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# Four Ways the Executive Branch Can Advance Mens Rea Reform

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## KEY TAKEAWAYS

Although congressional action is needed, the executive branch has an important role to play in advancing *mens rea* reform.

The executive branch can use its prosecutorial discretion to ensure that people are not prosecuted for accidents or innocent mistakes.

The executive can also use its authority over agencies that have criminally enforced regulations to identify those regulations and describe their *mens rea* elements.

With the passage last year of the First Step Act,<sup>1</sup> legislators and policymakers who are passionate about criminal justice reform have been looking for the next issue around which to rally. For years, scholars at The Heritage Foundation,<sup>2</sup> the National Association of Criminal Defense Lawyers,<sup>3</sup> and law schools around the country<sup>4</sup> have hoisted *mens rea* reform as the rallying banner.

*Mens rea*—Latin for “guilty mind”—refers to the knowledge or intent that a criminal defendant must possess to be guilty of a crime. Historically, two components made up a crime: a bad action (“*actus reus*”) and knowledge that the act was wrong (“*mens rea*”).<sup>5</sup> Intent mattered because the criminal law did not punish honest mistakes or harm caused by accident or negligence. It punished only behavior that was morally blameworthy.

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That is no longer the case. Increasingly, the criminal law punishes accidents and criminalizes behavior without any regard to the defendant's intent.<sup>6</sup> *Mens rea* reformers are concerned about this trend and want to ensure that the state does not incarcerate "people who engage in conduct without any knowledge of or intent to violate the law and that they could not reasonably have anticipated would violate a criminal law."<sup>7</sup>

Just a few years ago, in 2013, a bipartisan group of members of the U.S. House of Representatives formed the Over-Criminalization Task Force and agreed on the need for *mens rea* reform.<sup>8</sup> Ranking Member Robert "Bobby" Scott (D–VA) summed up the Democratic Members' views:

Federal courts have consistently criticized Congress for imprecise drafting of intent requirements for criminal offenses.... It is clear that the House and Senate need to do better. We can do so by legislating more carefully and articulately regarding *mens rea* requirements, in order to protect against unintended and unjust conviction. We can also do [so] by ensuring adequate oversight and default rules when we fail to do so.<sup>9</sup>

Unfortunately, despite these and other efforts,<sup>10</sup> Congress has not succeeded in passing *mens rea* reform legislation.

Additionally, it is not clear how much bipartisan support *mens rea* reform still enjoys. To some on the left, notably former President Barack Obama, *mens rea* reform "could undermine public safety and harm progressive goals."<sup>11</sup> That argument, however, misunderstands the role *mens rea* plays in our justice system. *Mens rea* protects everyone equally from criminal prosecution for honest mistakes or accidents. To call *mens rea* reform an obstacle to progressive goals reveals a willingness to sacrifice individuals' liberty—sending them to prison and burdening them with all the consequences that a criminal conviction imposes—in pursuit of policy preferences. That is not an acceptable trade-off, but President Obama's opinions on this issue are thankfully not ubiquitous on the left.<sup>12</sup> *Mens rea* reform remains good policy, and policymakers should make it a high priority.

Congress, however, cannot be counted on to act on any *mens rea* proposals while it is bogged down in impeachment proceedings. That does not mean, however, that *mens rea* reform is a nonstarter. The executive branch has several options that it can consider to advance this important objective on its own.

## Executive Branch Actions

The first three actions that the executive branch can take to advance *mens rea* reform arise out of what is known as “prosecutorial discretion.” That term refers to the charging discretion that the President and his lieutenants at the U.S. Department of Justice (DOJ) possess. The president has the responsibility to “take Care that the Laws be faithfully executed,”<sup>13</sup> but prosecutors have the authority to decline to charge someone, offer him or her a plea bargain, or seek a death sentence in any particular case.<sup>14</sup> The purpose of that discretion is “to provide individualized justice.”<sup>15</sup> Prosecutorial discretion is broad, and the Supreme Court has imposed few limits on it aside from prohibiting its exercise “to violate constitutionally prescribed guaranties of equality or liberty.”<sup>16</sup>

Although prosecutorial discretion is broad, it should be employed only in individual cases or in a small set of cases.<sup>17</sup> It is “designed to help achieve statutory objectives...not to frustrate statutory objectives or to effectuate a change in policy.”<sup>18</sup> Fundamentally, it is not “an invitation to violate or ignore the law.”<sup>19</sup>

With these guidelines in mind, the executive branch can use its prosecutorial discretion to advance the cause of *mens rea* reform in three ways, two of which we approve and one of which we do not approve. The fourth option derives not from prosecutorial discretion, but from the President’s authority over executive branch agencies.

