



## Congress Considers Bill to Reduce Federal Overcriminalization

In an effort to restore some semblance of justice to the federal government's sprawling "criminal justice" machine, a coalition of U.S. lawmakers including liberty-minded Senator Rand Paul (R-Ky.) are pursuing reforms that would force the feds to prove suspects were willfully committing a crime. With tens of thousands of pages in new "regulations" imposed on America each year just by federal regulatory agencies — many with severe criminal penalties attached — legal experts say virtually every American professional likely commits several federal crimes each day without even realizing it. Under the newly re-introduced "[Mens Rea Reform Act](#)," though, that would all change. The effort has drawn widespread support across the political spectrum, and especially among conservatives and liberals concerned about overcriminalization.



If and when the bill becomes law, it would require that federal prosecutors prove beyond a reasonable doubt that the defendant actually intended to commit a crime. The measure would apply to almost all federal criminal laws and regulations that do not currently include such protections — protections that were standard in Anglo-Saxon jurisprudence for centuries in English common law. Mens Rea, which means "guilty mind" in Latin, is an important legal protection that generally requires a defendant to have intended to commit a crime for the action to be prosecuted as such. It is aimed at distinguishing between negligence, for example, and actual criminal intent. With an estimated 5,000 federal statutes and close to half of a million federal regulations carrying potential criminal penalties, advocates for the Mens Rea protection say it is urgently needed.

"Rampant and unfair overcriminalization in America calls for criminal justice reform, which starts with default mens rea legislation," [said](#) Senator Orrin Hatch (R-Utah), who sponsored the measure. "Requiring proof of criminal intent protects individuals from prison time or other criminal penalties for accidental conduct or for activities they didn't know were wrong. In recent years, Congress and federal agencies have increasingly created crimes with vague or unclear criminal intent requirements or with no criminal intent requirement at all. The Mens Rea Reform Act will help correct that problem and ensure that honest, hardworking Americans are not swept up in the criminal justice system for doing things they didn't know were against the law."

Hatch also [spoke on the Senate floor](#) about why his bill was needed, pointing to a wide range of absurd



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criminal offenses defined in practically innumerable federal statutes and regulations — everything from writing checks for less than \$1 to allowing a pet to make a noise that frightens wildlife on federal land is a federal crime. “Individuals should not be threatened with prison time for accidentally committing a crime or for engaging in an activity they did not know was wrong,” the senator from Utah said. “If Congress wants to criminalize an activity, and does not want to include any sort of criminal intent requirement, Congress should have to specify in statute that it is creating a strict liability offense. I believe this simple legislative solution will go a long way in reducing harsh sentences for morally innocent offenders. It will also push back against the overcriminalization of innocent behavior.”

The legislation, also known as S. 1902, was introduced this month by Senator Hatch, along with co-sponsors Senator Mike Lee (R-Utah), Senator Ted Cruz (R-Texas), Senator David Perdue (R-Ga.), and Senator Paul. While Hatch has developed a reputation as an establishment “Republican in Name Only,” or RINO, most of his colleagues who have rallied behind the bill so far do not fall in that category. Among the coalition supporting the effort are three of the Senate’s top scoring lawmakers as measured by *The New American* magazine’s Freedom Index, which ranks members of Congress based on the constitutionality of their voting record. Hatch’s score on this index is 56 percent, while Lee has a 92, Paul has a 93, Cruz has an 82, and Perdue has a 64.

In statements released online, the co-sponsoring lawmakers explained why they felt the measure was so important. “Our criminal justice system is supposed to be built on the foundation of -innocent until proven guilty,- yet the massive growth of Big Government subjects Americans to possible jail time for crimes they could have had no reasonable idea they were committing,” explained Senator Paul, one of the leading constitutionalists in Washington, D.C., who has largely followed in his father’s footsteps when it comes to protecting liberty. “This bill would implement much-needed change.”

