

Senator Orrin G. Hatch
Statement on the Senate Floor
“Overcriminalization and *Mens Rea* Reform”
September 21, 2015

Mr./Mme. President, I rise today to address the topic of criminal justice reform. There’s been a lot of discussion in Congress recently on this subject. Nearly all of the conversation has focused on sentencing. Various proposals have been introduced to cut prison sentences, augment judges’ ability to sentence below statutory minimums, or allow prisoners to earn early release for good behavior. A number of my colleagues on the Senate Judiciary Committee have been meeting behind closed doors for months to try to reach a compromise that incorporates elements of these various proposals.

I rise today to address the broader parameters of criminal justice reform and to remind my colleagues that sentencing reform is only one piece of a broader effort that has been underway for some time now in both houses of Congress. There are a number of other aspects of criminal justice reform that merit our attention, foremost of which is the need to ensure meaningful criminal intent requirements in our statutes and regulations.

Over the past several years, a unique coalition of Members and stakeholder groups from across the ideological spectrum has been working together to address the problem of overcriminalization. There is broad, bipartisan agreement in many quarters that Congress has criminalized too much conduct and mandated overly harsh penalties for too many crimes. Congress’s persistent recourse to criminal law as the answer for society’s ills has cost taxpayers millions of dollars and branded as criminal conduct that may be unwitting or not even blameworthy. It has also resulted in thousands of Americans losing their livelihoods or liberty for reasons that, upon closer examination, seem not entirely justified.

The overcriminalization problem manifests itself in a variety of ways. First is through the sheer number of federal crimes. There are now nearly 5,000 criminal statutes scattered throughout the U.S. Code. But statutes are only part of the story. In addition, there are an estimated 300,000 criminal regulatory offenses buried in the 80,000-page Code of Federal Regulations. 300,000, Mr./Mme. President. If the administration promulgated one criminal regulation per day—that is, if it created one new crime each day—it would take 822 years to create that many criminal regulations.

The entire Code of Hammurabi was only 282 laws. Our current federal criminal code—statutes and regulations together—is over a thousand times that size. I’m not saying Hammurabi should be our model in many things, but surely 300,000-plus federal crimes is overkill. If Hammurabi could govern ancient Mesopotamia with fewer than 300 laws, surely we can make do with less than 300,000.

And it’s not just the sheer number of crimes, Mr./Mme. President. Overcriminalization also manifests itself through the creation of arcane, obscure, and frankly ridiculous crimes. For example, under federal law, it’s a crime, punishable by up to six months in prison, to use the 4-H club logo without authorization. It’s also a federal crime, again punishable by up to six months in prison, to walk a dog in a federal park area on a leash that’s longer than six feet. Why on earth

do either of these actions need to be federal crimes? I don't dispute that really long dog leashes can be annoying, and I can understand why the 4-H club wouldn't want pretenders roaming around claiming to serve the heads, hearts, hands, and health of youth. But these are not proper subjects for criminal penalties. Whatever crises exist with overlong dog leashes or impostor 4-H clubs can be dealt with through civil means.

The problem with such obscure and esoteric crimes—aside from the sheer embarrassment they should cause to Congress and the promulgating agency—is that they criminalize conduct that no reasonable person would know was illegal. Walking a dog on a seven-foot leash is not inherently wrongful. Nor is putting a 4-H club logo on a sign. And even if common sense might suggest checking with the 4-H club before using its logo, no sane person would think it's a crime not to do so.

The upshot is that there are who-knows-how-many crimes on the books that the average person has no idea about and that criminalize conduct no reasonable person would think was wrong. According to a recent book, the average American unwittingly commits three felonies per day. That should deeply trouble all of us, and not because it suggests anything wrong with the average American.

We're a nation of laws, Mr./Mme. President. We're supposed to be guided by the rule of law. Our criminal law—indeed, the very idea that it's proper to brand some conduct, and some people, as criminal—is predicated on the notion that individuals know the law and are able to choose whether or not to follow it. If, as I have suggested, and as many scholars agree, we live in a country where much otherwise benign conduct has been labeled criminal, and where decent, honorable citizens can become criminals through no fault or intent of their own, then we have a real problem on our hands. Our criminal laws should be aimed at protecting our communities and keeping bad influences off our streets, not tripping up honest citizens.

The third way the problem of overcriminalization manifests itself is through the vague, duplicative, and even conflicting terms of many of our criminal laws. Put simply, many of our criminal laws are bad laws. They are poorly written, they sweep too broadly, and they give too much power to overzealous prosecutors.

