



# Three Ways Congressional Mens Rea Proposals Could Allow White Collar Criminals to Escape Prosecution

By Greg Dotson and Alison Cassady      March 11, 2016

Congress has been working on a criminal justice reform package to address the over-criminalization and mass incarceration problems that the United States faces. These problems are major drivers of poverty and inequality and are devastating many families and communities, particularly communities of color.<sup>1</sup> Unfortunately, some congressional policymakers are pushing to use this reform package to fundamentally change what it means to be guilty of a white-collar crime.

On November 18, 2015, the U.S. House of Representatives Judiciary Committee voted to advance H.R. 4002, the Criminal Code Improvement Act of 2015, as part of its criminal justice reform package.<sup>2</sup> The legislation includes a provision—making up just twelve lines of the 35-page legislation—that would force prosecutors to meet a new, two-part default mens rea requirement for certain crimes.<sup>3</sup> Mens rea—Latin for “guilty mind”—is a legal standard used to identify the state of mind that would make a defendant culpable of a crime.<sup>4</sup>

Just a few days later, Sen. Orrin Hatch (R-UT) introduced companion bill S. 2298, the Mens Rea Reform Act.<sup>5</sup> On January 20, 2016, the U.S. Senate Committee on the Judiciary held a hearing on this bill and the issue of criminal intent standards in federal prosecutions. Leslie Caldwell, the witness for the U.S. Department of Justice, or DOJ, expressed concern about the proposed mens rea language under consideration in both bills, warning that it could “cause extreme and very harmful disruptions to essential federal criminal law enforcement operations.”<sup>6</sup> She testified that the legislation would “make it considerably more difficult to effectively prosecute violent crimes, sexual offenses, corporate wrongdoing, and other serious misconduct.”<sup>7</sup>

In effect, both bills would significantly increase the burden of proof for prosecutors seeking to enforce criminal provisions of food safety, banking, and environmental laws, among others, designed to thwart corporate crime. This issue brief describes the default mens rea proposals and outlines three ways this new legal standard could make it easier for corporate criminals to go unpunished.

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## The proposed mens rea requirement

Most crimes consist of two elements: an act, or *actus reus*, and a mental state, or *mens rea*.<sup>8</sup> When trying a case against an alleged criminal, the prosecutor needs to prove both elements—that the defendant performed the act or omission that comprises the crime and that the defendant had a certain state of mind when committing the crime. The state of mind necessary for culpability differs based on the crime. For some crimes, the prosecutor may not need to prove that the defendant had any specific state of mind. For other crimes, the prosecutor must show that the defendant acted knowingly or even willfully. For many crimes, the U.S. Supreme Court has made clear that the prosecutor must show only that the defendant acted in willful blindness, explaining that “defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances.”<sup>9</sup>

Some laws do not specify the state of mind required to prove guilt. However, in Caldwell’s testimony before the Senate, she noted that the Supreme Court has clearly stated that courts will interpret statutes without an explicit *mens rea* standard as adhering to the “basic principle that ‘wrongdoing must be conscious to the criminal.’”<sup>10</sup> The DOJ testified that this does not mean that people have to know that their conduct is illegal, only that they must “know the facts that make [their] conduct fit the definition of the offense.”<sup>11</sup>

The Criminal Code Improvement Act, as introduced in the House of Representatives and advanced by the House Judiciary Committee, would depart from this approach. The bill establishes a default *mens rea* requirement for federal criminal offenses if the relevant statute or regulation is silent on it—in other words, where “no state of mind is required by law for a Federal criminal offense.”<sup>12</sup> The default standard consists of two parts. First, prosecutors would need to prove that defendants acted knowingly. That means that the defendants knew—or were not willfully blind to—the facts that constitute their offense. For instance, if the law prohibits taking a specific action, such as transporting a dangerous substance, prosecutors would need to prove that the defendants knew that they took that action.

The second part of the proposed default standard would add a significantly higher burden of proof for the prosecutor. The bill states:

*If the offense consists of conduct that a reasonable person in the same or similar circumstances would not know, or would not have reason to believe, was unlawful, the Government must prove that the defendant knew, or had reason to believe, the conduct was unlawful.*<sup>13</sup>

In effect, prosecutors would not only have to prove that defendants knew they took a prohibited action but also that they knew the action was prohibited by law. For example, in the case of the Peanut Corporation of America, company officials were sentenced to prison for their roles in shipping salmonella-infected peanut products that poisoned more than 700 people and killed nine people.<sup>14</sup> If the proposed mens rea provision applied to conspiracy—one of the charges brought in the case—prosecutors would have needed to prove both that the officials worked together to ship tainted peanut products and that they understood that such action constituted an illegal conspiracy in order to convict on that charge.

Meanwhile, S. 2298—the Mens Rea Reform Act<sup>15</sup>—requires, with some exceptions, federal prosecutors to prove that defendants acted “willfully, with respect to any element [of a criminal statute or regulation] for which the text of the covered offense does not specify a state of mind.”<sup>16</sup> The bill defines “willfully” as acting “with knowledge that the person’s conduct was unlawful.”<sup>17</sup> The bill also heightens the challenge of prosecuting alleged criminals under a “knowingly” standard by redefining that term to mean that they are “aware that it is practically certain” that their conduct will cause a criminal result.<sup>18</sup>

The House and Senate language would have practical implications for the federal prosecution of corporate crime, as described in the following section.

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### Three ways the proposed mens rea requirements would hinder the prosecution of white-collar crime

The Criminal Code Improvement Act and the Mens Rea Reform Act would impose a default mens rea standard that could make it more difficult for federal prosecutors to win cases against corporate criminals. These bills could tip the scales of justice toward alleged corporate criminals in three important ways.

