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## **Innocents Found Guilty**

### *Mens Rea and Criminal Justice in Rhode Island*

**Background:** The rapid expansion of criminal laws in modern day jurisprudence requires a default *mens rea* (criminal intent) provision to ensure innocent citizens are not given serious criminal penalties for conduct outside the realm of traditional criminal laws.

#### **Recommendations:**

- Criminal laws in Rhode Island today cover a wide range of otherwise innocent behavior, from trading workout tips to transporting poultry, in statutes and administrative regulations.
- Such criminal sanctions to regulate behavior sometimes do not include a requisite culpable mental state, opening up innocent actors to serious criminal sanctions for behavior that is not inherently wrong.
- Enacting a default criminal intent rule would ensure that criminal sanctions are levied against the guilty while protecting citizens from unduly burdensome regulations and criminal laws. It would not alter any Legislative pronouncement of a requisite mental state, but merely supply the answer when the Legislature has not already specifically addressed it in codification in a particular criminal law.

#### **Introduction**

There are myriad factors required to ensure a fair and just criminal justice system: both the United States' and Rhode Island's Constitutions protect the rights of the accused to counsel, speedy trials, and due process, among other guarantees. But those constitutional protections exclude one notable aspect of a fair criminal justice system, which may be so fundamental that it escaped constitutional inclusion in the heady days of constitution writing.

That aspect is the requirement that criminal penalties are levied only on the guilty—more specifically, those with a 'guilty mind'. For hundreds of years, this fundamental aspect was so natural to American criminal justice that it

rarely required discussion or justification. This was largely because criminal laws were almost wholly relegated to acts which were facially criminal. That is, the intent to break the law was obvious as a result of the action itself, such as with breaking and entering another's dwelling, or unjustifiably assaulting another. One's intent to break the law was indistinguishable from the act itself.

But once criminal laws moved away from the reign of facially criminal acts, this fundamental aspect of a guilty mind requirement gained substantial importance. Today, criminal laws encompass even facially innocent behavior, extending beyond penal codes and into violations of administrative agency rules, occupational licensure laws, fish and game statutes, and almost every other aspect of American life that legislatures seek to regulate.

Because of this expansion, it is now essential to the maintenance of a fair and just criminal justice system that defendants are convicted upon a showing of a guilty mind. Today, because it is possible to go to jail simply for rebuilding a car without the right license or paperwork, to ensure both fair notice to citizens and reserve criminal sanction for the blameworthy, a guilty mind must be found.

Traditional criminal laws in Rhode Island found in the Penal Code generally comport to this standard, as most states do. However, criminal penalties are attached to hundreds of statutes across Rhode Island codes that relate to everyday activities by businesses and individuals that in many cases would not always be assumed to be criminal. And some of these carry no guilty mind requirement, meaning that citizens can be convicted without carrying any intent or guilt with their otherwise lawful conduct. To that end, Rhode Island's citizens deserve a default criminal intent rule to guide their legislature and their courts, and to maintain a fair and just criminal justice system in Rhode Island.

## **Criminal Law 101: An Act *and* Moral Culpability**

At its most basic level, crime consists of two fundamental parts, an *actus reus*, or guilty act, and a *mens rea*, or guilty mind.<sup>i</sup> The guilty act usually requires that some voluntary act form the basis of a criminal conviction. A voluntary act usually excludes, for example, acts in the course of suffering a seizure or while sleep walking, but includes possession and, less frequently, omission<sup>ii</sup> as the voluntary act component of a crime.

In contrast to the objective component of a crime represented by the guilty act, the guilty mind requirement is a subjective culpable mindset that must be established before a criminal penalty will attach. In this sense, a guilty mind ensures that criminal punishment for an act is morally justified. The U.S. Supreme Court has called the mental element of a crime “instinctive,” and noted its “unqualified acceptance” in English common law.<sup>iii</sup> The Rhode Island Supreme Court has explained, “The requirement of a *mens rea*, or guilty mind, is the most notable example of the concept that before punishment may be exacted, blameworthiness must be demonstrated.”<sup>iv</sup>

This mental component of criminality became so innate to a criminal prosecution that courts actually began reading a guilty mind requirement into crimes that did not specifically mention what mental state must be proven. The reason courts have done this is to avoid striking down the criminal law entirely as a violation of due process, which could in some cases allow someone who committed a very harmful act to go free. Instead, courts will sometimes read in a culpable mental state requirement into a statute that is silent as to intent. The U.S. Supreme Court noted, “[a]s the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation.”<sup>v</sup>

This was codified in Model Penal Code, which was an attempt to formally codify state-based criminal codes and provide clarity and uniformity. A nonbinding advisory code, the Model Penal Code has served as the basis for reform in dozens of states, and specifically included a default mental state in its advice to the states. Model Penal Code Section 2.02(3) states that, “When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or

recklessly with respect thereto.”<sup>vi</sup> Such a provision is in place in more than 20 states, but not Rhode Island.

