

## The Intent Element in Statutory Crimes

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### Recommended Citation

DePaul College of Law, *The Intent Element in Statutory Crimes*, 2 DePaul L. Rev. 86 (1952)  
Available at: <https://via.library.depaul.edu/law-review/vol2/iss1/10>

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## THE INTENT ELEMENT IN STATUTORY CRIMES

The philosophy of the common law was that no act would constitute a crime if the element of criminal intent was lacking.<sup>1</sup>

To constitute crime there must not only be the act, but also the criminal intention, and these must concur, the latter being equally essential with the former. *Actus non reum facit, sed mens* is a maxim of the common law.<sup>2</sup>

At common law it was ordinarily necessary that the criminal intent be alleged and proved.<sup>3</sup> It appears obvious that any society which has, as its basis, a belief in the freedom of the human will, and the resultant ability of normal individuals to choose between right and wrong, would incorporate the notion of the intent element into its criminal jurisprudence. The history of the common law shows that the doctrine requiring a consideration of the mental element in crime gained unqualified acceptance. Such a doctrine has a natural appeal to man's sense of justice. Furthermore, it is a doctrine most consistent with the philosophy of individualism prevalent in the United States. Hence, it became a fundamental and immutable principle that unless a man's intention was evil, his act was not guilty.<sup>4</sup> This principle, as could be expected, did not remain undisputed. There came into being a few exceptions.<sup>5</sup>

Life could not be expected to remain as simple as it was in the early days of the common law, and, as society became more complex, the lawmaking bodies saw the need for enacting statutes to modify the requisites for common law crimes, to clarify or strengthen them, and to create criminal laws to combat the new and varied situations which necessarily arise with civilization's progress.<sup>6</sup> With the advent of numerous statutory crimes, the necessity of criminal intent was cast in doubt. Criminal intent has still been held to be essential in some statutory crimes,<sup>7</sup> while in others it has been held to play no part in the con-

<sup>1</sup> *People v. Fernow*, 286 Ill. 627, 122 N.E. 155 (1919); *Kilbourne v. State*, 84 Ohio St. 477, 95 N.E. 824 (1911); *Mills v. State*, 58 Fla. 74, 51 So. 278 (1910); *Commonwealth v. Mixer*, 207 Mass. 141, 93 N.E. 249 (1910); *State v. Kinkead*, 57 Conn. 173, 17 Atl. 855 (1889); *Dotson v. State*, 62 Ala. 141 (1878).

<sup>2</sup> *Stokes v. New York*, 53 N.Y. 164, 179 (1873).

<sup>3</sup> *Commonwealth v. Mixer*, 207 Mass. 141, 93 N.E. 249 (1910).

<sup>4</sup> *State v. Kinkead*, 57 Conn. 173, 17 Atl. 855 (1889).

<sup>5</sup> The following examples illustrate the well-known exceptions: rape, where the girl was not of the age of consent; involuntary manslaughter and other crimes of negligence or omission. Cf. *Commonwealth v. Welansky*, 316 Mass. 383, 55 N.E. 2d 902 (1944).

<sup>6</sup> Examples of such statutes are those pertaining to food, drugs, intoxicating liquors, narcotics, etc.

<sup>7</sup> *Morissette v. United States*, 342 U.S. 246 (1952); *Seaboard Oil Co. v. Cunningham*, 51 F. 2d 321 (C.A. 5th, 1931), cert. denied 284 U.S. 657 (1931); *State v. Hefflin*, 338

viction for the breach of a statute<sup>8</sup> or ordinance.<sup>9</sup> In an early American case, it was stated that:

Nothing in law is more incontestable than that, with respect to statutory offenses, the maxim that crime proceeds only from a criminal mind does not universally apply. The cases are almost without number that vouch for this.<sup>10</sup>

That Congress and the legislatures of the several states have the power and authority to create statutory crimes, and, in so doing, to dispense with the need for the element of criminal intent, is generally conceded.<sup>11</sup>

Criminal intent is, ordinarily, an element of crime, and this is true although the offense is purely statutory. It is competent, however, for the Legislature to make certain acts coupled with certain facts, offenses, punishable by fine and imprisonment, without regard to the actor's actual knowledge of the existence of the facts.<sup>12</sup>

If it is the apparent intention of the legislature to make the act itself constitute the crime, without regard to the good motives of the doer of the act, the court must give effect to it.<sup>13</sup> Such legislation has already been enacted,<sup>14</sup> and it appears that more will follow in the future.

