LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

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Swift and Sweeping

A LEGAL ANALYSIS OF THE IMPACT OF THE CRIMINAL CODE IMPROVEMENT ACT OF 2015 AND THE MENS REA REFORM ACT OF 2015

About the Lawyers' Committee for Civil Rights Under Law

The principal mission of the Lawyers' Committee for Civil Rights Under Law is to secure equal justice for all through the rule of law, targeting in particular the inequities confronting African Americans and other racial and ethnic minorities. The Lawyers' Committee is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combatting racial discrimination and the resulting inequality of opportunity – work that continues to be vital today.

Confronting the nation today are debilitating and subtle forms of racial discrimination; the emergence of new, racially-targeted predatory practices; and the continuing impact of historical racial discrimination based on de jure segregation and de facto inequity. The Lawyers' Committee seeks to address this evolving landscape and secure equal opportunity for disadvantaged and excluded minorities by marshaling the leadership, skills, and pro bono resources of the private bar. While the Lawyers' Committee's primary focus is to represent the interests of African Americans, the Lawyers' Committee also represents the interests of other victims of discrimination where doing so can help further the organization's mission.

The Lawyers' Committee implements its mission and objectives through collaborative, multi-dimensional approaches to litigation, public policy advocacy, public education, transactional representation, and other forms of service in the cause of civil rights. The organization operates six projects, namely, Educational Opportunities, Employment, Fair Housing and Community Development, Pro Bono and Legal Mobilization, Public Policy, and Voting Rights. The Criminal Justice Initiative operates as part of the Legal Mobilization Project.

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I. Introduction

Late in 2015, a pair of bills were introduced in the Senate and the House of Representatives that would establish a "default mens rea" for all federal criminal offenses: the Mens Rea Reform Act of 2015, S. 2298, and the Criminal Code Improvement Act of 2015, H.R. 4002. While these bills have propelled mens rea reform into the spotlight of the national conversation about criminal justice reform, they have also generated considerable uncertainty regarding the extent of the bills' potential impact. The Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee), in partnership with a leading law firm, conducted an independent analysis of both bills.

This analysis reveals that the bills contain ambiguous terms and provisions that make it difficult to ascertain with any certainty their likely interpretation by government officials and courts. Their greatest likely impact will be to make it more difficult to enforce laws that promote public health and safety, especially against corporations who violate federal laws, as well as to prosecute more traditional criminal offenses such as child sexual exploitation and terrorism. Moreover, the bills are not likely to have an appreciable effect on "over-criminalization" or "mass incarceration" because their provisions will not likely impact drug and immigration offenses, which comprise the vast majority of federal prosecutions.

Mens rea requirements lie at the heart of criminal liability and reform to these requirements merit rigorous debate. However, the bills as introduced would fundamentally alter the required mens rea across all federal statutes and regulations, thereby upsetting the carefully negotiated balances that have been struck by Congress in passing these and other laws throughout the past several decades. To do so without a full understanding of the force and consequences of the law, and to do so without precise language which makes the intent of Congress clear, would be reckless and irresponsible in the context of federal public safety protections. Accordingly, the Lawyers Committee opposes the passage of both the Mens Rea Reform Act of 2015, S. 2298, and the Criminal Code Improvement Act of 2015, H.R. 4002.

II. Background

a. Mens Rea in American Law

Mens rea, a Latin term meaning *guilty mind*, refers to the state of mind that an individual must possess in order to commit a crime. The various forms of mens rea, called "modes of culpability," may be arranged along a spectrum defined by how certain the individual was that the results of her conduct would occur. For example, an individual may act *purposefully*, meaning that she acts with the purpose or intent for the criminal action to occur; or she may act *knowingly*,

meaning that she is practically certain that the criminal action will occur even if she did not directly intend it. Crimes that do not have a mens rea requirement are referred to as *strict liability* offenses. Crucially, mens rea does not refer to whether the individual knew her conduct was *illegal*; knowledge of the illegality of one's actions (often called "mistake of law") does not constitute a defense to criminal liability and is generally irrelevant in American law.

Mens rea applies to each element of a crime rather than to the crime as a whole. For example, the elements of the crime of larceny are (1) the unlawful taking and carrying away of (2) someone else's property (3) without the consent of the owner (4) with the intent to deprive the owner of the property permanently. Implicit in each of these elements is at least a *knowing* mens rea, meaning a prosecutor could not charge someone with larceny for accidentally taking the wrong bag from baggage claim at the airport; although she intentionally took and carried away the bag, she did not know that it was someone else's property.

