Has Congress Eroded the Intent Requirement in Criminal Law?

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Last week, bloggers Solomon Wisenberg (Letter of Apology blog) and Professor Douglas A. Berman (Sentencing Law and Policy blog) reported that the Heritage Foundation and the National Association of Criminal Defense Lawyers released a joint report entitled "Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law."

The study — based on an analysis of bills introduced in and/or enacted by Congress during the 2005-06 legislative session — reports that a "recent proliferation of federal criminal laws has produced scores of criminal offenses that lack adequate mens rea requirements and are vague in the conduct they criminalize." Notably, the study did not compare 2005-06 to any previous year, so it is unclear whether 2005-06 is one point on a relatively flat continuum or a sharp departure from previous legislatures. Obviously, the study is intended for lawmakers and attorneys — not for would-be criminals, who are unlikely to consult the U.S. Code for guidance as to what state of mind they must have to avoid crossing the line between innocence and culpability. Given that the report is geared to lawyers and legislators, it is odd that the authors gave short shrift to U.S. Supreme Court precedent, which states that "knowledge" is generally the default mens rea requirement when the statute is not explicit.

As the U.S. District Court for the Southern District of New York explained in United States v. Griffith, citing the Supreme Court case of Staples v. United States, 511 U.S. 600, 619 (1994), "the Supreme Court has held that where mens rea is absent from a statute, 'the usual presumption that a defendant must know the facts that make his conduct illegal should apply.'" 2000 WL 1253265 (S.D.N.Y. Sept. 25, 2000).
In other words, absent a contrary indication from Congress, "knowingly" is presumed to be the default mens rea. Unless the Heritage authors think that judge-made law is not real law, they are incorrect when they assert that criminal statutes without mens rea requirements have no requirement and, thus, threaten to land innocent people in jail. As a matter of law, many (if not most) statutes without an explicit mens rea requirement do carry an implicit requirement - knowledge. That may not be clear to the average layperson, but, it should be abundantly clear to those who represent them.

All that said, it's possible the study has identified a weakness in legislative drafting that plays out in nefarious ways. The authors assert that Congress's sloppy drafting endangers civil liberties. But here the authors' speculation is unsupported by real-life examples showing how poorly drafted statutes result in abusive or unjust enforcement. Perhaps the more interesting question is whether and how the lack of an explicit mens rea requirement affects prosecutions and/or plea negotiations. For example, do data show that prosecutors are more or less likely to prosecute crimes involving statutes without explicit mens rea requirements? It is at least conceivable that prosecutors might be less likely to prosecute crimes when

they are uncertain of the government's burden as to each element of the crime. Similarly, it may be that criminal defendants are able to exploit vague or ambiguous statutory language to increase their leverage in plea negotiations.

Crime in the Suites is authored by the Ifrah Law Firm, a Washington DC-based law firm specializing in the defense of government investigations and litigation. Our client base spans many regulated industries, particularly e-business, e-commerce, government contracts, gaming and healthcare.

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