The constitutionality of this type of legislation is generally sustained on the grounds of necessity.<sup>15</sup> The fact that no criminal intent need be

Mo. 236, 89 S.W. 2d 938 (1936); *Burnan v. Commonwealth*, 228 Ky. 410, 15 S.W. 2d 256 (1929); *People v. Connors*, 253 Ill. 266, 97 N.E. 643 (1912); *Crawford v. Joslyn*, 83 Vt. 361, 76 Atl. 108 (1910).

<sup>8</sup> *United States v. Balint*, 258 U.S. 250 (1922); *Hargrove v. United States*, 67 F. 2d 820 (C.A. 5th, 1933); *United States v. Gunn*, 97 F. Supp. 476 (D.C. Ark., 1950); *Elliot v. People*, 115 Colo. 382, 174 P. 2d 500 (1946); *State v. Manos*, 179 S.C. 45, 183 S.E. 582 (1936); *Commonwealth v. Anderson*, 272 Mass. 100, 172 N.E. 114 (1930); *State v. Dowling*, 92 Fla. 848, 110 So. 522 (1926); *People v. McClennege*, 195 Cal. 445, 234 Pac. 91 (1925); *State v. Avery*, 111 Kan. 588, 207 Pac. 838 (1922); *State v. Dombroski*, 145 Minn. 278, 176 N.W. 985 (1920); *State v. Ryan*, 70 N.H. 196, 46 Atl. 49 (1900); *State v. Huff*, 89 Me. 521, 36 Atl. 1000 (1897).

<sup>9</sup> *City of Hays v. Schueler*, 107 Kan. 635, 193 Pac. 311 (1920); *Commonwealth v. Closson*, 229 Mass. 329, 118 N.E. 653 (1918).

<sup>10</sup> *Halsted v. State*, 41 N.J.L. 552, 589 (S. Ct., 1879).

<sup>11</sup> *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57 (1910); *State v. Shedoudy*, 45 N.M. 516, 118 P. 2d 280 (1941); *Borderland Construction Co. v. State*, 49 Ariz. 523, 68 P. 2d 207 (1937); *Commonwealth v. Ober*, 286 Mass. 25, 189 N.E. 601 (1934); *People v. Cramer*, 247 Mich. 127, 225 N.W. 595 (1929); *People v. McClennege*, 195 Cal. 445, 234 Pac. 91 (1925); *People v. Fernow*, 286 Ill. 627, 122 N.E. 155 (1919); *Mills v. State*, 58 Fla. 74, 51 So. 278 (1910); *Satte v. Zichfeld*, 23 Nev. 304, 46 Pac. 802 (1896).

<sup>12</sup> *People v. Rice*, 161 Mich. 657, 664, 126 N.W. 981, 984 (1910).

<sup>13</sup> *United States v. Balint*, 258 U.S. 250 (1922); *State v. Fulco*, 194 La. 545, 194 So. 14 (1940); *State v. Gaetano*, 96 Conn. 306, 114 Atl. 82 (1921); *State v. Cox*, 91 Ore. 518, 179 Pac. 575 (1919).

<sup>14</sup> Note 6 supra.

<sup>15</sup> *People v. Fernow*, 286 Ill. 627, 122 N.E. 155 (1919); *Mills v. State*, 58 Fla. 74, 51 So. 278 (1910); *People v. Rice*, 161 Mich. 657, 126 N.W. 981 (1910).

shown in order to convict the doer of the forbidden act does not render the statute unconstitutional as being a deprivation of "due process" under the Fourteenth Amendment of the United States Constitution.<sup>16</sup>

Sometimes criminal intent is expressly made a part of the statute,<sup>17</sup> and in such case no difficulty arises. The problem of statutory construction becomes perplexing when no mention of the intent element is made.

