

INTENT-OPTIONAL CRIMINAL STATUTES: A PLEA FOR REFORM, AND A NOTE OF CAUTION TO REFORMERS

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This Essay is adapted from a panel discussion on federal police power, or the nonexistence thereof, and the relatively recent trend of enacting federal criminal statutes to impose punishment without proof of bad intent.

I am going to say very little about the general police power, not because it is uninteresting as a matter of constitutional law, but because it is a less-than-promising avenue for those seeking to curb federal overreach.

Hoping to scale back any significant amount of federal criminal law through constitutional challenges to the police power is like hoping the courts will repeal the New Deal. Now the New Deal might have been a really bad idea,¹ and it might have begun the transformation of the country into a gargantuan welfare state confounding the Framers' vision,² but the courts are not going to fix it.³ After all this time, they also are not going to fix what they have written in poorly considered decisions about federal police power. Probably the best we can hope for is that courts will help to contain the law; they will not be rolling it back.

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1. See Thomas DiLorenzo, *The New Deal Debunked*, FREE MARKET, November 2004, available at http://www.mises.org/freemarket_detail.aspx?control=515.

2. See JIM POWELL, *FDR'S FOLLY: HOW ROOSEVELT AND HIS NEW DEAL PROLONGED THE GREAT DEPRESSION* (2004).

3. See, e.g., *Sullivan v. Zebley*, 493 U.S. 521 (1990); *Helvering v. Davis*, 301 U.S. 619 (1937).

What I would like to address instead is the growing number of federal statutes that impose criminal punishment without requiring the government to prove bad intent.⁴ The most obvious problem with intent-optional federal crimes is not that they are federal, but that they are crimes at all. They break the link between punishment and intentional misbehavior that most contemporary thinkers, not to mention the Founders' generation, found indispensable to the government's authority legitimately to impose criminal punishment.⁵

The breaking of this link is not as novel as one might think, however. It is just the flip side of the coin minted many decades ago, and that the law has unwisely come increasingly to accept. The "heads" side of this coin is our hesitation to impose punishment for bad behavior. The hesitation takes root in all manner of psychobabble excuses and in the view that criminals are really victims—victims of the latest manufactured brain syndrome,⁶ or forces like racism,⁷ capitalism,⁸ bourgeoisie culture,⁹ the "one percent,"¹⁰ and the other usual suspects. This zombie-like, volition-free view of criminals and crime has been in vogue since at least the 1960s. What we are seeing now is the "tails" side of the same coin: Being reluctant to impose consequences on bad behavior, we will now take the next logical step and affirmatively impose them on *good* behavior, such as producing useful stuff like energy¹¹ or farming on your own land.¹²

4. See Paul Rosenzweig, *Congress Doesn't Know Its Own Mind—And That Makes You a Criminal*, HERITAGE FOUND. (July 2013), <http://www.heritage.org/research/reports/2013/07/congress-doesnt-know-its-own-mind-and-that-makes-you-a-criminal>.

5. See *id.* (describing general consensus that crimes require intent).

6. See, e.g., *Smith v. State*, 663 S.E.2d 155, 157 (Ga. 2008) (sleepwalking); *State v. Olmstead*, 800 P.2d 277, 285–86 (Or. 1990) (insane drunken driver).

7. See Glenn Loury, *A Nation of Jailers*, CATO UNBOUND March 11, 2009, <http://www.cato-unbound.org/2009/03/11/glenn-loury/nation-jailers>.

8. See Peter Chau, *Poverty, Distributive Justice, and Punishment*, 25 CAN. J.L. & JURISPRUDENCE 39 (2012) (arguing undeserved poverty should be a mitigating factor in sentencing).

9. See generally JAMES W. MESSERSCHMIDT, *CAPITALISM, PATRIARCHY, AND CRIME: TOWARD A SOCIALIST FEMINIST CRIMINOLOGY* (1986).

10. Cf. Morgan Kelly, *Inequality and Crime*, 82 REV. ECON & STAT. 530 (2000) (analyzing the statistical relationship between inequality and crime).

11. Andrew May Kuth, *Shale criminal charges stun drilling industry*, PHILA. INQUIRER, Sept. 13, 2013, http://articles.philly.com/2013-09-13/news/42012429_1_xtn-energy-inc-criminal-charges-attorney-general.