- 1. As a matter of policy and absent extraordinary circumstances, prosecutors should decline to prosecute cases brought under statutes with inadequate *mens rea* elements unless there is clear evidence of bad intent.**

The first option is for the Department of Justice to exercise its prosecutorial discretion to decline to prosecute crimes in any case where the Mens Rea Reform Act of 2018 would have enhanced the existing *mens rea* requirements.<sup>20</sup> That bill would have added a default *mens rea* element of willfulness to any criminal offense that otherwise lacked a *mens rea* element.<sup>21</sup>

The Attorney General could issue a policy directive to the effect that absent extraordinary circumstances, prosecutors should not file criminal charges against anyone unless there is clear evidence of

“willfulness,” which would require a government prosecutor to prove that the defendant intended to break a known law or otherwise knew he was doing something wrong.<sup>22</sup>

**2. Require prior approval of a high-ranking DOJ official for any prosecution under a strict-liability statute.**

The second option is to require approval from a U.S. Attorney or senior DOJ official before any defendant can be prosecuted for a strict-liability crime. This approach would ensure that someone in a position of authority pauses before charges are filed to consider whether a strict-liability prosecution is in the interests of individualized justice.

The Department of Justice already uses a similar approval process for other crimes. For example:

- A prosecutor must obtain the approval of the Assistant Attorney General for the Criminal Division before initiating a case under the Racketeer Influenced and Corrupt Organizations Act.<sup>23</sup> The same goes for prosecutions of the crime of fleeing to avoid prosecution.<sup>24</sup>
- Likewise, the Assistant Attorney General for the National Security Division must approve all economic espionage prosecutions.<sup>25</sup>
- Additionally, no prosecution of crimes against “Federally Protected Activities”<sup>26</sup> (such as voting, serving on a federal jury, or receiving federal financial assistance) may commence until the Attorney General or Deputy Attorney General certifies that “in his or her judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice.”<sup>27</sup>
- A similar approval requirement once existed for prosecutions of trade secret theft but has since expired.<sup>28</sup>

The DOJ’s *Criminal Resource Manual* includes dozens more of these prior-approval requirements, so adding another for strict-liability prosecutions would accord with established practices.

**3. Forbid prosecutions under statutes that lack any *mens rea* element.**

The third option—which we do not support—is simpler but more dramatic than the first two: Simply refuse to prosecute crimes under any statute that lacks an adequate *mens rea* element. That policy would be analogous to President Obama’s Deferred Action for Childhood Arrivals (DACA) policy because, like DACA, it amounts to a broad refusal to enforce a law.<sup>29</sup> Adopting the rationale behind that policy, the executive branch could conclude that prosecuting people for violations of statutes that lack an adequate (or any) *mens rea* element would be unjust and ought to be a lower priority than prosecuting individuals who violate statutes with an adequate *mens rea* element and engage in intentional wrongdoing or conduct they know to be dangerous.

Although this option accords with the DACA precedent, we oppose it for the same reasons we opposed that policy.<sup>30</sup> It would be an improper exercise of prosecutorial discretion that violates separation-of-powers principles.

**4. Order executive branch agencies to identify all agency regulations that could serve as the basis for a criminal charge and list their *mens rea* element(s).**

The fourth option comes not from the executive’s prosecutorial discretion but from the President’s authority over the executive branch agencies that he oversees. Pursuant to that authority, the President can issue an executive order requiring all executive branch agencies that have criminally enforced regulations to identify those regulations and describe their *mens rea* elements. The Department of Justice should then review them to determine whether those regulations adequately protect potential defendants from unjust prosecutions.