Whether criminal intent is an element of statutory crime is exceedingly important in view of the consequences which follow from the unconscionable performance of the forbidden act. Where a specific intent is expressly required by the statute, it must be alleged and proved in order to obtain a conviction.<sup>18</sup> Conversely, where criminal intent is not a requisite of the statutory crime, it is of no consequence whether the defendant acted with the best of motives, or whether he acted in the *bona fide* belief that he was obeying the law.<sup>19</sup>

It is important, therefore, to determine whether some criteria exists which can be applied to ascertain whether the necessity for criminal intent can be assumed in a statutory crime where such intent is not expressly made a requisite. Referring to this very proposition, the United States Supreme Court, in the recent case of *Morissette v. United States*,<sup>20</sup> said:

Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not. We attempt no closed definition, for the law on the subject is neither settled nor static.<sup>21</sup>

The difficulty in setting up a criteria for distinguishing between statutory crimes that require a criminal intent and those which do not arises from a conflict of two cardinal considerations which are diametrically opposed to each other, and which, by their very essence, cause unrest in the minds of judges who are called upon to decide this issue. There is, on the one hand, the abhorrence with which civilized people view the punishing of unconscionable violations of the law, and the natural in-

<sup>16</sup> *United States v. Balint*, 258 U.S. 250 (1922); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57 (1910).

<sup>17</sup> *State v. Huffman*, 131 Ohio St. 27, 1 N.E. 2d 313 (1936); *State v. Thomas*, 127 La. 576, 53 So. 868 (1910); *People v. Welch*, 71 Mich. 548, 39 N.W. 747 (1888).

<sup>18</sup> *Morissette v. United States*, 342 U.S. 246 (1952); *State v. Huffman*, 131 Ohio St. 27, 1 N.E. 2d 313 (1936); *People v. Fernow*, 286 Ill. 627, 122 N.E. 155 (1919).

<sup>19</sup> *United States v. Balint*, 258 U.S. 250 (1922); *State v. Manos*, 179 S.C. 45, 183 S.E. 582 (1936); *State v. Hennessy*, 114 Wash. 351, 195 Pac. 211 (1921); *Commonwealth v. Mixer*, 207 Mass. 141, 93 N.E. 249 (1910).

<sup>20</sup> 342 U.S. 246 (1952).

<sup>21</sup> *Ibid.*, at 260.

justice which flows from such a system. Thus, in an early Connecticut case,<sup>22</sup> it was held that the unconscious violation of a statute forbidding the driving of carriages on Sunday subjected the violator to no liability. There was no mention of intent in the statute; nevertheless, the court held that the defendant's act was not within the spirit of the law. The reasoning of the opposite school of thought, has been expounded in a Michigan case,<sup>23</sup> in which it was said:

Section 1 of the act<sup>24</sup> prohibits in positive terms the sale of intoxicating liquors, and no language is used which indicates that the element of intent is to be read into it. Had the Legislature intended to make the intent to violate the law an essential element, it would have doubtless used some appropriate language indicating its purpose. If it were necessary to prove intent to violate the law before a conviction could be had, the act would fall far short of doing what the Legislature obviously intended it should do; and presumably in this can be found the chief reason why it did not incorporate into the act the element of intent. Laws forbidding the sale of intoxicating liquors and impure foods would be of little use, if convictions for their violations were to depend on showing guilty knowledge.<sup>25</sup>

It is apparent that the basis of this school of thought is the necessity of protecting society through the police power of the state, and the practicality of enforcing the laws directed toward that end.<sup>26</sup> Probably one of the best examples of the conflict between these two schools of thought, involves the construction of statutes regulating the sale of intoxicating liquors. Some courts require an intent element,<sup>27</sup> while other courts dispense with it.<sup>28</sup>

It is to be noted, in the Michigan case, that the court relies heavily on the intent of the legislature as the basis for its construction of the statute. The common law rule for construing statutes has been applied as a general test in determining whether criminal intent is essential to the commission of the statutory offense:

While the general rule at common law was that the *scienter* was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it . . . there has been a modification of this view in respect to

<sup>22</sup> *Myers against The State of Connecticut*, 1 Conn. 502 (1814).

<sup>23</sup> *People v. Hatinger*, 174 Mich. 333, 140 N.W. 648 (1913).

<sup>24</sup> Mich. Pub. Laws (1899) No. 183.

<sup>25</sup> *People v. Hatinger*, 174 Mich. 333, 335, 140 N.W. 648, 649 (1913).

<sup>26</sup> *People v. Crammer*, 247 Mich. 127, 225 N.W. 595 (1929); *People v. Fernow*, 286 Ill. 627, 122 N.E. 155 (1919); *Mills v. State*, 58 Fla. 74, 51 So. 278 (1910).

<sup>27</sup> *People v. Rice*, 161 Mich. 657, 126 N.W. 981 (1910); *Mulread v. State*, 107 Ind. 62, 7 N.E. 884 (1886).