One way to justify criminal sanctions for such conduct is to exile the role of intent. The dominant cultural voices in academia,¹³ the press,¹⁴ and Hollywood¹⁵ have been doing just that for years. When the importance, or even the existence, of personal responsibility has been hectored off the reservation of criminal law, we should scarcely be surprised to find that the space it used to occupy is now ready to be filled by something else—and that is the good part. The bad part is that there is a more immediate outcropping of airbrushing intent—an outcropping illustrated by the current demand for federal gun-control legislation.¹⁶ The demand is rooted in, first, a juvenile, and second, a diversionary view of law—a view you will not be surprised to learn doggedly, if quietly, depends on ignoring intent.

12. See *Wickard v. Filburn*, 317 U.S. 111 (1942).

13. See, e.g., SHADD MARUNA, *MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES* 19–21 (2001) (explaining that criminals can be reformed and analyzing repeat offenders who have created productive lives instead of committing crimes); Donald R. Cressey, *Social Psychological Foundations for Using Criminals in the Rehabilitation of Criminals*, 2 J. RES. CRIME & DELINQ. 49, 49–50 (1965) (discussing the use of criminals to rehabilitate criminals); cf. DAVID FARABEE, *RETHINKING REHABILITATION: WHY CAN'T WE REFORM OUR CRIMINALS?* (2005) (recommending a return to basic principles of behavior to detect crime, swift application of sanctions and an increase in intermediate sanctions rather than prison for nonviolent crimes, and use of prisons as institutional management tools rather than rehabilitation facilities).

14. See, e.g., Editorial, *Promoting Rehabilitation*, L.A. TIMES, June 20, 2011, at A14 (critiquing the Supreme Court's ruling that a court may not impose or lengthen a prison sentence to enable completion of a treatment program or promote rehabilitation); Eric Smith, *Healing with hammers and wood*, N.Y. TIMES, Aug. 22, 2010, at 8 (describing first hand work with rehabilitated criminals in the construction industry); Joseph Diaz, *Missouri Sets New Standard for Juvenile Detention*, ABC NEWS, (Sept. 9, 2009), <http://abcnews.go.com/Primetime/missouri-sets-standard-juvenile-detention/story?id=8510425> (describing a juvenile rehabilitation program deemed more successful than most).

15. See, e.g., *A CLOCKWORK ORANGE* (Warner Bros. 1971); Illya Lichtenberg, et al., *"Darker than any Prison, Hotter than Any Human Flame": Punishment, Choice, and Culpability in A Clockwork Orange*, 15 J. CRIM. JUST. EDUC., 429, 440–45 (2004); James J. Sobol, *The Shawshank Redemption: A Review*, 4 J. CRIM. JUST. & POPULAR CULTURE 15, 15–17 (1996).

16. See, e.g., Ted Barrett & Tom Cohen, *Senate gun law proposal lacks enough support now*, CNN, (Apr. 15, 2013), <http://www.cnn.com/2013/04/15/politics/senate-gun-laws>; *Now Is The Time: The President's plan to protect our children and our communities by reducing gun violence*, WHITE HOUSE, 2 (Jan. 16, 2013), http://www.whitehouse.gov/sites/default/files/docs/wh_now_is_the_time_full.pdf.

It is juvenile because it examines behavior only superficially and without reflection. After the Sandy Hook Elementary school massacre, we heard the cry to “do something,” and the reflexive push for more federal statutes without any serious question about whether the absence of such statutes was the problem or whether similar statutes already on the books had any positive effect. There was similarly no inquiry into the actual cause of these bizarre mass murders, not principally because that would jeopardize the preexisting, federalizing agenda—although that too—but because it would require serious-seriousness of purpose and actual work, something the juvenile outlook tends to avoid.

Subtracting intent from criminal law is diversionary because, to continue with the gun-control example, if we can blame the object, the gun, we can more readily ignore the actual problem, the shooter. Indeed, the very phrase “gun violence” could easily, if one is inclined to this way of thinking, be recast as “finger violence,” since the gun will not work unless you use your finger, and fingers and guns have equal amounts of volition, that being none. Subtracting human volition from the definition of crime makes just as much sense as subtracting it from the gun-control debate, but exactly that subtraction is what has been going on for decades in criminal courtrooms across America.