Indeed, even courts in Rhode Island have recognized the need for a default mental state. For example, in a case involving child abuse, the Supreme Court of Rhode Island recognized a “number of states” which use a default guilty mind requirement, and adopted the Model Penal Code default in that particular case.<sup>vii</sup> But this judicial modification has remained relegated to the courts, and has not yet been recognized legislatively. Therefore, it could depend on the specific statute at issue and which court the case is in whether a *mens rea* requirement would be read into the many Rhode Island criminal laws that are silent on this. Such a patchwork does not achieve the goals of uniformity and predictability in the justice system whereby similar cases are treated similarly.

## **The Regulatory State and Public Welfare Offenses: The Birth of a Problem**

There are indeed exceptions to the guilty mind requirement; notably, in the case of statutory rape. And beginning in the early 20<sup>th</sup> century, these exceptions expanded to include “public interest” violations, liquor law violations, traffic regulations, and general “public welfare issues.”<sup>viii</sup> For example, speeding is rightly recognized as a public welfare offense since one can assume someone had their foot on the pedal and a speedometer and the offense is not punishable by incarceration. Courts have been more willing to hold that due process permits exceptions to the traditional *mens rea* requirement for low-level misdemeanors that do not carry the possibility of jail time.

Public welfare offenses are recognized as an exception to the requirement that a defendant have a guilty mind. The United State Supreme Court has defined a public welfare offense as that which “a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety.”<sup>ix</sup> A classic example is that someone with a hand grenade who is not in the military can be assumed to have known this was illegal.

Public welfare offenses, it could be argued, fall within the facially criminal definition, and thus the search for a guilty mind is of little significance. But criminal laws today exceed even public welfare offenses, often criminalizing seemingly innocent conduct and arcane economic regulations such as not attaching the right label to a product. In essence, criminal penalties are

increasingly being attached to regulations that previously would have carried at most civil fines, if they had even existed at all.

The second half of the twentieth century introduced a widely recognized regulatory explosion. At the beginning of the twentieth century, there was no federal register. In 2010, the federal register contained 81,405 pages. State regulatory burdens have exploded as well with the proliferation of state analogues, in addition to the areas discussed above extending to areas as diverse as land use restrictions, labor laws, insurance and securities regulations, occupational licensing, and aesthetic restrictions limiting everything from what you may hang on your walls - to when and how you may cut your grass - to what, and to whom you may otherwise sell legal products.

The Rhode Island Supreme Court noted the “increasing tendency to impose criminal sanctions without regard as to whether the accused knew his actions were prohibited or illegal. This has come about by the legislative regulation of various industries, trades or activities that affect the public's health and safety.”<sup>x</sup> While this is certainly within the purview of the legislature, it increases the need to find a guilty mind in each defendant. And if the legislature fails to specify what guilty mind must be present, than a default guilty mind requirement is necessary to ensure a fair and just criminal justice system.

### **Rhode Island Statutes Void of Guilty Minds**

In Rhode Island, criminal penalties are attached to an incredible variety of behavior without an attendant mental state required for a guilty verdict. Here are just a few examples:

#### *At Home*

It is a strict liability offense to sell or exchange pillows, hammocks, or other bedding with statutorily required tags, punishable by six months in prison and a \$500 fine.<sup>xi</sup> There is no exception for garage sales or hand-me-downs, leaving those wishing to transfer a gently used bedspread to even a family member susceptible to a stringent criminal penalty. Or, if a Rhode Island citizen takes up automobile work as a hobby, and rebuilds a car on the weekends in his garage, he or she must obtain a license as an official “salvage rebuilder.” If not, the title will be stamped “FOR PARTS ONLY,” or the choice to take up this hobby will trigger a felony charge, two years in prison, and a \$5,000 fine.<sup>xii</sup> This applies no matter what intent or state of mind the Rhode Islander had.

#### *At Work*

Don't even think about using the title “athletic trainer” without a license. In fact, a Rhode Island citizen is currently barred from even acting like an athletic trainer without a license. The penalty for doing so is a misdemeanor offense, and no guilty mind is currently required.<sup>xiii</sup> Salvage and wreck yard owners in Rhode Island not only must be licensed, but must include the license number on every article of written communication, and cannot be open on Sundays or holidays, and must keep extensive records on every vehicle, *and* must store all vehicles in a fenced-in area—or face up to a year in prison.<sup>xiv</sup> And this criminal liability attaches without any showing of intent or guilty mind.

#### *Regarding Animals*

Recent years have seen steep growth in at-home chicken coops. But Rhode Island citizens put themselves in danger of criminal sanction if they transport poultry without a license. If buying or selling a chicken, one must constantly possess a bill of sale. Failure to do so triggers a \$200 fine or a year in prison, or both, even if the poultry possessor had no guilty mind, desire to break the law, or knowledge their conduct was regulated, let alone criminalized.<sup>xv</sup> Chicken regulations are outdone, however, by swine laws in Rhode Island. Feeding non-domestic garbage to more than four swine without a permit is a misdemeanor, regardless of intent.<sup>xvi</sup> And greasy pig contests risk an eleven month jail term along with a \$500 fine, no matter if the pig is caught or the guilty mind of the catcher.<sup>xvii</sup>

### **A Solution: The Criminal Intent Protection Act**

To provide relief for Rhode Island citizens who could unwittingly stumble under the weight of these heavy penalties for innocent behavior, Rhode Island should enact a default criminal intent provision.