#### Allow white-collar criminals to claim ignorance of the law—and win

To prosecute a federal crime successfully under the new default standard, prosecutors would have to prove that defendants actually knew or should have known that a certain action was prohibited by law. This overturns the age-old maxim that ignorance of the law is no excuse for breaking it.

Corporate executives would have an incentive to remain ignorant of certain company practices and the laws and regulations that apply to them in order to maintain a plausible defense. Current law allows prosecutors to prove a defendant’s guilt based on the defendant’s “conscious avoidance” or “willful blindness.”<sup>19</sup> In contrast, the DOJ expressed concern that the default mens rea standard could allow criminal defendants to “escape liability—or at a minimum waste the federal judiciary’s time in attempts to do so—by arguing that they did not know their conduct was illegal.”<sup>20</sup>

The Senate bill would apply the default mens rea standard even in cases where questions about the applicable mens rea standard for a specific offense have already been resolved by the courts.<sup>21</sup> This could have the effect of trumping well-understood, settled law with a new requirement—that prosecutors prove that defendants acted with knowledge that their conduct was unlawful.

Robert Weissman, president of Public Citizen, testified before the Senate Judiciary Committee about efforts to establish a default mens rea standard. He warned that the nature of corporate crimes “may pose special problems of proof in establishing willfulness” and intent to commit a crime. Specifically, he noted that “diffuse responsibility and decentralized decision-making may make it difficult to establish who, exactly, made a decision to break the law.”<sup>22</sup> According to Anthony Romero of the American Civil Liberties Union, if the mens rea proposal were implemented, it would “require prosecutors to prove that a defendant was aware of the illegal nature of his or her actions and intended to cause them. Proving such intent would be nearly impossible for many financial, environmental and regulatory crimes but relatively simple for drug and property crimes.”<sup>23</sup>

Even proponents of a default mens rea standard have admitted that this provision could result in CEOs and other high-level executives avoiding prosecution. John G. Malcolm, a senior legal fellow at the Heritage Foundation, wrote: “Will some senior corporate management ‘fat cats’ benefit because stricter *mens rea* requirements make it more difficult to prosecute them successfully? Possibly.”<sup>24</sup>

### Weaken enforcement of critical environmental, health, and safety statutes

The DOJ testified that a default mens rea requirement “would severely weaken important statutes critical to protecting public health and safety” and “insulate from liability those who profit from activities that, if not carefully conducted, can kill or injure innocent citizens.”<sup>25</sup>

The DOJ noted that some health and safety laws deliberately exclude a mens rea requirement in order to place “the burden of compliance on those who are in the best position to ensure their products and activities are safe.”<sup>26</sup> It offered the Federal Food, Drug, and Cosmetic Act as a case study. This law does not apply an explicit mens rea requirement to the sale of adulterated foods, drugs, and medical devices. As a result, the DOJ has been able to prosecute companies with lax hygiene and safety practices that led to consumer illness and death. In recent years, for example, the DOJ successfully prosecuted two egg company executives who failed to adhere to food safety standards, causing a deadly salmonella outbreak.<sup>27</sup>

## Create years of costly litigation and legal uncertainty

The proposed legislation contains ambiguous language that guarantees there would be legal challenges based on interpretation. As a result, the default mens rea proposals could lead to years of costly litigation that would only hamper criminal prosecution of guilty individuals.

The proposed language could create confusion—and therefore opportunities for litigation—in several ways. The House bill specifies that the default mens rea provision would apply to federal criminal offenses where “no state of mind is required by law.”<sup>28</sup> The bill fails to define “state of mind” and “required by law,” raising uncertainties about whether the default mens rea standard would apply in cases where a mens rea standard has been established by judicial interpretation of a federal statute rather than the statute itself.<sup>29</sup> Similarly, the Senate bill applies the default requirement “to any element for which the text of the covered offense does not specify a state of mind.”<sup>30</sup> This language would create tremendous uncertainty by subjecting every element of an offense to the default mens rea standard. Additionally, under the alternative mens rea standards in both bills, uncertainties would be raised regarding how those standards might apply to new and existing laws and regulations. In the case of the Senate bill, the proposal’s redefinition of the term “knowingly” would create new uncertainties even around criminal statutes that have applied the “knowingly” standard with clarity for decades or longer.

The proposed House legislation introduces additional confusion by applying the default mens rea standard “if the offense consists of conduct that a reasonable person in the same or similar circumstances would not know, or would not have reason to believe, was unlawful.”<sup>31</sup> Therefore, before building a case that the defendant knew the conduct was unlawful—already a high burden of proof—the prosecutor would have to conduct a broadly defined and unprecedented inquiry into whether a “reasonable” person would or would not know whether certain conduct would violate the law. Defendants with good lawyers would be sure to use the ambiguity of this language to embroil prosecutors in protracted litigation.

The Senate bill carves out several exceptions to the default mens rea standard, but the exceptions are limited and provide ample fodder for litigation. For example, it specifies that the default standard does not apply to “any element for which the text of the covered offense makes clear that Congress affirmatively intended not to require the Government to prove any state of mind with respect to such element.”<sup>32</sup> The DOJ testified that this and other exceptions in the Senate proposal “would spawn numerous challenges to whether elements of federal statutes meet the ambiguous ‘exceptions’ carved out by the legislation.”<sup>33</sup>

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## Conclusion

If the default mens rea provisions under discussion in the House of Representatives and the Senate become law, they could make it harder for prosecutors to bring white-collar corporate criminals to justice. Language with such potentially significant consequences for human health, the environment, and public safety has no place in a meaningful criminal justice reform effort.

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## Endnotes

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