The task would be daunting—experts estimate that there are 300,000 or more regulatory crimes<sup>31</sup>—but not without precedent.

- North Carolina’s legislature recently ordered the state’s agencies to compile and report on all of their criminal regulations.<sup>32</sup> The legislature will then review the regulations and determine whether any of them should have their criminal penalties removed.<sup>33</sup>

- In 2014, Minnesota’s legislature—at the request of its Democratic Governor, Mark Dayton, reviewed and repealed 1,175 obsolete regulations and crimes.<sup>34</sup>
- The Texas legislature maintains a Sunset Advisory Commission that assesses “the continuing need for a state agency or program to exist.”<sup>35</sup> As part of that ongoing assessment, the legislature reviews and, if appropriate, eliminates certain regulations.<sup>36</sup>

In addition, easily adaptable model language for this executive order already exists. The Mens Rea Reform Act of 2018, which was introduced by then-Senator Orrin Hatch (R-UT), included language that would have required federal agencies to specify a *mens rea* standard for all regulations that carry criminal penalties and would have automatically invalidated any regulations that lacked a *mens rea* standard after six years, with some exceptions.<sup>37</sup>

Regardless of whether it is Congress or the President that decides to take action on *mens rea* reform, rounding up and taking inventory of the vast herd of regulatory crimes would be an important first step.

## Conclusion

*Mens rea* reform remains a high priority for many criminal-justice reformers who are concerned about the expansion and misuse of the criminal laws. Unfortunately, despite bipartisan support, Congress has not acted and, at least for the foreseeable future, is not likely to act. Thankfully, however, the cause is not dead in the water; the executive branch has various options that it can and should consider to advance *mens rea* reform efforts.