Similarly to the Model Penal Code and many other states, a default criminal intent provision would supplant an omitted guilty mind requirement. If the legislature does not include a requisite degree of guilty mind that must be present to be convicted, nor specifically state that a crime is meant to be a strict liability offense (that is, guilty regardless of the mental state), then a default criminal intent is presumed to apply to the offense.

Specifically, the default mental state, if not otherwise included in the law, would require that a Rhode Island

citizen;

- Act with the conscious object to engage in conduct of that nature, and
- Act with the conscious object to cause such a result,
- While aware of the attendant circumstances required or with a belief or hope that such circumstances exist, and,
- With a specific intent to violate that law or knowledge that the conduct is unlawful.

Put more simply, the default criminal intent rule would require that a Rhode Island citizen act knowingly to break the law and intend to act unlawfully.

To be clear, if the Rhode Island legislature speaks clearly as to a different requisite mental state, or explicitly states that no criminal intent is required, this standard would not apply. This is the case with traditional crimes such as theft covered in the Penal Code. When specifying a culpable mental state, the Legislature can select among many choices ranging from strict liability to intentional conduct. But when a mental state is missing or excluded from statutory language, this default language fills the void and protects innocent behavior.

Under this provision, a Rhode Islander giving workout tips to a friend (acting as an athletic trainer) could only be sent to prison if he or she was aware that their conduct was generally unlawful. Feeding non-domestic garbage to five pigs would only be a crime if it was an intentional subversion of the law. Selling a hammock at a yard sale would only trigger a criminal penalty if the previous owner had the intent to break the law. To be clear, this does not stand contrary to the adage that “ignorance of the law is not excuse.” Under this proposal, the person need not know the law chapter and verse and what type of criminal penalties it contains, but the person must at least intend to engage in conduct that is generally unlawful.

Accordingly, this proposal focuses the criminal justice system on its original and central function: sanctioning those who wish and intend and then act in order to break the law.

## Conclusion

The criminal justice system today looks little like that of its predecessors in the common law or even the system created at the birth of our country. It is larger, more expansive, more expensive, and covers more conduct and more citizens than ever before.

But that does not mean that the fundamental aspects of criminal justice which serve to ensure a fair and just system for all citizens should be ignored. In fact, quite the opposite. A robust criminal justice system demands robust protections for innocent citizens, to ensure they are not unfairly caught up in the system.

A default mental state would prevent unjust criminal sanctions for innocent behavior. It would protect citizens from oversights in legislative drafting and provide peace of mind for those taking part in wholly innocent and blameless behavior. It would not restrict the Legislature, but instead encourage it to speak clearly as to the guilty mind it thinks must be proven to obtain a guilty verdict.

Rhode Island citizens are currently without recourse if charged with a crime that should have a mental state included in its language but does not. A default criminal intent provision would restore the protection afforded to Americans for centuries.

## End Notes

<sup>i</sup> Elizabeth A. Martin, ed., *Oxford Dictionary of Law*. Oxford: Oxford University Press (2003).

<sup>ii</sup> See, e.g., R.I. Gen. Laws § [11-56-1](#) (providing a criminal penalty upon the breach of the duty to assist, crime of omission).

<sup>iii</sup> *Morrisette v. United States*, 342 U.S. 246, 251-52 (1952) (footnotes and internal citations omitted).

<sup>iv</sup> *State v. Johnson*, 399 A.2d 469, 570-71 (R.I. 1979).

<sup>v</sup> *Morrisette v. United States*, 342 U.S. 246, 252 (1952).

<sup>vi</sup> Deborah Denno, “[Selected Model Penal Code Provisions](#),” Fordham University School of Law (2009), pg. 8.

<sup>vii</sup> *State v. Lima*, 546 A.2d 770, 772 (R.I. 1988). This ruling was superseded when the Rhode Island legislature made modifications to the child abuse law and specifically included a mental state requirement.

<sup>viii</sup> Francis Bowes Sayre, *Public Welfare Offenses*, 33 Col. L. Rev. 55, 56 (1933).

<sup>ix</sup> *Liparota v. United States*, 471 U.S. 419, 433 (1985).

<sup>x</sup> *State v. Gilman*, 291 A. 2d 425, 430 (R.I. 1972).

<sup>xi</sup> R.I. Gen. Laws § [23-26-27](#).

<sup>xii</sup> R.I. Gen. Laws § [31-46-7](#).

<sup>xiii</sup> R.I. Gen. Laws § [5-60-9](#); R.I. Gen. Laws § [5-60-17](#).

<sup>xiv</sup> R.I. Gen. Laws § [42-14.2-13](#)

<sup>xv</sup> R.I. Gen. Laws § [4-10-16](#)

<sup>xvi</sup> R.I. Gen. Laws § [4-3-3](#); R.I. Gen. Laws § [4-3-11](#).

<sup>xvii</sup> R.I. Gen. Laws § [4-1-28](#)