Consider the case of John Yates, who was convicted of violating the so-called anti-shredding provision of the Sarbanes-Oxley Act. This extraordinarily broad law, which Congress passed in the wake of the Enron scandal, prohibits the destruction of any “tangible object” with intent to impede, obstruct, or influence a federal investigation.

Yates was not an Enron executive, or any sort of corporate executive. He was a fisherman. His crime? Discarding a small number of undersized fish from his boat after a state inspector found him carrying fish slightly below the minimum legal size. Yates appealed his conviction all the way to the Supreme Court on the ground that the statute did not apply to his conduct. By a 5-4 vote, the Court agreed.

In a remarkable move, the dissenting Justices—who had voted to sustain Yates's conviction—heaped scorn on the anti-shredding statute. They called it a “bad law—too broad and undifferentiated, with too-high maximum penalties.” Its vague terms and overly harsh

penalties were “unfortunately not an outlier, [but rather] an emblem of a deeper pathology in the federal criminal code.”

These words should be a wake-up call. For too long, Congress has criminalized too much conduct and enacted overbroad statutes that sweep far beyond the evils they’re designed to avoid.

Surely, of all the categories of laws we pass here in Congress, we should take most care with criminal laws. Criminal laws empower the state to deprive citizens of liberty and precious financial resources. They carry serious collateral consequences, including loss of the right to vote, the right to own a firearm, and the ability to hold certain jobs. And they permit the state to brand citizens with that most repugnant of all titles—criminal. There is simply no excuse for sloppily drafted, slapdash criminal laws. Too much is at stake.

Related to the problem of poor draftsmanship is the fourth way the overcriminalization problem manifests itself—through the absence of meaningful *mens rea* requirements. The need for strong *mens rea* protections, I believe, is of particular concern and will be the focus of the rest of my remarks.

Mens rea is Latin for guilty mind. The term expresses a time-honored, fundamental feature of our criminal law that in order for an act to be a crime, the actor must have committed the act with malicious intent. The requirement of a guilty mind protects individuals who unwittingly commit wrongful acts or who act without knowledge that what they are doing is wrong.

The person who mistakenly retrieves the wrong coat from the coat room does not become a thief merely because he took something that wasn’t his. Only if he takes a coat knowing that it belongs to someone else has he committed a criminal act, for only then has he acted with criminal intent. Similarly, a person who enters land that he believes is public property but that in fact belongs to another person does not thereby commit criminal trespassing. Only if the person knows she is not legally entitled to enter the property is she guilty of a criminal offense.

In an era when our statute books and regulations overflow with criminal offenses, *mens rea* protections are even more important. Many modern criminal offenses, such as the dog walking offense I mentioned earlier, involve conduct that is not inherently wrongful. Only a person who knows the details of such offenses—and knows that they exist—would know that conduct in violation of the offenses is criminal. This is different from traditional crimes such as assault or theft, which even a child knows is wrong. And with 300,000-plus federal crimes on the books, you can be sure that the vast majority are not traditional crimes that everyone knows are wrong, but rather obscure provisions known only to a select few in the bowels of the federal bureaucracy. It doesn’t take 300,000 individual crimes to cover the categories of conduct everyone knows is wrong.

Without adequate *mens rea* protections—that is, without the requirement that a person know his conduct was wrong, or unlawful—everyday citizens can be held criminally liable for conduct that no reasonable person would know was wrong. This is not only unfair; it is immoral. No government that purports to safeguard the liberty and the rights of its people should have power to lock individuals up for conduct they didn’t know was wrong. Only when a person has

acted with a guilty mind is it just, is it ethical, to brand that person a criminal and deprive him of liberty.

Unfortunately, many of our current criminal laws and regulations contain inadequate *mens rea* requirements, or even no *mens rea* requirement at all. Far too often, such laws leave people vulnerable to prosecution for conduct they thought was lawful. Consider two examples.

First is Wade Martin, an Alaskan fisherman who sold ten sea otters to a buyer he thought was a Native Alaskan, but who turned out not to be. Authorities charged Wade with violating the Marine Mammal Protection Act, which criminalizes the sale of sea otters to non-Native Alaskans. The fact that he thought the buyer was a Native Alaskan was irrelevant. Prosecutors had to prove only that the buyer was not in fact a Native Alaskan. The absence of a criminal intent requirement meant Wade could be convicted regardless of whether he knew what he was doing was wrong. Wade pleaded guilty to a felony charge and was ordered to pay a \$1,000 fine.

