach students how to dance in public with a live band.”

The district judge denied Ramos’s request to instruct the jury that “he must have ‘knowingly violated the order of protection’ in order ... to find him guilty.” Convicted and sentenced to 364 days of incarceration, Ramos took his case to the Court of Appeals, but lost. When scrutinized by the state’s high court, a majority of justices noted that the law Ramos was found guilty of violating “does not specify any particular mental state or *mens rea* that a restrained party must demonstrate to be found guilty of this misdemeanor.” The court ordered a new trial for Ramos, writing that “our Legislature could only have intended to make the crime a ‘knowing’ violation”:

The need for a “knowing” violation is perhaps best illustrated by a commonsense example. The restraining order in this case prohibited Defendant from being in a public place within 25 yards of the protected party. Without knowledge being part of the crime, then a violation could occur, however innocently, at any public place such as a shopping center or an entertainment venue, without one party even being aware of the others presence. The general intent instruction given in this case requires only an intentional act -- e.g., the act of going to a store -- even though he may not know that his act is unlawful. Prosecution for that kind of a violation would not serve the deterrent purpose of the Family Violence Protection Act.<sup>23</sup>

But *State Of New Mexico v. Aaron A. Ramos* did nothing to address *mens rea* issues with other New Mexico statutes and regulations. Many opportunities remain for “crimes” to occur absent criminal intent. Examples include:

- It is illegal to “hunt, take, capture, kill or attempt to take, capture or kill, at any time or in any manner, any game animal, game bird or game fish in the state,” except “as permitted by regulations adopted by the state game commission or as otherwise allowed by law.”<sup>24</sup> The New

Mexico Department of Game and Fish's rule book for fishing is 52 pages long.<sup>25</sup> The rule book for hunting upland and big game is 144 pages long.<sup>26</sup>

- Under the state's Weights and Measures law, the Board of Regents of New Mexico State University establishes regulations for fuelwood.<sup>27</sup> In 2014, the board decreed that it

Shall be advertised, offered for sale, and sold only by the cord or fractional part of a cord, except it may be sold by weight if the seller declares the price per unit of weight and the equivalent price per cord. The provisions of this method of sale shall not apply to fuelwood sold in packaged form in bundles of less than one hundred (100) pounds.<sup>28</sup>

Thus, sales of fuelwood in "unspecified quantities, such as 'load' or a 'truck load,'" which commonly occur throughout New Mexico, are prohibited.<sup>29</sup>

- The state's "Night Sky Protection Act" mandates that all "outdoor lighting fixtures ... shall be shielded, except incandescent fixtures of one hundred fifty watts or less and other sources of seventy watts or less."<sup>27</sup> First-time offenders "may be issued a warning," with a "second offense or offense that continues for thirty days from the date of the warning" fined \$25 "minus the replacement cost for each offending fixture."<sup>30</sup>

## Conclusion

New Mexico needs a default *mens rea* standard, in order to codify "the classic liberal idea that moral culpability is, and criminal liability should be, based on a *conscious choice to do wrong*."<sup>31</sup> (Emphasis in original.) In addition to protecting its citizenry from unwarranted prosecution of ignorance and/or mistakes, the reform would offer clarity -- and promote efficiency -- in New Mexico law enforcement.

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## Notes

1. Vikrant P. Reddy, prepared testimony before the Ohio Senate, December 2, 2014.
2. "The Conservative Case for Reform," Right on Crime (website), accessed December 11, 2015.
3. Quoted in *Morissette v. United States*, 342 U.S. 246, 250 n. 4 (1952).
4. Leo M. Romero, "New Mexico *Mens Rea* Doctrines and the Uniform Criminal Jury Instructions: The Need for Reform," *New Mexico Law Review*, Summer 1978.

5. Michael J. Reitz, J.D., "Criminal Minds: Defining Culpability in Michigan Criminal Law," Mackinac Center for Public Policy and Texas Public Policy Foundation, December 10, 2013.
6. *Morissette v. United States*, 342 U.S. 246, 250 n. 4 (1952).
7. Ibid.
8. Legal Information Institute (website), Cornell University Law School, accessed December 29, 2015.
9. John G. Malcolm, "The Pressing Need for *Mens Rea* Reform," Legal Memorandum No. 160, The Heritage Foundation, September 1, 2015.
10. Michael Cottone, "Rethinking Presumed Knowledge of the Law in the Regulatory Age," *Tennessee Law Review*, Vol. 82:137, Winter 2015.
11. "Criminalizing America: How Big Government Makes a Criminal of Every American," American Legislative Exchange Council, 2013.
12. "Establish *Mens Rea* as Default Standard in Criminal Statutes," Legislative Analysis, House Fiscal Agency, Michigan Legislature, September 30, 2015.
13. Darryl K. Brown, "Criminal Law Reform and the Persistence of Strict Liability," *Duke Law Journal*, Vol. 62:285, 2012.
14. "Establish *Mens Rea* as Default Standard in Criminal Statutes," Legislative Analysis, House Fiscal Agency, Michigan Legislature, September 30, 2015.
15. Bobby Unser, testimony before the Subcommittee on Commercial and Administrative Law, Judiciary Committee of the U.S. House of Representatives, May 7, 1998.
16. Jack Thompson, "Bobby Unser Convicted On Wilderness Law," *The Chicago Tribune*, June 13, 1997
17. Kenneth W. Simmons, "Should the Model Penal Code's *Mens Rea* Provisions Be Amended?" *Ohio State Journal of Criminal Law*, Vol 1:179, 2003.
18. Amended Senate Bill Number 361, Ohio General Assembly, 130th General Assembly.
19. "Establish *Mens Rea* as Default Standard in Criminal Statutes," Legislative Analysis, House Fiscal Agency, Michigan Legislature, September 30, 2015.
20. Ibid.