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## Endnotes

1. The First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 519 (2018).
2. See, e.g., Paul J. Larkin, Jr., *Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 HOFSTRA L. REV. 745 (2014); John G. Malcolm, *Morally Innocent, Legally Guilty: The Case for Mens Rea Reform*, 18 FEDERALIST SOC'Y REV. 40 (2017); John G. Malcolm, *The Pressing Need for Mens Rea Reform*, HERITAGE FOUND. LEGAL MEMORANDUM No. 160 (Sept. 1, 2015), <https://www.heritage.org/crime-and-justice/report/the-pressing-need-mens-rea-reform>; John G. Malcolm, *Criminal Law and the Administrative State: The Problem with Criminal Regulations*, HERITAGE FOUND. LEGAL MEMORANDUM No. 130 (Aug. 6, 2014), <http://www.heritage.org/research/reports/2014/08/criminal-law-and-the-administrative-state-the-problem-with-criminal-regulations>; Paul Rosenzweig, *Congress Doesn't Know Its Own Mind—And That Makes You a Criminal*, HERITAGE FOUND. LEGAL MEMORANDUM No. 98 (July 18, 2013), <http://www.heritage.org/research/reports/2013/07/congress-doesnt-know-its-own-mind-and-that-makes-you-a-criminal>; Brian W. Walsh, *The Criminal Intent Report: Congress Is Eroding the Mens Rea Requirement in Federal Criminal Law*, HERITAGE FOUND. WEBMEMO No. 2900 (May 14, 2010), <http://www.heritage.org/research/reports/2010/05/the-criminal-intent-report-congress-is-eroding-the-mens-rea-requirement-in-federal-criminal-law>.
3. See Brian W. Walsh & Tiffany Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, HERITAGE FOUND. SPECIAL REPORT No. 77 (May 5, 2010), <https://www.nacdl.org/Document/WithoutIntentHowCongressIsErodingCriminalIntentReq>.
4. See, e.g., Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 574 (2012); Richard G. Singer, *The Resurgence of Mens Rea: The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. Rev. 337, 403–04 (1989); Rollin M. Perkins, *Criminal Liability Without Fault: A Disquieting Trend*, 68 IOWA L. REV. 1067, 1067–70 (1983).
5. See, e.g., *Fowler v. Padgett*, 7 T.R. 509 (King's Bench 1798) (Lord Kenyon, C.J.) (“It is a principle of natural justice, and of our law, that *actus non facit reum nisi mens sit rea*. The intent and the Act must both concur to constitute the crime.”); *Morissette v. United States*, 342 U.S. 246, 250 (1952) (“The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion.”).
6. See, e.g., Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 742 (2012); Gerald E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 38–39 (1997) (“[T]he more dominant and longer-standing trend in our century has been the erosion of mens rea requirements. This period has seen the dramatic growth of strict liability offenses (and their close cousin, liability for negligence) in American criminal law, and such offenses have found a particular home in the kind of regulatory criminal statutes that have the greatest impact in corporate settings.”); see also A. P. Simester, *Is Strict Liability Always Wrong?*, in APPRAISING STRICT LIABILITY 21 (A. P. Simester ed., 2003) (Strict liability is wrong because it “leads to conviction of persons who are, morally speaking, innocent.”); Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1109 (1952) (“The most that can be said for [strict liability] provisions is that where the penalty is light, where knowledge normally obtains and where a major burden of litigation is envisioned, there may be some practical basis for a stark limitation of the issues; and large injustice can seldom be done. If these considerations are persuasive, it seems clear, however, that they ought not to persuade where any major sanction is involved.”).
7. Malcolm, *The Pressing Need for Mens Rea Reform*, *supra* note 2.
8. See Mens Rea: *The Need for a Meaningful Intent Requirement in Federal Criminal Law: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113th Cong. (2013).
9. Bobby Scott, *Democratic Views on Criminal Justice Reforms Raised Before the Over-Criminalization Task Force & the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations* 120 (2014).
10. Notably, until his retirement, Senator Orrin Hatch was a leading proponent of *mens rea* reform in the Senate. See John-Michael Seibler & John G. Malcolm, *Criminal Justice Reform a Big Part of Orrin Hatch's Legacy*, HERITAGE FOUND. COMMENTARY, June 25, 2018, <https://www.heritage.org/crime-and-justice/commentary/criminal-justice-reform-big-part-orrin-hatchs-legacy>.
11. Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 829 n. 89 (2017).
12. See, e.g., Gideon Yaffe, *A Republican Crime Proposal That Democrats Should Back*, N.Y. TIMES, Feb. 12, 2016, <https://www.nytimes.com/2016/02/12/opinion/a-republican-crime-proposal-that-democrats-should-back.html>.
13. U.S. CONST. ART. II, § 3; see also *Wayte v. United States*, 470 U.S. 598, 608 (1985); *United States v. Batchelder*, 442 U.S. 114, 124 (1979).
14. *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987).
15. *Id.*
16. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 511 (1999); see also *United States v. Armstrong*, 517 U.S. 456, 464–465 (1996); *Wayte*, 470 U.S. at 608; *Batchelder*, 442 U.S. at 124. Other constitutional provisions and legal doctrines (specifically, the Take Care Clause and the Nondelegation Doctrine) might restrict prosecutorial discretion, but the Supreme Court has not addressed those issues. Cf. *Howell v. McAuliffe*, 788 S.E. 2d 706, 720–24 (Va. 2016) (ruling that governor's executive order granting voting rights to all formerly imprisoned felons violated the state constitutional provision against “suspension” of the law); Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2156–59 (2019); Paul J. Larkin, Jr., *A New Approach to the Texas v. United States Immigration Case: Discretion, Dispensation, Suspension, and Pardon—The Four Horsemen of Article II*, HERITAGE FOUND. LEGAL MEMORANDUM No. 181 (Apr. 15, 2016); cf. U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

