

ESTABLISH *MENS REA* AS DEFAULT STANDARD IN CRIMINAL STATUTES

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House Bill 4713 (Substitute H-1 as reported by committee)
Sponsor: Rep. Edward McBroom
Committee: Oversight and Ethics
Complete to 9-30-15

Analysis available at
<http://www.legislature.mi.gov>

BRIEF SUMMARY: The bill would provide protection to a person accused of a crime for which no *mens rea* standard is currently provided by establishing a default *mens rea* standard and requiring *mens rea* to be satisfied for each element of a criminal offense in order to convict the person of a criminal offense. (*Mens rea*, translated from the Latin as "guilty mind," typically refers to criminal intent.) The bill applies only to some statutes and specifically does not apply to the Penal Code, Vehicle Code, controlled substances violations in the Public Health Code, and certain other specified laws.

FISCAL IMPACT: The bill could result in a decrease in costs for state and local correctional systems. Costs would be decreased if there is a decrease in the number of people convicted due to the inability to establish *mens rea*. The amount of savings would depend on the number of people actually diverted from prison or jail sentences. The average cost of prison incarceration in a state facility is roughly \$34,800 per prisoner per year, a figure that includes various fixed administrative and operational costs. The costs of local incarceration in county jails and local misdemeanor probation supervision vary by jurisdiction. There could also be a decrease in penal fine revenues which would decrease funding for local libraries, which are the constitutionally-designated recipients of those revenues.

THE APPARENT PROBLEM:

Historically, to be convicted of a criminal act under common law required proof of criminal intent (known as *mens rea* or guilty mind). Thus, a person who did a prohibited act, but did not do so knowingly or intentionally, could be protected from criminal prosecution. Generally speaking, *mens rea* provisions served to determine the level of a person's culpability and so differentiated between deliberate acts and unintentional acts.

As common laws through the decades have been codified into statute, *mens rea* requirements have not always been specifically delineated, often leading to a strict liability interpretation. Strict liability means that 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. Strict liability is appropriate for some conduct that common sense would make obvious would or should be prohibited and for those that are clearly wrong in and of themselves, e.g., rape, murder, robbery, theft, and burglary.

Over the past few decades however, many, if not most, statutory prohibitions enacted that result in a penalty are more regulatory in nature. Michigan has over three thousand criminal offenses. By some estimates, most of the felonies and about three-quarters of acts constituting misdemeanors lie outside of the Penal Code and are found in statutes such as the Food Law and the Natural Resources and Environmental Protection Act. Most of these prohibitions lack a *mens rea*, leaving courts to guess at the legislature's intent as to the level of culpability and subjecting otherwise good people who may have made a good faith mistake to becoming convicted criminals.

For example, a few years ago a Michigan mother was alleged to be operating an illegal day care—a misdemeanor punishable by jail and/or a fine. Her crime? Watching the children of friends during the short time between when the friends left for work and their children caught the school bus. Even though she did not accept money, her actions under the law constituted operating an unlicensed day care. (A legislative fix enabled her to avoid prosecution.)

In another cited example, a Sparta business owner expanded the employee parking lot and in the process, according to the Department of Environmental Quality, encroached on a wetland. According to media reports, the business owner was not warned by the DEQ that the land was a protected wetland, the construction company did not identify the property as being a wetland, and even a DEQ investigator admitted that it is difficult for lay persons to identify an area as a wetland because there are many determining factors. Yet, and even with a clear lack of criminal intent, the business owner was convicted of not one but two misdemeanors and ordered to pay fines totaling more than \$8,000.

One proposal offered to address such concerns is to adopt a *mens rea* default standard that would apply to any prohibition that carries a criminal penalty for which a *mens rea* is not explicitly stated and that is not clearly meant to be strict liability.

THE CONTENT OF THE BILL:

The bill adds a new section to Chapter 1 of the Revised Statutes of 1846 (MCL 8.9). Under the bill, a person could not be found guilty of a criminal offense unless:

1. The person's criminal 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.

And

2. The person has the requisite degree of culpability for each element of the offense as to which a culpable mental state is specified by the language defining the offense. (For example, the statutory provision might specify that it is a crime to "knowingly," "intentionally," "negligently," or "recklessly" commit the prohibited act.)

Strict liability:

Culpability would not be required if the description of the criminal offense did not specify any degree of culpability but plainly imposed strict criminal liability for the prohibited

conduct described in that provision (meaning a person could be found guilty just for committing the prohibited conduct regardless of whether they intended to commit a crime or were aware they were committing a crime). If one provision of a statute imposes strict criminal liability on a particular criminal offense, it would not automatically impose strict criminal liability on other criminal offenses in other provisions within that statute; thus each criminal offense provision in a statute would be considered separately as to the level of culpability or strict liability it establishes for each element of that offense.