The concept of mens rea holds a venerable place in American law, but it is far from a universal rule.[1] The mens rea for each crime is the result of a delicate balancing of the interests of society and the rights of the accused. Accordingly, the requisite mens rea frequently varies among crimes and even among the elements of a single crime. The difference between the various degrees of murder, for example, often turns on whether the defendant intended the victim to die. In the example of larceny cited above, the mens rea for the second element is *knowing* while the mens rea for the fourth is *purposeful*.

b. Crimes Without Mens Rea

A crime for which there is no required mens rea is not a new concept. Referred to as a "strict liability," these crimes hold actors responsible for their actions without any showing of a criminal mind as to one or more elements of the crime. One classic example of this type of crime is statutory rape, which holds individuals liable for sexual intercourse with a minor, regardless of whether the individual knew the minor was under the legal age of consent.

In one of the seminal cases on strict liability crimes, *United States v. Morissette*, the Supreme Court upheld the prosecution of a man convicted for converting government property, despite the fact that he thought the property was abandoned and he did not act with intent to steal. The Supreme Court explained that the rise of the Industrial Revolution and the increasingly dangerous workplace conditions called for higher precautions by employers; the congested and crowding of cities required new health and welfare regulations; and the wide distribution of goods, food, drink, drugs and securities meant that those controlling the means of production and the

[1] *See generally Morissette v. United States*, 342 U.S. 246, 256–57 (1952).

ability to ensure quality and safety needed to be held to higher legal standards.[2] Congress passed some of these laws without a required showing of intent, the violation of which may not directly cause injury to person or property, "but merely create the danger or probability of it."[3]

A host of federal laws passed over the past century have provisions which fall into this category: the Food, Drug, and Cosmetic Act of 1938; the Internal Revenue Code; the Resource Conservation and Recovery Act; the Comprehensive Environmental Response, Compensation, and Liability Act of 1980; and the Dodd Frank Act, to name just a few.

Amending any of these laws to require a higher mens rea for a given criminal penalty is not objectionable in itself. However, passing a law which alters the required mens rea across all federal statutes and regulations would fundamentally alter the balances that have been struck by Congress in passing these and other laws throughout the past several decades. To do so without a full understanding of the force and consequences of the law, and to do so without precise language which makes the intent of Congress clear, would be reckless, irresponsible and disruptive to the enforcement of federal public safety protections.

III. Pending Mens Rea Reform Legislation

a) The Criminal Code Improvement Act of 2015, H.R. 4002

Subchapter C of the Criminal Code Improvement Act of 2015 imposes a default state of mind proof requirement in federal criminal cases "[i]f no state of mind is required by law for a Federal criminal offense." H.R. 4002, 114th Cong. sec. 2, § 11 (2015). In such a circumstance, the House Bill provides that (1) "the state of mind the Government must prove is knowing" and (2) "if the offense consists of conduct that a reasonable person in the same or similar circumstances would not know, or would not have reason to believe, was unlawful, the Government must prove that the defendant knew, or had reason to believe, the conduct was unlawful."

b) The Mens Rea Reform Act of 2015, S. 2298

The Mens Rea Form Act of 2015 imposes a state of mind element for any "covered offense," which generally includes any offense specified by an act of Congress, a regulation, or any law of any state or foreign government incorporated by reference into an act of Congress, in each case that is punishable by imprisonment, a maximum criminal fine of at least $2,500, or both.[4]

[2] *Id*. at 252-255.
[3] *Id*. at 256.
[4] S. 2298, 114th Cong. sec. 2, § 28(a)(1)(A).

Covered offenses do not include certain military crimes set forth in Chapters 47 and 47A of Title 10 of the U.S. Code, certain crimes committed in locations outside the jurisdiction of the United States incorporated by Section 13(a) of Title 18 of the U.S. Code, or "any offense that involves conduct which a reasonable person would know inherently poses an imminent and substantial danger to life or limb."[5]

The Senate Bill provides the following default rule:

> [A] covered offense shall be construed to require the Government to prove beyond a reasonable doubt that the defendant acted—(1) with the state of mind specified in the text of the covered offense for each element for which the text specifies a state of mind; and (2) willfully, with respect to any element for which the text of the covered offense does not specify a state of mind.[6]

Willfully means "that the person acted with knowledge that the person's conduct was unlawful."[7] The Senate Bill clarifies that if the text of a criminal statute "specifies the state of mind required for commission of the covered offense without specifying the elements of the covered offense to which the state of mind applies, the state of mind specified shall apply to all elements of the covered offense, unless a contrary purpose plainly appears."[8]

In addition, the Senate Bill contains exceptions to the default rule for the following: (1) any element for which the statutory text "makes clear that Congress affirmatively intended not to require the Government to prove any state of mind with respect to such element"; (2) any element that establishes subject matter or venue; and (3) any element to the extent that applying the foregoing rules "would lessen the degree of mental culpability that the Government is required to prove with respect to that element under—(i) precedent of the Supreme Court of the United States; or (ii) any other provision of this title, any other Act of Congress, or any regulation."[9]