21. Ryan Boetel , “Report: NM ranks 2nd in nation for violent crime,” *Albuquerque Journal*, January 7, 2015.
22. Mike Gallagher , “Turnstile thugs terrorize Albuquerque,” *Albuquerque Journal*, November 1, 2015.
23. *State Of New Mexico v. Aaron A. Ramos*, 2013-NMSC-031.
24. N.M. Stat. § 17-2-7.
25. “2015-16 Fishing Rules & Info: Bass, Catfish, Crappie, Perch, Pike, Salmon, Sunfish, Tiger Muskie, Trout, Walleye,” New Mexico Department of Game and Fish.
26. “2015-16 Hunting Rules & Info: Rules and Information for Upland and Big Game,” New Mexico Department of Game and Fish.
27. N.M. Stat. § 57-17-1
28. New Mexico Administrative Code 16.4, July 1, 1997.
29. Memo to Fuelwood Dealers, New Mexico Department of Agriculture, Division of Standards and Consumer Services, July 24, 2014.
30. N.M. Stat. § 74-12-4.
31. N.M. Stat. § 74-12-10.

## AN ACT

**To clarify when strict criminal liability is imposed or a degree of culpability is required for the commission of an offense, to modify the concept of acting recklessly, and to require that future acts creating criminal offenses specify the requisite degree of culpability.**

***Be it enacted by the Legislature of New Mexico:***

**SECTION 1.** (A) Every act enacted on or after the effective date of this section that creates a new criminal offense shall specify the degree of mental culpability required for commission of the offense. A criminal offense for which no degree of mental culpability is specified that is enacted in an act in violation of this division is void.

(B) Nothing in this statute shall be construed as overruling previous judicial interpretations of existing criminal statutes.

(A) Except as provided in division (B) of this section, a person is not guilty of an offense unless both of the following apply:

(1) The person's liability is based on conduct that includes either a voluntary act, or an omission to perform an act or duty that the person is capable of performing;

(2) The person has the requisite degree of culpability for each element as to which a culpable mental state is specified by the language defining the offense.

(B) When the language defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense. The fact that one division of a section plainly indicates a purpose to impose strict liability for an offense defined in that division does not by itself plainly indicate a purpose to impose strict criminal liability for an offense defined in other divisions of the section that do not specify a degree of culpability.

(C)(1) When language defining an element of an offense that is related to knowledge or intent or to which mens rea could fairly be applied neither specifies culpability nor plainly indicates a purpose to impose strict liability, the element of the offense is established only if a person acts recklessly.

(2) Division (C)(1) of this section does not apply to offenses defined in Title XLV of the Revised Code.

(3) Division (C)(1) of this section does not relieve the prosecution of the burden of proving the culpable mental state required by any definition incorporated into the offense.

(E) As used in this section:

(1) Possession is a voluntary act if the possessor knowingly procured or received the thing possessed, or was aware of the possessor's control of the thing possessed for a sufficient time to have ended possession.

(2) Reflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actor's volition, are involuntary acts.

(3) "Culpability" means purpose, knowledge, recklessness, or negligence, as defined in section 2901.22 of the Revised Code.

**Sec. 2** (A) A person acts purposely when it is the person's specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is the offender's specific intention to engage in conduct of that nature.

(B) A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.

(C) A person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that such circumstances are likely to exist.

(D) A person acts negligently when, because of a substantial lapse from due care, the person fails to perceive or avoid a risk that the person's conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, the person fails to perceive or avoid a risk that such circumstances may exist.

(E) When the section defining an offense provides that negligence suffices to establish an element thereof, then recklessness, knowledge, or purpose is also sufficient culpability for such element. When recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element. When knowledge suffices

to establish an element of an offense, then purpose is also sufficient culpability for such element.

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