What is surprising about the recent push to delete volition from the definition of federal crime in order to broaden it is not that it has occurred, but that it has taken progressives this long to figure out how powerful it is to move it from the defense side to the prosecution. On the defense side, it can only help the occasional drug pusher or strong arm. On the prosecution side, it can threaten us all.

And yet, there is another angle to this story. It is not just liberals who can be tempted to divert their gaze from the more serious underlying problem. To a lesser but still critical extent, everyone faces the same temptation. The reason for this is that while legal conservatives are vigilant in spotting the infectious bacteria—the intent-optional or jurisdictionally-challenged federal statutes—we are less vigilant about keeping an eye on the Petri dish in which they grow.

The Petri dish is dumbed-down moral standards. I cannot give even an overview of that subject here, so I will make only a couple of points. The decision in *Skilling v. United States*,¹⁷ the honest services case, was welcomed by most conservatives, except for those who thought, like most of today's panel and the three concurring Justices, that the Court did not go far enough.¹⁸ The relief was understandable. Few will regret that the Court neutered a statute whose prior breadth was rife with opportunities for prosecutorial overreach. But left unanswered, because unasked, was any question about the reasons for our slide toward a culture of deceit or what role the law might have played in it.

Cultural decay was on bold display in *Skilling*,¹⁹ an Enron spin-off rich in warnings about how disingenuity and outright lying increasingly threaten not just corporate governance, but the fundamental trust without which a healthy commercial and civic life cannot exist. Yet the Court whittled away the honest services statute without so much as mentioning *honesty*. What it means to be honest in our dealings with one another is, so apparently it seemed to the Court, just too hard to figure out.²⁰

That was the gist of the Court's vagueness analysis, but one must wonder if it is correct. The truth that the Court, and our society, seemed so determined to avoid is that people know full well when they are cheating. Employees by the million might well spend time messaging on Facebook, or looking at the porn site, or sneaking off to the ballgame, but that such behavior is widespread scarcely shows, or even suggests, that anyone is confused about whether it is honest. Conservatives should be worried, not happy, that the new anchor of the Court's vagueness jurisprudence is not so much the admitted difficulty in defining specifically the cheating at which the statute was aimed, but just that, "Everybody does it."²¹ When I was grow-

17. 561 U.S. 130 S.Ct. 2896, 2897–2907 (2010) (holding that the honest service statute 18 U.S.C. § 1346 proscribes solely bribes and kickbacks; otherwise it would be unconstitutionally vague).

18. *See id.* at 2935 (Scalia, J., concurring).

19. *See id.* at 2907–12 (describing the corrupt actions taken by Skilling while at Enron).

20. *Id.* at 2927–31.

21. *See id.* at 2928 (describing the void-for-vagueness doctrine).

ing up, saying that “Everybody does it” was considered less a constitutional insight than a reason to get sent to your room.

A corrupted culture is a big deal, and not just for social critics, statisticians, or puritanical nags. If we took all the problematic federal statutes off the books this afternoon, the most worrisome danger would remain. We take pride in saying that we are a nation of laws and not of men, but the laws need men and women to enforce them, and how the culture molds those men and women makes at least as much difference to our freedom as the laws we are talking about today. If you have a Mike Mukasey as the prosecutor, our citizens can take heart that even laws pushing the federalism envelope will at least be applied with good faith and decency. If you have Mike Nifong of Duke Lacrosse fame²² as the prosecutor, even the most basic laws, laws whose pedigree and legitimacy no one doubts, can become the road to a police state.

Undisciplined law is a danger that rightly and gravely concerns us, now more than ever, in the era of the regulatory state, and particularly of a politicized Department of Justice. But as the Father of Our Country, the indispensable federalist, warned in his farewell address, it is a corrupted culture, even more than a corrupted law, that most ominously threatens the survival of our freedom.²³

22. Duff Wilson, *Prosecutor in Duke Case Is Disbarred for Ethics Breaches*, N.Y. TIMES, June 16, 2007, http://www.nytimes.com/2007/06/16/us/16cnd-nifong.html?_r=0.

23. President George Washington, Farewell Address (Sept. 19, 1796), available at www.ourdocuments.gov/doc.php?doc=15&page=transcript.