Senator Lee, who along with Hatch represents Utah in the Senate, said that prosecutors should have to show that a suspect had a guilty mind before that person is put behind bars. “Unfortunately our federal laws contain far too many provisions that do not require prosecutors to prove a defendant intended to commit a crime,” he explained. “The result is criminal justice system that over penalizes innocent acts which only undermines the rule of law.”

Senator Cruz, meanwhile, called the lack of standard Mens Rea protections “one of the biggest flaws” in America’s modern criminal justice system. “Currently, the federal government can send men and women to prison without demonstrating criminal intent,” he said, adding that he was proud to join Senator Hatch in addressing this key issue. “As Congress works to address criminal justice reform, the Mens Rea Reform Act needs to be enacted to protect the rights of all Americans.”

As of now, there are close to 200,000 inmates held in federal prisons across America. (The overwhelming majority of the millions of Americans behind bars are in state prisons.) But according to legal experts who have studied the proliferation of regulations and statutes with criminal penalties at the federal level — [the Obama administration imposed an almost unfathomable 75,000 pages of regulations in 2014 alone](#) — virtually every American could theoretically find themselves behind bars if federal prosecutors decided to target them. Indeed, when the Congressional Research Service was asked by lawmakers to calculate the number of statutes and regulations with criminal penalties, its response was that it lacked the “manpower and resources to accomplish this task.”

In his 2011 book [Three Felonies A Day: How the Feds Target the Innocent](#), Harvey Silverglate explained that the average American professional likely commits several federal crimes in the course of a normal day — all without realizing it. The reason for that, he says, is the very nature of modern federal criminal



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laws, “which have exploded in number but also become impossibly broad and vague,” states a summary of the book. Prosecutors could pin arguable federal crimes on practically everyone. Other experts, such as prominent emeritus law professor John Baker, have made similar arguments. “There is no one in the United States over the age of 18 who cannot be indicted for some federal crime,” Baker was quoted as saying by the *Wall Street Journal*. That means you, too.

Such alarming facts have contributed to the widespread support for the Mens Rea Reform Act across the political spectrum. While the Obama administration fought back against the same measure when it was introduced in 2015, it has plenty of supporters on the left — particularly among those seeking to end what they view as the overcriminalization that has contributed to America having essentially the highest prison population of any country in the world. When the measure was introduced in the House in 2015, it was co-sponsored by some of the nation’s most liberal lawmakers, such as also by Representative John Conyers, Jr. (D-Mich.) and Representative Sheila Lee Jackson (D-Texas). The U.S. Chamber of Commerce, the National Association of Criminal Defense Lawyers (NACDL), the Federal Defenders of New York, Inc., and numerous other interests have also publicly announced their support.

Among conservatives, the legislation has also earned support, with the Heritage Foundation and FreedomWorks, among others, offering their support. “Having mens rea protections — requiring that a person knows his or her action was wrong — is an essential element in maintaining a free society,” said Adam Brandon, president at the grassroots group FreedomWorks, while urging supporters to contact lawmakers in support of the bill. “Only when a person acts with a guilty mind can he or she rightfully be called a criminal, and our justice system should reflect that principle.” If even the Congressional Research Service cannot number America’s criminally enforceable federal laws and regulations, everyday Americans “certainly cannot be expected to know the details of each one,” he added. “Sentencing someone as a criminal who acted without any semblance of a guilty mind in accidentally violating a federal law — for example, having a pet on a leash longer than six feet in a federal park — is not only unfair, but contributes to wasteful government spending on people who are not criminals.”

The Constitution delegates only a very limited amount of authority to the federal government to create and punish crimes. Treason, piracy, and counterfeiting, for example, are all constitutionally authorized federal crimes. But for the most part, criminal law should be within the purview of the states, and it should be used only to punish genuine criminals. The Mens Rea Reform Act may not instantly restore respect for constitutional principles and justice in Washington, D.C., but it would go a long way toward protecting innocent Americans from [abuse and threats by overzealous federal prosecutors](#). Over the long term, though, the only real solution to the crisis of an out-of-control federal government is to restore widespread understanding and appreciation of the Constitution among the American people.

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