Default *mens rea* standard:

If statutory language defining an element of a criminal offense related to either knowledge or intent or as to which *mens rea* could reasonably be applied neither specified culpability (e.g., recklessness or intent) nor plainly imposed strict liability, then the element of the offense would be established only if a person acts with intent, knowledge, or recklessness. (Thus, at a minimum, a person would need to act with recklessness in order for criminal culpability to attach.)

This provision would not relieve the prosecution of the burden of proving the culpable mental state required by any definition incorporated into the offense.

Further, when a statute defining a criminal offense provides that negligence suffices to establish an element of the offense, then intent, knowledge, or recklessness is also sufficient culpability to satisfy that element. (Thus, if the prosecution could prove that the person intended to commit the act or knew that the act was prohibited, negligence would not have to be proven because proof of either intent or knowledge would be sufficient to show that the person had met the threshold of being criminally culpable and was therefore criminally liable for the act.)

Similarly, if knowledge sufficed to establish an element of an offense, then intent would also be sufficient culpability to satisfy that element.

Defenses:

Being—at the time the crime occurred—under the influence of or impaired by a voluntarily and knowingly consumed alcoholic liquor, drug (including a controlled substance), other substance or compound, or combination of any of those substances would not be a defense to a crime.

However, it would be an affirmative defense to a specific intent crime (for which the defendant has the burden of proof by a preponderance of the evidence) that he or she voluntarily ingested a legally obtained and properly used medication or other substance and did not know and reasonably should not have known that he or she would become intoxicated or impaired.

Applicability/Exemptions to bill:

The bill only applies to crimes committed on or after the bill's effective date. Further, the bill would not apply to, and could not be construed to affect, crimes under any of the following:

- ❖ The Michigan Vehicle Code (MCL 257.1-257.923)
- ❖ The Michigan Penal Code (MCL 750.1-750.568)
- ❖ Article 7 of the Public Health Code ("Controlled Substances", MCL 333.7101-333.7545)
- ❖ Chapter 752 of the Michigan Compiled Laws ("Crimes and Offenses," includes various statutes, some of which impose criminal penalties; e.g., death or injuries from firearms)

Definitions:

"Culpable" would mean sufficiently responsible for criminal acts or negligence to be at fault and liable to punishment for commission of a crime.

"Intent" would mean a desire or will to act with respect to a material element of an offense **if both** of the following applied:

- ❖ The element involves the nature of a person's conduct or a result of that conduct and it is the person's conscious object to engage in conduct of that nature or to cause that result.
- ❖ The element involves the attendant circumstances (e.g., the factual circumstances giving context to the act), and the person is aware of the existence of those circumstances or believes or hopes that they exist.

"Knowledge" would be defined to mean awareness or understanding with respect to a material element of an offense **if both** of the following circumstances existed:

- ❖ The element involves the nature or the attendant circumstances of the person's conduct (e.g., the factual circumstances giving context to the act), and the person is aware that the conduct is of that nature or than those circumstances exist.
- ❖ The element involves a result of the person's conduct, and the person is aware that it is practically certain that the conduct will cause that result.

"Negligence" would mean the failure to use reasonable care with respect to a material element of an offense to avoid consequences that are the foreseeable outcome of the person's conduct with respect to a material element of an offense and that threaten or harm the safety of another.

"Recklessness" would mean a person's conscious disregard of a substantial and unjustifiable risk that a material element exists or will result from the person's conduct, if the risk is of a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, the person's disregard of the risk is a gross deviation from the standard of conduct that a law-abiding and reasonable person would observe in the person's situation.

"Intoxicated or impaired" includes, but is not limited to, a condition of intoxication resulting from the ingestion of alcohol, a controlled substance, or a combination of both.

"Controlled substance" would mean the term as defined in the Public Health Code, which includes Schedule 1-5 drugs (MCL 333.7401).

"Ingestion" would mean to have eaten, drunk, ingested, inhaled, injected, or topically applied, or to have performed any combination of those actions, or otherwise introduced into the body.

ARGUMENTS:

For:

The bill addresses the issue that some refer to as *overcriminalization*, or, as The Heritage Foundation explains, "the misuse and overuse of criminal laws and penalties to address societal problems." ("The Pressing Need for *Mens Rea* Reform", Malcolm, John G., *Legal Memorandum*, On. 160, Sept 1, 2015.) Much attention today is focused on sentencing reform, which addresses how long someone would be incarcerated upon conviction of a criminal offense. By comparison, enacting a *mens rea* default standard would address who is being convicted in the first place.