IV. Ambiguous Terms

Both the Mens Rea Reform Act and the Criminal Code Improvement Act contain numerous ambiguous terms which would make it extremely difficult for enforcement officers, such as federal prosecutors, and courts to determine the legislation's purpose, scope, and application to various dissimilar federal code provisions. If Congress passes either iteration of

[5] *Id.* § 28(a)(1)(B).
[6] *Id.* § 28(b).
[7] *Id.* § 28(a)(4).
[8] *Id.* § 28(c).
[9] *Id.* § 28(d)(1).

mens rea reform into law as they are proposed now, it would introduce uncertainty and confusion into the federal criminal code that would undoubtedly open the door to a plethora of legal challenges.

a) Criminal Code Improvement Act of 2015, H.R. 4002

H.R. 4002 imposes a mens rea requirement of "knowing" when "no state of mind is required by law." It is unclear by the wording of this phrase whether the "knowing" requirement applies only to an offense when *none* of its elements have mens rea requirement or whether it would also apply to each element within an offense for which a state of mind is not enumerated, even when other elements of that offense already have mens rea requirements.

Moreover, the legislation does not define "required by law." As any lawyer will attest, the "law" is not confined to the statutory text but is instead supplemented by court interpretation and precedent. The phrase "required by law" does not specify whether court precedent interpreting a crime as containing an implied mens rea requirement, as many federal statutes have, satisfies the "required by law" element or whether the mens rea must be within the text of the statute itself.

These ambiguities in the bill's text are not trivial; they define the scope and impact of a fundamental change to criminal liability in an undetermined number of provisions of federal code. In its narrowest reading, the phrase applies only to statutory – not regulatory – offenses for which there is no mens rea requirement listed as to any element, nor read in by any federal court. In its broadest reading, the bill will impose a "knowing" intent requirement on every element of every federal criminal statute and regulation, and without regard to a court's implied mens rea interpretation. Without further clarifying language, the legislation, if passed into law, would require federal courts to resolve the ambiguities in the statute. The gap between these two extremes is unacceptably wide for an omnibus bill which could affect something as important as criminal law enforcement.

b) Mens Rea Reform Act, S. 2298

S. 2298 generally provides more clarity than its House counterpart, but it also contains a number of ambiguous provisions that raise concerns regarding its applicability and impact. The bill would impose a mens rea requirement of "knowing" on "any element for which the text of the covered offense does not specify a state of mind," placing the Senate bill closer to the broadest application end of the spectrum. The bill also clarifies that the "knowing" requirement will not apply to an element of an offense when its application "would lessen the degree of mental culpability that the Government is required to prove with respect to that element under . . .

precedent of the Supreme Court of the United States." Read together, these provisions dictate that the bill will override all district and circuit court precedent regarding mens rea requirements.

S. 2298 also contains a carve-out provision for offenses involving "conduct which a reasonable person would know inherently poses an imminent and substantial danger to life or limb." The bill contains no definitions, guidance, or limiting principle regarding what such conduct might entail, which is concerning given that the Supreme Court struck down a similar phrase as unconstitutionally vague just last year in *Johnson v. United States*.[10]

V. Fundamental and Far-Reaching Consequences

The ambiguous terms in both S. 2298 and H.R. 4002 and the lack of clear guidance regarding the applicability of court precedent make it difficult to state with certainty what the consequences of the bills will be. Nevertheless, our independent legal analysis revealed a number of crimes that will likely be more difficult to prosecute if either bill becomes law.

a) Crimes Committed by Corporations

The concept of mens rea is difficult to apply in a corporate setting. Because corporate personhood is a legal fiction, it is difficult to pinpoint what the corporation "knew" or "intended" for the purposes of establishing criminal liability. Corporate offenses are thus quintessential examples of crimes in which policymakers must tailor mens rea requirements to ensure that public safety is adequately safeguarded. Moreover, corporate offenses often involve the risk of harm to a substantial number of people via instrumentalities that are firmly within the corporation's control. In such cases, Congress may criminalize risky conduct with no mens rea requirement in order to raise the stakes for corporations to ensure they comply with the law.[11]

b) Public Health and Safety and Environmental Offenses

Both S. 2298 and H.R. 4002 would frustrate prosecution of violations of many public health and safety and environmental statutes, such as the Federal Food, Drug, and Cosmetic Act (FDCA). In this context, even the narrowest application of the legislation would be to the detriment of public safety in the development, branding, and distribution of pharmaceutical drugs. For example, in 2013, the United States prosecuted Janssen, a subsidiary of Johnson & Johnson, for