17. John G. Malcolm, *President Obama's Executive Action on Immigration Sets a Dangerous Precedent*, HERITAGE FOUND. ISSUE BRIEF No. 4313, Dec. 4, 2014, <https://www.heritage.org/immigration/report/president-obamas-executive-action-immigration-sets-dangerous-precedent>.
18. *Id.*
19. *Id.* (quoting Doris Meissner, *Exercising Prosecutorial Discretion Memo*, Nov. 17, 2000, <http://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/IMM-Memo-ProsDiscretion.pdf>). Perhaps the most well-known recent example of over-broadly applied prosecutorial discretion was President Barack Obama's Deferred Action for Childhood Arrivals (DACA) policy. That policy set forth "in exercise of [the government's] prosecutorial discretion" the Obama administration's decision not to enforce the nation's immigration laws against certain children brought to the country illegally. See Sec'y Janet Napolitano, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, Dep't of Homeland Security Memo., June 15, 2012, <https://www.dhs.gov/xlibrary/assets/sl-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>. The policy was created in large part because "these individuals lacked the intent to violate the law." *Id.* That policy was not an appropriate use of prosecutorial discretion because it was (1) broadly applied to a huge class of cases, (2) used to change policy, and (3) used to ignore the law.
20. S. 3118, 115th Cong. (2017).
21. *Id.*
22. See, e.g., *United States v. Pomponio*, 429 U.S. 10, 12 (1976), and *United States v. Bishop*, 412 U.S. 346, 360 (1973) (both defining "willfulness"); 28 U.S.C. §§ 517-19 (authorizing the Attorney General to conduct, direct, or supervise all litigation in which the United States has an interest). This option runs into an issue with jury instructions. Standard jury instructions for statutory crimes that lack a *mens rea* element or have a weaker *mens rea* element than willfulness, of course, will not require the proof that this policy would require. Accordingly, the policy could not force a district court to instruct the jury on willfulness, however much the parties might urge the court to do so.
23. Department of Justice, CRIMINAL RESOURCE MANUAL 9-110.101, <https://www.justice.gov/jm/jm-9-110000-organized-crime-and-racketeering#9-110.801/> (hereinafter CRIMINAL RESOURCE MANUAL).
24. Department of Justice, JUSTICE MANUAL 9-2.112, <https://www.justice.gov/jm/jm-9-85000-protection-government-integrity#9-85.200> (hereinafter JUSTICE MANUAL).
25. *Id.* 9-59.100.
26. See 18 U.S.C. § 245.
27. JUSTICE MANUAL 9-85.200.
28. See CRIMINAL RESOURCE MANUAL 9-59.100 ("The approval requirement was not extended for cases under 18 U.S.C. § 1832 [theft of trade secrets], however, prosecutors are strongly urged to consult with the Computer Crime and Intellectual Property Section prior to filing charges under § 1832.").
29. See Napolitano, *supra* note 19.
30. See, generally, Malcolm, *supra* note 17.
31. Overcriminalization, SOLUTIONS 2018: THE POLICY BRIEFING Book, The Heritage Foundation, <https://solutions.heritage.org/protecting-the-rule-of-law/over-criminalization/>; Smith, *supra* note 4, at 538.
32. GianCarlo Canaparo & Lucas Drill, *North Carolina Is Tackling Crimes Run Amok. Congress Should Take Notes*, THE DAILY SIGNAL, Sept. 13, 2019, <https://www.dailysignal.com/2019/09/13/north-carolina-is-tackling-crimes-run-amok-congress-should-take-notes/>.
33. *Id.*
34. Bill Salisbury, *Minnesota "Unsession" Dumps 1,175 Obsolete, Silly Laws*, TWIN CITIES PIONEER PRESS, May 26, 2014, <https://www.twincities.com/2014/05/26/minnesota-unsession-dumps-1175-obsolete-silly-laws/>.
35. Sunset Advisory Commission, *Sunset in Texas*, Report of the 87th Legislature, Sept. 2019, <https://www.sunset.texas.gov/public/uploads/u64/Sunset%20in%20Texas%202017-2019.pdf>.
36. *Id.* at 9-13.
37. See S. 3118, 115th Cong. (2017); see also Seibler & Malcolm, *supra* note 10 (describing and supporting this approach). Subsection (d)(1)(2)(A) of the bill states that the sunset provision does not apply to:
  - (i) 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;
  - (ii) any element of a covered offense, to the extent that the element establishes—
    - (I) subject matter jurisdiction over the covered offense; or
    - (II) venue with respect to trial of the covered offense; or
  - (iii) any element of a covered offense, to the extent that [applying the Act to it] would lessen the degree of mental culpability that the Government is required to prove with respect to that element under—
    - (I) precedent of the Supreme Court of the United States; or
    - (II) any other provision of this title, any other Act of Congress, or any regulation.