Second is Lawrence Lewis, a janitor at a retirement home who was charged with criminally violating the Clean Water Act when he diverted backed-up sewage at the retirement home to a storm drain. Lawrence thought the storm drain was connected to the city's sewage-treatment system, but it turned out it emptied into a creek that ultimately connected to the Potomac River, a protected waterway. The Clean Water Act required proof only that Lawrence diverted the sewage into the storm drain. It required no proof that he knew the drain connected to a creek that emptied into the Potomac or that he knew he was violating the law. Lawrence pleaded guilty and was sentenced to probation.

These and other examples demonstrate the danger of missing or incomplete *mens rea* requirements. Even before we get to the point of sentencing, the fact that people can be swept up in the criminal justice system and convicted for doing things they thought were lawful is deeply troubling. Any sentence they receive for their purported crimes is unfair, because they shouldn't even have been charged criminally in the first place. Or at the very least, the government should have had to prove criminal intent in order to convict.

And this is why, Mr./Mme. President, it is important for my colleagues to keep in mind the full scope of our overcriminalization problem. Sentencing is only one part of the criminal justice process—an important part, to be sure—but only one part of a very long process.

And that process begins here, in Washington, when we in Congress decide what conduct to criminalize and what the government must prove in order to convict. Among the most important choices we make when crafting a criminal law is deciding what level of criminal intent the government must prove. Must the person know he was acting unlawfully? Is it enough that the person intended the wrongful act? Or is it enough merely that he knew his actions would produce a certain result? The answers to these questions determine whether the person even committed a crime in the first place, separate and apart from what the penalties should be if he's convicted.

As one expert has written, "While sentencing reform addresses how long people should serve once convicted, *mens rea* reform addresses those who never should have been convicted in the first place: people who engaged in conduct without any knowledge of or intent to violate the

law and [conduct] that they could not reasonably have anticipated would violate a criminal law.” Surely we can all agree that a person should not be branded a criminal and locked up for doing something they didn’t know was wrong.

Unsurprisingly, then, from the inception of the anti-overcriminalization movement, ensuring that criminal laws have adequate *mens rea* protections has been a bipartisan priority. During the hearings of the House Overcriminalization Task Force, Chairman Sensenbrenner declared that “[t]he lack of an adequate intent requirement in the Federal Code is one of the most pressing problems facing this Task Force....” Ranking Member Bobby Scott similarly warned that without adequate *mens rea* protections, “honest citizens are at risk of being victimized and criminalized by poorly crafted legislation and overzealous prosecutors.” And Representative Conyers said that “when good people find themselves confronted with accusations of violating regulations that are vague, address seemingly innocent behavior, and lack adequate *mens rea*, fundamental Constitutional principles of fairness and due process are undermined.”

But here in the Senate, there has been a noticeable absence of discussion about *mens rea* and the need for robust *mens rea* protections. There’s been a lot of talk about sentencing, but little about *mens rea*. It’s time to change that, Mr./Mme. President.

For the past several months, I’ve been working on legislation to address the deficiencies in *mens rea* requirements in existing statutes. My bill would set a default *mens rea* requirement for all statutes that lack such a requirement. It would ensure that courts and creative prosecutors do not take the absence of an express criminal intent standard to mean that the government can convict without any proof of a guilty mind. My bill would also clarify that when a statute identifies a *mens rea* standard but does not specify which elements of the crime that standard applies to, the standard identified applies to all elements of the crime unless a contrary purpose plainly appears in the text of the statute.

My bill would not mandate a particular *mens rea* standard for all crimes, nor would it override existing standards set forth in statutes. All it would do is set a default for when Congress has failed to specify the criminal intent required for conviction. Congress would remain free whenever it wanted to specify a different *mens rea* standard for a statute, replacing the default with its own chosen standard. The default would merely operate in the absence of congressional action. It would bring clarity, ensure that Congress does not through oversight create crimes without any *mens rea* requirement, and protect individuals from being convicted for conduct they didn’t know was wrong.

I look forward to working with my colleagues on this important legislation and urge all of them to give it their support. Any deal on sentencing, Mr./Mme. President, and any package of criminal justice reforms, must include provisions to shore up *mens rea* protections. In fact, Mr./Mme. President, I question whether a sentencing reform package that does not include *mens rea* reform would be worth it. And I am not alone.

Many members of the overcriminalization coalition—members who helped lay the key intellectual and political groundwork for the negotiations now underway—believe strongly that any criminal justice reform bill that passes this body must include *mens rea* reform. I agree.

There can be no more important work that we do here in Congress than ensuring that honest, hard-working Americans are not unjustly imprisoned.

###