Critics say that many of the over 3,000 criminal offenses established in state statutes are regulatory in nature, such as paperwork requirements, and most of those do not contain a *mens rea* to establish a person's culpability for criminal liability. The legislation creating these criminal penalties often came from committees other than the House and Senate standing committees that typically deal with criminal law. They were enacted without the input or oversight of legislators having a law or law enforcement background. Many lack clear direction by their language to guide the courts in interpretation and implementation. Absent a *mens rea*, (for example, doing the act knowingly, or willfully, or intentionally), a court is more likely to impose strict liability by which simply doing the deed is enough for conviction. Mitigating factors such as not knowing one's actions are a violation of law, not intending to violate a law, or not causing any harm by the violation are not considered.

House Bill 4713 is needed, say its supporters, because a *mens rea* default standard will protect citizens who did not intend to violate a law from the stigma of a criminal record and—by reducing the number of criminal convictions—will lower associated criminal justice-related costs borne by taxpayers. The bill is needed because it is the most comprehensive and efficient way to address the sheer volume of criminal offenses lacking a *mens rea*. Rather than amending thousands of statutory provisions piecemeal, the bill clearly establishes a threshold by which courts can determine if a person deserves to be held criminally liable.

For:

Many of the prohibitions that carry criminal penalties would be better suited to having civil penalties, such as fines or license sanctions, say critics of the current system. Their point is that there are so many rules and regulations that the average person or business owner simply has no way of being aware of all of them. Thus, mistakes happen. A person may be culpable of causing harm, and may deserve to bear responsibility for his or her actions, but a criminal penalty may not be the most appropriate.

For:

It is important to understand what the bill will and won't do. The bill does not raise a prosecutor's burden of proof to convict an individual (that remains at beyond a reasonable doubt), but does require a prosecutor to establish *mens rea* for each element of an offense. The bill does not abolish responsibility or culpability, but it does set a threshold, a floor so to speak, that the prosecution must establish in order for the person to be held guilty of committing a crime. For some offenses, there may still be civil remedies for an individual aggrieved by the person's action.

The bill does not apply to every criminal penalty on the books. Many criminal offenses already contain a *mens rea*. They say things like, "if a person knowingly" does this or that, or "if a person intentionally does" this thing, the person is guilty of a misdemeanor or a felony. The default standard of recklessness would be applied only if the wording of a particular statute is not clear. Criminal culpability runs on a spectrum, with "negligence" being the lowest standard, followed by "recklessness," next is "knowingly," then "intentionally," with "willfully" at the top. If the default standard is applied, "recklessness" would not have to be established if one of the higher standards can be. Courts still may differ in how they define these standards, but the bill at least adds some guidance when a statute is silent as to the level of intent needed to establish criminal liability.

The bill will also not apply to offenses in which the language of the provision is clear that it intends to apply strict liability, even if it does not specify a *mens rea*. In addition, the bill does not apply to certain statutes like the Penal Code, Vehicle Code, or controlled substance violations under the Public Health Code. Most of the penalties in those statutes either contain a *mens rea* or are considered to be wrong in and of themselves such as murder, rape, and drunk driving because of the threat to public safety.

The bill will apply to all criminal offenses currently in statute that do not have a specific *mens rea*, and it will apply to criminal penalties enacted in the future that are vague and lack a *mens rea*. It is hoped, however, that enactment of the bill will draw attention to the need for more precise language that clearly encompasses the legislative intent. As to protecting morally blameless individuals who unintentionally violate a criminal prohibition, the bill will apply only to crimes committed on or after the bill's effective date; it will not provide relief to persons "in the pipeline" (those who are awaiting trial or sentencing) or those previously convicted.

Against:

The bill would apply to a broad spectrum of criminal offenses. Though categorized as being "regulatory in nature," that may not be true for all statutes currently lacking a specified *mens rea*. Wouldn't a better approach be to look at each of the criminal offenses and decide on a case by case basis?

Response:

As mentioned earlier, there are thousands of criminal offenses on the books, most of which lie outside of the exempted statutes. To do each one individually would be a time-consuming task, and would use a lot of public resources, such as staff time. The bill makes more sense, as it would be appropriate for most of the provisions it will apply to. If there

are criminal prohibitions for which a default standard of recklessness is not appropriate, legislation could be offered to tweak the existing language.

POSITIONS:

A representative of the National Federation of Independent Business (NFIB) testified in support of the bill. (9-24-15)

A representative of the Mackinac Center testified in support of the bill. (9-17-15)

A representative of the US Justice Action Network testified in support of the bill. (9-17-15)

ACLU of Michigan indicated support for the bill. (9-17-15)

The Michigan Chamber indicated support for the bill. (9-17-15)

The Criminal Defense Association of Michigan (CDAM) indicated support for the bill. (9-24-15)

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.