<sup>28</sup> *Feeley v. United States*, 236 Fed. 903 (C.A. 8th, 1916); *People v. Sybisloo*, 216 Mich. 1, 184 N.W. 410 (1920); *State v. Kinkead*, 57 Conn. 173, 17 Atl. 855 (1889); *Farmer v. People*, 77 Ill. 322 (1875).

prosecutions under statutes the purpose of which would be obstructed by such a requirement. It is a question of legislative intent to be construed by the court.<sup>29</sup>

Actually this is but an illusory test in a great number of instances, for if the legislative intent could be readily ascertained, there would be no problem. In those statutes where the legislative intent is clearly reflected, the courts must give effect to it.<sup>30</sup> However, in those cases where the legislative intent is not so clear, an attempt should be made to discover what the lawmaker's intent was, since it is always the important factor in determining whether *scienter* should be incorporated into the language of the statute.

In those cases where the statute codifies a common law crime, or in which common law terms are used, it is generally assumed that the legislature intended that a provision for intent be incorporated into the statute even though this is not expressly done.<sup>31</sup> Where no mention is made as to whether intent is necessary, and no common law terms are used, it has been held that there is a presumption that the legislature intended there to be a requirement of criminal intent.<sup>32</sup>

As a general rule where an act is prohibited and made punishable by statute only, the statute is to be construed in the light of the common law and the existence of a criminal intent is to be regarded as essential, even when not in terms required.<sup>33</sup>

However, there are cases which hold that unless intent is expressly required by the statute, it does not have to be alleged and proved.<sup>34</sup> Such courts will not indulge in any presumption of an intent requirement.

The view also has been taken in some cases that where the act is merely *malum prohibitum*, criminal intent is not necessary.<sup>35</sup> A similar result was reached where the statute was merely in aid of the police power of the state, although the statute made no mention of criminal intent.<sup>36</sup> Consequently, the distinction between those crimes which are *malum in se* and those *malum prohibitum* may serve as another factor

<sup>29</sup> United States v. Balint, 258 U.S. 250, 251 (1922).

<sup>30</sup> Burnan v. Commonwealth, 228 Ky. 410, 15 S.W. 2d 256 (1929); Birney v. Ohio, 8 Ohio 230 (1837); Neidlinger v. State, 17 Ga. App. 811, 88 S.E. 687 (1916).

<sup>31</sup> State v. Shedoudy, 45 N.M. 516, 118 P. 2d 280 (1941); State v. Hefflin, 338 Mo. 236, 89 S.W. 2d 938 (1936); Knecht v. Kenyon, 179 Wis. 523, 192 N.W. 82 (1923).

<sup>32</sup> Knecht v. Kenyon, 179 Wis. 523, 192 N.W. 82 (1923).

<sup>33</sup> Ibid.

<sup>34</sup> Note 18 supra.

<sup>35</sup> Armour Packing Co. v. United States, 209 U.S. 56 (1908); Hargrove v. United States, 67 F. 2d 820 (C.A. 5th, 1933); State v. Fulco, 149 La. 545, 149 So. 14 (1940); People v. Sybisloo, 216 Mich. 1, 184 N.W. 410 (1920); Commonwealth v. Weiss, 139 Pa. 247, 21 Atl. 10 (1891).

<sup>36</sup> Duncan v. Commonwealth, 289 Ky. 231, 158 S.W. 2d 396 (1942); State v. Striggles, 202 Iowa 1318, 210 N.W. 137 (1926); State v. Smith, 57 Mont. 563, 190 Pac. 107 (1920); People v. Fernow, 286 Ill. 627, 122 N.E. 155 (1919).

to be considered in determining whether the intent element is required.<sup>37</sup> However, the distinction between crimes *malum in se* and *malum prohibitum* is not a clearly defined one. There is a twilight zone wherein the classification becomes doubtful, and where forceful arguments may be presented on both sides of the question.