[10] 576 U.S. ____ (June 26, 2015) (considering the Armed Career Criminals Act, in which "violent felony" was defined as one that has an "element" of using physical force, or "is" burglary, arson, or extortion, or "involves the use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another"*)(emphasis added).
[11] *Morissette*, 342 U.S. at 256.

introducing misbranded drugs into interstate commerce in violation FDCA. Although one of the drugs, called Risperdal, was associated with serious and fatal side effects in the elderly, Janssen heavily marketed Risperdal to elderly patients for the treatment of dementia. Janssen pled guilty to a misdemeanor violation of the statute, which contains no mens rea requirement and holds corporations strictly liable for distribution of misbranded drugs, and agreed to pay a $400 million fine. If either version of the bill were in effect at the time of this prosecution, the Government would have had to prove Janssen *knew* that it was introducing misbranded drugs into interstate commerce, evidence of which would have resulted in a *felony* prosecution under the statute.[12] The effect of the legislation in this circumstance would be to eviscerate liability for a corporation when it recklessly or negligently introduces a misbranded drugs into the market, leaving those harmed by the misbranded drugs with no vindication under our federal criminal laws.

The mens rea reform legislation pending in Congress would also impede the federal government's ability to ensure the cleanliness and safety of food distributed throughout the United States. By way of example, Eric Jensen and Ryan Jensen operated a farm in Granada, Colorado where they grew, picked, packaged, sold and shipped cantaloupe.[13] In May 2011, the Jensen brothers installed a new cleaning system that did not function properly. Investigation by the U.S. Food and Drug Administration ("FDA") and the Center for Disease Control ("CDC") determined that the defendants failed to adequately clean cantaloupe and maintained the fruit in unsanitary conditions, which allegedly resulted in the distribution of at least six shipments of cantaloupe contaminated with a harmful bacteria. CDC tracked the outbreak-associated illness and determined that people living in 28 states consumed contaminated cantaloupe, resulting in at least 33 deaths and 147 hospitalizations. The Jensen brothers pled guilty to criminal misdemeanor charges under 21 U.S.C 331. Similarly to the situation explained above, if prosecuted after passage of the mens rea reform bills, federal prosecutors would have to prove that the Jensen brothers *knew* they were introducing adulterated food into interstate commerce. Negligent, grossly negligent, reckless, and repeated introduction of contaminated food would go without any penalty under federal law.

c) Child Sexual Exploitation Offenses

Both S. 2298 and H.R. 4002 are likely to make it more difficult to prosecute offenses that involve the sexual exploitation of children, including child pornography. Federal courts have consistently held that the statutes that criminalize child pornography and child prostitution contain no mens rea requirement regarding the age of the victim; that is, the prosecution is not required to prove that the defendant knew that the victim was a minor at the time the crime occurred. In addition, sentence ranges for conviction of many of these offenses varies depending on the age of the child. Omission of a mens rea requirement for such crimes is based on the idea that these

[12] 21 U.S.C. § 331.
[13] *See United States of America v. Eric Jenson, Ryan Jenson*, D. Colo., Oct. 22, 2013. *Available at* http://www.justice.gov/sites/default/files/usao-co/legacy/2013/10/23/US%20v%20Jensen%20COP.pdf

offenses are so harmful to society that the government wants to deter their commission by putting the onus on the adult actor to determine the age of the child. Because S. 2298 and H.R. 4002 would impose a "knowing" mens rea to every element of every federal criminal offense, including the age of the child victim, this longstanding protection for children from sexual exploitation would be read out of the law.

VI. Conclusion

The Criminal Code Improvement Act and the Mens Rea Reform Act raise important questions of criminal liability and the ability of the federal government to hold individuals and corporations accountable with the use of criminal penalties. It is no accident that the issue arises in a time when the nation is reexamining the unparalleled expansion of the criminal legal system into the lives of Americans, not only through the imposition of criminal liability itself, but in the ways cities, counties, states and the federal government punish through the use of imprisonment, financial penalties, forms of surveillance, and other restraints.

Outweighing these concerns, however, is the reality of the likely impact of these bills as currently introduced. Each bill contains ambiguous provisions that make the precise reach of the bill impossible to ascertain, but with the certainty that they fundamentally alter the balance struck by Congress in passing several important federal laws as interpreted by federal courts. Even in their narrowest reading, however, their identifiable probable effects on the ability to protect the public from environmental, health, and public safety offenses animate the potential sweep of these pieces of legislation. At a minimum, the questions raised by these pieces of legislation call for further examination and a careful consideration of the means by which to effectuate mens rea reform. In the context of greater criminal justice reform, mens rea reform is out of place: as proposed, these bills will not have any appreciable effect on mass incarceration.