

## Hard to Believe She Taught Law at Harvard

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Here's [Walter Olson's description](#) of Elizabeth Warren's latest proposal:

Presidential candidate and Sen. Elizabeth Warren (D-Massachusetts) wants to see more business people behind bars, and she's not fussy about how to make that happen. In a [Washington Post op-ed last week](#) she unveiled a new [Corporate Executive Accountability Act](#), which in her words would expand "criminal liability to any corporate executive who negligently oversees a giant company causing severe harm to U.S. families." She says she wants top executives to know that they can be (again in her own words) "hauled out in handcuffs for failing to reasonably oversee the companies they run."

Under longstanding legal protections in the Anglo-American legal system, before convicting you of most crimes prosecutors must ordinarily show that you had mens rea, a guilty state of mind. Occasionally one or another law relaxes the standard of guilt to "willful blindness" or gross negligence. More rarely, as under a controversial doctrine in FDA law, courts have permitted convictions on a theory of what amounts to vicarious criminal liability, as of a drug executive whose underlings commit certain offenses even absent proof that the higher-up knew of, encouraged, or was willfully blind toward the offenses. ... Warren explicitly states that her proposal "builds on" it as the basis for her proposals for what should happen to executives generally. ...

[Y]ou don't have to be libertarian to find what Warren is proposing a "very bad idea," one based on "dangerous" arguments and propelled by "political rhetoric that is designed to inflame voters' sense of injustice and righteous indignation." [Writing in Slate](#), law professors Carissa Byrne Hessick and Benjamin Levin observe:

Negligence is an incredibly low standard for criminal punishment. A person who is acting negligently does not know that what she is doing (or failing to do) is wrong or risky. Negligence means that a "reasonable person" in that position would have realized that there was a risk of harm. Prosecutors are likely to think that defendants should have known that there were risks simply because something bad occurred—not because they necessarily would have recognized the risks themselves if they'd been in that situation. ...

One of Warren's most dangerous arguments for relaxing the law's standards for knowingness and requisite mental state is that prosecutors often find it difficult to prove higher and more exacting standards. The effect, note Hessick and Levin, is "to water down the law simply to make it easier to punish people." ...

We should be clear about who will be at risk if Sen. Warren passes her law. The civil courts already hear many thousands of cases seeking damages over claims that serious harm arose from industry conduct that falls short of being reckless or deliberately wrongful. Not infrequently – as with claims over supposed "[sudden acceleration](#)" in cars, [cancer from Roundup](#), and autoimmune

disease from silicone breast implants – large sums get paid even when science finds no basis for concluding the products caused the harms alleged, such is our legal system’s tendency to tilt against business defendants as unsympathetic. Under the Warren standard, complaints that driverless cars have gotten into avoidable accidents or vaccines have caused side effects – maybe even that cheeseburgers, supersize sodas, and margaritas have worsened the harms of obesity – will put business people at risk for long prison terms. To her backers, will this count as a bug? Or a feature?

Read the whole thing, and weep for the Anglo-American system of justice. If folks like Elizabeth Warren end up in power, that system is doomed.