One thing appears certain—that the appearance or lack of appearance of the word “knowingly,” or its equivalent, in a statute is not conclusive on the question of whether the statute requires criminal intent.<sup>38</sup> It has been held that the performance of the forbidden acts must be voluntary and, as such, they are intentional, although not criminally so.<sup>39</sup> Thus, in a case involving a statute prohibiting bigamy, a man who had an honest belief that his wife was dead, entertained on reasonable grounds, and who voluntarily remarried just prior to the expiration of the time necessary to raise a legal presumption of death, was held guilty on the ground that his voluntary act of remarriage was the only intent required to be shown.<sup>40</sup>

Some courts, in construing the word “knowingly” in a statute, consider it to mean “intentionally.” In such jurisdictions, the doer of the act must have knowledge of its illegality.<sup>41</sup> On the other hand, those courts which adhere to the other trend of thought, construe the word “knowingly,” or its equivalent, to mean that the doer of the act must have such knowledge of the essential facts so as to allow the law to indulge in a presumption that he also had a knowledge of its legal consequences.<sup>42</sup>

In any event, the logical and equitable guarantee that the legislature can not do away with the necessity of criminal intent in all cases, exists. There are limitations to its power to eradicate the intent element, even in crimes which are merely *malum prohibitum*. It has been held that, in spite of the general rule that the legislature may penalize the doing of an act without regard to the intent or knowledge of the doer, a law which would punish a man for the commission of an act which the utmost care on his part would not enable him to avoid, and would be valid.<sup>43</sup> Also, in *State v.*

<sup>37</sup> *Nabob Oil Co. v. United States*, 190 F. 2d 478 (C.A. 10th, 1951).

<sup>38</sup> *State v. Gaetano*, 96 Conn. 306, 114 Atl. 82 (1921).

<sup>39</sup> *State v. Fulco*, 194 La. 545, 194 So. 14 (1940); *State v. Smith*, 57 Mont. 563, 190 Pac. 107 (1920); *Pappas v. State*, 135 Tenn. 499, 188 S.W. 52 (1916); *State v. McLean*, 121 N.C. 589, 28 S.E. 140 (1897).

<sup>40</sup> *State v. Ackerly*, 79 Va. 69, 64 Atl. 450 (1906).

<sup>41</sup> *Hargrove v. United States*, 67 F. 2d 820 (C.A. 5th, 1933); *Crawford v. Joslyn*, 83 Vt. 361, 76 Atl. 108 (1910).

<sup>42</sup> *People v. Sybisloo*, 216 Mich. 1, 184 N.W. 410 (1920); *Crawford v. Joslyn*, 83 Vt. 361, 76 Atl. 108 (1910).

<sup>43</sup> *State v. Laundry*, 103 Ore. 443, 204 Pac. 958 (1922), rehearing denied 103 Ore. 443, 206 Pac. 290 (1922); *State v. Strasburg*, 60 Wash. 106, 110 Pac. 1020 (1910).

*Strasburg*,<sup>44</sup> it was held that a statute which expressly declared that insanity would no longer be a defense to crime was unconstitutional under the Washington Constitution<sup>45</sup> which, in substance, provides that no person shall be deprived of life, liberty, or property without due process of law.

The United States Supreme Court was undoubtedly correct in saying that there seems to be no one, true test for determining whether the intent element should be included in a statutory offense that does not expressly provide for it.<sup>46</sup> As has been shown, the legislative intent should generally be the controlling factor. Also, the subject matter and the purpose the statute is designed to accomplish may be another factor. It has been suggested that an examination of the probable results that the various constructions might effect may be useful.<sup>47</sup> Whether the statute is a codification of a common law crime or makes use of common law terms is also to be considered, as is the distinction between crimes *malum in se* and *malum prohibitum*.

There can be no doubt that, for public protection, certain acts should be made criminal without regard to the intent element. Generally, the penalty for the breach of such a statute is comparatively light. Also, the violators of statutes of this class usually receive little, if any, social condemnation. Nevertheless, if we are to preserve our concepts of freedom and individual rights, the intent element must always hold a position of importance in our criminal jurisprudence. Perhaps it is well to bear in mind an observation made by Justice Holmes: ". . . even a dog distinguishes between being stumbled over and being kicked."<sup>48</sup>

<sup>44</sup> 60 Wash. 106, 110 Pac. 1020 (1910).

<sup>45</sup> Article 1.

<sup>46</sup> *Morissette v. United States*, 342 U.S. 246 (1952).

<sup>47</sup> *State v. Laundry*, 103 Ore. 443, 204 Pac. 958 (1922), rehearing denied 103 Ore. 443, 206 Pac. 290 (1922).

<sup>48</sup> Holmes, *The Common Law* 3 (1881).